



# State Legislative Developments on Campus Sexual Violence: *Issues in the Context of Safety*



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## ABOUT THE PROJECT

NASPA – Student Affairs Administrators in Higher Education and Education Commission of the States (ECS) have partnered to address legislative developments and offer considerations for leaders in higher education and policy on two top-level safety issues facing the higher education community: campus sexual violence and guns on campus. The first in a series jointly released by NASPA and ECS, this publication looks at recent state legislation on campus sexual violence. By offering in-depth analyses of state legislation and framing key issues and considerations for leaders in higher education and policy across the states, NASPA and ECS look to support constructive dialogue toward effective action on campus safety.

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## ABOUT THE AUTHORS



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## ISSUE OVERVIEW

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In recent years, the effort put forth by colleges and universities to prevent and address incidents of campus sexual violence has come under increased public scrutiny. Fueling concern about the prevalence of campus sexual violence are two recent national surveys reporting that one in five females, one in 20 males, and one in four transgender students experience sexual violence after enrolling in college (Cantor et al., 2015; DiJulio, Norton, Craighill, Clement, & Brodie, 2015). These surveys follow a litany of media reports on alleged incidents of sexual violence on campuses across the United States. The national visibility of campus sexual violence has turned this issue into a top priority for policy action among lawmakers at both the state and federal levels (see “White House Response to Campus Sexual Assault” sidebar).

Against a backdrop of existing federal law and regulation, calls have been made for new state policy action to shape how postsecondary institutions address campus crime in general and campus sexual violence in particular. In 2014, the U.S. Department of Education’s

Office for Civil Rights (OCR; 2014) published responses to frequently asked questions related to its 2011 dear colleague letter (OCR, 2011) on Title IX (1972) and sexual violence. Additionally, in 2015, the U.S. Department of Education’s Office of Postsecondary Education (OPE) published a dear colleague letter summarizing the final regulatory amendments to the Clery Act (1990) and the Violence Against Women Act (1994) that took effect on July 1, 2015. These documents have significantly influenced how campuses create an environment that supports survivors of sexual violence and establish processes that handle allegations of sexual violence with fairness and equity for all parties involved.

Beyond federal requirements, the higher education community has approached the problem of campus sexual violence with a commitment to prevention. In testimony before the 114th Congress, for instance, Dr. Penny Rue, vice president for campus life at Wake Forest University, outlined a series of common and effective campus-wide approaches, including bystander

intervention and educational programming, to prevent incidents of sexual violence on campus (Preventing and Responding, 2015). Coupled with its compliance with state and federal law—the duty of public stewardship and confidence—the higher

### WHITE HOUSE RESPONSE TO CAMPUS SEXUAL ASSAULT

On January 22, 2014, President Obama established the White House Task Force to Protect Students from Sexual Assault. As part of the work of the task force and partnering organizations, a new resource portal was launched: NotAlone.gov. Accessible to students, institutions, or anyone interested in the subject, this website contains resources for preventing and responding to sexual assault on college and university campuses and in our nation’s secondary schools. NotAlone.gov provides information on service centers for crisis situations, the process for filing grievances, and legal guidance.

education community has taken action to educate students about safe sexual behaviors and to equip campus communities with strategies to prevent and reduce incidents of violence.

Given the attention to sexual violence and related policy issues from postsecondary institutions and the federal government, it is not surprising that campus sexual violence has become a top-tier policy issue across the states as well. During the 2015 legislative sessions, at least 28 states introduced or enacted legislation concerning campus sexual violence (Fulton, Sponsler, Sisneros, & Perez, 2015). As state lawmakers have taken action on a variety of policy proposals intended to protect students and support sexual assault survivors, several common policy themes have emerged. An Education Commission of the States (ECS) analysis of state legislative actions in the broad area of campus sexual violence identified four primary policy themes embedded in 22 state actions:

- **Defining affirmative consent:** State policy has pushed to build a common understanding of welcomed sexual behavior by defining consent in statute or directing institutions to do so.
- **The role of local law enforcement:** State policy has sought to define, clarify, or expand the role of local law enforcement in campus reporting and investigative processes following survivors' disclosure or report of sexual assault to a campus employee.
- **Transcript notation:** State policy has addressed notation of serious violations of a campus' code of conduct, including sexual assault, on student transcripts. The duration of the transcript notation, procedures for its removal, and the process of notation have been considered in statute.
- **The role of legal counsel:** State policy has addressed the role of legal counsel in the campus adjudication process, building

upon, supplementing, or extending provisions found in federal regulatory guidelines.

In this policy brief, ECS and NASPA offer a retrospective analysis of state legislative activity during the 2013–2015 legislative sessions that focused on campus sexual violence. We provide detailed descriptions of four major policy themes identified through a content analysis of introduced and enacted legislation and frame considerations for state decision makers and campus leaders. This brief is intended to help inform constructive policy dialogue as the higher education and stakeholder communities continue to deliberate the merits of proposed policy actions to support and affirm educational environments that are safe, inclusive, and equitable for all students on campus.

**Table 1**  
**Status of State Legislation in the Four Primary Policy Areas, 2013–2015**

Policy area	Enacted	Died	Pending
<b>Consent</b>	California, Hawaii, Illinois, New York	Arizona, Connecticut, Iowa, Kansas, Maryland, Minnesota, Missouri, North Carolina, West Virginia	Massachusetts, New Jersey, Pennsylvania
<b>Law enforcement</b>	California, Minnesota, New York, Virginia	Delaware, Maryland, Missouri, New Jersey, Oklahoma, Rhode Island	Massachusetts
<b>Transcript notation</b>	New York, Virginia	California, Maryland	Pennsylvania
<b>Role of counsel</b>	North Carolina	Massachusetts, North Dakota, South Carolina	

Note: Adapted from Fulton, M., Sponsler, B. A., Sisneros, L., & Perez Jr., Z. (2015). State policy database on campus sexual violence [unpublished]. Denver, CO: Education Commission of the States.

# STATE POLICY: CAMPUS SEXUAL VIOLENCE

In response to calls for increased public policy to support survivors of campus sexual violence and intensify prevention efforts on campus, state policy leaders have taken a number of legislative actions. During the 2013–2015 legislative sessions, at least 22 states introduced or enacted legislation covering at least one of four primary policy areas: defining affirmative consent, clarifying and expanding the role of local law enforcement, creating or expanding requirements for transcript notations covering major conduct violations, and addressing the role of legal counsel in conduct

hearings centered on sexual violence.

