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FISCAL AND POLICY NOTE
First Reader

Senate Bill 607 (Senator Conway, *et al.*)
Education, Health, and Environmental Affairs

Higher Education - Sexual Assault Policy - Disciplinary Proceedings Policy

This bill requires the governing body of each institution of higher education to adopt and submit a revised sexual assault policy that includes a disciplinary proceedings policy that meets specified requirements by August 1, 2019. Unless the disciplinary proceedings under the bill will not result in the expulsion of a student as specified, the policy must require that counsel be provided for each student alleging a violation of the sexual assault policy *and* each student responding to an allegation. Further, in such a case, the Maryland Higher Education Commission (MHEC) must pay reasonable costs and attorney's fees for a student that is entitled to counsel under the bill and is indigent and unable to retain counsel.

Fiscal Summary

State Effect: General fund expenditures increase, potentially significantly as explained below, to pay reasonable costs and attorney's fees for specified students. Public institutions of higher education expenditures increase to implement the required disciplinary proceedings; however, some of these costs may be partly offset as explained below. Revenues are not affected.

Local Effect: Local community college expenditures increase to implement the required disciplinary proceedings; however, some of these costs may be partly offset as explained below. Revenues are not affected.

Small Business Effect: None.

Analysis

Bill Summary: The disciplinary proceedings policy must include a description of the rights of a student who alleges a violation of or a student who responds to an allegation of a violation of the institution's sexual assault policy, including:

- treatment with dignity, respect, and sensitivity by officials of the institution of higher education during all phases of the disciplinary proceedings;
- a timely investigation;
- disciplinary proceedings that are fair and impartial and provide a meaningful opportunity for the alleged victim and the alleged violator to be heard;
- timely written notice of specified matters, including the student's rights and responsibilities under the sexual assault policy and applicable law;
- participation in the disciplinary proceedings, including access to the case file and evidence;
- assistance by a licensed attorney, an advocate supervised by an attorney, or an advocate certified by the federally recognized State sexual assault coalition throughout the disciplinary proceedings, as specified; and
- the presence of a personal supporter of the student's choice, in addition to an attorney or advocate, at any hearing, meeting, or interview during the disciplinary proceedings.

Further, the disciplinary proceedings policy must require:

- the institution of higher education to provide each student involved in disciplinary proceedings with specified notice, at least 10 days before the start of the disciplinary proceedings; and
- the use of the same standard of proof used in other disciplinary proceedings at the institution of higher education for allegations of discrimination or harm to another individual.

The disciplinary proceedings policy must prohibit:

- the institution of higher education from using mediation to resolve an allegation of a violation of the institution's sexual assault policy;
- the adjudicating official or body from considering specified evidence, including an alleged victim's prior sexual history; and
- the adjudicating official or body from finding that all students involved violated the sexual assault policy, except in specified circumstances.

Current Law: Since 1993, all institutions of higher education in the State, including local community colleges and public and private four-year institutions, have been required to have sexual assault policies. Chapter 436 of 2015 specifically requires the sexual assault policies of higher education institutions in the State to comply with Title IX of the Education Amendments of 1972 and to include additional specified procedures and provisions.

Background: In recent years, a number of high-profile incidents of sexual violence at institutions of higher education have heightened scrutiny of the policies and procedures that institutions use to address sexual violence on campus. The policies and procedures developed in response to campus sexual violence, including campus discipline hearings, are now receiving scrutiny.

In April 2011, U.S. Department of Education (ED), released a [Dear Colleague Letter](#) regarding institution responsibility regarding sexual violence. This letter and the accompanying [Q&A document](#) were withdrawn on September 2017, stating, “the withdrawn documents ignored notice and comment requirements, created a system that lacked basic elements of due process and failed to ensure fundamental fairness.” At that time ED released an [interim Q&A document](#) regarding the topic and announced its intention to engage in rulemaking on Title IX responsibilities arising from complaints of sexual misconduct in the next few months. ED further advised that it will continue to rely on its Revised Sexual Harassment Guidance, which was issued in 2011, as well as the Dear Colleague Letter on Sexual Harassment issued on January 25, 2006.

