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# Title IX

## A Year End Review

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# Meet Your Facilitators



**Jody Shipper, J.D.**

*She/Her*

Co-Founder and Managing  
Director



**Adam Wolkoff, J.D., Ph.D.**

*He/Him*

Senior Solutions Specialist

# About Us

## Vision

We exist to help create safe and equitable work and educational environments.

## Mission

Bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.

## Core Values

- Responsive Partnership
- Innovation
- Accountability
- Transformation
- Integrity

# Learning Outcomes

1

Understand newer sources of legal requirements for processing claims of sexual harassment and sexual violence in California.

2

Understand how to apply these requirements in responding to reports or when conducting an investigation or hearing.

3

Understand how recent cases may modify or clarify these rules.

# Proposed Title IX Regulations

- We only have the draft; they will change
- Highlights:
  - Broader scope of covered conduct
    - Definitions
    - Jurisdiction
  - Different procedures
  - Adaption to state standards
  - Hearings optional \*



# Sources of Legal Requirements

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# Sources of Legal Requirements in CA

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2020 Title IX  
Regulations

State Law  
Requirements  
(SB 493, FEHA,  
case law)

Clery  
Amendments

# GENERAL REQUIREMENTS UNDER SB 493

Education Code 66281.8

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# SB 493

## Scope of SB 493's Requirements

- Coverage:
  - All colleges and universities in CA that receive state financial assistance
  - Applies in educational programs and activities *and* outside, whether on or off campus\* if could contribute to hostile educational environment or interfere with access to education.
  - Knows or reasonably should know
  - Different definitions of covered conduct

# SB 493

## General Requirements

- Basic requirements:
  - Designate a coordinator
  - Provide required notices
  - Provide required trainings (in addition to those required by Ed Code 67386 and FEHA)
  - Adopt policies and procedures
    - Where they directly conflict, federal law (Title IX/Clery) supersedes state law (Education Code). But where they do not *directly* conflict, must follow both.

# SB 493 and Title IX

- Compare to Title IX
  - Wider geographic and behavioral range
  - Return to classic Title IX?\*\*\*
  - For colleges, know or should have known is a different standard
- Coverage (and considerations)
  - Both
  - Just SB 493
  - Don't forget the VAWA Amendments to the Clery Act

# SB 493

## Notice and Training

- Notice to all students
  - Policies
- Notice to all faculty and staff
  - Policies
  - Obligations to report (where a Responsible EE)
  - Identifying sexual harassment and to whom it should be reported
- Notice to all volunteers who regularly interact with students
  - Policies
- Notice to all vendors whose service requires them to interact with students
  - Policies

# SB 493

## Notice and Training

- Training for all involved in grievance process
  - Trauma-informed investigatory and hearing processes
  - Best practices for assessment and questioning
  - Implicit bias and racial inequities
    - Materials shall include statistics on prevalence and inequity where possible.
- Training for RA's
  - Handling reports (and situations of which they become aware) in a trauma-informed manner

# DEFINITIONS OF PROHIBITED CONDUCT UNDER SB 493

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# Covered SB 493 Violations

- **Sexual Harassment:**

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:

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# Covered SB 493 Violations

- (a) Submission to the conduct is explicitly or implicitly made a term or a condition of an individual's employment, academic status, or progress.**
  
- (b) Submission to, or rejection of, the conduct by the individual is used as the basis of employment or academic decisions affecting the individual.**



# Covered SB 493 Violations

**(c) 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.**

**(d) 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.**

# Covered SB 493 Violations

- **Sexual violence**

Physical sexual acts perpetrated against a person without the person's affirmative consent, including:

- **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.

# Covered SB 493 Violations

- **Sexual violence**

Physical sexual acts perpetrated against a person without the person's affirmative consent, including:

- **“Sexual battery”** means 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.

