

Department of Legislative Services  
Maryland General Assembly  
2015 Session

FISCAL AND POLICY NOTE

House Bill 839 (Delegate Morales)  
Judiciary and Appropriations

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**Education - Institutions of Higher Learning - Affirmative Consent Standard**

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This bill requires, by September 1, 2016, that the written sexual assault policy of each institution of higher education in the State (1) include an affirmative consent standard; (2) include a statement that contains specified elements; (3) provide that specified circumstances are not a valid excuse to allege lack of affirmative consent; and (4) use a preponderance of the evidence standard to determine if a complaint against an accused has been demonstrated. “Affirmative consent” is defined as clear, unambiguous, knowing, informed, and voluntary agreement between all participants to engage in sexual activity.

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**Fiscal Summary**

**State Effect:** The University System of Maryland (USM) institutions, Morgan State University (MSU), St. Mary’s College of Maryland (SMCM), and Baltimore City Community College (BCCC) can update their sexual assault policies as required using existing resources. The Maryland Higher Education Commission (MHEC) can review the policies within existing resources.

**Local Effect:** Local community colleges can update their sexual assault policies as required using existing resources.

**Small Business Effect:** None.

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## Analysis

**Bill Summary:** Specifically, the sexual assault policy must include a statement that:

- it is the responsibility of each individual involved in the sexual activity to ensure that the individual has the affirmative consent of the other or others to engage in the activity;
- affirmative consent is active, not passive;
- lack of protest, resistance, or silence does not mean consent;
- affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time; and
- the existence of a dating relationship between the individuals involved, or the fact of past sexual activity between the individuals involved, should never by itself be assumed to be an indicator of consent.

The policy must provide that it is not a valid excuse to an alleged lack of affirmative consent that the accused believed that the complainant consented to the sexual activity if:

- the accused's belief arose from the intoxication or recklessness of the accused;
- the accused's belief arose from a failure to take reasonable steps to ascertain whether the complainant affirmatively consented; or
- the accused knew or reasonably should have known that the complainant was unable to consent to the sexual activity because the complainant was asleep or unconscious; 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; or unable to communicate due to a mental or physical condition.

**Current Law:** An "institution of higher education" is defined in statute as an institution of postsecondary education that generally limits enrollment to graduates of secondary schools and awards degrees at either the associate, baccalaureate, or graduate level. It includes public, private nonprofit, and for-profit institutions of higher education.

"Institution of postsecondary education" is defined as a school or other institution that offers an educational program in the State for individuals who are at least 16 years old and who have graduated from or left elementary or secondary school, *i.e.*, private career schools. Not included in the definition are any adult education, evening high school, or high school equivalence program conducted by a public school system of the State or any apprenticeship or on-the-job training program subject to approval by the Apprenticeship and Training Council.

By August 1, 1993, the governing board of each institution of higher education was required to adopt and submit to MHEC a written policy on sexual assault. The adopted policy must apply to each student, faculty member, and employee of the institution and inform the students, faculty members, and employees of their rights and duties under the policy. Each institution of higher education must post at appropriate locations on each campus and distribute to its students, faculty members, and employees a copy of the policy. Each institution of higher education was also required to *implement* the policy adopted.

The sexual assault policy must conform to the appropriate provisions of the Higher Education Act of 1965 and the Higher Education Amendments of 1992 and must include procedures for reporting an incident of sexual assault and for taking disciplinary actions against a violator of the policy. Specifically, the policy must include provisions for the following:

- informing a victim of a sexual assault of the right to file criminal charges with the appropriate law enforcement official;
- the prompt assistance of campus authorities, at the request of the victim, in notifying the appropriate law enforcement officials and disciplinary authorities of an incident of sexual assault;
- designation of the nearest hospitals equipped with the Department of State Police Sexual Assault Evidence Collection Kit;
- full and prompt cooperation from campus personnel in obtaining appropriate medical attention, including transporting the victim to the nearest designated hospital;
- offering counseling to a victim of sexual assault from mental health services provided by the institution, other victim service entities, or the nearest State-designated rape crisis program; and
- after a campus sexual assault has been reported, and upon the request of the alleged victim, the transfer of the alleged victim to alternative classes or housing, if such alternatives are available and feasible.