Table 1 presents summary information on the number of bills that were enacted, are pending, or failed to emerge from the legislative process for the 2013–2015 legislative sessions. In total, seven states enacted legislation that covered at least one of the four primary policy areas outlined here. In several cases, a state either enacted multiple pieces of legislation or passed a comprehensive policy that covered multiple policy issue areas.

Table 2 summarizes legislative activity in the four primary policy

areas and the status of bills for the 2013–2015 legislative sessions—by state. In total, four states enacted laws defining consent and addressing the role of local law enforcement, two states passed laws creating rules governing the notation of major violations of campus judicial codes of conduct (including sexual violence) on student transcripts, and one state—North Carolina—enacted legislation that addresses the role of counsel at campus disciplinary proceedings.

The patterns of policy adoption and consideration presented in Tables 1 and 2 and summarized

**Table 2**

**Status of Legislation in the Four Primary Policy Areas, by State, 2013–2015**

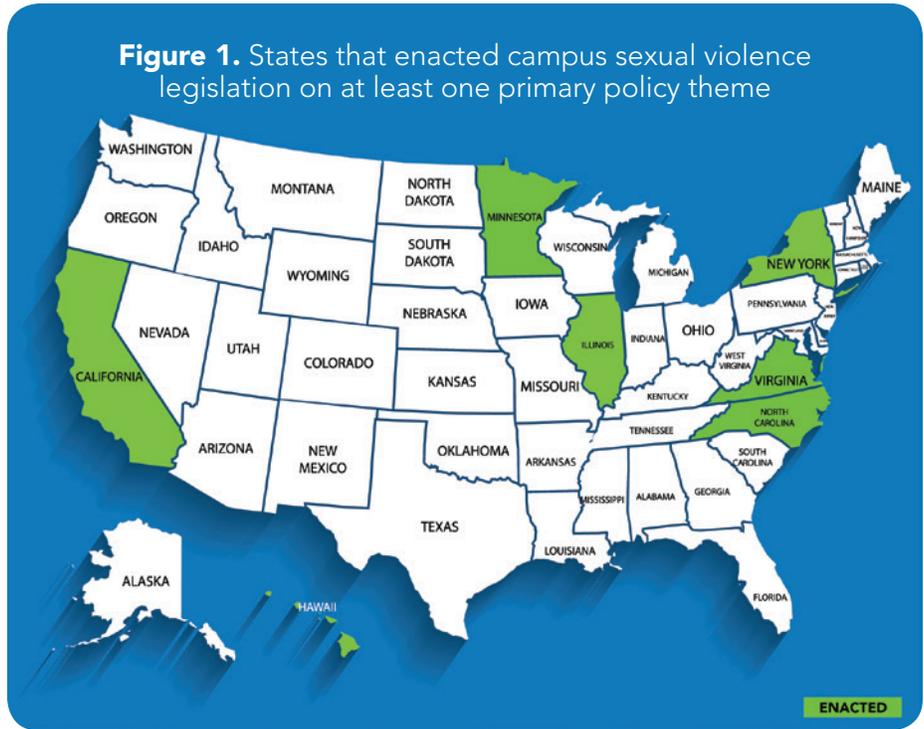
State	Primary policy areas			
	Consent	Law enforcement	Transcript notation	Role of counsel
Arizona	Died			
California	Enacted	Enacted	Died	
Connecticut	Died			
Delaware		Died		
Hawaii	Enacted			
Illinois	Enacted			
Iowa	Died			
Kansas	Died			
Maryland	Died	Died	Died	
Massachusetts	Pending	Pending		Died
Minnesota	Died	Enacted		
Missouri	Died	Died		
New Jersey	Pending	Died		
New York	Enacted	Enacted	Enacted	
North Carolina	Died			Enacted
North Dakota				Died
Oklahoma		Died		
Pennsylvania	Pending		Pending	
Rhode Island		Died		
South Carolina				Died
Virginia		Enacted	Enacted	
West Virginia	Died			

Note: Adapted from Fulton, M., Sponsler, B. A., Sisneros, L., & Perez Jr., Z. (2015). State policy database on campus sexual violence [unpublished]. Denver, CO: Education Commission of the States.

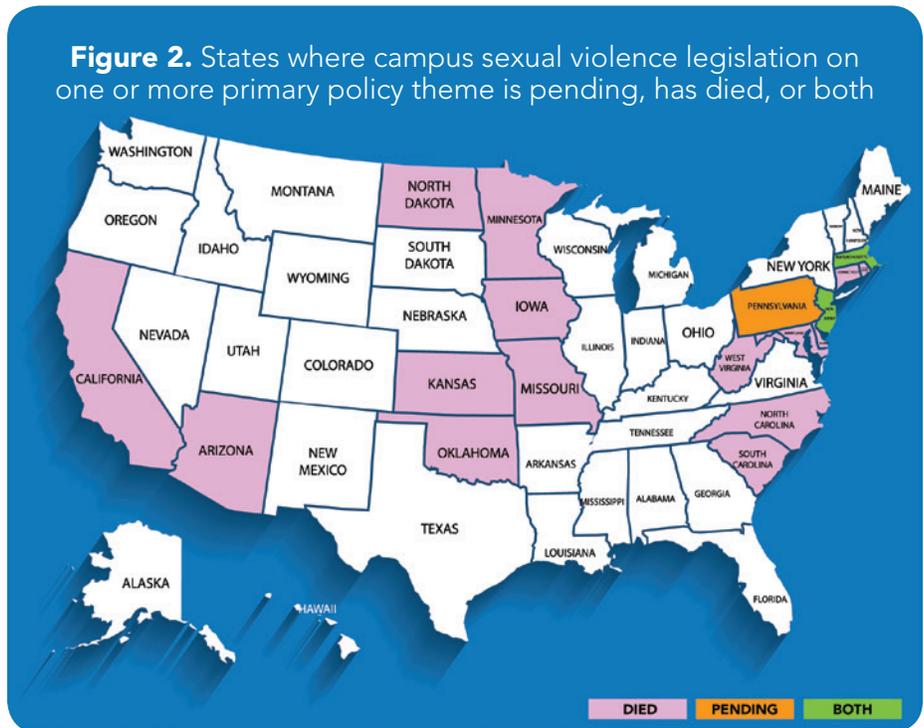
in Figures 1 and 2 reveal a broad diffusion of policy activity at the state level relating to campus sexual violence. As in many other policy domains, however, not all policy is crafted in the same way nor aimed toward the same ends. A detailed content analysis of statutory language is necessary to shed light on the specifics of policy intent and focus. Moreover, for campus leadership and administrators, understanding the content and context of enacted bills is critical to support effective policy implementation.

