An act to amend Section 66262.5 of, and to add Section 66281.8 to, the Education Code, relating to education.

LEGISLATIVE COUNSEL’S DIGEST

SB 493, as amended, Jackson. Education: sex equity.

Existing federal law, known as Title IX, prohibits a person, on the basis of sex, from being excluded from participation in, being denied the benefits of, or being subject to discrimination, which includes sexual harassment, under any education program or activity receiving federal financial assistance. A portion of the Donahoe Higher Education Act, known as the Equity in Higher Education Act declares, among other things, that it is the policy of the State of California that all persons, regardless of their sex, should enjoy freedom from discrimination of any kind in the educational institutions of the state.

This bill would require an institution of higher education that receives state funds, including funds for student financial assistance, to comply with requirements relating to the protection of students from, and providing students with procedural protections relating to complaints of, sexual harassment. In particular, the bill would require the governing board or body of each of these institutions to (1) disseminate a notice of nondiscrimination to each employee, volunteer, and individual
contracted with the institution, (2) designate at least one employee of
the institution to act as a gender equity officer, (3) adopt rules and
procedures for the prevention of sexual harassment, (4) adopt and
publish on its internet website grievance procedures providing for the
prompt and equitable resolution of sexual harassment complaints, (5)
publish on the institution’s internet website the name, title, and contact
information for the gender equity officer and any individual official
with the authority to investigate complaints or to institute corrective
measures, as specified, (6) include specified training to each employee
engaged in the grievance procedure, and (7) include annual training for
resident life student and nonstudent staff for the trauma-informed
handling of reports regarding incidents of sexual harassment or assault
at an institution with on-campus housing. This bill would authorize the
Attorney General and a person whose right to equitable access to an
educational institution, program, or activity was infringed through a
violation of these provisions to bring an action in a court to enjoin, or
recover specified damages for, a violation of its provisions, as specified.
By imposing new duties on community college districts, this bill would
impose a state-mandated local program.

The California Constitution requires the state to reimburse local
agencies and school districts for certain costs mandated by the state.
Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates
determines that the bill contains costs mandated by the state,
reimbursement for those costs shall be made pursuant to the statutory
provisions noted above.

State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares all of the
following:

(a) Education has long been recognized as the great equalizer
in the United States.

(b) Protecting students’ civil rights, including the right to an
educational environment free from discrimination, is of paramount
importance. Sexual harassment, including sexual violence, has a
devastating impact on students’ lives and prevents equal access to
education as required under California law.
(c) The Legislature recognizes that sex discrimination, including
sexual harassment and violence, harms all students, undermines
students’ physical safety, impedes students’ ability to learn, and
can reinforce social inequality throughout a student’s lifetime.
(d) Sexual harassment and violence in higher education is
pervasive. According to research published by the American
Association of University Women, during college, 62 percent of
women and 61 percent of men experience sexual harassment. The
Association of American Universities (AAU) survey of students
shows that more than 1 in 5 women and nearly 1 in 18 men are
sexually assaulted in college.
(e) Historically marginalized and underrepresented groups are
more likely to experience sexual harassment than their peers.
Research from GLSEN and the Centers for Disease Control and
Prevention show that more than half of LGBTQ students 13 to 21
years of age are sexually harassed at school. An AAU survey
indicates that nearly one in four transgender and
gender-nonconforming students are sexually assaulted during
college. According to a National Women’s Law Center (NWLC)
report, students with disabilities are 2.9 times more likely than
their peers to be sexually assaulted.
(f) Existing law prohibits institutions of higher education that
receive state funding from discriminating on the basis of sex.
(g) Existing law requires all higher educational institutions that
receive state funding to adopt trauma-informed policies concerning
sexual assault, domestic violence, dating violence, and stalking
involving a student, both on and off campus.
(h) Existing law requires the application of an affirmative
consent standard and prohibits consideration of past sexual relations
as probative by themselves of ongoing or repeated affirmative
consent between parties.
(i) Sexual harassment occurs both on campus and in off-campus
spaces associated with school. Nationwide, nearly 9 in 10 college
students live off campus and 41 percent of college sexual assaults
involve off-campus parties. Research by the Rape, Abuse & Incest
National Network indicates that only 8 percent of all sexual assaults
occur on school property.
(j) Survivors generally underreport instances of sexual
harassment and assault. The NWLC reports that only 12 percent
of college survivors report sexual assault to their schools or the police.

