
SENATE COMMITTEE ON EDUCATION

Senator Connie Leyva, Chair
2019 - 2020 Regular

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Author:	Jackson		
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Consultant:	Lynn Lorber		

Subject: Education: sex equity.

NOTE: This bill has been referred to the Committees on Education and Judiciary. A "do pass" motion should include referral to the Committee on Judiciary.

SUMMARY

This bill requires higher education institutions to, among other things, adopt rules and procedures for the prevention of sexual harassment, and adopt and post on their websites the grievance and investigation procedures to resolve complaints of sexual harassment.

BACKGROUND

Existing federal law:

- 1) Provides that, in part, "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program of activity receiving Federal financial assistance." Enforcement of compliance is initiated upon the filing of a complaint alleging a violation of Title IX.
- 2) Requires each school district and county office of education, or a local public or private agency that receives funding from the state or federal government, to designate a person to serve as the Title IX compliance coordinator to enforce compliance at the local level, including coordinating any complaints of non-compliance. (Title IX of the Education Amendments of 1972 to the 1964 Civil Rights Act)

Existing state law:

- 1) Requires each educational institution in California (K-12 and postsecondary education) to have a written policy on sexual harassment, and requires schools to display the policy in a prominent location in the main administrative building or other area of the campus or schoolsite, be provided as part of any orientation program for new students, provided to each faculty member, administrative staff and support staff, and appear in any publication of the school that sets forth the rules, regulations, procedures and standards of conduct. (Education Code § 231.5 and § 66281.5)

- 2) Requires the governing board of each community college district, the Trustees of the California State University, the Regents of the University of California, and the governing boards of independent postsecondary institutions to adopt policies concerning campus sexual violence, domestic violence, dating violence, and stalking that includes an affirmative consent standard, detailed and victim-centered policies and protocols, and the standard used in determining whether the elements of the complaint against the accused have been demonstrated is the preponderance of the evidence. (EC § 67386)
- 3) Requires schools to post information on their Web sites relative to the designated Title IX coordinator, rights of students and responsibilities of schools, and a description of how to file a complaint. (EC § 221.61)

ANALYSIS

This bill requires higher education institutions to, among other things, adopt rules and procedures for the prevention of sexual harassment, and adopt and post on their websites the grievance and investigation procedures to resolve complaints of sexual harassment. Specifically, this bill:

- 1) Requires, as a condition of receiving state funds for student financial assistance, the governing board or body of a campus of the University of California (UC), California State University (CSU), or California Community College (CCC), a private postsecondary educational institution, or an independent institution of higher education that receives state funds to comply with all of the following requirements at the institution:
 - a) Disseminate a notice of non-discrimination to each employee and volunteer, including any individual employed by contract to perform any service at the institution. The notice must include but is not limited to all information required to be included in the currently-required notice related to written policies on sexual harassment.
 - b) Designate at least one employee to act as a gender equity officer to coordinate its efforts to comply with and carry out its responsibilities. This bill authorizes the gender equity officer to be the same individual as the institution's federal Title IX coordinator. This bill requires the gender equity officer to have adequate training on what constitutes sexual harassment and on trauma-informed investigatory and hearing practices, and understand how the institution's grievance procedures operate.

Sexual harassment policy

- c) Adopt rules and procedures for the prevention of sexual harassment that also provides for specified elements, including but not limited to:
 - i) The harassing conduct shall be deemed to create a hostile environment on campus for the purposes of this section if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the institution's

programs or activities (including a single or isolated incident of sexual harassment).

- ii) The institution's primary concern shall be student safety. The use of alcohol, or drugs, or both shall not constitute grounds for determining that a complainant is at fault for sexual harassment or sexual violence.
- iii) If a student files a complaint with the institution, regardless of where the conduct occurred, the institution shall process the complaint in accordance with this bill.

Grievance procedures

- d) Adopt and publish on its website grievance procedures that provide for prompt and equitable resolution of student sexual harassment complaints filed by a student against an employee, another student, or a third party. This bill requires the grievance procedures to satisfy specified requirements, including but not limited to:
 - i) They shall require notice to each student of the grievance procedures, including where and how complaints may be filed.
 - ii) They shall ensure adequate, reliable, trauma-informed and impartial investigation of complaints, including the opportunity for both parties to present witnesses and other evidence.
 - iii) They shall include an explanation of the meaning of a preponderance of the evidence standard, which shall apply to all investigations involving complaints of sexual harassment or sexual assault. The preponderance of the evidence standard is met if an allegation is more likely than not to be true.
 - iv) They shall provide for notice in writing to parties of any extension of a time period granted in the investigation and outcome determination process.
 - v) They shall provide for notice to parties of the outcome of the complaint in writing. The written outcome shall explain to the parties the reasons for the decision.

