

HOUSE BILL REPORT

ESHB 2327

As Amended by the Senate

Title: An act relating to addressing sexual misconduct at postsecondary educational institutions.

Brief Description: Addressing sexual misconduct at postsecondary educational institutions.

Sponsors: House Committee on College & Workforce Development (originally sponsored by Representatives Pollet, Kilduff, Frame, Bergquist, Orwall, Wylie and Appleton).

Brief History:

Committee Activity:

College & Workforce Development: 1/21/20, 2/5/20 [DPS];
Appropriations: 2/8/20 [DPS(CWD)].

Floor Activity:

Passed House: 2/13/20, 94-4.
Senate Amended.
Passed Senate: 3/6/20, 35-13.

Brief Summary of Engrossed Substitute Bill

- Requires postsecondary educational institutions (institutions) to complete investigations into sexual misconduct, make written findings of whether sexual misconduct complaints or allegations are substantiated, and maintain substantiated findings in an employee's personnel file or employment records.
- Requires institutions to ask and require applicants to sign statements regarding substantiated findings of, or investigations into, sexual misconduct before hiring, beginning October 1, 2020.
- Requires institutions to disclose information about substantiated findings or investigations into sexual misconduct when asked for reference checks about previous or current employees, beginning July 1, 2021.
- Prohibits provisions of settlement agreements between institutions and employees when disclosure of investigations into, or findings of sexual misconduct by the employee, are prohibited.
- Exempts personal identifying information held in personnel, student, or investigation files by institutions from the Public Records Act.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

- Requires the Student Achievement Council to develop a standardized statewide campus climate assessment to gauge the prevalence of sexual misconduct on college campuses.

HOUSE COMMITTEE ON COLLEGE & WORKFORCE DEVELOPMENT

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 14 members: Representatives Hansen, Chair; Entenman, Vice Chair; Leavitt, Vice Chair; Van Werven, Ranking Minority Member; Gildon, Assistant Ranking Minority Member; Graham, Assistant Ranking Minority Member; Bergquist, Kraft, Mead, Paul, Pollet, Ramos, Sells and Slatter.

Minority Report: Do not pass. Signed by 3 members: Representatives Rude, Sutherland and Young.

Staff: Megan Mulvihill (786-7304).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The substitute bill by Committee on College & Workforce Development be substituted therefor and the substitute bill do pass. Signed by 26 members: Representatives Ormsby, Chair; Robinson, 1st Vice Chair; Bergquist, 2nd Vice Chair; Stokesbary, Ranking Minority Member; MacEwen, Assistant Ranking Minority Member; Chandler, Chopp, Cody, Dolan, Dye, Fitzgibbon, Hansen, Hudgins, Kilduff, Kraft, Macri, Mosbrucker, Pettigrew, Pollet, Ryu, Senn, Steele, Sullivan, Tarleton, Tharinger and Ybarra.

Minority Report: Do not pass. Signed by 5 members: Representatives Rude, Assistant Ranking Minority Member; Caldier, Hoff, Schmick and Sutherland.

Staff: Kate Henry (786-7349).

Background:

Sexual Misconduct Policies and Title IX.

Higher education institutions each have policies prohibiting sexual misconduct on campus, which can include sexual harassment, sexual assault or violence, nonconsensual sexual activity, stalking, indecent exposure, sexual exploitation, dating violence, and domestic violence. Every college and university that accepts federal funds must comply with Title IX, which is a federal civil rights law that prohibits discrimination based on sex in federally funded education programs and activities. Under Title IX, a public or private institution of higher education receiving federal financial assistance must respond promptly and effectively to reports of sexual violence and have grievance procedures in place for resolving student and employee complaints of sexual discrimination. Colleges and universities must develop sexual violence procedures that at least include the following:

- notice to students and employees of grievance procedures, including where complaints may be filed;

- application of grievance procedures to complaints filed by students or on their behalf;
- provisions for reliable and impartial investigation of complaints, including the opportunity for both the complainant and alleged perpetrator to present witnesses and evidence;
- designated and reasonably prompt time frames for the major stages of the complaint process;
- notice to the complainant and alleged perpetrator of the outcome of the complaint; and
- assurance that the school will take steps to prevent recurrence of any sexual violence and remedy discriminatory effects on the complainant and others.

Public Records Act.

Under the Public Records Act (PRA), state and local agencies are required to make written records available to the public for inspection and copying upon request, unless an exemption applies. Certain investigative, law enforcement, and crime victim information is exempt, in addition to certain personal information in employee files maintained for public agencies, to the extent that the disclosure would violate their right to privacy.

Campus Climate Assessment.

In 2015 Substitute Senate Bill 5518 required the public four-year institutions of higher education to each conduct a campus climate assessment to gauge the prevalence of sexual misconduct among students at their campuses. The State Board for Community and Technical Colleges (SBCTC) was required to conduct a uniform campus climate assessment for the community and technical colleges. The surveys asked about students' experiences with sexual assault, relationship and domestic violence, stalking, and other unwanted behavior as well as sexual harassment. In addition, the survey included questions about perceptions of campus climate, attitudes, and knowledge of policies and procedures. The institutions and the SBCTC reported the findings to the Governor and the Legislature in December 2016.

