



Association of
Title IX Administrators

What California Schools Need to Know About SB 493

Brett A. Sokolow, JD

Chair, TNG and President, ATIXA

Mikiba W. Morehead, Ed.D.

Consultant, TNG



Strategic Risk
Management Solutions



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AGENDA

- 1 Senate Bill 493 Overview
- 2 Requirements in Agreement with Title IX
- 3 Requirements in Conflict with Title IX
- 4 Implementation Recommendations
- 5 Questions

SENATE BILL 493

- Issued September 29, 2020
- Effective and enforceable January 1, 2022
- Amends Section 66262.5 of the Education Code
- References Sections 66292.3, 66292.4, 67386, and Section 212.5 of the Education Code
- Applies to all higher education institutions in California that receive state funding

REQUIREMENTS IN AGREEMENT WITH TITLE IX

- Disseminate a notice of nondiscrimination
- Designate at least one employee of the institution to coordinate efforts to comply with the law
- Adopt rules and procedures for the prevention of sexual harassment
- Adopt grievance procedures providing for the prompt and equitable resolution of sexual harassment complaints and publish on website
- Publish on website the name, title, and contact information for the Title IX Coordinator or other employee designated to coordinate efforts and any individual official with the authority to investigate complaints or to institute corrective measures

REQUIREMENTS THAT DIFFER FROM TITLE IX

- Definition of Sexual Harassment
- Designated Mandatory Reporters
- Notice
- Jurisdiction
- Policy Statements
- Grievance Procedures
- Hearing Requirements
- No-contact Directives
- Training Requirements
- Mediation Prohibition
- Private Right of Action Provision

SEXUAL HARASSMENT – TITLE IX REGULATIONS

- Conduct on the basis of sex (including sexual conduct) that satisfies one or more of the following:
 - An employee of the Recipient conditioning the provision of an aid, benefit, or service of the Recipient on an individual's participation in unwelcome sexual conduct;
 - 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;
 - Sexual assault, dating violence, domestic violence, and stalking (as defined in the Clery Act and VAWA)

SEXUAL HARASSMENT – SB 493

- 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 any of the following conditions:
 - Submission to the conduct is explicitly or implicitly made a term or a condition of an individual's employment, academic status, or progress.
 - Submission to, or rejection of, the conduct by the individual is used as the basis of employment or academic decisions affecting the individual.
 - The conduct has the purpose or effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile, or offensive work or educational environment.

SEXUAL HARASSMENT – SB 493 (CONT.)

- Submission to, or rejection of, the conduct by the individual is used as the basis for any decision affecting the individual regarding benefits and services, honors, programs, or activities available at or through the educational institution.
- Sexual violence, sexual battery, and sexual exploitation.
- Given the disparity in definitions between the CA and federal requirements, ATIXA has decided to adopt a 2P1P approach in its model policies and procedures.
 - How to decide whether a CA institution should have more than one process...

SEXUAL VIOLENCE – SB 493

- **Sexual violence** means physical sexual acts perpetrated against a person without the person's affirmative consent, including sexual assault, dating violence, domestic violence, and stalking. Physical sexual acts include both of the following:
 - Rape, defined as penetration, no matter how slight, of the vagina or anus with any part or object, or oral copulation of a sex organ by another person, without the consent of the victim.
 - Sexual battery (continued next slide) ...

SEXUAL BATTERY – SB 493

- The intentional touching of another person's intimate parts without consent, intentionally causing a person to touch the intimate parts of another without consent, or using a person's own intimate part to intentionally touch another person's body without consent.
 - Contrast with “for the purpose of sexual gratification” language within the Title IX regulations.
 - Broader range of conduct covered in CA definition.

SEXUAL EXPLOITATION – SB 493

- A person taking sexual advantage of another person for the benefit of anyone other than that person without that person's consent, including, but not limited to, any of the following acts:
 - The prostituting of another person.
 - The trafficking of another person, defined as the inducement of a person to perform a commercial sex act, or labor or services, through force, fraud, or coercion.
 - The recording of images, including video or photograph, or audio of another person's sexual activity or intimate parts, without that person's consent.

SEXUAL EXPLOITATION – SB 493 (CONT.)

- The distribution of images, including video or photograph, or audio of another person's sexual activity or intimate parts, if the individual distributing the images or audio knows or should have known that the person depicted in the images or audio did not consent to the disclosure.
- The viewing of another person's sexual activity or intimate parts, in a place where that other person would have a reasonable expectation of privacy, without that person's consent, for the purpose of arousing or gratifying sexual desire.

MANDATORY REPORTING – SB 493

- Responsible Employee:
 - Individuals with any of the following positions or substantially similar positions or job duties (regardless of the specific title the institution may attach to the position):
 - Title IX Coordinator or other coordinator designated to comply with and carry out the institution's responsibilities under this section
 - Residential advisors, while performing the duties of employment by the institution
 - Housing directors, coordinators, or deans
 - Student life directors, coordinators, or deans

MANDATORY REPORTING – SB 493 (CONT.)

