

## **Complying with the Drug-Free Schools and Campuses Regulations (Edgar 86)**

### **I. Background**

On December 12, 1989, President Bush signed into law the Drug-Free Schools and Communities Act Amendments of 1989 (“DFSCA”). The DFSCA amended the Higher Education Act of 1965 to require that, as a condition of receiving funds or any other form of financial assistance under any federal program after Oct. 1, 1990, an institution in higher education (“college”) must submit certification that it has adopted and implement a drug prevention program (“AOD”).

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. Annually notify each employee and student, in writing, of standards of conduct, a description of appropriate sanctions for violation of federal, state, and local law and campus policy, a description of health risks associated with AOD use, and a description of available treatment programs.
2. Develop a sound method for distributing annual notification information to every student and staff member each year.
3. Prepare a biennial report on the effectiveness of its AOD programs and the consistency of sanction enforcement.<sup>1</sup>

### **II. Overview**

While the basic compliance requirements of the DFSCA have not substantively changed since 1990, recent developments suggest that the Department of Education (“DOE”) will increase its enforcement efforts to ensure institutions of higher education are meeting those statutory obligations.

#### *Recent Developments*

In 2012, the DOE’s Office of Inspector General (“OIG”) issued a report that identified serious deficiencies in the DOE’s enforcement of the DFSCA requirements. The report found that in the twelve years between 1998 and 2010, the DOE performed no oversight on whether universities and colleges were in compliance with these requirements. Furthermore, OIG found that the DOE had no procedures in place to ensure institutional compliance. In response to the OIG report, the DOE stated it would:

1. Revise its oversight processes to more effectively monitor university compliance with the regulations. Specifically, the DOE indicated that it would:
  - a. amend and clarify its review procedures;
  - b. develop further training and guidance for the DOE reviewers;
  - c. begin reporting all identified cases of noncompliance with the regulations;and

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<sup>1</sup> U.S. Department of Education, Office of Safe and Drug-Free Schools, Higher Education Center for Alcohol and Other Drug Abuse and Violence Prevention, *Complying with the Drug-Free Schools and Campuses Regulations [EDGAR Part 86]: A Guide for University and College Administrators* (2006). “AOD” refers to alcohol and other drugs.

- d. Develop a process to accurately identify all colleges that receive any federal funds so they can be periodically reviewed for compliance with the regulations.

The OIG report and the DOE's response are strong signals that the DOE will soon turn its attention to DFSCA enforcement.

Another factor in the DOE's increased attention to DFSCA could stem in part from the DOE's Title IX enforcement efforts. The links between alcohol use and sexual assault are quite significant. Some of the DOE's Title IX resolution letters and agreements include language of the link between alcohol and drug use and sex-based harassment and how colleges should address these concerns. It is not hard to anticipate the DOE adding a DFSCA compliance review as part of a Title IX investigation.

### **AN IN-DEPTH REVIEW OF 34 C.F.R. Part 86 ("Part 86")**

#### **1. Annual Notification**

Annual notification to students and employees must include specific items identified in this Section to "prohibit, at a minimum, the unlawful possession, use, or distribution of illicit drugs and alcohol by students and employees on its property or as part of any of its activities."

##### **A. Standards of conduct**

Standards of conduct can be made in broad statements that apply to all on-campus and off-campus activities and range from prohibiting illegal activities related to AOD or reflect more specific expectations set by the college. The standards should apply to all students, including both part-time and full-time, except for those taking courses as part of a continuing education program. Enrolled students with part-time jobs on campus are covered by both student and employee policies.

##### **B. Legal Sanctions**

The annual notification must include relevant legal sanctions, including a copy or summaries of federal and applicable state penal codes and local ordinances that deal with illegal substances that include sanctions for policy violations. A description of federal penalties and sanctions for illegal trafficking is the minimum level of information about federal laws that the college must provide to comply with the regulations.<sup>2</sup> The college should include in their AOD policy that a student or employee who violates the AOD policy is subject to both the institution's sanctions as well as criminal sanctions.<sup>3</sup>

##### **C. Health Risks**

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<sup>2</sup> See Id. Appendix A of the Federal Register announcement of the Drug-Free Schools and Campuses Regulations includes a description.

<sup>3</sup> See Id.

The college must distribute information about the health risks associated with alcohol abuse and illicit drug use and should focus on sharing information about substances covered by the *Controlled Substances Act* (21 U.S.C. 811).<sup>4</sup>

**D. Drug and Alcohol Programs**

At a minimum, the college must provide students, staff, and faculty with a description of alcohol and other drug programs, such as prevention, counseling, treatment, rehabilitation, and re-entry.