Provides that this bill does not require a school to provide separate grievance procedures for student sexual harassment complaints, and authorizes the school to use student disciplinary procedures or other separate procedures to resolve sexual harassment complaints. This bill requires any procedures used to adjudicate complaints of sexual harassment, including disciplinary procedures, to afford a complainant and a respondent a prompt and equitable resolution.

Rights that must be provided in grievance procedures

- vi) If both the complainant and the respondent are students at the institution, they shall be afforded specified rights, including:
 - i) To have the opportunity to give information, identify witnesses, and provide documentary information during the course of the investigation and the opportunity and a

- reasonable amount of time to respond to any evidence upon which any findings will be based.
- ii) To have a support person or adviser accompany a student party during key stages of the investigation and hearing processes, if requested.
 - iii) To not be subjected to any form of direct, live cross-examination from the other party or the other party's advisor.
 - iv) To receive an attorney advocates list developed and maintained by the institution for student parties in school misconduct matters involving sexual harassment or sexual assault.
 - v) To receive a written outcome of the findings, including disciplinary outcomes.
 - vi) If the institution has an appeals process for an investigation, for either party to appeal the outcome of the misconduct proceeding or the disciplinary proceeding.

Provides that nothing in this bill requires schools to provide non-student parties with rights listed in this bill, to the extent that the student rights listed in this bill do not otherwise exist by statute or agreement.

Prohibitions that must be included in grievance procedures

- vii) To have appropriate disciplinary outcomes, remedial measures, and systemic remedies put in place following a final finding of responsibility. To ensure this right is properly protected, an institution of higher education is prohibited from doing any of the following:
 - a. Mandating mediation to resolve allegations of sexual assault.
 - b. Requiring that the complainant enter a voluntary resolution agreement or any other form of resolution as a prerequisite to receiving remedial measures from the institution which safeguard the complainant's access to education.
 - c. Issuing a mutual no-contact directive when an allegation of harm has been made against only one of the parties or when a counter allegation of harm is facially retaliatory.

Who to contact

- (e) Publish in a prominent place on its website, with accompanying text clearly associating them with the sexual harassment and sexual assault grievance processes, the name, title, and contact information (which shall include the telephone number, office location, and email address) of each of the following individuals:
 - i) The gender equity officer or the gender equity officer's designee.

- ii) Any individual official within the institution with the authority to investigate complaints made or to institute corrective measures such as sanctions, accommodation, or other forms of resolution of the complaint.

Training

- f) Provide mandatory training to each employee engaged in the grievance procedures related to sex discrimination, including sexual violence, which shall include for these employees training on trauma-informed and victim-centered best practices for assessment of a sexual harassment or sexual assault complaint and questioning of the complainant, respondent, and witnesses, and on implicit bias, the history of institutional racism, and racial inequities, both broadly and in school disciplinary processes. This bill requires materials approved by the institution for this training to include data-based information on the prevalence of sexual harassment and assault in education, the rate of accuracy in reporting by complainants, and the rates at which students of color, LGBTQI, disabled, non-binary, cisgendered female, and cisgendered male students experience sexual harassment and sexual assault on campus to ensure that campus procedures are grounded in best practices. This bill requires, when possible, citation to such data to be included in the written anti-discrimination policies accompanying the institution's grievance procedures.
- g) Requires an institution, if it has on-campus housing, to ensure that residence life student and non-student staff, or their equivalent, annually receive trauma-informed training for handling reports made to them regarding incidents of sexual harassment or assault, or incidents of sexual harassment or assault of which they have actual or constructive knowledge in student residential facilities.

Investigation

- h) Adopt and publish on its website procedures for an investigation providing for prompt and equitable resolution of student sexual harassment complaints filed by a student, or initiated by the higher education institution itself, against an institution employee, another student, or a third party. This bill requires the procedures to contain specified elements.

Action in court

- 4) Authorizes either of the following people to bring an action in a court of competent jurisdiction to enjoin a violation of this bill or to recover compensatory damages, court costs, and reasonable attorney's fees, or all of these:
 - a) The Attorney General.
 - b) A person whose right to equitable access to a higher education institution, program, or activity through a higher education institution that is a

recipient of state funds was infringed through violation of this bill.

- 5) Requires that a person bring an action no later than the statute of limitations applicable to a personal injury claim in California at the time the cause of action accrues.
- 6) Authorizes civil law remedies to also be available to complainants, and provides that nothing in this bill is to be construed to require an exhaustion of the administrative complaint process before civil law remedies may be pursued.

