Complying with Education Law Article 129-B
New York State Education

I- Introduction:

This guidance document is joint guidance of the State Education Department and the New York State Office of Campus Safety. It is intended to assist colleges and universities in complying with Education Law Article129-B, as added by Chapter 76 of the Laws of 2015, relating to the establishment of sexual assault, dating violence, domestic violence and stalking prevention and response policies and procedures. Article 129-B includes §§ 6439-6449 of the Education Law.

II- History of the Legislation:

Governor Andrew Cuomo introduced comprehensive sexual assault prevention legislation as part of the 2015 Executive Budget. Final legislation was passed unanimously in the Senate (S.5965, sponsored by Senator LaValle) and 138-4 in the Assembly (A.8244, sponsored by Assemblymember Glick) on June 17, 2015. On July 7, 2015, Governor Cuomo signed the bill into law as Chapter 76 of the Laws of 2015.

Article 129-B (except for the provisions regarding Climate Surveys [Education Law §6445] and Reporting Aggregate Data to the Department [Education Law §6449]) became effective October 5, 2015. The Climate Survey and Aggregate Data sections take effect in July 2016 with the provisions applying for the 2016-2017 academic year.

III- Rulemaking:

The State Education Department (SED) is required by Education Law §6449(4) to adopt regulations by July 2017 relating to the reporting of aggregate data, in consultation with representatives of SUNY, CUNY, and the private and independent colleges.

IV- Compliance:

Each institution is required by Education Law §6440(1) to adopt written rules implementing this article by amending its code of conduct or other comparable policies. A copy of these rules and policies must be filed with SED on or before July 1, 2016. Updated policies must be filed at least every 10 years, except that the second filing shall coincide with the required filing of a certificate of compliance under Article 129-A of the Education Law, and continue on the same cycle thereafter.

6. "Privacy" may be offered by an individual when such individual is unable to offer confidentiality under the law but shall still not disclose information learned from a reporting individual or bystander to a crime or incident more than necessary to comply with this and other applicable laws, including informing appropriate institution officials. Institutions may substitute another relevant term having the same meaning, as appropriate to the policies of the institution.

Confidentiality is a defined term under the statute, and the obligation to keep information in confidence is inherent for certain professionals on campus, such as health care providers, licensed social workers, licensed psychologists and pastoral and professional counselors (including licensed mental health counselors). Many off-campus resources such as rape crisis centers are also confidential, and with the exception of certain child abuse and imminent threats, individuals working in such organizations have no obligation to report information back to the reporting individual's campus.

Most employees at an institution are required to report known incidents of sexual assault, or other crimes, so they are not confidential resources. Still, most college employees can offer "privacy." Privacy is the default. It means that an employee may have to share information pursuant to federal or state law or college policy with certain other college employees, but they will not share the private information beyond what is required or needed to comply with law and policy, and will otherwise limit redisclosure as much as possible. They may not however, offer true confidentiality. Each institution should determine which employees may offer true confidentiality as opposed to privacy.

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

8. "Respondent" shall mean a person accused of a violation who has entered an institution's judicial or conduct process.

9. "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.

Institutions may use different words to describe the various roles in the campus conduct or complaint process. These definitions are included to ensure an understanding of the stated rights for the parties that are provided within the legislation. The legislation does not require that each college use this nomenclature, it merely states that, whatever the institution calls the people who meet these definitions, these are the rights and responsibilities that apply to those individuals. The term reporting individual is limited in the statute to those directly impacted by the violation

Education Act, as amended by the Violence Against Women Act. The relevant definitions appear at pages 62784 and 62789-62790 of the Violence Against Women Act Final Rule, 34 C.F.R. § 668.46,

Education Law 129-B is not limited in any way by the geographic reporting categories of the Clery Act. The rights and responsibilities of Article 129-B law apply based on identity of the reporting individual and/or accused/respondent, not based on the geographic location of the violation.

7. Institutions shall, where appropriate, utilize applicable state and federal law, regulations, and guidance in writing the policies required pursuant to this article.

A list of resources at the end of this guidance document may assist institutions in drafting policies.[2]

8. Nothing in this article shall be construed to limit in any way the provisions of the penal law that apply to the criminal action analogous to the student conduct code violations referenced herein. Action pursued through the criminal justice process shall be governed by the penal law and the criminal procedure law.

This subdivision is to make clear that 129-B is distinct from criminal justice process, and vice versa. The processes have different purposes and use different standards and methods.

A team of attorneys from public and private colleges developed a resource to assist colleges in complying with the requirement to educate reporting individuals about the differences in the criminal and conduct process. The resource may be accessed in Word or PDF format at this site: http://system.suny.edu/sexual-violence-prevention-workgroup/College-and-Criminal-Resource/[3]

9. Nothing in this article shall be construed to create a new private right of action for any person.

This is the equivalent to a provision in the Clery Act.

10. Nothing in this article shall be construed to prevent an institution from continuing an investigation when required by law to continue such investigation.

This paragraph is in place to acknowledge the separate and independent responsibility of colleges and universities to investigate violations when required by law, regardless of whether a

[2] Please note that the list resources attached to this document have not been reviewed and/or endorsed by SED and are provided solely as resources developed by other attorneys and/or institutions to assist higher education institutions in developing their own policies and procedures to comply with this new law.

