

New York State to Pass Sexual Misconduct Legislation

Today, Governor Andrew Cuomo announced that he and State Legislative Leaders have reached an agreement regarding new sexual misconduct legislation.

It may be recalled that several months ago, the Governor's office proposed and publicly promoted a sexual misconduct bill, many provisions of which we analyzed [here](#). The new bill addresses several questions and concerns raised by the previous bill's text and makes improvements in certain areas. However, the latest bill contains several major mandates that were not in the previous version.

The full text of the new bill is available [here](#). Over the coming weeks, Bond will be discussing the bill's provisions in detail on our [Higher Education Law Report blog](#). This Client Alert is intended to notify you of the likely adoption of this legislation, and to highlight certain of the bill's provisions that will require the most significant changes in institutions' policies and practices if the bill passes in its current form (as is expected).

- Every institution in New York State must use a single verbatim definition of consent, adopt a prescribed Bill of Rights, and adopt specific language providing amnesty for alcohol and drug use violations committed by Reporting Parties or Bystanders. The bill contains many other provisions concerning the information that must be shared with the community, including [information](#) that must be provided to a Reporting Party at the first instance of his/her disclosure about an incident of sexual assault, domestic violence, dating violence or stalking.
- If the Respondent is a student, the bill would require that the institution issue a No Contact Order requiring the Respondent to leave any public place upon observing the Reporting Party. Presumably, the Reporting Party's wishes could trump this requirement, but this is not entirely clear. The bill goes on to require that every institution must have a procedure to allow either party to review the need for and terms of a No Contact Order. For many institutions, this will be an entirely new process that must be created.
- In circumstances where an institution provides interim measures or accommodations to a student in connection with a report of sexual assault, domestic violence, dating violence or stalking, the bill would require the institution to have a procedure to allow both the recipient of the interim measures or accommodations, as well as the other party (if directly affected by them), to review the need for and terms of the interim measures or accommodations. For many institutions, this will be an entirely new process that must be created.
- Institutions would be required to provide written notice to students, in advance of "any meeting" they are required or eligible to attend in connection with the disciplinary process, describing the rule(s) and/or law(s) they are accused of violating and in what manner, as well as potential sanctions that may be applied. The bill appears to require this notice not only in advance of adjudicatory hearings, but also prior to investigative interviews.
- In a judicial proceeding, the bill provides that the parties have the right to exclude their prior sexual history other than with other party. A common provision in policies is the exclusion of prior sexual history, but usually with the caveat that a party could make a showing that prior sexual history has some unique, strong relevance. The bill apparently would not allow any discretion based on the facts and issues of a particular case, and, therefore, policies allowing for the introduction of this evidence upon a special showing of relevance would be non-compliant.
- The written determination following a disciplinary hearing must include not only the rationale for the decision regarding responsibility and the sanction, if any, but also "findings of fact". The requirement that "findings of fact" (and presumably all findings of fact) be reduced to writing will make the drafting of decisions onerous and potentially fraught, as any failure to include a finding may make a decision vulnerable on internal appeal or in external litigation.

- The decision of an officer or panel concerning responsibility for a violation of sexual assault, domestic violence, dating violence or stalking must be subject to at least one level of appeal, and the appeal must be decided by a “panel”. The bill does not state how many individuals must comprise the panel or specify its composition. For institutions with a single appeal officer, this will require a major policy restructure that may be difficult to staff, particularly at smaller institutions.
- The bill mandates that institutions mark the transcripts of students who are found responsible for a “crime of violence” (including but not limited to sexual violence) within the definition of the Clery Act and either suspended or expelled. The bill specifies the precise words that must be used: “suspended after a finding of responsibility for a code of conduct violation” or “expelled after a finding of responsibility for a code of conduct violation”. If a student withdraws during the pendency of allegations, this also must be noted on the transcript with the words: “withdrew with conduct charges pending”.
- An institution must train **all** new incoming first year students and **all** transfer students. The training must cover sexual assault, domestic violence, dating violence and stalking, as well as the institution’s policies, bystander intervention, and risk assessment, among other subjects. The bill requires that each student complete the training during the “onboarding” process. The bill goes on to state that an institution is required to ensure that every student organization leader and officer must complete the training as a condition to recognition of the organization, and that every student athlete must complete the training as a condition to participation in intercollegiate athletic competition.
- Institutions will be required to report annually to the New York State Department of Education information about how complaints were handled. The information to be disclosed includes, among other items of information, the number of reports of sexual assault, domestic violence, dating violence and stalking; the number of cases processed through to a finding; the number of cases in which respondents were found responsible or not responsible; and the sanctions imposed on the respondent in each case where responsibility was found.
- Institutions will be required to conduct a climate assessment no less frequently than every other year. The survey is to probe campus awareness concerning nine topics, including campus policies; how and where to make a report; the prevalence of incidents of sexual assault, domestic violence, dating violence and stalking; bystander attitudes; and experiences with reporting and institutional processes.

To be clear, the above are only some of the pending bill’s requirements, but they are the provisions most likely to require substantial change to policy and procedure, and, therefore that administrators will want to be thinking about immediately. Institutions will be required to be in compliance with virtually all of the bill’s provisions within 90 days of passage. The bill provides that compliance will be enforced through random audits conducted by the Department beginning in September 2016.

If you would like to discuss the bill and its anticipated impact on your institution, please contact a member of our [Title IX Team](#).

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