



TOPIC: Sexual Misconduct Policy Proposal

COMMITTEE: Education Policy and Student Life

DATE OF COMMITTEE MEETING: June 3, 2014

SUMMARY: In order to ensure compliance with a series of federal legislative changes and policy concerns over the last several years, the Office of the Attorney General (OAG) reviewed the System's policies on sexual assault and sexual harassment. The review revealed that the current policies were in need of revision. The OAG has prepared a draft sexual misconduct policy that is designed to take the place of the System's policies on sexual assault and sexual harassment and follows best practices developed nationally.

This draft is in the process of being reviewed by the USM staff, presidents, provosts, human resource officers, vice presidents of student affairs, Title IX officers, university counsel, and the shared governance councils. Today, the draft policy is being brought to the Committee for initial regent review and discussion. Feedback from stakeholders will be taken into consideration, and a final revised draft will be presented to the Committee of the Whole on June 27, 2014.

ALTERNATIVE(S): This is an information item only.

FISCAL IMPACT: This is an information item only; there is no fiscal impact associated with this item.

CHANCELLOR'S RECOMMENDATION: This is an information item only.

COMMITTEE RECOMMENDATION: Information Only DATE: June 3, 2014

BOARD ACTION: DATE:

SUBMITTED BY: Joann A. Boughman 301-445-1992 jboughman@usmd.edu

Draft USM Policy on Sexual Misconduct

IV- _____ - UNIVERSITY SYSTEM OF MARYLAND POLICY ON SEXUAL MISCONDUCT (Approved by the Board of Regents, _____)

PURPOSE & APPLICABILITY

The University System of Maryland (USM) is committed to providing a working and learning environment free from Sexual Misconduct, including sexual and gender-based harassment, sexual violence, dating violence, domestic violence, sexual exploitation, and sexual intimidation. USM prohibits and will not tolerate Sexual Misconduct. Sexual Misconduct is a form of sex discrimination prohibited by state and/or federal laws, including Title IX of the Education Amendments of 1972 as amended (“Title IX”) and Title VII of the Civil Rights Act of 1964 as amended, and it also may constitute criminal activity.

USM endeavors to foster a climate on all USM institution campuses free from Sexual Misconduct through training, education and prevention programs, and through policies and procedures that promote prompt reporting, prohibit retaliation, and promote timely, fair and impartial investigation and resolution of Sexual Misconduct cases in a way that eliminates the Sexual Misconduct, prevents its recurrence, and addresses its effects. All USM Community members are subject to this policy, regardless of sex, sexual orientation, gender identity and gender expression. This includes all students, faculty, and staff of USM institutions, as well as third parties and contractors under USM or USM constituent institution control. This Policy applies to Sexual Misconduct in connection with any USM institution education programs or activities, including Sexual Misconduct: (1) in any USM institution facility or on any USM institution property; (2) in connection with any USM or USM institution sponsored, recognized or approved program, visit or activity, regardless of location; (3) that impedes equal access to any USM institution education program or activity or adversely impacts the employment of a member of the USM community; or (4) otherwise threatens the health or safety of a member of the USM community.

I. Definitions

For purposes of this Policy, the following definitions apply. While institutions may adopt their own definitions that do not conflict with the language below, institutions are strongly encouraged, at a minimum, to adopt the elements of the below definitions in institution policies/procedures:

- A. Consent** means a knowing, voluntary, and affirmatively communicated willingness to mutually participate in a particular sexual activity or behavior. It must be given by a person with the ability and capacity to exercise free will and make a rational and reasonable judgment. Consent may be expressed either by affirmative words or actions, as long as those words or actions create a mutually understandable permission regarding the conditions of sexual activity. Consent may be withdrawn at any time. Consent cannot be obtained by force, threat, coercion, fraud, manipulation, reasonable fear of injury, intimidation or through the use of the one’s

mental or physical helplessness or incapacity. Consent cannot be implied based upon the mere fact of a previous consensual dating or sexual relationship. Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another.

