CTA LEGAL SERVICES
California Teachers Association
1705 Murchison Drive
Burlingame, CA 94010
650-697-1400 • www.cta.org

October 2020

LEGAL ADVICE MEMORANDUM

New Title IX Rules on Sexual Harassment and California's SB 493

On May 19, 2020, following an earlier pre-publication release, the United States Department of Education ("ED") published its final Title IX rule on sexual harassment ("federal rule"). The federal rule, which applies to K-12 schools and postsecondary colleges, became effective on August 14, 2020. It narrows the definition of sexual harassment, makes it more difficult to hold schools and colleges liable for inaction, and sets forth the standards of evidence used to evaluate sexual harassment complaints. Schools/colleges that fail to comply with the new federal rule risk federal funding and, potentially, civil litigation under Title IX.

In response to the federal rule, on September 29, 2020, California enacted SB 493, putting into place increased civil rights protections for students in California institutions of higher education, such as Community Colleges.[1] *SB 493 does not apply to K-12 schools*. SB 493 goes fully into effect on January 1, 2022, and as of that date, colleges in California will be required to comply with its stricter provisions. Colleges that fail to comply with SB 493 risk state funding and, potentially, civil litigation under Ed. Code §§ 66292.3 and 66292.4. (See Ed. Code § 66281.8(d)). Where the provisions of SB 493 conflict with Title IX, the provisions of Title IX control. (Ed. Code § 66281.8(f)).

The purpose of this guidance is to alert chapters to the most relevant changes in federal and state law regarding sexual harassment complaints, and to provide guidance regarding the applicability of the duty of fair representation as it pertains to Title IX and SB 493 procedures. A summary of the new provisions follow, beginning with significant changes in the definition of sexual harassment and the scope of schools' and colleges' responsibility to respond to harassment allegations; and then turning to detailed procedures that are required for processing Title IX and SB 493 complaints.

It is important to note while the federal rule is currently in force and effect, it could be rescinded if a new federal administration is elected in November. However, any rescission, whether partial or total, would take time. Consequently, we advise chapters, particularly those working with community college districts, to be mindful of this fact when amending policies to comport with the federal rule.

---

[1] Ed. Code § 231.5 requires all educational institutions in California (including K-12 schools and Colleges) to have written policies on sexual harassment. "Sexual harassment" is defined in section 212.5. As explained below, California's definition of sexual harassment is broader and more inclusive than the definition provided in the federal rule.

Impacts of the New Rules on Chapters

As explained below, the federal rule and SB 493 require schools and colleges to respond to complaints of sexual harassment using a defined “grievance procedure.” For postsecondary institutions handling Title IX complaints, that grievance procedure culminates in a live hearing. (As explained below, the federal rule permits, but does not require K-12 schools to hold live hearings.) It is important to note that the “grievance procedure” contemplated under the federal rule and SB 493 is not the same as the grievance procedure set forth in a collective bargaining agreement. The federal and state sexual harassment resolution procedures are created by statute, not collective bargaining agreements. As such, these are *extra-contractual* proceedings and the duty of fair representation does not apply.

While unit members may properly invoke their Weingarten rights during an investigation of a Title IX or SB 493 complaint against them, once the matter proceeds to hearing, chapters do not have an obligation to represent members at that stage or to serve as a unit member’s “advisor” in the hearing. If discipline is imposed as a result of a Title IX or SB 493 proceeding, the chapter should evaluate whether the unit member’s discipline is governed by the CBA or, for CTA members, whether a GLS referral is appropriate because the employer violated a member’s statutory rights.

There are a few exceptions to keep in mind: (1) if, at the time a Title IX or SB 493 investigation begins, a unit member is already the subject of another disciplinary action or investigation, please contact the Legal Department to discuss what assistance the union might be able to provide; (2) if there are specific facts surrounding the Title IX or SB 493 complaint that cause the chapter to want to be involved at the hearing stage, please contact the Legal Department to discuss the matter; and (3) if a chapter agrees to represent a member at a Title IX or SB 493 hearing, a duty of care akin to the duty of fair representation will likely apply. (*Lane v. I.U.O.E. Stationary Engineers* (1989) 212 Cal.App.3d 164, 171). When this duty of care applies, a chapter must act fairly, honestly, and in good faith, and must refrain from acting arbitrarily, discriminatorily or in bad faith. (*See Lane*, 212 Cal.App.3d at 174.)

The new rules likely will prompt colleges and K-12 districts to change their Title IX complaint process and/or internal sexual harassment policies. Chapters should monitor and be aware of such changes. Community college chapters in particular should review their CBA’s to determine if the new legal obligations require any modifications to contractual provisions governing sex discrimination complaints, discipline, and/or other matters.

