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Affirmative Consent Policies at the Federal, State, and University Levels

The first affirmative consent policy in the United States was introduced at Antioch College (Yellow Springs, OH) in 1991. The policy, titled the Sexual Offense Prevention Policy, was advocated for by students concerned with two sexual assaults which occurred on the small campus of fewer than 200 undergraduate students. While the policy was originally criticized by some media outlets, affirmative consent has since entered mainstream policy discussions and debates.² In 2014, California became the first U.S. state to pass a bill mandating affirmative consent in sexual activities. Since the introduction of the California affirmative consent law, New York, Illinois, and Connecticut have also passed bills which require affirmative consent prior to and during sexual activities.

The following report offers an explanation and overview of affirmative consent policies in the United States. Specifically, this report researches affirmative consent at the federal, state, and university levels and examines academic and legal literature both supporting and critiquing enacted and proposed affirmative consent policies.

What is Affirmative Consent?

Affirmative consent is different from simple consent. California highlights the difference in the informal title of their affirmative consent law, “Yes Means Yes.” Per the California law, “affirmative consent means affirmative, conscious, and voluntary agreement to engage in sexual activity.”³ Affirmative consent policies mandate affirmative consent prior to and during sexual activities. Such affirmative consent can be expressed verbally or non-verbally. Consider National Public Radio, October 5, 2014.

² Katie Mettler, “No means no’ to ‘yes means yes’: How our language around sexual consent has changed,” Washington Post, February 15, 2018.

³ H.B. No. 967, Sess. of 2014 (Cal. 2014).
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB967

students 19.0% reported at least one instance of sexual victimization. Among female students, 17.0% reported at least one instance of sexual victimization. Finally, 4.4% of surveyed male students reported at least one instance of sexual victimization. These rates are as high or slightly higher than those revealed in prior surveys conducted by the AAU. The AAU announced on June 18, 2018 that it will commission another survey for the spring of 2019.

State Policies: Case Studies of CA, NY, IL, and CT

California

In 2014, California became the first state to pass affirmative consent legislation. S.B. 967 adds

Table 2. § (1)(b)(1-13) of Section 67386 in California's Education Code

Provisions for detailed and victim-centered policies and protocols
Policy statement on confidentiality and how institution will protect privacy of individuals involved
Initial response to incident report includes provisions for assisting the victim, identifying and locating witnesses, and information about the importance of preserving evidence
Response to stranger and non-stranger sexual assault

updated "Sexual Violence and Sexual Harassment" policy on January 1⁵, 2016.

provision seeks to increase reporting for incidents.²⁰

assault, stalking and intimate partner violence.²⁸ As seen in other state definitions, Connecticut mandates that consent is revocable and ongoing.

Federal Policies Regarding Consent in Education Institutions

Currently, there is no federal legal definition of affirmative consent. In U.S.C. 10 § 920 Article 120, consent is defined as “freely given agreement to the conduct at issue by a competent person.”²⁹ The federal government has passed several policies to expand victims’ rights as well as the responsibilities of institutions of Higher Education (IHEs) in maintaining the equality and safety of students in response to sex discrimination and gender-based violence, such as Title IX (1972), the Clery Act (1990), and the Violence Against Women Act (2014).

Title IX

In 1972, Congress passed Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681. This amendment explicitly prohibits discrimination on the basis of sex in education programs and activities that receive any federal funding. Title IX is best known for affording women equal access to sports activities. Sexual harassment and violence, however, are also considered forms of gender-based discrimination prohibited under this amendment. All students, faculty, and staff at institutions covered by Title IX are “protected regardless of sex, sexual orientation, gender identity, part or full-time status, disability, race, or national origin.”³¹ Every institution that receives federal funding must have a Title IX coordinator that ensures the institutional compliance with Title IX and that is easily accessible for students, faculty, and staff to file complaints.

