S 2979: What Does it Mean for Massachusetts Schools?

Abbey Marr,

Assistant Director, SUNY Student Conduct Institute

On January 12, 2021, Governor Baker signed Massachusetts S.2979, "An Act Relative to Sexual Violence on Higher Education Campuses." S.2979 is the first Massachusetts statute specifically focused on campus responses to sexual violence. It applies to both public and private higher education institutions. What does S.2979 do, and what does it mean for colleges and universities in the Bay State?

S.2979, which will take effect on **August 1, 2021**, makes a few important changes relating to institutions efforts to prevent and respond to sexual misconduct, including requiring institutions to:

- provide regular training to officials involved in response, investigation and disciplinary processes related to sexual misconduct;
- designate Confidential Resource Providers to serve as confidential resources and advocates for reporting parties;
- provide an option for anonymous reporting of incidents of sexual misconduct;
- include amnesty provisions for reporting parties and witnesses;
- notify parties of a determination regarding responsibility within 7 business days of a disciplinary proceeding;
- enter memoranda of understanding with sexual assault and domestic violence providers and law enforcement;
- submit annual reports on aggregated data to the Department of Higher Education; and
- conduct regular sexual misconduct campus climate surveys.

Institutions are just beginning their second semester implementing response procedures overhauled in August 2020 in response to the new Title IX rules. We are all awaiting any changes to the approach on this issue under the Biden administration. So, new requirements from the state at this time may cause concern. Luckily, the vast majority of the S.2979 should neither feel new nor necessitate significant changes in process for most institutions. We will walk through each of its provisions to assist in understanding the new law's requirements, beginning with the new Massachusetts General Laws Chapter 6, Section 168E, governing institutional response to sexual misconduct.

I. Section 168E

Much of § 168E adopts into state law existing requirements under the Violence Against Women Amendments to the Clery Act and their implementing regulations (VAWA/Clery), as well as under the 2020 Title IX Rules (2020 Rules). Other provisions mirror those adopted by several other states in recent years. Finally, a few language choices in § 168E reflect a desire to avoid conflict with the 2020 Rules but leave open the possibility for a different approach should those Rules change.

First and foremost, institutions must now adopt policies on sexual misconduct that comport with federal and state law, as well as "best practices and current professional standards." Institutions are to develop these policies in coordination with their Title IX coordinator. They *may* (but are not required to) consider input from a wide range of internal and external stakeholders and will also need to establish procedures for regular review and updates. *See* § 168E(b) as amended by S.2979. As all institutions should have an existing policy

on sexual misconduct to comply with federal VAWA/Clery and Title IX, this initial adoption will likely look more like a review and update than starting from scratch.

The requirements for these policies, as well as related requirements for response, are summarized below. We will note where they mirror existing practices under current law, reflect similar laws adopted in other states that can be looked to for best practices, and represent something new or noteworthy.

a. Scope and Definitions

§ 168E has been drafted to cover at least any incidents of misconduct that would be subject to the requirements of VAWA/Clery and the 2020 Rules, mandate institutions provide some response for incidents of misconduct that occur beyond the 2020 Rules' jurisdiction, allow institutions to cover additional types of situations.

§ 168E applies to any reports of "sexual misconduct," defined broadly as "sexual violence, dating violence, domestic violence, gender-based violence, violence based on sexual orientation or gender identity or expression, sexual assault, sexual harassment or stalking." § 168E(a) as amended by S.2979. With its specific inclusion of sexual assault, dating violence, domestic violence, and stalking, this definition covers any conduct covered by VAWA/Clery under 34 C.F.R. 668.46(a). In addition, you may note § 168E's definition includes "sexual harassment" but does not define it: this is consistent with the 2020 Title IX Rules' coverage of sexual harassment but does not explicitly necessitate using the definition in the 2020 Rules, 34 C.F.R. 106.30(a), allowing institutions to define the term more broadly and leaving it open for any future changes made to Title IX regulations and guidance by the U.S. Department of Education. Note also violence based on sexual orientation or gender identity or expression is expressly covered by § 168E. This inclusion is consistent with recent federal interpretations of Title IX: On January 21, 2021, the Biden Administration adopted the position that the Supreme Court's *Bostock v. Clayton County* decision interpreting Title VII's prohibition on sex discrimination to cover discrimination based on sexual orientation and gender identity applies to Title IX as well.