- B. Dating Violence** means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the complainant. The existence of such a relationship shall be determined based on a consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.
- C. Domestic Violence** means violence committed by a current or former spouse or intimate partner of the complainant, by a person with whom the complainant shares a child in common, by a person who is cohabitating with or has cohabitated with the complainant as a spouse or intimate partner, by a person similarly situated to a spouse of the complainant, or by any other person against an adult or youth complainant protected from those acts by domestic or family violence laws of Maryland.
- D. Interim Measures** means reasonably available steps the Institution may take to protect the parties while a Sexual Misconduct investigation is pending.
- E. Responsible Employee** includes any employee who (1) has the authority to take action regarding Sexual Misconduct; (2) is an employee who has been given the duty of reporting Sexual Misconduct; or (3) is someone another individual could reasonably believe has this authority or duty. At a minimum, Responsible Employees must include: the Title IX Coordinator and any Title IX Team members, all institution administrators, all non-confidential employees in their supervisory roles, all faculty, all athletic coaches, and institution law enforcement and other non-confidential first responders.
- F. Retaliation** means intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by law or USM policy relating to Sexual Misconduct, or because an individual has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing related to Sexual Misconduct. Retaliation includes retaliatory harassment.
- G. Sexual Assault**

Sexual Assault I. – Non-Consensual Sexual Intercourse

Any act of sexual intercourse with another individual without consent. Sexual intercourse includes vaginal or anal penetration, however slight, with any body part or object, or oral penetration involving mouth to genital contact.

Sexual Assault II. – Non-Consensual Sexual Contact

Any intentional touching of the intimate parts of another person, causing another to touch one's intimate parts, or disrobing or exposure of another without consent.

Intimate parts may include genitalia, groin, breast, or buttocks, or clothing covering them, or any other body part that is touched in a sexual manner. Sexual contact also includes attempted sexual intercourse.

- H. Sexual Exploitation** means taking non-consensual or abusive sexual advantage of another person for one's own advantage or benefit or for the advantage or benefit of anyone other than the person being exploited.
- I. Sexual Harassment** is any unwelcome sexual advance, unwelcome request for sexual favors, or other unwelcome verbal or physical conduct of a sexual nature when: (1) Submission to or rejection of such conduct is made, either explicitly or implicitly, a term or condition of an individual's employment, evaluation of academic work, or participation in any aspect of a USM or USM institution program or activity; (2) Submission to or rejection of such conduct by an individual is used as the basis for academic, employment, or activity or program participation related decisions affecting an individual; or (3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work or academic performance, i.e., it is sufficiently severe or pervasive to create an intimidating, hostile, humiliating, demeaning or sexually offensive working, academic, residential or social environment.
- J. Sexual Intimidation** means (1) threatening to sexually assault another person; (2) gender or sex-based stalking, including cyber-stalking; or (3) engaging in indecent exposure.
- K. Sexual Misconduct** is an umbrella term that includes dating violence, domestic violence, sexual exploitation, sexual harassment, sexual intimidation, sexual violence, and stalking.
- L. Sexual Violence** is a form of sexual harassment and refers to physical sexual acts perpetrated without consent. Sexual violence includes rape, sexual assault, sexual battery, and sexual coercion. Sexual Violence, in any form, is a criminal act.
- M. Stalking** means engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others, or suffer substantial emotional distress.

II. Institutional Obligations

A. Title IX Compliance Oversight

1. Title IX Coordinator

Each Chief Executive Office of a constituent institution shall designate a Title IX Coordinator responsible for coordinating the institution's efforts to comply with and carry out its responsibilities under Title IX.

The Title IX Coordinator must have adequate training on the requirements of Title IX, including what constitutes Sexual Misconduct, Consent, counter-intuitive complainant behaviors, and credibility assessments. The Coordinator must understand how relevant institution procedures operate and must receive notice of all complaints raising Title IX issues at the institution.

2. Title IX Team

Depending on the size and specific needs of the institution, the institution may want to identify a Title IX Team, which may include the Title IX Coordinator, Deputy Title IX Coordinators, Title IX investigators, and representatives from campus safety, Student Affairs, the Provost's Office, and Human Resources. The Title IX Coordinator shall be responsible for coordinating the activities of the Title IX Team.

B. Notice of Nondiscrimination

1. Content

Each constituent institution must publish a notice of nondiscrimination that contains the following content:

- a. Title IX prohibits the institution from discriminating on the basis of sex in its education program and activities;
- b. Inquiries concerning the application of Title IX may be referred to the institution's Title IX Coordinator or the Office for Civil Rights; and
- c. The Title IX Coordinator and any Title IX Team Member's title, office address, telephone number and email address.

2. Dissemination of Notice

The notice must be widely distributed to all students, employees, applicants for admission and employment, and other relevant persons. The notice must be prominently displayed on the institution's web site and at various locations

throughout the campus, and must be included in publications of general distribution that provide information to students and employees about the institution's services and policies. The notice should be available and easily accessible on an ongoing basis.

