

New York State Colleges' and Universities' Responses to Reports of Sexual Misconduct

July 7, 2015

On July 7, 2015, New York Governor Andrew Cuomo signed into law legislation that will, once again, change the way public and private colleges and universities in New York (“higher education institutions”) must respond to reports of sexual misconduct. The new law, the cornerstone of Governor Cuomo’s “Enough is Enough” campaign, is intended to encourage victims and witnesses of sexual misconduct to report such incidents, and sets forth uniform policy and reporting requirements for all higher education institutions. Such requirements can be found under the new Article 129-B of the New York Education Law, which was added by the legislation.[1] While many provisions of Article 129-B reinforce or expand on existing obligations imposed on higher education institutions by Title IX of the Education Amendments of 1972 (“Title IX”) and/or the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, as amended by the Violence Against Women Act/Campus Sexual Violence Act (the “Clery Act”), Article 129-B also includes a number of new requirements that are likely to significantly impact the current policies and procedures of higher education institutions.

Higher education institutions must be in compliance with most of the Article 129-B requirements within 90 days of its passage, which is October 5, 2015. Accordingly, administrators should not delay in reviewing their higher education institution’s existing policies and procedures to determine any modifications necessary to implement these new requirements. The following is a summary of the key provisions of Article 129-B that should be considered when reviewing, revising, and implementing legally compliant policies and procedures.

Statewide Definition of Consent

Article 129-B requires higher education institutions to adopt a statewide uniform definition of “affirmative consent,” which provides: “Affirmative consent is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent. The definition of consent does not vary based upon a participant’s sex, sexual orientation, gender identity, or gender expression.”

This effectively mandates that institutions adopt a “yes means yes” standard. In other words, consent exists only if all parties assent to the sexual activity through words or actions that *clearly* indicate a willingness to participate in the activity. Article 129-B sets forth certain principles that must be included in higher education institutions’ codes of conduct. The principles are meant to aid an institution’s community in understanding what constitutes consent.

Statewide Alcohol and/or Drug Use Amnesty Policy

While much higher education institutions have already voluntarily enacted such policies based on existing guidance, Article 129-B now requires these institutions to adopt statewide uniform alcohol and/or drug use amnesty policy as part of their codes of conduct. Under Article 129-B, this policy must provide that, when reporting instances of sexual misconduct in good faith, students or bystanders will not be subject to alcohol and/or drug use policy violations occurring around the time of the alleged incident. Such a policy is intended to encourage reporting by eliminating students’ hesitations to report sexual misconduct out fear that their own conduct may subject them to disciplinary action.

Students’ Bill of Rights

Article 129-B further requires higher education institutions to include in their codes of conduct, and distribute annually, a prescribed statewide uniform Students’ Bill of Rights, which informs students of their rights in situations involving sexual misconduct. The Students’ Bill of Rights must be made widely available, including on the higher education institution’s website and at various locations on campus.

Mandatory Disclosures and Resources for Reporting Individuals

Overlapping with existing obligations imposed by Title IX and/or the Clery Act, Article 129-B requires that higher education institutions must ensure that all individuals who report incidents of sexual misconduct are advised of certain rights, including, but not limited to, their right to notify campus security and/or local law enforcement, their rights regarding reporting to confidential institution representatives, and their right to consult the institution’s Title IX Coordinator and other institution representatives for assistance and information. In addition, higher education institutions must ensure that, at the first instance a “Reporting Individual” discloses an incident of sexual misconduct to a representative of the higher education institution, the Reporting Individual is presented a uniform statement of his or her rights to report or not report the incident, to be protected from retaliation, and to receive assistance and resources from the institution.

Pursuant to Article 129-B, higher education institutions must provide Reporting Individuals with emergency access to a Title IX coordinator or other school representatives who, among other things, is trained in interviewing victims. In addition, higher education institutions must provide Reporting Individuals with access to mental and physical health resources and information, including information on sexually transmitted diseases, sexual assault forensic examinations, and resources available through the New York State Office of Victim Services.

Article 129-B also requires higher education institutions to provide certain protections and accommodations in

response to incidents of sexual misconduct. For example, where the accused or respondent is a student, the higher education institution must consider the issuance of a “No Contact Order” in accordance with the institution’s policies and procedures. Additionally, higher education institutions must provide assistance in obtaining an order of protection or equivalent. If the accused or respondent is a student determined to present a continuing threat to the health and safety of the Institute community, the higher education institution must impose an interim suspension on such student pending the outcome of a judicial or conduct proceeding consistent with Article 129-B and the higher education institution’s policy and procedures. Both parties must be afforded the right to request a review of the institution’s decision regarding a No Contact Order or interim suspension, and the higher education institution must allow either party to submit evidence in support of this request.

Rights with Regard to Institution Conduct and/or Judicial Proceedings

Once again reinforcing and expanding on existing obligations imposed by Title IX and/or the Clery Act, higher education institutions must ensure that all students are afforded certain rights before, during, and after a higher education institution’s conduct or judicial proceeding. For example, once a report of sexual misconduct has been made by a reporting student, the higher education institution must provide notice to the accused describing the date, time, location, factual allegations, and potential sanctions associated with the alleged violation. Both parties must also be provided with reasonable notice of any and all meetings that require their attendance, an opportunity to offer evidence during an investigation and hearing, where appropriate, a full and fair record of any such hearing (e.g., a transcript or recording), and written notice of the findings of fact, decision, and sanction(s), if any. Such written notice must also include the rationale for the decision and sanction(s).

