

LFC Requester:	Liu
-----------------------	------------

**AGENCY BILL ANALYSIS
2023 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Original	<input checked="" type="checkbox"/>	Amendment	<input type="checkbox"/>	Date	<u>01/23/23</u>
Correction	<input type="checkbox"/>	Substitute	<input type="checkbox"/>	Bill No:	<u>43</u>

Sponsor:	<u>Thomson</u>	Agency Name and Code	<u>924</u>
Short Title:	<u>AFFIRMATIVE CONSENT POLICY IN SCHOOLS</u>	Number:	<u></u>
		Person Writing	<u>Gregory Frostad</u>
		Phone:	<u>(505) 470-5752</u>
		Email	<u>Gregory.Frostad@ped.nm.gov</u>

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY23	FY24		
None	None	N/A	NFI

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY23	FY24	FY25		
None	None	None	N/A	NFI

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	N/A	N/A	N/A	N/A	N/A	NFI

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: N/A

Duplicates/Relates to Appropriation in the General Appropriation Act: N/A

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis: House Bill 43 (HB43) proposes a new section of the Public School Code to require the Public Education Department (PED) to adopt detailed, trauma-informed policies and trauma-informed responses for the investigation of and disciplinary procedures addressing allegations of sexual assault, domestic violence, dating violence and harassment or stalking involving a student, faculty member, employee, school volunteer or contractor both on and off campus.

HB43 would amend graduation requirements to include a standard of affirmative consent.

Schools, to the extent feasible, would be required to (1) enter into agreements or partnerships with existing on-campus or community-based organizations to offer supports to a “responding party” and “complainant” at no cost, and (2) implement comprehensive prevention and outreach programs addressing affirmative consent, sexual assault, domestic violence, dating violence and harassment or stalking.

HB43 defines:

- “Affirmative consent” as “affirmative, conscious and voluntary agreement to engage in sexual activity.”
- “Complainant” as “a student or employee who reports having experienced an incident of sexual assault, domestic violence, dating violence or harassment or stalking to the institution.”
- “Responding party” as “a student or employee who has been accused of an alleged incident of sexual assault, domestic violence, dating violence or harassment or stalking.”

FISCAL IMPLICATIONS

HB43 does not contain an appropriation.

SIGNIFICANT ISSUES

Background. Sexual violence is a pressing public health issue that directly and indirectly impacts millions of men and women in the United States. Data from the 2015 National Intimate Partner and Sexual Violence Survey (NISVS) indicate that 43.6 percent of women and 24.8 percent of men in the United States have experienced some form of contact sexual violence in their lifetime, with 4.7 percent of women and 3.5 percent of men experiencing this in the 12 months preceding the survey. Sexual assault or 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.

According to the Brown et al. article of Rape and Sexual Assault in the Georgetown Journal of Gender and the Law 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.

The New Mexico Youth Risk and Resiliency Survey (YRRS), in 2021, 9.8 percent of New Mexico high school students reported ever having been forced to have sexual intercourse. In 2019, the most recent year for which national data are available, 9.1 percent of New Mexico high school students reported ever having been forced to have sexual intercourse, compared with 7.3 percent of high school students, nationally.

Graduation requirement changes. For students who enter ninth grade in the 2023-2024 school year and subsequent school years, and who have not passed a health education course prior to the implementation of the provisions of this bill, they would be required to take a health education course that includes age-appropriate training in the prevention and awareness of sexual abuse and assault that includes a standard of affirmative consent - defined as an affirmative, conscious and voluntary agreement to engage in sexual activity – and that emphasizes:

- it is the responsibility of each person involved in the sexual activity to ensure that the person has the affirmative consent of all other participants engaged in that sexual activity;
- affirmative consent cannot be implied, assumed or inferred from silence or lack of protest or resistance
- affirmative consent is ongoing throughout a sexual activity and can be revoked at any time;
- the existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never be assumed to be an indicator of consent; and
- affirmative consent can never be given by a person who is asleep, unconscious, incapacitated due to the influence of drugs, alcohol or medication or unable to communicate due to a mental or physical condition.

