

Date of Hearing: July 9, 2019

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
SB 493 (Jackson) – As Amended May 17, 2019

As Proposed to be Amended

SENATE VOTE: 30-8

SUBJECT: EDUCATION: POSTSECONDARY: SEXUAL HARASSMENT

KEY ISSUE: SHOULD COLLEGES AND UNIVERSITIES IN CALIFORNIA - IN ORDER TO MORE EFFECTIVELY PREVENT, INVESTIGATE, AND ADDRESS INCIDENTS OF SEXUAL HARASSMENT, INCLUDING SEXUAL VIOLENCE - ADOPT DETAILED PROCEDURAL REQUIREMENTS FOR HANDLING SUCH COMPLAINTS FROM STUDENTS?

SYNOPSIS

Sexual harassment and assault on college and university campuses is rampant and substantially impedes equitable access to education for victims, who are disproportionately from underserved and minority communities. Several federal and state laws prohibit discrimination on the basis of sex, including at educational institutions, and courts have interpreted such prohibitions to provide an implicit mandate for educational institutions to adopt procedures to identify, mitigate, and discipline sexual harassment and assault. Nonetheless, these laws are general and vague as to the proper implementation of their provisions, leading to vacillating federal guidance, inconsistency, and confusion. In 2011, the Department of Education under the Obama Administration released a "Dear Colleague" letter which provided detailed guidelines for sexual harassment complaint procedures in order to comply with long-standing federal protections against sexual discrimination and harassment enshrined in the regulations of Title IX of the Educational Amendment of 1972. However, the Department of Education under the Trump Administration rescinded that letter in 2017, and has telegraphed the emergence of new implementing regulations for Title IX that focus more on the due process rights of the alleged perpetrator. Concern that new regulations will undermine the protections afforded by Title IX and other laws has led to legislative interest in state guidance for implementation of these protections.

This bill seeks to codify aspects of the 2011 "Dear Colleague" letter including notification requirements for parties to a sexual harassment complaint and certain requirements for associated grievance procedures. The bill also incorporates several provisions relating to appropriate procedures to afford reasonable due process protections to all parties, which were standardized in a recent California appellate court decision, including requiring live hearings and opportunities to cross-examine via a neutral fact finder. Most controversially, the bill provides for enforcement by the Attorney General or by private right of action, though the bill in print does not define the parameters of such litigation effectively. The bill in print lacks clarity in many respects, including as to which provisions apply to whom, and many of the details surrounding the private right of action and provisions prohibiting automatic issuing of mutual no-contact directives.

In response to these issues, the author has agreed to a host of clarifying and substantive amendments which, inter alia, specify that the rights and responsibilities delineated in this bill apply to students, and do not confer any new rights to non-student parties, limiting the scope of the private right of action to students who suffered an injury-in-fact for which violation of the provisions of the bill was a proximate cause, and permitting mutual no-contact directives if the complainant has harmed or threatened to harm the respondent, or if the complainant has interfered with, or has threatened behavior that would interfere with, the investigative or disciplinary proceedings through contact with the respondent.

This bill is co-sponsored by Equal Rights Advocates and the Women's Foundation of California Women's Policy Institute, and the bill in print is supported by a coalition of women's advocates, legal aid organizations, civil rights advocates, workers' rights organizations, and domestic violence prevention groups. Supporters of the bill argue that state and federal law lack sufficient guidance to implement workable policies relating to complaints of sexual harassment on campus, and that the clarification and protections for both parties to such a complaint provided by this bill are crucial to ensuring the civil rights, safety, and well-being of all students is paramount. This bill is opposed by groups advocating on behalf of the rights of the accused who are concerned that the bill codifies practices that are inefficient for investigating and hearing complaints, does not sufficiently provide for the due process rights of the accused, and will ultimately conflict with the new federal regulations set to be released this fall. The bill is also opposed unless amended by the University of California and the Association of Independent California Colleges and Universities who are concerned that granting a broad private right of action without defining parameters for litigation will subject the institutions to costly and time consuming lawsuits that may be founded on unmeritorious claims. This bill was heard and approved by the Assembly Committee on Higher Education by a 9-3, party-line vote.

SUMMARY: Requires postsecondary educational institutions in California to comply with specific detailed regulations in conducting proceedings relating to complaints of sexual harassment, including sexual violence, on campus. Specifically, **this bill:**

- 1) Provides that in order to receive state funds for student financial assistance, the appropriate governing board or body of each postsecondary institution must implement, and at all times comply with, all of the following requirements:
 - a) Disseminate a notice of non-discrimination to each employee of the institution, volunteer who will regularly interact with students, and individual or entity under contract with the institution to perform any service involving regular interaction with students at the institution.
 - b) Designate at least one employee of the institution, trained on what constitutes sexual harassment, trauma-informed investigatory and hearing practices, and the grievance procedures of the institution, to coordinate its efforts to comply with and carry out its responsibilities under the provisions of this bill.
 - c) Adopt rules and procedures within the policies required by Title IX and otherwise in the Education Code providing for all of the following:
 - i) The institution's primary concern shall be student safety.