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reporting individual or any other witness chooses to participate in the institution's process and regardless of a decision within the criminal justice process whether or not to proceed investigate.

Affirmative Consent to Sexual Activity (Section 6441):

1. Every institution shall adopt the following definition of affirmative consent as part of its code of conduct: "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 the 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."

2. Each institution's code of conduct shall reflect the following principles as guidance for the institution's community:

a. Consent to any sexual act or prior consensual sexual activity between or with any party does not necessarily constitute consent to any other sexual act.

b. Consent is required regardless of whether the person initiating the act is under the influence of drugs and/or alcohol.

c. Consent may be initially given but withdrawn at any time.

d. Consent cannot be given when a person is incapacitated, which occurs when an individual lacks the ability to knowingly choose to participate in sexual activity. Incapacitation may be caused by the lack of consciousness or being asleep, being involuntarily restrained, or if an individual otherwise cannot consent. Depending on the degree of intoxication, someone who is under the influence of alcohol, drugs, or other intoxicants may be incapacitated and therefore unable to consent.

e. Consent cannot be given when it is the result of any coercion, intimidation, force, or threat of harm.

f. When consent is withdrawn or can no longer be given, sexual activity must stop.

The provisions in the first paragraph must be included verbatim in each code of conduct. The provisions in the second paragraph must be included conceptually in each code of conduct, but they do not have to be included verbatim (institutions may include them verbatim).

Consent must be knowing, voluntary and mutual.

Voluntary consent means that consent under coercion such as a threat of violence is not consent. Mutual means that all parties must consent.

There is no requirement under the definition of consent that there be “verbal” consent or a specific statement of yes. To require a verbal statement would be to exclude hearing and speaking impaired students from consenting to sexual activity. Consent can be given through words or a

sexual activity or contact when they have been drinking or using drugs. Such individuals may still affirmatively consent through words or actions that clearly indicate interest in engaging in the activity.

Someone who is unconscious, asleep, or involuntarily restrained cannot consent to sexual activity.

Minors who cannot consent under New York's laws covering age of consent are considered incapacitated for purposes of §6441(2)(d) (See New York Penal Law Article 130 et seq.).

Whether all parties consented to sexual activity or contact is to be determined through the student conduct or grievance process. Per Section 6444(5)(c)(ii) below, respondents have a "right to a presumption that the respondent is 'not responsible' until a finding of responsibility is made pursuant to the provisions of this article." This means that the burden of showing that a student had sexual activity or contact with another without affirmative consent as defined here is on the institution, not on the respondent to prove a negative. Note that the burden is on the institution to develop these facts, not on the reporting individual, who may participate at the level to which he or she is comfortable. Through the process, appropriate officials may listen to witnesses and review available evidence to make a determination, to the best of their ability, whether it is more likely than not that a policy violation occurred.

Policy for Alcohol and/or Drug Use Amnesty (Section 6442):

1. Every institution shall adopt and implement the following policy as part of its code of conduct: "The health and safety of every student at the [Institution] is of utmost importance. [Institution] recognizes that students who have been drinking and/or using drugs (whether such use is voluntary or involuntary) at the time that violence, including but not limited to domestic violence, dating violence, stalking, or sexual assault occurs may be hesitant to report such incidents due to fear of potential consequences for their own conduct. [Institution] strongly encourages students to report domestic violence, dating violence, stalking, or sexual assault to institution officials. A bystander acting in good faith or a reporting individual acting in good faith that discloses any incident of domestic violence, dating violence, stalking, or sexual assault to [Institution's] officials or law enforcement will not be subject to [Institution's] code of conduct action for violations of alcohol and/or drug use policies occurring at or near the time of the commission of the domestic violence, dating violence, stalking, or sexual assault."

2. Nothing in this section shall be construed to limit an institution's ability to provide amnesty in additional circumstances.

The legislation contains provisions that provide amnesty to students reporting incidents under this Article from internal institutional violations for drug or alcohol use. This subdivision does not require amnesty for drug dealers or those who use drugs or alcohol as a weapon or to facilitate assault. It covers personal drug use and possession whether intentional or accidental.

The point of this subdivision is to remove the fear of those who have, legally or illegally, been using or in the presence of drugs or alcohol at or near the time of the commission of the domestic violence, dating violence, stalking, or sexual assault, that the college would take conduct action related to the use of drugs or alcohol rather than action on the sexual or interpersonal violence

Note that this provision only covers the student disciplinary process. The legislation does not cover the criminal justice process (but see New York State Good Samaritan Law, Penal Law §220.78), does not cover areas outside of conduct, and does not apply to employees of the institution. Note that many higher education institutions operate clinical or residency placements where the prohibition on drug and alcohol use in the workplace is governed by federal or state law or regulation, national standards or accreditation requirements. For example, if a student reports being sexually assaulted in a hospital residency placement while under the influence of prescription drugs stolen from the hospital pharmacy, this section would not prevent the student from being removed from the placement or from having restrictions placed on participation in the placement. The student would have amnesty from student judicial or conduct charges for that prescription drug use.

This section does not limit a college from seeking assistance for a student who is struggling with drug or alcohol addiction or is otherwise in danger provided that the assistance is not disciplinary in nature.

"Occurring at or near the time of the commission" is not defined in the law, and should be implemented reasonably and in good faith by institutions.

