

Date of Hearing: July 11, 2017

ASSEMBLY COMMITTEE ON HIGHER EDUCATION

Jose Medina, Chair

SB 169 (Jackson) – As Amended July 6, 2017

SENATE VOTE: 26-10

SUBJECT: Education: sex equity

SUMMARY: Requires the governing board or body of any elementary or secondary school and each public or private postsecondary educational institution that receives state financial assistance or state funds for student financial assistance to take specified actions related to federal guidance regarding protections from sexual harassment and sexual violence under Title IX. Specifically, **this bill:**

- 1) Makes various Legislative findings and declarations, including:
 - a) Statements relating to every student's right to be free from sexual harassment, including sexual violence, and notes that sexual harassment creates a hostile environment that significantly interferes with a student's ability to fully participate in, and benefit from, the programs and activities offered by the educational institution. Statements also note that each school has a responsibility to make reasonable efforts to respond effectively when sexual harassment is reported or observed by school employees.
 - b) Declares that all educational institutions in the state comply with Title IX regulations, in order to prevent sexual harassment, including sexual violence, at California's schools, colleges, and universities.
 - c) Declares that each local educational agency (LEA) designate at least one LEA employee to act as a gender equity coordinator to coordinate its efforts to comply with and carry out its responsibilities under the act. The gender equity coordinator may be the same individual as the school's federal Title IX coordinator, and the LEA should post the identity of the gender equity coordinator in a prominent location on its, and each of its schools', Internet Web sites.
 - d) Declares that the requirements of this act be interpreted, to the greatest extent possible, consistent with the federal guidelines issued by the United States Department of Education's Office for Civil Rights on April 4, 2011, as it read on January 1, 2017.
- 2) Amends the definition of "sexual harassment" for purposes of the Education Code to include "sexual violence."
 - a) Defines "sexual violence" to mean physical sexual acts perpetrated against a person without the person's consent. An individual may be unable to give consent due to an intellectual or other disability. Physical sexual acts include, but are not limited to, both of the following:

- i. Rape, as defined in the Penal Code (PEN); and,
 - ii. Sexual assault or sexual battery, as defined in the PEN.
- 3) Requires the appropriate governing body for each LEA to ensure that the policies and procedures in place at the LEA are properly posted on its Internet Web site, in both English and Spanish and at a reading level that may be comprehended by pupils in high school, the information set forth in the federal regulations implementing Title IX.
 - a) Clarifies that, for the purposes of posting information regarding the federal regulations implementing Title IX, the right to be free from sexual harassment, including sexual violence, may be included.
- 4) Clarifies that, for the purposes of the Sex Equity in Education Act (Education Code (EC) Sections 221.5 - 231.5), harassment and other discrimination on the basis of sex include, but are not limited to, sexual harassment, including sexual violence, among other definitions.
- 5) Requires that each elementary and secondary school that is subject to the requirements of the Sex Equity in Education Act shall use a “preponderance of the evidence” standard to decide whether or not to take disciplinary action against a student who has been accused of sexual harassment, including sexual violence.
- 6) Requires the governing board of a school district to have the primary responsibility for ensuring that school district programs and activities are free from discrimination based on age, disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes in the Penal Code, and sexual harassment, including sexual violence, and for monitoring compliance with any and all rules and regulations promulgated pursuant to Section 11138 of the Government Code (GOV).
- 7) Clarifies that, for the purposes of the Equity in Higher Education Act (EC Sections 66250-66292.4) except for the definition of “sexual violence,” “sexual harassment” has the same meaning as defined as it pertains to provisions governing K-12.
 - a) Defines “Sexual violence” to mean physical sexual acts perpetrated against a person without the person’s consent. An individual may be unable to give consent due to an intellectual or other disability. Physical sexual acts include, but are not limited to Rape as defined in the PEN;
 - b) Defines “sexual assault” as actual or attempted sexual contact with another person without that person’s consent, regardless of the victim’s affiliation with the higher education institution, including, but not limited to, any of the following:
 - i. Intentional touching of another person’s intimate parts without that person’s consent or other intentional sexual contact with another person without that person’s consent; and,