MHEC must coordinate the development of the sexual assault policies and periodically review and make recommendations for changes in these policies.

Title IX of the federal Education Amendments of 1972 protects people from discrimination on the basis of gender in education programs at higher education institutions that receive federal student assistance.

The federal Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act of 1990 requires institutions of higher education across the United States to disclose information about crime on and around their campuses. The law is tied to an

institution's participation in federal student financial aid programs, and it applies to most institutions of higher education, both public and private.

The law was amended in 1992 to add a requirement that schools afford the victims of campus sexual assault certain basic rights, and it was amended again in 1998 to expand the reporting requirements. The 1998 amendments also formally named the law in memory of Jeanne Clery, a 19-year-old LeHigh University student who was raped and murdered in her campus residence hall in 1986. Subsequent amendments in 2000 and 2008 added provisions dealing with registered sex offender notification and campus emergency response. The 2008 amendments also added a provision to protect crime victims, "whistleblowers," and others from retaliation.

In 2013, the Campus Sexual Violence Elimination Act, or Campus SaVE Act, amended the Clery Act to require colleges and universities participating in federal student aid programs to expand the scope of their reporting, response, and prevention education requirements around rape, acquaintance rape, domestic violence, dating violence, sexual assault, and stalking. Institutions were required to implement Campus SaVE Act requirements no later than October 1, 2014 – in effect by the 2014-2015 academic year.

**Background:** One in five women is sexually assaulted while in college, according to the widely cited *Campus Sexual Assault Study* funded by the National Institute for Justice, which is based on the results of a 2006 survey of undergraduate women at two large public institutions. The study also found that most of the incidents happened at parties, usually off campus; a majority had been drinking and/or using drugs at the time; and a low percentage of victims reported incidents.

Under federal law, a school is obligated to act when it knows or reasonably should have known that one of its students has been sexually assaulted. Furthermore, a school is charged with providing a safe learning environment for all students and giving victims the help needed to reclaim their education. As part of Title IX, schools that receive federal financial assistance are required to take the necessary steps to prevent sexual assault on their campuses and respond promptly and effectively when an assault is reported.

MHEC has had statutory responsibility (Section 11-601 of the Education Article) since 1993 to review sexual assault policies and how those policies should be posted and distributed in Maryland. In summer 2014, MHEC began requesting all institutions' sexual assault policies, and by January 2015 had reviewed all public and independent institution policies to ensure their compliance with Title IX.

The USM Board of Regents approved a new policy on sexual misconduct on June 27, 2014. The policy includes an affirmative consent standard. SMCM's sexual assault policy includes an effective consent standard, which is similar to affirmative consent. MSU's and BCCC's sexual assault policies do not specifically address consent.

**Appendix – Campus Sexual Assault** provides more detailed information regarding the following:

- campus sexual assault statistics;
- federal laws and enforcement;
- reported aggravated and sexual assault crimes in Maryland;
- colleges and universities under investigation;
- campus sexual assault legislation in other states;
- campus sexual misconduct policies and MHEC; and
- sexual assault policies of colleges and universities in the State.

**Additional Comments:** The Maryland Independent College and University Association advises that the necessary discovery and investigative efforts required pursuant to a sexual assault complaint increase under the bill, which increases the cost of an investigation and any resulting litigation.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Baltimore City Community College, Maryland Higher Education Commission, Maryland Independent College and University Association, Morgan State University, St. Mary's College of Maryland, University System of Maryland, Clery Center for Security on Campus, Department of Legislative Services

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## Appendix – Campus Sexual Assault

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### *Campus Sexual Assault Statistics*