Definitions.

- “Dating violence” means 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.
- “Domestic violence” means domestic abuse as defined in Section 40-13-2 NMSA 1978 or crimes against household members described in Sections 30-3-12 through 30-3-16 NMSA 1978.
- “Harassment or stalking” means harassment, stalking and aggravated stalking as described in Sections 30-3A-2 through 30-3A-3.1 NMSA 1978.
- “Sexual assault” means sexual offenses described Sections 30-9-11 through 30-9-14 and 30-9-14.3 NMSA 1978, which describe criminal sexual penetration, criminal sexual

contact, criminal sexual contact of a minor, indecent exposure, and aggravated indecent exposure.

- “Trauma-informed policy” means a program or system that considers 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.
- “Trauma-informed response” means a response involving an understanding of the complexities of dating violence, domestic violence, sexual assault and harassment or stalking through training centered on the neurobiological impact of trauma, the influence of societal myths and stereotypes surrounding the causes and impacts of trauma with an understanding of perpetration methodology and how to conduct an effective investigation.

Requirements for policies and procedures. Per HB43, all policies and procedures would be required to:

- reference an affirmative consent standard in the determination of whether consent was given, by all parties, to sexual activity;
- confirm that it is the responsibility of each person involved in the sexual activity to ensure that the person has the affirmative consent of all other participants engaged in the sexual activity;
- confirm that 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; and
- confirm that affirmative consent:
 - can never be given by a person who is asleep, unconscious, incapacitated due to the influence of drugs, alcohol or medication or unable to communicate due to a mental or physical condition;
 - cannot be implied, assumed or inferred from silence or lack of protest or resistance; and
 - is ongoing throughout a sexual activity and can be revoked at any time.

Policies would be required to include a:

- provision addressing how the school will provide appropriate protections for the privacy of individuals involved, including confidentiality;
- provision that an individual who participates as a complainant or witness in an investigation will not be subject to disciplinary sanctions for a violation of the school's student conduct policy at or near the time of the incident;
- description of the role of the school staff supervision; and
- provision for a comprehensive, trauma-informed training program for school officials involved in investigating and adjudicating sexual assault, domestic violence, dating violence and harassment or stalking cases.

Procedures would be required to include:

- an initial response by the school's personnel to a report of an incident, including:
 - written notification to the complainant about the availability of, and contact information for, on- and off-campus resources and services and coordination with law enforcement, as appropriate;
 - providing information in writing to the complainant about the importance of preserving evidence;

- the identification and location of witnesses;
- response to stranger and non-stranger sexual assault;
- a preliminary complainant interview; and
- a comprehensive follow-up complainant interview, as appropriate.
- investigation of the complaint, including:
 - contacting and interviewing the responding party;
 - seeking the identification and location of witnesses;
 - investigating allegations that alcohol or drugs were involved in the incident; provided that these allegations cannot be used against the complainant during the process of investigating the complaint; and
 - participation of complainant advocates and other support persons.
- confidential reporting by complainants and third parties; and
- evaluating complaints and taking disciplinary action as appropriate.

PERFORMANCE IMPLICATIONS

N/A

ADMINISTRATIVE IMPLICATIONS

PED 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.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

N/A

TECHNICAL ISSUES

Although statute allows school districts to determine whether health education is to be required in middle school or high school, the bill says the provisions would apply to students entering the ninth grade in the 2023-2024 school year. The sponsor of the bill may consider changing the applicability of the bill to students entering middle school or high school.

The bill misspells “resistance” on page 21, line 16.

OTHER SUBSTANTIVE ISSUES

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.

ALTERNATIVES

N/A

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

N/A

AMENDMENTS

The sponsor may wish to consider amending the bill to direct PED to promulgate rule, rather than adopt policies.

The sponsor of the bill may also consider changing the applicability of the bill to students entering middle school or high school.