- ii. Coercing, forcing, or attempting to coerce or force a person to touch another person's intimate parts without that person's consent.
 - c) Aligns the definition of sexual battery to that in the PEN;
 - d) Defines sexual exploitation as a person taking sexual advantage of another person for the benefit of anyone other than that person without that person's consent, regardless of the victim's affiliation with the higher education institution, including, but not limited to, any of the following:
 - i. Prostituting another person;
 - ii. Recording images, including video or photograph, or audio of another person's sexual activity, intimate body parts, or nakedness without that person's consent;
 - iii. Distributing images, including video or photograph, or audio of another person's sexual activity, intimate body parts, or nakedness, if the individual distributing the images or audio knows or should have known that the person depicted in the images or audio did not consent to the disclosure and objected to the disclosure; and,
 - iv. Viewing another person's sexual activity, intimate body parts, or nakedness in a place where that person would have a reasonable expectation of privacy, without that person's consent, and for the purpose of arousing or gratifying sexual desire.
- 8) Requires higher education institutions receiving state funds, including state funds for student financial assistance, to comply with provisions that address sexual harassment, and harassment involving a student which could create a hostile environment on campus.
- 9) Requires the governing board or body of each higher educational institution to implement, and at all times comply with, the following requirements:
 - a) Disseminate a notice of nondiscrimination to each higher education institution employee and volunteer, including any individual employed by contract to perform any service at the institution, and provide notice to each individual described above and each student of the grievance procedures, including where and how complaints may be filed;
 - b) Designate at least one employee of the institution to act as a gender equity officer to coordinate its efforts to comply with and carry out its responsibilities under this section. The gender equity officer may be the same individual as the institution's federal Title IX coordinator. The gender equity officer shall have adequate training on what constitutes sexual harassment and understand how the institution's grievance procedures operate;
 - c) Adopt rules and procedures for the prevention of sexual harassment that include all of the following elements:

- i. When a student sexually harasses another student, the harassing conduct creates 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. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment on campus, particularly if the harassment is physical. A single or isolated incident of sexual harassment, including sexual violence, may create a hostile environment on campus if the incident is sufficiently severe;
 - ii. The institution's primary concern is student safety;
 - iii. The institution shall address sexual harassment allegations separately from all other campus violations. Use of alcohol or drugs shall never make a victim at fault for sexual harassment;
 - iv. The institution shall ensure that students are protected in connection with all academic, educational, extracurricular, athletic, and other programs of the institution, whether those programs take place in the institution's facilities, on a school bus, at a class or training program sponsored by the institution at another location, or elsewhere;
 - v. 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 section. Because students often experience the continuing effects of off-campus sexual harassment in the educational setting, the institution shall consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus. The institution may have an obligation to respond to student-on-student sexual harassment that initially occurred off campus grounds, outside of the institution's educational programs or activities; and,
 - vi. If the institution knows, or reasonably should know, about possible sexual harassment that could create a hostile environment on campus, the institution shall promptly investigate to determine what occurred and then take appropriate steps to resolve the situation, regardless of whether or not a harassed student, his or her parents, or a third party files a complaint under the institution's grievance procedures established in accordance with this section, or otherwise requests action on the student's behalf.
- 10) Provides that information regarding the rights of a sexual harassment complainant and respondent, shall be afforded to student parties, both the complainant and the respondent, in the same manner and, except under extenuating circumstances, such as the unavailability of a party, at the same time:
- a) Receive notice that the institution is conducting an investigation;

