



Pennsylvania’s Model Sexual Misconduct Policy: Is it Time for a Change?

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The Pennsylvania Department of Education (PDE) has just released its [Sexual Violence and Sexual Harassment Model Sexual Misconduct Policy](#) (Model Policy), in response to the state legislature’s call for a model policy that all postsecondary institutions can apply in their response to sexual harassment and sexual violence.

While your campus likely already has policies and procedures covering these issues under its existing federal and state obligations, the Model Policy offers a comprehensive approach to this challenging topic reflecting both legal requirements and best practices.

In light of The Student Conduct Institute’s experience advising thousands of campus officials on legal compliance in this field, we have analyzed the Model Policy to guide your institution in considering its provisions, and highlighted areas of concern where the Policy is vague, inconsistent, or potentially in conflict with common understandings of due process and fair process.

Background

As part of its 2019-2020 state budget legislation, Pennsylvania enacted [two new requirements](#) for higher education institutions related to sexual misconduct, which go into effect June 29, 2020. 24 Pa. Cons. Stat. § 20-2003-J will require institutions to establish and maintain an online reporting system to receive complaints of sexual harassment and sexual violence from students and employees.

The second law, 24 Pa. Cons. Stat. § 20-2002-J, will require institutions to adopt policies on sexual harassment and sexual violence that inform victims of their rights under federal and state laws. This law also requires institutions to adopt an “amnesty” policy stating that witnesses or victims of sexual harassment or sexual violence who report in good faith will not be sanctioned by the institution for admitting in the report to a violation of the institution’s policy on personal use of drugs or alcohol. Finally, this law tasked PDE with creating a model policy for addressing sexual misconduct. While postsecondary institutions must adopt a policy that complies with the new law, they are not required to adopt *this* model or its requirements.

Here are the highlights of the PDE Model Policy, with our analysis:

Scope and Definitions

As required by 24 Pa. Cons. Stat. § 20-2002-J, the Model Policy covers sexual harassment *and* sexual violence. In fact, it prohibits all forms of misconduct covered by Title IX and the Clery Act, as amended in 2013 by the Violence Against Women Act reauthorization, and its definitions of prohibited conduct generally conform with federal and state law. In an effort to offer campuses a single policy, it also covers both employees and students. With that wide scope, the PDE has carefully balanced broad applicability and the inclusion of appropriate rights and processes for the sexual misconduct context.

Consistent with New York and California law, and the approach taken by many campuses across the country, the policy uses an *affirmative* consent definition, requiring “knowing, voluntary, active, present, and ongoing” agreement to engage in sexual activity. In discussing incapacitation, the policy states that the institution will consider whether a sober reasonable person should have known the other party was incapacitated. Courts in California, as well as the federal Southern District of New York and Sixth Circuit, have reviewed and upheld findings of responsibility that used a form of this reasonable person standard. *See, Doe v. Occidental Coll.*, 2019 WL 4024524, at *13 (Cal. Ct. App. Aug. 27, 2019); *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 479 (S.D.N.Y. 2015); *Mallory v. Ohio Univ.*, 76 F. App’x 634, 639 (6th Cir. 2003).

Along with defining affirmative consent, the policy carefully identifies the differences and duties of confidential resources and individuals who can provide privacy (they will share information only as necessary, but cannot promise true confidentiality). The Model Policy’s explanations of the complicated concepts of confidentiality, privacy, and privilege are written in plain language that appears to be accessible to students and employees alike.

While its confidentiality definitions are clear and conform with the law and best practices, its broad definition of “responsible employee” may be problematic for campuses. The Model Policy includes all employees and volunteers as responsible employees with a duty to inform the institution about reports they receive of sexual misconduct. The broad scope of “responsible employee” could have been seen as advisable under prior guidance from the federal Department of Education, Office for Civil Rights (OCR), that any employee “who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment...” or “who a student could reasonably believe has this authority or responsibility” is a responsible employee who would impute knowledge to an institution such that the institution has a duty to respond. *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 19, 2001) (2001 Guidance).

However, this is an area where we can expect to see some changes, with OCR’s pending proposed regulations likely to narrow the definition: in the proposal’s view, the only employees who have a responsibility to act are those employees who actually would have the power to address the incident, although, of course, institutions can use a broader definition. In fact, a broad definition of responsible employee that includes all volunteers and employees serves the purpose of ensuring that an institution can learn of any incidents and take appropriate action to address sexual harassment on its campus, regardless of OCR’s approach.

One final note on definitions: While the Clery Act refers to the reporting party as a “victim,” and the Model Policy generally refers to this party as the “complainant,” campuses may consider the use of a term that does not imply responsibility, such as “reporting individual” or “reporting party.” E.g., N.Y. Educ. L. § 6439 (9).