Miscellaneous

- 7) Requires this bill to be implemented at each higher education institution by January 1, 2021.
- 8) Requires the gender equity officer, if the school relies on disciplinary procedures for compliance, to review the school's disciplinary procedures to ensure that the procedures comply with the requirements of this bill.
- 9) Defines "higher education institution" as a campus of the University of California, California State University, or California Community College, a private postsecondary educational institution, or an independent institution of higher education that receives state funds.
- 10) Modifies the definition of "sexual harassment" to specifically include sexual battery, sexual violence, and sexual exploitation.
- 11) Defines "sexual violence" as physical sexual acts perpetrated against a person without the person's consent, and provides that physical sexual acts include specified acts such as rape.
- 12) Defines "sexual battery" as is currently defined in the Penal Code.
- 13) Defines "sexual exploitation" as taking sexual advantage of another person of the benefit of anyone other than that other person without that other person's consent, regardless of that other person's affiliation with the higher education institution, including specified acts.

STAFF COMMENTS

- 1) ***Need for the bill.*** According to the author, "Schools in California lack clear guidance regarding the rights of California students are entitled to during a school misconduct investigation and proceeding involving an underlying complaint of gender-based discrimination, including sexual harassment and/or violence. While existing California law prohibits institutions of higher education that receive state funding from discriminating on the basis of sex, there is no state law or state agency guidance on what a process for student misconduct investigation and findings by a school must entail in order to ensure that these rights are effectuated and to equity in such a process. SB 493 delineates the rights students are afforded by the state in these processes and also

acknowledges the individuality and autonomy of these institutions and allows ample room for local problem-solving built on a foundation of fundamental process rights students must have. This creates clarity for our higher education institutions and a guaranteed common baseline process experience for California students in higher education when it comes to the enforcement of this important civil right.”

2) ***Proposed changes to federal Title IX rules.*** The United States Department of Education rescinded guidance issued by the previous administration that is related to how institutions of higher education are to comply with Title IX, and issued new guidance in September 2017. Guidance is not necessarily legally binding. In November 2018, the US Department of Education released proposed changes to Title IX rules, which are legally binding. Proposed changes that are related to provisions of this bill include:

- a) Places limits on the use of the “preponderance of evidence” standard, and requires institutions of higher education to otherwise use the “clear and convincing evidence” standard.
- b) Modifies the standard for when an institution of higher education must respond to allegations of sexual harassment from “know or reasonably should know” to “actual knowledge.”
- c) Allows for the cross-examination of complainants during a live hearing.
- d) Excludes some off-campus conduct.
<https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf>

This bill specifically applies the preponderance of evidence standard to all investigations; provides that specified harassing conduct, which could be a single or isolated incident, is to be deemed to create a hostile environment; requires an institution, regardless of where the conduct occurred, to process the complaint in accordance with this bill; prohibits a complainant or respondent from being subjected to any form of direct, live cross-examination from the other party or the other party’s advisor; and prohibits an institution from mandating mediation, requiring the complainant enter a voluntary resolution agreement or any other form of resolution, or issuing a mutual no-contact directive.

If this bill were to become law and the proposed changes to federal Title IX rules are adopted, California would have stronger Title IX protections and requirements in institutions of higher education than would be required by federal standards.

3) ***Federal guidance institutions have been following.*** The United States Department of Education’s Office for Civil Rights (OCR) issued a “Dear Colleague” letter on April 4, 2011, providing guidance on ensuring compliance with Title IX specific to sexual harassment. The letter detailed numerous requirements under Title IX related to sexual harassment, explained that sexual harassment includes sexual violence, and provided guidance relative to specific requirements pursuant to Title IX. The OCR stated that its “letter does not add

requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations.”

This guidance stated, among other things, that:

- a) Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX.
- b) Institutions must publish a notice of non-discrimination, as specified.
- c) Institutions must designate an employee as the Title IX coordinator and notify students and employees of the name and contact information for the Title IX coordinator.
- d) Institutions that know or reasonably should know about harassment that creates a hostile environment must take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.
- e) Institutions must adopt and publish grievance procedures providing for the prompt and equitable resolution of sex discrimination complaints.
- f) Institutions’ grievance procedures should specify the timeframe within which the institution will conduct a full investigation, both parties receive a response regarding the outcome, and the parties may file an appeal.
- g) Institutions must use a preponderance of the evidence standard (it is more likely than not that sexual harassment or violence occurred) in order for the grievance procedures to be consistent with Title IX standards.
- h) Institutions are not relieved of their duty under Title IX to resolve complaints promptly and equitably whether or not a criminal investigation is underway.
- i) Institutions must notify both parties, in writing, about the outcome of the complaint and any appeal.
- j) Institutions need to ensure their employees are trained to know how to report harassment and how to respond properly.

This bill essentially codifies the guidance provided by the Office of Civil Rights (OCR)’s “Dear Colleague” letter in 2011, as well as imposes requirements, procedures, and rights that the proposed changes in federal Title IX rules modify.