The following sections present a summary analysis of enacted legislation in the four primary policy areas, highlighting general themes within enacted bills and providing detailed examples of state legislative activity. Each section concludes with considerations and discussion points designed to inform policy makers and campus leaders as they contemplate policy action and move toward successful implementation of laws, rules, and regulations.

**Figure 1.** States that enacted campus sexual violence legislation on at least one primary policy theme



**Figure 2.** States where campus sexual violence legislation on one or more primary policy theme is pending, has died, or both

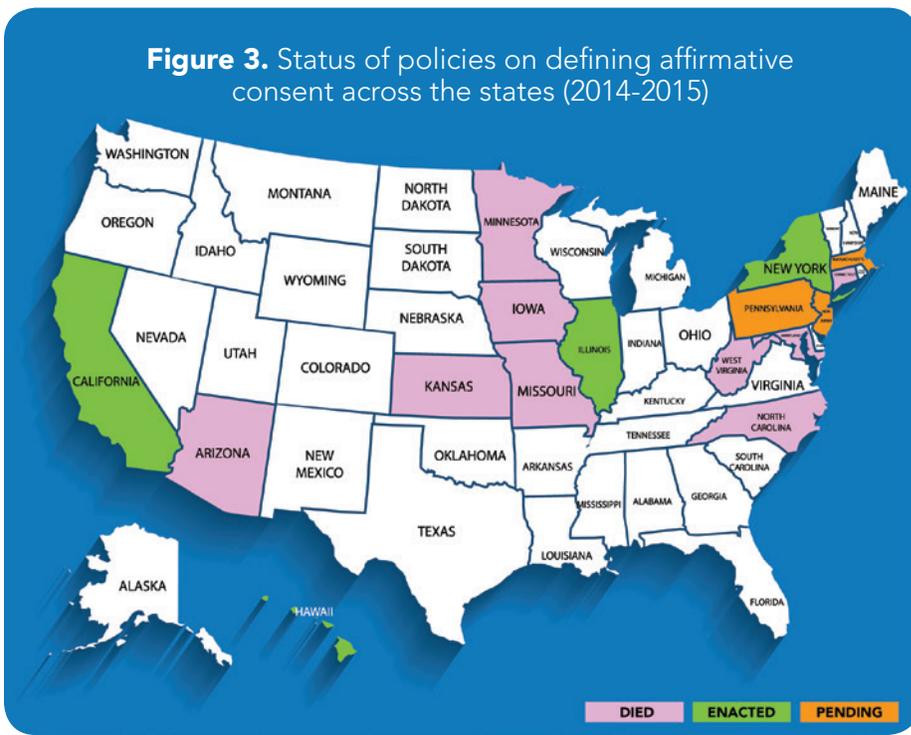


# POLICY THEME: DEFINING AFFIRMATIVE CONSENT

Traditionally the domain of institutional student codes of conduct, affirmative consent standards have been incorporated by a number of states into their multifaceted approaches for preventing and reducing incidents of campus sexual violence. Although post-secondary institutions often include affirmative consent language in their sexual assault policies, the goal of state law is to bring consistency across colleges and raise awareness of the concept of affirmative consent within and beyond a campus community. State efforts to codify affirmative consent definitions also reinforce the movement from a “no means no” to “yes means yes” posture in discussing how consent is obtained, which parties involved in sexual encounters are required to obtain consent, and the frequency with which consent must be obtained.

## THEME OVERVIEW

Since 2014, four states—**California, Hawaii, Illinois, and New York**—have enacted legislation that addresses or defines affirmative consent related to sexual activity between students enrolled in a postsecondary institution (Fulton et al., 2015). California, Illinois, and New York’s definitions of affirmative consent share the common element of a voluntary or freely given agreement to engage in sexual activity.



The standards clarify that a lack of protest or resistance does not indicate consent. In two of the states, California and New York, the consent to sexual activity must also be consciously or knowingly given. In addition, New York’s definition refers to a mutual decision among all participants. All three states’ standards indicate circumstances under which a person cannot consent to sexual activity, including when the person is incapacitated due to the use or influence of alcohol or drugs or due to a mental disability, or if the person is asleep or unconscious.

In Hawaii, the legislature established an affirmative consent task force under **Senate Bill 387** of 2015 to review and make recommendations on the University of Hawaii’s

executive policy on domestic violence, dating violence, sexual assault, and stalking. The law outlines the charges to the task force, identifies the membership, and requires the task force to consider campus definitions of consent in reviewing the University of Hawaii’s sexual assault policies. The task force must submit a report of its findings and recommendations, including any proposed legislation, to the legislature no later than 20 days prior to the convening of the regular sessions of 2016 and 2017. The task force will cease to exist on June 30, 2017.

## STATE POLICY SUMMARIES

This section summarizes state policy actions pertaining to

affirmative consent in California, Illinois, and New York.

**California.** In 2014, California lawmakers enacted **Senate Bill 967**, which requires postsecondary systems and institutional governing boards to adopt policies concerning sexual assault, domestic violence, dating violence, and stalking as defined by the Higher Education Act of 1965. The governing boards must adopt these policies to receive state funds for student financial assistance, and the policies must include the following elements:

- An affirmative consent standard in determination of whether consent was given by a complainant. Affirmative consent is defined as affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent.
- Specified in the law, circumstances under which the accused will not be granted an excuse from obtaining affirmative consent include:
  - The accused individual's belief in affirmative consent arose from the intoxication or recklessness of the accused.
  - The accused did not take reasonable steps to ascertain whether the complainant affirmatively consented.
- The preponderance of the evidence standard will be used

to examine the elements of the complaint against the accused.

