

# What CHROs Need to Know re Compliance with SB 493 and Overlapping State Laws

Association of Chief Human Resource Officers (ACHRO) Fall Training Institute | October 22, 2021

Presented By: Lorraine Y. Jones, Ryan Wilson & Pilar Morin

**LCW** LIEBERT CASSIDY WHITMORE

## What CHROs Need to Know re Compliance with SB 493 and Overlapping State Laws

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## Agenda

- Overview of SB 493
- Overview of Title 5 Regulations
- Title IX Preemption
- Questions?

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## Senate Bill 493



### Senate Bill 493: Effective Jan. 1, 2022

- Adds additional protections re sexual harassment
- Applies to institutions receiving state financial assistance including California community colleges
- Amended the definition of “sexual harassment” (Cal. Ed. Code § 66262.5.)
- Added procedural requirements for responding to notice of sexual harassment (Cal. Ed. Code § 66281.8.)



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## Definition of “Sexual Harassment” Under the Education Code

- “Sexual harassment” means 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 certain conditions
- Includes sexual battery, sexual violence, and sexual exploitation

Cal. Ed. Code §§ 212.5

## Definition of “Responsible Employee” Under the Education Code

- A “responsible employee” includes an employee:
- With authority to take action to redress sexual harassment or provide supportive measures; or
  - With a duty to report sexual harassment to an employee with such authority.

## Who is a Responsible Employee?

- “Responsible employee” includes the following positions or positions with similar job duties (regardless of title):

- Title IX Coordinator
- Residential advisors
- Housing directors, coordinators, or deans
- Athletic directors, coordinators, or deans
- Athletic and academic coaches
- Faculty, associated faculty, teachers, instructors, or lecturers
- Graduate student instructors
- Laboratory directors, coordinators, or principal investigators
- Internship/externship directors or coordinators
- Study abroad program directors or coordinators

Cal. Ed. Code § 66281.8(a)(2)(B).



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## Knowledge of Sexual Harassment

“A postsecondary institution shall be presumed to know of sexual harassment if a **responsible employee** knew, or, in the exercise of reasonable care, should have known, about the sexual harassment.”

An institution may rebut this presumption of knowledge if certain elements are met.

Cal. Ed. Code § 66281.8(b)(3)(C).



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## Title 5 Regulations



### Title 5 – District Responsibilities and Policies

- “Community college districts must ensure that their programs and activities are available to all persons without unlawful discrimination. Community college districts shall investigate complaints of unlawful discrimination in their programs and activities, in accordance with the provisions of this subchapter.” (5 CCR § 59320.)
- Each district must establish and adopt written policies consistent with the Title 5 Regulations. (5 CCR § 59322.)



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## Title 5 – Protected Characteristics 5 CCR § 59311(d)

“Unlawful discrimination” means unfair or unequal treatment of an individual (or group) based upon an actual or perceived characteristic related to:

- Ethnic group identification,
- National origin
- Immigration status
- Religion
- Age
- Sex, gender, gender identification, gender expression
- Military and veteran status
- Marital status
- Medical condition
- Race
- Color
- Ancestry
- Sexual orientation
- Physical or mental disability,
- Any other characteristic protected under applicable federal or state law



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## Updates to Title 5 Regulations

*(Updates effective September 18, 2020)*

- Definition of “complaint” was amended to permit verbal complaints
- Student sexual misconduct subject to Title IX, districts must comply with Title IX regulations
- Amended timelines and process for obtaining extensions



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## Updates to Title 5 Regulations

*(Updates effective September 18, 2020)*

- Informal resolution is optional and may only be implemented with a complainant's consent
- Both complainant and respondent must receive an administrative determination, the proposed resolution of the complaint (including any disciplinary action against the respondent)



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## Overview of Procedural Requirements





## Notice of Nondiscrimination

- **Ed. Code** (Cal. Ed. Code §§ 66281.5; 66281.8(b)(1).):
  - Must include the following information:
    - Complaint process information and timeline
    - Where to obtain the specific rules and procedures for reporting charges of sexual harassment and for pursuing available remedies and resources, both on and off campus
  - Must be disseminated to each:
    - Employee of the district
    - Volunteer who will regularly interact with students
    - Individual or entity under contract for services involving regular interaction with students
- **Title 5** (5 CCR § 59326.)
  - Each district must notify students and employees of the provisions of the subchapter on nondiscrimination



