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MEMORANDUM

TO: Segmental Advisory Council

FROM: Dr. James D. Fielder, Secretary

DATE: June 3, 2019

SUBJECT: Policies Regarding Sexual Assault at Institutions of Higher Education

Please circulate this memo to appropriate campus personnel.

Pursuant to Education Article §11-601, on or before August 1, 2019, the governing body of each institution of higher education shall adopt and submit a revised sexual assault policy to the Maryland Higher Education Commission (MHEC) that includes disciplinary proceedings provisions provided in Education Article §11-601(d). **Please submit a copy of the revised sexual assault policy to <https://tinyurl.com/mhecSexualAssaultPolicies> on or before August 1, 2019.**

Please take note that this request for revised policies is separate and apart from the biennial *Sexual Assault Climate Survey* institutions are required to submit to MHEC (next due date is June 1, 2020).

The disciplinary proceedings revision outlined in the Education Article includes 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, one of which is the ability to have a licensed attorney, an advocate supervised by an attorney, or a trained advocate in attendance at the disciplinary proceedings. Subject to funding, students may access assistance from licensed attorneys paid for by MHEC.

MHEC is currently (a) developing a list of attorneys and legal services programs willing to represent students and (b) finalizing regulations for the implementation of this process. We will provide further communication as the list of attorneys and legal service programs is finalized and posted on MHEC's website and the regulations are adopted. For the purposes of drafting the revised policy, please direct students to view the list of attorneys at MHEC's website. A specific web address will be provided once the list has been posted.

Enclosed: Education Article §11-601

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§11-601.

(a) (1) By August 1, 1993, the governing body of each institution of higher education shall adopt and submit to the Commission a written policy on sexual assault.

(2) The policy adopted under paragraph (1) of this subsection shall 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.

(b) (1) Each institution of higher education shall post at appropriate locations on each campus and distribute to its students, faculty members, and employees a copy of the policy adopted under subsection (a) of this section.

(2) Each institution of higher education shall implement the policy adopted under subsection (a) of this section.

(c) The sexual assault policy required under subsection (a) of this section shall conform with § 485(f) of the Higher Education Act of 1965 as amended, Title IX of the Education Amendments of 1972, and any additional requirements under this section and shall include procedures for reporting an incident of sexual assault and for taking disciplinary actions against a violator of the policy, including provisions for:

(1) Informing a victim of a sexual assault of the right to file criminal charges with the appropriate law enforcement official;

(2) 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;

(3) Designation of the nearest hospitals equipped with the Department of State Police Sexual Assault Evidence Collection Kit;

(4) Full and prompt cooperation from campus personnel in obtaining appropriate medical attention, including transporting the victim to the nearest designated hospital;

(5) 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;

(6) 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;

(7) Prohibiting 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 of higher education for a student who reports to the institution or a law enforcement officer an incidence of sexual assault or who participates in an investigation of a sexual assault as a witness if:

(i) The institution of higher education determines the violation occurred during or near the time of the alleged sexual assault;

(ii) The student is determined to have made the report of sexual assault or is participating in an investigation as a witness in good faith; and

(iii) The institution of higher education determines that the violation was not an act that was reasonably likely to place the health or safety of another individual at risk;

(8) Prohibiting 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 of a sexual assault; and

(9) Pursuing formalized agreements with:

(i) The local law enforcement agency that complies with the relevant provisions of Title IX of the Education Amendments of 1972 and clearly states when a school will refer a matter to local law enforcement; and

(ii) A State designated rape crisis program, federally recognized sexual assault coalition, or both that formalizes a commitment to provide trauma-informed services to victims of sexual assault and improve the overall response to sexual assault by the institution of higher education.

(d) (1) The governing body of each institution of higher education shall include in the sexual assault policy required under subsection (a) of this section provisions for disciplinary proceedings provisions for alleged violations of the sexual assault policy.

(2) On or before August 1, 2019, the governing body of each institution of higher education shall adopt and submit a revised sexual assault policy that includes the disciplinary proceedings provisions required under paragraph (1) of this subsection.

(3) The disciplinary proceedings provisions required under paragraph (1) of this subsection shall 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:

(i) Treatment with dignity, respect, and sensitivity by officials of the institution of higher education during all phases of the disciplinary proceedings;

(ii) A fair and impartial investigation;

(iii) Disciplinary proceedings and resolutions that are prompt and equitable and provide an opportunity for the alleged victim and the alleged violator to be heard;

(iv) Timely written notice of:

1. The reported violation, including the date, time, and location of the alleged violation, and the range of potential sanctions associated with the alleged violation;

2. The student's rights and responsibilities under the sexual assault policy and information regarding other civil and criminal options;

3. The date, time, and location of each hearing, meeting, or interview that the student is required or permitted to attend;

4. A final determination made by the adjudicating official or body regarding whether a sexual assault policy violation occurred and the basis for the determination;

5. Any sanction imposed; and

6. The student's rights to appeal and a description of the appeal process;

(v) Participation in the disciplinary proceedings, including:

1. Access to the case file and evidence regarding the incident obtained by the institution of higher education during the investigation or considered by the adjudicating official or body, with personally identifiable or other information redacted as required by applicable law;

2. Offering testimony at a hearing or, if the institution's process does not include a hearing, to the adjudicating official;

3. Submitting evidence, witness lists, and suggested specific questions to be posed to the other student involved in the disciplinary proceedings by investigators or the adjudicating official or body;

4. Providing and reviewing testimony electronically or in a way in which the students are not required to be in the physical presence of the other;

5. Reviewing and providing written responses to reports and proposed findings; and

6. Appealing a determination or a sanction;

(vi) Assistance by a licensed attorney, an advocate supervised by an attorney, or a trained advocate throughout the disciplinary proceedings, including by the attorney or advocate's:

1. Attendance at hearings, meetings, and interviews with the student;

2. Private consultations with the student during hearings, meetings, and interviews, except during questioning of the student at a hearing; and

3. Assistance with the student's exercise of any right during the disciplinary proceedings; and

(vii) Notwithstanding the choice that a student makes under paragraph (4)(v) of this subsection, 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.