One in five women is sexually assaulted while in college, according to the widely cited *Campus Sexual Assault Study* funded by the National Institute for Justice, which is based on the results of a 2006 survey of undergraduate women at two large public institutions. The study also found that most of the incidents happened at parties, usually off campus; a majority had been drinking and/or using drugs at the time; and a low percentage of victims reported incidents. These findings were similar to a December 2014 U.S. Department of Justice (DOJ) special report on *Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013*, which also found that the rate of sexual assault was lower for students compared to nonstudents. Furthermore, a recently released report from United Educators (UE), *Confronting Campus Sexual Assault: An Examination of Higher Education Claims*, studied 304 claims filed between 2011 and 2013 from 104 institutions, which further supported the previous findings. Findings included that 90% of the victims knew the perpetrator, 60% of the sexual assaults occurred on campus, 41% involved off-campus parties, 78% involved alcohol, nearly three of four victims were freshmen or sophomores, and 40% delayed reporting by almost a year. These factors highlight the need to educate and change the culture to not only prevent sexual assaults to begin with but to create an atmosphere where victims feel comfortable in coming forward.

### *Federal Laws and Enforcement*

While some victims may report incidents to the police, others may first turn to the university for help or recourse. Under federal law, a school is obligated to act when it knows or reasonably should have known that one of its students has been sexually assaulted. Furthermore, a school is charged with providing a safe learning environment for all students and giving victims the help needed to reclaim their education.

As part of Title IX of the federal Education Amendments of 1972, which protects people from discrimination based on gender in education programs, schools that receive federal financial assistance are required to take the necessary steps to prevent sexual assault on their campuses and respond promptly and effectively when an assault is reported. In addition, the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics of 1990 (Clery Act) requires institutions participating in federal financial aid programs to annually report statistics on crime including sexual assault and rape on or near their campuses, and to develop and disseminate prevention policies. Last year, the U.S. Department of Education (ED) proposed new rules to the Clery Act that include a requirement that institutions provide education and awareness programs and improve security policies. While the rules do not go into effect until July 2015, according to a

White House task force, institutions are expected to make a good faith effort now to meet the new rules.

ED's Office for Civil Rights (OCR) is charged with administrative enforcement of Title IX. Investigations are initiated either by an individual complaint or a federal decision to examine records and policies called a compliance review. If a violation is found, an institution is at risk of losing its federal funds, but first OCR must seek a voluntary resolution with the institution. Through this process, the institution enters into an agreement with OCR to take steps to remedy the problem. In addition, DOJ, which is responsible for coordinating enforcement of Title IX across all federal agencies, shares authority with OCR for enforcing Title IX and may initiate an investigation or compliance review of institutions receiving DOJ financial assistance.

The White House Task Force to Protect Students from Sexual Assault was established on January 22, 2014, to strengthen federal enforcement efforts and provide schools with additional tools to help combat sexual assault on campus. The task force issued a report, *Not Alone*, in April 2014, which included recommendations on identifying the problem by conducting campus climate surveys, preventing sexual assault and engaging men in prevention, responding effectively to assault, and increasing transparency and improving enforcement. A website, [NotAlone.gov](http://NotAlone.gov), was launched in 2014 that makes enforcement data public and provides resources to students and schools. For schools, there is guidance on their federal obligations, best available evidence and research on prevention programs, and a guide to drafting policies including a checklist highlighting elements that should be included in any policy. For students, the website provides an explanation of their rights, how to file a complaint, and what they should expect throughout the process.