For the first time, higher education institutions are *required* to provide the parties with at least one level of appeal, before a panel, of a determination in a sexual misconduct proceeding. Until now, the United States Department of Education’s Office for Civil Rights (“OCR”) has recommended that higher education institutions offer an appeals process in certain circumstances, but the implementation of such a process has been left to the discretion of the higher education institution. Consistent with OCR guidance on Title IX, rights on appeal must be provided equally to both parties.

Article 129-B explains that all parties involved a higher education institution’s proceeding to investigate sexual misconduct may exclude information about their prior sexual history with persons other than the other party. In addition, during the phase of the institution’s disciplinary process that determines responsibility, the parties may exclude from the evidence of their own mental health diagnosis and/or treatment. Past findings of domestic violence, dating violence, sexual assault, or stalking may, however, be considered in the sanctioning phase.

Transcript Notations

Significantly, Article 129-B mandates that higher education institutions include notations on the transcripts of students found responsible through the institution’s conduct process for crimes of violence, including, but not limited to, sexual violence, as set forth in 20 U.S.C. 1092(f)(1)(F)(i)(I)-(VIII) of the Clery Act. Such transcript notations must state “suspended after the finding of responsibility for a code of conduct violation” or “expelled

after a finding of responsibility for a code of conduct violation,” as applicable. Should the student withdraw from the higher education institution while the investigation of the complaint is pending, his or her transcript must note “withdrew with conduct charges pending.” Higher education institutions must have in place written policies regarding such transcript notations, which, at a minimum, provide an appeals process for students seeking the removal of such notations in accordance with Article 129-B.

On-Campus Assistance and Resources

Article 129-B requires that each higher education institution employ a sexual assault nurse examiner in its campus health center or enter into a memorandum of understanding with at least one local health care facility to provide such service to its students. In addition, if a higher education institution is unable to provide other on-campus resources or services required by Article 129-B, the higher education institution must enter into memoranda of understanding with organizations in the local community, such as rape crisis centers and domestic violence shelters, to provide such resources or services to its students.

Campus Climate Assessments

Article 129-B mandates that higher education institutions conduct biennial anonymous campus climate assessments to ascertain general awareness and knowledge of the provisions of Article 129-B, including, but not limited to, the role of the institution’s Title IX coordinator, how and where to report sexual misconduct, the definition of affirmative consent, and utilization of the institution’s policies and procedures addressing sexual misconduct. Higher education institutions must publish the results of such assessments on their websites. The requirement to conduct biennial campus climate assessment will take effect on July 7, 2016.

Training for Administrators, Staff, and New and Current Students

Pursuant to Article 129-B, and in accordance with existing federal obligations, every higher education institution must implement a student onboarding and ongoing education plan to educate the campus community about sexual misconduct. This plan must, among other things, educate students about general awareness of sexual misconduct, consequences of violations of the institution’s policies, the role of the institution in preventing and investigating such incidents, and the importance of bystander intervention.

The higher education institution must provide training to all students, including, but not limited to, first-year, transfer, international, online, and distance education students, leaders and officers of student organizations recognized or seeking recognition from the institution, and student-athletes. The higher education institution must also provide specific training to members of groups it identifies as high-risk populations. With respect to leaders and officers of student organizations and student-athletes, such training must be a prerequisite to their participation in a student organization and/or intercollegiate athletic competition.

Reporting Requirements

In addition to the above, Article 129-B sets forth a number of reporting requirements for higher education institutions. By July 1, 2016, and annually thereafter, higher education institutions must file with the New York

State Education Department a certificate of compliance. In addition, by July 1, 2016, and once every ten years thereafter, coinciding with the filing required by Article 129-A of the New York Education Law, higher education institutions must file a copy of all written rules and policies they have adopted in accordance with Article 129-B.

Finally, effective July 7, 2016, higher education institutions must annually report to the Education Department specific data regarding reports of domestic violence, dating violence, sexual assault, and stalking. Article 129-B directs the Education Department to create a reporting mechanism through which higher education institutions can provide such information.

Beginning after September 1, 2016, the Education Department will conduct random audits of higher education institutions to confirm compliance with the requirements of Article 129-B.

Next Steps

Article 129-B appropriates \$1 million to aid higher education institutions with expenses incurred in connection with their implementation of the law's requirements. It is unclear how these funds will be distributed across higher education institutions. Article 129-B directs the Education Department to issue regulations pursuant to the new law. These regulations may provide further clarification as to how these funds will be allocated.

Higher education institutions should commence a review of their policies and procedures immediately to ensure that they are compliant within the 90-day timeframe or by July 1, 2016, as applicable. Failure to file a certificate of compliance on or before September 1, 2016, may result in ineligibility for state aid or assistance.

This post is intended to provide a comprehensive overview of the requirements of Article 129-B, but does not address every component of Article 129-B and should not be construed as legal advice. For the full text of the legislation, please visit <http://open.nysenate.gov/legislation/bill/S5965-2015>. For information on how to develop, implement, and maintain legally compliant policies and procedures, please contact any of the following attorneys in our Higher Education Practice Group:

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