

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Introduced

Senate Bill 479

BY SENATORS CLINE, BALDWIN, AND WOELFEL

[Introduced January 30, 2019; Referred
to the Committee on Education; and then to the
Committee on the Judiciary]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section,
 2 designated §18B-4-11, relating to requiring each state institution of higher education, on
 3 or before a certain date, to adopt and submit to the West Virginia Higher Education Policy
 4 Commission a written sexual assault policy that includes certain due process protections
 5 in disciplinary proceedings; requiring disciplinary proceedings provisions to include a
 6 description of the rights for certain students and to include certain provisions; requiring the
 7 disciplinary proceedings provisions to require an institution of higher education to provide
 8 certain students with a certain notice, to use a certain standard of proof in certain
 9 disciplinary proceedings, to prohibit the use of mediation to resolve certain allegations
 10 except under certain circumstances, to prohibit a certain adjudicating official or body from
 11 considering certain types of evidence except in certain circumstances, to authorize
 12 counsel to be provided to certain students under certain circumstances, to require the
 13 institution to pay certain costs and fees except under certain circumstances; specifying
 14 that the institution is not required to pay a student's attorney's fees for representation in a
 15 criminal or civil matter; and relating to sexual assault and disciplinary proceedings
 16 provisions at institutions of higher education.

Be it enacted by the Legislature of West Virginia:

ARTICLE 4. GENERAL ADMINISTRATION.

§18B-4-11. Policy on sexual assault disciplinary proceedings.

1 (a) The governing board of each state institution of higher education subject to rules of
 2 accreditation pursuant to §18B-4-7 of this code, and the governing boards of West Virginia
 3 University and Marshall University, shall adopt or revise, on or before August 1, 2019, a campus
 4 sexual assault policy that includes all of the following disciplinary proceeding provisions for
 5 alleged violation of the sexual assault policy:

6 (1) A description of the rights of the student who alleges a violation of or a student who
 7 responds to an allegation of a violation of the institution's sexual assault policy;

8 (2) Treatment with dignity, respect, and sensitivity by officials of the institution of higher
9 education during all phases of the disciplinary proceedings;

10 (3) A fair and impartial investigation;

11 (4) Disciplinary proceedings and resolutions that are prompt and equitable and provide an
12 opportunity for the alleged victim and the alleged violator to be heard;

13 (5) Timely written notice of:

14 (A) The reported violation including the date, time, and location of the alleged violation,
15 and the range of potential sanctions associated with the alleged violation;

16 (B) The student’s rights and responsibilities under the sexual assault policy and
17 information regarding other civil and criminal options;

18 (C) The date, time, and location of each hearing, meeting, or interview that the student is
19 required or permitted to attend;

20 (D) A final determination made by the adjudicating official or body regarding whether a
21 sexual assault policy violation occurred and the basis for the determination;

22 (E) Any sanction imposed; and

23 (F) The student’s rights to appeal and a description of the appeal process;

24 (6) Participation in the disciplinary proceedings, including:

25 (A) Access to the case file and evidence regarding the incident obtained by the institution
26 of higher education during the investigation or considered by the adjudicating official or body, with
27 personally identifiable or other information redacted as required by applicable law;

28 (B) Offering testimony at a hearing or, if the institution’s process does not include a
29 hearing, to the adjudicating official;

30 (C) Submitting evidence, witness lists, and suggested specific questions to be posed to
31 the other student involved in the disciplinary proceedings by investigators or the adjudicating
32 official or body;

33 (D) Providing and reviewing testimony electronically or in a way in which the students are

34 not required to be in the physical presence of the other;

35 (E) Reviewing and providing written responses to reports and proposed findings; and

36 (F) Appealing a determination or a sanction;

37 (7) Assistance by a licensed attorney, an advocate supervised by an attorney, or a trained

38 advocate throughout the disciplinary proceedings, including an attorney or advocate's:

39 (A) Attendance at the hearings, meetings, and interviews with the student;

40 (B) Private consultations with the student during hearings, meetings, and interviews,

41 except during questioning of the student at a hearing; and

42 (C) Assistance with the student's exercise of any right during the disciplinary proceedings;

43 (8) Despite a student's choice under subdivision (b)(5) of this section, the presence of no

44 more than two people, including a personal supporter of the student's choice, an attorney, or an

45 advocate, at any hearing, meeting or interview during the disciplinary proceedings.

