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FISCAL IMPACT REPORT

SPONSOR Thomson/Chasey/Romero, A./Serrato/
Szczepanski LAST UPDATED 02/23/2023
ORIGINAL DATE 01/19/2023
BILL
SHORT TITLE Affirmative Consent Policy in Schools NUMBER House Bill 43
ANALYST Chilton

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
	Indeterminate but minimal	Indeterminate but minimal	Indeterminate but minimal	Indeterminate	Recurring	General Fund

Parentheses () indicate expenditure decreases.

*Amounts reflect most recent version of this legislation.

Sources of Information

LFC Files

Responses Received From

New Mexico Attorney General (NMAG)
Human Services Department (HSD)
Department of Health (DOH)
Public Education Department (PED)
Higher Education Department (HED)

No Response Received

Albuquerque Public Schools (APS)

SUMMARY

Synopsis of House Bill 43

House Bill 43 creates new requirements for policy and teaching in public schools, all consistent with the requirement that sexual activities among students be governed by a principle of informed, mutual affirmative consent. Any and all participants in sexual activity must be capable of consent (i.e., cognitively capable and not impaired by substance use) and capable of expressing that consent in a positive manner.

The first section of the bill requires that post-secondary institutions receiving state support adopt policies consistent with affirmative consent. It also requires that such institutions of higher education provide policies and responses to allegations of sexual assault, domestic violence, dating violence, harassment, or stalking in a way consistent with trauma-informed principles (defined in this section).

Affirmative consent is extensively defined in the bill as being required of all parties involved in a sexual activity and cannot be assumed through the silence of an individual or through there having been a “date” between or among individuals. Further, affirmative consent is to be considered invalid if a participant is impaired through influence of a substance such as alcohol or drugs. Affirmative consent is to be contrasted with absence of negative response, in effect substituting “[only] yes means yes,” for “no means no.”

In investigating a complaint in this realm, decisions are to be made on the basis of a standard of “preponderance of evidence.” Higher-educational institutions must protect confidentiality of parties involved, must abstain from retaliation against complainants, and must educate those who would be investigating allegations in this area in comprehensive, trauma-informed response and in enumerated components of that response.

Post-secondary institutions must make agreements with on- or off-campus organizations that can assist students who have been victimized. They must also make their policies regarding affirmative consent well known to students.

Section 2 of the bill applies to schools under PED jurisdiction. PED is required to produce trauma-informed policies and responses regarding the same sex-related activities mentioned in Section 1. These are to involve “students, faculty members, employees, school volunteers and contractors both on and off campus.” Policies and procedures (and definitions) are identical to those required of post-secondary institutions.

Section 3 of the bill amends Section 22-12-1.1 NMSA 1978, which refers to requirements for graduation from a New Mexico high school. It removes outdated language regarding past school years and adds to subsection K of that section of statute new requirements for health education of each student. That health education must include discussion of the principles of affirmative consent to sexual activity.

Section 4 of the bill indicates that new requirements for the health education course required for graduation be applied first to students entering ninth grade in the 2023-2024 school year.

This bill does not contain an effective date, and as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed. As noted, the provisions of the bill regarding additions to the health education requirement for graduation would apply to those entering ninth grade in the 2023-2024 school year and in subsequent years.

FISCAL IMPLICATIONS

There is no appropriation in HB43. There may be additional workload for PED in implementing the provisions of the bill, but PED does not mention any fiscal impact for either implementing provisions in the bill or for purchasing or producing curriculum materials regarding affirmative consent.

HED states that HB43 does not increase costs to that agency. It is LFC’s belief that institutions of higher learning have procedures in place to deal with sexual assault and the circumstances around it, which would require only minor alterations to current policy to conform to the mandates of this bill. This bill may be an unfunded mandate for some entities, so costs for policy

development/implementation, training, and graduation requirement changes may have to be absorbed by any public institutions that currently do not meet the requirements of this bill.

SIGNIFICANT ISSUES

According to the National Education Association:

While many parents and educators may recall learning that “no means no” when it comes to sexual relationships, students today may be more likely to learn “yes means yes,” as the concept of affirmative consent is increasingly taught on campuses.