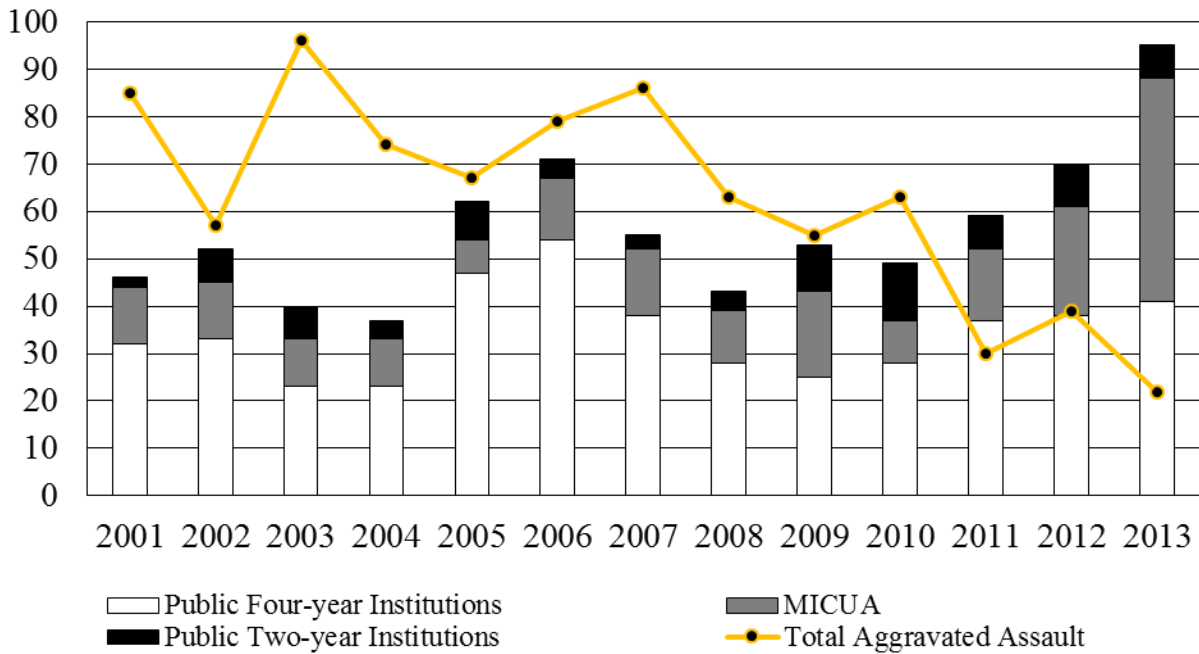
The issue of sexual assault on campuses has been controversial as institutions grapple with revising their policies in ways that are fair to both accusers and the accused. Around the country, women and men have filed Title IX lawsuits against institutions charging they were not taken seriously enough or were dealt with too harshly because of their gender. This is partly due to the Title IX requirement that institutions promptly and fairly investigate reports of sexual assault, regardless of whether the police are involved.

Of the 304 claims UE studied, 28% resulted in lawsuits against the institution and 28% led to federal Title IX complaints. All the federal complaints and about 40% of the lawsuits were filed by the victim. Lawsuits filed by the alleged perpetrator generally argued the disciplinary process had discriminated against them, and the penalties had been harsh and disproportionate. It was also found that institutions investigated three quarters of the complaints; those that were not investigated were due to the victim not being cooperative, an inability to identify the alleged perpetrator, or the student withdrawing the complaint.

*Reported Aggravated and Sexual Assault Crimes in Maryland*

**Exhibit 1** shows campus crime statistics in Maryland for sexual assault and aggravated assault for all years currently available from ED. Overall, during this time period, reported cases of aggravated assault dropped from approximately 80 cases per year down to less than half that number in 2011 through 2013. Meanwhile, reported cases of sexual assault at Maryland campuses increased rapidly from 2010 through 2013, especially at private, nonprofit institutions affiliated with the Maryland Independent College and University Association (MICUA). Whether this represents an increase in the incidence of sexual assaults or an improvement in reporting crimes cannot be determined from this data.

**Exhibit 12**  
**Reported Aggravated and Sexual Assault Crimes in Maryland**  
**Reporting Years 2001-2013**



MICUA: Maryland Independent College and University Association

Note: Includes crimes whose locations were reported as “campus” and “noncampus.” Educational sectors not shown accounted for no more than one sexual assault and three aggravated assaults in any given reporting year and so are excluded from this exhibit.

Source: U.S. Department of Education, *Campus Safety and Security Data Analysis Cutting Tool*



### *Colleges and Universities under Investigation*

As of February 2015, 96 colleges and universities nationwide, of which almost all are residential four-year institutions, were under investigation by OCR. An investigation can be triggered by an individual complaint or a decision of OCR to review a particular institution's record. In Maryland, three public institutions of higher education (*i.e.*, Frostburg State University, Morgan State University (MSU), and St. Mary's College of Maryland (SMCM)) and one independent institution of higher education (*i.e.*, Johns Hopkins University) are currently under investigation by OCR.