(k) Every student has a right to be protected from sexual harassment, including sexual violence, in a school’s educational programs, activities, and facilities. Each institute of higher education has a responsibility to make reasonable efforts to respond effectively when sexual harassment is reported to, or observed by, college and university employees, including on-campus housing employees, such as residential advisors.

(l) The Legislature affirms that institutions of higher education should conduct prompt and equitable investigations into allegations of sexual harassment, including sexual violence, and that interim accommodations and remedial measures may be necessary during the pendency of an investigation to ensure students’ safety and equal access to education. When institutions fail to effectively respond to allegations of sexual harassment and violence, the impact on students can be devastating. Research published in the Journal of College Student Retention: Research, Theory & Practice demonstrates that 34 percent of sexual harassment and violence survivors drop out of college.

(m) Sexual harassment of students, including acts of sexual violence, is a form of sex discrimination prohibited by Title IX of the Education Amendments of 1972 (20 U.S.C. Sec. 1681 et seq.), and its implementing regulations in Part 106 of Chapter 1 of Subtitle B of Title 34 of the Code of Federal Regulations.

(n) The Legislature notes the legal distinction between the processes necessary to protect students’ civil rights to equal access to education and those required to ensure due process in a criminal proceeding. In enacting this bill, it is the intent of the Legislature to account for the significant individual civil consequences faced by respondents charged with committing sexual violence as well as the significant harm to individual victims and to education equity more generally if sexual violence goes unaddressed.

(o) It is the intent of the Legislature to define “sexual harassment” to include “sexual violence,” as defined in Section 66262.5 of the Education Code, for the purposes of Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 and the Equity in Higher Education Act established in Chapter 4.5 (commencing with Section 66250) of Part 40 of Division 5 of Title 3 of the Education Code.
(p) It is the intent of the Legislature that each higher education institution that receives state funds for student financial assistance, and their respective governing boards or bodies, comply with the requirements of this act as a condition of receiving that financial assistance.

SEC. 2. Section 66262.5 of the Education Code is amended to read:

66262.5. (a) “Sexual harassment” has the same meaning as defined in Section 212.5 and includes sexual battery, sexual violence, and sexual exploitation.

(b) For purposes of this chapter the following terms have the following meanings:

(1) “Sexual violence” means physical sexual acts perpetrated against a person without the person’s affirmative consent, as defined in paragraph (1) of subdivision (a) of Section 67386. An individual may be unable to give affirmative consent due to an intellectual or other disability. Physical sexual acts include all of the following:

(A) Rape as defined in Chapter 1 (commencing with Section 261) of Title 9 of Part 1 of the Penal Code.

(B) The intentional touching of another person’s intimate parts or other intentional sexual contact with another person.

(C) The use of duress or force, or the attempt to use duress or force, to touch another person’s intimate parts.

(2) “Sexual battery” has the same meaning as defined in Chapter 9 (commencing with Section 240) of Title 8 of Part 1 of the Penal Code.

(3) “Sexual exploitation” means taking sexual advantage of another person for the benefit of anyone other than that other person without that other person’s consent, regardless of that other person’s affiliation with the higher education institution, including any of the following acts:

(A) The trafficking of another person, as defined in Section 236.1 of the Penal Code, without that person’s consent.

(B) The recording of images, including video or photograph, or audio of another person’s sexual activity, intimate body parts, or nakedness, without that person’s consent.