[In 2015], New York passed its “Enough is Enough” law, which requires New York colleges to adopt a uniform definition of affirmative consent as “knowing, voluntary, and mutual decision” among partners in sexual activity, and to teach it to incoming college freshman. One year earlier, California Gov. Jerry Brown signed an even more progressive law, requiring “yes means yes” be the standard on California campuses—and also taught in high school curriculum.

“While ‘no means no’ has become a well-known slogan, it places the burden on victims, making it their responsibility to show resistance,” wrote California lawmakers Kevin de León and Hannah-Beth Jackson to *The Washington Post* last year. “Research shows that that with affirmative consent education, we can create a climate of respect.”

DOH cites US and New Mexico statistics regarding rape and unwanted sexual activity in its summary of significant issues:

Sexual violence is a pressing public health issue that directly and indirectly impacts millions of men, women, and children in the United States. Researchers know the numbers underestimate this problem because many cases are unreported. Survivors may be ashamed, embarrassed, or afraid to tell the police, friends, or family about the violence. Victims may also keep quiet because they have been threatened with further harm if they tell anyone or do not think anyone will help them. The data shows:

- Sexual violence is common. Over half of women and almost 1 in 3 men have experienced sexual violence involving physical contact during their lifetimes. One in 4 women and about 1 in 26 men have experienced completed or attempted rape. Additionally, 1 in 3 women and about 1 in 9 men experienced sexual harassment in a public place.
- Sexual violence starts early. More than 4 in 5 female rape survivors reported that they were first raped before age 25 and almost half were first raped as a minor (i.e., before age 18). Nearly 8 in 10 male rape survivors reported that they were made to penetrate someone before age 25 and about 4 in 10 were first made to penetrate as a minor.
- In 2021, 9.8 percent of New Mexico high school students reported ever being forced to have sexual intercourse. In 2019, the most recent year that national data are available, 9.1 percent of New Mexico high school students and 7.3 percent of U.S students reported ever being physically forced to have sexual intercourse, indicating a higher risk of forced sexual intercourse for students in New Mexico than the US (New Mexico Risk and Resiliency Survey (YRRS), New Mexico DOH and PED).

- Sexual violence disproportionately affects some groups. Women and racial and ethnic minority groups experience a higher burden of sexual violence. For example, more than 2 in 5 non-Hispanic American Indian or Alaska Native and non-Hispanic multiracial women were raped in their lifetime.
- Sexual violence is costly. Recent estimates put the lifetime cost of rape at \$122,461 per survivor, including medical costs, lost productivity, criminal justice activities, and other costs.
(<https://www.cdc.gov/violenceprevention/sexualviolence/fastfact.html>)

Sexual assault/rape is consistently one of the most underreported violent crimes, with only 24.9 percent of survivors from 2018 reporting their assault to law enforcement, according to U.S. Department of Justice (<https://www.bjs.gov/content/pub/pdf/cv18.pdf>). Reporting by survivors to law enforcement is low for a variety of reasons, including fear of the offenders, shame and embarrassment, and belief that law enforcement will not act. Many survivors do not seek treatment after their assault for similar reasons.

Considering medical costs, lost work productivity, criminal justice activities, and other costs such as victim property loss or damage, rape was projected to have a lifetime cost of \$122,461 per victim in 2014 according to Peterson et al. (<https://pubmed.ncbi.nlm.nih.gov/28153649/>). Based on the most recent Behavioral Risk Factor Surveillance System (BRFSS) information available, an estimated 45,108 New Mexican residents were victims of rape between 2016 and 2018. This equates to approximately \$5,523,970,788 of lifetime costs absorbed by the public and private sectors over the three-year period.

