

Department of Legislative Services
 Maryland General Assembly
 2018 Session

FISCAL AND POLICY NOTE
 Third Reader - Revised

House Bill 913
 Appropriations

(Delegate A. Miller, *et al.*)

Education, Health, and Environmental Affairs

Higher Education – Sexual Assault Policy – Disciplinary Proceedings Provisions

This bill requires the governing body of each institution of higher education to adopt and submit a revised sexual assault policy that includes provisions for disciplinary proceedings that meet specified requirements by August 1, 2019. Generally, the provisions must permit each student (current or former) alleging a violation of the sexual assault policy *and* each student (current or former) responding to an allegation access to counsel paid for by the Maryland Higher Education Commission (MHEC), as specified. MHEC is not required to pay a student’s attorney’s fees for representation in a criminal or civil matter.

Fiscal Summary

State Effect: *Under one set of assumptions*, general fund expenditures increase by an estimated \$412,800 annually, likely beginning in FY 2020, as explained below, to pay reasonable costs and attorney’s fees for specified current or former students. Additional costs for administration are likely but are not reflected below. Higher education expenditures increase for public institutions of higher education to implement the required disciplinary proceedings provisions; however, these costs have not been quantified and may be partly offset, as explained below. Revenues are not affected.

(in dollars)	FY 2019	FY 2020	FY 2021	FY 2022	FY 2023
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	-	412,800	412,800	412,800	412,800
Higher Ed Exp.	-	-	-	-	-
Net Effect	(-)	(\$412,800)	(\$412,800)	(\$412,800)	(\$412,800)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

Local Effect: Local community college expenditures increase to implement the required disciplinary proceedings provisions; 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 provisions must include a description of the rights of a student who alleges a violation, 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 fair and impartial investigation;
- disciplinary proceedings and resolutions that are prompt and equitable and provide an 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, information regarding other civil and criminal options, and the range of potential sanctions associated with the alleged violation;
- 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 a trained advocate throughout the disciplinary proceedings, as specified; and
- the presence of no more than two people, including a personal supporter of the student's choice, an attorney, or an advocate at any hearing, meeting, or interview during the disciplinary proceedings.

In addition, the disciplinary proceedings provisions must require:

- the institution of higher education to provide each student involved in disciplinary proceedings with specified notice, presented in an appropriate and sensitive format, 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 code of conduct violations involving discrimination or harm to another individual.

The disciplinary proceedings provisions must prohibit:

- the institution of higher education from using mediation to resolve an allegation of a violation of the institution's sexual assault policy, unless several specified conditions are met; and

- the adjudicating official or body from considering specified evidence, including a student's prior sexual history.

Further, the disciplinary proceedings provisions must permit students to access counsel paid for by MHEC, as specified, for:

- a current or former student who makes a complaint on which a formal Title IX investigation is initiated and who was enrolled as a student at the institution at the time of the incident that is the basis of the complaint, unless the student knowingly and voluntarily chooses not to have counsel; and
- a current or former student who responds to a complaint on which a formal Title IX investigation is initiated and who was enrolled as a student at the institution at the time of the incident that is the basis of the complaint, unless the student knowingly and voluntarily chooses not to have counsel.

In consultation with State and local bar associations and legal services providers with expertise about sexual misconduct, MHEC must develop a list of attorneys and legal services programs willing to represent students on a pro bono basis or at fees equivalent to those paid to attorneys under civil legal services programs administered by the Maryland Legal Services Corporation (MLSC). A student may select an attorney from the list. A student may select and retain an attorney prior to the conclusion of the formal Title IX proceedings. If a student selects and retains an attorney who is not on the list, MHEC must pay fees to the attorney selected by the student that are equivalent to those paid to attorneys under civil legal services programs administered by MLSC. An institution may not discourage a student from retaining an attorney.

The bill may not be construed to prohibit an institution of higher education from imposing interim safety measures.

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:

Maryland Higher Education Commission

The bill requires MHEC to pay reasonable costs and attorney’s fees for a current or former student who is entitled to counsel under the bill; thus, general fund expenditures increase, likely significantly. Actual expenditures cannot be reliably estimated; however, *under one set of assumptions*, general fund expenditures for legal representation increase by approximately \$412,800 annually beginning in fiscal 2020. MHEC may incur some costs sooner. The assumptions and information used in this estimate are explained below.

- The [Judicare Family Law Pilot Project](#) is the only MLSC program that provides hourly compensation for civil legal services. Thus, it is assumed that MHEC must pay attorney fees of \$80 per hour or the current attorney compensation rate for Judicare. Under Judicare, attorney fees are \$80 per hour with a cap of \$1,600 for 20 hours of work. Depending on the availability of funds, Judicare may pay an additional \$80 an hour, up to an additional \$800 (\$2,400 total cap), for every hour over 25 hours that the attorney spends on the case (thus, 5 hours must be pro bono). It is unclear if the attorney fees under the bill will be subject to the hours of work cap or the requirement for pro bono work.
- 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 258 formal complaints at institutions of higher education, of those 205 were at public institutions and 53 were at private institutions. These complaints would involve at least 516 individuals.

- The bill requires MHEC to pay for counsel for students at any institution of higher education, including private nonprofit institutions. Thus, MHEC will need to pay for representation for approximately 516 individuals at \$80 per hour.
- 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. However, for the purposes of this estimate it is assumed that, on average, MHEC will need to pay for 10 hours of attorney time for each individual.
- Thus, under this set of assumptions, MHEC general fund expenditures for legal representation increase by \$412,800 annually. Although costs may be incurred beginning in fiscal 2019 if institutions of higher education expeditiously adopt and submit revised sexual assault policies, the bill requires that they do so by August 1, 2019. Thus, this analysis assumes implementation for a full year beginning in fiscal 2020 (academic year 2019-2020).

This estimate assumes that there is no increase in formal complaints made due to the availability of representation, and that only two individuals receive representation for each formal complaint. If the number of complaints increases, or the number of individuals who receive representation increases, MHEC general fund expenditures increase further.

The estimate does not take into account any administrative expenditures for MHEC related to *coordinating* legal representation for current or former students; thus, general fund expenditures for MHEC further increase – possibly as early as fiscal 2019.

Public Higher Education Institutions

Higher education expenditures for public institutions of higher education increase to implement the required disciplinary proceedings provisions. 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 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 provisions; 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: Although designated as a cross file, SB 607 (Senator Conway, *et al.* - Education, Health, and Environmental Affairs) is not identical.

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; Maryland Legal Services Corporation; U.S. Department of Education; Department of Legislative Services

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Analysis by: Caroline L. Boice

Direct Inquiries to:
(410) 946-5510
(301) 970-5510