- ii) The institution shall take reasonable steps to respond to sex discrimination in connection with all academic, educational, extracurricular, athletic, and other programs of the institution, whether those programs take place in the institution's facilities, during travel, at a class or training program sponsored by the institution at another location, or elsewhere on or off campus where such incidents could interfere with a student's equitable access to education.
 - iii) 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 the provisions of this bill; if the incident 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 so, the institution shall process the complaint in accordance with the provisions of this bill.
 - iv) If the institution knows, or reasonably should know, about possible sexual harassment, the institution shall promptly investigate, and shall immediately take all reasonable steps to eliminate any resulting hostile environment on campus.
 - d) Adopt and publish on its internet 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.
- 2) Requires grievance procedures for prompt and equitable resolution of student sexual harassment complaints to include all of the following requirements:
- a) Notice to each student of the grievance procedures, including where and how complaints may be filed.
 - b) A neutral fact-finder responsible for investigating the complaint, finding facts, and making credibility assessments in order to determine whether a policy violation has occurred, who is not the same as the person or entity responsible for making disciplinary decisions.
 - c) Trauma-informed and impartial investigation of complaints, including the opportunity for both parties to identify witnesses and other evidence to assist the institution in determining whether a policy violation has occurred.
 - d) If the institution determines that a hearing is required in order to determine whether a policy violation has occurred, the opportunity for students to cross-examine one another and any adverse witnesses live, through submission of written questions to the neutral fact-finder in advance with an opportunity for the other party to object.
 - e) Explanation as to the meaning of a preponderance of the evidence standard and affirmation that such a standard shall apply to all investigations of sexual harassment or sexual violence.
 - f) A reasonably prompt timeframe for all of the major stages of the complaint process.

- g) Periodic status updates to students on the investigation consistent with the timelines provided.
- h) Notice in writing to parties of any extension of a time period granted in the investigation and fact-finding process.
- i) Notice in writing to the parties of the outcome of the complaint including whether a policy violation was found to have occurred, the basis for that determination, and any discipline imposed.
- j) Assurance that the institution will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.
- k) Notice to parties that the institution is conducting a formal investigation, including the allegations and alleged institutional policy violations.
- l) Reasonable procedures for the investigation process, including evidentiary guidelines, deadlines, and limitations on submissions from student parties.
- m) The opportunity to have a support person or adviser accompany a student party during key stages of the investigation and hearing process, if requested.
- n) Notice regarding appropriate counseling resources developed and maintained by the institution for student parties in school misconduct matters involving sexual violence.
- o) Notice that student parties have the right to seek the assistance of an attorney at any stage of the process if they wish to do so.
- p) Information as to the disciplinary outcomes, remedial measures, and systemic remedies that may be put in place during the pendency of an investigation and following a final finding of responsibility, including the following requirements:
 - i) An institution shall not mandate mediation to resolve allegations of sexual violence.
 - ii) An institution shall not require that the complainant enter a voluntary resolution agreement or any other form of resolution as a prerequisite to receiving remedial measures from the institution.
 - iii) An institution shall not issue an interim mutual no-contact directive automatically when an allegation of harm has been made against only one of the parties, and shall only issue a mutual no-contact directive if there is reason to believe that the complainant has harmed or threatened to harm the respondent, or has interfered with, or threatened behavior that would interfere with, the investigative or disciplinary proceedings through contact with the respondent.
- q) Description of obligations of all faculty and staff designated by the institution as required to report concerns of sexual harassment to the Title IX officer or other designated employee.
- r) A Title IX officer or employee designated to 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, as specified, and information on the internet website of the institution regarding the contact information of that individual as well as any official within the institution with the authority to investigate complaints made pursuant to these provisions.

- s) Mandatory training to each employee engaged in the grievance procedures related to sex discrimination, including training on trauma-informed investigatory and hearing practices.
 - t) Mandatory training to each employee of their obligation to report harassment to appropriate school officials and on the identification of sexual harassment.
- 3) Allows an action to enjoin a violation of these provisions, or to recover compensatory damages, court costs, and reasonable attorney's fees, as specified, to be brought by the Attorney General or by a student or former student of a postsecondary institution who alleges to have suffered injury-in-fact for which violation of these provisions was a proximate cause.
 - 4) Provides that a violation of these provisions is established by demonstrating in an action in a court of competent jurisdiction any of the following:
 - a) That the institution's written policy does not conform to the requirements of these provisions.
 - b) That the institution engages in a non-conforming process that does not substantially and materially comply with its written policy.
 - c) That an institution, by an act or actions of one of its employees, knowingly violated the requirements of these provisions.
 - 5) Requires a person alleging injury caused by a violation of these provisions to give written notice to the institution and to the Attorney General of the specific provisions alleged to have been violated, including the facts and theories to support the alleged violation and injury, prior to filing a civil action.
 - 6) Permits a person alleging injury to commence a civil action seeking damages after 90 days have elapsed from the date of the institution's receipt of the notice pursuant to 5), above.
 - 7) Provides that a person alleging injury caused by a violation of these provisions may commence a civil action exclusively seeking injunctive relief at any time following written notice pursuant to 5), above.
 - 8) Permits a court to grant compensatory damages as relief in any action filed pursuant to these provisions by a person alleging injury as a result of a violation of these provisions, provided all of the following are demonstrated:
 - a) The person suffered an injury-in-fact.
 - b) The defendant institution was in violation of these provisions at the time of the alleged injury.

