

The State Education Department received additional questions about the “Enough is Enough” Statute (Chapter 76 of the Laws of 2015, Education Law Article 129-B) after the Guidance Document was finalized and posted on the Department’s website. Below are the questions as submitted and suggested responses.

Please note that the purpose of this Q&A is to provide guidance to the field relating to implementation of Article 129-B of the Education Law. This document does not constitute legal advice. To the extent any of the answers in this document conflict with federal or State law and/or regulations, the provisions of the applicable law/regulation shall prevail.

Question 1:

“Section 6444(5)(vi) of EIE allows parties to exclude their prior sexual history with individuals other than the reporting individual in the stage of an institution’s disciplinary process that determines responsibility, further providing that past findings of domestic violence, dating violence, sexual assault or stalking may be admissible at the sanctions phase. At the same time, the US ED OCR’s 2014 Q&A on Sexual Violence advises that an institution has notice and an obligation to respond when it receives a “credible report” of a pattern of sexually violent behavior by a student. In addition, both EIE and the 2014 Q&A note that, when considering a reporting individual’s request for confidentiality or request not to proceed on a complaint, an institution should consider whether an alleged perpetrator has committed prior violent acts or is a repeat offender, with OCR stating that an institution should consider “credible evidence” of prior acts or a likelihood of future perpetration. In light of OCR’s emphasis on consideration of pattern evidence in response to reports of sexual misconduct (and EIE’s reference to institutions considering whether the perpetrator is a “repeat offender”), our first question is whether and how information suggesting a pattern (such as reports of prior incidents that the reporting individual wished not to pursue and that, therefore, did not result in a prior finding) can be used or shared during the investigative process and at a hearing?”

Answer 1:

Education Law §6444(5)(c)(vi) allows individuals to exclude their prior sexual or mental health history in the judicial or conduct process (including the hearing) in the disciplinary stage that determines responsibility, but it allows past findings of domestic violence, dating violence, stalking or sexual assault to be admissible in the disciplinary stage that determines sanction.

The law also permits an institution, when considering a reporting individual’s request for confidentiality or request not to proceed on a complaint, to consider whether an alleged perpetrator has committed prior violent acts or is a repeat offender, including any “credible evidence” of prior acts or a likelihood of future perpetration when determining whether to proceed with an investigation.

Question 2:

“On a separate but somewhat related note, we have a question about an institution proceeding with a complaint when the reporting individual does not wish to proceed. Specifically, if there are multiple reports against the same individual and none of the reporting individuals wish to proceed, but the institution determines that it must proceed (as EIE and OCR guidance allow), may the institution proceed against the individual in one hearing? Or must the institution hold four separate hearings with separate panels?”

Answer 2:

Article 129-B is flexible as to whether institutions hold a single hearing or multiple hearings. However, colleges/universities should consult with their local counsel before making such a determination because there may be other considerations such as due process, college policy, or the similarity of the violations alleged against a single respondent that should be considered.

Question 3:

“Does Article 129-B, in whole or in part, apply to institutions that are ineligible to receive state aid under Section 6401 of the Education Law? I note that some parts of Article 129-A do not apply to institutions that are ineligible to receive state aid (i.e., such institutions are not required under Section 6431 to appoint an advisory committee on campus security, and such institutions are not required under Section 6433 to provide information about campus crime statistics).”

Answer 3:

Unlike Article 129-A, there is no language in Article 129-B that exempts institutions that are not eligible to receive state aid from any of the requirements of Article 129-B.

Question 4:

“Does Article 129-B, in whole or in part, apply to institutions that receive no federal funds, given that neither Title IX nor the Clery Act—two federal laws that are heavily relied upon in Article 129-B—apply to such institutions?”

Answer 4:

There is no language in Article 129-B that exempts any institution from any of the requirements of Article 129-B, regardless of whether or not the institution receives federal funds.

Question 5:

“If an institution is not required to comply with all or part of Article 129-B, how (if at all) should the institution indicate to NYSED that it is not required to comply?”

Answer 5:

See responses to Questions 3 and 4 above, Article 129-B does not include any language that exempts any institution from any requirement of Article 129-B.