**E. Disciplinary Sanctions**

The college is required to provide students, staff, and faculty a written description of the range of disciplinary sanctions that would result in violation of their standards of conduct as well as an explicit statement that these sanctions will be imposed.<sup>5</sup> The responsibility in enforcing the standards of conduct falls onto college administrators, and in most cases, is shared among campus police, health providers, college or student affairs staff, faculty, and students.<sup>6</sup>

**2. Distribution of the Annual Notification**

The college must distribute its AOD annual notification in writing. If new students enroll or new employees are hired after the annual distribution date, these students and employees must also receive the materials. The DOE has stated that merely making the materials available to those who wish to take them does not satisfy the requirements of the regulations, as that does not ensure distribution to every student and employee.

Possible methods of delivery can include:

- A. Inserting the AOD notification with other college mailings and/or handouts, such as employees' paychecks and student registration materials, academic calendars, class schedules, or financial invoices.
- B. Sending the AOD notification through US mail and/or e-mail, provided that the email method ensures distribution to all students and employees.
- C. Developing the AOD notification into an institutional policy and incorporating the policy into annual distributed documents such as the Annual Security Report, Student Handbook, Staff and Faculty Manuals.
- D. Using multiple methods of delivery to ensure the AOD notification is distributed as widely as possible.

**3. The Biennial Review**

The DFSCA requires the college review its AOD programs and policies every two years. The required review has two objectives:

- A. to determine the effectiveness of, and to implement any needed changes to, the AOD program; and

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<sup>4</sup> COLLEGES can use the U.S. Department of Justice's *Drugs of Abuse* as a guide. See id.

<sup>5</sup> See EDGAR Part 86.100(a)(5).

<sup>6</sup> U.S. Department of Education, Office of Safe and Drug-Free Schools, Higher Education Center for Alcohol and Other Drug Abuse and Violence Prevention, *Complying with the Drug-Free Schools and Campuses Regulations [EDGAR Part 86]: A Guide for University and College Administrators* (2006).

- B. To ensure that the disciplinary sanctions for violating standards of conduct are enforced consistently.

### *Timeframe for the Biennial Review*

Although the regulations do not specify a date in which the reports must be completed, long practice has held that a college submit a review by the end of each even-numbered calendar.<sup>7</sup>

### *Contents of the Biennial Review*

The DFSCA regulations do not specify what a biennial review should include or how it should be conducted. The college has considerable leeway in determining how to conduct and what to include in their biennial review.

#### **4. Reviewing the AOD Prevention Program**

The first step in preparing a biennial report is reviewing a campus' AOD program, which relies on the clear description of AOD-related problems, strategic interventions, and desired outcomes.<sup>8</sup>

Best practice is to convene a committee that has a diverse representation of campus constituencies who have immediate knowledge of alcohol and drug related problems and the college programs and policies in place to address them. Overall, the committee should have active involvement and begin compiling a list of all its policies, judge them for effectiveness and consistent enforcement by looking at its program goals and outcomes, and identify whether or not the policies are logically moving the college towards its goals and outcomes.

#### **5. Preparing the Biennial Review and Report**

Typically, the committee that is responsible for reviewing AOD policies and programs conducts the biennial review. Information should be collected on a continual basis rather than waiting until just before the report due date. The best practice is for the committee to meet quarterly and send notices requesting AOD-related information twice a year.

#### **6. Contents of the Biennial Review Report**

Biennial review reports do not have a page requirement, but traditionally, they have ranged from as few as 2 to almost 30 pages. The more thorough reports include the following:

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<sup>7</sup> For example, for the 2015 biennial review, the dates of coverage should include Sept. 1, 2014-Aug.31, 2015 and Sept. 1, 2015-Aug. 31, 2016.

<sup>8</sup> The DOE's Higher Education Center for Alcohol and Other Drug Abuse and Violence Prevention provides assistance and information to help COLLEGES assess campus needs, develop a strategic plan, and measure results; for more information, visit [www.higheredcenter.org/eval](http://www.higheredcenter.org/eval).