- c) The violation of these provisions by the defendant institution was a proximate cause of the alleged injury.
- 9) Permits a court, in its discretion, to award the prevailing party in a civil action pursuant to these provisions reasonable attorney's fees and costs, except that a prevailing defendant shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so.
- 10) Provides that a person shall bring an action alleging a violation of these provisions no later than the statute of limitations applicable to a personal injury claim in California at the time the cause of action accrues.
- 11) Provides that, in addition to compensatory damages, injunctive relief or other remedies appropriate to the circumstances may also be available to injured parties who file a civil action under these provisions.
- 12) If an action brought by the Attorney General establishes a postsecondary institution to be in violation of these provisions, permits the court to assess a civil penalty not to exceed \$2,500 per day that the institution remains in violation, and not exceed \$50,000 total per violation.
- 13) Defines "sexual harassment" to include sexual battery, sexual violence, and sexual exploitation, and to have the same meaning as elsewhere in the Education Code.
- 14) Defines "sexual violence" to mean physical sexual acts perpetrated against a person without the person's affirmative consent, as defined, including all of the following:
 - a) Rape, defined as penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.
 - b) The intentional touching of another person's intimate parts.
 - c) The use of duress or force, or the attempt to use duress or force, to touch another person's intimate parts.
- 15) Defines "sexual battery" to have the same meaning as in Section 1708.5 of the Civil Code.
- 16) Defines "sexual exploitation" to mean a person taking sexual advantage of another person for the benefit of anyone other than that person without that person's consent, including all of the following:
 - a) The prostituting of another person.
 - b) The trafficking of another person, defined as the inducement of a person to perform a commercial sex act, or labor or services, through force, fraud, or coercion.
 - c) The recording of images, including video or photograph, or audio of another person's sexual activity, intimate body parts, or nakedness, without that person's consent.
 - d) The distribution of images, including video or photograph, or audio of another person's sexual activity, intimate body parts, or nakedness, if the individual distributing those

images or audio knows or should have known that the person depicted in the images or audio did not consent to the disclosure.

- e) The viewing of another person's sexual activity, intimate body parts, or nakedness, in a place where the other person would have a reasonable expectation of privacy, without that person's consent, for the purpose of arousing or gratifying sexual desire.

17) Makes several findings and declarations relating the pervasiveness and insidiousness of sexual harassment at postsecondary educational institutions.

EXISTING LAW:

- 1) Provides, under Title IX of the federal Education Amendments of 1972, that no person 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 or activity receiving federal financial assistance. (20 U.S.C. Section 1681 *et seq.*)
- 2) Requires any school district, college, or university (recipients) that receive federal financial assistance to comply with procedural requirements outlined in Title IX implementing regulations. Specifically, for purpose of this bill, Title IX regulations require recipients to do the following:
 - a) Disseminate a notice of nondiscrimination. Specifies that the notice of nondiscrimination must state that the recipient does not discriminate on the basis of sex in its educational programs and activities, and that Title IX prohibits the recipient from discriminating in such a manner. (34 CFR Section 106.9.)
 - b) Designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX. (34 CFR Section 106.8 (a).)
 - c) Adopt and publish a grievance procedure providing for prompt and equitable resolution of student and employee sex discrimination complaints. (34 CFR Section 106.8 (b).)
- 3) Declares that it is the policy of this state to afford all persons in public schools, regardless of their disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic, equal rights and opportunities in the educational institutions of the state. Declares further that all students have the right to participate fully in the educational process, free from discrimination and harassment; that California's public schools have an affirmative obligation to combat racism, sexism, and other forms of bias, and a responsibility to provide equal educational opportunity; and that harassment on school grounds directed at an individual on the basis of personal characteristics or status creates a hostile environment and jeopardizes equal educational opportunity. (Education Code Sections 200-201; all further references to code sections refer to the Education Code unless otherwise specified.)
- 4) Requires educational institutions in California to have a written policy on sexual harassment and to display that policy in a conspicuous place, and to distribute it, as specified, to students, faculty, and staff. (Section 231.5.)

- 5) Requires the governing board of each community college district, the Trustees of the California State University (CSU), the Regents of the University of California (UC), and the governing boards of independent postsecondary institutions to adopt policies concerning campus sexual violence, domestic violence, dating violence, and stalking that include an affirmative consent standard, detailed and victim-centered policies and protocols, and to use the "preponderance of evidence" standard for determining whether the elements of the complaint against the accused have been demonstrated. (Section 67386.)
- 6) Requires schools to post information on their websites about the school's designated Title IX coordinator, the rights of students under Title IX, the responsibilities of schools in addressing sexual discrimination and harassment, and a description of how to file a complaint. (Section 221.61.)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: Sexual harassment and assault on college and university campuses is rampant and substantially impedes equitable access to education for victims, who are disproportionately from underserved and minority communities. Several federal and state laws prohibit discrimination on the basis of sex, including at educational institutions, and courts have interpreted such prohibitions to provide an implicit mandate for educational institutions to adopt procedures to identify, mitigate, and discipline sexual harassment and assault. Nonetheless, these laws are general and vague as to the proper implementation of their provisions, leading to vacillating federal guidance, inconsistency, and confusion. In 2011, the Department of Education under the Obama Administration released a "Dear Colleague" letter which provided detailed guidelines for sexual harassment complaint procedures in order to comply with long-standing federal protections against sexual discrimination and harassment enshrined in the regulations of Title IX of the Educational Amendment of 1972. However, the Department of Education under the Trump Administration rescinded this letter in 2017, and has telegraphed the emergence of new implementing regulations for Title IX that focus more on the due process rights of the alleged perpetrator. Concern that new regulations will undermine the protections afforded by Title IX and other laws has led to legislative interest in state guidance for implementation of these protections.