(4) The disciplinary proceedings provisions required under paragraph (1) of this subsection shall:

(i) Require the institution of higher education to provide each student involved in disciplinary proceedings with notice, presented in an appropriate and sensitive format, before the start of the disciplinary proceedings, of:

1. The student's right to the assistance of an attorney or an advocate;

2. The legal service organizations and referral services available to the student; and

3. The student's right to have a personal supporter of the student's choice at any hearing, meeting, or interview during the disciplinary proceedings;

(ii) Require 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;

(iii) Except as provided in paragraph (5) of this subsection, prohibit the institution of higher education from using mediation to resolve an allegation of a violation of the institution's sexual assault policy;

(iv) Prohibit the adjudicating official or body from considering certain evidence, including:

1. A student's prior sexual history with an individual other than a party to the proceedings, except to:

A. Prove the source of injury;

B. Prove prior sexual misconduct;

C. Support a claim that a student has an ulterior motive; or

D. Impeach a student's credibility after that student has put his or her own prior sexual conduct at issue; and

2. A student's history of mental health counseling, treatment, or diagnosis, unless the student consents; and

(v) Permit students to access counsel paid for by the Commission, as described under paragraph (6) of this subsection, for:

1. 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

2. 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.

(5) The disciplinary proceedings provisions required under paragraph (1) of this subsection shall authorize an institution to use mediation or other informal mechanisms for resolving a complaint relating to the institution's sexual assault policy if:

(i) The complaining student requests an informal mechanism;

(ii) All parties to the complaint, and the institution, agree to the use of the informal mechanism;

(iii) The institution participates in the informal mechanism by providing trained staff;

(iv) Any party may end the informal mechanism at any time in favor of a formal resolution proceeding; and

(v) The alleged misconduct does not involve sexual assault or sexual coercion.

(6) (i) The disciplinary proceedings provisions required under paragraph (1) of this subsection shall, unless a student waives counsel under paragraph (4)(v) of this subsection, require the Commission to pay reasonable costs and attorney's fees for students provided counsel under paragraph (4)(v) of this subsection, as provided under this paragraph.

(ii) In consultation with State and local bar associations and legal services providers with expertise about sexual misconduct, the Commission shall 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, established under Title 11 of the Human Services Article.

(iii) A student may select an attorney from the list developed under subparagraph (ii) of this paragraph.

(iv) 1. A student may select and retain an attorney prior to the conclusion of the formal Title IX proceedings.

2. An institution may not discourage a student from retaining an attorney.

(v) If a student selects and retains an attorney who is not on the list developed under subparagraph (ii) of this paragraph, the Commission shall pay fees to the attorney selected by the student that are equivalent to those paid to attorneys under civil legal services programs administered by the Maryland Legal Services Corporation.

(7) This subsection may not be construed to prohibit an institution of higher education from imposing interim safety measures.

(8) The Commission is not required to pay a student's attorney's fees for representation in a criminal or civil matter.

(e) The Commission shall:

(1) Coordinate the development of the sexual assault policies; and

(2) Periodically review and make recommendations for changes in these policies.

(f) (1) The Commission, in consultation with institutions of higher education, shall establish procedures for the administration of a sexual assault campus climate survey by each institution of higher education.

(2) The procedures shall require each institution of higher education to provide for the completion of the survey by various methods, including online.

(g) On or before March 1, 2016, and at least every 2 years thereafter, each institution of higher education shall:

(1) Develop an appropriate sexual assault campus climate survey using nationally recognized best practices for research and climate surveys; and

(2) Administer the sexual assault campus climate survey to students in accordance with the procedures established under subsection (f) of this section.

(h) (1) On or before June 1, 2016, and every 2 years thereafter, each institution of higher education shall submit to the Commission:

(i) A report on school specific results of the sexual assault survey; and

(ii) A report aggregating the data collected by the institution regarding sexual assault complaints made to the institution, including the:

1. Types of misconduct;
2. Outcome of each complaint;
3. Disciplinary actions taken by the institution;
4. Accommodations made to students in accordance with the sexual assault policy established under subsection (c) of this section; and
5. Number of reports involving alleged nonstudent perpetrators.

(2) In reporting the data under paragraph (1) of this subsection, the institution of higher education shall make reasonable efforts to protect student privacy.

(3) An institution of higher education shall submit the data required under paragraph (1) of this subsection together with the reporting requirements of the federal Jeanne Clery Disclosure of Campus Security Policy and Crime Statistics Act, as amended by the Violence Against Women Reauthorization Act of 2013.

(i) On or before October 1, 2016, and every 2 years thereafter, the Commission shall:

(1) Report to the Governor and, in accordance with § 2-1246 of the State Government Article, the Senate Education, Health, and Environmental Affairs Committee, the Senate Budget and Taxation Committee, the House Health and Government Operations Committee, and the House Appropriations Committee on the reports required under subsection (h) of this section; and

(2) Publish the reports required under subsection (h) of this section on the Commission's website and in any other location or venue the Commission determines is necessary or appropriate.

(j) Nothing in this subtitle shall be construed to confer a private cause of action upon any person to enforce the provisions of this subtitle.

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