#### A. AOD Program Elements

*AOD program elements* are the activities that college implement to achieve program goals and outcomes and may refer to the tactics used. This section should provide a general description of the types of activities that address the following areas of environmental interventions:

- (i) how does the college provide an environment with alcohol-free options;
- (ii) how does the college create a social and academic environment that supports health promoting norms;
- (iii) how does the college's AOD prevention program limit alcohol availability;
- (iv) how does the college prevention program limit marketing and promotion of alcohol on and off campus; and
- (v) how does the college prevention program develop and enforce AOD policies on and off campus.

#### B. AOD Program Goals

*AOD program goals* identify the problem that the college seeks to address and the outcome it seeks to achieve, creating a blueprint for future action. A college may use program outcomes to measure whether program goals were achieved. 'Outcomes' can be thought of as measurable statements of the increases in positive behavior and decreases in negative behavior that are expected when program goals are met.<sup>9</sup>

#### C. AOD Program Strengths and Weaknesses

Identifying *AOD program strengths and weaknesses* is helpful when creating the report. Strengths can include infrastructure support, such as presidential leadership, a reasonable budget for the intended efforts, and a campus and community coalition. Weaknesses are barriers of progress, including a lack of data about the scope of the problem, a lack of allies, or a lack of leadership.

#### D. Procedures for distributing annual AOD notification

Colleges should list the methods it used in *distributing its annual AOD notification* to students and employees as well as any special considerations that were addressed to ensure that all faculty, staff, and students received policy information annually.

#### E. Copies of the Policies

The *copies of the policies distributed to students and employees* should be included in the review and would be in the college's best interest that the policies be reviewed and revised on a regular basis for reasonableness, comprehensiveness, and enforceability and so that they reflect current case law and changes in federal, state, and local laws.

#### F. Number of Drug and Alcohol Related Violations and Fatalities

Effective August 14, 2008, pursuant to amendments in the HEOA, any biennial review must include a determination of the number of drug and alcohol-related violations and fatalities that occur on the college's campus or as part of the college's activities and the number and type of sanctions imposed by the college as a result of drug and alcohol-

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<sup>9</sup> U.S. Department of Education, Office of Safe and Drug-Free Schools, Higher Education Center for Alcohol and Other Drug Abuse and Violence Prevention, *Complying with the Drug-Free Schools and Campuses Regulations [EDGAR Part 86]: A Guide for University and College Administrators* (2006).

related violations and fatalities that occur on the institution's campus or as part of the institution's activities.

#### G. Recommendations

*Recommendations for revising AOD programs* involve the prevention professionals looking back at the campus and community and assessing both the gaps in their programmatic efforts and the problems faced by students.

#### E. Enforcement

If the college violates DFSCA, then the DOE will provide information and technical assistance. Specifically, the college will enter into a compliance agreement designed to bring it into full compliance with DFSCA as soon as possible. The DOE Secretary may also impose one or more sanctions on the college, including repayment of any or all forms of Federal financial assistance received by the college; and the termination of any or all forms of Federal financial assistance. However, to date, no college has had its Federal funding pulled due to violations of the DFSCA.

As state laws begin to legalize marijuana, the college still needs to be mindful of its DFSCA obligations and any possible enforcement efforts. Under federal law, possession, sale, and cultivation of marijuana is illegal. Specifically, the Controlled Substances Act (“CSA”) classifies cannabis as a Schedule I drug, defined as having a high potential for abuse. The CSA designates marijuana as contraband. By classifying marijuana as a Schedule I drug, the manufacture, distribution, or possession is still a federal criminal offense. States legalizing marijuana does not change federal law. Therefore, the college still must prohibit possession, use, or distribution of marijuana by students and employees on its property or as part of any of its activities. If not, the college may risk losing federal funding for financial aid if they allow the use of illicit drugs on campus.

### **III. Suggestions for Ensuring Compliance**

1. Conduct a university wide audit on all DFSCA compliance efforts.
2. Consider developing a written AOD policy that serves as the annual notice.
3. Distribute the written AOD policy through multiple methods and incorporate the AOD written policy into other campus publications for wide and effective dissemination.
4. Create a standing committee of knowledgeable community members (students, faculty, and staff) responsible for reviewing AOD policies and programs (including the biennial review).
5. Continuous committee review of the AOD policy and programs, as well monitoring the campus’ AOD-related problems, strategic interventions, and desired AOD goal outcomes.
6. Consider conducting surveys to measure the campus climate on AOD issues.
7. Keep an ongoing comprehensive database of drug and alcohol-related violations and fatalities that occur throughout the year.
8. Do not wait every two years to being collecting data or assessing AOD programs.