C. Prompt Investigation and Resolution

1. Investigation

Once an institution knows or reasonably should know of possible Sexual Misconduct, it must take immediate and appropriate action, in accordance with its internal procedures, to investigate or otherwise determine what occurred. This obligation applies to Sexual Misconduct covered by this Policy regardless of where the Sexual Misconduct allegedly occurred and regardless of whether a parallel law enforcement investigation or action is pending.

2. Prompt Resolution

If the institution determines that Sexual Misconduct has occurred, an institution must take prompt and effective steps to eliminate the Sexual Misconduct, prevent its recurrence, and address its effects.

- a. In this subsection, "prompt" generally means within 60 calendar days from the time a complaint is brought to the institution's attention until an initial decision is rendered.
- b. There may be circumstances that prevent an institution from meeting the 60-day timeline. When an institution is unable to meet the 60-day timeline, the institution should document the reasons why it was unable to meet the 60 day timeline.

3. Notice of Outcome

The institution must notify both parties concurrently, in writing, about the outcome of the complaint and whether or not Sexual Misconduct was found to have occurred. The institution must also concurrently inform the parties of any change to the results or outcome that occurs before the results or outcome become final, and the institution must inform the parties when the results or outcome become final.

D. Policy & Procedures

1. General

Each institution shall adopt and publish policies and procedures, as needed, that:

- a. Prohibit Sexual Misconduct;
- b. Prohibit Retaliation against any individual who makes a complaint, testifies, assists, or participates in any manner in a Sexual Misconduct investigation, hearing, or proceeding;
- c. Maintain employee and student procedures that provide for the prompt and equitable reporting, investigation, adjudication, and legal sufficiency review of Sexual Misconduct and/or Retaliation cases;
- d. Require prompt interim measures be implemented, as necessary, to protect the parties during the investigation and adjudication processes;
- e. Apprise the community of various USM institution resources and education programs, as well as other community resources and programs, geared to promote the awareness of and eliminate Sexual Misconduct, prevent its recurrence; and, as appropriate, remedy its effects; and
- f. Are easily understood, easily located, and widely distributed.

2. Required Content

At a minimum, the policy and procedures must:

- a. Include a statement prohibiting Sexual Misconduct and Retaliation;
- b. Define Consent, Dating Violence, Domestic Violence, Retaliation, Sexual Harassment, Sexual Exploitation, Sexual Intimidation, Sexual Misconduct, Stalking, and Sexual Violence;
- c. Identify Responsible Employees required to report any knowledge of Sexual Misconduct to the Title IX Coordinator;
- d. Identify confidential and non-confidential medical, counseling and advocacy resources on and off campus to assist individuals affected by Sexual Misconduct, including sexual assault centers, victim advocacy offices, women's centers, and health centers;
- e. Identify options and procedures for immediate and ongoing assistance following an incident of Sexual Misconduct, including encouragement to obtain immediate medical help and notify law enforcement as appropriate (especially to receive guidance in the

preservation of evidence needed for proof of criminal assaults and the apprehension and prosecution of assailants), institution resources available to help obtain such medical or law enforcement assistance, and available interim measures; and

- f. Detail procedures that:
- i. Identify who can file a complaint of Sexual Misconduct with the institution (to include students, institution employees, and third parties);
 - ii. Explain how to file a complaint;
 - iii. Identify to whom such complaints should be directed;
 - iv. Describe any institutional policies governing confidentiality;
 - v. Identify any USM or institution policies that may grant amnesty to a party or witness from drug, alcohol and other student conduct policies;
 - vi. Inform the parties about Interim Measures and how to request the same. Each institution must provide notice, in writing, to the parties about options for, and available assistance in, obtaining no contact or protective orders, enforcing existing and lawful no contact or protective orders, changing academic, transportation, residential, and working situations, if such an accommodation is reasonably available. The institution must also advise the parties of existing options for counseling, health, mental health, victim advocacy, legal assistance, and other services available on and off campus;
 - vii. Explain the complainant's options and rights, as well as institution responsibilities, regarding notification of law enforcement and campus authorities, as well as student conduct options;
 - viii. Detail an investigative process and adjudicative process that affords the parties equal opportunity to present relevant witnesses and evidence throughout the process, and affords the parties similar and timely access to information to be used during any process;
 - ix. Notify the parties of their equal opportunity to be accompanied to any disciplinary meeting or proceeding by an advisor of their choice, and detail the scope of any advisor's role or potential

involvement;