This bill seeks to codify aspects of the 2011 "Dear Colleague" letter including notification requirements for parties to a sexual harassment complaint and certain requirements for associated grievance procedures. The bill also incorporates several provisions relating to appropriate procedures to afford reasonable due process protections to all parties, which were standardized in a recent California appellate court decision, including requiring live hearings and opportunities to cross-examine via a neutral fact finder. Most controversially, the bill provides for enforcement by the Attorney General or by private right of action, though the bill in print does not define the parameters of such litigation effectively. The bill in print lacks clarity in many respects, including as to which provisions apply to whom, and many of the details surrounding the private right of action and provisions prohibiting automatic issuing of mutual no-contact directives. In response to these issues, the author has agreed to a host of clarifying and substantive amendments which, inter alia, specify that the rights and responsibilities delineated in this bill apply to students, and do not confer any new rights on non-student parties, limiting the scope of the private right of action to students who suffered an injury-in-fact for which violation of the provisions of the bill was a proximate cause, and permitting mutual no-contact directives if the complainant has harmed or threatened to harm the respondent, or if the

complainant has interfered with, or has threatened behavior that would interfere with, the investigative or disciplinary proceedings through contact with the respondent. The proposed amendments are discussed in this analysis.

According to the author:

[Schools] in California lack sufficient or clear guidance regarding the processes to follow if put on notice of an incident of sex discrimination (including sexual harassment or sexual violence), including during a school misconduct investigation based on an underlying complaint of gender-based discrimination, including sexual harassment and/or violence.

SB 493 will address this deficiency in state law as it concerns institutions of Higher Education, which is particularly important in light of the rampant epidemic of sexual violence in higher education. The bill delineates processes for schools to respond to alleged incidents of sexual harassment and sexual violence. These requirements include: notice and posting requirements to ensure students are aware of such processes, their rights, and where to report; transparent procedures for timely investigating complaints to ensure a fair and equitable process for all parties; [and] training for school officials involved in misconduct investigations[.]

The bill 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 when it comes to the enforcement of their civil right to equitable access to education.

Sexual harassment, including sexual assault, sexual battery, and sexual exploitation, is alarmingly prevalent at colleges and universities. Recent efforts to quantify the scope of the campus sexual assault epidemic have painted a horrific picture. A report prepared for the National Institute of Justice and submitted to the United States Department of Justice indicated that at the two large public universities surveyed, "13.7 percent of undergraduate women had been survivors of at least one completed sexual assault since entering college: 4.7 percent were survivors of physically forced sexual assault, 7.8 percent of women were sexually assaulted when they were incapacitated after voluntarily consuming drugs and/or alcohol," and 0.6 percent were sexually assaulted while incapacitated after being involuntarily drugged. (Krebs et al., *The Campus Sexual Assault (CSA) Study: Final Report (Document 221153)*, U.S. Department of Justice, Oct. 2007, <http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.)

Despite the severity of this issue, the same study suggested that campus sexual assault is dramatically under-disciplined. According to that study, only 0.6 percent of perpetrators of campus sexual assault were disciplined for this conduct by their university, and only 5.7 percent of these perpetrators were arrested, prosecuted, or convicted by the criminal justice system. (*Ibid.*) These findings are in spite of the fact that 90 percent of campus rapes are committed by repeat offenders comprising approximately six percent of men on campus. (Lisak & Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists* (2002) Violence and Victims, 17(1), 73-84.) Given this rate of recidivism, colleges and universities appear to lack a sufficiently robust disciplinary framework to protect their students from sexual assault, as ideally these repeat offenders would be disciplined and removed from campus before they can reoffend.

Sexual assault substantially infringes upon the equitable access of victims to educational opportunity. The impact of sexual assault on the educational environment of a victim is startling, and demonstrates a fundamental educational interest, beyond the obvious moral interest, in combating campus sexual assault. The Campus Sexual Assault Study discussed previously spells out some of the repercussions of sexual assault at a college or university: 22.1 percent of victims of forced sexual assault sought psychological counseling, 67.4 percent avoided or tried to avoid the assailant following the assault, 8.3 percent dropped a class, 1.2 percent changed a major, 3.1 percent changed universities, 11.5 percent moved residences, and 3.5 percent quit a job. Worse still, a 2016 study published in the *Journal of College Student Retention* found that 34 percent of student victims of campus sexual assault dropped out of school. (Mengo & Black, *Violence Victimization on College Campus: Impact on GPA and School Dropout* (2016) *Journal of College Student Retention: Research, Theory & Practice*, Vol. 18, Issue 2, <https://journals.sagepub.com/doi/abs/10.1177/1521025115584750>.)