Reporting and Initiating the Conduct Process

Confusion often arises in the conduct process regarding how campuses divide responsibility for receiving reports, providing assistance and accommodations, investigating allegations of misconduct, and adjudicating them. With some qualifications, the Model Policy provides a step in the right direction toward a clear and consistent response.

Most notably, the Model Policy distinguishes between two types of response: how the campus will respond to a *report* of sexual misconduct, and how it will address *complaints*, which initiate the formal disciplinary process. This distinction should benefit reporting parties, as it highlights that there is a process and resources available to an individual who comes forward regardless of whether they have interest in pursuing formal discipline. It also helps clarify the differing but overlapping roles of the Title IX Office and the Student Conduct Office at an institution.

At the outset, the Model Policy tasks the Title IX Coordinator or their designee with an assessment of reports, including “an initial assessment of the conduct, the reporting party’s desired course of action, and the necessity for any supportive or interim measures to protect the safety of the complainant or the community.” The Title IX Coordinator is also tasked with determining if a timely notification is necessary under Clery Act requirements. From this assessment, reports may be accompanied by (1) a request for supportive or interim measures, (2) no further action, (3) a request to initiate an informal resolution process (which this memo discusses further below) and/or (4) a formal complaint.

How do reports become complaints? The Model Policy specifies that a report may become a formal complaint either by the reporting party’s request or by the Title IX Coordinator after an assessment of risk. In other words, the Model Policy indicates that the reporting party decides whether to move their report into a complaint; only under exigent circumstances should the Title IX Coordinator override the reporting party’s decision *not* to seek an investigation. Campuses may consider expanding this section to clarify the analysis that the Title IX Coordinator will apply in determining if the disclosed misconduct is a “serious or immediate threat to the campus community” that necessitates overriding a reporting party’s wishes. Compare, N.Y. Educ. L. § 6446 (g) (4) (multi-factor test for evaluating risk to community or reporting party).

Gatekeeping

Once the reporting party or Title IX Coordinator decides to convert the report into a complaint, the Model Policy creates a second tier of gatekeeping. It states that the institution itself “will conduct a preliminary inquiry to determine if the allegations, if true, would rise to the level of a violation” of the institution’s policy. The policy does not indicate who will serve as this gatekeeper. Our analysis would caution that this gatekeeper should not be the Title IX Coordinator or their designee; that role would put the Coordinator in the function of a decision-

maker, which is likely a conflict of interest. *See*, U.S. Dept. of Ed., *Dear Colleague Letter on Title IX Coordinators*, Apr. 24, 2015 (2015 DCL).

On its face, this type of gatekeeping is comparable to the federal motion to dismiss standard, through which a court will order the dismissal of a complaint if the allegations could not state a cause of action even if the facts asserted are assumed to be true. Applying the motion to dismiss standard should be straightforward, provided the gatekeeper understands how the underlying violation is defined with the code.

But the Model Policy also allows this gatekeeper to close the case “when insufficient evidence exists to move forward.” Problematically, this provision suggests that the “preliminary inquiry” involves something that may be quite more than an initial look and, in some cases, may approach a full investigation of the allegations. How else would the gatekeeper be able to determine if “insufficient evidence” exists to move forward absent some level of investigation?

Moreover, as a matter of both due process and fair process, this type of pre-investigatory inquiry raises red flags. Certainly, courts applying Pennsylvania law have approved of policies allowing the conduct office to review a Title IX investigator’s report before permitting the matter to go to a hearing, but that approval process occurred *after* the investigation had completed. *Doe v. Pennsylvania State Univ.*, No. 4:18-CV-02350, 2019 WL 2324506, at *1 (M.D. Pa. May 31, 2019). By contrast, courts generally agree that, at a minimum, the respondent should receive notice of the complaint, if not the charges, before being questioned about the alleged misconduct. *Doe v. Belmont Univ.*, 334 F. Supp. 3d 877, 891 (M.D. Tenn. 2018) (breach of contract). Any type of “preliminary inquiry” must be carefully designed to avoid undue disturbance of these rights. And our analysis would caution that the level of proof to establish a credible case under the “preliminary inquiry” should be lower than the preponderance of the evidence standard that the Model Policy applies to a finding of responsibility for sexual misconduct.

