

SENATE RULES COMMITTEE

SB 493

Office of Senate Floor Analyses

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THIRD READING

Bill No: SB 493

Author: Jackson (D), et al.

Amended: 5/17/19

Vote: 21

SENATE EDUCATION COMMITTEE: 6-0, 4/3/19

AYES: Leyva, Wilk, Chang, Durazo, McGuire, Pan

NO VOTE RECORDED: Glazer

SENATE JUDICIARY COMMITTEE: 7-0, 4/23/19

AYES: Jackson, Allen, Caballero, Monning, Stern, Umberg, Wieckowski

NO VOTE RECORDED: Borgeas, Jones

SENATE APPROPRIATIONS COMMITTEE: 4-2, 5/16/19

AYES: Portantino, Bradford, Hill, Wieckowski

NOES: Bates, Jones

SUBJECT: Education: sex equity

SOURCE: Equal Rights Advocates

Women's Foundation of California/Women's Policy Institute

DIGEST: 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 Web sites the grievance procedures to resolve complaints of sexual harassment.

ANALYSIS:

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 schooldistrict 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)

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, 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 of the institution, volunteer who will interact with students more than 10 hours in a calendar year, and individual under contract with the institution 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 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.
 - ii) If a student files a complaint with the institution regarding an incident that took place on campus, the institution shall process the complaint in accordance with this bill. If a student files a complaint regarding an incident that took place off-campus, the institution shall evaluate the complaint to determine if there is a nexus between the off-campus incident and the institution such that the incident could contribute to a hostile environment on campus. If such a nexus exists, the institution shall process the complaint in accordance with this section. In the absence of evidence to the contrary, a nexus to the campus exists whenever the incident complained of is so grievous and the likelihood of continuing to encounter the perpetrator on campus is so credible that inaction would deprive the complainant of the benefits of any education program.

Grievance procedures

- d) Adopt and publish on its Web site 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 that the investigation of the allegation and the adjudication of the matter are not conducted by the same person or entity.
 - iii) They shall provide for a hearing before a neutral adjudicator with the power independently to find facts and make credibility assessments.
 - iv) They shall ensure adequate, reliable, trauma-informed and impartial investigation of complaints, including the opportunity for both parties to present witnesses and other evidence.
 - v) 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.
 - vi) They shall provide for notice in writing to parties of any extension of a time period granted in the investigation and outcome determination process.
 - vii) 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.
 - viii) They shall contain a requirement that the gender equity officer, or that officer's designee, assess each report of sexual harassment and provide outreach, as appropriate, to each identifiable student who is alleged to be the victim of the reported conduct. This bill requires outreach to include specified information.
- e) Provide 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

- f) Provide that 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 receive a notice regarding appropriate legal and counseling resources developed and maintained by the institution for student parties in school misconduct matters involving sexual violence.
 - iv) To receive a written outcome of the findings, including disciplinary outcomes.
 - v) 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.
- g) Provide 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.

Cross examination

- h) Require the grievance procedures to provide both parties the opportunity, during the hearing, to cross-examine one another and any witnesses against them subject to the following rules:
 - i) The cross examination shall be live, but either party and any witness may request to answer the questions by video from a remote location.
 - ii) The live cross examination of either party and any witnesses shall be conducted indirectly, through the submission of written questions to the neutral adjudicator in advance and with an opportunity for the other party to object. The neutral adjudicator shall have the authority

and obligation to discard or rephrase any question that the neutral adjudicator deems to be repetitive, irrelevant, or harassing. In making these determinations, the neutral adjudicator is not bound by, but may take guidance from, the formal rules of evidence. The neutral adjudicator shall provide a mechanism for both parties to ask, indirectly, through the neutral adjudicator, and subject to objections, followup questions to be posed to the cross-examinee. The neutral adjudicator shall be empowered to require any witness to answer any question to which, in the view of the neutral adjudicator, the witness has not yet been responsive. In no circumstance shall a cross-examinee be limited to answering “yes” or “no.”

Prohibitions that must be included in grievance procedures

- i) Require 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:
 - i) Mandating mediation to resolve allegations of sexual assault.
 - ii) 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.
 - iii) 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

- j) Require institutions to publish in a prominent place on its Web site, 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

- k) Require institutions to 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 investigatory and hearing practices that help ensure an impartial and equitable process, best practices for assessment of a sexual harassment or sexual assault complaint and best practices for 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 statistics on the prevalence of sexual harassment and sexual violence in the educational setting,, 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.
- l) Require an institution, if it has on-campus housing, to ensure that residence life student and non-student staff, or their equivalent, annually receive training on trauma-informed handling of 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.