These affronts to the educational experience of victims are not proportionate across demographics, but rather primarily affect typically underserved communities such as students of color, LGBTQ students, and women. Nearly 14 percent of gay or lesbian students have experienced a sexual assault while at a postsecondary institution (Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, Association of American Universities (Sept. 2015, rev. Oct. 2017)), and transgender students are nearly 300 percent more likely to be sexually assaulted than their cisgender counterparts. (Rankin et al., *Sexual Assault Victimization Disproportionately Affects Certain Minority College Students*, University of Pittsburgh School of the Health Sciences (Mar. 27, 2017).) Cisgender women are 150 percent more likely to be sexually assaulted than cisgender men, and the disparity is even higher among black women. (*Ibid.*) Black students face higher rates of sexual assault across all sexual orientations and gender identities. (*Ibid.*) Considering these disparities, campus sexual assault is not only a moral and educational problem, but a civil rights issue as well.

Title IX and California laws modeled on Title IX prohibit sex discrimination including by requiring policies for ensuring equitable access to education for victims of sexual harassment.

Title IX of the Education Amendments of 1972 bars sex discrimination in any "educational institution" that receives or benefits from federal aid. Title IX defines "educational institution" broadly to include local educational agencies, school districts, elementary schools, and secondary schools, as well as colleges and universities. While perhaps best known for its requirement that schools provide equal funding for athletic programs, Title IX covers several academic, extracurricular, and administrative matters related to discrimination on the basis of sex. It applies not only to admissions, but also to treatment of students once they are admitted, including discrimination in housing and facilities, courses, educational activities, counseling, student financial aid, student health and insurance benefits, marital or parental status, and athletics. Moreover, federal regulations and relevant case law generally define "sex discrimination" to include any form of "sexual harassment" of students by peers, employees, faculty, or third parties. Federal regulations also define "sexual harassment" to include any form of "sexual violence." To warrant disciplinary action, the harassment must be sufficiently serious to deny or limit a student's ability to fully participate in, or benefit from, a school's programs or activities. (See U.S. Department of Education, Office for Civil Rights, *Title IX Resource Guide*, April 2015.) Title IX requirements also interact with two other federal laws: the Jeanne Clery Act, which requires campuses to report crime statistics and investigate and act upon complaints; and the Violence Against Women Act (VAWA), which, among other things, requires colleges to

notify victims of their right *not* to report the crime to law enforcement and ensures victim confidentiality in crime reporting.

In addition to Title IX and other federal laws, schools in California are also subject to various state laws and policies – for the most part modeled after Title IX – that prohibit sex discrimination, including sexual harassment, in the educational institutions of the state. (*See e.g.* Education Code Sections 200 *et seq.*) To further this policy, California law requires every school in the state to develop, publish, and disseminate a written policy on sexual harassment. The policy must include information on where to obtain the specific rules and procedures for reporting charges of sexual harassment and for pursuing available remedies. (Section 231.5.) In the last three years, the Legislature has enacted a number of other laws to address, in particular, the problem of sexual assault on campus. SB 967 (De León), Chap. 748, Stats. 2014, requires California colleges to adopt the so-called "affirmative consent" standard (i.e. only "yes" means "yes"), to educate students about issues of "consent," sexual assault, and bystander intervention, and to review and improve their response and prevention protocols. SB 695 (De León), Chap. 424, Stats. 2015, requires students, as a prerequisite for high school graduation, to take a course in health education that includes information on identifying, preventing, and reporting sexual assault and sexual harassment. AB 2654 (Bonilla), Chap. 107, Stats. 2016, requires colleges to post written policies on sexual harassment on their Internet websites.

Despite federal and state requirements that schools develop policies designed to prevent sexual harassment and sexual violence – and to ensure fair and equitable remedies when such incidents occur – far too many studies suggest that sexual harassment and sexual violence remain a serious problem on schools and campuses. It is difficult to know for certain whether increased reporting of sexual violence on college campuses, in particular, reflects an increase in the *incidence* of sexual violence and assault or an increase in the *reporting* of sexual violence and assault. In either case, studies suggesting that one in five women experience some form of sexual harassment, sexual violence, or sexual assault remains unacceptably high.

Previous guidance for implementing the federal campus sexual misconduct requirements was rescinded in 2017 and replaced with a notice of new, substantively distinct, regulations.

Though state and federal laws require schools to develop complaint and disciplinary procedures for campus sexual misconduct, the statutory requirements for these procedures are fairly vague in order to allow for campuses to specifically tailor their procedures to their student population. Nonetheless, the lack of specific guidance relating to implementation of such policies has resulted in varying campus procedures that can be either confusing or insufficient in some cases. Accordingly, in April of 2011, the United States Department of Education's Office of Civil Rights issued a "Dear Colleague" letter providing detailed instructions on the requirements of sexual misconduct policies and guidelines for effective implementation. This included specific frameworks for producing and disseminating notices of nondiscrimination, for designating an officer to coordinate Title IX compliance and responsibilities, and for adopting and publishing grievance procedures "for prompt and equitable resolution of student and employee sex discrimination complaints." (*Dear Colleague Letter*, U.S. Department of Education, Apr. 4, 2011.)

