Date of Hearing: June 27, 2023

ASSEMBLY COMMITTEE ON HIGHER EDUCATION
Mike Fong, Chair
SB 791 (McGuire) – As Amended June 15, 2023

SENATE VOTE: 40-0

SUBJECT: Postsecondary education: academic and administrative employees: disclosure of sexual harassment

SUMMARY: Requires the California Community Colleges (CCC) and the California State University (CSU), and requests the University of California (UC) to require potential employees to disclose whether they have been found to have committed sexual harassment in seven years prior to their application of employment at the given intuition. Specifically, **this bill**:

1) Requires a community college district and a CSU campus to require applicants, as part of the hiring process for an academic or administrative position, to disclose whether a final administrative decision or a final judicial decision where the applicant was found to have committed sexual harassment within the seven years.

    a) Clarifies an applicant is permitted to provide the potential employer with information regarding whether the applicant has filed an appeal either with the previous employer or with the United States Department of Education.

    b) Clarifies the hiring institution is not required to ask the applicant to disclose the information in (1) until after the institution has determined whether the applicant meets the minimum employment qualifications as stated in the notice for the position.

2) Requests the UC to require applicants, as part of the hiring process for an academic or administrative position, to disclose whether a final administrative decision or a final judicial decision where the applicant was found to have committed sexual harassment within the seven years.

    a) Clarifies an applicant is permitted to provide the potential employer with information regarding whether the applicant has filed an appeal either with the previous employer or with the United States Department of Education.

    b) Clarifies the hiring institution is not required to ask the applicant to disclose the information in (2) until after the institution has determined whether the applicant meets the minimum employment qualifications as stated in the notice for the position.

3) Defines the following:

    a) "Final administrative decision" means the written determination as to whether or not sexual harassment occurred as determined by the decisionmaker following the final investigative report and the subsequent hearing.

    b) "Final judicial decision" means the final determination of a matter submitted to a court that is recorded in a judgment or by order of the court.

c) "Sexual harassment" has the same meaning as described in subdivision (a) of Section 66262.5 or if applicable as defined in Section 106.30 of Title 34 of the Code of Federal Regulations.

4) Authorizes that if the Commission on State Mandates determines this act contains a cost mandated by the state, the state is required to reimburse local agencies and districts for those identified costs in accordance with Part 7 of Division 4 of Title 3 of the Government Code.

EXISTING LAW: *Federal law.*

1) No person in the United States will, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance except for specified circumstances including membership of fraternities and sororities (United States Code Title 20, Chapter 38, Section 1681… colloquially known as Title IX).

2) Outlines the required response pursuant to Title IX, of a postsecondary higher education institution when the institution is made aware of an alleged sexual harassment incident on campus. The regulations include a requirement for a formal complaint, a grievance procedure for an investigation into whether the incident based on a standard of evidence occurred, and a method of appealing the outcome of the grievance process (Federal Code of Regulations Title 34, Subtitle B, Chapter 1, Subpart D, Section 106.45).

3) Defines sexual harassment as conduct on the basis of sex that satisfies at least one of the following:

   a) An employee of the postsecondary education institution conditions aid, benefit, or services to a recipient on the individual's participation in unwelcome sexual conduct;

   b) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; an

   c) Sexual assault, dating violence, domestic violence, and stalking, as defined in the United States Code (Federal Code of Regulations, Title 34, Subpart D, Section 106.30).

State law.

1) Establishes the UC as a public trust to be administered by the Regents and grants the Regents full powers of organization and governance subject only to legislative control as necessary to ensure the security of funds, compliance with terms of its endowments, and the statutory requirements around competitive bidding and contracts, sales of property, and the purchase of materials, goods, and services (Article IX, Section (9) (a) of the California Constitution).

2) Defines "Sexual Harassment" as unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting under the following conditions: quid pro quo, as defined, and hostile workplace, as defined. Further defines "Sexual Harassment" as sexual violence, sexual battery, and sexual exploitation, as defined (Education Code (EDC) Section 66262.5 and 212.5).

3) Establishes the CSU system, made of 23 campuses, and bestows upon the CSU Trustees, through the Board of Trustees, the powers, duties, and functions with respect to the management, administration, and control of the CSU system (EDC Section 66606 and 89030, et seq).

4) Establishes the CCC under the administration of the Board of Governors of the CCC, as one of the segments of public postsecondary education in this state. The CCC shall be comprised of community college districts (Education Code (EDC) Section 70900).

5) Establishes that CCC districts are under the control of a board of trustees, known as the governing board, who has the authority to establish, maintain, operate, and govern one or more community colleges, within its district as specified (EDC Section 70902).