(C) The distribution of images, including video or photograph, or audio of another person’s sexual activity, intimate body parts, or nakedness, 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.

(D) The viewing of another person’s sexual activity, intimate
body parts, or nakedness, in a place where that other
person would have a reasonable expectation of privacy, for the purpose of arousing or gratifying sexual desire.

SEC. 3. Section 66281.8 is added to the Education Code, to
read:

66281.8. (a) For the purposes of this section, “higher education
institution” means a campus of the University of California, the
California State University, or the California Community Colleges,
a private postsecondary educational institution, or an independent
institution of higher education that receives state funds, including
state funds for student financial assistance.

(b) In order to receive state funds for student financial assistance,
the appropriate governing board or body of each higher education
institution shall implement, and at all times comply with, all of
the following requirements at the institution:

(1) It shall disseminate a notice of nondiscrimination, including,
but not limited to, all information required to be included in the
notice provided pursuant to Section 66281.5, to each:
(A) Employee of the higher education institution.
(B) Volunteer who will interact with students more than 10
hours in a calendar year.
(C) Individual under contract with the higher education
institution to perform any service at the institution.

(2) It shall designate at least one employee of the institution to
act as a gender equity officer to coordinate its efforts to comply
with and carry out its responsibilities under this section. The gender
equity officer may be the same individual as the institution’s federal
Title IX coordinator. The gender equity officer shall have adequate
training on what constitutes sexual harassment and on
trauma-informed investigatory and hearing practices and shall
understand how the institution’s grievance procedures operate.

(3) It shall adopt rules and procedures within the policies
required by Section 67386 for the prevention of sexual harassment
that also provides for all of the following elements:
(A) The institution’s primary concern shall be student safety.
The use of alcohol, or drugs, or both shall not constitute grounds
for determining that a complainant is at fault for sexual harassment
or sexual violence. All disciplinary measures imposed by the institution for violations of the institution’s student conduct policy at or near the time of the incident being investigated shall be consistent with paragraph (10) of subdivision (b) of Section 67386.

(B) The institution shall take reasonable steps to ensure that students are protected in connection with all academic, educational, extracurricular, athletic, and other programs of the institution, whether those programs take place in the institution’s facilities, during travel, at a class or training program sponsored by the institution at another location, or elsewhere.

(C) If a student files a complaint with the institution regarding an incident that took place on campus, the institution shall process the complaint in accordance with this section. If a student files a complaint regarding an incident that took place off-campus, the institution shall evaluate the complaint to determine if there is a nexus between the off-campus incident and the institution such that the incident could contribute to a hostile environment on campus. If such a nexus exists, the institution shall process the complaint in accordance with this section. In the absence of evidence to the contrary, a nexus to the campus exists whenever the incident complained of is so grievous and the likelihood of continuing to encounter the perpetrator on campus is so credible that inaction would deprive the complainant of the benefits of any education program.

(D) If the institution knows, or reasonably should know, about possible sexual harassment that could create a hostile environment on campus, the institution shall promptly investigate. If the institution investigates and determines that sexual harassment creating a hostile environment on campus has more likely than not occurred, whether the harassment occurred on or off campus, it shall take immediate action to eliminate the hostile environment, prevent its recurrence, and address its affects, regardless of whether or not a complaint has been filed under the institution’s grievance procedures.

(4) It shall adopt and publish on its internet website grievance procedures that provide for prompt and equitable resolution of student sexual harassment complaints filed by a student against an employee, another student, or a third party. The grievance procedures shall satisfy all of the following requirements:
(A) They shall require notice be provided to each student of the grievance procedures, including where and how complaints may be filed.

(B) They shall apply to each complaint alleging sexual harassment perpetrated by an employee of the institution, another student, or a third party.

(C) They shall ensure that the investigation of the allegation and the adjudication of the matter are not conducted by the same person or entity.