However, in September 2017, Betsy DeVos, the Secretary of Education under President Trump, rescinded the 2011 "Dear Colleague" letter and issued an interim set of "Questions and Answers" that covered, in part, the new policy direction set to replace the previous guidance. (*Q&A on Campus Sexual Misconduct*, U.S. Department of Education, Sep. 2017.) The Trump

Administration then further clarified their policy intent through a Notice of Proposed Rulemaking issued a year later, indicating that new proposed regulations would include the following: colleges and universities must apply basic due process protections for students, including a presumption of innocence throughout the grievance process, written notice of allegations, and equal opportunity to review evidence collected, as well as a right to cross-examination; colleges and universities must hold a live hearing where cross-examination can be conducted through the parties' advisors; colleges and universities may not use a "single investigator" or "investigator-only" model for grievance proceedings; sexual harassment shall be defined as "unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's education program or activity." (*Secretary DeVos: Proposed Title IX Rule Provides Clarity for Schools, Support for Survivors, and Due Process Rights for All*, U.S. Department of Education, Nov. 16, 2018.)

Critics have pointed out a number of shortcomings and potential issues created by these proposed regulations. Among such criticisms are that these regulations are premised on a seemingly overstated equivalence between Title IX hearings and criminal cases, despite the fact that the fundamental objectives of these hearings are unique from criminal proceedings. Not only are Title IX hearings civil rather than criminal matters, but the broader objective of these hearings is not to dispense justice, but rather to provide for an educational environment conducive to the school's mission for all students. Additionally, the regulations increase the legal standard for identifying an act as sexual harassment. While typically sexual harassment cases are decided on a "severe *or* pervasive" standard, these regulations require that the unwelcome sexual conduct is "severe, pervasive, *and* objectively offensive." This change in standard would generally make it more difficult for a complainant to spur action on the part of the institution toward removing an assailant or other perpetrator of sexual harassment. It is certainly critical that all parties are entitled to due process in grievance proceedings, but it should be noted that these proceedings are not related to the criminal investigation of the alleged offense, which may be carried out in parallel, and while possible discipline may be assigned based on the proceedings, the intent is to mitigate the risk of interfering with student education. These regulations are not yet operational and are currently being reviewed. As such, they would have no preemptive effect on this bill.

SB 169 sought to codify many components of the Title IX compliance guidance provided in the 2011 Dear Colleague letter, but was vetoed by Governor Brown. Because changes in federal policy guidance convoluted the development of sexual misconduct policies on college and university campuses, the Legislature prudently recognized a need for implementation standards. Regular changes in policy can be costly for institutions that must redevelop procedures, and can be confusing for students who may be less informed on new policies and procedures, especially when those policies differ markedly from one institution to another. Accordingly, in 2018, the author of this bill proposed SB 169, which codified several components of the guidance provided in the 2011 "Dear Colleague" letter. Since, generally, the "Dear Colleague" letter provided for more intensive sexual misconduct processes on campuses, the bill did not seem to conflict with federal law, but rather guided California institutions with respect to a stricter standard relative to the alternative federal guidance. Though the bill passed both houses of the Legislature and made it to Governor Brown's desk, it was vetoed due to concerns regarding due process for accused students.

Governor's veto message:

I am returning Senate Bill 169 without my signature.

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.

The court in Doe v. Allee identified procedural standards for institutional disciplinary procedures to provide parties to sexual harassment grievances with sufficient due process. A commonality between Governor Brown's veto message and the proposed regulations by the current federal administration is the focus on due process protections for the accused. Several cases in California and elsewhere have weighed in on the availability of due process across a number of different institutional disciplinary procedures related to sexual misconduct, and have arrived at different conclusions (if any) as to how a procedure can appropriately balance the rights of the accused with the safety and security of the alleged victim. The Court of Appeal of California's Second Appellate District considered the range of decisions on this topic in deciding *Doe v. Allee* (2019) 30 Cal. App. 5th 1036. The court in *Doe v. Allee* was tasked with determining whether, if a student accused of sexual misconduct faces severe disciplinary sanctions and the credibility of witnesses is central to the adjudication, due process rights require the opportunity for cross-examination of those witnesses at a live hearing in front of a neutral

fact finder. The court ultimately held that the availability of live cross-examination in front of a neutral fact finder is, under state law, the minimum standard for affording due process to the parties. The court described their determination as follows:

[We] hold that when a student accused of sexual misconduct faces severe disciplinary sanctions, and the credibility of witnesses (whether the accusing student, other witness, 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 (e.g. videoconferencing) before a neutral adjudicator with the power independently to find facts and make credibility assessments. That fact finder cannot be a single individual with...divided and inconsistent roles... (*Doe v. Allee*, 30 Cal. App. 5th at 136-137.)