Definitions and Standards for Liability

California – “Sexual Harassment”

Sexual Harassment is defined in Ed. Code § 212.5 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… educational setting, under any of the following conditions:

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.

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.

(Ed. Code § 212.5; see also Ed. Code § 66262.5(a)(1)). Sexual harassment includes sexual battery, sexual violence, and sexual exploitation. (*Id.*).

Federal Rule – "Sexual Harassment"

The federal rule prohibits quid pro quo sexual harassment by school/college employees and sexual assaults.

The federal rule also prohibits creating a sexually hostile environment, but it raises the standard of proof required to take action against this type of sexual harassment to a level that is higher than that required in non-educational workplace environments. The United States Department of Education ("ED") adopted the Supreme Court's definition of sexual harassment from Title IX civil litigation: conduct is not actionable unless it is "'so severe, pervasive, **and** objectively offensive' that it denies its victims equal access to education." (85 Fed. Reg. at 30032-33, quoting *Davis v. Monroe County Board of Education*, 526 U.S. 629, 650 (1999) (emphasis added)).

While this is a very high standard to meet (higher than under the previous guidance), ED noted that schools/colleges are still free to develop a code of conduct to address objectionable conduct that does not reach the level of actionable sexual harassment under its Title IX rule. (85 Fed. Reg. at 30038, n.108, citing 34 C.F.R. § 106.45(b)(3)).

California – Standard for Postsecondary Institution's Liability

Under SB 493, by no later than January 1, 2022, a college in California will 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. (Ed. Code § 66281.8(b)(3)(C)(i)). Regardless of whether a complaint has been filed, if the institution knows, or reasonably should know, about possible sexual harassment involving individuals subject to the institution's policies at the time, the institution shall promptly investigate to determine whether the alleged conduct more likely than not occurred, or otherwise respond if the institution determines that an investigation is not required. If the institution determines that the alleged conduct more likely than not occurred, it shall immediately take reasonable steps to end the harassment, address the hostile environment if one has been created, prevent its recurrence, and address its effects. (*Id.*).

"Responsible employee" means an employee who has the authority to take action to redress sexual harassment or provide supportive measures to students, or who has the duty to report sexual harassment to an appropriate school official who has that authority, including Title IX coordinators; resident advisors; 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; laboratory directors, coordinators, or principal investigators; internship or externship directors or coordinators; and study abroad program directors or coordinators. (Ed. Code § 66281.8(a)(2)). Therapists, victim advocates, and others who have a confidential relationship with students by law are excluded. (Ed. Code §§ 66281.8(a)(2)(C), (b)(4)(A)(xxii)).

Colleges that fail to investigate or redress sexual harassment may lose state funding and, potentially, be subject to a civil action under Ed. Code §§ 66292.3 and 66292.4. (See Ed. Code § 66281.8(d)).

Federal Rule – Standard for Institution's Liability

The federal rule raises the standard for holding schools/colleges liable for failing to respond to sexual harassment complaints. Under the new rule, schools/colleges risk termination of federal funding only if they had "actual knowledge" of the sexual harassment, rather than "constructive knowledge," which was the prior standard. Moreover, schools/colleges are liable only if they respond to a harassment report with "deliberate indifference." (85 Fed. Reg. at 30033-34).

A school/college is "deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances." (34 C.F.R. § 106.44(a)). This is a change from the previous guidance, which had provided that schools/colleges would be in violation of Title IX if their responses failed to stop the harassment and prevent its recurrence. (85 Fed. Reg. at 30034).

In determining whether a school/college has "actual knowledge" of a report of sexual harassment under the federal rule, ED focused on defining which personnel within an educational institution must receive the report of sexual harassment. The federal rule expands the scope of actual knowledge in the K-12 context to include reports to all employees of a school covered by Title IX. (*Id.* at 30039). The federal rule also allows colleges some flexibility to decide which categories of employees have responsibility for reporting sexual harassment complaints.[2] (*Id.* at 30040).

---

[2] Note, the Clery Act requires that all postsecondary institutions participating in Title IV student financial assistance programs disclose campus crime statistics and other security information to students and the public, and require that institutions disclose statistics, policies and programs related to dating violence, domestic violence, sexual assault, and stalking. While the federal rule's reporting requirements for sexual harassment may overlap with an institution's reporting obligations under the Clery Act, the Clery Act and Title IX are two different laws which serve different purposes and provide separate obligations for entities covered by both laws. On October 9, 2020, the U.S. Department of Education announced the rescission of the 2016 *Handbook for Campus Safety and Security Reporting* (Handbook), the most recent Clery Act subregulatory guidance. The Handbook was replaced with the Appendix for Federal Student Aid Handbook, which can be found here: https://ifap.ed.gov/sites/default/files/attachments/2020-10/CleryAppendixFinal.pdf

California's Inclusion of Harassment Outside of College Programs

SB 493 requires California colleges to take reasonable steps to respond to each incident of sexual harassment involving individuals subject to the institution's policies that occurs in connection with any educational activity or other program of the institution, as well as incidents that occurred outside of those educational programs or activities, whether they occurred on or off campus, if, based on the allegations, 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. (Ed. Code § 66281.8(b)(3)(B)).