Action in court

- 2) Authorizes either of the following people to bring an action in a court of competent jurisdiction to enjoin a knowing violation of this bill or to recover compensatory damages, court costs, and reasonable attorney's fees, or all of these:
 - a) The Attorney General, consistent with the Attorney General's existing authority under Section 13 of Article V of the California Constitution and Article 2 (commencing with Section 11180) of Chapter 2 of Part 1 of Division 3 of Title 2 of the Government Code, to investigate, and, as necessary, prosecute any knowing violation of the law. The Attorney

General may also conduct an investigation or bring an action under this section.

- 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 knowing violation of this bill.
- 3) 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.
- 4) Authorizes civil law remedies to also be available to complainants.

Miscellaneous

- 5) Requires this bill to be implemented at each higher education institution by January 1, 2021.
- 6) 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.
- 7) 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.
- 8) Modifies the definition of "sexual harassment" to specifically include sexual battery, sexual violence, and sexual exploitation.
- 9) Defines "sexual violence" as physical sexual acts perpetrated against a person without the person's affirmative consent, and provides that physical sexual acts include specified acts such as rape.
- 10) Defines "sexual battery" as is currently defined in the Penal Code.
- 11) 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.

Comments

1) *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; requires an institution that receives a complaint regarding an incident that took place on campus to process the complaint in accordance with this bill; requires the live cross examination of either party and any witnesses to be conducted indirectly, through the submission of written questions to the neutral adjudicator in advance and with an opportunity for the other party to object; 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.

2) *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 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.

- 3) *Related Workgroup*. This bill is similar to SB 169 (Jackson, 2018), which was vetoed by Governor Brown. A portion of Governor Brown's veto message read "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.*"

Governor Brown subsequently convened a workgroup, and the workgroup issued their recommendation in November 2018. Most of the working group's findings are consistent with this bill. For example, the working group embraced the focus on sexual misconduct as involving both sexual harassment and sexual violence, the importance of training on trauma-informed investigatory practices, the use of the preponderance of the evidence standard, the right to legal counsel if desired, and the importance of ensuring that any cross-examination is conducted indirectly.

Some of the recommendations from the workgroup differ somewhat from provisions of this bill. For example, while the working group embraced the preponderance of the evidence standard, it describes that standard as requiring "persuasive, relevant, and substantial" evidence, whereas this bill uses the more traditional explanation that preponderance of the evidence means "more likely than not." Similarly, while both the working group and this bill emphasize that investigations must be impartial, and both endorse the importance of trauma-informed investigatory methods, the working group also explicitly states that trauma-informed investigatory methods should not be used to undermine the impartiality of the investigation.

[<http://www.ivc.edu/policies/titleix/Documents/Recommendations-from-Post-SB-169-Working-Group.pdf>]

- 4) *Related court decision.* In *Doe v. Allee* (2019) 30 Cal.App.5th 1036, the court set aside the expulsion of a student accused of sexual assault. The court criticized the higher education institution's procedures for handling complaints of sexual assault and provided the following minimal standard:

we hold that when a student accused of sexual misconduct faces severe disciplinary sanctions, and the credibility of witnesses (whether the accusing student, other witnesses, or both) is central to the adjudication of the allegation, fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross-examine those witnesses, directly or indirectly, at a hearing in which the witnesses appear in person or by other means (such as means provided by technology like videoconferencing) before a neutral adjudicator with the power independently to find facts and make credibility assessments. (*Doe v. Allee* (2019) 30 Cal.App.5th 1036, 1039.)

Unlike the proposed federal regulations, these court rulings are currently binding on California.

- 5) *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, Statutes of 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.

- 6) *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 investigatory and hearing practices that help ensure an impartial and equitable process, best practices for assessment of a sexual harassment or sexual assault complaint, best practices for 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 training on trauma-informed handling of 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.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: Yes

According to the Senate Appropriations Committee:

- 1) The bill's provision creating a private cause of action will result in unknown but potentially significant costs associated with litigation to the UC and CSU.
- 2) CSU estimates an additional \$1.8 million associated with the bill's provisions allowing a suing party to recover compensatory damages and reasonable attorney's fees. CSU also estimates additional costs of about \$3.7 million for each campus to hire a new gender equity officer for each of its 15 campuses.
- 3) The Department of Justice estimates ongoing General Fund costs of approximately \$895,000 to fund four positions.

SUPPORT: (Verified 5/16/19)

Equal Rights Advocates (co-source)

Women's Foundation of California/Women's Policy Institute (co-source)

American Association of University Women-California

California Association for Health, Physical Education, Recreation and Dance
California Partnership to End Domestic Violence
California Women's Law Center
Children's Defense Fund-California
Citizens for Choice
Courage Campaign
Ella Baker Center for Human Rights
Empowering Pacific Islander Communities
Family Violence Law Center
Feminist Majority Foundation
Los Angeles United Methodist Urban Foundation
National Association of Social Workers, California Chapter
Peace Over Violence
Public Counsel
Southeast Asia Resource Action Center

OPPOSITION: (Verified 5/16/19)

Families Advocating for Campus Equality

Prepared by: Lynn Lorber / ED. /
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**** **END** ****