Summary of Engrossed Substitute Bill:

Campus Climate Assessments.

The Student Achievement Council (Council) must develop a standardized statewide campus climate assessment to be administered by postsecondary educational institutions (institutions) and the SBCTC. The assessment must include, but is not limited, to the following:

- prevalence of sexual misconduct on and off campus;
- options for reporting sexual misconduct and how those options are presented to survivors and witnesses;
- whether survivors or witnesses reported to institutions, campus police, or other law enforcement, and any barriers or discouragement experienced;
- whether survivors or witnesses experienced retaliation for reporting, filing complaints, or working with investigators, or any perceptions of retaliation; and
- an evaluation of student and employee attitudes and awareness of campus sexual misconduct issues and consent.

The institutions and the SBCTC must work with the Council to develop definitions, survey questions, the assessment scope, and other features the Council deems necessary for

consistency. The assessment results must be submitted to the Council every five years, beginning July 1, 2023, and the Council must submit reports summarizing the findings to the Governor and the appropriate legislative committees by December 31 of each year the assessments are due. The institutions must make the part of the Council's report relating to their institution available by posting it on the institutions' website and by emailing students, faculty, and staff.

Settlement Agreements.

Any provision of a settlement agreement between an institution and an employee is considered void and unenforceable if the provision prohibits the employee, institution, survivor, or any other person from disclosing that the employee is the subject of an ongoing investigation or was found to have conducted sexual misconduct. A settlement agreement may contain provisions requiring nondisclosure of personal identifying information of persons filing complaints, making allegations, and witnesses participating in investigations.

Public Records Act.

Personal identifying information in an employee personnel file, student file, investigation file, settlement agreement, or other files held by an institution that reveals the identity of witnesses or victims of sexual misconduct committed by an employee of the institution are exempt from public disclosure and copying, unless the victim or witness indicates a desire for disclosure.

Personnel Files.

An institution must complete investigations of complaints or allegations of sexual misconduct committed by an employee against a student regardless of whether the employee voluntarily or involuntarily leaves employment with the institution, unless the victim requests otherwise. When the investigation is complete, the institution must make written findings of whether the complaint or allegation is substantiated. Institutions must use a preponderance of the evidence standard when determining whether findings are substantiated. Institutions must include in an employee's personnel file or employment records any substantiated findings of sexual misconduct committed by the employee while employed with that institution. When disclosing records in an employee's personnel file or employment record, the institution must keep personal identifying information of the complainant and any witness confidential, unless otherwise agreed to by the complainant or witnesses.

Institutional Requirements for Applicant Reference and Background Checks.

Beginning October 1, 2020, before a postsecondary educational institution hires an applicant, the institution must request the applicant to sign a statement with three items:

1. a declaration of whether the applicant is the subject of any substantiated findings of sexual misconduct in any current or former employment or is currently being investigated for, or left a position during an investigation into, a violation of sexual misconduct, and if so, an explanation of the situation;
2. an authorization to permit the applicant's current and past employers to disclose to the hiring institution any sexual misconduct committed by the applicant and to make copies of all documents in the previous employer's personnel, investigative, or other files relating to sexual misconduct by the applicant available to the hiring institution; and

3. a release from liability for the applicant's current and past employers, and employees acting on behalf of the employer, for providing the information in 1 and 2.

In addition, beginning July 1, 2021, before hiring an applicant the institution must request that the applicant's current and past employers provide copies of all documents, if any, related to sexual misconduct in an employee's personnel file. The request must include a copy of the applicant's declaration and signed statement. The institution must also ask the applicant if he or she is the subject of any substantiated findings of, is currently being investigated for, or has left a position during an investigation into sexual misconduct, and if so, an explanation of the situation. The institution may only use the information received for the purpose of evaluating the applicant's qualifications for the position for which the person applied.

An institution that receives a request to disclose information about substantiated findings or investigations into sexual misconduct about a current or previous employee must provide the information requested and make copies of documents related to substantiated sexual misconduct in the applicant's personnel file available to the requesting institution. In addition, an institution must disclose information about substantiated findings of sexual misconduct to any employer conducting reference or background checks on a current or former employee, even if the employer conducting the reference check does not specifically ask for such information.

Beginning October 1, 2020, an institution may not hire an applicant who does not sign the statement attesting to any sexual misconduct findings or investigations.

Institutions without existing procedures in place must establish procedures to begin implementing sexual misconduct disclosure requirements no later than July 1, 2021.

Institutions, or an employee acting on behalf of the institution, who discloses information are presumed to be acting in good faith and are immune from civil and criminal liability for disclosure. The institution is not liable for nondisclosure of information by an employee without access to personnel records who is asked to respond to a reference check. Institutions must share best practices with all staff who are likely to receive reference checks about how to inform requesters to contact the appropriate office for personnel records. Institutions must keep personal identifying information of the complainant and any witness confidential, unless the complainant or witness agree to disclose their identifying information. The disclosure requirements do not restrict expungement from a personnel file or employment records of information about alleged sexual misconduct that has not been substantiated.