(D) They shall provide for a hearing before a neutral adjudicator with the power independently to find facts and make credibility assessments.

(E) They shall ensure adequate, reliable, trauma-informed and impartial investigation of complaints, including the opportunity for both parties to present witnesses and other evidence.

(F) They shall provide both parties the opportunity, during the hearing, to cross-examine one another and any witnesses against them subject to the following rules:

(i) The cross examination shall be live, but either party and any witness may request to answer the questions by video from a remote location.

(ii) The live cross examination of either party and any witnesses shall be conducted indirectly, through the submission of written questions to the neutral adjudicator in advance and with an opportunity for the other party to object. The neutral adjudicator shall have the authority and obligation to discard or rephrase any question that the neutral adjudicator deems to be repetitive, irrelevant, or harassing. In making these determinations, the neutral adjudicator is not bound by, but may take guidance from, the formal rules of evidence. The neutral adjudicator shall provide a mechanism for both parties to ask, indirectly, through the neutral adjudicator, and subject to objections, followup questions to be posed to the cross-examinee. The neutral adjudicator shall be empowered to require any witness to answer any question to which, in the view of the neutral adjudicator, the witness has not yet been responsive. In no circumstance shall a cross-examinee be limited to answering “yes” or “no.”

(G) They shall include an explanation of the meaning of a preponderance of the evidence standard, which shall apply to all investigations involving complaints of sexual harassment or sexual
assault. The preponderance of the evidence standard is met if an
allegation is more likely than not to be true.

(H) They shall determine a reasonably prompt timeframe for
all of the major stages of the grievance procedures, as well as a
process for extending the timelines for good cause only, and shall
provide for the prompt communication of that information to the
complainant and respondent in a complaint. The communicated
timeline information shall include, but shall not necessarily be
limited to, each of the following:

(i) The period during which the institution shall conduct an
investigation appropriate to the complaint.

(ii) The time when both parties shall receive a response
regarding the outcome of the complaint.

(iii) The deadlines and process for parties to file an appeal, if
the institution’s grievance procedures include an appeals process.

(I) They shall provide for periodic status updates on those
timelines referenced in subparagraph (H) to the complainant and
respondent.

(J) They shall provide for notice in writing to parties of any
extension of a time period granted in the investigation and outcome
determination process, either by the institution to itself or by the
institution to one of the parties, which would change the
prospective timeframes for the major stages of the complaint
process, and the reason for that extension.

(K) They shall provide for notice to parties of the outcome of
the complaint in writing. The written outcome shall explain to the
parties the reasons for the decision.

(L) They shall provide assurance that the institution will take
steps to prevent recurrence of any harassment and to correct its
discriminatory effects on the complainant and others, if appropriate.

(M) If both the complainant and respondent are students at the
institution, they shall provide for the communication of information
regarding the rights of a complainant and respondent in an
allegation of sexual harassment. A student party, both complainant
and respondent, shall be afforded, in the same manner and, except
under extenuating circumstances, such as the unavailability of a
party or if it would impede an investigation, at the same time, all
of the following rights:

(i) To receive notice that the institution is conducting an
investigation. The notice shall include sufficient information to
ensure that the parties understand the allegations and the alleged institutional policy violations under review.

(ii) To receive information on the institution’s investigative process, decision-making procedures, and grievance procedures established pursuant to this section. Each higher education institution shall create reasonable procedures for the investigation process, including instituting reasonable and equitable evidentiary guidelines, deadlines, and page or word limitations on student party submissions, in order that parties may be aware of and can follow those procedures. The institution shall include, but is not limited to including pursuant to these procedures, a prohibition on the consideration of past sexual relations by themselves as probative of whether the alleged incident occurred.

(iii) To receive information about reasonably prompt timeframes for the major stages of the complaint process.

(iv) To have the investigation and decision of responsibility made by a neutral decisionmaker or decisionmaking body.