Students' Bill of Rights (Section 6443):

Every institution shall adopt and implement the following "Students' Bill of Rights" as part of its code of conduct which shall be distributed annually to students, made available on each institution's website, posted in campus residence halls and campus centers, and shall include links or information to file a report and seek a response, pursuant to section sixty-four hundred forty-four of this article, and the options for confidential disclosure pursuant to section sixty-four hundred forty-six of this article: "All students have the right to: 1. Make a report to local law enforcement and/or state police; 2. Have disclosures of domestic violence, dating violence, stalking, and sexual assault treated seriously; 3. Make a decision about whether or not to disclose a crime or violation and participate in the judicial or conduct process and/or criminal

justice process free from pressure by the institution; 4. Participate in a process that is fair, impartial, and provides adequate notice and a meaningful opportunity to be heard; 5. Be treated with dignity and to receive from the institution courteous, fair, and respectful health care and counseling services, where available; 6. Be free from any suggestion that the reporting individual is at fault when these crimes and violations are committed, or should have acted in a different manner to avoid such crimes or violations; 7. Describe the incident to as few institution representatives as practicable and not be required to unnecessarily repeat a description of the incident; 8. Be protected from retaliation by the institution, any student, the accused and/or the respondent, and/or their friends, family and acquaintances within the jurisdiction of the institution; 9. Access to at least one level of appeal of a determination; 10. Be accompanied by an advisor of choice who may assist and advise a reporting individual, accused, or respondent throughout the judicial or conduct process including during all meetings and hearings related to such process; and 11. Exercise civil rights and practice of religion without interference by the investigative, criminal justice, or judicial or conduct process of the institution."

The student bill of rights is intended to be a brief but overarching document to set the expectations for students. Specific requirements appear in the sections below. This section is aimed at educating students as to their rights under this legislation. The law requires that the bill of rights be widely distributed but gives options to institutions as to how to distribute it in a way that maximizes dissemination to as many students as possible. While all concepts must be included, institutions may present them in a different order, split or re-combine them (such as in training documents or social media) and make minor, non-substantive changes for readability, understandability or consistency. Posted documents should include URL links, shortened URL's, QR codes, or other methods of informing students of the availability and location of other relevant policies required by the law.

Subdivisions 1 and 2 speak for themselves.

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Institutions that do not have an on campus security option and/or a local law enforcement option

instance “response.campus.edu” or “campus.edu/safety”) or be accessible as a mobile phone application that is free and easily accessed by students. While each institution should determine for itself who qualifies as officials likely to receive a report, some examples include, but are not limited to:

- Title IX Coordinator.
- University Police or Campus Security.
- Student Affairs professionals.
- Resident Assistants and Hall Directors.
- Coaches, trainers and athletic staff.
- Club and organization advisors.
- Counseling professionals and advocates.
- Individuals designated as Campus Security Authorities for Clery Act compliance purposes.
- Individuals designated as Responsible Employees for Title IX compliance purposes.

To assist institutions in developing such resources, including access to a list of available state and community organizations that may serve as options for emergency access officials, the State University of New York prepared a Toolkit to develop a website similar to the SUNY SAVR (Sexual Assault and Violence Response) Resource.

A team of attorneys from public and private colleges developed a resource to assist colleges in complying with the requirement of educating about the different standards of proof and evidence. The resource may be accessed as a Word or PDF at this site: http://system.suny.edu/sexual-

e. Disclose the incident to institution representatives who can offer privacy or confidentiality, as appropriate, and can assist in obtaining resources for reporting individuals;

f. File a report of sexual assault, domestic violence, dating violence, and/or stalking and the right to consult the Title IX Coordinator and other appropriate institution representatives for information and assistance. Reports shall be investigated in accordance with institution policy and a reporting individual's identity shall remain private at all times if said reporting individual wishes to maintain privacy;

g. Disclose, if the accused is an employee of the institution, the incident to the institution's human resources authority or the right to request that a confidential or private employee assist in reporting to the appropriate human resources authority;

The above paragraphs are a list of options a reporting individual has in reporting the violation. They are not mutually exclusive. A reporting individual may use any or none of these options.

Institutions should only list resources that are actually available to the institution's students.

h. Receive assistance from appropriate institution representatives in initiating legal proceedings in family court or civil court; and

Institutions have flexibility in complying with this provision. Large institutions may have personnel on campus who can assist with understanding the initial requirements to bring a case in family or civil court, while other institutions may refer reporting individuals to legal aid or community resources (institutions may access a list and/or map of legal aid resources in New York State by visiting http://www.suny.edu/violence-response/, clicking on "Off Campus Resources" and then sorting for "Legal Resources"). This provision does not require institutions to bring actions on behalf of reporting individuals, provided that institutions

to the reporting individual: "You have the right to make a report to university police or campus security, local law enforcement, and/or state police or choose not to report; to report the incident to your institution; to be protected by the institution from retaliation for reporting an incident; and to receive assistance and resources from your institution."

Institution representative includes employees likely to receive such a report, who may be student employees. Institutions may not limit this coverage to a single employee, but should act in good faith to provide the information to employees likely to receive such a report or otherwise comply as addressed in the guidance below.