- b) Receive information on the institution's investigative process, decisionmaking procedures, and grievance procedures established pursuant to the requirements of this section;
 - c) Receive information about reasonably prompt timeframes for the major stages of the complaint process;
 - d) Have the matter investigated by a neutral investigator and to have a decision of responsibility made by a neutral decisionmaker or decisionmaking body;
 - e) Have the opportunity to give testimony, identify witnesses, and provide documentary information during the course of the investigation and the opportunity to respond to any evidence upon which any findings will be based;
 - f) Have a support person accompany the student during key stages of the investigation and hearing processes;
 - g) Receive a written outcome of the findings, including disciplinary outcomes;
 - h) Appeal the outcome to a neutral appeal officer or body; and,
 - i) Have appropriate disciplinary outcomes, remedial measures, and systemic remedies put in place following a final finding of responsibility.
- 11) Requires higher education institutions to adopt and publish investigation procedures on its Internet Web site 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. The procedures shall contain all of the following elements:
- a) Information describing the obligations of staff designated by the institution to report concerns of sexual harassment to the designated gender equity officer. Clarifies that an individual who has a confidential relationship with a student or students by law, or other relationship designated by the institution as confidential, is exempt from having to report sexual harassments concerns to the gender equity officer pertaining to the confidential relationship or relationships; and,
 - b) A requirement that the designated gender equity officer or his or her designee, assess each report of sexual harassment and provide specified outreach, as appropriate, to each identifiable student who is alleged to be the victim of the reported conduct.
- 12) Clarifies that any procedures used to adjudicate complaints of sexual harassment, including disciplinary procedures, shall afford a complainant and a respondent a prompt and equitable resolution, and that to the extent that the student rights listed do not otherwise exist by statute or agreement, nothing in this section requires schools to provide nonstudent parties with those rights.
- 13) Clarifies that it is the responsibility of the appropriate governing board for each higher education institution to ensure that the policies and procedures in place at the institution

comply with specified requirements implement any changes necessary to ensure compliance.

- 14) Requires the California Department of Justice (DOJ), if it finds that a higher education institution has not taken prompt and effective steps to respond to a sexual harassment complaint, to seek appropriate remedies for both the complainant and the broader student population. When conducting enforcement activities, the DOJ should seek to obtain voluntary compliance from institutions. When an institution does not come into compliance voluntarily, the DOJ may initiate proceedings against the institution. The DOJ may direct the California Student Aid Commission to initiate proceedings to withdraw state funding for student financial assistance from the institution.
- 15) Requires that, on or before July 1, 2018, the appropriate governing board or body of each school shall adopt regulations to ensure that implementation of this section at the school is, to the greatest extent possible, consistent with federal Title IX regulations, and requires each higher education institution to implement provisions of the bill no later than January 1, 2019, or by another date determined by the Student Aid Commission.

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 employer 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 (EC) Sections 200-201.)

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. (EC Sections 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 includes 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. (EC Section 67386.)

6) Requires schools to post information on their Web sites 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. (EC Section 221.61)

FISCAL EFFECT: According to the Senate Appropriations Committee:

- 1) Minor and absorbable costs for the UC and the CSU to comply with this bill's requirements.
- 2) Unknown state reimbursable mandated costs, potentially in the low millions of dollars in Proposition 98 General Fund, for community college districts' implementation activities.
- 3) Unknown General Fund costs to the various institutions and the Department of Justice for a potential increase in litigation. Related costs to the UC and CSU are expected to be absorbed within existing resources.

COMMENTS: *Double-referral.* SB 169 was double-referred to the Assembly Judiciary Committee, where it passed on June 27, 2017 with a 9-1-1 vote.

Need for the bill. According to the author, "Title IX protections apply to all schools, public and private, that receive federal funding. This federal civil rights law and its implementing regulations are enforced by the Office for Civil Rights (OCR) within the United States Department of Education. On April 4, 2011, OCR issued a detailed guidance document updating the interpretation of Title IX and explaining that sexual harassment covers all physical sexual acts perpetuated against a person's will or where a person is incapable of giving consent, including forms of sexual violence such as rape, sexual assault, sexual battery, and sexual coercion. This guidance document reminds schools of their responsibilities to take affirmative steps to respond to sexual violence in accordance with Title IX. Educational institutions have an affirmative duty to take immediate and effective steps to end discriminatory conduct, to prevent its recurrence, and to address its effects."