- x. Specify “preponderance of the evidence” as the standard of review;
- xi. Identify the range of possible employment and student sanctions for those found responsible for Sexual Misconduct, up to and including suspension and dismissal;
- xii. If institution policies provide an appeal process, provide an appeal process that is equally available to both parties;
- xiii. After a legal sufficiency review, require the institution to inform the parties, concurrently and in writing, about the outcome of any investigation, adjudication, and appeal conducted under this policy;
- xiv. Designate reasonably prompt timeframes for the major stages of the process, and set forth the procedure for extending such timeframes, to include the timeframes within which (1) the institution will conduct a full investigation, (2) both parties will receive a notice of outcome, and (3) if available, when the parties may file an appeal;
- xv. Assure the community that the institution will take steps to prevent the occurrence of any Sexual Misconduct and remedy its discriminatory effects;
- xvi. Advise the community of institutional programs that endeavor to promote the awareness of Sexual Misconduct and prevent its occurrence; and
- xvii. Advise the community of external options for complainants to lodge complaints of Sexual Misconduct, including local law enforcement, the Equal Employment Opportunity Commission and the U.S. Department of Education Office for Civil Rights.

3. Prohibited Content

The policy and procedures may not include any of the following content:

- a. Content requiring the parties to attempt to resolve any Sexual Misconduct matter informally;
- b. Requirement for or allowance of mediation in Sexual Violence cases;

- c. Allowing a party to personally cross-examine the other party, if an institution allows cross-examination;
- d. Allowing or requiring the institution to wait until a concurrent law enforcement proceeding concludes to begin any Sexual Misconduct investigation, Interim Measures or adjudication;
- e. Allowing questioning or evidence about the complainant's sexual history with anyone other than the respondent during any adjudication proceeding; and
- f. Content that discourages or may be perceived as discouraging a complainant from notifying local law enforcement.

III. Clery Act Compliance

In handling Sexual Misconduct complaints, each institution remains responsible for complying with the requirements of the Crime Awareness and Campus Security Act of 1990 ("Clery Act") and its amendments. Institutions must comply with Clery Act requirements, including crime recording and reporting requirements, where compliance is not otherwise reached by actions under this policy.

IV. MOU with Local Law Enforcement

Each institution must review any Memoranda of Understanding with local police forces to ensure that the terms of the MOU allow the institution to meet its legal obligations.

V. Training

A. Prevention and Awareness Education

Each institution must develop and implement preventative education, directed toward both employees and students, to help reduce the occurrence of Sexual Misconduct. At a minimum, these educational initiatives must contain information regarding what constitutes Sexual Misconduct, definitions of consent and prohibited conduct, the institution's procedures, bystander intervention, risk reduction, and the consequences of engaging in Sexual Misconduct. These educational initiatives shall be for all incoming students and new employees. Each institution also must develop ongoing prevention and awareness campaigns for all students and employees addressing, at a minimum, the same information.

B. Training for Persons Involved in Sexual Misconduct Cases

All persons involved in any way in responding to, investigating, or adjudicating Sexual Misconduct complaints, including but not limited to, the Title IX Team, Responsible Employees, law enforcement, pastors, counselors, health professionals,

resident advisors, and complainant advocates, must have annual training in receiving, reporting and handling complaints of Sexual Misconduct; must be familiar with the institution's procedures; and must understand the parameters of confidentiality.

VI. Record Keeping

Each institution must keep records of actions taken under this policy, including, but not limited to, records of any complaints, records of any proceedings or resolutions, and records of any Sexual Misconduct trainings (including, but not limited to, lists of trainees, dates of training, and training content), and must maintain such records in accordance with the institution's Records Retention Schedule.

VII. Implementation

Each Chief Executive Officer shall promptly communicate this policy and applicable procedures to his/her institutional community after the Board of Regents approves the policy. Each Chief Executive Officer shall also promptly identify his/her Title IX Coordinator and other designee(s), as appropriate for this policy. No later than December 31, 2014, each institution must develop procedures as necessary to implement this policy; and shall forward a copy of its Title IX designations and procedures, and any subsequent changes in such designations and procedures, to the Chancellor.

(This policy replaces USM VI-1.20 USM Policy on Sexual Harassment and USM VI-1.30 USM Policy on Sexual Assault in their entirety. This policy should be cross-referenced with USM BOR VI-1.50 – Policy on the Reporting of Child Abuse & Neglect.)