(v) To have the opportunity to give information, identify witnesses, and provide documentary information during the course of the investigation and the opportunity and a reasonable amount of time to respond to any evidence upon which any findings will be based.

(vi) To have a support person or adviser accompany a student party during key stages of the investigation and hearing processes, if requested.

(vii) To receive a notice regarding appropriate legal and counseling resources developed and maintained by the institution for student parties in school misconduct matters involving sexual violence, subject to all of the following:

(I) The notice shall advise student parties of their right to seek the assistance of an attorney at any stage of the process if they wish to do so.

(II) The notice shall provide student parties with a list of known complainant and respondent attorneys. For each party, at least two referrals must be pro bono or nonprofit legal organizations. The institution shall make a diligent effort to include referrals that are within 25 miles of the institution’s main campus.

(III) The list shall indicate whether the attorney or legal aid organization is known by the institution to represent complainants, respondents, or both. The difference between the number of
attorneys on the attorney referral list known to represent complainants or respondents exclusively shall not exceed by more than three the number of attorneys that represent the other side exclusively.

(IV) The institution shall confirm at least once per calendar year that all of the listed attorneys and organizations are continuing to accept clients for Title IX proceedings.

(V) The institution shall not remove anyone from the list in retaliation for pursuing any legal action or seeking any legal remedy against the institution.

(viii) To receive a written outcome of the findings, including disciplinary outcomes.

(ix) If the institution has an appeals process for an investigation pursuant to this section, for either party to appeal the outcome of the misconduct proceeding or the disciplinary proceeding.

(x) To have appropriate disciplinary outcomes, remedial measures, and systemic remedies put in place following a final finding of responsibility. To ensure this right is properly protected, all of the following shall apply:

(I) An institution shall not mandate mediation to resolve allegations of sexual assault.

(II) An institution shall not require that the complainant enter a voluntary resolution agreement or any other form of resolution as a prerequisite to receiving remedial measures from the institution which safeguard the complainant’s access to education.

(III) An institution shall not issue a mutual no-contact directive when an allegation of harm has been made against only one of the parties or when a counter allegation of harm is facially retaliatory.

(xi) To have Campus Assault Resources and Education advocates, or similar advocates employed by or located on the campus of an institution of higher education, given adequate resources to carry out their responsibilities and address students’ needs.

(N) They shall describe the obligations of all staff designated by the institution to report concerns of sexual harassment to the gender equity officer. An individual who has a confidential relationship with a student or students by law, or other relationship designated by the institution as confidential, is exempt from having to report sexual harassment concerns to the gender equity officer pertaining to the confidential relationship or relationships.
They shall contain a requirement that the gender equity officer, or that officer’s designee, assess each report of sexual harassment and provide outreach, as appropriate, to each identifiable student who is alleged to be the victim of the reported conduct. The outreach shall include all of the following information:

1. The institution has received a report that the student may have been a victim of sexual harassment.
2. The prohibition of retaliation.
3. Behavioral health services at the institution or in the community.
4. If there is the possibility of a criminal act, notice that the student has the right, but not the obligation, to report the matter to law enforcement.
5. The institution’s investigation procedures established pursuant to the requirements of this section.
6. Potential interim measures, such as no contact directives, housing changes, and academic schedule changes, where applicable.
7. The importance of preserving evidence.
8. A request for the student to meet with the gender equity officer, or the officer’s designee, to discuss options for responding to the report.
9. The manner in which the institution responds to reports of sexual harassment and a description of potential disciplinary consequences.

(5) It shall publish in a prominent place on its internet website, with accompanying text clearly associating them with the sexual harassment and sexual assault grievance processes, the name, title, and contact information, which shall include the telephone number, office location, and email address, of each of the following individuals:

(A) The gender equity officer designated pursuant to paragraph (2), or the gender equity officer’s designee.
(B) Any individual official within the institution with the authority to investigate complaints made pursuant to this section or to institute corrective measures such as sanctions, accommodation, or other forms of resolution of the complaint.