This bill seeks to codify aspects of the 2011 Dear Colleague letter as well as the standard provided by Doe v. Allee to provide a uniform procedural baseline for Title IX sexual harassment complaints at California postsecondary institutions. This bill contains many of the same provisions as SB 169 in that guidance from the 2011 "Dear Colleague" letter would be codified as a standard framework for sexual misconduct grievance proceedings on campus. In addition, this bill also incorporates the procedural standard for sufficient due process provided by *Doe v. Allee*. It provides for extensive noticing requirements for student parties to complaints regarding sexual harassment allegations on campus or at other locations during activities with a nexus to campus, including notice of rights and resources, as well as the nature of proceedings. The bill in print also provides that an action to enforce its provisions can be brought either by the Attorney General, or by a person whose right to equitable access to education was infringed by violation of the bill, and that mutual no-contact agreements shall not be permitted, and shall be imposed only unilaterally against the alleged perpetrator unless a counter complaint has been filed. The bill in print lacks clarity in a number of provisions, including an absence of specific remedies available to persons bringing actions for violation of the bill, and confusion as to which provision of the bill apply to whom (e.g. students only, students and employees, third parties, etc.). However, the author has accepted proposed amendments to provide essential clarity in these respects, specifying that the provisions of this bill apply to student parties and do not provide non-students with any rights beyond those conferred otherwise in statute or regulation.

Private right of action. Much of the controversy surrounding this bill relates to the author's decision to include a private right of action as a means of enforcing its provisions. The author and supporters contend the private right of action is essential to ensure compliance as it democratizes enforcement authority. Critics, primarily institutions that would be subject to such actions, argue that the inclusion of a private right of action in the bill in print, particularly with minimal parameters provided to clarify its boundaries, will result in costly and unmeritorious litigation, and could lead to weaponization of the legal system in order to coerce favorable judgments in complaint proceedings. To address these concerns in part, the author has agreed to amendments that limit the scope of this right of action. Rather than applying to any party that can allege infringement upon their right to equitable access to education, the proposed amendments specify that a student or former student can bring an action for injunctive relief, compensatory damages, and/or attorney's fees, if they establish that 1) the institution was in violation of the provisions of this bill; 2) the student or former student suffered an injury-in-fact; and 3) the violation of the provisions of this bill was a proximate cause of the injury-in-fact. The additional limitations and guidance here clarify the intent of this private right of action and

reduce the risk of frivolous litigation apart from receiving damages for harms. The proposed amendments also require written notice to the institution and the Attorney General if such harm is alleged and an action will be brought, and does not permit an action to commence seeking compensatory damages for at least 90 days from the receipt of the written notice. The proposed amendments further clarify the remedies that can be sought by the Attorney General as well by defining a civil penalty, and clarifying that the Attorney General is seeking penalties for the violation of the bill, whereas the private party would be seeking damages for injury caused by violations of the bill.

Mutual no-contact directive. Another controversial component of the bill in print is its prohibition of issuing mutual no-contact directives upon receipt of a sexual misconduct complaint. Often when investigating and hearing a complaint relating to sexual misconduct, an institution will issue a directive that the two parties do not contact one another. The objective here, according to those institutions, is to cool the situation down in order to avoid retaliation, particularly by the respondent. However, the author and sponsors of the bill point out that restrictions on behavior that could result in disciplinary action should not be imposed on a complainant simply by virtue of having brought a complaint, especially since no allegations of wrongdoing have been alleged about the complainant. The bill in print does permit issuing a mutual no-contact directive when a counter-allegation of harm exists, so long as it is not facially retaliatory.

There are valid arguments both in favor and against permitting the use of mutual no-contact directives, but balancing the interests of both parties in this respect requires a delicate approach. In an effort to address the concerns of the opposition toward the no-contact directive provision, the author has agreed to proposed amendments that would allow a mutual no-contact directive to be issued if there is reason to believe that the complainant has harmed or threatened to harm the respondent, or has interfered with, or threatened behavior that would interfere with, the investigative or disciplinary proceedings through contact with the respondent. The proposed amendments also require the institution to provide a party or parties subject to a no-contact directive with a written justification for the directive and an explanation of the terms of the directive, including circumstances, if any, under which violation could be subject to disciplinary action.

Impending federal regulations. Some concerns have been raised that the adoption of the provisions of this bill would be premature considering the likelihood that the new federal Title IX regulations will be released in the near future. Though it is unlikely that the provisions of this bill would conflict with such regulations considering the general authority of states to impose stricter regulations than those at the federal level, and considering the provisions of this bill largely implement rather than modify Title IX, proposed amendments nonetheless address this concern. The author has agreed to include intent language clarifying that this bill is intended to work in conjunction with Title IX and other federal and state laws, and has also included a severability clause in the event any provision of the bill is preempted by the new regulations.

ARGUMENTS IN SUPPORT: This bill is supported by a large coalition of women's rights advocates, legal aid organizations, civil rights advocates, workers' rights organizations, and domestic violence prevention groups. Supporters of the bill argue that state and federal law lack sufficient guidance to implement workable policies relating to complaints of sexual harassment on campus, and that the clarification and protections for both parties to such a complaint

provided by this bill are crucial to ensuring that the civil rights, safety, and well-being of all students is paramount to the process.

