

**SENATE JUDICIARY COMMITTEE**  
**Senator Hannah-Beth Jackson, Chair**  
**2019-2020 Regular Session**

SB 493 (Jackson)

Version: February 21, 2019

Hearing Date: April 23, 2019

Fiscal: Yes

Urgency: No

TSG

**SUBJECT**

Education: sex equity

**DIGEST**

This bill establishes baseline standards and procedures that California colleges and universities must follow, in order to continue receiving state funds, in regard to incidents of sexual harassment, sexual battery, sexual violence, and sexual exploitation that impact equal access to educational opportunity.

**EXECUTIVE SUMMARY**

Research has documented an epidemic of sexual harassment and sexual violence at educational institutions throughout the U.S. The research also shows wide-ranging negative impacts resulting from this epidemic. Sexual harassment and sexual violence not only interfere with students' ability to learn, they can also produce life-long social, psychological, and economic harm. Female students bear the overwhelming – though not exclusive – brunt of this problem.

Existing federal law, in the form of Title IX, requires educational institutions to provide for the prompt and equitable resolution of student and employee reports of sexual harassment and violence. Existing state law contains some further specifications about how California colleges and universities must handle such incidents. This bill would provide still greater detail about the obligations of California institutions of higher education. Its content borrows heavily from U.S. Department of Education guidelines issued during the Obama Administration and subsequently withdrawn under President Trump. The bill is also designed to be responsive to recent court decisions that have elaborated on respondents' rights within the context of campus-related sexual harassment and violence complaints.

The bill is sponsored by Equal Rights Advocates and the Women's Foundation of California, Women's Policy Institute. It is supported by women's and victims' rights advocates. Opposition is from parents of alleged perpetrators who assert that it does not sufficiently protect the rights of students accused of sexual harassment and sexual violence. The bill passed out of the Senate Education Committee by a vote of 6-0.

## **PROPOSED CHANGES TO THE LAW**

### Existing federal law:

- 1) States that no person in the U.S. shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance. (Title IX of the Education Amendments of 1972 to the Civil Rights Act of 1964; 20 U.S.C. § 1681 *et seq.*)
- 2) Mandates that recipients of federal financial assistance comply with the procedural requirements outlined in the Title IX implementing regulations. To do so, a recipient must: (1) disseminate a specified notice of nondiscrimination; (2) designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX; and (3) adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints. (34 C.F.R. §§ 106.9, 106.8(a), 106.8(b).)

### Existing state law:

- 1) Defines “sexual harassment” 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 work or 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; or
  - 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)
- 2) Requires each postsecondary educational institution in California to have a written policy on sexual harassment and to:
  - a) display the policy in a prominent location;
  - b) provide the policy to each faculty member, administrative staff, and support staff;
  - c) provide the policy as part of any orientation program for new students; and

- d) include the policy in any publication of the school that sets forth the rules, regulations, procedures, and standards of conduct. (Ed. Code § 66281.5.)
- 3) Requires the governing board of each community college district, the Trustees of the California State University, the Regents of the University of California, and the governing boards of independent postsecondary institutions to adopt policies concerning campus sexual violence, domestic violence, dating violence, and stalking that include:
- a) an affirmative consent standard;
  - b) detailed and victim-centered policies and protocols; and
  - c) the use of a preponderance of the evidence standard in determining whether the elements of the complaint against the respondent have been established sufficiently for consequences to be imposed on the respondent. (Ed. Code § 67386.)

This bill:

- 1) Makes a series of legislative findings regarding the prevalence of sexual harassment and sexual violence in the postsecondary educational setting and its short-term and long-term impacts on the ability of survivors to thrive in the educational setting and beyond.
- 2) Modifies the definition of “sexual harassment” to specifically include sexual battery, sexual violence, and sexual exploitation.
- 3) Defines “sexual violence” as physical sexual acts perpetrated against a person without the person’s consent, and provides that physical sexual acts include specified acts such as rape.
- 4) Defines “sexual battery” as it is currently defined in the Penal Code.
- 5) Defines “sexual exploitation” as taking sexual advantage of another person to 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 specified acts.
- 6) Requires the governing board or body of a campus of the University of California (UC), California State University (CSU), or California Community College (CCC), a private postsecondary educational institution, or an independent institution of higher education that receives state funds to adopt and follow specified policies for addressing sexual harassment and sexual violence that interferes with equal access to education as a condition of receiving state funds for student financial assistance.