- Circumstances under which the complainant is unable to give consent include:
  - The complainant was asleep or unconscious.
  - The complainant was incapacitated due to the influence of drugs, alcohol, or medication so that the complainant could not understand the fact, nature, or extent of the sexual activity.
  - The complainant was unable to communicate due to a mental or physical condition.

**Illinois.** Illinois enacted the Preventing Sexual Violence in Higher Education Act in 2015 (H.B. 821) requiring all higher education institutions to adopt a comprehensive policy concerning sexual violence, domestic violence, dating violence, and stalking consistent with federal and state law. Among other provisions, institutions' policies must include a definition of consent that includes specified criteria, but permits institutions to define *consent* in a more demanding manner; state policy sets a minimal definition of consent that may be used at the institutional level.

The definition of consent must, at a minimum, recognize that (a) consent is a freely given agreement to sexual activity; (b) a person's lack of verbal or physical resistance, or submission resulting from the use or threat of force does not constitute consent; (c) a person's manner of dress does not constitute consent; (d) a person's consent to past sexual activity

does not constitute consent to future sexual activity; (e) a person's consent to engage in sexual activity with one person does not constitute consent to engage in sexual activity with another; (f) a person can withdraw consent at any time; and (g) a person cannot consent to sexual activity if that person is unable to understand the nature of the activity or give knowing consent due to circumstances, including and without limitation to the following:

- The person is incapacitated due to the use or influence of alcohol or drugs;
- The person is asleep or unconscious;
- The person is under age; or
- The person is incapacitated due to a mental disability.

**New York.** In 2015 New York enacted **Assembly Bill 8244** requiring that all institutions adopt the following definition of affirmative consent as part of their code of conduct:

Affirmative consent is a knowing, voluntary and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent. The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression.

Each institution's code of conduct must reflect the following principles as guidance for the institutional community:

- Consent to any sexual act or prior consensual sexual activity between or with a party does not necessarily constitute consent to any other sexual act;
- Consent is required regardless of whether the person initiating the act is under the influence of drugs or alcohol (or both);
- Consent may be initially given but withdrawn at any time;
- Consent cannot be given when a person is incapacitated, which occurs when an individual lacks the ability to knowingly choose to participate in sexual activity. Incapacitation may be caused by the lack of consciousness or being asleep, being involuntarily restrained, or if an individual otherwise cannot consent. Depending on the degree of intoxication, someone who is under the influence of alcohol, drugs, or other intoxicants may be incapacitated and therefore unable to consent;
- Consent cannot be given when it is the result of any coercion, intimidation, force, or threat of harm;
- When consent is withdrawn or can no longer be given, sexual activity must stop.

## CONSIDERATIONS FOR CAMPUS AND POLICY LEADERS

State-level policy that defines affirmative consent for sexual activity within postsecondary settings has raised a number of issues on which policy makers and campus leadership should reflect as they move toward implementation or consideration of policy actions.

- Some due-process advocates have raised questions about rights for the accused, particularly since affirmative consent laws shift the burden of demonstrating the affirmation of consent from the survivor to the accused (Department of Education [ED], 2014). Providing clarity around the process for determining when consent was given, and how it was obtained, is critical to implementation and to ensuring all students are aware of the standards required to determine if sexual activity is consensual. Campus officials will need to make sure the affirmative consent policies are consistently and fairly applied and that an unreasonable or uneven burden is not placed on a single party.
- In some circumstances, especially when both persons engaged in sexual activity are intoxicated, there could be uncertainty about who initiated

the sexual activity, causing ambiguity as to who is the party responsible for obtaining consent. Outlining how these assessments will be made, and the standards for their evaluation during campus disciplinary hearings, is an important consideration. In particular, questions have arisen about the practicality and reasonableness of institutions or states requiring affirmative consent at each stage of a sexual encounter. Clarity is needed about how individuals can demonstrate consent has been obtained.

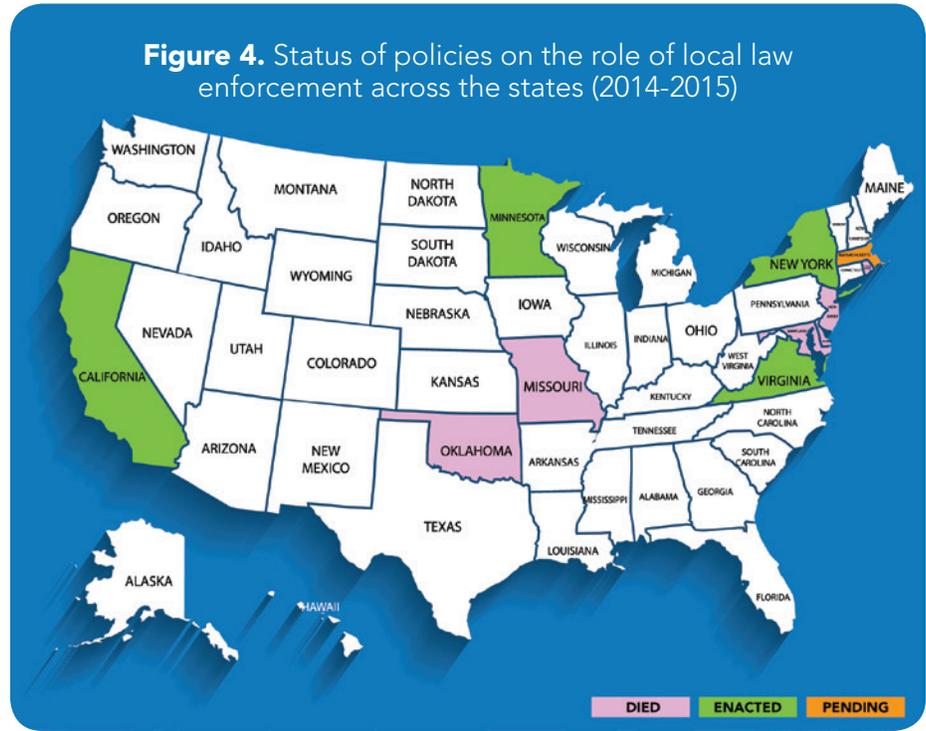
- Part of successfully implementing affirmative consent standards in a postsecondary setting requires an examination of how these definitions align or do not align with a state's criminal code related to sexual violence. As New York sought to address in their affirmative consent law, it is possible that campus level standards of obtaining and affirming consent will be unaligned with the standards applied in criminal proceedings. Policy makers, institutional representatives, and students themselves should be made aware of and understand the implications of these potential differences and the impact on campus judicial hearings and public criminal cases.

