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 introduced, 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. Specified provisions of law relating to educational equity in schools, including the Equity in Education Act and the Equity in Higher Education Act, define, in the same way, “sexual harassment” for the purposes of their respective provisions.

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, as defined, including requiring the governing board or body of each of these institutions to (1) disseminate a notice of nondiscrimination to each employee and volunteer, (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, (7) include annual trauma-informed training for resident life student and nonstudent staff for handling reports regarding incidents of sexual harassment or assault at an institution with on-campus housing, and (8) adopt and publish on the institution’s internet website investigation procedures for student sexual harassment complaints. 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.


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

1 SECTION 1. The Legislature finds and declares all of the following:
2   (a) Education has long been recognized as the great equalizer in the United States.
3   (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 by themselves as probative 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 acknowledges 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.

(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 consent. An individual may
be unable to give 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 that other
person’s affiliation with the higher education institution, including
any of the following acts:
(A) The prostituting of another person.
(B) The recording of images, including video or photograph,
or audio of another person’s sexual activity, intimate body parts,
or nakedness.
(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 and objected 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 higher education institution employee and volunteer, including any individual employed by contract 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) When a student sexually harasses another student, the harassing conduct shall be deemed to create a hostile environment on campus for the purposes of this section if the conduct is sufficiently serious that it interferes with or limits a student’s ability to participate in or benefit from the institution’s programs or activities. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment on campus, particularly if the harassment is physical. A single or isolated incident of sexual harassment may create a hostile
environment on campus if the incident being investigated is sufficiently severe.

(B) 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.

(C) 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, on a schoolbus, at a class or training program sponsored by the institution at another location, or elsewhere.

(D) If a student files a complaint with the institution, regardless of where the conduct occurred, the institution shall process the complaint in accordance with this section. Because students often experience the continuing effects of off-campus sexual harassment in the educational setting, the institution shall consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus. The institution may have an obligation to respond to student-on-student sexual harassment that initially occurred off campus grounds, outside of the institution’s educational programs or activities.

(E) If the institution knows, or reasonably should know, about possible sexual harassment that could create a hostile environment on campus, the institution shall promptly determine whether to 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 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 adequate, reliable, trauma-informed and impartial investigation of complaints, including the opportunity for both parties to present witnesses and other evidence.

(D) 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.

(E) They shall determine the timeframes for all of the major stages of the grievance procedures, as well as the process for extending the timelines, 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.

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

(G) 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.

(H) 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.
(I) 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.

(J) 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 not be subjected to any form of direct, live cross-examination from the other party or the other party’s advisor.
(viii) To receive an attorney advocates list developed and maintained by the institution for student parties in school misconduct matters involving sexual harassment or sexual assault, subject to all of the following:

(I) The institution shall advise a student party of the right to seek the assistance of an attorney who can represent the student party in matters in which the other student party has retained an attorney for purposes of on-campus representation or acting as the other student party’s advisor during the on-campus investigatory process.

(II) The institution shall provide a student party with a list of known complainant and respondent attorneys. For each party, at least two referrals must be pro bono and nonprofit legal organizations.

(III) The number of attorneys on the attorney referral list maintained by a campus known to represent exclusively complainants shall not be more than 3 greater or less than 3 fewer than the number of attorneys on the list known to represent exclusively respondents.

(IV) The institution shall not remove anyone from the list unless it receives an ethical complaint from a represented student or the institution has confirmed that the attorney no longer accepts such cases.

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

(x) 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.

(xi) 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.

(xii) 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.

(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 and victim-centered best practices for assessment of a sexual harassment or sexual assault complaint and 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 data-based information on the prevalence of sexual harassment and assault in education, the rate of accuracy in reporting by complainants, and the rates at which students of color, LGBTQI, disabled, nonbinary, cisgendered female, and cisgendered male students experience sexual harassment and sexual assault on campus to ensure that campus procedures are grounded in best practices. When possible, citation to such data shall be included in the written antidiscrimination policies required by Section 66281.5 accompanying the institution’s grievance procedures.
If the institution has on-campus housing, it shall ensure that residence life student and nonstudent staff, or their equivalent, annually receive trauma-informed training for handling 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.

(8) It shall adopt and publish on its internet website procedures for an investigation providing for prompt and equitable resolution of student sexual harassment complaints filed by a student or initiated by the higher education institution itself against an institution employee, another student, or a third party. The procedures shall contain all of the following elements:

(A) Information describing the obligations of all staff designated by the institution to report concerns of sexual harassment to the gender equity officer designated pursuant to paragraph (2). 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.

(B) A requirement that the gender equity officer designated pursuant to paragraph (2), 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:

(i) The institution has received a report that the student may have been a victim of sexual harassment.

(ii) The prohibition of retaliation.

(iii) Behavioral health services at the institution or in the community.

(iv) 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.

(v) The institution’s investigation procedures established pursuant to the requirements of this section.

(vi) Potential interim measures, such as no contact directives, housing changes, and academic schedule changes, where applicable.

(vii) The importance of preserving evidence.
(viii) 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.

(ix) The manner in which the institution responds to reports of sexual harassment and a description of potential disciplinary consequences.

(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.

(e) (1) 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.

(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 either of the following:

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

(B) That a recipient institution engages in a process that does not reflect its written policy though its policy does conform with the requirements of this section.
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, 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. Nothing in this section shall be construed to require an exhaustion of the administrative complaint process before civil law remedies may be pursued.

(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.