



SB 1389 Report

Letter of Good Standing

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Background on Virginia Law on Transcript Notations

In 2015, Virginia enacted legislation requiring registrars of public and private institutions of higher education to include notations on student transcripts in situations in which a student was permanently dismissed or suspended as a result of misconduct involving sexual violence, or withdrew from the institution while under investigation for such misconduct. (Va. Code § 23.1-900; full text included in the appendix). By providing a mechanism to alert institutions about problems during the transfer process, the law seeks to prevent bad actors from avoiding the consequences of their actions at one institution and potentially reoffending at a new location.

In the 2017 Virginia General Assembly session, Senator Monty Mason introduced SB1389, which would have amended Code § 23.1-900 to add a duty of each registrar to require that the dean of students or similar individual of any institution, within or outside the Commonwealth, to submit a letter of good standing of any student who seeks admission. The bill was passed by indefinitely by the Senate Committee on Education and Health; however, the State Council of Higher Education for Virginia (SCHEV) was requested by the Senate clerk to study the subject matter of the bill and to submit a report by November 1, 2017.

As introduced, the bill raised the following concerns for SCHEV and the higher education community:

1. Virginia cannot grant its institutions of higher education authority over out-of-state institutions to mandate compliance with any particular process.
2. In the absence of authority over an out-of-state transferring institution, a requirement to obtain a letter would essentially devolve to the applicant. In instances in which the applicant's previous institution refused to provide a letter or did not provide one in a timely manner, the Virginia institution would be prohibited from accepting the student. This would be an unwelcome constraint on institutional decision-making regarding admissions and have a chilling effect on transfer applications and have a detrimental effect on enrollment goals.
3. Virginia Code § 23.1-900 has drawn criticism due to the permanent stigma of the notation that implicates a protected property interest and, therefore, increases the risk of lawsuits claiming denial of due process to students who face adverse

disciplinary action related to allegations of sexual violence. Adding another requirement, such as a letter of good standing, may serve only to increase such risk.

National Landscape

Currently New York and Virginia are the only states with provisions regarding transcript notations for students who have been found responsible for an offense involving sexual violence. However, in 2016, The Safe Transfer Act was introduced in the U.S. Congress, which would “amend the Family Educational Rights and Privacy Act of 1974 to require the notification of institutions of postsecondary education of public safety concerns.”¹ In all of these cases, the notation would expire after a set period of time, typically five years.

In the state of New York, the 2015 transcript notation law was part of comprehensive sexual violence legislation. It states,

“For crimes of violence, including, but not limited to sexual violence, defined as crimes that meet the reporting requirements pursuant to the federal Clery Act established in 20 U.S.C. 1092(f)(1)(F)(i)(I)-(VIII), institutions shall make a notation on the transcript of students found responsible after a conduct process that they were ‘suspended after a finding of responsibility for a code of conduct violation’ or ‘expelled after a finding of responsibility for a code of conduct violation.’ For the respondent who withdraws from the institution while such conduct charges are pending, and declines to complete the disciplinary process, institutions shall make a notation on the transcript of such students that they ‘withdrew with conduct charges pending.’ Each institution shall publish a policy on transcript notations and appeals seeking removal of a transcript notation for a suspension, provided that such notation shall not be removed prior to 34 one year after conclusion of the suspension, while notations for expulsion shall not be removed. If a finding of responsibility is vacated for any reason, any such transcript notation shall be removed. This provision requires all institutions to place notations on transcripts of students when two factors are met:

¹ <https://www.congress.gov/bill/114th-congress/house-bill/6523>

- The student is found responsible, after a process (or takes responsibility) for a code of conduct violation that is equivalent to the definitions for Clery Act Part I Primary Crimes; and
- The student is expelled, suspended, and/or withdraws with conduct charges pending. Institutions may (but are not required to) place notations on transcripts for other violations, but must at a minimum place notations when the two factors above are met.”²

All transcript notations must appear on the actual transcript, and not on a separate and detachable letter or piece of paper. The notation is required for a violation of the code of conduct and applies to all violations that occur on campus, off campus, or while studying abroad. Violations include (but are not limited to): murder; manslaughter; rape, fondling, incest and statutory rape, robbery, aggravated assault, burglary, motor vehicle theft, and arson. Institutions may, but are not required to, include transcript notations for additional violations.³

Nationally, United States Representative Jackie Speier (D-CA) introduced legislation in 2016 entitled the Safe Transfer Act, which would require a notation on a student’s transcript regarding violations of a school’s sexual assault policy for five years.⁴ This would require colleges and universities nationwide to disclose any disciplinary findings specific to sexual harassment or sexual violence to any other institution of higher education, should the student apply. The legislation would also prevent a student from transferring before their disciplinary findings were complete by providing a notation on their transcript for one year regarding the open case.