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## Duty to Respond

- Primary concern must be student safety
- Must take reasonable steps to respond to incident of sexual harassment
  - Whether occurring in connection with or outside of its educational activities or programs
  - Whether occurring on or off campus
- If there is any reason to believe the incident could contribute to a hostile educational environment or otherwise interfere with a student's access to education

Ed. Code § 66281.8(b)(3)



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## Confidentiality

If a complainant reporting sexual harassment requests:

- Confidentiality or
- No investigation or
- Disciplinary action

A district must generally grant the request, but must consider safety responsibilities and certain factors.

Ed. Code § 66281.8(b)(3)



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## Confidentiality – Factors to Consider

- Whether there are multiple or prior reports against the respondent;
- Whether a weapon, physical restraints or battery was involved;
- Whether the respondent was a faculty or staff member with student oversight;
- The imbalance of power, if any, between the parties;
- The safety of complainant; and
- Whether a thorough investigation can be completed while maintaining the request for confidentiality.

If complainant's identity will be disclosed, complainant must receive notice prior to disclosure or investigation and District must take immediate steps to provide for the safety of complainant when appropriate.



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## Training Employees

- A district must provide training to each employee engaged in the grievance procedures related to sexual discrimination, including sexual violence. It must include training on:
  - 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; and
  - Implicit bias and racial inequities, both broadly and in school disciplinary processes.

Cal. Ed. Code §§ 66281.8(b)(6); 67386(b)(12).



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## Training Employees and Notice of Obligation to Report

- A district must provide training to all employees on the identification of sexual harassment, including the person to whom it should be reported.
  - A district is not required to provide separate training for identification of sexual harassment. It may include this requirement in existing employee training on sexual harassment.
- A district must notify employees of the obligation to report harassment to appropriate school officials.

Cal. Ed. Code §§ 66281.8(b)(8)-(9).



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## Grievance Procedures

- A district must adopt and publish grievance procedures on its website that provide for prompt and equitable resolution of sexual harassment complaints filed by a student against an employee or another student.
  - These grievance procedures do not need to be separate for student sexual harassment complaints; a district may use student disciplinary procedures or other separate procedures to resolve sexual harassment complaints.
- The grievance procedures must
  - Provide a process for a student to report sexual harassment by a third party.
  - Must state that this is not an adversarial process (no burden to prove or disprove the underlying allegation(s) of misconduct).
  - Prohibit questions that are repetitive, irrelevant, or harassing.

Cal. Ed. Code §§ 66281.8(b)(4), (c).



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## Grievance Procedures

- Must provide notice to all students of the grievance procedures, including where and how complaints may be filed.
- Must apply the preponderance of the evidence standard, and provide an explanation of the meaning of that standard.
- Must provide a reasonably prompt timeframe and a process for extending timelines for good cause.
- Must not unreasonably deny a student party's request for an extension of a deadline during periods of examinations or school closures.

Cal. Ed. Code § 66281.8(b)(4).



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## Grievance Procedures

- Grievance procedures must outline:
  - Possible interim measures pending an investigation;
  - Supportive measures that may be provided in the absence of an investigation; and
  - The disciplinary outcomes, remedial measures, and systemic remedies that may follow the final finding of responsibility.

Cal. Ed. Code § 66281.8(b)(4)(A)(xxi).

## Grievance Procedures – Notice to Student Parties

- A district must provide student parties notice that it is conducting a formal investigation. The notice must include the allegations and the alleged district policy violations under review.
  - Any new allegations that arise during the course of the investigation that could subject either party to new or additional sanctions shall be subject to the same notice requirements.

Cal. Ed. Code § 66281.8(b)(4)(A)(xvi).

## Grievance Procedures – Communication to Student Parties

- Both student parties must have the opportunity to have a support or advisory person accompany them during any stage of the process.
- Student parties must be advised of their right to consult with an attorney, at their own expense. An attorney may serve as the student's support person or advisor.
- Student parties must receive notice of the appropriate counseling resources developed and maintained by the district.