- Athletic directors, coordinators, or deans
- Coaches of any student athletic or academic team or activity
- Faculty and associate faculty, teachers, instructors, or lecturers
- Graduate student instructors, while performing the duties of employment by the institution
- Laboratory directors, coordinators, or principal investigators
- Internship or externship directors or coordinators
- Study abroad program directors or coordinators

MANDATORY REPORTING – SB 493 (CONT.)

- Excluded from mandatory reporting obligations:
 - Therapists
 - Victim advocates
 - University of California Center for Advocacy, Resources, and Education (CARE) director, advocate, or employee
 - California State University victim advocate, or other position with similar responsibilities
 - Other individuals acting in a professional capacity when confidentiality is mandated by law

NOTICE

- **Under Title IX**

- Actual notice standard (requiring notice to the Title IX Coordinator or an Official with Authority).

- **Under SB 493**

- Revives the concept of “constructive notice” for California institutions.
- Requires that an institution take steps to investigate possible policy violations once the institution knows (actual notice) or reasonably should know (constructive notice) about possible instances of sexual harassment.
- This difference creates a greater duty on the part of institutions to respond to notice, not just complaints.

JURISDICTION

- **Under Title IX**

- Jurisdiction applies only to incidents of sexual harassment (as defined in the federal regulations) occurring within an education program or activity.

- **Under SB 493**

- Jurisdiction includes incidents of sexual harassment (as defined in the new state law) that occur within or outside of an education program or activity,
- Whether on campus or off campus if the incident could contribute to a hostile educational environment or interfere with a student's access to education.

POLICY STATEMENTS – SB 493

The law outlines specific language and principles that institutions must include in grievance procedures that go beyond the requirements of Title IX:

- A statement that the investigation and adjudication are not adversarial processes between the complainant, the respondent, and the witnesses, but rather a process for the institution to comply with its obligations under existing law.
- The complainant does not have the burden to prove, nor does the respondent have the burden to disprove, the underlying allegations.
 - What does this mean in practice?

POLICY STATEMENTS – SB 493 (CONT.)

- The inclusion, when possible, of citations to statistics on the prevalence of sexual harassment and sexual violence in the educational setting, and the differing rates at which students experience sexual harassment and sexual assault in the educational setting based on their race, sexual orientation, disability, gender, and gender identity.
- A prohibition against mandated mediation and restrictions on the use of mediation, even voluntarily, for the resolution of allegations of sexual violence (i.e., sexual assault, dating violence, domestic violence, and stalking).
- A prohibition against any requirement that a complainant agree to a voluntary resolution agreement or any form of resolution as a means to receiving remedies or other interim measures.

GRIEVANCE PROCEDURES – SB 493

- Adopt grievance procedures that provide prompt and equitable resolution of sexual harassment complaints filed by a student against another student or employee and publish on website.
- Some SB 493 grievance procedure requirements are consistent with the Title IX regulations, and in other cases, the requirements may present a legal conflict.

GRIEVANCE PROCEDURES – SB 493 (CONT.)

Consistent with Title IX

- Ensure trauma-informed and impartial investigation of complaints.
- An investigator or hearing officer cannot consider prior or subsequent sexual history between the complainant and anyone other than the respondent for any reason unless, the consideration is directly relevant to prove that physical injuries alleged to have been inflicted by the respondent were inflicted by another individual.
 - Note that the “subsequent” language expands the Title IX prohibition to additional conduct.

GRIEVANCE PROCEDURES – SB 493 (CONT.)

- An investigator or hearing officer cannot consider the existence of a dating relationship or prior or subsequent consensual sexual relations between the complainant and the respondent unless the evidence is relevant to how the parties communicated consent in prior or subsequent consensual sexual relations.
- Notification that repetitive, irrelevant, or harassing questions of either party or witness are prohibited.
- Use a preponderance of the evidence standard, including providing an explanation of the meaning of the preponderance of the evidence standard.

GRIEVANCE PROCEDURES – SB 493 (CONT.)

- Provide a reasonably prompt timeframe for all of the major stages of the complaint process to students, as well as outline a process for extending these timelines, for good cause.
- Provide notice to student parties of their right to consult with an attorney, at their own expense, at any stage of the process and may have an attorney serve as a support person or advisor at any stage of the process.
- Provide notice to student parties regarding appropriate counseling resources developed and maintained by the institution for students involving in sexual harassment complaints.

GRIEVANCE PROCEDURES – SB 493 (CONT.)

- Allow either party to appeal the outcome of the grievance proceeding if the institution has an appeals process. An institution's grievance procedure may limit the grounds for an appeal, provided that any limitation applies equally to all parties and that the nonappealing party has an opportunity to respond to the appeal.

GRIEVANCE PROCEDURES – SB 493 (CONT.)

In Conflict with Title IX

- Include reasonably equitable evidentiary guidelines that may include page or word limits for evidence submitted by parties.
 - Possible conflict regarding Title IX's mandate that parties be permitted to submit all relevant evidence, if a party seeks to submit relevant evidence that exceeds the limits.