While each institution should determine for itself who qualifies as officials likely to receive a report, some examples include, but are not limited to:

- Title IX Coordinator.
- University Police or Campus Security.
- Student Affairs professionals.
- Resident Assistants and Hall Directors.
- Coaches, trainers and athletic staff.
- Club and organization advisors.
- Counseling professionals and advocates.
- Individuals designated as Campus Security Authorities for Clery Act compliance purposes.
- Individuals designated as Responsible Employees for Title IX compliance purposes.

The important point in this paragraph is for employees to provide this information to students at the first instance of disclosure.

Employees

exceptionally rare cases where a protected individual is actively seeking to be in the same place as the covered person, this does not mean that an institution must sanction the covered person or is prohibited from taking other reasonable action to address the situation, consistent with its policies and procedures. The definition of a public place is to be interpreted by institutions using reason and good faith. Some institutions may assist students in compliance by setting up a schedule of attendance in certain locations such as academic buildings, libraries, athletics or fitness facilities and dining halls, but there is no requirement that institutions develop such a schedule.

Both the accused or respondent and the reporting individual shall, upon request and consistent with institution policies and procedures, be afforded a prompt review, reasonable under the circumstances, of the need for and terms of a no contact order, including potential modification, and shall be allowed to submit evidence in support of his or her request.

As has been generally accepted practice in higher education, covered and protected individuals under no contact orders may request a review of the need for ovie-2(on, c)40(r 2a1d02(vi)-)-2(m)2(51)-9( )Tj, u

This means that institutions shall treat the process and award of an out-of-state court document equivalent to a New York State Order of Protection.

c. To receive a copy of the order of protection or equivalent when received by an institution and have an opportunity to meet or speak with an institution representative, or other appropriate individual, who can explain the order and answer questions about it, including information from the order about the accused's responsibility to stay away from the protected person or persons;

The intention of this provision is to assist both covered and protected students with understanding a document that may appear complicated or otherwise difficult to understand. If, due to some circumstance, the reporting individual or respondent does not have a copy of the order, they can receive that copy from an institution representative if the institution has a copy.

This requirement may be met by an institution representative or other appropriate official. This means that an institution that lacks on campus resources to assist in this matter may work with a local resource or a neighboring institution where such a resource is available. Local resources may include law enforcement, legal aid organizations, rape crisis centers, and domestic violence prevention organizations (this is not a comprehensive list). Institutions may access a list and/or map of state and local resources in New York State by visiting http://www.suny.edu/violence-response/ and clicking on "Off Campus Resources" or "View NYS Resources").

The law requires that institutions be clear that the responsibility to stay away falls upon the covered person, not the protected individual. In the exceptionally rare case that a protected individual is actively seeking to be in the same place as the covered person, this does not mean that an institution must sanction the covered person or is prohibited from taking reasonable action to address the situation, consistent with its policies and procedures.

As with many provisions of the law, this section does not change the current requirements for arrests for violations of such orders, but instead the law is aimed at educating students about their rights under Orders of Protection.

Each institution should post information about personnel, likely in University Police, Campus Safety, or Student Affairs, who can assist a student in understanding an Order of Protection, and a clear method for contacting that office. To comply with the Clery Act requirement of even-handedness, such explanations should be available both to students who are protected by Orders of Protection and to those who are subject to Orders of Protection.

The language about not limiting current law enforcement jurisdiction is intended to make clear that 129-B does not change current law enforcement jurisdiction.

f. When the accused or respondent is a student determined to present a continuing threat to the health and safety of the community, to subject the accused or respondent to interim suspension pending the outcome of a judicial or conduct process consistent with this article and the institution's policies and procedures. Both the accused or respondent and the reporting individual shall, upon request and consistent with the institution's policies and procedures, be afforded a prompt review, reasonable under the circumstances, of the need for and terms of an interim suspension, including potential modification, and shall be allowed to submit evidence in support of his or her request;

Institutions should use good faith and best practices to determine when a person presents a continuing threat to the health and safety of the community. Interim suspensions should be reasonabled (o de)tsionstym6(c t)-31(p T[(r)-12(3.9)30i)131(p T. Tc)-1(iubm)5.9t

g. When the accused is not a student but is a member of the institution's community and presents a continuing threat to the health and safety of the community, to subject the accused to interim measures in accordance with applicable collective bargaining agreements, employee handbooks, and rules and policies of the institution;

This provision is a parallel to the provision above that applies to non-student members of an institution community. Consistent with the law collective bargaining agreements, and institution policy, institutions may remove a non-student from the institution community when the person is accused of a violation and presents a danger. Nothing in the law changes collective bargaining agreements or requires changes to other policies.

Individuals who are neither students, nor employees, but are members of the institution community who present a continuing threat, as determined by the institution, would also be subject to interim measures, consistent with institution policy. An example is a persona non grata letter notifying an individual that they are not allowed on institution property and entering property may subject them to arrest or trespassing charges (consistent with applicable law, institutional policy, and due process requirements, where applicable).

h. To obtain reasonable and available interim measures and accommodations that effect a change in academic, housing, employment, transportation or other applicable arrangements in order to help ensure safety, prevent retaliation and avoid an ongoing hostile environment, consistent with the institution's policies and procedures. Both the accused or respondent and the reporting individual shall, upon request and consistent with the institution's policies and procedures, be afforded a prompt review, reasonable under the circumstances, of the need for and terms of any such interim measure and accommodation that directly affects him or her, and shall be allowed to submit evidence in support of his or her request.