§ 168E does not explicitly proscribe *where* alleged sexual misconduct needs to occur for institutions to have jurisdiction to act under their sexual misconduct policies. It is silent regarding whether its required disciplinary procedures must apply to off-campus conduct. But, it explicitly requires that institutions allow reports and provide certain information to reporting individuals regardless of where the offense occurred, and that institutions should provide appropriate supportive measures "regardless of where the conduct occurred or whether such conduct occurred outside of an institution's programs or activities, and regardless of whether a complaint is filed under the institution's policy for resolving complaints." § 168E(b) as amended by S.2979. § 168E's reference to an institution's "program or activities" and how a complaint is filed builds on the 2020 Title IX Final Rules, which require supportive measures be provided to reporting parties regardless of whether they file a "formal complaint," but do not require supportive measures or information be provided to reporting individuals when the conduct is alleged to have happened outside of a program or activity or other geographic area specifically designated in the Final Rule.[i]

Finally, and consistent with the 2020 Rules, § 168E requires that an institution's policies on sexual misconduct apply to conduct involving both students and employees.

b. Incident Reporting

§ 168E outlines specific procedures institutions must follow for receiving reports of sexual misconduct. The procedure most likely to require an update to current practice relates to anonymous reporting: institutions will now be required to provide a specific method for anonymous reporting. § 168E (i) as amended by S.2979. With this requirement, Massachusetts joins a growing number of states, including Pennsylvania and Minnesota.

However an institution receives a report, its required response is mainly consistent with existing requirements under VAWA/Clery at 34 C.F.R. 668.46(b)(11). For example, § 168E(b) requires institutional policies to include procedures for reporting an incident to the institution, as well as information on immediate emergency assistance following an incident of sexual misconduct, including information related to preserving evidence and contact information for seeking medical treatment on campus, if available, and off-campus.

Additionally, § 168E(g) requires institutions to notify reporting parties of their rights and options upon receiving a report. Those rights will also sound familiar to those of us that have read 34 C.F.R. 668.46(b)(11). They include the right to notify or decline to notify law enforcement (and to receive assistance from campus authorities in making any such notification, and to obtain a court-issued protective order or an institution-issued no-contact order against an alleged perpetrator of the sexual misconduct (as well as the institution's responsibilities upon receiving notice of a protected order). § 168E provides further detail, noting that reporting individuals have a right "to concurrently utilize the institution's process for investigating sexual misconduct complaints and any external civil or criminal processes available to the student or employee." § 168E(b) as amended by S.2979.

The final response provision § 168E adopts from VAWA/Clery is the requirement that institutional policies describe the types of counseling and health, safety, academic, and other support services available on or off-campus, as well as information on school-based supportive measures reasonably available from the institution. To further implement these requirements for supportive measures, § 168E specifies that institutional policies should outline how to request such measures and the process to have any such measures reviewed. § 168E(b) as amended by S.2979.

c. Disciplinary Procedures for Sexual Misconduct

Next, § 168E outlines specific requirements for an institution's policies related to pursuing a disciplinary process against students in sexual misconduct cases.

Only three of the specific provisions regarding disciplinary procedures do not simply adopt requirements under VAWA/Clery or the 2020 Title IX Rules:

- § 168E(k) provides that institutions may not subject a reporting party or witness who "causes an investigation of sexual misconduct" to "a disciplinary sanction for a violation of the institution's student conduct policy related to the incident unless the institution determines that the report was not made in good faith or that the violation was egregious." This is often referred to as an "amnesty policy" and mirrors similar requirements under quite a few other state laws, including in neighboring New York as well as Pennsylvania, Illinois, and Minnesota.
- At the close of the disciplinary proceeding, § 168E(b) provides a specific timeline in which the determination regarding responsibility must be made, providing that the parties must be informed in writing no "later than 7 business days after a final determination of a complaint, not including any time for appeal unless good cause for additional time is shown and that they shall be informed of any process for appealing the decision."
- Unsurprisingly given § 168E's requirement that institutions' policies cover both employee and student conduct, it requires that the policy also include a summary of the institution's employee disciplinary process as it pertains to sexual misconduct. § 168E(b) as amended by S.2979.

The rest of the new law's provisions relating to disciplinary procedures echo federal requirements, including VAWA/Clery's provisions in 34 C.F.R. 668.46(k): § 168E(b) requires institutions to include in their policy a description of the standard of evidence used to resolve a complaint (although it does not proscribe a specific standard that must be used). It also requires institutions to include the "range" of sanctions that may be imposed on students or employees found responsible,[ii] and borrows VAWA/Clery's 34 C.F.R. 668.46(k) requirement that both parties be allowed an advisor of their choice (who may be an attorney) but that the institution may establish rules regarding how proceedings will be conducted, including guidelines around

advisors' participation so long as they apply equally to all parties. Finally, § 168E(b) echoes 34 C.F.R. 668.46(k)'s requirement that any proceeding be "impartial" and conducted by individuals who receive "annual training on issues relating to sexual misconduct, investigatory procedures and hearing procedures to protect the safety and rights of students and employees and promote accountability." § 168E's training requirements will be discussed further below.