### *Campus Sexual Assault Legislation in Other States*

In September 2014, California passed a "Yes Means Yes" bill, upending the prior "No Means No" standard frequently used to determine consent in sexual relations. While codifying human sexual behavior is not without complexity, the California measure requires "affirmative consent" and lists situations in which a person cannot legally give consent.

As of January 2015, Maryland and at least seven other states had similar legislation introduced (*i.e.*, Arizona, Connecticut, Hawaii, Iowa, Missouri, New Jersey, and New York). In Oklahoma, a bill has been introduced that would require the idea of affirmative consent to be taught in high school sex education classes; an Indiana bill adds the definition of affirmative consent to criminal law, which would apply to all sexual assault cases, not just those on college campuses.

### *Campus Sexual Misconduct Policies and the Maryland Higher Education Commission (MHEC)*

MHEC has had statutory responsibility (Section 11-601 of the Education Article) since 1993 to review campus sexual assault policies and how those policies should be posted and distributed in Maryland. This includes the right to file criminal charges, designation of the nearest hospital, *etc.* MHEC must also periodically review and make changes to institutional policies to ensure that higher education institutions in Maryland are in compliance with federal regulations and are adopting best practices.

In summer 2014, MHEC began requesting all institutions' sexual assault policies. By January 2015, MHEC had reviewed all public and independent institutions in the State to ensure that all institutions are in compliance with federal Title IX. MHEC has requested that each institution revise its policies consistent with OCR best practices.

In addition to reviewing policies, MHEC, in conjunction with the Maryland Association of Community Colleges, held an all-day workshop for community colleges on sexual violence

in January 2015. This covered definitions of key terms, case studies of campus policies, and reporting and adjudicating procedures. Maryland's criminal code does not specifically define some terms frequently used in Title IX and Clery discussions, such as sexual assault, domestic violence, dating violence, or consent, so the workshop was able to assist community colleges in meeting federal intent. This was very beneficial to smaller campuses, namely community colleges, that do not necessarily have full-time legal representation on staff. This ensures that new policies are more inclusive and will bring institutions into compliance with the next round of federal regulations, which take effect in summer 2015. These changes expand rights afforded to campus survivors of sexual assault, expand reporting for such incidents, and require institutions to provide certain training programs. They also expand the types of crimes covered in the Annual Security Report each institution must file under the Clery Act and require institutions to report the number of withheld crime statistics. Finally, complicating implementation of sexual assault policies has been compliance with the Family Educational Rights and Privacy Act (FERPA), which governs access to education records but allows disclosure of criminal conduct. Online federal resources provide materials explaining how institutions are to comply with Title IX, the Clery Act, and FERPA. While MICUA institutions were not included in this directly, Goucher College did provide resources and examples for the two-year sector.

#### *University of System of Maryland (USM) Policies on Sexual Misconduct and Consent*

The USM Board of Regents approved a new policy on sexual misconduct on June 27, 2014. The policy covers all students, faculty, and staff of USM institutions. USM institutions may adopt their own definitions that do not conflict with the USM policy; however, institutions were strongly encouraged, at a minimum, to adopt the definitions in the USM policy.

In the USM policy, **consent** is defined as knowing, voluntary, and affirmatively communicated willingness to mutually participate in a particular sexual activity or behavior. It must be given by a person with the ability and capacity to exercise free will and make a rational and reasonable judgment. Consent may be expressed either by affirmative words or actions, as long as those words or actions create a mutually understandable permission regarding the conditions of sexual activity. Consent may be withdrawn at any time. Consent cannot be obtained by force, threat, coercion, fraud, manipulation, reasonable fear of injury, intimidation, or through the use of one's mental or physical helplessness or incapacity. Consent cannot be implied based upon the mere fact of a previous consensual dating or sexual relationship. Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another. Thus, under USM's sexual assault policies, **affirmative consent** is required prior to engaging in a particular sexual activity.

USM's sexual misconduct policy also defines other terms such as dating violence, domestic violence, responsible employee, retaliation, sexual exploitation, sexual harassment, and stalking. Furthermore, the USM policy requires USM institutions to adopt a number of policies and procedures related to sexual misconduct, reporting sexual misconduct, disciplinary procedures, and services for victims.

