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FISCAL AND POLICY NOTE
First Reader

House Bill 1142 (Delegate Morales, *et al.*)
Judiciary and Appropriations

Education - Institutions of Higher Learning - Affirmative Consent Standard

This bill requires, by September 1, 2017, 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 in campus hearings 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 each act within the course of sexual activity.

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. Revenues are not affected.

Local Effect: Local community colleges can update their sexual assault policies as required using existing resources. Revenues are not affected.

Small Business Effect: Minimal. Private institutions of higher education must update their sexual assault policies to comply with the law.

Analysis

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

- it is the responsibility of the individual initiating a sexual act during the course of the sexual activity to ensure that the individual has the affirmative consent of the other or others to engage in that sexual act;
- affirmative consent is active, not passive;
- lack of protest, resistance, or silence does not indicate consent;
- affirmative consent must be ongoing throughout a sexual act and during the course of sexual activity and can be revoked at any time; and
- the existence of a dating relationship between the individuals involved or prior consensual 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 act or course of sexual activity if:

- the accused's belief arose during a state of intoxication;
- the accused's belief arose from a failure to take steps a reasonable person would have taken 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 act or course of sexual activity because the complainant was asleep or unconscious; incapacitated due to the influence of drugs, alcohol, other intoxicant, or medication, to render the complainant unable to understand the fact, nature, or extent of the sexual act or course of sexual activity; or unable to communicate affirmative consent due to a mental or physical condition.

Consent to a sexual activity may be given by words or actions, providing the words or actions create clear willingness to engage in the sexual activity. Silence or lack of resistance alone does not demonstrate consent. The meaning of consent does not vary based on a participant's sex, sexual orientation, gender identity, or gender expression.

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.

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 federal 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.

Chapter 436 of 2015 required the sexual assault policies of institutions of higher education to conform with Title IX in addition to other requirements and required MHEC to establish procedures by which institutions administer a sexual assault campus climate survey on or before March 1, 2016, and at least every two years thereafter.

Under Chapter 436, a sexual assault policy must prohibit the imposition of a campus conduct action, except for a mandatory intervention for substance abuse, for a violation of the alcohol or drug use policies of the institution for a student who reports to the institution or law enforcement officer an incident of sexual assault or who participates in an investigation of a sexual assault as a witness under specified circumstances. The policy must also prohibit the institution of higher education from retaliating against a student who files a complaint for sexual assault or who participates as a witness in an investigation for a sexual assault. The policy is required to include provisions for the pursuit, by the institution, of formalized agreements with a local law enforcement agency that complies with the relevant provision of Title IX and a State-designated rape crisis program or federally recognized sexual assault coalition, or both.

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, and amended June 19, 2015. 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.

Language in the 2015 *Joint Chairman's Report* (JCR) required USM, MSU, SMCM, the Maryland Independent College and University Association, and the Maryland Association of Community Colleges to submit a report by July 15, 2015, on the status of implementation of sexual misconduct policies. The 2015 JCR further required MHEC to submit a report by December 1, 2015, on higher education institutions' revised sexual misconduct policies. The [Report on Higher Education Institutions' Revised Sexual Misconduct Policies](#), November 2015, can be found in the Department of Legislative Services' library.

As the policies were submitted to MHEC, they were reviewed by a certified Title IX Coordinator. The report states, "[t]he attached Appendix lists each institution, whether or not the policy was found to be in compliance and what changes were recommended, the policy status, and the status of implementation. Of the fifty-five institutions covered by [Chapter 436], fifty have responded, their policies reviewed, and where necessary, recommendations were provided." The report advises that it focused on items required by statute that can be included immediately, and advises that developing and implementing a memorandum of understanding (MOU) as required by statute can take time and negotiation before an agreement is reached.

As noted in the [Fiscal 2017 MHEC Budget Analysis](#), two issues arose. First, five small, private schools did not respond to MHEC or did not respond in a timely manner. The second issue is that, although many of the remaining 50 institutions have updated their policies, due to shared governance structures these policies will not be formally adopted

until the next convening of their respective governing boards – meaning that these institutions are not yet in compliance with Chapter 436. MHEC reports that many such boards will meet in early 2016 to adopt the revised policies.

USM advises it submitted the required report on the status of implementing its sexual misconduct policies including whether institutions have an amnesty policy and, if so, how it is implemented; how the institutions plan to implement a climate survey; and a list of all MOUs applicable to the issue of sexual misconduct. USM submitted a report on June 30, 2015, and subsequently provided a more recent update as some institutions had not fully implemented all the policy requirements. All USM campuses:

- have amnesty policies, which are described within their sexual misconduct policies;
- have created their own climate survey or have adopted, with modifications, the MHEC climate survey and plan to administer the survey by March 1, 2016; and
- are pursuing or are finalizing MOUs with local police departments and rape crisis centers.

As of March 2016, Maryland and at least four other states had introduced affirmative consent legislation (*i.e.*, Connecticut, Hawaii, Missouri, and New Jersey). In addition, five states have affirmative consent legislation that has carried over from 2015, although there has been no movement on any of the 2015 legislation. Michigan has a 2015 bill that has carried over that would require sex education classes to teach affirmative consent.

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.

Additional Information

Prior Introductions: HB 839 of 2015 was withdrawn after a hearing in the House Judiciary Committee.

Cross File: None.

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

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