§ 168E(b) also adopts language from the 2020 Title IX Rules, with some notable omissions. It requires institutional policies to provide "a summary of the institution's procedures for resolving complaints of sexual misconduct promptly and equitably," which should include providing a notice of allegations to the responding party that includes "the date, time and location, if known, of the alleged incident of sexual misconduct and a specific statement of which policies were allegedly violated and by what actions" and a presumption the responding party is not responsible for the alleged conduct until a determination regarding responsibility is made, both broadly adopted from provisions in the 2020 Rules, 34 C.F.R. § 106.45. Consistent with the 2020 Rules, 34 C.F.R. § 106.71, institutions must prohibit retaliation against anyone who reports sexual misconduct, assists another in making a report, or participates in an investigation, and specifies that institutions may not disclose identities of the parties except as necessary to carry out a disciplinary process or as permitted under state or federal law.

Regarding evidence, § 168E(b) adopts the 2020 Rules' requirement that all parties be provided equal opportunities to inspect and review evidence obtained as part of the investigation that is directly related to the allegations. However, it sidesteps many of the 2020 Rules' proscriptive timelines for inspection and review of the evidence, instead requiring only that the parties be provided with the policies regarding "the submission and consideration of evidence that may be used during a hearing or disciplinary proceeding and shall have equal opportunity to present evidence and witnesses on their behalf during a hearing or disciplinary proceeding; provided, however, that each party shall be provided with timely and equal access to relevant evidence that shall be used in the determination of a disciplinary action." Thus, § 168E has the flexibility to allow consistency with any future Department of Education action altering the timelines for review or methods of sharing evidence.

Similarly, § 168E(b) provides that there *may be* restrictions on evidence considered by the fact-finder including, but not limited to, "the use of evidence of prior sexual activity or character witnesses." The 2020 Rules currently do not allow a blanket restriction on the use of character witnesses for Title IX covered conduct and limit the use of evidence of prior sexual activity only relating to reporting parties.[iii] § 168E(b)'s "*may*" language allows institutions to comply with the 2020 Rules in the immediate term while limiting such evidence for conduct that falls outside of Title IX or for Title IX if a future Department of Education action allows.

§ 168E(b) also stays away from one of the most controversial provisions of the 2020 Rules: cross-examination by advisors. It does not require a specific hearing process or cross-examination for sexual misconduct, noting only that the parties may not be allowed to "directly question each other" during any hearing. Finally, § 168E does not adopt the 2020 Rules' requirements for appeal but notes only that *if* an appeal is provided for on the grounds of procedural errors or new evidence or disproportionate sanctions, then, consistent with VAWA/Clery, it must be offered equally to all parties.

d. Publication

Under the new law, institutions will need to make their policies publicly available on their website in an accessible format and in writing upon request. To further publicize the policies and procedures, § 168E requires institutions to email students and employees these policies and procedures each year by August 20. Other publication requirements in § 168E echo VAWA/Clery closely, requiring the publication of the Annual Security Report required by Clery as well as related information about institutional policies and

procedures and institutional duties to investigate and address sexual misconduct, assess reports for necessary timely warnings or emergency notifications, and more.[iv]

e. Training Requirements

For over six years, VAWA/Clery, 34 C.F.R. 668.46(j), has required that institutions provide primary prevention and awareness campaigns to new students and employees. § 168E(m) adopts this requirement, adding that such programming must be provided within 45 days of matriculation or employment. The programming will need to include:

- An explanation of civil rights laws, their meaning, purpose, definition, and applicability to sex- and gender-based harm;
- the role drugs and alcohol play in changing behavior and affecting an individual's ability to consent;
- reporting options for sexual misconduct, the effects of each option, and the methods to report, including confidential and anonymous disclosure;
- information on the institution's policies and procedures for resolving sexual misconduct complaints and sanctions the institution may impose;
- the name, contact information, and role of the confidential resource provider;
- strategies for bystander intervention and risk reduction; and
- information on opportunities for ongoing prevention and awareness programming.

SCI encourages all institutions to explore whether SUNY's Sexual & Interpersonal Violence Prevention And Resource Course (SPARC), a free, customizable training, would work for your institutions to provide this required training.