On November 3, 2018, Secretary of Education Betsy DeVos proposed changes to Title IX that would “condemn sexual violence and punish those who perpetrate it, while ensuring a fair grievance process.”³² Under the proposed revisions, sexual harassment will be formally redefined under Title IX using three different definitions. The first is quid pro quo harassment which is where someone offers something in exchange for a sexual act. Sexual assault as defined in the Clery Act will fall under the definition of sexual harassment under Title IX. Lastly, it will be defined as “unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively

²⁸ H.B. 5376, Sess. of 2016 (Conn. 2016).

²⁹ Rape and sexual assault generally, 10 USC 920: § art. 120
[http://uscode.house.gov/view.xhtml?req=\(title:10%20section:920%20edition:prelim\)](http://uscode.house.gov/view.xhtml?req=(title:10%20section:920%20edition:prelim))

³⁰ U.S. Department of Justice, Overview of Title IX of the Education Amendments of 1972, 20 USC A§ 1681 accessed on February 14, 2019, <https://www.justice.gov/crt/overviewtitle-ix-educationamendments1972-20-usc1681-et-seq>

³¹ U.S. Department of Education, Office for Civil Rights. Title IX Resource Guide (2015), accessed on February 14, 2019, <https://www2.ed.gov/about/offices/list/ocr/docs/dctitle-ix-coordinatorsguide201504.pdf>

³² US Department of Education, Title IX Resource Guide.

offensive that it effectively denies a person equal access to a school's education program.³⁸ The proposed revisions also would provide a strengthened "presumption of innocence" for the accused during the adjudication process with the "burden of proof on the school." The public commenting period of sixty days concluded on January 30th, 2019. As of February 2019, there have not been any further Department of Education statements nor actions regarding the proposed changes

Violence Against Women Act of 1994

The Violence Against Women Act (VAWA) passed as Title IV of the Violent Crime Control and Law Enforcement Act of 1994. VAWA addresses violent crimes perpetrated more frequently against women, including intimate partner violence, sexual assault, and stalking. In 1995, the Office on the Violence Against Women (OVW) was created by the Department of Justice to oversee allocation of funds authorized under VAWA. The OVW has awarded over \$8.1 billion in grants to "state, tribal, and local governments, nonprofit organizations, and universities" from its creation in 1995 through FY2018. VAWA has been reauthorized by Congress in 2000, 2005, and 2013. As of February 2019, H.R.6545, Violence Against Women Reauthorization Act of 2018 has been introduced and referred to committee. The budget of VAWA is still up for political debate. On campuses of IHEs, VAWA is implemented through the Clery Act. The reauthorization of VAWA in 2013 greatly expanded the responsibilities of IHEs regarding reportable crimes under the Clery Act, which is explained further in the next section.

Clery Act

The Student Right-to-Know and Campus Security Act was passed in 1990 as an amendment to the Higher Education Act of 1965. In 1998 the act was renamed the Jeanne Clery Disclosure of Campus Security Policy and Campus Statistics Act or Clery Act in memory of Jeanne

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violence are used, or if the person has a physical or mental condition that prevents the person from being able to give consent.

Saint Michael's College

Under Saint Michael's College's (SMC) "Sexual Harassment, Sexual Misconduct, Domestic Violence, Dating Violence, and Stalking Policy," consent is informed, voluntary, and clearly established. A person's ability to give or withhold consent can be impaired by the consumption of drugs or alcohol, if the person is asleep or unconscious, or if the person has a physical or mental incapacity. In the policy, it is stated that, "ignorance of the policy noted above, or the intoxication of the respondent, will be in no way considered an excuse for violating the policy."⁴⁵ The language used in SMC's consent policy is similar to that of California's state law and can be considered an affirmative consent policy despite the absence of the word "affirmative."

Vermont Technical College

Although Vermont Technical College (VTC) does not use the word "affirmative" in their consent definition, they have an affirmative consent policy based on the components seen in California's law. Their policy describes "effective consent as "knowing and voluntary agreement to engage in a mutually agreed upon sexual activity."⁴⁶ Under their policy, consent for one activity does not imply consent for another, and a prior sexual or dating relationship does not imply consent for another.

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