“Sexual harassment and sexual violence impedes a student’s right to pursue and receive an education in a safe, non-discriminatory environment. The civil rights and protections enshrined in Title IX and its implementing regulations have been an important tool for student victims, survivors, and advocates, helping to make California’s campuses a safe space for students. With the strong and focused support of the previous presidential administration student advocates have proactively asserted Title IX protections, specifically the standards articulated in the April 4, 2011 OCR guidelines. School administrators have implemented enhanced response policies, and education and other prevention initiatives. Changes in federal enforcement priorities may degrade Title IX standards and undermine the protections students have found essential to pursuing an education. In fact, the current administration has signaled the intent to redirect the priorities of OCR.”

“Considering the scope and scale of student sexual harassment, sexual assault and sexual violence, and the intersection of federal and state requirements, it is critically important for our state laws to reflect the strength of federal policies and for state-level enforcement to be as robust as federal oversight and enforcement. The standards codified in federal statute and regulations, or upheld in case law, are in some instances stronger than California’s standards. SB 169 is intended to codify the standards articulated in the 2011 OCR guidelines, and to ensure strong state-level enforcement—in the case of federal enforcement priorities or standards changing under the new administration.”

Guidance. The OCR issued a “Dear Colleague” letter on April 4, 2011, providing guidance on ensuring compliance with Title IX specific to sexual harassment. The letter details numerous requirements under Title IX related to sexual harassment, explains that sexual harassment includes sexual violence, and provides guidance relative to specific requirements pursuant to Title IX. The OCR states 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.”

Deviates from the guidance. This bill essentially codifies the guidance provided by the OCR’s “Dear Colleague” letter. The OCR letter generally references existing law, yet also details actions schools should take to ensure procedures are consistent with Title IX standards. The OCR letter indicates that it looks to whether schools have taken those actions when evaluating complaints. The OCR letter provides, in part, that schools “should” take specified action as follows:

- 1) The grievance procedures should provide both parties of a complaint periodic status updates and specify the timeframe within which specified actions will occur. This bill requires the grievance procedures for higher education institutions provide a timeframe for those specified actions.
- 2) The sex equity coordinator, if the school relies on disciplinary procedures for compliance, should review the school’s disciplinary procedures. This bill requires the gender equity officer, if the higher education institution 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.
- 3) A school should take proactive measures to prevent sexual harassment and sexual violence, and correct its discriminatory effects on the complainant and others. This bill

requires a higher education institution to take proactive measures to prevent sexual harassment and sexual violence, and correct its discriminatory effects on the complainant and others.

- 4) A school should notify the complainant of his or her options to avoid contact with the alleged perpetrator and allow student to changes academic or living situations. This bill requires the higher education institutions to notify the complainant of his or her options to avoid contact with the alleged perpetrator and allow students to change academic or living situations, as appropriate.

Preponderance of evidence standard. According to the “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.

While the OCR letter indicates that the preponderance of evidence standard applies to Title IX grievance procedures at all schools and postsecondary institutions, nothing in state law or regulations explicitly requires K-12 schools to use the preponderance of evidence standard relative to Title IX complaints. This bill provides that specificity.

As noted in the Assembly Judiciary Committee analysis, “...code sections dealing with postsecondary institutions already expressly adopt the “preponderance of evidence” standard. While it may be a good idea to make the K-12 and postsecondary provisions consistent, the Committee notes that the “preponderance of evidence” standard is the appropriate standard, and presumably the one that K-12 schools already apply. This is the standard that is currently used by OCR in all Title IX and other cases. The higher “beyond a reasonable doubt” standard is used only for criminal cases, because the outcome of a criminal prosecution could be a loss of personal liberty. Although a disciplinary action against a student can be quite consequential – including expulsion – it cannot pose a threat to personal liberty. The premise underlying the differing standards of proof for criminal cases, on the one hand, and civil or administrative proceedings, on the other hand, is the conviction that the loss of physical freedom is a more serious outcome than the loss of money or benefits.”