GRIEVANCE PROCEDURES – SB 493 (CONT.)

- Notification that the institution decides whether or not a hearing is necessary to determine whether any sexual violence (i.e., sexual assault, dating violence, domestic violence, or stalking) occurred, based on a preponderance of the evidence standard.
 - Possible procedural conflict with the Title IX regulations, which seem to imply that a hearing is required, unless a formal complaint has been otherwise dismissed or a complaint is resolved through informal resolution.
 - What does this provision mean? That a complaint can be dismissed without a hearing? That something other than a hearing can be used to resolve a complaint? If so, what?

GRIEVANCE PROCEDURES – SB 493 (CONT.)

Additive to Title IX:

- An investigator or hearing officer is generally prohibited from considering the past sexual history of a complainant or respondent.
 - Title IX only has a rape shield provision for evidence of a complainant's prior sexual history.

CROSS-EXAMINATION

- **Under Title IX**

- Live hearings provide an opportunity for advisors to cross examine the other party and any witnesses.

- **Under SB 493**

- Cross-examination cannot be conducted by a party or their advisor.
- Does not expressly indicate who can or should conduct cross-examination but implies that the hearing officer would conduct questioning.

TREATMENT OF EVIDENCE - SB 493

- Allows for parties to submit written questions to the hearing officer in advance of the hearing. The other party has an opportunity to object, in written form only, to the questions posed.
- The hearing officer has the authority and obligation to discard or rephrase any question that the hearing officer deems to be repetitive, irrelevant, or harassing.
- Both parties are restricted from introducing evidence, including witness testimony, at the hearing that was available but not identified during the investigation.
- The hearing officer has discretion to accept for good cause, or exclude, any new evidence offered at the hearing.

NO-CONTACT DIRECTIVES

- **Under Title IX**

- Mutual no-contact directives are preferred; however, SB 493 addresses mutual and unilateral no-contact directives.

- **Under SB 493**

- Mutual no-contact directives should be “necessary or justifiable” to protect the respondent’s safety or well-being, but otherwise mutuality is not preferred.
- If requested by a complainant or when appropriate, institutions should issue an interim no-contact directive that prohibits the respondent from contacting the complainant during the investigation.

NO-CONTACT DIRECTIVES (CONT.)

- No-contact directives issued after a respondent has been found responsible must be unilateral and only apply to the respondent.
 - This application is generally consistent with Title IX.
- Institutions must provide to the parties a written justification for the no-contact directive and explanation of the terms of the directive including the circumstances, if any, which could violate the terms and be subject to disciplinary action.

TRAINING REQUIREMENTS – SB 493

SB 493 outlines training requirements for administrators involved in the grievance process beyond what are required by VAWA Section 304 and Title IX.

- Institutions must provide a comprehensive, trauma-informed training program for campus officials involved in investigating and adjudicating sexual assault, domestic violence, dating violence, and stalking cases to each employee engaged in the grievance procedures related to sex discrimination, including sexual violence.
- This training must include:
 - trauma-informed investigatory and hearing practices that help ensure an impartial and equitable process
 - best practices for assessment of a sexual harassment or sexual violence complaint

TRAINING REQUIREMENTS (CONT.)

- best practices for questioning of the complainant, respondent, and witnesses
- implicit bias and racial inequities, both broadly and in school disciplinary processes
- Training materials must include statistics on the prevalence of sexual harassment and sexual violence in the educational setting, and the differing rates at which students experience sexual harassment and sexual assault in the educational setting based on their race, sexual orientation, disability, gender, and gender identity.

TRAINING REQUIREMENTS (CONT.)

SB 493 also adds training requirements for student and professional residential life staff.

- If the institution has on-campus housing, residential life student and professional staff must receive annual trauma-informed training on how to handle reports of sexual harassment or sexual violence, as well as how to handle situations in which they are aware of sexual harassment or sexual violence, in student residential facilities.

TRAINING REQUIREMENTS (CONT.)

SB 493 requires training for all employees.

- Institutions must provide training to all employees on their obligation to report sexual harassment to appropriate school officials, how to identify sexual harassment, and the person to whom employees should report.
 - These specific training elements may be added to existing employee training on sexual harassment.

PRIVATE RIGHT OF ACTION

- SB 493 states that violations of the law could constitute discrimination and could subject institutions to civil lawsuits and applicable remedies, including but not limited to, injunctions, restraining orders.
- Reference to California Education Code §§ 66292.3 and 66292.4.

RECOMMENDATIONS FOR IMPLEMENTATION

- If federal Title IX regulations conflict with a state or local law, Title IX pre-empts that law to the extent of the conflict, and schools should follow Title IX.
- SB 493 states, “If...any provision of the act...conflicts with federal law, that provision shall be rendered inoperative for the duration of the conflict and without affecting the whole.”
- SB 493 would have California institutions defer to the Title IX regulations for those specific conflicting provisions, but only so long as the conflict exists. If the conflict disappears because federal law changes, then SB 493 remains ready take effect.



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Questions?



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