FISCAL EFFECT: According to the Senate Committee on Appropriations:

1) The UC estimates ongoing General Fund costs of $2.3 million for each campus to dedicate one disclosure analyst position to manage changes to the application processes. The UC also estimates $105,000 in one-time General Fund costs to update its "Recruit Program" which would be needed to track and manage the applicants' responses.

2) The Chancellor's office of the Community Colleges (CCCCO) estimates costs of approximately $2,900 per community college to update existing policies, procedures or memorandums of understanding (MOUs), resulting in statewide costs of up to $332,000. To the extent the Commission on State Mandates determines this requirement to be a reimbursable state-mandated activity, there would be pressure to increase the mandate block grant for community colleges. The CCCCO also estimates one-time General Fund costs of about $117,000 to implement Title 5 changes and update existing policies and procedures.

3) The CSU indicates there could be additional, unknown administrative costs related to adding an extra step to each hiring process. The CSU typically hires approximately 16,000 employees across the system each year. Further, there could be potentially significant liability costs since the bill requires the "final administrative decisions" to be shared, even though these decisions may be appealed and may not be final.

4) Though not explicitly required, this bill could create cost pressure for the segments to investigate the disclosures on applications. It is unknown how many investigations would occur as a result of these disclosures or how many applicants will actually self-report this information, but an investigation could cost up to $30,000. There could also be unknown, potentially significant costs related to liability resulting from potential lawsuits pursued by applicants who disclosed the required information.

COMMENTS: *Purpose of the measure.* As enumerated by the author, "recent reports and news have exposed serious incidents of sexual harassment and misconduct across our college campuses. While Title IX protections exist to protect students, faculty and staff, bad actors have been able to escape the consequences of their egregious actions by moving from one campus to the next. SB 791 is all about shining the light on dark and dangerous behavior, holding perpetrators accountable and ensuring the cycle of harassment and abuse on California's college campuses is stopped in its tracks. This bill will require applicants for administrative or academic positions to disclose any final administrative or judicial decision determining they committed

sexual harassment. That information would then be turned over to the hiring committee at the college campus to put an end to the cycle of abuse."

What this measure will accomplish. SB 791 (McGuire) would a requirement for applicants for academic and administrative positions at the CCC and the CSU to disclose whether they have been determined to have committed sexual harassment within the last seven years either through the Title IX process or by a judicial decision. Furthermore, the measure permits the applicant to explain whether they are appealing the decision to either their previous employer or the United States Department of Education.

The measure requests the above of the UC system as the UC is a constitutional independent system and the procedure of disclosure must be adopted by the UC Board of Regents before being implemented by UC campuses.

The measure *does not* require the campus to verify the information disclosed by the applicant *nor does* the measure require the postsecondary education institution to act on the information received by the employee.

Concerns about liability. One could suggest the disclosure of the information by the applicant could subject the institution to liability if they hire the applicant and the applicant has a repeat Title IX offense. In such a case, under Title IX, the institution could be seen as having prior knowledge of a potential risk of repeat sexual harassment.

The issue of when a university is considered liable for sexual harassment that occur on campus has been debated within the court system in the last few years. Multiple Circuit Courts have provided differing opinions as to when a campus is considered liable for damages for having not intervened to prevent sexual harassment. The current Title IX regulations have actual knowledge of when a campus is required to act upon knowledge of sexual harassment is defined as when a complaint is provided to the Title IX coordinator or to an official who has the authority to issue corrective action. Since the sexual harassment has already transpired and the applicant is just disclosing, it would not constitute as "actual knowledge" and therefore, would not require the institution to do anything with the knowledge or create a circumstance of liability even if the applicant was hired and committed sexual harassment. The institution would only be liable if it did not act to resolve the subsequent sexual harassment incident.

Committee Staff note this is a topic that is heavily debated before Circuit Courts throughout the United States and the issue of liability created by SB 791 (McGuire) could create lawsuits for the institutions as to whether they were liable for the actions of an employee they knew to have committed sexual harassment.

Title IX and sexual harassment grievance procedures. Established in 1972, Title IX Education Amendments of 1972 (Title IX) protects students who elect to participate in education programs from experiencing discrimination based on their sex. The U.S. Department of Education confirmed in June 2021, that Title IX protections extend to protect students from discrimination based on sexual orientation and gender identity.

