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LEGISLATIVE EDUCATION STUDY COMMITTEE
BILL ANALYSIS
54th Legislature, 1st Session, 2019

Bill Number	<u>HB133/aHFI/aSJC/aSFI</u>	Sponsor	<u>Thomson</u>
Tracking Number	<u>.211329.2</u>	Committee Referrals	<u>HHHC/HEC; SEC/SJC</u>
Short Title	<u>School Sexual Activity Consent Standards</u>		
Analyst	<u>Terrazas</u>	Original Date	<u>1/24/19</u>
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BILL SUMMARY

Synopsis of Senate Floor Amendment 1

The Senate Floor Amendment 1 to HB133, as amended by the Senate Judiciary Committee and the House Floor (HB133/aHFI/aSJC/aSFI) adds language that would require complainant-centered policies and procedures to confirm what affirmative consent is “for age-appropriate students.” Health education courses, required either in middle school or high school, would have to include age-appropriate prevention and awareness training that emphasizes affirmative consent can never be given by a person who is unable to communicate. The amendment also cleans up other language in the bill.

Synopsis of SJC Amendment

The Senate Judiciary Committee Amendment to HB133, as amended by the House Floor, (HB133/aHFI/aSJC) replaces the term “complainant-centered” with “trauma-informed” to refer to the policies and procedures for the investigation of and disciplinary procedures addressing incidents. The amendment defines “trauma-informed policy” as a program or system that realizes the widespread impact of trauma and understands potential paths for recovery; recognizes the signs and symptoms of trauma in clients, families, staff, and others involved with the system; responds by fully integrating knowledge about trauma into policies, procedures, and practices; and seeks to actively resist re-traumatization. The amendment removes language from the bill that would require an investigation of and disciplinary procedures addressing allegations of incidents involving a regent.

Synopsis of House Floor Amendment 1

The House Floor Amendment 1 to HB133 (HB133/aHFI) includes language that would ensure the accuser, in addition to the accused, could also be referred to a postsecondary institution’s partner organization to receive assistance or services, including counseling, healthcare, mental healthcare, and legal assistance. HB133/aHFI would remove the requirement that each school district submit a health education implementation plan to the Public Education Department (PED). The bill, as amended, would require seventh grade students, beginning in the 2019-2020 school year, to

receive age-appropriate prevention and awareness of sexual abuse and assault training that addresses affirmative consent.

Synopsis of Original Bill

House Bill 133 (HB133) would require public schools and public and private postsecondary institutions that receive state funds for financial assistance to adopt complainant-centered policies and procedures addressing affirmative consent and allegations of sexual assault and prevention of sexual assault, domestic violence and harassment, dating violence, and stalking involving a student, faculty member, employee, school volunteer, contractor, or regent both on and off campus. HB133 amends graduation requirements to require health education courses to address affirmative consent.

FISCAL IMPACT

The bill does not contain an appropriation.

To comply with new trainings and policies, Central New Mexico Community College (CNM) anticipates between \$8,000 and \$13 thousand in initial costs to purchase, develop, and implement trainings for the appropriate campus staff and faculty. CNM indicates establishing partnerships or agreements of service to offer healthcare, mental healthcare, legal assistance, or other related services to students could be a significant financial burden for the college.

SUBSTANTIVE ISSUES

HB133/aHFI/aSJC/aSFI would require health education courses, required for graduation, to include a standard of “affirmative consent,” defined as affirmative, conscious, and voluntary agreement to engage in sexual activity. The bill would require policies and procedures to reference affirmative consent and prevention of sexual assault as a standard in the determination of whether consent was given by both parties to sexual activity. Policies and procedures must confirm each person involved in a sexual activity has receipt of affirmative consent of each participant engaged in that sexual activity; that affirmative consent can never be given by a person who is unable to communicate, cannot be implied, assumed, or inferred from silence or lack of protest or resistance, and can be revoked at any time; and that the existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, shall never by itself be assumed to be an indicator of consent.

HB133/aHFI/aSJC/aSFI defines “dating violence” as violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the complainant and where the existence of such a relationship shall be determined based on the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. The bill defines “postsecondary educational institution” as an academic, vocational, technical, business, professional or other school, college or university, or other organization or person offering or purporting to offer courses, instruction, training or education, from a physical site in New Mexico, through distance education, correspondence, or in person.

HB133/aHFI/aSJC/aSFI would require procedures to include, an initial response by the school’s or postsecondary institution’s personnel, a report of an incident, an investigation of the complaint, confidential reporting by complainants and third parties, and appropriate disciplinary action. The bill includes provisions that protect the privacy of individuals involved in a complaint and prohibits

the use of disciplinary sanctions against individuals who make a complaint or are witness in an investigation. School and campus officials involved in investigating and adjudicating sexual assault, domestic violence, dating violence, and harassment, or stalking cases would be required to receive a comprehensive, trauma-informed training program.

