

Date of Hearing: June 24, 2014

ASSEMBLY COMMITTEE ON HIGHER EDUCATION
Das Williams, Chair
SB 967 (De León) – As Amended: June 18, 2014

SENATE VOTE: 27-9

SUBJECT: Student safety: sexual assault.

SUMMARY: Requires California postsecondary educational segments to adopt policies regarding sexual assault. Specifically, this bill:

- 1) Provides that, in order to receive state funds for student financial assistance, the governing board of each community college district (CCD), the Trustees of the California State University (CSU), the Regents of the University of California (UC), and the governing boards of independent institutions must to all of the following:
 - a) Adopt a policy concerning sexual assault, domestic violence, dating violence, and stalking, as defined in the federal Higher Education Act, involving a student, both on and off campus, that includes:
 - i) An affirmative consent standard in the determination of whether consent was given by both parties to sexual activity; defined to mean:
 - (1) Affirmative, conscious, and voluntary agreement to engage in sexual activity;
 - (2) It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity;
 - (3) Lack of protest or resistance does not mean consent, nor does silence mean consent;
 - (4) Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time; and,
 - (5) The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.
 - ii) A policy that, in the evaluation of complaints in any disciplinary process, it shall not be a valid excuse to alleged lack of affirmative consent that the accused believed that the complainant consented to the sexual activity under either of the following circumstances:
 - (1) The accused's belief in affirmative consent arose from the intoxication or recklessness of the accused; or

- (2) The accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain whether the complainant affirmatively consented.
- iii) A policy that the standard used in determining whether the elements of the complaint against the accused have been demonstrated is the preponderance of the evidence.
- iv) A policy that, in the evaluation of complaints in the disciplinary process, it shall not be a valid excuse that the accused believed that the complainant affirmatively consented to the sexual activity if the accused knew or reasonably should have known that the complainant was unable to consent under the following circumstances:
 - (1) The complainant was asleep or unconscious.
 - (2) The complainant was incapacitated due to the influence of drugs, alcohol, or medication, so that the complainant could not understand the fact, nature, or extent of the sexual activity.
 - (3) The complainant was unable to communicate due to a mental or physical condition.
- b) Adopt detailed and victim-centered policies and protocols regarding sexual assault, domestic violence, dating violence, and stalking involving a student that comport with best practices and current professional standards, and at a minimum cover the following:
 - i) A policy statement on how the institution will provide appropriate confidentiality for individuals involved in an incident;
 - ii) Initial response by the institution's personnel to a report of an incident, including requirements specific to assisting the victim, providing information in writing about the importance of preserving evidence, and the identification and location of witnesses;
 - iii) Response to stranger and non-stranger sexual assault;
 - iv) The preliminary victim interview, including the development of a victim interview protocol, and a comprehensive follow-up victim interview;
 - v) Contacting and interviewing the accused;
 - vi) Seeking the identification and location of witnesses;
 - vii) Providing written notification to the victim about the availability of, and contact information for, on- and off-campus resources and services, and coordination with law enforcement;
 - viii) Participation of victim advocates and other supporting people;
 - ix) Investigating allegations that alcohol or drugs were involved in the incident;

- x) Providing that those who participate in the investigation as a complainant or a third-party witness, will not be subject to disciplinary sanctions for violations of the institution's student conduct policy at or near the time of the incident if the violations did not place the health or safety of any other person at risk;
 - xi) The role of the institutional staff supervision;
 - xii) A comprehensive, trauma-informed training program for campus officials involved in investigating and adjudicating cases; and,
 - xiii) Procedures for confidential reporting by victims and third parties.
- c) To the extent feasible, enter into memoranda of understanding, agreements, or collaborative partnerships with existing on-campus and community-based organizations, including rape crisis centers, to refer students for assistance or make services available to students, including counseling, health, mental health, victim advocacy, student advocacy, and legal assistance.
 - d) Implement comprehensive prevention and outreach programs that include a range of prevention strategies, including, but not limited to, empowerment programming, awareness raising campaigns, primary prevention, bystander intervention, and risk reduction. Outreach programs shall be provided to make students aware of the institution's policy, and, shall include a process for contacting and informing the student body, campus organizations, athletic programs, and student groups about the institution's overall sexual assault policy, the practical implications of an affirmative consent standard, and the rights and responsibilities of students under the policy. Outreach programming shall be included as part of new student orientation.

