

California Colleges and Universities Face New Requirements to Address Sexual Harassment and Sexual Violence

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California is set to expand protections for students beyond Title IX in state-funded higher education institutions.

California has taken another step to demonstrate its commitment to the ideal “that all persons, regardless of their sex, should enjoy freedom from discrimination of any kind in the educational institutions of the state.” (CA [Senate Bill 493](#), 2020). Seeking to moderate the effects of some of the provisions of the 2020 federal Title IX regulations, SB 493 was signed by Governor Gavin Newsom on September 29, 2020, and takes effect on January 1, 2022. The law applies to all higher education institutions in California that receive state funding. SB 493 also significantly represents the intent of the California legislature to overrule a set of cases decided by California Courts of Appeal which interpreted the state Administrative Procedure Act (APA) to require broad due process protections for California college and university hearings. SB 493 pulls back on those due process protections, reversing a court trend going back to 2015.

The new law is one of a handful of state laws enacted after the 2020 Title IX regulations and echoes and intentionally overlaps with familiar federal requirements under Title IX and/or VAWA § 304. For example, the law requires that each institution:

- disseminate a notice of nondiscrimination to each employee, volunteer, and individual or entity contracted with the institution
- designate at least one employee of the institution to coordinate efforts to comply with the law,
- adopt rules and procedures to prevent sexual harassment
- adopt and publish on its website grievance procedures providing for the prompt and equitable resolution of sexual harassment complaints
- publish on the institution's website the name, title, and contact information for the Title IX Coordinator or other employee designated to coordinate the institution's efforts and any individual official with the authority to investigate complaints or to institute corrective measures

In addition, SB 493 also provides students with additional civil rights protections, some of which create direct conflict with the Title IX regulations.

The Definition of Sexual Harassment

Under existing California law, as amended by SB 493, sexual harassment is defined as:

- 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.
- 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.

Therefore, California’s definition of sexual harassment is notably broader than the federal definition under 34 C.F.R. § 106.30. California has also adopted several components of ATIXA’s long-standing model definitions that are commonly in use throughout the field, to include incidents of sexual battery, sexual violence, and sexual exploitation:

- 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.¹ 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, defined as 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.
 - Sexual exploitation means 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.
 - 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.

¹ SB 493 references sexual violence which includes incidents of sexual assault, domestic violence, dating violence, and stalking as defined under VAWA § 304. (See 20 U.S.C. § 1092(f)).

California institutions will need to ensure that their policies include this expanded definition of sexual harassment, and that the provisions sexual harassment grievance procedures apply to all incidents that fall within this broader definition. Functionally, this means that institutions in California will charge with two different definitions of sexual harassment in each case where SB 493 and the federal Title IX regulations apply.²

Mandatory Reporters

The new state law identifies which institutional employees have a duty to report sexual harassment by defining “Responsible Employee” along with a list of designated personnel. Responsible employees include, but are not limited to, 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
- 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

Additionally, SB 493 excludes some professionals from reporting obligations. Specifically, 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, and other individuals acting in a professional capacity when confidentiality is mandated by law. Functionally, the California designation and definition of “Responsible Employee” combines the concepts of the mandated reporter and “Official with Authority” from the federal Title IX regulations.

Notice

SB 493 revives the concept of “constructive notice” for California institutions. Recall that the Title IX regulations use an actual notice standard (requiring notice to the Title IX Coordinator or an Official with Authority). In contrast, SB 493 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 broader duty on the part of institutions in California, with actionable enforcement standards through private rights of action.

Jurisdiction

² And, if the college is residential and the sexual misconduct occurs in a residence hall, then perhaps a third standard must also be charged, the HUD definition of sexual harassment, which tracks with the Title VII definition.

The law provides for a much broader jurisdictional scope beyond Title IX's narrow scope. Under Title IX, jurisdiction applies only to incidents of sexual harassment (as defined in the federal regulations) occurring within an education program or activity. Jurisdiction under SB 493 extends to 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. This will inevitably create situations where a formal complaint must be dismissed under Title IX, but jurisdiction will remain for purposes of the California law.

Policy Statements

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

- A statement that the investigation and adjudication is not an adversarial process between the complainant, the respondent, and the witnesses, but rather a process for institutions to comply with their 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.
- 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

Additionally, under SB 493 institutions are obliged to implement grievance procedures that contain procedural elements beyond those required by Title IX. In some cases, these requirements can be synthesized to be consistent with the Title IX regulations, and in other cases, they may present a legal conflict. Specifically, a grievance process must:

- Ensure trauma-informed and impartial investigation of complaints.
 - *This can be consistent with the Title IX regulations so long as the training materials do not rely on sex stereotypes.*
- Include reasonably equitable evidentiary guidelines that may include page or word limits for evidence submitted by parties.
 - This could possibly run afoul of 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.*
- An investigator or hearing officer are generally prohibited from considering the past sexual history of a complainant or respondent.