Interim Measures

The PDE Model Policy’s discussion of interim measures is largely consistent with the requirements of Title IX, the Clery Act, as well as due process and fair process requirements. For example, it specifies that interim suspensions may only be used after a determination of a continuing threat to the health and safety of the community, and requires a hearing to be held within ten (10) working days unless there are extenuating circumstances. This appears to conform with the standards set under *Goss v. Lopez*, 419 U.S. 565, 582–83 (1975) in the K-12 educational setting. *See, also, Haidak v. Univ. of Massachusetts-Amherst*, 933 F.3d 56, 72 (1st Cir. 2019) (outlining due process requirements for applying interim suspension).

Campuses may consider shortening this timeline, however, in view of section 106.44 (c) of OCR’s proposed regulations, which would require “an opportunity to challenge the decision immediately following the removal.” As of the date of this memo, this proposal is not yet effective, and OCR may clarify the meaning of “immediately following” in its final rulemaking.

Under the Model Policy, both employees and students are subject to the same policy regarding interim suspensions. Yet a single policy may not be practical, as the due process requirements

applicable to employees may be very different than for students, not only owing to employment policies or collective bargaining agreements, but also arising from the differing “property” or “quasi-property” interests of employees and students. For the sake of comprehensiveness, campuses may also consider including the option of applying a “Persona Non Grata” order to non-students not otherwise covered by relevant employment policies, contracts, or bargaining agreements. *Moore v. Ricotta*, 29 Fed.Appx. 774, 775 (2d Cir. 2002).

Readers will note that the Model Policy is a bit spare when it comes to defining the process for review of any other interim measures, such as no-contact orders. Public institutions with a duty to comply with constitutional due process should certainly include some procedural safeguards allowing a party the chance to make their case for an adjustment. *See Haidak v. Univ. of Massachusetts at Amherst*, 299 F. Supp. 3d 242, 265 (D. Mass. 2018), *aff’d in part, vacated in part, remanded sub nom. Haidak v. Univ. of Massachusetts-Amherst*, 933 F.3d 56 (1st Cir. 2019). For example, they may consider adopting the approach, applied under New York law, wherein schools will provide “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.” N.Y. Educ. L. § 6444 (4) (a).

Complaint Resolution

As noted above, Informal Resolutions are allowed under the policy; however, they may *only* be used if agreed to by a reporting party, the Title IX Coordinator, and the respondent, and any party may end the informal process and chose to go through the formal process instead at any time. If resolution is reached, the Title IX Coordinator must notify all parties in writing and memorialize the agreement into a memo, including any consequences for noncompliance, which is then included in the respondent’s student record.

These safeguards are consistent with current OCR guidance against pressuring complainants to work out the problem directly with their alleged harassers and requiring complainants to be notified of the right to end any informal process at any time. *See*, 2001 Guidance, p. 21. The inclusion of an informal process may also be included in anticipation of coming changes from OCR (not yet finalized as of this writing), whose proposed regulations allow institutions to utilize such informal resolution processes where institutions provide parties written notice of the allegations, requirements of the process, and potential consequences. Institutions must obtain the parties’ voluntary written consent to engage in the informal process.

While we await further guidance on these issues, our position would be that, to the extent possible, institutions offering an informal process should endeavor to create a “firewall” between the officials involved in the informal and formal resolution processes; thus, if, as suggested in the Model Policy, the Title IX Coordinator leads the informal process, that official should not be involved in the Formal Resolution stage to avoid the appearance of a conflict of interest. *E.g.*, *Montague v. Yale Univ.*, No. 3:16-CV-00885(AVC), at *40 (D. Conn. Mar. 29, 2019) (unreported); *but see*, *Haley v. Virginia Com. Univ.*, 948 F. Supp. 573, 579 (E.D. Va. 1996) (no Title IX violation where same official served as neutral mediator at informal stage and non-neutral prosecutor at formal stage; we note that this is a 1996 opinion and it is unclear whether court would find the same today).

Even as it provides an extensive discussion of the steps before the Formal Resolution, a gap in the Model Policy concerns its lack of guidance regarding the actual procedures for investigations, hearings, sanctioning, and appeals. Instead, it refers readers to an “institution’s applicable policy” for students and for employees on these topics, which appears to refer to the institution’s general conduct and disciplinary policies.

While we understand the rationale for doing so – it is important to have consistency in due process rights and sanctioning across different types of policy violations, and as we all await the federal Title IX regulations, it is clear these are the areas that could be most affected – it means that schools cannot simply adopt the Model Policy verbatim and be assured that they are in compliance with their Title IX and Clery Act obligations. Schools should review all other applicable policies and practices and make necessary changes to conform their existing policies with this Model.