Applicant, employee, employer, postsecondary educational institution, sexual misconduct, and student are all defined.

EFFECT OF SENATE AMENDMENT(S):

The Senate amendment does the following:

- removes the requirement for campus climate assessments to be administered every five years by postsecondary educational institutions to gauge the prevalence of sexual

- misconduct on their campuses and removes the corresponding report by the Student Achievement Council;
- requires the public four-year institutions of higher education to report to the Legislature and Governor by December 1, 2023, on information obtained from any campus climate assessments conducted, how the information was used, and the impacts on institutional hiring practices due to the requirements in the bill;
 - modifies the definition of "employer" to only include postsecondary educational institutions;
 - changes the timeframe of when an applicant must be asked about and must sign a declaration statement regarding substantiated findings of, or current investigations into sexual misconduct, from "before hiring" to "prior to an official offer of employment;"
 - changes the timeframe of when a postsecondary educational institution must request information regarding sexual misconduct from past employers from "before hiring" to "prior to an official offer of employment;" and
 - defines "witness" to exclude an employee under investigation for allegations of sexual misconduct for the purpose of exempting personal identifying information kept in an employee personnel file, student file, investigation files, settlement agreement, or other files held by a postsecondary educational institution from public disclosure.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony (College & Workforce Development):

(In support) It is time to end the process of passing along faculty who have conducted sexual misconduct to other higher education institutions. This bill is aimed at creating very clear standards, and it allows time for the institutions to have procedures put in place. It is complex trying to balance victim identity, thousands of employees, institutional systems, and legal requirements, but the bill strikes the right balance between protecting students and identities. Students are the largest stakeholders at higher education institutions and deserve information about faculty. Most survivors do not report because of the belief that their school will not respond. Survivors are often blamed or punished, rather than offered help. Documentation is a critical step that builds trust in institutions and shows that they care. Students should not live with the fear of the perpetrator committing another crime. This will help the institutions save money from liability. There are a few refinements recommend relating to hiring and reference checks. These standards will require a new human resources structure, and there will be a cost associated with this, but the policy is respected.

The campus climate assessments are very important. There were two pieces of legislation passed in 2015 regarding sexual violence. One required a campus climate assessment that helped provide understanding of how to reach all students. Data about attitudes, beliefs, and culture are important to help address the problem.

(Opposed) This bill is predicated on the reliability of campus proceedings and the findings of amateurish committees at institutions. The conclusions of these campus proceedings are not liable or trustworthy. There is a lack of due process. Often findings are determined by a single investigator. There is a preponderance of men of color in these types of allegations. Many individuals have been wronged by Title IX proceedings. There are 500 federal court cases where the accused have appealed college decisions. Of those, 80-100 cases were settled out of court.

(Other) A safe and welcoming environment for students is the number one concern. There is a cost associated with these requirements, but private institutions cannot request fiscal resources from the state. Therefore, the cost will be shifted to students. The bill is similar to existing law in K-12 where if the applicant does not sign the statement, they cannot be hired. An allegation that has not been founded or proven should not be included in a personnel file. The Legislature should ensure that due process rights are respected in order to ensure students and employees are in a safe environment.

Staff Summary of Public Testimony (Appropriations):

(In support) The bill will break the pattern of individuals with a history of sexual misconduct being allowed to sign nondisclosure agreements and move to another institution. Institutions would need to complete and publish reports, even if someone has left the institution. Keeping records of completed reports supports survivors. The ratio of individuals that experience sexual misconduct is unfortunate. Students will be able, with the support of this bill, to focus on studying and feel increased safety on campus. The sponsor is working with the institutions to decrease the impact stated in the fiscal note.

(Opposed) None.

Persons Testifying (College & Workforce Development): (In support) Representative Pollet, prime sponsor; Fajer Saeed Ebrahim, Legal Voice; Bengisu Cicek, Associated Students of University of Washington—Tacoma; Joe Dacca and Elizabeth Umphress, University of Washington; Paul Francis, Council of Presidents; Chris Mulick and Sheridan Ingalls, Washington State University; Darin Dorsey, Washington Coalition of Sexual Assault Programs; Maggie Dunham Jordahl, Graduate and Professional Student Senate of the University of Washington; Ed McCallister, State Board for Community and Technical Colleges; Samantha Cruz, Washington State University—Pullman; and Lisa Schubert.

(Opposed) Buddy Ullman.

(Other) Lucinda Young, Washington Education Association; and Terri Standish-Kuon, Independent Colleges of Washington.

Persons Testifying (Appropriations): Representative Pollet, prime sponsor; and Nancy Sapiro, Legal Voice.

Persons Signed In To Testify But Not Testifying (College & Workforce Development): None.

Persons Signed In To Testify But Not Testifying (Appropriations): None.