Public Counsel, the nation's largest public interest law firm specializing in delivering *pro bono* legal services to low-income communities, argues:

Existing state and federal laws prohibit discrimination in education based on sex and require equal access to educational opportunities. However, there is insufficient state law and/or agency guidance regarding the processes that schools must have in place to respond to complaints of sexual harassment and assault and thereby ensure that students' right to equal access to education is upheld.

SB 493 will address this gap in state law by outlining processes for institutions of higher education to follow to respond to and investigate sexual harassment and assault, in order to ensure clarity for students and a fair process for both the complainant and respondent to protect the civil rights, safety and well-being of all students.

ARGUMENTS IN OPPOSITION: This bill is opposed by groups advocating on behalf of the due process rights of the accused, including Families Advocating for Campus Equality and Stop Abusive and Violent Environments, who are concerned that the bill codifies practices that are inefficient for investigating and hearing complaints, does not sufficiently provide for the due process rights of the accused, and will ultimately conflict with the new federal regulations set to be released this fall.

The bill is also opposed unless amended by the University of California and the Association of Independent California Colleges and Universities. Representatives of these institutions share concerns that granting a broad private right of action without defining parameters for litigation will subject the institutions to costly and time consuming lawsuits that may be founded on unmeritorious claims. They also express concerns that the limitations on mutual no-contact directives eliminate an important interim measure that can help protect against cross-complaints while an allegation is being investigated. The University of California argues:

The measure currently in print is not practicable, and would significantly expand the burdens on California's schools as they investigate sexual assault allegations. Over the past several weeks, we have worked with our higher education partners to communicate those concerns to the author and to develop solutions that ensure a fair and equitable process without unintended consequences.

The UC's concerns include:

1. Granting a broad private right of action without defining parameters for litigation. The University believes that the broad scope of right to sue would likely result in unmeritorious claims that would disrupt investigations. For example, the University already faces more litigation related to sexual violence and sexual harassment from respondents than complainants, and we believe that respondents will make disproportionate use of the private right of action.

2. Prohibiting mutual no-contact directives. A mutual no-contact directive can serve as an important interim measure during an investigation. These are issued on a case-by-case basis and are reviewed regularly to ensure equity in the process. We are concerned

that a prohibition would lead to an increase in cross-complaints against students who come forward seeking help.

3. Conflicting or unclear definitions. California has an affirmative consent standard for the adjudication of Title IX hearings on college and university campuses. However, the author has not clarified why the existing definition needs to be modified. The bill references definitions in the Penal Code, which will be difficult to reconcile or administer in an academic – not judicial – setting; these conflicts would result in unclear policies.

Several of these concerns have been addressed, in part, by the proposed amendments, but it is unclear whether the proposed amendments satisfy the concerns of these institutions. Limitations on the private right of action to situations in which violation of the provisions of the bill constitutes a proximate cause of injury-in-fact to the student would significantly narrow the scope of this right and the likelihood of frivolous litigation. The proposed amendments also adjust the mutual no-contact provision to permit mutual no-contact directives if the complainant has harmed or has threatened to harm the respondent, or if the complainant has interfered with, or has threatened to interfere with, the investigative or disciplinary proceedings through contact with the respondent. Definitions are proposed to be amended to draw either from the Cleary Act or the Education Code if possible, except when no such definitions are available, in which case Civil Code definitions are used instead of Penal Code definitions, underscoring that this is a civil, rather than criminal, proceeding.

REGISTERED SUPPORT / OPPOSITION:

SUPPORT

Equal Rights Advocates (co-sponsor)
Women's Foundation of California, Women's Policy Institute (co-sponsor)
Alameda County District Attorney's Office
American Association of University Women - California
Asian Americans Advancing Justice - California
Asian Pacific Institute on Gender Based Violence
Asian Pacific Policy and Planning Council
Business and Professional Women of Nevada County
California Association for Health, Physical Education, Recreation & Dance
California Commission on the Status of Women and Girls
California Faculty Association
California Partnership to End Domestic Violence
California State Council of Service Employees
California Voices for Progress
California Women's Law Center
Child Care Law Center
Children's Defense Fund-California
Citizens for Choice
City and County of San Francisco Department on the Status of Women
Coalition for Humane Immigrant Rights
Consumer Attorneys of California
Courage Campaign
Ella Baker Center for Human Rights

Empowering Pacific Islander Communities (EPIC)
End Rape on Campus
End Violence Against Women International
Family Violence Law Center
Feminist Majority Foundation
Girls, Inc. of Orange County
Motivating Individual Leadership for Public Advancement (MILPA)
National Association of Social Workers, California Chapter
Peace Over Violence
Public Counsel
Southeast Asia Resource Action Center
United Food and Commercial Workers, Western States Council
Voices for Progress

OPPOSITION

Families Advocating for Campus Equality (FACE)
Hathaway Parker, LLP
Stop Abusive and Violent Environments (SAVE)

OPPOSE UNLESS AMENDED

Association of Independent California Colleges and Universities (AICCU)
University of California

Analysis Prepared by: Landon Klein / JUD. / (916) 319-2334