# Covered SB 493 Violations

- **Sexual violence**

Physical sexual acts perpetrated against a person without the person's affirmative consent, including:

- **"Sexual Exploitation"**

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# Covered SB 493 Violations

- **Sexual violence**

**“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:

**(A) The prostituting of another person.**

**(B) The trafficking of another person.**

# Covered SB 493 Violations

- **Sexual Exploitation (as part of Sexual Violence)**
  - (C) The recording of images, including video or photograph, or audio of another person's sexual activity or intimate parts, without that person's consent.**
  - (D) The distribution of [such] images, 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.**
  - (E) 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.**

# SB 493 and Title IX

- Compare to 2020 Title IX Final Rule
  - Sexual harassment quid pro quo **by employee**
  - 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 school's education program or activity
  - Clery crimes
    - Domestic violence
    - Dating violence
    - Sexual assault
    - Stalking
- SB 493 covers a wider range of behavior to protect students;
- FEHA covers a wider range of behavior to protect employees.

# RESPONSIBLE EMPLOYEES UNDER SB 493

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# Responsible Employee

- 2020 Title IX Final Rule moved from Responsible Employee to Official with Authority. \*\*\*
- SB 493 uses Responsible Employee language. Examples:
  - TIXC
  - RA's, Housing
  - Student Life
  - Athletics and Coaches
  - Faculty and graduate instructors (while performing employment duties)
  - Lab directors and PI's
  - Internship and Study Abroad

● Exempt from RE:  
Therapists and related  
Victim Advocates  
Where confidentiality is required by law

# SB 493 and Title IX

- SB 493 requires a wider range of employees (and some student employees) to bring information forward than the Title IX Final Rule does.
- They are bringing information forward that is covered by SB 493 *and* by Title IX
- CA institutions must have more people trained and tasked with reporting disclosed and witnessed violations.

# INTERIM MEASURES AND NO-CONTACT ORDERS

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# SB 493 No Contact Orders

- When requested by complainant or otherwise appropriate, shall issue NCO
- Not automatically but based on case-by-case facts to determine whether mutual NCO is necessary
- After a finding of responsibility, one way NCO
- If mutual NCO, provide parties with written justification, and an explanation of terms. For any NCO, explanation of terms including when violations could subject the person to discipline.

# SB 493 and Title IX

- Mutual versus one way NCO
- Not technically incompatible, but...
- Title IX prefers mutual NCO and requires work to do one way; SB493 defaults to one way and requires explanation before mutual.

• So...

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# SB 493 GRIEVANCE PROCEDURES

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# SB 493 Grievance Process

## General principles:

- Not an adversarial process; burden on institution
- Redress harm and prevent recurrence
- Decision makers are neutral

# SB 493 Grievance Process

- Trauma-informed and impartial investigations, that may result in a hearing.

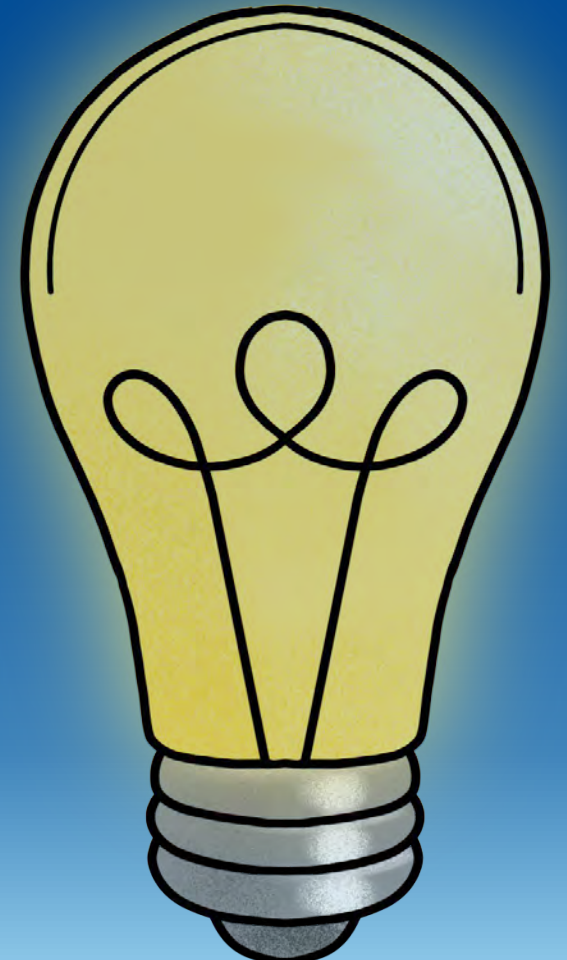
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# Investigations or Hearing?

