

Updates for the New Year at Pennsylvania Colleges and Universities



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As institutions of higher education begin their spring 2020 semester, they should be aware of several Pennsylvania-specific developments regarding sexual misconduct and child abuse.

Model Sexual Misconduct Policy

As discussed in an earlier alert (available at <https://www.pepperlaw.com/publications/pa-higher-education-institutions-subject-to-new-law-on-sexual-violence-reporting-2019-07-09/>), Act 16 of 2019 (HB 1615 - available at: <https://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2019&sessInd=0&billBody=H&billTyp=B&billNbr=1615&pn=2268>) includes a provision requiring colleges and

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universities to adopt a “clear, understandable written policy on sexual harassment and sexual violence that informs victims of their rights under federal and state law.” 24 P.S. § 20-2002-J(A). While institutions of higher education may already meet the requirements of Act 16 by virtue of their compliance with Title IX, the Clery Act and related guidance, this direct action by Pennsylvania lawmakers illustrates the challenges that can arise as more state and federal entities seek to demonstrate their commitment to combating sexual misconduct, sometimes without coordinating among themselves.

The Pennsylvania Department of Education has released a Model Sexual Misconduct Policy under Act 16 (available at: <https://www.education.pa.gov/Postsecondary-Adult/Pages/Act-16-of-2019.aspx>). The release of the Model Policy comes at an interesting time, as institutions await the U.S. Department of Education’s (DOE’s) impending release of final Title IX regulations. As readers will recall, DOE released proposed regulations in late 2018, garnering more than 120,000 public comments. While it remains to be seen what the final regulations will look like, it is safe to assume that they will impact the validity of the Model Policy as a possible template.

Highlights of the Model Policy include the following:

- Perhaps the most interesting aspect of the Model Policy lies in what it *does not* say. The Model Policy does not cover the procedures institutions should use in determining responsibility in sexual misconduct cases. While it refers to a “hearing,” the Model Policy simply redirects institutions to the “applicable requirements” in their existing policies. These procedural details, however, have garnered the most attention — and concern — with respect to DOE’s proposed Title IX regulations.
- The Model Policy uses a preponderance of the evidence standard for determining allegations of sexual misconduct. While many schools already use this standard, it is worth noting that DOE’s draft Title IX regulations permitted the preponderance of the evidence standard only if schools use it in all conduct matters, including those involving faculty and staff.
- The Model Policy adopts an exceptionally broad definition of “responsible employee” — including all employees *and volunteers* — for purposes of identifying who must report sexual misconduct. The only exclusion is for those who serve in a privileged or confidential role.

- With respect to the impact of incapacitation on the ability to consent, the Model Policy adopts a “reasonable person” standard, *i.e.*, whether a reasonable person would have known that the other party could not consent. Interestingly, the Model Policy adds that consideration will be given to “all the circumstances of the relationship between the parties.” The inclusion of this language raises questions as to how the details of the relationship between the parties would impact capacity to consent.
- The Model Policy allows an institution to impose an interim suspension on a respondent in “exceptional circumstances where it is determined that a respondent is a continuing threat to the health and safety of the community,” with the respondent being entitled to a hearing within 10 working days. Assuming the hearing is solely for purposes of challenging the interim suspension, 10 working days seems long, particularly considering that the Model Policy does not include a timeframe for rendering a decision following the hearing.

While the Model Policy is a resource for institutions to consider as they review and update their sexual misconduct policies, it will need to be digested through the lens of the final Title IX regulations once they are released. The final regulations will likely require significant changes in the way many colleges and universities handle reports of sexual misconduct.

Revised Statutes of Limitations for Abuse Claims

In late 2019, Gov. Tom Wolf signed three bills related to childhood sexual abuse into law.

Act 89 of 2019 (HB 1171) addresses settlement agreements reached in connection with allegations of childhood sexual abuse. The law renders unenforceable any settlement terms that prohibit a party from disclosing information concerning the abuse to law enforcement. Settlement agreements must now include a statement in 12-point, boldface type reading: “By signing this agreement, you do not surrender your right to speak to law enforcement about the actions, underlying facts or circumstances referenced in this agreement.” Act 89 takes effect on January 25, 2020.

Act 88 (HB 1051) amends Pennsylvania’s Child Protective Services Law to increase penalties for mandatory reporters — including employees of institutions of higher education — who fail to report suspected child abuse to appropriate authorities. The law also expands the situations that trigger this reporting obligation. Specifically, if a mandatory reporter fails to report suspected child abuse while having reasonable cause to suspect

that the individual continues to have direct contact with children through the individual's employment or volunteer service, the penalty is increased from a first-degree misdemeanor to at least a third-degree felony, depending on the nature of the abuse. Moreover, the law requires only reasonable cause to *suspect* abuse rather than a reasonable *belief* that there is abuse to trigger the reporting obligation. Act 88 also takes effect on January 25, 2020.

Act 87 of 2019 (HB 962) implements long-anticipated extensions to the statutes of limitations for civil claims and criminal charges arising out of the sexual abuse of minors and young adults. The law eliminates the statute of limitations previously set at 50 years of age for certain crimes arising from the sexual abuse of a victim under the age of 18, which can now be prosecuted at any time. For other such crimes, it raised the limitations period to 55 years of age. It extends the statute of limitations for civil claims to 37 years following the victim reaching the age of majority, *i.e.*, age 55, regardless of whether that individual files a criminal complaint. Previously, a victim was required to bring a civil claim within 12 years of reaching the age of majority, *i.e.*, age 30.

The law creates a new statute of limitations applicable to the sexual assault of young adults, allowing an individual who suffered sexual abuse between the ages of 18 and 23 years old to bring a claim until they reach the age of 30. It also extends the criminal statute of limitations for sexual offenses against young adults to "the later of the period of limitation provided by law after the individual has reached 24 years of age or 20 years after the date of the offense."

Act 87 is effective immediately, but does not apply retroactively to claims or prosecutions for which the statute of limitations has already expired. It does, however, extend the limitations periods for claims that are currently viable.

The Pennsylvania General Assembly is also pursuing a constitutional amendment to allow for the retroactive revival of expired claims. It has already passed HB 963, including just such an amendment. Next, the initial notice of the proposed amendment must be published in two newspapers in every county in Pennsylvania, at least three months before the general election in November 2020. Following the required notice, the bill must be reintroduced and again passed in both houses of the General Assembly, followed by republication. Ultimately, in order for there to be a constitutional amendment, the language must be approved by a majority of voters at the election following both cycles of

passage through the General Assembly and publication. Thus, it appears that Spring 2021 would be the soonest the amendment could be effective.

Child protection efforts in the Commonwealth continue to evolve. Colleges and universities are encouraged to regularly review their child abuse, mandatory reporting and minors-on-campus policies to ensure they are up to date.

A Reminder on Hazing

As schools are aware, the Timothy J. Piazza Antihazing Law, 18 Pa. C.S. § 2801, *et seq.*, was enacted in October 2018. Under the law, colleges and universities are required to post on their publicly accessible websites reports of violations of the institutions' antihazing policies or the antihazing law. The first report was due to be posted by January 15, 2019, with updates posted on August 1 and January 1 of each year.

Pepper Hamilton's higher education attorneys will continue to monitor developments in these areas impacting institutions of higher education in the Commonwealth and across the country. We are available to assist colleges and universities as they navigate the ever-changing higher education landscape.