- 7) Authorizes either the Attorney General or any person whose right to equitable access to a higher education institution, program, or activity was infringed as a result of a violation of this bill, to bring an action in court seeking redress in the form of injunctive relief, compensatory damages, court costs, and reasonable attorney's fees, for any of the following:
  - a) a failure to adopt the required policies;
  - b) a failure to adhere to the required policies despite adopting them; or
  - c) violation of any of the specified requirements in the bill by an act or actions of one of a higher education institution's 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.
- 8) Provides that all other civil remedies shall also be available to complainants and specifies that a complainant need not exhaust administrative complaint processes before pursuing such remedies.

### COMMENTS

#### 1. Data on the scope of the problem of sexual violence on campuses

There is ample evidence of an epidemic of sexual harassment and sexual violence taking place on higher education campuses, at locations connected with those campuses, and in the course of extracurricular activities associated with the campus. There is also strong evidence demonstrating how this epidemic negatively impacts survivors' ability to thrive and succeed in the educational setting. Because the overwhelming majority of victims are female and because other vulnerable populations, including LGBTQ individuals and people of color, are disproportionately impacted, addressing sexual harassment and violence in the educational context is not merely a public safety issue. It is also, fundamentally, a civil rights issue.

The following statistics offer a sense of the scope of the problem. Victims' stories, such as those provided through the Clap Back Project, speak to the human impact behind these numbers.<sup>1</sup>

##### *a. Evidence of scope of sexual harassment and sexual violence in the postsecondary educational context*

A research report prepared for the National Institute of Justice, and submitted to the U.S. Department of Justice, provides a statistical picture of the impacts of campus sexual assault. The report, entitled *The Campus Sexual Assault (CSA) Study*, collected data from two large public universities using web-based surveys collected from over

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<sup>1</sup> Meyerhoff, *The Clapback: An Investigation of the Sexual Assault and Rape Climate at Cal Poly San Luis Obispo* (2019) <https://the-clapback.com/> (as of Apr. 11, 2019).

5,466 undergraduate women and 1,375 undergraduate men. The report finds “13.7 percent of undergraduate women had been survivors<sup>2</sup> of at least one completed sexual assault since entering college: 4.7 percent were survivors of physically forced sexual assault,<sup>3</sup> 7.8 percent of women were sexually assaulted when they were incapacitated after voluntarily consuming drugs and/or alcohol,”<sup>4</sup> and an additional 0.6 percent were sexually assaulted when incapacitated after being involuntarily drugged.

Research findings indicate that 90 percent of campus rapes are committed by repeat offenders. Those offenders make up approximately six percent of men on campus.<sup>5</sup> The CSA Study found that only 0.6 percent of assailants committing acts of forcible sexual assault received disciplinary action from their university, and just 5.7 percent of assailants of forcible sexual assault were arrested, prosecuted, or convicted by the criminal justice system. Of the assailants committing an act of sexual assault on an incapacitated victim, a mere 0.8 percent were disciplined by the university, and only 0.4 percent were arrested, prosecuted, or convicted by the criminal justice system. A lack of enforcement of student code of conduct standards and state and federal law creates an unsafe environment for students on campus. This research suggests that if a student commits one sexual assault, there is a high likelihood the student is an ongoing risk to the campus community.

*b. Data regarding the negative impact of sexual harassment and sexual violence on educational opportunity*

The CSA Study also reported findings on the impacts of college sexual assault on a survivor’s health and safety. The study revealed that 22.1 percent of the survivors of forced sexual assault sought psychological counseling, 67.4 percent avoided or tried to avoid their assailant after the assault, 8.3 percent dropped a class, 1.2 percent changed a major, 3.1 percent changed universities, 11.5 percent moved residences, and 3.5 percent quit a job. Of the students who were survivors of sexual assault while incapacitated, 5.6 percent sought psychological counseling, 61.9 percent avoided or tried to avoid their assailant, 1.8 percent dropped a class, 0.8 percent changed a major, 1.5 percent changed universities, 1.5 percent moved their residence, and 0.2 percent quit a job.