- *Doe v. Allee* and subsequent cases in California require hearing with indirect or direct questioning in cases of student sexual misconduct where credibility is an issue and serious disciplinary sanctions are possible.

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# Updates on Cross-Examination

- End of the federal "suppression rule" in Title IX hearings (July 2021)
- Doe v. The Regents of Univ. of Cal. (Cal. App. 2021)
  - Respondent's own account of the incident provided substantial evidence of the policy violation.
  - Because the case did not hinge on credibility, Respondent was not entitled to a live hearing with cross examination.
- Teacher v. Cal. Western School of Law (Cal. App. 2022)
  - Policy provided right to cross-examine "witnesses"
  - Because school did not provide opportunity for student to question witnesses whose testimony was relied upon for decision, procedural error

# EVIDENTIARY RULES

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## SB 493 GRIEVANCE PROCEDURES

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# SB 493 Grievance Process:

- Students given the opportunity to ID witnesses, but the institution may choose not to consider evidence not disclosed during investigation at the hearing. Hearing officer has discretion to accept for good cause or exclude.
- Reasonable and equitable evidentiary guidelines (including page or word limits)

# SB 493 Grievance Process

- Standard- preponderance of the evidence
  - Title IX says you can use preponderance or clear and convincing (but must be uniform)
  - CA law says must be preponderance for student sexual misconduct cases. (Ed Code 67386)

# SB 493 Grievance Process

- Investigator and hearing decision maker shall not consider past sexual history unless:
  - Directly relevant to prove injuries inflicted by another
  - To show how parties communicated about sex
- The fact that parties engaged in sex with one another at other times is not sufficient to show that conduct here was consensual
- Must provide a written explanation to the parties before allowing consideration of past sexual history

# SB 493 and Title IX

- SB493 past sexual history vs. Title IX “rape shield law”
- Title IX covers complainant’s past sexual history (ED declined to apply it to respondents)
- Questions deemed not relevant, unless:
  - Offered to prove that another person committed the conduct; or
  - Specific incidents used to prove consent (this does not allow for evidence of sexual history with another person beside the accused).

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# NOTICES & PROCEDURAL RIGHTS

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## SB 493 GRIEVANCE PROCEDURES

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# SB 493 Grievance Process:

- Reasonably prompt timeframe and process for extending the timeframe for good cause (with prompt notice to parties)
- Notice to all student parties (and updated notice if additional allegations)
- Support person or advisor of choice during all stages
  - Student parties may consult with attorney at own expense; Advisor of choice may be attorney
- Notice of appropriate counseling options

# SB 493 Grievance Process:

- Respect request not to move forward unless:
  - Multiple reports against respondent
  - Use of weapon, physical restraints, or battery
  - Respondent is faculty or staff with student oversight
  - Power imbalance
  - Complainant believes they will be less safe if their name is disclosed or investigation conducted
  - Institution can investigate without complainant participating

# SB 493 Grievance Process:

## When honoring requests for confidentiality:

- Still must take steps to limit impact/prevent recurrence
- If must disclose identity, inform complainant and provide for their safety; honor request to notify respondent of confidentiality

# INFORMAL RESOLUTION RULES

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## SB 493 GRIEVANCE PROCEDURES

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# SB 493 Grievance Process

- No mandatory mediation; no mediation *allowed* in allegations of sexual violence (note Title IX Final Rule)
- No required voluntary resolution to receive remedial measures