Federal Rule's Exclusion of Harassment Outside of School/College Programs

The federal rule limits a school or college's liability to conduct that is within its control regardless of the impact that harassment outside of the school/college may have on a student's access to education. (*Id.* at 30092). Under the federal rule, schools/colleges may only address sexual harassment under Title IX when it occurs within a school's or college's "education program or activity." (*Id.* at 30092, citing § 106.44(a)). An education program or activity includes "locations, events, or circumstances over which the recipient [of federal funding] exercised substantial control over both respondent and the context in which the harassment occurs." (*Id.* 30092). The final rule specifies that this also includes conduct within any building owned or controlled by a student organization that a postsecondary institution officially recognizes. (34 C.F.R. § 106.44(a)).

New Complaint and Grievance Procedures

SB 493 Grievance Procedures (Applicable Only to Colleges as of January 1, 2022)

California requires each college to adopt and publish on its internet website grievance procedures that provide for prompt and equitable resolution of sexual harassment complaints filed by a student against an employee or another student. (Ed. Code § 66281.8(b)(4)). Those procedures must provide, among other things, notice to all students of the grievance procedures, including where and how complaints may be filed, and must make clear that investigations and adjudication of alleged misconduct are not an adversarial process between the complainant, the respondent, and the witnesses, but rather a process for colleges to comply with their obligations under existing law. (*Id.*). They must also state that the complainant does not have the burden to prove, nor does the respondent have the burden to disprove, the underlying allegation or allegations of misconduct. (Ed. Code § 66281.8(b)(4)(A)(i)).

Institutions must ensure trauma-informed and impartial investigation of complaints, and provide training to each employee engaged in the grievance procedures related to sex discrimination, including sexual violence. (Ed. Code § 66281.8(b)(4)(A)(iv)).

Any hearing conducted shall be subject to the following rules, among others:

a. Any cross-examination of either party or any witness shall not be conducted directly by a party or a party's advisor.
b. Either party or any witness may request to answer the questions by video from a remote location.
c. Student parties shall have the opportunity to submit written questions to the hearing officer in advance of the hearing. At the hearing, the other party shall have an opportunity to note an objection to the questions posed. The institution may limit such objections to written form, and neither the hearing officer nor the institution are obligated to respond, other than to include any objection in the record.
d. Generally, the parties may not introduce evidence, including witness testimony, at the hearing that the party did not identify during the investigation and that was available at the time of the investigation. However, the hearing officer has discretion to accept for good cause, or exclude, such new evidence offered at the hearing.

(Ed. Code § 66281.8(b)(4)(A)(viii)).

Colleges must provide an explanation of the meaning of the preponderance of the evidence standard, and affirm that it shall apply to adjudications of sexual harassment complaints. (Ed. Code § 66281.8(b)(4)(A)(ix)). The preponderance of the evidence standard is met if the institution determines that it is more likely than not that the alleged misconduct occurred, based on the facts available at the time of the decision. (*Id.*).

If an institution provides for an appeals process, SB 493 requires that either party be allowed to appeal the outcome of the grievance proceeding. (Ed. Code § 66281.8(b)(4)(A)(xx)). An institution's grievance procedure may limit the grounds for an appeal, provided that any limitation shall apply equally to all parties and that the nonappealing party shall have an opportunity to respond to the appeal. (*Id.*).

Institutions shall outline the possible interim measures that may be put in place during the pendency of an investigation, the supportive measures that may be provided in the absence of an investigation, and the disciplinary outcomes, remedial measures, and systemic remedies that may follow a final finding of responsibility. (Ed. Code § 66281.8(b)(4)(A)(xxi)). As part of those interim measures, an institution shall not mandate mediation to resolve allegations of sexual harassment, and shall not allow mediation, even on a voluntary basis, to resolve allegations of sexual violence. (Ed. Code § 66281.8(b)(4)(A)(xxi)(I)).

