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## California Adopts Extensive New Requirements on Postsecondary Institutions to Address Sexual Harassment of Students

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On September 29, 2020, Governor Newsom signed Senate Bill (SB) 493, requiring postsecondary institutions to take certain actions and implement certain procedures related to sexual harassment prevention and handling complaints of sexual harassment. The new law requires compliance no later than January 1, 2022.

### **Key Elements of SB 493**

**Definitions.** SB 493 modifies or adds definitions for important terms. Most notably, the bill (1) expands the definition of “sexual harassment” and adds definitions for “sexual violence”, “sexual battery”, and “sexual exploitation” in Education Code section 66262.5; and (2) adds a detailed definition for “responsible employee” in new Education Code section 66281.8. A “responsible employee” includes an employee who (1) has authority to take action to redress sexual harassment or provide supportive measures; or (2) has the duty to report sexual harassment to an employee with such authority. The bill identifies specific positions that are or are not “responsible employees.”

**Duty to Respond.** The institution must respond to sexual harassment, including off campus incidents if there is “any reason to believe that the incident could contribute to a hostile educational environment or otherwise interfere with a student’s access to education.” The institution must respond to incidents actually, or that reasonably should be, known to the institution. With exceptions, an institution is presumed to have known of an incident if a responsible employee knew or, in the exercise of reasonable care, should have known about the incident.

**Grievance Procedure.** The bill requires institutions to adopt and publish procedures to provide for the prompt and equitable resolution of sexual harassment complaints filed by a student. The requirements of the procedures include, but are not limited to, the following:

- State that the procedures are not adversarial.
- Provide notice of the procedures to all students.
- Provide for trauma-informed, impartial investigations.
- Ensure that neutral persons are responsible for conducting investigations, finding facts, and making disciplinary determinations.

- Prohibit consideration of evidence regarding past sexual history or the existence of a dating relationship, except in limited circumstances. When such evidence is considered, notice and an explanation of the circumstances leading to its admission must be provided to the complainant.
- Prohibit repetitive, irrelevant or harassing questions.
- If a live hearing is held, which is a decision for the institution to make, prohibit direct cross-examination by the party or party's advisor, permit testimony by remote video, and prohibit new evidence without good cause.
- Communicate to the parties a reasonably prompt timeframe for and periodic status updates on the investigation.
- Provide notice of an investigation, including any new or additional allegations.
- Provide notice of the investigation outcome.
- Provide an opportunity for both parties to have a support person or advisor, including an attorney, accompany them during any stage of the process.
- Provide notice of available counseling resources.
- Allow both complainant and respondent to appeal the outcome.
- Outline the possible interim measures, supportive measures, and disciplinary outcomes.
- Require outreach by the Title IX coordinator or other employee to each alleged victim of sexual harassment.

**Notices.** A notice of nondiscrimination must be disseminated to all (1) employees, (2) volunteers who regularly interact with students, and (3) individuals or entities under a contract involving regular interaction with students.

**Employee Authority, Duties and Training.** At least one trained employee must be designated to coordinate compliance with SB 493, which may be the institution's Title IX coordinator. The name, title and contact information of this person and any other official with authority to investigate or institute corrective measures must be published on the institution's website.

All employees must be advised of their obligation to report sexual harassment and be trained on how to identify it. Specified training must additionally be provided to each employee engaged in the grievance procedure. For those institutions with on-campus housing, training must be provided annually for residential life student and nonstudent staff.

**Confidentiality.** When a complainant requests confidentiality, the institution must take the request seriously, while at the same time considering its responsibility to provide a safe and nondiscriminatory environment. In evaluating the confidentiality request, the institution may consider various factors: (1) whether there are multiple or prior reports against the respondent; (2) whether a weapon, physical restraints or battery was involved; (3) whether the respondent was a faculty or staff member with student oversight; (4) the power imbalance, if any, between the parties; (5) the safety of complainant; and (6) whether a thorough investigation can be completed while maintaining the request for confidentiality. If it is determined the complainant's identity will be disclosed, the complainant must be informed prior to making the disclosure or initiating the investigation. When a complainant's identity is disclosed against their request, the institution shall take immediate steps to provide for the safety of complainant when appropriate.

## Takeaways

SB 493 is a significant addition to the Title IX/sexual harassment framework for postsecondary institutions. Broadly, the Legislature's expressed intent was to adopt a state law framework that was generally consistent with the new federal Title IX regulations. (See [Lozano Smith's 2020 Client News Brief Number 49](#).) However, SB 493 imposes some requirements that may differ from the Title IX regulations in important ways. For example, unlike the Title IX regulations, SB 493 requires a response to certain off campus conduct, even if it did not occur within an institution's educational program or activity. Another example is that the Title IX regulations require live hearings with direct cross-examination by party advisor, while SB 493 prohibits direct cross-examination by party advisor.

Post-secondary institutions will now need to ensure that their policies and procedures comply with SB 493, the Title IX regulations, and the new Title 5 regulations governing unlawful discrimination which went into effect on September 18, 2020. (See [Lozano Smith's 2020 Client News Brief Number 80](#).)

Our Title IX practice group provides in-depth training to institutions on all aspects of Title IX and unlawful discrimination, in addition to policy and procedure audits to ensure legal compliance. For questions about SB 493, or to discuss any legal matters pertaining to sexual harassment in the educational setting, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcast](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

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