# POLICY THEME: THE ROLE OF LOCAL LAW ENFORCEMENT

The heightened attention to sexual violence has led to evaluation of how expediently and responsibly postsecondary institutions respond to incidents of sexual violence, fueling a national conversation about whether and when law enforcement should be notified of such occurrences. A central issue in policy deliberations is protection of the rights of the survivor to decide whether to report a sexual assault to local law enforcement, while simultaneously ensuring that investigation of a potential crime is thorough and launched in a timely manner. Supporting local law enforcement agencies in fully investigating sexual violence and related crimes requires intentional collaboration between law enforcement and campus authorities.

## THEME OVERVIEW

Since 2014, four states—**California, Minnesota, New York, and Virginia**—have enacted legislation addressing the responsibilities of postsecondary institutions to inform sexual assault survivors of their right to report the crime to law enforcement officials; the process by which institutions enter into a memorandum of understanding (MOU) with local police jurisdictions; or requirements that incidents of sexual violence be reported to local law enforcement. Two states—Minnesota and New York—have taken explicit



legislative action affirming the rights of sexual assault survivors to decide whether to refer a case to law enforcement.

California and Virginia established requirements for reporting sexual assault crimes to law enforcement. Specifically, California law requires postsecondary institutions to adopt policies to ensure the reporting of violent crimes, sexual assaults, or hate crimes to local law enforcement immediately or as soon as reasonably possible. Virginia law requires that acts of sexual violence be reported to the Title IX coordinator who then reports the information to an internal review committee. A representative of law enforcement sits on the review committee and helps

determine whether to disclose the information to the law enforcement agency responsible for any forthcoming investigation. Virginia law also requires the local attorney for the state to be notified of campus criminal felony assault investigations.

## STATE POLICY SUMMARIES

This section summarizes state policy actions in these four states pertaining to the relationship between campus and local law enforcement, and related provisions.

**California.** As a condition of eligibility to participate in the state-based financial aid Cal Grant Program, Assembly Bill 1433 (2014) requires postsecondary system

and public and private institutional governing boards to adopt policies to ensure that campuses immediately, or as soon as practically possible, disclose to campus or local law enforcement any report by a survivor of a violent crime, sexual assault, or hate crime that is received by campus security. The disclosure should not identify the survivor, unless he or she consents after being informed of the right to have personally identifying information withheld. The law prohibits a report to a local law enforcement agency from identifying the alleged assailant if the survivor does not consent to being identified. These requirements do not constitute a waiver of, or exception to, any law providing for the confidentiality of information.

In addition, **Assembly Bill 913** (2015) amended state statute to reaffirm that campus law enforcement agencies have the primary authority for providing police or security services, including the investigation of criminal activity, to their campuses. The law revises existing requirements for governing boards of community college districts to mandate that their campuses enter into written agreements with local law enforcement agencies. These agreements must clarify which law enforcement agency has operational responsibilities for investigating violent crimes and be made public by January 1, 2016. Similar agreements with law enforcement agencies are already required for the governing boards of the California State University, the University of California, and independent postsecondary institutions.

**Minnesota.** Under **Senate File 5** (2015), campuses within the Minnesota State Colleges and Universities System as well as private institutions that are eligible for state student financial aid must allow sexual assault survivors to decide whether to refer a case to law enforcement and take measures to protect their privacy. Consistent with laws governing access to student records, the institutions must provide a student who chooses to report a sexual assault with access to their description of the incident.

The law, which revised state statute (§ 135A. 15), further requires higher education institutions to enter into a memorandum of understanding (MOU) with the primary local law enforcement agency that serves the campus. The MOU must provide delineation and information sharing protocols for investigative responsibilities; protocols for investigations, including standards for notification and communication, and measures to promote evidence preservation; and a method of sharing information about specific crimes, when directed by the survivor, and a method of sharing crime details anonymously. A campus would be exempt from this requirement if it establishes a sexual assault protocol team with local law enforcement to facilitate cooperation and collaboration.

**New York.** As part of a comprehensive campus sexual assault law, **Assembly Bill 8244** (2015), New York requires every higher education institution to adopt and implement a students' bill of rights as part of its code of conduct that is distributed annually, made available on each institution's website,

and posted in residence halls and campus centers. The students' bill of rights must include a statement that "all students have the right to make a report to local law enforcement and/or state police." Each institution must ensure that reporting individuals are advised of their right to notify university police or campus security, local law enforcement, or state police. Institutions also must ensure that individuals are provided with protections and accommodations, including no contact orders, between the reporting student and the respondent.

**Virginia.** Virginia enacted **Senate Bill 721** in 2015 that requires employees of public and private higher education institutions who obtain information that an act of sexual violence has been committed against a student to report to the Title IX coordinator as soon as practicable. The Title IX coordinator is required to report to a review committee, which must meet within 72 hours of receiving the information. The review committee must comprise the Title IX coordinator, a representative of law enforcement, and a student affairs representative. If the review committee determines that disclosure of the information regarding the alleged act of sexual violence is necessary to protect the health and safety of the survivor or other individuals, the law enforcement representative must disclose the information, including personally identifiable information, to the law enforcement agency responsible for investigating. The Title IX coordinator must notify the survivor that such disclosure is being made. If the alleged act of sexual violence constitutes a felony, the

law enforcement representative must, within 24 hours, consult the local attorney for the commonwealth or another prosecutor and provide the information received by the review committee.

A second Virginia law enacted in 2015, **House Bill 1785**, amends state statute to require that mutual aid agreements between campus police forces and law enforcement agencies contain provisions to notify the local attorney for the commonwealth within 48 hours of beginning an investigation that involves a felony criminal sexual assault. Public and private higher education institutions without campus police forces must enter into memoranda of understanding with local law enforcement agencies or state police, which are required to issue the same notifications to the local attorney for the commonwealth.