Also following VAWA/Clery, § 168E(b) requires specific training for officials involved in sexual misconduct response and disciplinary processes. As mentioned above, it echoes 34 C.F.R. 668.46(k)'s requirement that any proceeding be conducted by individuals who receive at least "annual training on issues relating to sexual misconduct, investigatory procedures and hearing procedures to protect the safety and rights of students and employees and promote accountability." Later, § 168E(n) specifies that individuals who participate in "the implementation of an institution's disciplinary process for addressing complaints of sexual misconduct" must have training "or experience"[v] in handling sexual misconduct complaints and the operation of the institution's applicable disciplinary process, to include:

- working with and interviewing persons subjected to sexual misconduct;
- the particular types of conduct that constitute sexual misconduct;
- consent and the role drugs and alcohol may play in the ability to consent;
- the effects of trauma, including any neurobiological impact;
- how sexual misconduct may impact individuals differently depending on factors that contribute to an individual's cultural background, including, but not limited to, national origin, sex, ethnicity, religion, gender identity, gender expression, and sexual orientation;
- communicating sensitively and compassionately with a reporting party, including an awareness of responding to a reporting party with consideration of that party's cultural background and providing services to or assisting in locating services for the reporting party;
- training and information regarding how sexual misconduct may impact individuals with developmental or intellectual disabilities; and
- training on the principles of due process necessary to ensure that proceedings are conducted impartially in a manner that is fundamentally fair to all parties.

This section also separately requires all institutions to ensure that Title IX coordinators and members of the police force or the campus safety personnel are educated and trained in the awareness and prevention of sexual misconduct and that designated confidential resource providers trained in the awareness and

prevention of sexual misconduct and trauma-informed response. SCI members can access all of these topics for all such covered officials at your institution using both our online modules and live training.

f. Confidential Resources Providers

Like neighboring New Hampshire's new Chapter 188H, S.2979 designates the "Confidential Resource Provider" (C.R.P.) role. Under § 168E(l), institutions must select at least one C.R.P., who may not be a student, a Title IX coordinator, or an employee required to report to the Title IX coordinator. The law also notes that the institution "shall designate new or existing categories of employees that may serve" as C.R.P.s. Recognizing resource constraints, § 168E(l) allows institutions to partner with an outside victim support services organization to provide a C.R.P. It allows small institutions (with less than 1,000) students to partner with other institutions to provide a C.R.P.

A CRP carries this "confidential" title because the law specifies that they are *not* required to report an incident they learn of to the institution or a law enforcement agency unless otherwise required by law and must provide confidential services to students and employees. The law also grants them privilege in criminal and civil proceedings but clarifies that this privilege does not put such C.R.P.s in the role of a health provider or counselor itself.

C.R.P.s are also expected to play a role beyond the role institutions are likely to be most familiar with, providing a space for confidential communications. The law anticipates that this C.R.P. will act in many ways as a reporting party's advocate. Under § 168E(l), a C.R.P. is tasked with providing required information to the reporting party, including the reporting options, available counseling, medical and health services, available supportive measures, information on the disciplinary process and legal processes, and reporting party's rights and the institution's responsibilities regarding a protection order, no-contact order and any other lawful orders issued by the institution or court. They are further tasked with coordinating with any on-campus or off-campus sexual assault crisis service center or domestic violence program. As appropriate, they may assist the student or employee in contacting or reporting to campus or local law enforcement agencies. If requested, the C.R.P. must coordinate with the appropriate institutional personnel to arrange possible interim school-based supportive measures to allow the reporting party to change academic, living, campus transportation, or working arrangements in response to the alleged sexual misconduct. The law notes that if a conflict of interest arises in which a C.R.P. is advocating for the reporting party's need for sexual assault crisis services or campus or law enforcement services, the institution may not discipline, penalize, or otherwise retaliate against the C.R.P. for representing the interest of the reporting party.

A note that these services are to be provided *regardless* of whether a reporting party files a formal complaint for Title IX purposes and § 168E includes provisions for advocating for services while maintaining confidentiality to the extent possible. If a disciplinary process is sought, the law specifies that a C.R.P. may serve as an advisor or support person for a reporting party but is not automatically expected to serve in that role.

g. Reporting Requirements

Joining states including New York, Connecticut, and Minnesota, Massachusetts will now require institutions to report aggregate data on sexual misconduct annually to the state. Under § 168E(q), by December 1 annually, each institution must submit to the Department of Higher Education (D.H.E.) a report that includes the numbers of

- reports of sexual misconduct reported to the Title IX coordinator by a student or employee of the institution against another student or employee;
- reports made by a student or employee against another student or employee investigated by law enforcement, if known;
- students and employees found responsible;

- students and employees found not responsible; and
- disciplinary actions imposed after a finding of responsibility.