According to the Brown et al. article, “Rape and Sexual Assault”, in the Georgetown Journal of Gender and the Law (<https://www.law.georgetown.edu/gender-journal/wp-content/uploads/sites/20/2021/01/GT-GJGL200005.pdf>), seven states clearly define ‘consent’ and fourteen states have detailed the requirements that define acting without the consent of the victim. According to the Sexuality Information and Education Council of the United States data from 2020, the following states have requirements to teach ‘consent’ as part of instruction on healthy relationships: California, Colorado, Hawaii, Illinois, Maryland, Missouri, Oklahoma, Virginia, and Washington. Definitions of consent vary across legislative texts. California’s legislative definition is the most explicit and concise, defining consent as the affirmative, conscious, and voluntary agreement to engage in sexual activity (https://siecus.org/wp-content/uploads/2020/05/SIECUS-2020-Sex-Ed-State-Law-and-Policy-Chart_May-2020-3.pdf).

The Goodcase et al. 2021 study of 717 college students attending a Midwestern university published in the Journal of Interpersonal Violence found that most participants (76 percent) expected explicit, affirmative, and ongoing consent (<https://pubmed.ncbi.nlm.nih.gov/30873896/>). High school students additionally supported affirmative consent attitudes, with girls and those with egalitarian gender role beliefs having more positive attitudes than boys and those with less egalitarian gender role beliefs (<https://doi.org/10.1080/00224499.2019.1711009>).

Sexual violence disproportionately impacts young people. Among New Mexico public high school students surveyed in 2019, 1 in 6 female students (16.1 percent) and 1 in 15 male students (6.9 percent) reported experiencing sexual violence including things like unwanted kissing, touching, or sexual intercourse in the past year (Youth Risk Behavior Survey, 2019). Nearly half of women (43.2 percent), and over half of men (51.3 percent), who report ever having been forced to have sex, were first raped as children (NISVS, 2015). Children under 18 are considered minors and any sexual contact in this age group is considered statutory rape. Children and adolescents who are members of marginalized communities are at increased risk for sexual violence victimization. According to New Mexico's 2018 BRFSS, lifetime forced sex among adults was higher for lesbian, gay, or bisexual (LGB) individuals, transgender or gender non-conforming individuals, white individuals, those with a disability, and individuals with an annual household income under \$15 thousand (compared to individuals with annual household incomes greater than \$75 thousand).

HSD cites similar statistics and corroborates the need for improvements at all levels of education.

ADMINISTRATIVE IMPLICATIONS

PED indicates that it “would need to amend administrative regulation, [6.29.1 NMAC](#), relating to educational standards and expectations for all students attending public schools, to include affirmative consent. PED would also have to amend the course description in the Student Teacher Accountability Reporting System (STARS) to incorporate the affirmative consent requirement in the health education class.”

HED notes that “HB43 requires institutions to develop internal procedures regarding sexual misconduct in addition to those already required of institutions as mandated by Title IX of the Education Amendments of 1972, the Violence Against Women Act (VAWA) of 2021, and The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics (Clery) Act of 1990, and institutions policies regarding Title IX, VAWA, and Clery Act compliance that are already in place. Conflicts may exist between the requirements of HB43 and current institutional policies; the first step for each institution and the NMHED would be to ascertain if there are any discrepancies.”

TECHNICAL ISSUES

“Sexual activity” as referenced in the bill as requiring affirmative consent is not defined.

Section 2A of the bill states that PED must adopt policies and responses to covered actions involving students, faculty members, employees, school volunteers or contractors on or off campus. It is not clear how a school's authority would extend to off-campus activities.

According to AGO, “As this bill addresses in part students under the age of 18, some confusion might arise in certain instances between the bill's privacy and confidentiality measures and Section 32A-4-3's reporting requirements. The bill could create additional clarity by providing that school policies must provide for the privacy and confidentiality of students ‘subject to mandatory reporting requirements established by state law.’”

PED notes, “The bill directs PED to adopt policies for the investigation of and disciplinary procedures addressing allegations of sexual and domestic violence, harassment, and stalking involving members of the school community. Policy, by definition, affects only the entity adopting it. If the sponsor wishes PED to adopt policy and procedure that affect entities other than PED, such as adoption of training requirements, the bill should be amended to reflect a directive to the Department to promulgate rule to that effect.”

LAC/al/ne/rl