EXISTING LAW

- 1) Requires CCC districts, the Trustees of CSU, the Board of Directors of the Hastings College of the Law, and the Regents of UC ("public segments") to adopt and implement procedures, as specified, to ensure that students, faculty and staff who are victims of sexual assault committed on grounds maintained by the institution or affiliated student organizations, receive treatment and information. (Education Code §67385.)
- 2) Requires the public segments, in collaboration with victim advocacy organizations, to provide as part of campus orientations, educational and preventive information about sexual violence; to post specified sexual violence prevention and education information on its campus website; and to develop policies to encourage students to report any campus crimes involving sexual violence. (Ed Code §67385.7.)
- 3) The federal Title IX and the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act) requires colleges and universities, as a condition of federal student aid program participation, to (a) publish annual campus security reports, maintain crime logs, provide timely warnings of crimes that present a public safety risk, and maintain ongoing crime statistics; and (b) establish certain rights for victims of sexual assault, including notification to victims of legal rights, availability of counselling, safety options for

victims, and offering prevention and awareness programs. (20 U.S.C. §1681-1688; 20 U.S.C. §1092(f).)

FISCAL EFFECT: According to the Senate Appropriations Committee, this bill may result in significant additional costs to each named entity, to the extent that its requirements exceed the scope of an institution's current policies and procedures. To the extent that many of the new requirements mirror new federal regulations likely to be adopted in the near future, those costs would still be incurred absent this bill.

COMMENTS: Double-referral. This bill was heard and approved by the Assembly Judiciary Committee on June 17, 2014.

Purpose of this bill. According to the author, sexual violence continues to be a significant problem on college campuses across the country; recent cases raise serious questions about the ability of colleges and universities to provide safe learning environments, particularly for female students. The author believes it is necessary to provide colleges and universities with clearer guidance on how to prevent and respond to sexual assault cases. According to the author, this bill will strengthen protections for victims in California by requiring campuses to implement comprehensive prevention programs and victim-centered sexual assault policies and protocols.

Federal action. Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in federally funded education programs and activities. All institutions receiving financial assistance are required to comply with Title IX. On April 4, 2011, the Office of Civil Rights (OCR) in the United States Department of Education issued a Dear Colleague Letter on student-on-student sexual harassment and sexual violence (DCL). The DCL provided guidance regarding an institution's responsibility and clearly outlined an institution's obligations, including all of the following:

- 1) Once a school knows or reasonably should know of possible sexual violence, it must take immediate and appropriate action to investigate or otherwise determine what occurred;
- 2) If sexual violence has occurred, a school must take prompt and effective steps to end the sexual violence, prevent its recurrence, and address its effects, whether or not the sexual violence is the subject of a criminal investigation;
- 3) A school must take steps to protect the complainant as necessary, including interim steps taken prior to the final outcome of the investigation;
- 4) A school must provide a grievance procedure for students to file complaints of sex discrimination, including complaints of sexual violence. These procedures must include an equal opportunity for both parties to present witnesses and other evidence and the same appeal rights;
- 5) A school's grievance procedures must use the preponderance of the evidence standard to resolve complaints of sex discrimination; and,
- 6) A school must notify both parties of the outcome of the complaint.

In April 2014, the President's Task Force to Protect Students From Sexual Assault (Task Force) issued a report outlining action steps and recommendations to "help schools live up to their obligation to protect students from sexual violence." The report recommended:

- 1) Urging institutions to conduct Campus Climate Surveys to better identify the extent of sexual violence problems on campus;
- 2) Establish prevention programs that, among other identified strategies, engage men and empower men to step in when someone is in trouble;
- 3) Ensure campuses effectively respond to sexual assault including establishing confidential places for support, comprehensive misconduct policies, trauma-informed training for school officials, establishing better disciplinary systems, and establishing community partnerships; and
- 4) Increasing transparency and improving information to students and survivors and providing better enforcement mechanisms to ensure institutions are fulfilling their responsibilities.