On September 22, 1980, the United States Court of Appeals for the Second Circuit, heard Alexander v. Yale (1980), 631 F.2nd 178 (2nd Cir.). The court ruled sexual harassment of female students was considered sex discrimination and, therefore, under Title IX was rendered illegal. The case found that a group of female students who had attended Yale College had been sexually

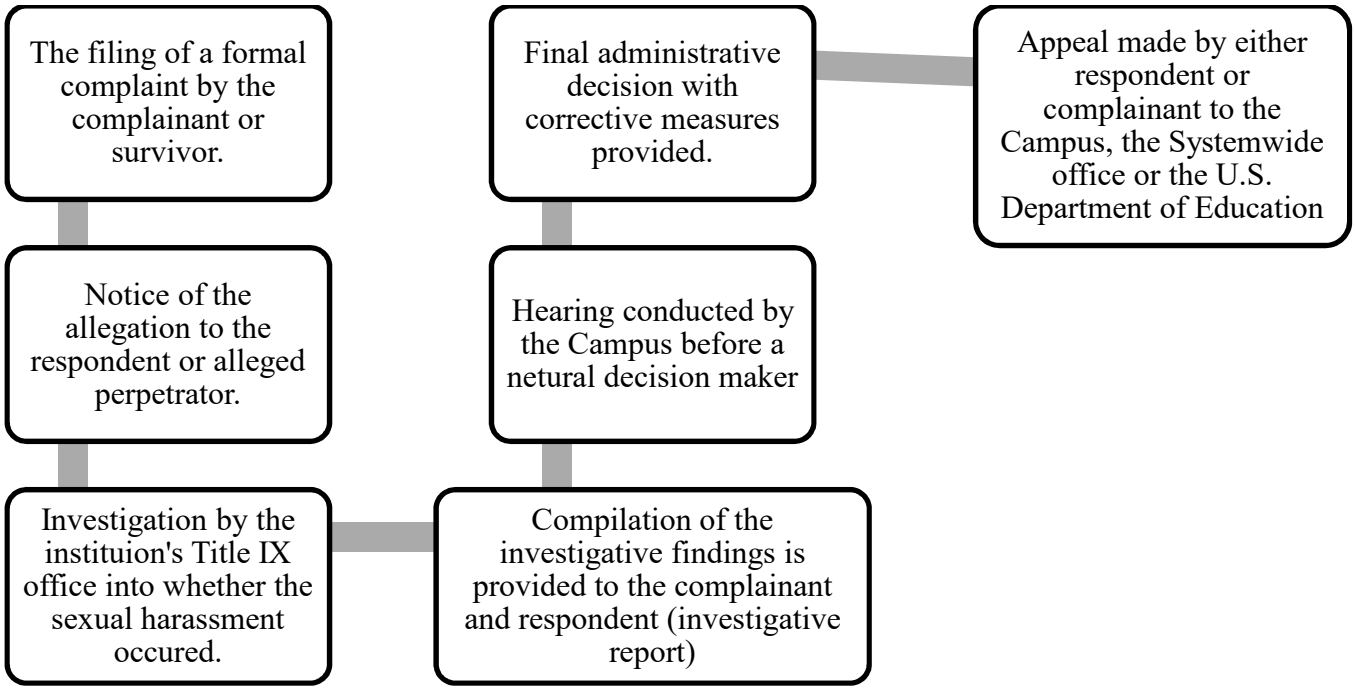
harassed by their flute teacher and hockey coach, and Yale College had not provided adequate due process under the law for these students to have their complaints addressed. This case became the impetus for the grievance procedures found within subsequent regulations for Title IX.

Under Title IX each postsecondary education institution that receives federal funding must have a Title IX coordinator and have a procedure in place for handling complaints of sex-based harassment. According to the Office for Civil Rights at the U.S. Department of Health and Human Services, sex-based harassment or gender-based harassment which can be reported under Title IX reporting requirements include:

- Sexual Harassment – unwelcomed conduct of a sexual nature; including, unwelcomed sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature; and,

- Sexual Violence – physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent; including, rape, sexual assault, sexual battery, sexual abuse, and sexual coercion.

Should a campus Title IX coordinator receive a report of sexual harassment, the Title IX regulations dictate the following procedures should occur:



SB 791 (McGuire) would only require an applicant to disclose information to the CCC, CSU, or the UC if the Title IX complaint reached a final administrative decision, or as provided in the chart, after a hearing occurred and a decision was rendered. Technically, there are two pathways by which a Title IX complaint can be resolved, either through the formal process or through an informal resolution.

The informal resolution process or alternative resolution occurs when the complainant (the survivor), the respondent (the accused), and the Title IX coordinator agree to the informal

process. According to the UC Sexual Violence and Sexual Harassment Interim Policy published on January 1, 2022, informal resolutions are only used when an investigation is not likely to lead to a resolution, both parties prefer an informal process, or a case involves less serious allegations. The policy includes examples of plausible outcomes of an informal resolution process including, but not limited to, separating of the parties, referring the parties to counseling, or the complainant electing to drop the complaint.