This provision should be interpreted in a manner consistent with federal law including but not limited to the Clery Act, and Office for Civil Rights interpretations of Title IX and the Americans with Disabilities Act. Institutions must, under those and this law, provide reasonable accommodations. Reasonability is to be determined on a case-by-case basis and using the standards established in law and by the institution. Not all accommodations must be granted. Institutions should analyze each request to determine if it could improve safety, prevent retaliation, and/or avoid an ongoing hostile environment, and the law is clear that such analysis should be consistent with institutional policy and procedure.

In the event that an accommodation or interim measure (including but not limited to campus or residence hall suspension) granted to or against one party impacts another party (parties in this case being the reporting individual[s] and accused or respondent[s]), both the directly impacted party and the secondarily impacted party may request a review of the terms or totality of the

accommodation and/or measure by the institution and may submit information as to their

This section should not be read to extend to private colleges the Constitutional due process requirements that apply to public colleges. It establishes minimum requirements for cases of sexual and interpersonal violence covered by 129-B, but institutions may offer more rights and requirements and may offer such rights and requirements for other violations that are outside the scope of this law.

Consistent with the regulations implementing the Clery Act, 34 C.F.R. §668.46(k)(2)(v), institutions should simultaneously provide both reporting individuals and respondents with notice or notices that include the date, time, location and factual allegations that have been reported, as well as a reference to the specific code provisions reported to have been violated and their associated sanctions. This list should be specific enough to allow a reasonable person to present a defense, pursuant to institutional policy, but need not be so long and detailed that it negatively impacts the student conduct process. The section is consistent with the notice requirements of tf ( )Tj0.i05.9ye

mandates a reference to these sanction lists which must already be created pursuant to federal law.

c. Throughout proceedings involving such an accusation of sexual assault, domestic violence, dating violence, stalking, or sexual activity that may otherwise violate the institution's code of conduct, the right:

In general, these rights apply to all students. Some rights by their nature may be more applicable to reporting individuals or accused/respondents.

i. For the respondent, accused, and reporting individual to be accompanied by an advisor of choice who may assist and advise a reporting individual, accused, or respondent throughout the judicial or conduct process including during all meetings and hearings related to such process. Rules for participation of such advisor shall be established in the code of conduct.

This paragraph parallels the requirements of the Clery Act and requires that institutions allow students to choose an advisor of choice to accompany the student to any hearing or meeting related to the conduct process. Institutions have the discretion to allow more than one advisor, although the law requires that they are permitted at least one. Institutions may, but are not required to, offer a particular advisor at the cost of the school or to pay for an advisor. The advisor is truly of choice; it may be a faculty member, family member, attorney or otherwise. Unless an institution maknthe6(n)2(in)2(s)1(in)2ff5.9i2(e)-ivaw w maknhsuinterglic(t)-6(a)6(toI)15(n)2(p)-8(e

advisor of choice, and institutions are not required to comply with the busy schedule of advisors of choice who may declare themselves unavailable for days, weeks or months. This provision is to be read in concert with provisions requiring a timely process (such as the Office for Civil Rights Title IX guidance that requires a process lasting approximately 60 days).

ii. To a prompt response to any complaint and to have the complaint investigated and adjudicated in an impartial, timely, and thorough manner by individuals who receive annual training in conducting investigations of sexual violence, the effects of trauma, impartiality, the rights of the respondent, including the right to a presumption that the respondent is "not responsible" until a finding of responsibility is made pursuant to the provisions of this article and the institution's policies and procedures, and other issues including, but not limited to domestic violence, dating violence, stalking or sexual assault.

Prompt is not defined in the law and is to be determined on a case-by-case basis, consistent with institution policy and procedures. Institutions should use good faith to conduct investigations and proceedings in a prompt but meaningful way. Consistent with the requirements of the Clery Act, individuals who conduct investigations, hearing and appeals should have annual training in conducting these investigations, the impact of trauma on reporting such violations, the importance of impartiality in these proceedings, and the rights of the respondent (rights of reporting individuals are established here and elsewhere in the law). The provisions of this subparagraph regarding training of those conducting investigations and adjudications are consistent with the requirements of the Clery Act, and are included here for education purposes.

A key provision in this subparagraph is a presumption that one should not be determined in advance to have violated a rule and then required to "prove a negative." To borrow a phrase from the criminal justice process, one is "innocent until proven guilty." This law, consistent with that principle, emphasizes that a respondent is presumed to be "not responsible" until the institution has established evidence, testimony or information that would allow the decision maker to find the respondent responsible pursuant to the institution code of conduct and this law. Note that the burden is on the institution to develop these facts, not on the reporting individual, who may participate at the level to which he or she is comfortable. Through the process, appropriate officials may listen to witnesses and review available evidence to make a determination, to the best of their ability, whether it is more likely than not that a policy violation occurred. For example, an institution cannot begin a process with the presumption that a respondent engaged in sex without consent, and then begin to gather evidence wherein the respondent would have to prove there was consent. The institution should gather evidence to determine whether a violation occurred and the burden of such a finding is on the institution.