- 4) ***Preponderance of evidence standard.*** According to the 2011 “Dear Colleague” letter from the OCR, “the Supreme Court has applied a preponderance of the evidence standard in civil litigation involving discrimination under Title VII of the Civil Rights Act of 1964 ... Like Title IX, Title VII prohibits discrimination on the basis of sex.” The letter also notes that the Title IX regulations adopt the procedural provisions applicable to Title VI of the Civil

Rights Act. The letter states “Thus, in order for a school’s grievance procedures to be consistent with Title IX standards, the school must use a preponderance of evidence standard.”

Existing state law, pursuant to SB 967 (de León, Chapter 748, 2014), requires California’s postsecondary institutions to adopt policies concerning campus sexual violence that includes an affirmative consent standard and the preponderance of evidence standard for determining whether the elements of the complaint against the accused have been demonstrated.

- 5) **Training.** Current law requires institutions of higher education’s policies and procedures to include training for campus officials involved in investigating and adjudicating cases, but stops short of actually requiring the training to occur. This bill requires institutions to provide the mandatory training to each employee engaged in the grievance procedures related to sex discrimination, including sexual violence. This bill requires the training to include training on trauma-informed and victim-centered best practices for assessment of a sexual harassment or sexual assault complaint and questioning of the complainant, respondent, and witnesses, and on implicit bias, the history of institutional racism, and racial inequities, both broadly and in school disciplinary processes.

This bill requires the gender equity officer to have adequate training on what constitutes sexual harassment and on trauma-informed investigatory and hearing practices, and understand how the institution’s grievance procedures operate.

This bill also requires residence life student and non-student staff to annually receive trauma-informed training for handling reports made to them regarding incidents of sexual harassment or assault, or incidents of sexual harassment or assault of which they have actual or constructive knowledge in student residential facilities

It is unclear whether all campuses have the capacity to provide this level of training; however, this bill does not preclude campuses from partnering or contracting with an outside entity to provide this training.

- 6) **Other things to consider.** This bill is double-referred to the Senate Judiciary Committee. Provisions of this bill that may be considered by the Judiciary Committee include: what it means for residence life student and non-student staff to have “constructive knowledge” of incidents of sexual harassment or assault in student residential facilities; bringing an action in a court of competent jurisdiction; the provision of a list of attorney advocates.
- 7) **Prior legislation.** SB 169 (Jackson, 2017) was similar to this bill. SB 169 was vetoed by Governor Brown, whose veto message read:

This bill would codify a combination of federal regulations and guidance on sexual harassment - some of which has been repealed, some of which is still in effect - as well as some language from model policies that have been developed by California universities.

This is not a simple issue. Sexual harassment and sexual violence are serious and complicated matters for colleges to resolve. On the one side are complainants who come forward to seek justice and protection; on the other side stand accused students, who, guilty or not, must be treated fairly and with the presumption of innocence until the facts speak otherwise. Then, as we know, there are victims who never come forward, and perpetrators who walk free. Justice does not come easily in this environment.

That is why in 2014 I signed into law the first affirmative consent standard in the country for colleges to adopt in their sexual assault policies, so that clear and basic parameters for responsible behavior could be established. Yes Means Yes, along with its attendant preponderance standard, is the law in California, which only the courts or a future legislature can change.

Since this law was enacted, however, thoughtful legal minds have increasingly questioned whether federal and state actions to prevent and redress sexual harassment and assault - well-intentioned as they are - have also unintentionally resulted in some colleges' failure to uphold due process for accused students. Depriving any student of higher education opportunities should not be done lightly, or out of fear of losing state or federal funding.

Given the strong state of our laws already, I am not prepared to codify additional requirements in reaction to a shifting federal landscape, when we haven't yet ascertained the full impact of what we recently enacted. We have no insight into how many formal investigations result in expulsion, what circumstances lead to expulsion, or whether there is disproportionate impact on race or ethnicity. We may need more statutory requirements than what this bill contemplates. We may need fewer. Or still yet, we may need simply to fine tune what we have.

It is time to pause and survey the land.

I strongly believe that additional reflection and investment of time in understanding what is happening on the ground will help us exercise due care in this complex arena. I intend to convene a group of knowledgeable persons who can help us chart the way forward.

SB 665 (Block, 2015) required the Attorney General to establish a statewide Title IX Oversight Office, required postsecondary educational institutions to report specific data to this office, required each student to complete training on rape and sexual assault awareness and prevention annually. SB 665 was held in the Senate Appropriations Committee.

SUPPORT

American Association of University Women-California

California Association for Health, Physical Education, Recreation and Dance
California Women's Law Center
Children's Defense Fund-California
Citizens for Choice
Empowering Pacific Islander Communities
Equal Rights Advocates
Family Violence Law Center
Los Angeles United Methodist Urban Foundation
National Association of Social Workers, California Chapter
Peace Over Violence
Public Counsel
Southeast Asia Resource Action Center

OPPOSITION

None received

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