On April 29, 2014, OCR issued "Questions and Answers on Title IX and Sexual Violence" to provide additional guidance to institutions regarding compliance with Title IX. The document, among other clarifications, specifies that:

- 1) When an institution knows or reasonably should know of possible sexual violence, it must take immediate and appropriate steps to investigate. If an investigation reveals a hostile environment, the school must eliminate the hostile environment;
- 2) There are only limited cases in which a student's confidentiality should be overridden in order for an institution to meet its Title IX obligations. Regardless of whether a student specifically asks for confidentiality, institutions should only disclose information regarding the incidents to individuals who are responsible for handling the school's response.
- 3) Title IX investigations are not criminal investigations and therefore the same procedural protections and legal standards are not required; complainants do not need to be present for hearings, but if the institution allows one party to be present for the entire hearing, it must do so for all parties involved;
- 4) Questioning during a hearing regarding the complainant's sexual history should not be permitted and a school should recognize that a current or previous consensual dating or sexual relationship does not, in itself, imply consent;
- 5) Institutions are required to take steps to ensure equal access to educational programs and activities and protect the complainant as necessary, including taking interim measures before the final outcome of an investigations and providing victims with information regarding available resources and legal rights. Schools are expected to enter into an MOU with a local victims center if the school does not offer campus services;
- 6) Effective remedial action may include disciplinary action against the perpetrator and providing counseling for the perpetrator; remedies for the complainant should include all services needed to remedy the hostile environment;

- 7) Both parties are required to be notified in writing about the outcome and any appeal; the perpetrator should not be notified of remedies for the complainant;
- 8) Institutions are required to provide training on Title IX and sexual violence to employees so that they can appropriately respond, and schools should have methods for verifying that training is effective; and
- 9) Institutions are required to provide training to students so that they understand their rights under Title IX; training should cover what constitutes sexual violence, reporting options and grievance procedures, consequences of violating provisions, and protections against retaliation, among other areas.

Many of the requirements of this bill are consistent with existing federal requirements. Additionally, it appears that CSU and UC are currently compliant with the provisions of this bill. On February 25, 2014, the University of California updated its policy on Sexual Harassment and Sexual Violence; the policy is generally consistent with the requirements of this bill, including containing an explicit requirement for an affirmative consent. On June 3, 2014, the CSU Chancellor issued comprehensive executive orders providing direction to campuses regarding compliance with federal law and prohibiting discrimination and harassment. The definition of consent in the CSU policy also appears consistent with the provisions of this bill. Committee staff was unable to ascertain the extent to which policies at CCC and independent colleges and universities are currently compliant with this bill.

Enforcement mechanism. Committee staff notes that there is no clear enforcement mechanism contained in this bill. The bill provides that institutions must comply with the provisions of this bill in order to receive state funds for financial assistance; however, the bill does not authorize any specific government entity to take action if an institution is found noncompliant. In talking with Legislative Counsel, Committee staff understands that the provisions of this bill do not cover financial aid to students through the Student Aid Commission (which provides funds to students), but instead to funding provided directly from the state to an institution (campus base allocations that result in student aid). If this interpretation is correct, it is unclear how the state would enforce this requirement against independent institutions (non-public). Committee staff understands that the author's office believes that enforcement would be possible through subsequent audits requested by the Legislature and subsequent actions of the Legislature upon findings of noncompliance. To the degree that these requirements align with federal requirements, federal enforcement mechanisms (Title IV eligibility) may ensure institutional compliance.

Related legislation. AB 1433 (Gatto), pending in the Senate, would require postsecondary educational institutions to establish specified policies governing the reporting of specified crimes to law enforcement. AB 1549 (Rendon), pending in the Senate, would require California postsecondary educational institutions to post sexual harassment policies on the institution's official Internet Web site.

REGISTERED SUPPORT / OPPOSITION:

Support

Associated Students of the University of California, Davis
California Communities United Institute
California Coalition Against Sexual Assault
California Department of Education
California State Student Association
California Police Chiefs Association
California Partnership to End Domestic Violence
California State Student Association
California Superintendent of Public Instruction
National Association of Social Workers – California Chapter
UAW Local 5810

Opposition

National Coalition for Men

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