This is additive of the Title IX regulations, which only have a rape shield provision for evidence of a complainant's sexual history.

- 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.
 - *This is seemingly consistent with the Title IX regulations, though note that it includes subsequent sexual activity, which is not specified in Title IX.*
- 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.³
 - *This is seemingly consistent with the Title IX regulations, though note that it includes subsequent sexual activity, which is not specified in Title IX.*
- Notification that repetitive, irrelevant, or harassing questions of either party or witness are prohibited.

This is consistent with the Title IX regulations.
- 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.
 - *This procedural step could be considered inconsistent with the Title IX regulations, which seem to infer that a hearing is required, unless a formal complaint has been otherwise dismissed or a complaint is resolved through informal resolution.*
- Use a preponderance of the evidence standard, including providing an explanation of the meaning of the preponderance of the evidence standard.
 - *This is consistent with the Title IX regulations unless an institution uses clear and convincing evidence for any employee-facing sexual harassment procedures, which would then require under Title IX that the institution use clear and convincing evidence for all sexual harassment allegations.*
- 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. Institutions must promptly communicate information regarding the timeline to the complainant and respondent. Communicated timeline information must include, but is not limited to, the period during which the institution will conduct any investigation, the date by which the parties will be notified of the outcome of any investigation, and the deadlines and process for parties to appeal (if an appeal process is available under the institution's grievance procedures).

³ It is important to note that in circumstances where an investigator or hearing officer determines that evidence regarding a dating relationship or prior or subsequent consensual sexual activity between a complainant and respondent to be relevant, the fact that the complainant and respondent engaged in other consensual sexual activity with one another remains insufficient, by itself, to establish that the behavior in question was consensual.

- *This is consistent with the Title IX regulations.*
- 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.
 - *This is consistent with the Title IX regulations.*
- Provide notice to student parties regarding appropriate counseling resources developed and maintained by the institution for students involving in sexual harassment complaints.
 - *This is consistent with the Title IX regulations.*
- 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.
 - *This is consistent with the Title IX regulations.*

Hearing Requirements

Title IX requires that live hearings provide an opportunity for advisors to cross examine the other party and any witnesses. In contrast, SB 493 bans cross-examination by a party or their advisor. The new law does not indicate expressly who can or should conduct cross-examination; however, the law implies that the Hearing Officer would conduct questioning. Additional requirements that expand beyond Title IX include:

- Allowing for parties to submit written questions to the hearing officer in advance of the hearing. At the hearing, the other party will have an opportunity to object, in written form only, to the questions posed. Neither the hearing officer nor the institution must respond to objections, other than to include any objection in the record. 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. However, the hearing officer has discretion to accept for good cause, or exclude, the new evidence offered at the hearing.

No-contact Directives

SB 493 lays out specific conditions for no-contact directives that track with long-standing ATIXA positions:

- When 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. Under SB 493, mutual no-contact directives should be "necessary or justifiable" to protect the respondent's safety or well-being. Note that the Title IX regulations largely contemplate mutual no-contact directives.

- In contrast, SB 493 directs that no-contact directives issued after a respondent has been found responsible must be unilateral and only apply to the respondent. This application is 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

The new law outlines specific training requirements that greatly expand on what is required by VAWA § 304 and Title IX (though they mostly track what institutions are already doing, over-and-above the floor set by federal law). The law requires the following:

- 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
 - 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.
- 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.
- 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 Provision

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 and restraining orders.⁴

Implementation

⁴ California Education Code §§ 66292.3 and 66292.4.

Obviously, SB 493 contains many provisions that are consistent with the Title IX regulations, some provisions that are flatly inconsistent with the Title IX regulations, and some provisions that just differ in subtle ways. Generally, when federal and state laws overlap, it is important to first determine whether the provisions of the federal and state law can be read consistently with each other. In many areas of SB 493, the California requirements are additive to what Title IX requires and therefore can be read to layer on additional requirements that California institutions need to implement.

In other cases, California institutions will have to carefully evaluate the areas where SB 493 conflicts with the Title IX regulations. SB 493 contains a provision that 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.” In plain language, SB 493 acknowledges that some of its provisions conflict with the Title IX regulations and where this is so, institutions need to follow Title IX. The Title IX regulations expressly pre-empt contradictory state laws, but California is clearly anticipating that the federal Title IX regulations will change at some future point, either by function of litigation outcomes, or when new Title IX regulations are put in place. Therefore, 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’s provisions immediately take effect.

Title IX Coordinators in California institutions will need to closely examine their existing policies and procedures to determine where modifications are needed to comply with SB 493 and then also consider whether the modification would cause the institution to run afoul of the 2020 Title IX regulations. This careful exercise is best achieved through close consultation with your campus legal counsel or well-versed external experts like our team at TNG Consulting.

TNG is available to help California campuses prepare for the effective date of SB 493 on January 1, 2022! Our experts are available to assist with policy revisions, revisions to websites, training for students, employees, investigators, and decision-makers, and drafting templates as described in the new law.