Institutions should read this provision consistent with a requirement in this same section to have training in, among other things, trauma-informed interviewing and investigations, which lead

with an initial obligation to

Generalized delays due to scheduling, workload, priority of investigation compared to other open cases, are insufficient to meet the requirements of this law that institutions independently investigate and act when receiving these reports, without being impacted in that responsibility by

party and/or evidence of mental health diagnosis and treatment (or have the institution present such evidence on their behalf), they may likewise prohibit the *other* party from seeking to present testimony or other evidence of the same.

The limit does not cover evidence of prior sexual history with the other party in the judicial or conduct action that is relevant to a charge or defense. For instance, if student Respondent A wants to testify about why A believed that Reporting Individual B was affirmatively consenting to sexual activity, A may testify about past sexual acts between B and A, indicia of consent in those acts (such as certain words or actions said or used in the past between participants to indicate consent which were or were not said or used in this particular sexual contact), and why A believed that consent was also given in the case under consideration. However, A may not introduce directly or seek to have Witness C testify about a past sexual act between Reporting Individual B and Witness C as evidence of same. Reporting Individual B may prohibit such testimony.

Further, if a reporting individual engaged in sexual activity with more than one partner in a short time period (as reasonably determined by the institution) and the institution alleges that the reporting individual sustained injuries during non-consensual sexual activity with the respondent, the fact of consensual or non-consensual sexual activity with the unrelated individual may be admitted for the limited purpose of addressing how injuries were sustained. Such evidence may not be used to show a pattern of engaging in sexual activity by the reporting individual or to allege that if the reporting individual consented to activity with the unrelated individual, ipso facto she or he was consenting to sexual activity with respondent.

The same concepts apply to past mental health diagnosis or treatment and cover both respondents and reporting individuals. A student may testify or offer evidence on their own past mental health diagnosis or treatment but may limit the other party from offering s

vii. To receive written or electronic notice, provided in advance pursuant to the college or university policy and reasonable under the circumstances, of any meeting they are required to or are eligible to attend, of the specific rule, rules or laws alleged to have been violated and in what manner, and the sanction or sanctions that may be imposed on the respondent based upon the outcome of the judicial or conduct process, at which time the designated hearing or investigatory officer or panel shall provide a written statement detailing the factual findings supporting the determination and the rationale for the sanction imposed.

This should be read in a manner consistent with the requirements of the regulations implementing the Clery Act, 34 C.F.R. §668.46(k). All requirements are subject to good faith application and to an institution's policies. The requirement to provide notice of meetings to which a person is required or eligible to attend is specific to that specific person and notice need not be provided to all parties unless *that* party is required or eligible to attend *this* meeting. For instance, in the case of an accusation of stalking, the institution need not notify the accused of a meeting for which the reporting individual is required or eligible to attend unless the accused is also required or eligible to attend that specific meeting

viii. To make an impact statement during the point of the proceeding where the decision maker is deliberating on appropriate sanctions.

This should be read in a manner consistent with the requirements of the Clery Act. Institutions may use different terms to describe the impact statement, and this provision would apply regardless of chosen term. Institutions may place reasonable restrictions on provision of such a statement, such as length.

ix. To simultaneous (among the parties) written or electronic notification of the outcome of a judicial or conduct process, including the sanction or sanctions.

This should be read in a manner consistent with the requirements of the Clery Act, 20 U.S.C §1092(f)(8)(iv)(III)(a) and 34 C.F.R. §668.46(k)(2)(v). There is no requirement in law that notice be provided using paper mail. Institutions may determine the best way of providing such notice in a manner reasonably calculated to be informative and simultaneous (in some cases, paper mail may be the best option). Oral notice does not meet the requirements of this section.

x. To be informed of the sanction or sanctions that may be imposed on the respondent based upon the outcome of the judicial or conduct process and the rationale for the actual sanction imposed.

This provision should be read in a manner consistent with the requirements of the Clery Act regulations, 34 C.F.R. §668.46(k). The Clery Act requires that institutions publish a list of the available sanctions for violations of institution policy related to sexual assault, domestic

violence, dating violence and stalking (institutions must, per the regulations, publish all possible sanctions and not just a range of sanctions). Therefore the rean

applicant presents a transcript with a notation, but the law does not mandate such policies, nor does it forbid licenses for individuals with a transcript notation.

If a court of competent jurisdiction vacates a finding of responsibility for a violation of college policy, the legislation requires that vacating an underlying finding also vacates the transcript notation memorializing that finding. This provision applies to vacating of the finding by an external entity, and is separate from the policy on transcript notations and appeals in this section that governs the process internal to the institution for removing or modifying a notation.

Institutions may, but are not required to, establish a policy for appealing a notation of suspension, including standards for lifting a notation and who such an appeal should be addressed to, provided that such notation may not be lifted until one year after the suspension ends. A notation for expulsion may not be removed via an appeal to the institution.

7. Institutions that lack appropriate on-campus resources or services shall, to the extent practicable, enter into memoranda of understanding, agreements or collaborative partnerships with existing community-based organizations, including rape-crisis centers and domestic violence shelters and assistance organizations, to refer students for assistance or make services available to students, including counseling, health, mental health, victim advocacy, and legal assistance, which may also include resources and services for the respondent.

This provision encourages such memoranda of understanding "to the extent practicable" and does not require such an agreement or demand any specific provisions be in such an agreement.