## CONSIDERATIONS FOR CAMPUS AND POLICY LEADERS

State policy in the area of campus sexual violence has targeted the roles and responsibilities of local law enforcement and campus leaders in the process of reporting and documenting campus sexual assaults. Issues of student confidentiality, the ability of local law enforcement to conduct expedient criminal investigations, and the differing requirements and standards used in campus disciplinary proceedings and criminal investigations and prosecutions have raised a number of issues for policy makers and campus leaders to consider as they move toward implementation or consideration

of additional policy actions.

- Mandatory reporting requirements could have a chilling effect on student reporting of a sexual assault to a campus official, particularly if students are reluctant to engage with law enforcement or in the legal process. Students need to understand the confidentiality provisions included in law, and institutional leaders and local policing authorities need to carefully navigate new policy within the contours of existing and superseding federal requirements as outlined in Title IX and articulated by recent guidance by the OCR. To ensure students are best supported, transparent, consistent, and enforced implementation is critical.
- Policy actions and campus support systems must prioritize the rights and choices of survivors. Sexual assault survivors need to be made aware of all of their options for pursuing justice and/or support, including campus adjudication processes, support services, and the criminal justice system. Survivors also need to understand the potential implications of reporting crimes to law enforcement and expectations for their participation in the legal process. To this end, state and campus policies should enable the survivor to choose her or his path for resolution or support, whether through the campus or the criminal courts (or both). The role of advisors, one that guarantees confidentiality and that outlines a full array of options to inform the independent decision making of survivors, is central in articulating a clear and consistent message of support.
- Mandatory reporting requirements may create conflicts with federal law. Current law requires institutions of higher education that receive federal funds to inform survivors of their rights to decline to notify law enforcement about being victimized (Institutional and Financial Assistance Information for Students, 2015). To this point, campus leaders and state decision makers should engage in constructive dialogue on the different purposes and degree of authority of campus disciplinary proceedings with criminal investigations led by law enforcement officials and consider these differences carefully to avoid conflicts.
- Requirements for MOUs will need to take into account institutional capacity and, in some cases, their interaction with multiple and overlapping law enforcement agencies or jurisdictions. To be implemented as designed, it is a prerequisite that institutional and local law enforcement leadership are behind the goals and desired outcomes of a well-crafted MOU related to the handling of sexual violence cases in a particular jurisdiction. Moreover, MOUs should account for campus responsibilities under federal law to affirm the rights of survivors to decide whether and how to pursue resolution and support after an incident of sexual violence.

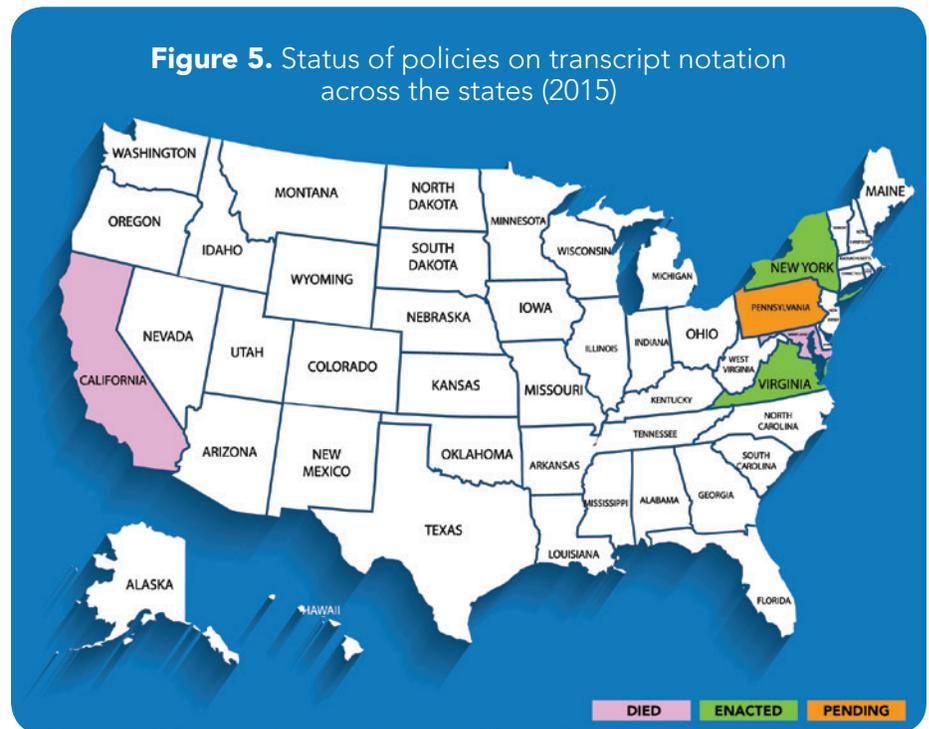
# POLICY THEME: TRANSCRIPT NOTATION

Students who have been accused of or found responsible for sexual violence and other conduct code violations are often able to transfer without the receiving institution's knowledge because this information typically is not noted on their transcripts. According to a recent survey by the American Association of Collegiate Registrars and Admissions Officers (2015, p. 3), about fifteen percent of colleges that responded currently note on a student transcript whether the student is ineligible to reenroll due to a "major" disciplinary violation.

Recent high-profile incidents of campus sexual assault by transfer students have prompted some state policy makers to call for greater transparency of student's disciplinary dismissals and more consistent protocols for sharing this information among postsecondary institutions (New, 2015; Witherspoon, 2015). The overall goals of policy in this area are to improve campus safety and security, hold offenders accountable, and minimize institutions' potential liability if a student with a conduct violation applies for a transfer.

## THEME OVERVIEW

In 2015, two states—**New York** and **Virginia**—enacted laws that require postsecondary education institutions to make a notation for code of conduct violations on transcripts. Under the New York and Virginia laws, transcript notations must indicate whether



a student has been suspended or expelled for violation of an institution's code of conduct, including for sexual violence. Both states also require campuses to include a notation if a student withdrew while under investigation for such a conduct violation. In addition, the laws address the circumstances under which the notations must be removed, typically if a student's responsibility for the violation has been vacated or after the suspension has been served.