*Morgan State University and St. Mary's College of Maryland Policies*

MSU's sexual assault policy, approved by its board of regents March 15, 1995, states that sexual assault represents a reprehensible act in violation of basic human rights which will not be tolerated. The policy defines "sexual assault" as any form of sexual contact with another person without his or her **consent**. **Consent** is not defined in the policy. MSU's policy also describes its educational programs to support awareness of sexual assault, Procedures for Reporting a Sexual Assault, disciplinary procedures, and services for victims.

SMCM's sexual misconduct policy prohibits nonconsensual sexual intercourse and nonconsensual sexual contact without **effective consent**. **Effective consent** is defined as willingly, freely, and knowledgably agreeing to engage in sexual conduct. Consensual sexual conduct is a mutual decision reached by all parties involved without any hint of force, threat, coercion, fraud, manipulation, intimidation, or reasonable fear of injury. Consent cannot be given if an individual is mentally or physically incapacitated (for example, due to excessive use of alcohol or drugs or a mental or physical condition). Silence, passivity, lack of active resistance, or lack of active response does not imply consent. In addition, previous participation in sexual activity does not indicate current consent to participate. Consent to one form of sexual activity does not imply consent to other forms of sexual activity.

According to SMCM's policy, the following are essential elements of **effective consent**:

- **Informed and reciprocal:** All parties must demonstrate a clear and mutual understanding of the nature and scope of the act to which they are consenting and a willingness to do the same thing, at the same time, in the same way.
- **Mutually understandable:** Communication regarding consent consists of mutually understandable words and/or actions that indicate an unambiguous willingness to engage in sexual activity. In the absence of clear communication or outward demonstration, there is no consent. Relying solely upon nonverbal communication can lead to a false conclusion as to whether consent was sought or given.
- **Not indefinite:** Consent may be withdrawn by any party at any time. Recognizing the dynamic nature of sexual activity, individuals choosing to engage in sexual

activity must evaluate consent in an ongoing manner and communicate clearly throughout all stages of sexual activity. Withdrawal of consent can be expressed verbally as “no” or can be based on a clear outward demonstration that conveys that an individual is hesitant, confused, uncertain, or no longer a mutual participant. Once consent is withdrawn, the sexual activity must cease immediately, and all parties must obtain mutually expressed or clearly stated consent before continuing further sexual activity.

- Not unlimited: Consent to one form of sexual contact does not constitute consent to all forms of sexual contact, nor does consent to sexual activity with one person constitute consent to activity with any other person. Each participant in a sexual encounter must consent to each form of sexual contact with each participant.

Even in the context of a current or previous intimate relationship, each party must consent to each instance of sexual contact each time. The consent must be based on mutually understandable communication that clearly indicates a willingness to engage in sexual activity. The mere fact that there has been prior intimacy or sexual activity does not, by itself, imply consent to future acts.

#### *Baltimore City Community College (BCCC) Sexual Assault Policy*

It is the policy of BCCC that sexual assault is a severe and criminal act and will not be tolerated within the college community. The policy is intended to ensure that incidents of sexual assault are given serious attention and that students, faculty, staff, and alleged victims of sexual assault are made aware of and provided with appropriate assistance, educational programs, counseling, mental health services, and student services. The policy is concerned with providing immediate assistance and protection for the physical health and safety of the alleged victim, the emotional health of the alleged victim, the safety of the BCCC community, the alleged victim from undue embarrassment or publication, and the confidentiality of the alleged victim. **Consent** is not defined in the policy.

#### *Sexual Assault Policies of Local Community Colleges and Other Colleges and Universities in Maryland*

Since 1993, all institutions of higher education in the State, including local community colleges, have been required to have sexual assault policies. The Department of Legislative Services has not reviewed the policies of the State’s 15 local community colleges, 31 private nonprofit institutions, private for-profit institutions, or private career schools. Thus, it is unknown if, or how, consent in regards to sexual activity is defined in each of these policies.