46 (b) The disciplinary proceedings provisions required under subsection (a) of this section

47 shall:

48 (1) Require the institution of higher education to provide each student in the disciplinary

49 proceedings with notice of:

50 (A) The student's right to the assistance of an attorney or advocate;

51 (B) Legal service organizations and referral services available to the student; and

52 (C) The student's right to have a personal supporter of the student's choice at any hearing,

53 meeting, or interview during the disciplinary proceedings;

54 (2) Require the use of the same standard of proof used in other disciplinary proceedings

55 at the institution of higher education for allegations of code of conduct violations involving

56 discrimination or harm to another individual;

57 (3) Except as provided in subsection (c) of this section, prohibit the institution of higher

58 learning from using mediation to resolve an allegation of a violation of the institution's sexual

59 assault policy;

60 (4) Prohibit the adjudicating official or body from considering certain evidence, including:

61 (A) A student’s prior sexual history with an individual other than a party to the proceedings,

62 except to:

63 (i) Prove the source of injury;

64 (ii) Prove prior sexual misconduct;

65 (iii) Support a claim that a student has an ulterior motive; or

66 (iv) Impeach a student’s credibility after that student has put his or her own prior sexual
67 conduct at issue; and

68 (B) A student’s history of mental health, counseling, treatment, or diagnosis, unless the
69 student consents; and

70 (5) Authorize students to access counsel paid for by the institution, as described under
71 subsection (d) of this section, for:

72 (A) A current or former student who makes a complaint on which a formal investigation
73 under Title IX of the Education Amendments Of 1972, 20 U.S.C. A§ 1681 et seq., is initiated and
74 who was enrolled as a student at the institution at the time of the incident that is the basis of the
75 complaint, unless the student knowingly and voluntarily chooses not to have counsel; and

76 (B) A current or former student who responds to a complaint on which a formal Title IX
77 investigation is initiated and who was enrolled as a student at the institution at the time of the
78 incident that is the basis of the complaint, unless the student knowingly and voluntarily chooses
79 not to have counsel.

80 (c) The disciplinary proceedings provisions required under subsection (a) of this section
81 shall authorize an institution to use mediation or other informal mechanisms for resolving a
82 complaint relating to the institution’s sexual assault policy if:

83 (1) The complaining student requests an informal mechanism;

84 (2) All parties to the complaint and the institution agree to the use of the informal
85 mechanism;

86 (3) The institution participates in the informal mechanism by providing trained staff;

87 (4) Any party may end the informal mechanism at any time in favor of a formal resolution
88 proceeding; and

89 (5) The alleged misconduct does not involve sexual assault or sexual coercion.

90 (d) The disciplinary proceedings provisions required under subsection (a) of this section
91 shall, unless a student waives counsel under subdivision (b)(5) of this section, require the
92 institution to pay reasonable costs and attorney's fees for students provided counsel thereunder.

93 (e) In consultation with state and local bar associations and legal services providers with
94 expertise in sexual misconduct proceedings, the institution shall develop a list of attorneys and
95 legal services programs willing to represent students on a pro bono basis or at fees equivalent to
96 those paid to attorneys under civil legal services programs.

97 (1) A student may select an attorney from the list developed under subsection (e) of this
98 section.

99 (2) A student may select and retain an attorney before the conclusion of formal Title IX
100 proceedings.

101 (3) An institution may not discourage a student from retaining an attorney.

102 (4) If a student selects and retains an attorney who is not on the list developed under
103 subsection (e) of this paragraph, the institution shall pay fees to the attorney selected by the
104 student that are equivalent to those paid to attorneys under civil legal services programs.

105 (f) This section may not be construed to prohibit an institution of higher education from
106 imposing interim safety measures.

107 (g) An institution shall not be required to pay a student's attorney's fees for representation
108 in a criminal or civil matter.

NOTE: The purpose of this bill is to require each state institution of higher education, on or before August 1, 2019 to adopt and submit to the West Virginia Higher Education Policy Commission a written sexual assault policy that includes certain due process protections

for students in disciplinary proceedings.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.