A similar transcript notation bill in California passed the legislature but was vetoed by the governor in October 2015. Senate Bill 968 would have required public and private institutions to indicate a student's ineligibility to reenroll on the transcript due to suspension or expulsion and to require the documentation to remain on

the transcript for as long as the sanction was applied by the institution's conduct board. In his veto message, Governor Jerry Brown stated that colleges currently have the ability to make a transcript notation for suspension or expulsion and that additional policy in this area is unnecessary.

## STATE POLICY SUMMARIES

This section summarizes state policy actions in New York and Virginia pertaining to the notation of serious code of conduct violations on student transcripts.

**New York.** As part of Assembly Bill 8244 (2015), higher education institutions must include a notation on the transcripts of students who were suspended or expelled after being found responsible for a code of conduct violation that

was violent in nature – including sexual violence. This law applies to institutions chartered by the New York Board of Regents or incorporated by a special act of the legislature that maintains a campus in New York.

The crimes that warrant a transcript notation are those that meet the reporting requirements under the Clery Act, including sexual violence. Institutions must make a notation on a student's transcript if the student withdraws while the conduct charges are pending and declines to complete the disciplinary process. Campuses must publish a policy on transcript notations and an accompanying appeal process for the accused to seek removal of a transcript notation for a suspension; notations for expulsion cannot be removed. If a finding of responsibility for the violation is vacated, the transcript notation must be removed.

**Virginia.** Under Virginia Senate Bill 1193 (2015), public higher education institutions or private colleges and universities that are eligible to receive funds from the state's Tuition Assistance Grant

Program or financing from the College Building Authority are required to include a notation on a student's transcript if he or she has been suspended, has been permanently dismissed, or withdrew while under investigation for a violation of the institution's code of conduct. Campuses must notify students if such documentation is made on their transcripts. Institutions must also adopt procedures to remove the notation from students' records if they are subsequently found not to have been in violation or completed their suspension and determined to be in good standing according to the institution's code of conduct.

### CONSIDERATIONS FOR CAMPUS AND POLICY LEADERS

State policies concerning transcript notation have received increased attention during policy debates about institutional response to campus sexual violence. Although the intent of policy in this area is typically to support clear and consistent

information sharing, several considerations should be addressed as policy makers and institutional leaders navigate the implementation of enacted laws or consider the merits of proposed legislation.

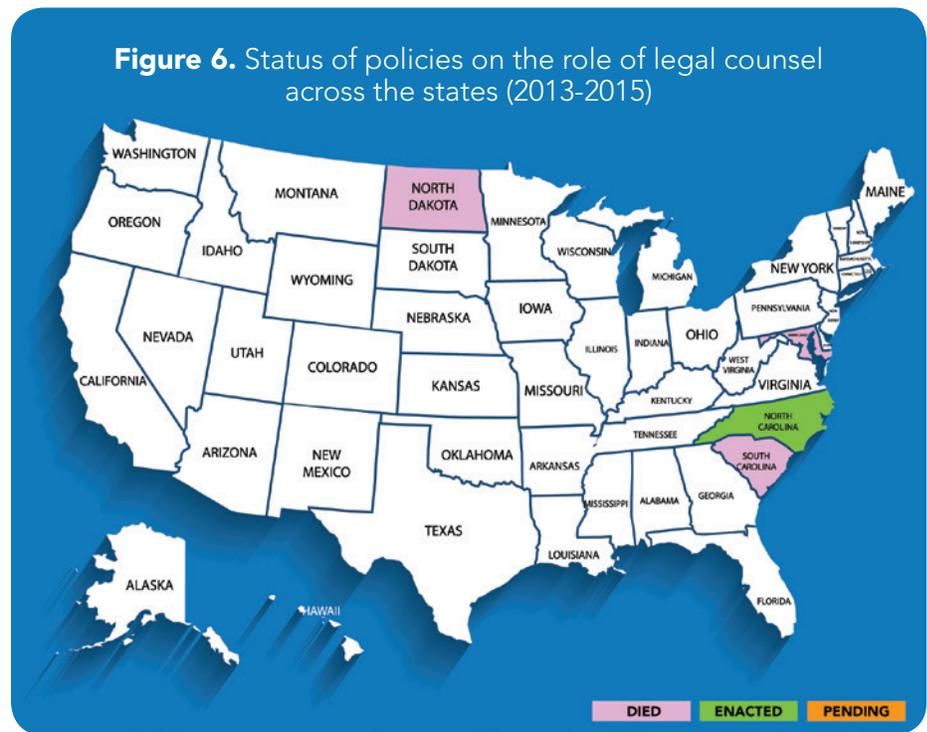
- Definitions of misconduct vary widely among institutions, including for specific violations related to sexual encounters, so the specific nature of the violation might not be clear on the transcript notation. What constitutes a major violation of a campus conduct code is ambiguous and may differ from institution to institution.
- Campus administrators might be concerned about running afoul of the Family Educational Rights and Privacy Act (FERPA; 2015), which dictates the manner in which institutions are allowed to share a student's records with the college to which he or she plans to transfer. However, current FERPA law does grant substantial latitude to institutions to disclose student records to other institutions.

# POLICY THEME: THE ROLE OF LEGAL COUNSEL

**V**iolations of an institution's code of student conduct result in a disciplinary proceeding. The public interest in campus crime—including incidents of sexual violence—has resulted in state-level consideration of students' rights to fair disciplinary processes. As state policy has developed in this area, attention has been given to the formal role legal counsel may play in institutional disciplinary hearings—a distinction from the mere presence of an advisor to consult with a student individually. From 2013 to 2015, the role of legal counsel in the disciplinary process has been deliberated by elected leaders across four states. Deliberations have focused on at least three areas of policy action: First, lawmakers have looked at expanding student due process rights in general. Second, policy makers have sought to expand the engagement of outside legal counsel in institutional hearings. Third, state leaders have proposed legislation to permit either the accused or the survivor (or both) to allow legal counsel to fully participate in campus conduct proceedings (see Table 2).

## THEME OVERVIEW

One state, **North Carolina**, has adopted policy that speaks directly to the role of legal counsel in institutional disciplinary hearings, but a clear definition of this role is not articulated in the law. In addition, three



states—Massachusetts, North Dakota, and South Carolina—introduced legislation in 2014 or 2015 concerning a student's or student organization's right to be represented by an attorney during institutional disciplinary hearings that may result in the suspension or expulsion of the student.