(6) (A) It shall provide the mandatory training required pursuant to paragraph (12) of subdivision (b) of Section 67386 to each
employee engaged in the grievance procedures related to sex
discrimination, including sexual violence, which shall include for
these employees 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 assault complaint, best practices for questioning of the
complainant, respondent, and witnesses, and on implicit bias, the
history of institutional racism, and racial inequities, both broadly
and in school disciplinary processes.

(B) Materials approved by the institution for this training shall
include statistics on the prevalence of sexual harassment and sexual
violence in the educational setting, and the rates at which students
of color, LGBTQI, disabled, nonbinary, cisgendered female, and
cisgendered male students experience sexual harassment and sexual
assault in the educational setting. When possible, citation to such
statistics shall be included in the written antidiscrimination policies
required by Section 66281.5 accompanying the institution’s
grievance procedures.

(7) If the institution has on-campus housing, it shall ensure that
residence life student and nonstudent staff, or their equivalent,
annually receive training on trauma-informed handling of reports
made to them regarding incidents of sexual harassment or assault,
or incidents of sexual harassment or assault of which they have
actual or constructive knowledge in student residential facilities.

(c) This section does not require a school to provide separate
grievance procedures for student sexual harassment complaints.
The school may use student disciplinary procedures or other
separate procedures to resolve sexual harassment complaints. Any
procedures used to adjudicate complaints of sexual harassment,
including disciplinary procedures, shall afford a complainant and
a respondent a prompt and equitable resolution. If the school relies
on disciplinary procedures for compliance with the requirements
of this section, the gender equity officer designated pursuant to
paragraph (2) of subdivision (b) shall review the school’s
disciplinary procedures to ensure that the procedures comply with
the requirements of this section.

(d) To the extent that the student rights listed in this article do
not otherwise exist by statute or agreement, nothing in this section
requires schools to provide nonstudent parties with those rights.
Either of the following persons may bring an action in a court of competent jurisdiction to enjoin a violation of this section or to recover compensatory damages, court costs, and reasonable attorney’s fees, or all of these:

(A) The Attorney General, consistent with the Attorney General’s existing authority under Section 13 of Article V of the California Constitution and Article 2 (commencing with Section 11180) of Chapter 2 of Part 1 of Division 3 of Title 2 of the Government Code, to investigate, and, as necessary, prosecute any violation of the law. The Attorney General may also conduct an investigation or bring an action under this section.

(B) A person whose right to equitable access to a higher education institution, program, or activity through a higher education institution that is a recipient of state funds was infringed through violation of this section.

(2) A violation of this section is established by the Attorney General or a person described in subparagraph (B) of paragraph (1) demonstrating in an action brought in a court of competent jurisdiction any of the following:

(A) That a recipient institution has a policy that the institution knows does not conform with to the requirements of this section.

(B) That a recipient institution engages in a process that the institution knows does not reflect its written policy though its policy does conform with to the requirements of this section.

(C) That a recipient institution, by an act or actions of one of its employees, administrators, or any person contracted to perform a service at the institution involving investigation or resolution of a complaint of sexual assault, harassment, or sex based discrimination, or by the enforcement of an institutional policy, knowingly violated the requirements of this section.

(3) (A) A person shall bring an action alleging a violation of this section no later than the statute of limitations applicable to a personal injury claim in California at the time the cause of action accrues.

(B) For purposes of calculating the limitation period imposed by subparagraph (A), each day that a violation of this section persists, and each day that a policy that violates this section remains in effect, constitutes a new violation of this section and is, therefore, a new day on which a cause of action has accrued.
(f) Civil law remedies, including, but not limited to, money damages, injunctions, restraining orders, or other remedies or orders may also be available to complainants.

(g) The requirements of this section shall be implemented at each higher education institution by no later than January 1, 2021.

SEC. 4. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.