MICUA Maryland Independent College and University Association

Oppose

Senate Education, Health, and Environmental Affairs Committee

SB 607 – Higher Education – Sexual Assault Policy – Disciplinary Proceedings Policy

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February 21, 2018

On behalf of Maryland's independent colleges and universities and the 64,000 students they serve, thank you for the opportunity to provide this testimony on Senate Bill 607 – *Higher Education – Sexual Assault Policy – Disciplinary Proceedings Policy*. This bill requires that on or before August 1, 2019 the governing body of each institution adopt and submit a revised sexual assault policy that includes a disciplinary proceedings policy that is provided for in the bill. The disciplinary proceedings outlined in the bill are extremely prescriptive and provide for written notice of violations of the policy, an accounting of the student's rights and responsibilities under the sexual assault policy and "applicable law", and the right to appeal the decision of a campus adjudicating body or official. The bill also allows students much greater participation in disciplinary proceedings, including access to the case file; the ability to offer testimony, submit evidence, and provide witness lists; as well as access to attorneys that can attend hearings, provide consultation and assist students with the exercise of any rights during the disciplinary process if expulsion is a possible outcome of the proceeding. The bill requires notification to each student 10 days before the start of disciplinary hearings. Furthermore, the bill prohibits the use of mediation and unless the adjudicating body determines that the disciplinary proceedings will not result in the expulsion of the student, provides the student counsel that will be paid for by the Maryland Higher Education Commission (MHEC) if it is determined the student is entitled to counsel and is indigent and unable to retain counsel.

MICUA and its member institutions have numerous concerns with provisions in SB 607. The overarching concern is that the bill turns a standard campus disciplinary hearing into a quasi-judicial hearing and creates an adversarial proceeding that includes legal protections that are not always feasible or applicable in disciplinary hearings. Campuses believe the engagement of attorneys will deter victims from reporting sexual assaults for fear that they will be exposed to a public "trial". This could have a chilling effect on reporting. Many victims do not wish to seek justice via the criminal justice system, and as written, the bill would essentially set up a criminal courtroom on each campus.

The bill fundamentally misunderstands the existing disciplinary processes in place on campuses. It presupposes that institutions convene separate disciplinary hearings which are held after an investigation into sexual assault when in fact relevant information, including information regarding possible discipline, is collected throughout the investigation. This allows the effective use of resources and avoids duplication of witness testimony and information presentation as part of a formalized "hearing" for every disciplinary proceeding. On many campuses, there is not a formal hearing, but students are allowed to present information to the decision panel, talk to them, and may submit questions to the panel and the other party.

The bill as drafted could not be successfully implemented given the nature of disciplinary hearings on campuses. The bill requires that the adjudicating body determine in advance of the hearing if a student might be subject to expulsion, and if so the adjudicating body must provide counsel for all parties. However, the point of the disciplinary process in the sexual assault and misconduct policies of institutions is to determine if an incident is sexual assault, sexual misconduct, sexual harassment or a simpler violation of the campus code of conduct. In the bill, the decision on the type of infraction that has occurred is made prior to the proceedings to investigate and determine the level of infraction. There is often a fine line between sexual misconduct and sexual assault, and the bill makes that determination prior to the start of proceedings, which is inherently irrational.

Furthermore, the ability to maintain the existing level of confidentiality that exists in disciplinary hearings would be jeopardized by the legislation. Currently students are allowed an advocate in proceedings, and that advocate may also be an attorney. This is done to provide the student an advocate but also to minimize the number of overall participants to keep the contents of the proceedings confidential, as well as enable timely and rapid scheduling of hearings with a smaller number of individuals. Another significant concern with respect to confidentiality is the requirement that students are allowed full access to the case file. Under Title IX students are allowed to see the relevant portions of a case file, not the entire file. Allowing the entire file could create tremendous breaches in confidentiality for both parties.

There are serious concerns about the costs associated with the bill as well as the delay in timely investigations. The bill's requirement of 10 days for notification will dramatically lengthen what needs to be a much timelier investigation and proceedings timeline. In most instances, disciplinary hearings are conducted and resolved in a 3-5-day period. The bill prohibits mediation which is often very successful in campus disciplinary hearings. Furthermore, prohibiting mediation is likely a violation of Title IX. Currently investigations are handled by Title IX coordinators. The bill requires that both students receive written notice of "the student's rights and responsibilities under the sexual assault policy *and applicable law".* Title IX coordinators are well versed in the institution's sexual assault policy but can't possibly advise the student on all their rights under applicable law. At a minimum to comply with this, each institution would need to replace their Title IX officers with attorneys.

If a determination is made that expulsion is a possible outcome of the disciplinary proceedings, the institution must provide counsel to both students. The only way for the institution to be reimbursed for those costs is if the student is determined to be indigent by MHEC and it is doubtful that MHEC would be in a financial or practical position to make numerous findings of indigency

to reimburse the institutions for providing counsel to students. Furthermore, if each student is entitled to counsel, then the institution itself would also require counsel and the costs of disciplinary hearings for the institution will be extremely expensive.

For all of these reasons, MICUA respectfully requests and unfavorable report for SB 607.