SB 791 (McGuire) does not include disclosure of informal resolutions or alternative resolutions as a final determination is not founded through this process as to whether or not the sexual harassment occurred. *The Committee should consider in future years, whether the disclosure of previous informal resolutions is a data point the institutions should consider when hiring a potential employee.*

Background checks for postsecondary education institutions. Each of the CCC, CSU, and the UC conduct background checks for potential applicants for academic and administrative positions. Based on the Fair Chance Act of 2018, postsecondary education institutions do not conduct the background check until after a condition of employment is provided and the check is limited to the last seven years and is limited to crimes related to the duties of the job. For example, the CCC conducts a Department of Justice background check for academic instructional staff as CCC districts are not permitted to hire someone with convicted sex offenses or controlled substance offenses according to Education Code Section 87405 subdivision (a). The background check is provided to the applicant who is given the opportunity to explain the findings.

SB 791 (McGuire) mirrors the requirements of a background check, in that it permits the applicant a chance to disclose the sexual harassment final administrative determination or judicial final determination and provides the applicant a chance to disclose their appeal of the determination. Furthermore, SB 791 (McGuire) does not require the institution to request the applicant disclose the information until after the institution has determined they are qualified for the position. With the inclusion of "final judicial decision" it is possible, the applicant could be disclosing information from a criminal or civil court decision prior to the job offer which could be interpreted as violating the Fair Chance Act of 2018; however, the measure is not specific as to when the institution must request the information of the applicant and therefore, it is possible for the institution to wait until an offer of employment has been made before asking for the disclosure.

The author may wish to remove the "final judicial decision" in future committees as this could be seen as potentially undermining work completed by the Fair Chance Act and could have the unintended consequence of capturing criminal convictions of sexual harassment, as defined.

Will this measure be impacted by the changes in Title IX regulations at the Federal level? In June 2022, the Biden Administration announced changes to the Title IX regulations which would undo the Betsy DeVos regulations from 2020. Originally the final ruling was scheduled for release in the Spring of 2023; however, an unprecedented number of comments from the public have delayed the release date of the final ruling to October 2023.

Committee Staff have closely monitored the new proposed regulations and have informed the author that the language of this measure will need to be amended should the bill be signed as the federal definition of sexual harassment could change based on the proposed regulations.

Arguments in support. As proponents of the measure, California State University Employee Union, expresses support for SB 791 (McGuire), as "Title IX policies at educational institutions exist to protect students, educators, and school employees against all forms of sex or gender discrimination, including sexual harassment, dating and domestic violence, and other forms of sexual misconduct. Despite this, recent audits and media outlets have shed light on serious incidents of sexual harassment and misconduct against students, faculty, and staff across our public colleges and universities, and how the individuals committing said harassment have escaped the consequences of their actions by moving from one campus to another.
SB 791 (McGuire) will ensure campuses are fully informed of any history of sexual misconduct when making hiring decisions."

Committee comments. Since March 2022 with the first exposé of Title IX practices at CSU Fresno, there has been a multitude of articles into the handlings and mishandlings of sexual harassment complaints at the CSU. In August 2022, EdSource published an article on disclosed Title IX records which showed faculty who had been disciplined for sexual harassment had been re-hired in administrative or academic positions at other campuses in the California public postsecondary education system. Other states, including New York, Texas, and Oregon, have systems in place to prevent the hiring of professors and staff who have been disciplined for sexual harassment. In past years, California has grappled with how to provide opportunities for rehabilitation while also ensuring campuses are not hiring professors and staff who have previously harmed students.

SB 791 (McGuire) provides a step in the direction of providing transparency in the hiring process while also providing an opportunity for rehabilitation. The measure does not require the institutions to act upon the information received from applicants but does require the institutions to be made aware of past sexual harassment violations that are excluded from a criminal background check.

Previous legislation. AB 1844 (Medina) of 2022, held in the Assembly Committee on Appropriations, would have provided a mechanism by which public postsecondary institutions are required to inquire whether an applicant for employment, as defined, is the subject of a sexual misconduct investigation and to disclose to future employers whether an employee was the subject of a sexual misconduct investigation while they were employed. Requires campuses to establish positions on campus to provide survivor and respondent support, as defined

SB 493 (Jackson), Chapter 303, Statues of 2020, requires postsecondary educational institutions to, among other things, adopt rules and procedures for the prevention of sexual harassment, and adopt and post on their Web sites the grievance procedures to resolve complaints of sexual harassment.

SB 1439 (Block), of 2016, provides that the UC, the CSU, and the CCC shall require applicants for employment, as specified, to disclose information regarding final administrative findings of sexual harassment. This bill had bipartisan support and was vetoed by Governor Brown who in his veto message stated: "while I understand the desire to mitigate risk, governing boards-who are the fiduciaries of these institutions-should be responsible for setting hiring standards, including the disclosure of prior bad conduct."

REGISTERED SUPPORT / OPPOSITION:

Support

California State University Employees Union

Opposition

None on file.

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