Committee comments. Prior versions of this legislation included references to K-12 oversight and a uniform complaint and appeals process. According to the author, the California Department of Education’s Uniform Complaint Process includes a uniform complaint and appeals process that has been approved by the United States Department of Education Office for Civil Rights, and thus language in SB 169 was no longer necessary.

Committee Staff notes that the expanded language in SB 169 amending EC Section 66262.5 to define “sexual violence” for higher education institutions is consistent with an existing definition of sexual assault that currently applies to CCCs (EC Section 76033 (g)(h)).

Committee Staff notes several technical changes that may need to be made as SB 169 moves forward. Specifically, references to GOV 11138 may need to be updated to better reflect discrimination current sections of the GOV. Committee staff also notes several instances in language amending EC 66281.8 where “school” was not modified with “higher education institution.”

Prior legislation. SB 1375 (Jackson, Chapter 655, Statutes of 2016) required all schools receiving federal funding post the following information on their Web site: the name and contact information of their Title IX Coordinator; the rights of a pupil and the public, and the responsibilities of the school under Title IX; a description of how to file a complaint under Title IX. SB 1375 also required the State Superintendent of Public Instruction to electronically send an annual letter to all schools notifying them of this responsibility.

SB 1435 (Jackson, Chapter 633, Statutes of 2016) requests that the “Health Framework for California Public Schools” includes comprehensive information on the development of healthy relationships and be age and developmentally appropriate.

AB 2654 (Bonilla, Chapter 107, Statutes of 2016) required postsecondary educational institutions to post their written policy on sexual harassment on their Internet Web sites. AB 2654 also required the policy to include information on the complaint process and the timeline for the complaint process. The policy must include information on where to obtain the specific rules and procedures for pursuing available remedies and resources, both on and off campus.

AB 969 (Williams) of 2016, would have required annual reporting for sexual assault complaints received by CCC districts, CSU, the UC, and independent postsecondary educational institutions. AB 969 was vetoed by the Governor.

SB 186 (Jackson, Chapter 232, Statutes of 2015) enabled the governing board of a California community college district to exercise jurisdiction over student conduct that occurs off district property in cases of sexual assault and sexual exploitation, regardless of the victim’s affiliation with the college.

SB 665 (Block) of 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.

SB 695 (DeLeón, Chapter 424, Statutes of 2015) required school districts that require completion of a course in health education as a condition of high school graduation to include instruction in sexual assault and violence.

SB 967 (DeLeón, Chapter 748, Statutes of 2014) required the governing boards of California community college districts, the Trustees of the California State University system, and the Regents of the University of California, as well as the governing boards of independent postsecondary institutions in California to adopt victim-centered sexual assault, domestic

violence, dating violence, and stalking policies as a condition of receiving state funds for student financial assistance.

AB 1433 (Gatto, Chapter 798, Statutes of 2014) required all California campuses to have policies in place to ensure immediate reporting and disclosure to law enforcement.

AB 3133 (Roos, Chapter 1117, Statutes of 1982) enacted the Sex Equity in Education Act, which, similar to its federal Title IX counterpart, prohibits discrimination in California schools on the basis of sex.

REGISTERED SUPPORT / OPPOSITION:

Support

American Academy of Pediatrics
American Association of University Women of California
Association of the California Commissions for Women
Black Women for Wellness
California College and University Police Chiefs Association
California Commission on the Status of Women and Girls
California Latinas for Reproductive Justice
California School Boards Association
California State Parent Teacher Association
California Women's Law Center
City of Glendale City Council
Equal Rights Advocates
Faculty Association of California Community Colleges
Feminist Majority
Glendale Commission on the Status of Women
Legal Aid at Work
National Association of Social Workers-California Chapter
Public Advocates
San Francisco Unified School District
Santa Barbara Women's Political Committee
Santa Clara County Office of Education
YWCA San Francisco and Marin

Opposition

None on file

Analysis Prepared by: Kevin J. Powers / HIGHER ED. / (916) 319-3960