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<sup>2</sup> The term “survivor” is sometimes used in this analysis; the word “victim” is sometimes used elsewhere, including in the relevant law. Use of the word survivor here is not intended to imply any legal distinction between the two terms.

<sup>3</sup> Sexual assault is, by definition, forced in all cases. The research on sexual assault uses the words “forced,” and “forcible” as modifiers for one type of sexual assault so as to distinguish it from sexual assault in which the person assaulted is incapacitated at the time of the assault. For purposes of consistency with the research only, this analysis uses the same terminology here.

<sup>4</sup> Krebs et al., *The Campus Sexual Assault (CSA) Study: Final Report (Document 221153)* (Oct. 2007) U.S. Department of Justice <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> (as of Apr. 21, 2019).

<sup>5</sup> Lisak and Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists* (2002) Violence and Victims, 17(1), 73-84 <https://www.davidlisak.com/wp-content/uploads/pdf/RepeatRapeinUndetectedRapists.pdf> (as of Apr. 21, 2019).

A 2016 study, meanwhile, estimated that 34 percent of student survivors of sexual harassment or violence dropped out of school.<sup>6</sup>

*c. Evidence of the disparate impact of sexual harassment and sexual violence on women, students of color, and LGBTQ students*

The author's office also points to research indicating that historically marginalized and underrepresented groups are more likely to experience sexual harassment. A 2016 study conducted by the Association of American Universities of over 150,000 students at 27 universities found that female students experienced the highest rates of sexual assault and misconduct, along with TQGN (transgender, genderqueer or non-conforming, questioning, or not listed on the survey) students.<sup>7</sup> Meanwhile, nearly 14 percent of gay or lesbian students reported experiencing a sexual assault while in college.<sup>8</sup>

A UC Berkeley campus survey revealed that "women, across all affiliate groups, are considerably more likely to report experiencing just about every form of SVSH [(sexual violence and sexual harassment)] than are men, and transgender participants are more likely than women or men to report experiencing most forms of SVSH, most notably sexual assault."<sup>9</sup> The study further found that among undergraduates, Latino participants reported the highest incidence of sexual harassment, stalking, and relationship violence, and African-American participants and participants of more than one race or ethnicity reported the highest incidence of sexual assault.<sup>10</sup>

Finally, according to a national study by the University of Pittsburgh, "gay, bisexual, and black men all had higher odds of being sexually assaulted than heterosexual and white men." Black women were more likely to be sexually assaulted than their peers. Among transgender students, black transgender students had a higher likelihood of being sexually assaulted."<sup>11</sup>

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<sup>6</sup> Mengo and Black, *Violence Victimization on College Campus: Impact on GPA and School Dropout* (2016) *Journal of College Student Retention: Research, Theory & Practice*, Vol. 18, Issue 2 <https://journals.sagepub.com/doi/abs/10.1177/1521025115584750?journalCode=csra&> (as of Apr. 11, 2019).

<sup>7</sup> David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, *Association of American Universities* (Sept. 2015, revised October 2017) <https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf> (as of Apr. 11, 2019) at pgs. 13-14.

<sup>8</sup> *Id.*

<sup>9</sup> Bartolone and Gebhart, *Final Report: University of California Berkeley MyVoice Survey* National Opinion Research Center at the University of Chicago [https://myvoice.berkeley.edu/lib/img/pdf/MyVoice\\_Final\\_Report\\_Publish.pdf](https://myvoice.berkeley.edu/lib/img/pdf/MyVoice_Final_Report_Publish.pdf) (as of Apr. 11, 2019) at pgs. 22-23.

<sup>10</sup> *Id.*

<sup>11</sup> Rankin et al, *Sexual Assault Victimization Disproportionately Affects Certain Minority College Students* (Mar. 27, 2017) University of Pittsburgh School of the Health Sciences [https://www.eurekalert.org/pub\\_releases/2017-03/uops-sav031617.php](https://www.eurekalert.org/pub_releases/2017-03/uops-sav031617.php) (as of Apr. 11, 2019).