The Association of Title IX Administrators (ATIXA) endorses the Safe Transfer Act by supporting the “notation of the academic transcript of any student duly found by a college or university to have committed acts of serious sexual misconduct.”⁵ However, ATIXA has several recommendations for changes to the law including clarification over what the notation should specifically state, as well as a timeline for withdrawal notations. They also express concern over “costly and laborious” task for college and

² <https://www.nysenate.gov/legislation/bills/2015/S5965>

³ <https://www.nysenate.gov/legislation/bills/2015/S5965>

⁴ <https://www.congress.gov/bill/114th-congress/house-bill/6523>

⁵ https://speier.house.gov/sites/speier.house.gov/files/wysiwyg_uploaded/2016NovemberATIXA%20SAFE%20TRANSFER%20ACT.pdf

university registrars to track transcript notations, an increase in lawsuits over transcript notations, and a chilling effect on reporting by victims of sexual misconduct.

Additionally, the association states:

“ATIXA does not suggest that students be excluded from admission solely on the basis of notation, but that colleges and universities should be empowered by the tool of transcript notation to make more informed vetting decisions on the eligibility of any candidate for admission. Because transcripts most often pass directly between schools, the transcript offers the best opportunity for information to be shared without a student’s interference and with minimal burden to administrations.”⁶

Current Practice in Virginia Institutions

SCHEV conducted a survey of Virginia’s public and private non-profit institutions during the summer of 2017 regarding implementation of § 23.1-900 and admissions practices for transfer students. The following questions were asked:

1. *What is or are the relevant notation(s) used by your institution to fulfill this mandate?*
2. *Has your institution developed a process by which a student who received such a notation may appeal to have it removed even though the circumstances described in §23.1-900 do not exist (e.g., after a certain period of time and under certain conditions)?*
3. *Does your institution request that applicants disclose disciplinary proceedings and/or findings at other educational institutions they attended?*
4. *Does your institution conduct any type of investigation of applicants whose applications reveal prior disciplinary proceedings and/or findings? If so, please describe.*
5. *What else would the institution like to share / i.e., what are we not asking?*

⁶ Ibid.

Responses were received from 12 public four-year institutions, the Virginia Community College System, Richard Bland College, and 15 private, non-profit institutions. Results are summarized as follows:

- All public and private institutions that responded to the survey are compliant with the requirements of §23.1-900.
- Institutions do not permit expungement or removal of the transcript notation other than in the explicit circumstances provided in the section.
- Virginia institutions request that freshman and transfer applicants disclose disciplinary histories and criminal convictions. The common application used by all Virginia public institutions and many privates, includes such questions.
- Most institutions conduct a follow-up inquiry/investigation if an applicant reveals a prior crime or disciplinary action at a previous institution. Actions include one or more of the following:
 - Requesting that the applicant provide a written statement of the details of the incident and/or documentation;
 - Admissions personnel discuss with upper level administrators, Chief of Police, Title IX coordinator, and/or counsel;
 - Request that the applicant interview with a university official;
 - Request that the applicant provide a FERPA release for records from the previous institution;
 - Committee review and background check;
 - If the situation involves violence, drugs, a weapon or anything that would threaten the safety of the community, referral to a committee of upper level administrators (or the Threat Assessment Team (TAT)), who may request further information or recommend the student be admitted with stipulations;
 - Dean of Students takes the lead on evaluating the situation and discussing with relevant officials;
 - Contacting prior institution and localities for further information;
 - Examining transcripts for any note indicating the student was dismissed or suspended and following up to determine circumstances;
 - Asking for a Dean's letter (letter of good standing) from the previous institution.

Challenges

The lack of an appeals procedure for removal of the transcript notation has left Virginia institutions vulnerable to lawsuits from students who claim the notation is a violation of their civil rights. Amending the law to add an additional requirement may provide such litigants a further cause of action.