The State University of New York, Department of Health, and New York State Coalition Against Sexual Assault developed a model agreement that can be implemented by private and public colleges and their community partners.

Nothing in this law requires or obligates institutions to pay a community organization or provider a fee or other consideration in exchange for signing a memorandum of understanding.

8. Institutions shall, to the extent practicable, ensure that students have access to a sexual assault forensic examination by employing the use of a sexual assault nurse examiner in their campus health center or entering into memoranda of understanding or agreements with at least one local health care facility to provide such a service.

Local health care facilities that provide sexual assault nurse examination services are required by law (including the Violence Against Women Act, codified at 42 U.S.C.A. § 3796gg-4; and N.Y. Exec. L. § 631(13)) to provide these examinations to college students and are barred from charging for the specific cost of the exam. The intent is for institutions to work collaboratively

with community partners and health care providers to provide the best service to victims and survivors of violence, and to that end, institutions and local health care facilities are strongly encouraged to develop partnerships that go beyond the minimum required by law. To the extent additional agreements are reached, they can be memorialized in a memorandum of understanding. Nothing in this law requires or obligates institutions to pay a community organization or health care provider a fee or other consideration in exchange for signing a memorandum of understanding.

9. Nothing in this article shall be deemed to diminish the rights of any member of the institution's community under any applicable collective bargaining agreement.

Certain rights and responsibilities of this law may be in conflict with provisions of applicable collective bargaining agreements. While institutions may wish to bargain for changes to those provisions, this law does not interfere with or abrogate existing collective bargaining agreements.

Campus Climate Assessments (Section 6445):

Care must be taken to ensure that data is protected and that individuals responding cannot be identified when data is published on the web. There are no specific requirements for what information must be published, but institutions should review the top level survey result publications of other institutions that have completed climate surveys so as to ascertain best practices.

To encourage institutions to properly conduct climate surveys and encourage participation in the survey, the law creates a presumption that data and information from a climate survey is not admissible in a federal or state court proceeding unless the court, in its discretion, determines that the information is material to the underlying claim or defense. The phrase *material* makes this a higher bar than the standard legal threshold for admissibility of evidence, which is *relevance*.

The White House Task Force has developed useful guidance on developing and conducting a climate survey: https://www.notalone.gov/assets/ovw-climate-survey.pdf;

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c. A plain language explanation of confidentiality which shall, at a minimum, include the following provision: "Even [Institution] offices and employees who cannot guarantee confidentiality will maintain your privacy to the greatest extent possible. The information you provide to a nonconfidential resource will be relayed only as necessary for the Title IX Coordinator to investigate and/or seek a resolution.";

This language must be included verbatim. It is intended to provide students with uniform guidance about confidentiality, regardless of where they attend college in New York State. Privacy is the default setting for institution personnel. Only a few personnel at any institution have the ability to offer true confidentiality under the law. This statement informs students that the confidential resources listed by the institution provide confidentiality, but other employees who offer privacy will not make their reported information public; they will treat it with respect and only share it as necessary to comply with law and/or institution policy.

d. Information about how the institution shall weigh a request for confidentiality and respond to such a request. Such information shall, at a minimum, include that if a reporting individual discloses an incident to an institution employee who is responsible for responding to or reporting domestic violence, dating violence, stalking, or sexual assault but wishes to maintain confidentiality or does not consent to the institution's request to initiate an investigation, the Title IX Coordinator must weigh the request against the institution's obligation to provide a safe, non-discriminatory environment for all members of its community. The institution shall assist with academic, housing, transportation, employment, and other reasonable and available accommodations regardless of reporting choices;

The confidentiality referenced here is slightly different from the confidentiality referenced

Reporting individuals may obtain all resources outlined in the law even if they decline to participate in an investigation or process or actively oppose the institution proceeding in its process.

e. Information about public awareness and advocacy events, including guarantees that if an individual discloses information through a public awareness event such as candlelight vigils, protests, or other public event, the institution is not obligated to begin an investigation based on such information. The institution may use the information provided at such an event to inform its efforts for additional education and prevention efforts;

This paragraph is intended to notify potential reporting individuals that, in accord with the Office for Civil Rights' analysis of Title IX, as stated in their April 2014 Dear Colleague Letter/Questions and Answers (modifying understanding of the April 2011 Dear Colleague Letter) institutions need not conduct a Title IX review of specific reports made at public events, including events like "Take Back the Night," "Paint the Campus Teal," "Walk a Mile" and other similar events. A Title IX Coordinator, consistent with this law, can use information learned at public events for training and prevention work, but may respect the desire of individuals to outcry at t

a. The institution prohibits sexual and interpersonal violence and will offer resources to any victims and survivors of such violence while taking administrative and conduct action regarding any accused individual within the jurisdiction of the institution;

b. Relevant definitions including, but not limited to, the definitions of sexual assault, domestic violence, dating violence, stalking, confidentiality, privacy, and consent;

c. Policies apply equally to all students regardless of sexual orientation, gender identity, or gender expression;

d. The role of the Title IX Coordinator, university police or campus security, and other relevant offices that address domestic violence, dating violence, stalking, and sexual assault prevention and response;

e. Awareness of violence, its impact on victims and survivors and their friends and family, and its long-term impact;

f. Bystander intervention and the importance of taking action to prevent violence when one can safely do so;

g. Risk assessment and reduction including, but not limited to, steps that potential victims, perpetrators, and bystanders can take to lower the incidence of violations, which may contain information about the dangers of drug and alcohol use, including underage drinking and binge drinking, involuntary consumption of incapacitating drugs and the danger of mislabeled drugs and alcohol, the importance of communication with trusted friends and family whether on campus or off campus, and the availability of institution officials who can answer general or specific questions about risk reduction; and

h. Consequences and sanctions for individuals who commit these crimes and code of conduct violations.