## Grievance Procedures – Investigation of Complaint

- Must be trauma-informed and provide impartial investigation of complaints
- Person or entity responsible for conducting investigations, finding facts, and making disciplinary decisions must be neutral
- Student parties must be given opportunity to identify witnesses and other evidence
- Must inform parties that any evidence available but not disclosed during the investigation might not be considered at a subsequent hearing
- Grievance procedures must include reasonable and equitable evidentiary guidelines

Cal. Ed. Code § 66281.8(b)(4).

## Grievance Procedures – Investigation of Complaint

- Provide periodic status updates on the investigation to the complainant and respondent.
- Provide written notice to parties of any granted extension in the investigation and fact-finding process and the reason for that extension.

Cal. Ed. Code § 66281.8(b)(4).

## Grievance Procedures – Hearing

- Any hearing shall be subject to the following rules:
  - Cross-examination of either party or any witness shall not be conducted directly by a party or a party's advisor.
  - Either party or any witness may request testimony via video from a remote location.
  - Student parties shall have the opportunity to submit written questions to the hearing officer in advance. At the hearing, the other party can object.
  - Parties may not introduce evidence available, but not identified during the investigation. Hearing officer has discretion.

Cal. Ed. Code § 66281.8(b)(4)(A)(viii).

## Grievance Procedures – Consideration of Prior or Subsequent Sexual History

- Grievance procedures must include that the investigator or hearing officer shall not:
  - Consider the past sexual history of a complainant or respondent except in certain limited circumstances
  - Consider prior or subsequent sexual history between the complainant and anyone other than the respondent for any reason unless directly relevant to prove that physical injuries were inflicted by another individual
- Before allowing the consideration of any evidence re prior or subsequent sexual history, the investigator or hearing officer shall provide a written explanation to the parties as to why consideration of the evidence is consistent with Cal. Ed. Code § 66281.8(b)(4)(A)(vi).

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## Grievance Procedures – Outcome of Complaint and Next Steps

- District must provide written notice to parties of the outcome of the complaint, including:
  - Whether a policy violation was found to have occurred;
  - The basis for that determination, including factual findings; and
  - Any discipline imposed.
- Grievance procedures must provide assurance that the district will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

Cal. Ed. Code § 66281.8(b)(4)(A)(xiv)-(xv).

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## Grievance Procedures – Appeals

- Grievance procedures must allow either party to appeal the outcome of the grievance proceeding if the district has such an appeals process.
  - Unlike the Title IX Regulations, the Ed. Code does not require an appeals process.
  - But, Title 5 permits a complainant to submit a written appeal within 30 days (5 CCR §§ 59338, 59339.)
- A district's grievance procedure may limit the grounds for an appeal, provided that any limitation shall apply equally to all parties and that the non-appealing party shall have an opportunity to respond to the appeal.

Cal. Ed. Code § 66281.8(b)(4)(A)(xx).



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## Overlapping Legal Obligations

### State Law Mandates

- |   |   |
|---|---|
| • “Yes” means “Yes” Policy                  | <i>Ed Code § 67386</i>                                |
| • District Nondiscrimination                | <i>Ed Code § 220</i>                                  |
| • Student Orientation Requirements          | <i>Ed Code § 67385.7</i>                              |
| • District / School Safety Plans            | <i>Ed Code § § 67380 (postsecondary)</i>              |
| • Coordination with Law Enforcement         | <i>Ed Code § 67381</i>                                |
| • Confidentiality of Sexual Assault Victims | <i>Ed Code § 67385</i>                                |
| • Mandated Reporting                        | <i>Pen Code § 11164 et seq. &amp; Ed Code § 48906</i> |
| • Data Collection, Analysis, Notice         | <i>Ed Code § 67380</i>                                |
| • Student Discipline Procedures             |   |
| • Collective Bargaining Agreements          |   |
| • Cal/OSHA                                  | <i>Lab Code § 6300 et seq.</i>                        |

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## Questions?



## Thank You!

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