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# CONDUCTING A HEARING

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## SB 493 GRIEVANCE PROCEDURES

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# SB 493 Grievance Procedures

- The institution shall decide on a hearing to determine whether it was “more likely than not” that the behavior occurred (compare to Title IX).
- Consider:
  - Whether the parties participated
  - Whether parties had the opportunity to suggest questions to be asked of other parties and witnesses

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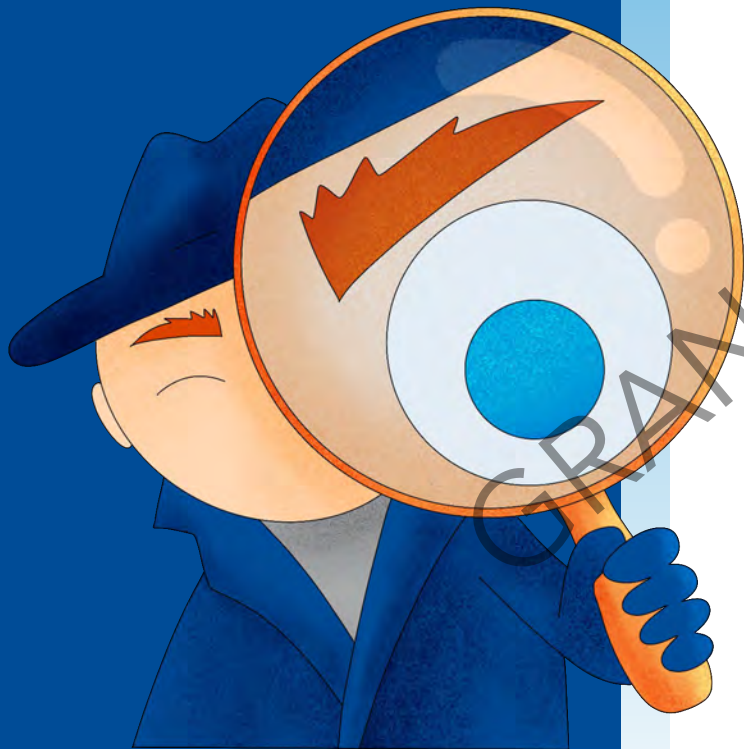
# SB 493 Grievance Process

At hearings:

- Parties may participate remotely.
- Prohibit questions of either party that are repetitive, irrelevant, or harassing.
- Cross-examination of parties and witnesses **shall not be conducted directly** by a party or party advisor. Student parties can submit written questions in advance. Parties can object. Hearing officers can rephrase.



# SB 493 and Title IX



- Title IX: Advisor Cross Examination explicitly required.
- SB 493: Cross Examination explicitly prohibited.
- *Doe v. Allee* requirement of direct or indirect questioning to test "credibility" in cases of student sexual misconduct.
- How to think about this:
  - If violations fall within Title IX and SB 493
  - If violations only fall within SB 493 but not Title IX
  - When Title IX changes...

# APPEALS

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# SB 493 GRIEVANCE PROCEDURES

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# SB 493 Grievance Process

- Either party may appeal
  - Institution may limit grounds for appeal (provided this limit is applied equally)
  - Nonappealing party has the right to respond to appeal

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# SB 493 and Title IX



- Title IX Final Rule includes three mandatory reasons (at minimum) for which a party can appeal:
  - Procedural irregularity that affected the outcome of the matter
  - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
  - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

# SB 493 and Title IX



- Title IX Final Rule requires notification of non-appealing party.
- All parties given opportunity to submit written statements.
- Outcome and rationale provided to all parties in writing.
- Not directly in conflict.