When requested by a complainant or otherwise determined to be appropriate, a college shall issue an interim no-contact directive prohibiting the respondent from contacting the complainant during the pendency of the investigation. (Ed. Code § 66281.8(b)(4)(A)(xxi)(III)). An institution shall not issue an interim mutual no-contact directive automatically, but instead shall consider the specific circumstances of each case to determine whether a mutual no-contact directive is necessary or justifiable to protect the noncomplaining party's safety or well-being, or to respond to interference with an

investigation. (*Id.*). A no-contact directive issued after a decision of responsibility has been made shall be unilateral and only apply against the party found responsible. (*Id.*).

If a mutual no-contact directive is issued, an institution shall provide the parties with a written justification for the directive and an explanation of the terms of the directive. (Ed. Code § 66281.8(b)(4)(A)(xxi)(III)(ib)). Upon the issuance of any no-contact directive, the institution shall provide the parties with an explanation of the terms of the directive, including the circumstances, if any, under which violation could be subject to disciplinary action. (*Id.*).

Federal Rule's Process

The federal rule provides its own detailed "grievance procedures" that schools and colleges must follow in response to any sexual harassment complaint. Once a school/college has actual knowledge of sexual harassment, it must issue an "initial response" including supportive measures for the complainant. (85 Fed. Reg. at 30044, citing 34 C.F.R. § 106.44(a)). If the complainant decides to file a formal complaint, the school/college must provide a "notice" of procedures and allegations to the parties and launch a formal investigation. (34 C.F.R. §106.45(b)(2)(i)). If the complaint does not allege sexual harassment that meets the definition of the federal rule, the complaint must be dismissed. (34 C.F.R. § 106.45(b)(3)(i)).

At any time before the school/college reaches a final determination regarding responsibility, the school/college may facilitate an informal resolution process, which would not include a full investigation and adjudication. (34 C.F.R. § 106.45(b)(9)). The school may not require the parties to participate in an informal resolution and may not offer an informal resolution unless a formal complaint has been filed. (34 C.F.R. § 106.45(b)(9)). If the school/college offers an informal resolution process, it must provide the parties with written notice about the limits of the informal process and obtain the parties' voluntary, written consent. (34 C.F.R. § 106.45(b)(9)(i)-(ii)). Informal resolution is available only in cases of alleged student-on-student harassment, not for cases of alleged employee harassment of a student. (34 C.F.R. § 106.45(b)(9)(iii)).

Complaints that are not dismissed or informally resolved proceed to a *live hearing* at which each party's advisor may cross-examine the other party and any witnesses on all relevant questions, including those related to credibility. (34 C.F.R. § 106.45(b)(6)(i)). The federal rule restricts questions about a complainant's sexual history to very specific circumstances. The rule also allows schools/colleges to have the complainant and respondent in separate rooms, so long as live questioning is facilitated by video conferencing or similar technology. (34 C.F.R. § 106.45(b)(6)(i)). Schools/colleges may choose to utilize a "preponderance of the evidence" standard or a "clear and convincing evidence" standard. Whichever standard a school/college chooses, it must use the same standard for complaints against students and complaints against employees. (See § 106.45(b)(vii)).

Elementary and secondary schools may, but are not required to, hold live hearings. (34 C.F.R. § 106.45(b)(6)(ii)). *Whether or not K-12 schools hold live hearings, they must give parties an opportunity for written cross-examination.* (34 C.F.R. §

106.45(b)(6)(ii)). Colleges, on the other hand, must hold live hearings. (34 C.F.R. § 106.45(b)(6)(i)). As discussed, keep in mind that the federal rule applies to all K-12 and postsecondary institutions, but effective January 1, 2022, California colleges also will be required to follow California's grievance procedures (which are more protective of students' rights) to the extent California's procedures do not directly conflict with Title IX.

The decision-maker must issue a written determination, which must be distributed to both parties simultaneously and must include the specific allegations, a procedural history, findings of fact, conclusions regarding the application of those facts to the school's code of conduct, results for each allegation, with accompanying rationale and whether the school will provide the complainant with any remedies, and procedures and permissible bases for either party to appeal. (34 C.F.R. § 106.45(b)(7)(ii)-(iii)). The determination becomes final at the conclusion of all appeals or, if no appeal is filed, once the deadline for filing an appeal has passed. (34 C.F.R. § 106.45(b)(7)(iii)).

Schools/colleges must allow both parties to appeal based on a material procedural irregularity, new material evidence that was not reasonably available when the determination was made, or a conflict of interest or bias on the part of the Title IX Coordinator, investigator, or decisionmaker. (34 C.F.R. § 106.45(b)(8)(i)). If the school offers other bases for appeal, it must make them available to both parties. (34 C.F.R. § 106.45(b)(8)(ii)).

For further information, Primary Contact Staff should contact the Legal Department.