At a minimum, the onboarding programing should cover the topics listed here, again in a method and manner appropriate to the institution. Not every topic needs to be covered in every session, and institutions can determine which areas to go can determine which areas to emphasize, but over the course of the programming all topics should be covered. Again, while institutions must offer this programming to students, the law does not require that students attend. The impetus is to develop creative trainings that engage students, rather than rote trainings that comply, but that bore students.

3. Every institution shall train all new students, whether first-year or transfer, undergraduate, graduate, or professional.

New students are requir

Institutions should make programming available at different times and in different formats to encourage participation.

Beyond this, institutions should use good faith to determine whether specific groups of students could benefit from more specific or tailored training. There is no requirement that each group receive individualized training, but institutions should determine whether there is additional tailored training that, if offered to specific groups, could assist in prevention and response. The legislation lists examples of groups such as international students, students who are also employees, student leaders and online students. That is not an exclusive list, but are examples to help institutions identify student groups that may benefit from additional, tailored training. Institutions should tailor training to their student population.

Each institution should also use good faith efforts to determine whether specific groups of students are in high risk populations who could benefit from more specific or tailored training. Institutions determine who these populations are and an institution can determine whether it wishes to provide training for populations who are at high risk for victimization, perpetration, being a bystander to violence, or a combination of these groups. In different years, population changes may lead to different determinations of membership in high risk populations. Again, the idea is for institutions to consider going beyond generalized training equally applicable to all to specialized training that could lessen violence when directed at a specific population.

6. Every institution shall require that each student leader and officer of student organizations recognized by or registered with the institution, as well as those seeking recognition by the institution, complete training on domestic violence, dating violence, stalking, or sexual assault prevention prior to receiving recognition or registration, and each institution shall require that each student athlete complete training on domestic violence, dating violence, stalking, or sexual assault prevention prior to participating in intercollegiate athletic competition.

This paragraph is the only provision of this onboarding section of the law that goes beyond the requirements of the Clery Act. While the above paragraphs require institutions to *offer* training and a campaign of education generally, this provision requires *completion* of training by student leaders (including athletes and club/organization officers and leaders) in an effort to change the culture in schools.

Institutions have significant flexibility in how to offer these required trainings. The legislation uses the disjunctive “or” in requiring training on domestic violence, dating violence, stalking, **or** sexual assault prevention, giving institutions flexibility to have broad or tailored programming that covers one topic in detail or several topics. Institutions may conduct a single training or a series of trainings for all athletes or student leaders or they may allow such students to show that they have attended one of many trainings offered by the institution over the course of the

semester. Institutions should endeavor to accomplish this in good faith. The training requirement is not measured by the *organization* or *team* being trained once, but by each *officer*, *leader*, or *athlete* completing the training her or himself to qualify for their position as athlete or club/organization leader. The legislation does not denote which individuals are considered "leaders" and "officers" and leaves it to the institution. While many student organizations have a president, vice president, treasurer, and secretary, other organizations have chancellors, directors, captains,

e. Of those cases in paragraph c of this subdivision, the number of respondents who were found not responsible through the institution's judicial or conduct process.

VI- Further Resources:

- Governor's Office Program Page: https://www.ny.gov/programs/enough-enough-combating-sexual-assault-college-campuses
- New York Article 129-B Legislation: http://www.nysenate.gov/legislation/bills/2015/S5965
- Signed Legislation Press Release: https://www.governor.ny.gov/news/governor-cuomo-signs-enough-enough-legislation-combat-sexual-assault-college-and-university
- Distinctions Between Penal Law and Discipline: http://system.suny.edu/sexual-violence-prevention-workgroup/College-and-Criminal-Resource/
- New York State Department of Health Rape Crisis and Sexual Violence Prevention Program: https://www.health.ny.gov/prevention/sexual_violence/
- New York State Office for the Prevention of Domestic Violence: http://www.opdv.ny.gov/
- New York State Coalition Against Sexual Assault: http://nyscasa.org/
- New York State Coalition Against Domestic Violence: http://www.nyscadv.org/
- New York City Alliance Against Sexual Assault: http://www.svfreenyc.org/
- Violence Against Women Act Final Regulations: https://www.federalregister.gov/articles/2014/10/20/2014-24284/violence-against-women-act
- Guidance for Complying with the Violence Against Women Act: http://system.suny.edu/media/suny/content-assets/documents/generalcounsel/SUNY-VAWA-Guidance-2014.pdf
- Federal Department of Education Office for Civil Rights Title IX Guidance: http://www2.ed.gov/about/offices/list/ocr/publications.html#TitleIX

SED provides links to these external resources throughout this document but does not control these resources. Such links are not an endorsement of any content not created by SED. SED welcomes additional resources developed by institutions, state agencies and community organizations to aid in compliance with this law.