# Questions & Answers

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# Case Law & OCR Updates

1

## U.S. Supreme Court updates

- Damages for Title IX Plaintiffs (Cummings)
- On the horizon: Revisiting Davis (Doe v. Fairfax County)

2

## Title IX Gender Bias

3

## Deliberate indifference

- Prompt response
- Jurisdiction

4

## Retaliation and Defamation

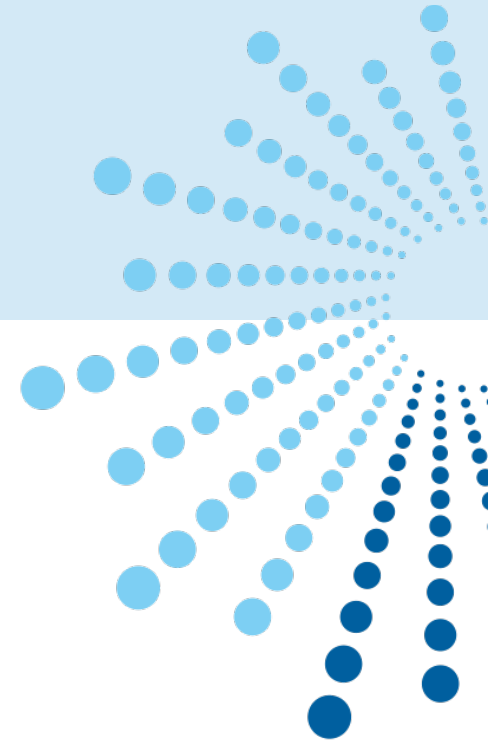
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## Class Action



# U.S. Supreme Court Updates

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# Cummings v. Premier Rehab Keller

- Title IX as “Spending Clause” legislation
- Emotional distress damages as not reasonably foreseeable
- Impact?
- Liability beyond Title IX
  - Due Process
  - Negligence (Barlow (2022); Regents of Univ. Cal. (“Rosen”) (2018)
  - California statute (Violation of SB 493 “shall be subject to a civil action brought pursuant to Sections 66292.3 and 66292.4.”)

# Doe v. Fairfax County School Board

- Flashback to *Davis* (1999)
- Fourth Circuit decision in *Fairfax County* (2021)
- Major issues posed to the Solicitor General:
  - What is “actual knowledge”?
  - Must “further harassment” be shown to establish “deliberate indifference”?

# Title IX Gender Bias

- Doe v. Regents of Univ. of California (9th Cir. 2022)
  - Part of a Trend: *Schwake v. Arizona Bd. of Regents*, 967 F.3d 940 (9th Cir. 2020), citing *Doe v. Purdue University*, 928 F.3d 652 (7th Cir. 2019) (Barrett, J.)
  - What makes a “plausible claim” of Title IX discrimination?
    - Backdrop
    - Procedural errors

# Deliberate Indifference

- Jurisdiction
  - Reminder: 2020 Title IX Rules vs. SB 493
  - Case law
    - Brown v. State of Arizona (9th Cir. 2022).
      - Compare, Hall v. Millersville University (3d Cir. 2022)
    - Doe v. Board of Trustees of Leland Stanford Junior Univ. (Cal. Ct. App. 2021)
- Prompt response
  - Sherman v. Regents of the Univ. of California (N.D. Cal. 2022)

# Retaliation and Defamation

- Retaliation
  - What does it mean in Title IX cases?
  - Sherman
- Defamation risk

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# Class Actions

- Doe v. White (Cal. App., 2d Dist., 5th Div. 2022)
  - Student who had been expelled after being found responsible for sexual misconduct tried to bring a class action lawsuit on behalf of himself and all other CSU students found responsible for sexual misconduct between July 2015 and July 2019.
  - Each case is individual, so students must file individually, and cannot maintain a “class”

# OCR Resolutions

- Pregnancy Discrimination violates Title IX and Section 504 (Salt Lake City CC)
  - College encouraged a pregnant student to drop a course because she was pregnant and;
  - Did not engage in an interactive process to provide her with academic adjustments or necessary services during her pregnancy, and;
  - Did not excuse her pregnancy-related absences or allow her later to submit work following those absences.
- Failure to investigate sexual assault and follow Title IX grievance procedure (San Juan Bautista School of Medicine)

# Thank you!

## Send Feedback



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