Three former students of Liberty University have filed lawsuits in either U.S. District Court or Lynchburg Circuit Court against the university and other related personnel for allegedly violating their Title IX rights.⁷ One of the lawsuits, which seeks over \$100 million in damages, describes how a former Liberty student's transcript was notated with a violation of Liberty's sexual harassment and sexual assault policies, in addition to other student conduct violations. Based on this notation, upon transfer to a new school, the student was banned from extracurricular activities, removed from the football team, and placed under curfew. All three former students are also suing for defamation, which is related to a news release issued by the school regarding the students' dismissal.

One of the lawsuits seeks a "declaratory judgment from [Liberty University] that would reverse the finding of the Conduct Review Committee, restore his reputation, expunge his disciplinary record, remove the transcript notation and administrative withdrawal from his academic file, destroy any record of the formal Title IX hearing or appeal, and have [Liberty University] acknowledge its 'regulations, and guidelines are unconstitutional as applied.'"⁸

Conclusion

The introduced bill, SB 1389, was well-intentioned in trying to prevent individuals with previous behavioral problems from attending Virginia's institutions of higher education. The original language in the bill purported to grant authority over the actions of out-of-state institutions, which would have been null and void. A more rational wording would instead direct institutions to require an applicant to acquire the

⁷ http://www.newsadvance.com/news/local/update-third-lawsuit-filed-against-liberty-university-over-title-ix/article_23f42ee0-9721-11e7-bf66-3733fde42ab3.html

⁸ Ibid.

letter of good standing from his previous institution. However, such a policy is concerning to SCHEV and the Virginia higher education community because it erodes institutional autonomy in admissions decisions and could result in the unjust rejection of an otherwise qualified transfer applicant who could not force a previous institution to produce a letter.

Based on the results of the survey, institutions have a number of methods of vetting applicants for misconduct issues. Depending in the nature of the disciplinary issue identified, there is a range of inquiry and investigation that occurs prior to accepting an applicant who presents “red flags”. Admissions officers take note of disclosures and request further information from the student and their prior institution. Potentially serious issues, including an indication that the student was involved in sexual misconduct, may precipitate consultation with threat assessment teams, legal counsel, and law enforcement.

Current practices have an inherent weakness, in that institutions are dependent upon the applicant to provide honest responses to the application questions. However, the practice of requiring a letter of good standing also depends on an applicant being forthright about having attended another institution. A dishonest applicant with past disciplinary issues could well apply to a new institution without seeking transfer credit, thus not disclosing any information about their history.

Appendix

§ 23.1-900. Academic transcripts; suspension, permanent dismissal, or withdrawal from institution.

A. As used in this section, "sexual violence" means physical sexual acts perpetrated against a person's will or against a person incapable of giving consent.

B. The registrar of each (i) private institution of higher education that is eligible to participate in the Tuition Assistance Grant Program pursuant to the Tuition Assistance Grant Act (§ 23.1-628 et seq.) or to receive project financing from the Virginia College Building Authority pursuant to Article 2 (§ 23.1-1220 et seq.) of Chapter 12 and (ii) public institution of higher education, or the other employee, office, or department of the institution that is responsible for maintaining student academic records, shall include a prominent notation on the academic transcript of each student who has been suspended for, has been permanently dismissed for, or withdraws from the institution while under investigation for an offense involving sexual violence under the institution's code, rules, or set of standards governing student conduct stating that such student was suspended for, was permanently dismissed for, or withdrew from the institution while under investigation for an offense involving sexual violence under the institution's code, rules, or set of standards. Such notation shall be substantially in the following form: "[Suspended, Dismissed, or Withdrew while under investigation] for a violation of [insert name of institution's code, rules, or set of standards]." Each such institution shall (a) notify each student that any such suspension, permanent dismissal, or withdrawal will be documented on the student's academic transcript and (b) adopt a procedure for removing such notation from the academic transcript of any student who is subsequently found not to have committed an offense involving sexual violence under the institution's code, rules, or set of standards governing student conduct.

C. The institution shall remove from a student's academic transcript any notation placed on such transcript pursuant to subsection B due to such student's suspension if the student (i) completed the term and any conditions of the suspension and (ii) has been determined by the institution to be in good standing according to the institution's code, rules, or set of standards governing such a determination.

D. The provisions of this section shall apply only to a student who is taking or has taken a course at a public institution of higher education or private institution of higher education on a campus that is located in the Commonwealth; however, the provisions of this section shall not apply to any public institution of higher education established pursuant to Chapter 25 (§ 23.1-2500 et seq.).

2015, c. 771, § 23-9.2:18; 2016, c. 588.