## STATE POLICY SUMMARIES

This section summarizes state policy action pertaining to the role of counsel in campus conduct proceedings in North Carolina.

**North Carolina.** North Carolina's legislation, House Bill 843 of 2013, requires that a student who is accused of violating the institution's disciplinary or conduct rules have the right to be represented

by a licensed attorney or non-attorney advocate who may fully participate during any disciplinary procedure or other procedure regarding the alleged violation. However, a student will not have the right to be represented by a licensed attorney or non-attorney advocate in either of the following circumstances:

- If the institution has implemented a student honor court which is fully staffed by students to address such violations.
- For any allegation of academic dishonesty, as defined by the constituent institution.

The law also provides student organizations recognized by the institution the right to be

represented by a licensed attorney or non-attorney advocate, with similar limitations.

## CONSIDERATIONS FOR CAMPUS AND POLICY LEADERS

Currently, federal regulatory guidance issued by the U.S. Department of Education (ED) provides for students engaged in sexual violence conduct hearings to have an advisor of the student's choice be present during institutional disciplinary proceedings. This includes individuals who may be attorneys or others drawn from the legal profession. However, federal regulation allows institutions to define the roles that advisors may play in disciplinary hearings. The extent of engagement and involvement in the process is a locally based decision and is deemed to be in compliance with federal

regulation as long as it is applied equally and consistently to the accuser and accused (United States Department of Education, 2014). State policy, such as the North Carolina law, deals with the role of the advisor and extends this concept to an advisor representing a student—a meaningful and important distinction. As state leaders consider similar policy actions, it is important to take into account several factors.

The extent to which lawyers can participate in campus disciplinary hearings may be confusing if legislation does not define terms such as *representation* and *fully participate* in clear and implementable language.

The presence of representative legal counsel may undermine the purpose of campus disciplinary hearings that aim to determine whether a student has violated the institution's conduct code and often serve to provide both disciplinary and educational outcomes.

Campus judicial hearings were not created, nor do they intend, to replace or replicate criminal proceedings. The presence of representative legal counsel is likely to fundamentally shift the dynamic of institutional judicial proceedings and outcomes.

Legislation that expands the role of legal counsel in campus judicial conduct hearings raises concerns about a postsecondary institution's ability to maintain compliance with a student's Title IX rights in cases where significant delays in the campus proceedings emerge. The complexity of some campus judicial conduct hearings involving sexual violence does not mitigate an institution's obligation to meet Title IX compliance guidelines. Institutional leaders need to make sure that processes are in place, even in cases where legal counsel has an active role in conduct hearings, to ensure timely completion of hearings in compliance with Title IX requirements.

# CONCLUDING THOUGHTS

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**A**cross many states, institutional leaders are realigning policy and practice to comply with newly enacted state laws that change campus approaches to preventing and handling incidents of sexual violence. In other states, institutional leaders face the prospect that these changes may soon come to their campuses. State policy makers concerned with campus safety, both in general and specifically as it pertains to preventing sexual violence, have taken a number of policy actions, outlined here, to support survivors and provide for what is intended to be a transparent, expedient, and consistent institutional response to these horrific acts.

This brief intends to help both institutional and policy leaders think through key issues on four major policy themes that have emerged from policy dialogue on campus-based sexual violence across the states: affirmative consent, role of law enforcement, transcript notation, and the role of legal counsel. Toward that end, this publication serves as a resource to help raise issues for discussion with state decision makers as they deliberate the merits of these policy themes in their states and campus administrators who seek to implement rules and regulations on their respective campuses. Further, this publication serves as a resource for institutional leaders who need

to navigate distance between the intent of enacted laws and effective strategies to guide implementation within the broader goal to sustain safe, inclusive, and equitable environments for all students.

Given the importance and complexity of this issue, it is imperative that state decision makers join leaders in the higher education community to engage in transparent discussions about effective and credible approaches to address the threat of sexual violence on campus. Getting the policies right on campus-based sexual assault is both a national imperative and duty of care owed to our nation's students.

## Appendix A

### State Legislation in the Four Primary Policy Areas: Enacted, 2013–2015

Primary policy areas				
State	Affirmative consent	Law enforcement	Transcript notation	Role of counsel
California	S.B. 967 (2014)	A.B. 913 (2015) A.B. 1433 (2014)		
Hawaii	S.B. 387 (2015)			
Illinois	H.B. 821 (2015)			
Minnesota		S.F. 5 (2015)		
New York	A.B. 8244 (2015)	A.B. 8244 (2015)	A.B. 8244 (2015)	
North Carolina				H.B. 843 (2013)
Virginia		S.B. 712/H.B. 1930 (2015) H.B. 1785 (2015)	S.B. 1193 (2015)	

## Appendix B

### Four Primary Policy Areas by State:

### Legislation that Died or Was Vetoed, 2013–2015

Primary policy areas				
State	Affirmative consent	Law enforcement	Transcript notation	Role of counsel
Arizona	H.B. 2474 (2015)			
California			A.B. 968 (2015)	
Connecticut	S.B. 636 (2015)			
Delaware		H.B. 1 (2015)		
Iowa	H.F. 390/S.F. 79 (2015)			
Kansas	H.B. 2266 (2015)			
Maryland	H.B. 138 (2015) H.B. 667 (2015) H.B. 839 (2015)	H.B. 749/S.B. 817 (2015) S.B. 578 (2015)	H.B. 749/S.B.817 (2015)	
Massachusetts				H.B. 3492 (2014)
Minnesota	S.F. 2126/H.F. 1689 (2015)			
Missouri	H.B. 412 (2015)	H.B. 595 (2015)		
New Jersey		S.B. 2382/A.B. 3652 (2014)		

Primary policy areas				
State	Affirmative consent	Law enforcement	Transcript notation	Role of counsel
North Carolina	H.B. 815 (2015) S.B. 474 (2015) S.B. 505 (2015)			
North Dakota				S.B. 2150 (2015)
Oklahoma		S.B. 553 (2015)		
Rhode Island		H.B. 5034 (2015)		
South Carolina				H.B. 3453 (2015)
West Virginia	H.B. 2690 (2015)			

Note: The transcript notation bill, A.B. 968, in California was vetoed by the governor. Primary legislation was enacted in seven states. Primary legislation died in 17 states.

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