Once it receives institutions' reports, D.H.E. will publish an annual report containing aggregate statewide information.

h. Memoranda of Understanding

Finally, § 168E includes several requirements related to the working relationships between institutions and external entities, including sexual assault crisis service centers, domestic violence programs, and law enforcement.

First, institutions (who do not have their own) are required to enter into and maintain a memorandum of understanding (M.O.U.) with a community-based sexual assault crisis service center and a community-based domestic violence program funded by the Department of Public Health.[vi] The M.O.U. may include an agreement for the sexual assault crisis service center or domestic violence program to provide confidential victim services and must consist of the services of the center or program to provide an off-campus alternative for sexual assault crisis and domestic violence crisis services, ensure students and employees can access free and confidential counseling and advocacy services on- or off-campus; and encourage cooperation and training relating to responding to reports and disclosures of sexual misconduct and the institution's protocols for providing support and services. *See* § 168E(h) as amended by S.2979. SUNY has created a Model MOU between Colleges and Rape Crisis Centers in compliance with New York's similar state law requirements, and this may serve as a good model for such an agreement.

Next, each institution is required, to the extent feasible, to adopt an M.O.U. with local law enforcement agencies to establish the respective roles and responsibilities of each party related to the prevention of and response to on-campus and off-campus sexual misconduct. This M.O.U. must cover the development of policies and procedures that set out the jurisdiction of the local law enforcement agencies; establish protocols for cases where a student or employee consents to the release of relevant documentation and information generated or acquired during local law enforcement or campus police investigations, and include methods for notifying the appropriate district attorney's office. If an institution is within more than one local law enforcement agency's jurisdiction, a single M.O.U. can be entered with all stakeholders. *See* § 168E(c) as amended by S.2979.

To further help develop policies and procedures and coordinate among campuses, the law requires the Commissioner of Higher Education to appoint a Campus Safety Advisor. This Campus Safety Advisor will facilitate and advance statewide campus safety via coordinating, aggregating, and disseminating best practices, training opportunities, and other resources to enhance campus safety. *See* § 168Edc) as amended by S.2979.

II. Section 168D. Sexual Misconduct Climate Surveys

In addition to its institutional response requirements, S. 2979 creates a new Massachusetts General Law Chapter 6, § 168D, requiring all institutions to conduct sexual misconduct climate surveys at least once every four years. Generally consistent with state statutes in New York, New Hampshire, and beyond, § 168D requires that these regular surveys cover specific topics, including the numbers of reported and unreported incidents (as well as when and where they occurred), student awareness of policies and procedures, whether students reported a given incident and to whom, whether they were informed of or referred to resources, contextual factors related to incidents, demographic information, and perceptions of campus safety and confidence in the institution's ability to prevent and respond to incidents.

To assist in developing and oversight of the surveys, § 168D creates a Task Force with representation from state policymakers in the executive and legislative branches, from public and private institutions of higher education in the state, from students, from sexual assault and victims' advocates, from the M.A. commission on lesbian, gay, bisexual, transgender, queer and questioning youth, and researchers with experience in development and design of these types of surveys. This Task Force will develop model questions & recommendations to the Commissioner of Higher Education, who will review and approve them and then provide a copy to all institutions.

Institutions may develop and use their own survey if it meets certain criteria. But either way, within 120 days after completion and analysis of a sexual misconduct climate survey, institutions must post a summary of the results on their website. D.H.E. is charged with promulgating any regulations necessary to implement this section by August 1, and then the Task Force will provide model questions & recommendations by January 1, 2022.

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[i] For further discussion of the Title IX Final Rules' jurisdiction requirements, *see* SUNY Joint Guidance on Federal Title IX Rule, *Geography of Jurisdiction and Institutional Liability*, June 5, 2020.

[ii] Note that VAWA/Clery sets the more prescriptive requirement that institutions *list all* possible sanctions that may be imposed, not merely a range.

[iii] For further discussion of the Title IX Final Rules' requirements for evidence that may be considered at a hearing *see* SUNY Joint Guidance on Federal Title IX Rule, *Live Hearings, Cross-Examination, and Advisors of Choice*, May 22, 2020.

[iv] Specific publication requirements may be found in § 168E(e) as amended by S.2979.

[v] While the language in this section refers to "training or experience," combined with § 168E's earlier requirement that proceedings be conducted by individuals with "annual training," we recommend institutions ensure that all individuals receive the listed training and not rely solely on past experience in these areas.

[vi] D.H.E. may waive the M.O.U. requirement to an institution that demonstrates that the institution acted in good faith but could not obtain a signed memorandum.