

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Introduced

House Bill 3122

**FISCAL
NOTE**

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LAVENDER-BOWE

[Introduced February 12, 2019; referred to the
Committee on Education then the Judiciary.]

1 A BILL to amend and reenact the Code of West Virginia, 1931, as amended, by adding a new
 2 section, designated §18B-4-5b, relating to requiring state institutions of higher education
 3 and community and technical colleges to adopt policies and programs relating to sexual
 4 assault, domestic violence, dating violence, and stalking involving students.

Be it enacted by the Legislature of West Virginia:

ARTICLE 4. GENERAL ADMINISTRATION.

§18B-4-5b. Required policies and programs concerning sexual assault, domestic violence, dating violence and stalking.

1 (a) The governing board of each state institution of higher education and of each
 2 community and technical college shall adopt a policy concerning sexual assault, domestic
 3 violence, dating violence and stalking, as defined in the federal Higher Education Act of 1965, 20
 4 U.S.C. §1092(f), involving a student, both on-campus and off-campus, applicable to standards of
 5 student conduct and to disciplinary matters involving students. The policy shall include all of the
 6 following:

7 (1) An affirmative consent standard in the determination of whether consent was given by
 8 both parties to sexual activity. "Affirmative consent" means affirmative, conscious and voluntary
 9 agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual
 10 activity to ensure that he or she has the affirmative consent of the other or others to engage in
 11 the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean
 12 consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at
 13 any time, including situations after initial consent to physical intercourse has been given; consent
 14 may be withdrawn to continued intercourse after actual, consensual penetration has occurred.
 15 The existence of a dating relationship between the persons involved, or the fact of past sexual
 16 relations between them, should never by itself be assumed to be an indicator of consent.

17 (2) A policy that the standard to be used in determining whether the elements of the
 18 complaint against the accused have been demonstrated is the preponderance of the evidence.

19 (3) A policy that, in the evaluation of complaints in any disciplinary process, is not a valid
20 excuse to alleged lack of affirmative consent that the accused believed that the complainant
21 consented to the sexual activity under either of the following circumstances:

22 (A) The accused's belief in affirmative consent arose from the intoxication or recklessness
23 of the accused.

24 (B) The accused did not take reasonable steps, in the circumstances known to the
25 accused at the time, to ascertain whether the complainant affirmatively consented.

26 (4) A policy that, in the evaluation of complaints in the disciplinary process, is not a valid
27 excuse that the accused believed that the complainant affirmatively consented to the sexual
28 activity if the accused knew or reasonably should have known that the complainant was unable
29 to consent to the sexual activity under any of the following circumstances:

30 (A) The complainant was asleep or unconscious;

31 (B) The complainant was incapacitated due to the influence of drugs, alcohol or
32 medication, so that the complainant could not understand the fact, nature or extent of the sexual
33 activity; or

34 (C) The complainant was unable to communicate due to a mental or physical condition.

35 (b) The governing board of each state institution of higher education and of each
36 community and technical college shall adopt detailed and victim-centered policies and protocols
37 that comport with best practices and current professional standards. At a minimum, the policies
38 and protocols shall cover all of the following subjects:

39 (1) An affirmative statement on how the institution will provide appropriate protections for
40 the privacy of individuals involved, including confidentiality;

41 (2) Initial response by the institution's personnel to a report of an incident, including
42 requirements specific to assisting the victim, providing information in writing about the importance
43 of preserving evidence, and the identification and location of witnesses;

44 (3) Response to stranger and nonstranger sexual assault;

- 45 (4) The preliminary victim interview, including the development of a victim interview
46 protocol and a comprehensive follow-up victim interview, as appropriate;
- 47 (5) Contacting and interviewing the accused;
- 48 (6) Seeking the identification and location of witnesses;
- 49 (7) Providing written notification to the victim about the availability of and contact
50 information for, on-campus and off-campus resources and services, and coordination with law
51 enforcement, as appropriate;
- 52 (8) Participation of victim advocates and other supporting people;
- 53 (9) Investigating allegations that alcohol or drugs were involved in the incident;
- 54 (10) Providing that an individual who participates as a complainant or witness in an
55 investigation of sexual assault, domestic violence, dating violence or stalking will not be subject
56 to disciplinary sanctions for a violation of the institution's student conduct policy at or near the
57 time of the incident, unless the institution determines that the violation was egregious, including,
58 but not limited to, an action that places the health or safety of any other person at risk or involves
59 plagiarism, cheating, or academic dishonesty;
- 60 (11) The role of the institutional staff supervision;
- 61 (12) A comprehensive, trauma-informed training program for campus officials involved in
62 investigating and adjudicating sexual assault, domestic violence, dating violence and stalking
63 cases;
- 64 (13) Procedures for confidential reporting by victims and third parties; and
- 65 (14) Adequate staffing to ensure prompt availability of trained, on-campus personnel to
66 students, victims, and witnesses at all times.
- 67 (c) The governing board of each state institution of higher education and of each
68 community and technical college shall, to the extent feasible, enter into memoranda of
69 understanding, agreements, or collaborative partnerships with existing on-campus and
70 community-based organizations, including rape crisis centers, to refer students for assistance or

71 make services available to students, including counseling, health, mental health, victim advocacy,
72 legal assistance and including resources for the accused.

73 (d) The governing board of each state institution of higher education and of each
74 community and technical college shall implement comprehensive prevention and outreach
75 programs addressing sexual violence, domestic violence, dating violence, and stalking. A
76 comprehensive prevention program shall include a range of prevention strategies, including, but
77 not limited to, empowerment programming for victim prevention, awareness raising campaigns,
78 primary prevention, bystander intervention, and risk reduction. Outreach programs shall be
79 provided to make students aware of the state's and the institution's policy on sexual assault,
80 domestic violence, dating violence, and stalking, with the definitions clearly stated and with a clear
81 statement of the rights of victims. At a minimum, an outreach program shall include a process for
82 contacting and informing the student body, campus organizations, athletic programs, and student
83 groups about the institution's overall sexual assault policy, the practical implications of an
84 affirmative consent standard, and the rights and responsibilities of students under the policy.

85 (e) Outreach programming shall be included as part of the orientation for every incoming
86 student, including students transferring from another institution.

NOTE: The purpose of this bill is to require state institutions of higher education and community and technical colleges to implement policies and programs relating to sexual assault, domestic violence, dating violence and stalking, including adoption of an "affirmative consent" standard in conduct rules and disciplinary proceedings at each institution.

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