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Secretary

## **Maryland Higher Education Commission Higher Education Fiscal 2020 Budget Overview**

**Testimony of Dr. James D. Fielder, Jr., Secretary of Higher Education,  
to the Senate Budget and Taxation Subcommittee on  
Education, Business and Administration and the  
House Appropriations Committee**

**January 31 & February 1, 2019**

### **Issues**

- 1. The Chancellor, presidents of SMCM and MSU, MICUA, and the Maryland Association of Community Colleges should comment on the impact that the proposed changes will have on campuses, including if revisions will be made to policies and procedures.**

**The Secretary of MHEC should comment on the lack of funding to pay attorney's fees and what will happen when a student contacts MHEC regarding the payment of attorney's fees.**

**MHEC Response:** The total amount of annual funding necessary to reimburse legal fees for the program is uncertain for a couple of reasons. First, the program is new and will be carried out pursuant to new policies of the institutions of higher education, which will be adopted this summer. Second, the U.S. Department of Education is in the process of revising federal regulations, and we do not yet know what effects, if any, the new federal regulations will have upon institutions' policies. Given this uncertainty, MHEC has consulted with DBM about the best manner to reimburse attorneys' fees, and MHEC will do so through the deficiency funding process, which is the same process MHEC has used in the past for the payment of other attorneys' fees.

The process for making a claim for attorneys' fees will be set forth in agency regulations. The Commission has approved regulations for publication in the Maryland Register. Under the regulations, a student will choose a reduced-fee or pro-bono attorney from an MHEC-provided list, or the student may choose an attorney not on the list. The attorney who represents the student will be responsible for submitting an application for fees to MHEC. The student will not have to submit the application. MHEC will reimburse reasonable fees to the attorney at rates equivalent to those charged by and paid to attorneys under civil legal services programs administered by the Maryland Legal Services Corporation. The attorney will agree not to charge any excess fees to the student if the attorney is on the MHEC list of attorneys. If the attorney is not on the MHEC list, the student might be responsible for paying the attorney any fees above and beyond those reimbursed by MHEC.



**Thursday, January 31, 2019**  
**Higher Education Overview**  
**University System of Maryland FY 2020 Budget Testimony**  
**Chancellor's Comments Requested**

*Page 28 - The Chancellor should comment on the impact that the proposed changes will have on campuses, including if revisions will be made to policies and procedures related to Title IX.*

The USM has been working with the OAG and conversing with national higher education organizations (e.g., ACE, APLU, AASCU, AAU and NACUA) regarding a response to the Title IX NPRM. Comments were due on January 30. Because the higher ed community has been working with the members of the legislature over the last several years, our institutions may be in a better place to narrowly respond to the Notice of Proposed Rulemaking than institutions in other states.

Over the last several years, we have worked hard to address issues of sexual misconduct on our campuses, and we have been implementing the actions required by state law, as well as remaining in compliance with federal standards. More specifically, our campuses have improved reporting processes aligned with the requirements of MHEC; conducted the most recent, mandated climate surveys (with two exceptions that we are addressing); and enhanced sexual misconduct prevention training processes. Overall, we are working to meet the serious and ever-changing challenges of continuous education for our student populations.

Our campuses are constantly aware of the need to create a climate in which our community feels safe and the reporting of incidents is supported, even if there is not an expectation of formal processes being fully implemented. To that end, we share successful practices among our campuses, focus on interim measures that support the parties involved, and encourage constant focus on the education of students who may be in the best position to intervene and/or prevent unwanted behaviors.

We will await the release of the final rule after the comment period and responses are completed. In the meantime, we will comment on our responses to the major changes in the proposed rule outlines by the analysis:

- Proposed narrowing of the definition of misconduct: The USM understands that constituent institutions will remain free to respond to misconduct that does not meet this new narrower definition, we request a clearer understanding of the conduct covered in the new definitions.
- Proposed that institutions must have actual knowledge of misconduct and are responsible only if the proper responsible person was notified: Our institutions will continue to encourage reporting and our Title IX offices will be appropriately responsive to all reports and referrals made by affected individuals or responsible employees. If the definitions and responsibilities change in the final rules, we will be compliant.

- Proposed changes in responsibility of investigating (only for on campus or official functions): While this narrowing of the responsibility would reduce the investigative workload of campus Title IX offices, reports from students of sexual misconduct in off-campus incidents will continue to be accepted and responded to, although the depth and breadth of the investigations might vary depending on the severity of the behavior reported and the timeliness of the report.
- Evidentiary standards: While the federal rules may change, our campuses currently plan to adhere to the “preponderance of the evidence” standard as defended by state statute.
- The right to direct cross examination: This proposed change is deeply concerning to our campuses as well as to institutions across the country. We are responding to this proposed rule with some fervor, as are many organizations. We believe that we are and will continue to provide a balanced and fair process to all parties, with the opportunity to submit questions and obtain responses from all parties involved. In addition, while very cumbersome and time-consuming, our institutions will comply with the statute passed last year that provides access to attorneys by all parties in each case. We are very concerned that the proposed rules would expect educational institutions to behave and perform as arms of or alternatives to the criminal justice system. Attempts to transform our conduct processes into formal legal procedures conflict with both case law and principles that distinguish college disciplinary processes from judicial systems. Implementing such “live hearing” processes will bring all of these processes to an adversarial, legal orientation, requiring the institutions to provide sufficiently-trained persons to manage these processes, as well as lead to additional legal support from the institutional perspective. This will require additional time and greatly increase the resources necessary to move cases through the process. We sincerely hope that this proposed rule will be reconsidered during and in response to the comments made during this comment period.
- One additional issue that the USM comments will address is the need for the new rules to much more clearly define the applicability of the proposed rules to Title IX claims by employees.

The USM will await the outcomes and decisions made in the final federal rulemaking process. We will be prepared to make the changes to our policies and processes where required if each of the proposed changes are put into effect.