Public schools and public and private postsecondary institutions that receive state funds for student financial assistance would be required to, to the extent feasible, enter into agreements or partnerships with organizations to which students can be referred for assistance or services, including counseling, healthcare, mental healthcare, complainant advocacy, legal assistance, and resources for the accused and the accuser, and implement comprehensive prevention and outreach programs that address sexual assault, domestic violence, dating violence, and harassment or stalking. Further, HB133/aHFI/aSJC/aSFI would require students be made aware of the school's or the postsecondary institution's policy on sexual assault, domestic violence, dating violence, and harassment or stalking, including as part of every incoming student's orientation.

Research finds sexual assault and violence in public schools and postsecondary institutions is prevalent. Using state education records, supplemented by federal crime data, The Associated Press found about 17 thousand official reports of sexual assault by students in schools across the country, from kindergarten through 12th grade, between fall 2011 and spring 2015. According to the Rape, Abuse, and Incest National Network, a national nonprofit anti-sexual assault organization, sexual violence on college campuses is common. Among all graduate and undergraduate students, 11.2 percent experience rape or sexual assault through physical force, violence, or incapacitation. Among graduate and professional students, 8.8 percent of females and 2.2 percent of males experience rape or sexual assault. Among undergraduate students, 23.1 percent of females and 5.4 percent of males experience rape or sexual assault. Among all students, 4.2 percent have experienced stalking since entering college. While the numbers are high, research also indicates sexual assaults are underreported. Some states don't track sexual assaults and those that do vary widely in how they classify and catalog sexual violence. According to the Department of Health (DOH) 25 states and the District of Columbia require sex education courses to include information about skills for avoiding coerced sex.

DOH notes the bill's definition of affirmative consent may not incorporate non-verbal body language, gestures, or actions that could represent a manner of communication for individuals with intellectual or developmental disabilities. If affirmative consent is interpreted as being exclusively verbal, that could pose a barrier for individuals with disabilities. Individuals with disabilities consent to sexual activity in a variety of ways, including absence of resistance, gestures, and actions, and non-verbal body language. The proposed definition of affirmative consent also presents the potential for inappropriate or disproportionate disciplinary action for students with disabilities. This concern is reflected in the fact that few states have adopted an affirmative consent standard for related criminal statutes.

Some of the bill's provisions overlap with federal law. All postsecondary institutions receiving federal financial aid dollars are required to adhere to Title IX, the Violence Against Women Act, and the Campus Sexual Violence Elimination Act. Title IX is a federal civil rights law that prohibits any gender-based discrimination, including sexual harassment and sexual violence, that may deny a person access to educational benefits and opportunities even when incidents occur off campus or involve people who are not students. Under Title IX, schools have a responsibility to stop the discrimination, prevent its recurrence, and address its effects. The federal law requires colleges, universities, and school districts to provide survivors with a prompt, adequate, and impartial investigation should survivors choose to make a report. The Violence Against Women

Act funds and administers numerous programs addressing domestic violence, dating violence, sexual assault, and stalking, including giving colleges tools to educate students about dating violence and sexual assault. Under the Campus Sexual Violence Elimination Act, colleges and universities must notify survivors of sexual assault of counseling resources, the option to report a case to the school, law enforcement or both, provide academic or living accommodations, such as changing dorms or classes, and to be notified of the final outcome of a disciplinary proceeding. The law encourages transparency by requiring colleges to keep track of forcible and non-forcible sex offenses and maintain statistics on dating violence, sexual assault, and stalking incidents. Colleges are required to guarantee rights for victims of sexual violence, and must have protocol for disciplinary proceedings and follow certain standards.

CNM indicates the bill's requirement to investigate incidents on and off campus would be significantly burdensome for the college. As a campus without a law enforcement agency, CNM relies on local law enforcement to provide criminal investigation related to incidents of sexual assault or violence. Further, CNM does not have the authority to investigate outside of the property, particularly if individuals are not students or employees of the college.

ADMINISTRATIVE IMPLICATIONS

The bill would require PED and public and private postsecondary institutions that receive state funds for student financial assistance to adopt complainant-centered policies and procedures for the investigation of and disciplinary procedures addressing allegations of sexual assault, domestic violence, harassment, or stalking involving a student, faculty member, employee, school volunteer, or contractor both on and off campus.

PED indicates they would need to monitor implementation of the adopted policies, as well as the training program for school officials, for which the bill does not allocate funds. PED would have to amend the New Mexico Administrative Code and the course description in the Student Teacher Accountability Reporting System to incorporate the affirmative consent requirement in the health education class, but reports this can be accomplished with existing staff and resources.

OTHER SIGNIFICANT ISSUES

Every state, state educational agency (SEA), or local educational agency (LEA) that receives funds through the Every Student Succeeds Act is required to have in place laws, regulations, or policies that prohibit the SEA, LEA, or school, as well as any school employee, contractor, or agent, from providing a recommendation of employment for an employee, contractor, or agent that the SEA, LEA, or school, or the individual acting on behalf of the SEA, LEA, or school, knows, or has probable cause to believe, has engaged in sexual misconduct with a student or minor in violation of the law.

SOURCES OF INFORMATION

- LESC Files
- Public Education Department (PED)
- Human Services Department (HSD)
- Department of Health (DOH)
- New Mexico Independent Community Colleges (NMICC)
- Central New Mexico Community College (CNM)