Chapter 436 of 2015 requires Maryland colleges and universities to conduct surveys and report incidents of sexual assault and other sexual violence.

State Expenditures: The bill requires MHEC to pay reasonable costs and attorney’s fees for a student who is entitled to counsel under the bill and is indigent and unable to retain counsel; thus, general fund expenditures increase, potentially significantly. Actual expenditures cannot be reliably estimated; however, *for illustrative purposes only*, if MHEC pays private attorneys to represent indigent students the current rate that such attorneys receive from the Office of the Public Defender (OPD) for representing indigent individuals, general fund expenditures increase by \$50 per hour of attorney time. As explained below, the total costs cannot be reliably estimated.

- The number of hours MHEC will need to pay cannot be reliably estimated. However, according to the 2016 report, [Report on Campus Climate and Sexual Violence at Maryland Colleges and Universities](#), during the 2015-2016 academic year, there were 205 formal complaints at public institutions of higher education. These complaints would involve at least 410 individuals.

- Given the information explained below, it is assumed that 50% of college students are indigent. Under this assumption, 205 students at public institutions of higher education would have qualified for representation by an attorney provided by MHEC.
- The bill requires MHEC to pay for counsel for students at any institution of higher education, include private nonprofit institutions.
- The average length of a sexual assault disciplinary hearing and attorney preparation time is unknown, and it will depend on the complexity of the particular case.

For informational purposes, an individual may apply for OPD services as an indigent individual if the individual states in writing, under oath or affirmation, that the individual, without undue financial hardship, cannot provide the full payment of an attorney and all other necessary expenses of representation in specified proceedings. For an individual whose assets and net annual income are less than 100% of the federal poverty guidelines, eligibility for OPD services may be determined without an assessment regarding the need of the applicant. For an individual whose assets and net annual income equal or exceed 100% of the federal poverty guidelines, eligibility for OPD services must be determined by the need of the applicant.

For 2018, an individual earning less than \$12,140 is at 100% the federal poverty guidelines. It is unknown if family assets will be taken into account by MHEC in determining eligibility. The poverty rate for college students is unknown and is hard to determine because students may be receiving support from loans or family in addition to working. However, academic research on the topic suggests that 50% of students face food insecurity, a good indication that an individual is indigent.

Public institutions of higher education expenditures increase to implement the required disciplinary proceedings. According to the [*Report on Campus Climate and Sexual Violence at Maryland Colleges and Universities*](#), 151 formal complaints were filed at public four-year institutions of higher education during the 2015-2016 academic year. Costs for institutions likely will include legal counsel to ensure that the disciplinary proceedings meet the requirements of the bill. However, some of these costs may be partly offset by fewer lawsuits by students who claim that they have been falsely accused. United Educators, a risk-management and insurance firm, reviewed dozens of cases from 2011 to 2015 in which colleges filed claims with the company involving accused students and eventually suffered financial losses. On average, United Educators and colleges ended up paying \$187,000 per case.

Local Expenditures: Local community college expenditures increase to implement the required disciplinary proceedings; however, as explained above, any costs and potential

savings due to fewer lawsuits cannot be reliably estimated. According to the [*Report on Campus Climate and Sexual Violence at Maryland Colleges and Universities*](#), 54 formal complaints were filed at community colleges, including the State-run Baltimore City Community College, during the 2015-2016 academic year.

Additional Comments: Private nonprofit institutions of higher education may incur similar costs to implement the bill as public institutions of higher education.

Additional Information

Prior Introductions: None.

Cross File: HB 913 (Delegate A. Miller, *et al.*) - Appropriations.

Information Source(s): Maryland Higher Education Commission; Baltimore City Community College; St. Mary's College of Maryland; Morgan State University; Maryland Independent College and University Association; U.S. Department of Education; Department of Legislative Services

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