In lieu of a more detailed approach, the policy does specify certain important protections within the Formal Resolution process. First, it allows for an advisor of choice, as consistent with federal law, with the following important limits: the choice of advisor may not “unduly delay” the process, and advisors may not “speak, write, or otherwise communicate with investigators, conduct administrators, hearing panel, members, or appeal reviewers on behalf of the party being advised.” We advise that your code of conduct provide more specific procedures to avoid undue delay, such as offering the parties a singular opportunity to request an adjournment during the course of the proceeding, limited to a discrete period of time (e.g., five school or calendar days), typically for good cause shown.

It also specifies that the institution will use the preponderance of evidence standard, with the burden of proof on the institution. Both of these provisions are consistent with mainstream practice, but may need to be revisited if OCR’s proposed regulations are finalized as proposed: first, the regulations may require that advisors be permitted to conduct cross-examination at a live hearing, and second, the proposed regulations may only allow institutions to use the preponderance of evidence standard in Title IX cases if such a standard is used for other conduct violations that carry the same maximum sanctions.

Another helpful procedure outlined in the Model Policy involves how campuses can address perceived or actual conflicts of interest in the process. Many Title IX and breach of contract lawsuits are based on a claim of bias against a party by an investigator, hearing panelist, or appeals board member. Yet campuses often fail to offer parties a consistent procedure for raising these challenges during the process. The Model Policy, by contrast, grants parties two (2) days from being advised of the identity of an assigned investigator, panel member, or appeal reviewer to raise the issue of conflict of interest. Parties that waive this opportunity may have weaker grounds for claiming bias, as courts may expect that they would have availed themselves of the defined process if they perceived a conflict or bias.

Less helpfully, the Model Policy leaves it to the Title IX Coordinator to judge the existence of a conflict of interest. This is not necessarily advisable, as the Coordinator’s decisions regarding whether or not an investigator or panelist is biased may generate its own perception of bias in a

party's view. Ultimately, the Coordinator's obligation is to avoid creating of conflicts of interest, which may not be possible when the Coordinator is in this position. *See*, 2015 DCL.

Other broad protections for complainants mentioned in the policy would suggest the need for particular procedures within the hearing process regarding the admission of hearsay. For example, Section VI (Rights/Responsibilities) provides the right for the complainant to withdraw the complaint; the Title IX Coordinator may continue the process without the complainant's continued participation. This right to withdraw the complaint amid the investigation seemingly implies the right of a campus to adjudicate the matter without the complainant's testimony; as a New York appellate court considering this issue has reasoned, hearsay testimony can be considered under these circumstances, as "it would be undue pressure for an institution to advise a reporting person that a decision not to participate would hinder the conduct process." *Jacobson v. Blaise*, 157 A.D.3d 1072, 1077, 69 N.Y.S.3d 419 (N.Y. App. Div., 3d Dept. 2018). As such, campuses considering including this language should carefully review their corresponding policies regarding direct and indirect questioning at the hearing.

Notably, the PDE Model Policy allows parties not to participate in the process, stating that this decision will not be used against them, which is suggestive of the rights guaranteed under the Fifth Amendment to the Constitution for criminal defendants. This "right to remain silent" provides students with a protection above and beyond what they are entitled by law: while respondents can refuse to participate in the process, courts hold that this decision can create an inference against them within the student conduct process. *See, e.g., Doe v. Univ. of Kentucky*, 2019 WL 267719, at *10 (E.D. Ky. Jan. 18, 2019); *Quade v. Arizona Bd. of Regents*, 700 F. App'x 623, 626 (9th Cir. 2017); *Sarver v. Jackson*, 344 F. App'x 526, 528–29 (11th Cir. 2009). Again, campuses should consider whether this right is appropriate within their campus process.

Finally, after a determination, the Model Policy allows for appeals on the grounds of new information, an alleged deviation from the policies or procedures that materially affected the outcome or sanctions, and/or that the sanction was too harsh or lenient. While not required by Title IX or the Clery Act, allowing for an appeal is certainly an advisable best practice, so long as the procedures for appeal are equitable, use impartial decision makers, and consider only the grounds specified in the code of conduct. In cases of conduct covered by the Clery Act, of course, where an appeal is offered, both parties must be given the opportunity to appeal. This is alluded to in the Model Policy with the inclusion of a ground for appeal on the basis that the sanction is too harsh *or* too lenient. We would note that it is not yet clear whether the final OCR regulations will include a concomitant requirement under Title IX.

Conclusion

Overall, the Pennsylvania Department of Education's Model Policy provides a comprehensive and useful model for higher education institutions in how to respond to sexual misconduct that complies with federal and state law and best practices. However, there are a few areas that we recommend institutions think about carefully before they adopt this model on their own campuses. The Student Conduct Institute maintains a casebook that includes analysis of the cases referenced in this memo. More information may be found at system.suny.edu/sci.