## 2. Recent developments in this area of the law

The Legislature's consideration of this bill comes at a time in which court decisions and federal regulatory activity has shifted, and may continue to alter, the surrounding legal context. The resulting instability represents a particular challenge for the colleges and universities attempting to carry out Title IX's mandate. They have had to adjust and re-adjust their policies constantly in response.

### *a. Changes in federal guidance*

In an attempt to help curb the epidemic of sexual assault on campus, on April 4, 2011, the U.S. Department of Education's Office of Civil Rights (ED OCR) issued a "Dear Colleague" Letter setting forth a lengthy series of instructions about what policies and procedures educational institutions must follow to prevent and respond to incidents of sexual harassment and sexual violence in order to remain compliant with Title IX.<sup>12</sup> This bill draws a number of its provisions from that 2011 regulatory guidance.

In September 2017, not long after her appointment to head the ED by President Trump, current Education Secretary Betsy DeVos retracted the 2011 "Dear Colleague" Letter and began the rule-making process with an eye toward issuing a different set of regulations. Meanwhile, ED issued an interim set of Questions and Answers partially addressing the subjects covered in the April 2011 Guidance.<sup>13</sup>

Then, in November 2018, the ED issued a Notice of Proposed Rule Making (NPRM) in this area. Of particular note, the proposed regulations would, according to ED:

- require schools to apply basic due process protections for students, including a presumption of innocence throughout the grievance process; written notice of allegations and an equal opportunity to review all evidence collected; and the right to cross-examination, subject to "rape shield" protections;
- require colleges and universities to hold a live hearing where cross-examination would be conducted through the parties' advisors. Personal confrontation between the complainant and respondent would not be permitted;
- prohibit the use of "single investigator" or "investigator-only" models;
- define sexual harassment as unwelcome conduct on the basis of sex that is so severe, pervasive, *and* objectively offensive that it effectively denies a person equal access to the school's education program or activity.<sup>14</sup> (Emphasis added.)

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<sup>12</sup> See, *Dear Colleague Letter* (April 4, 2011) U.S. Department of Education <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html> (as of Apr. 21, 2019).

<sup>13</sup> See, *Q&A on Campus Sexual Misconduct* (Sep. 2017) U.S. Department of Education <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> (as of Apr. 21, 2019).

<sup>14</sup> See, *Secretary DeVos: Proposed Title IX Rule Provides Clarity for Schools, Support for Survivors, and Due Process Rights for All* (Nov. 16, 2018) U.S. Department of Education <https://www.ed.gov/news/press->



The proposed federal regulations can be criticized on a number of grounds. First and foremost, they implicitly equate Title IX hearings with criminal cases. Title IX hearings are different from criminal proceedings in multiple ways. To begin with, Title IX hearings are civil matters. While the consequences for everyone involved are serious and long-term, nobody will be imprisoned as the result of a Title IX hearing. In addition, Title IX hearings are administrative in nature, meaning that less formality is to be expected. Finally, Title IX hearings take place in the educational setting, not in a courtroom. The participants are students, faculty, and administrators, rather than lawyers and judges, and the process is supposed to take that difference into account.

Second, the proposed federal regulations seem to be especially preoccupied with protecting the alleged perpetrator against the possibility of a false accusation. Less weight seems to be given to what happens to victims, and the campus community more generally, if perpetrators are not held accountable. Relatedly, by focusing on the individual parties' interest, the federal regulations give short shrift to the broader public interest at stake. As with any civil rights law, Title IX is not just about resolving disputes among individuals. Its greater purpose is to try to ensure equal access to educational opportunity for all.

Finally, the proposed federal regulations seem to impose a legal standard for sexual harassment that is considerably higher than the one used in most civil rights contexts. Whereas most sexual harassment cases are decided based on a "severe or pervasive" standard, the proposed federal regulations only consider unwelcome sexual conduct to be harassment if it is severe, pervasive, *and* objectively offensive. This standard tilts the scales significantly in favor of harassers over victims.

The proposed federal regulations have been controversial since they became public. The NPRM received over 106,000 public comments responding to the regulations, including letters from both the UC and the CSU systems outlining the complications and difficulties the proposed regulations would pose.<sup>15</sup>

ED is now in the process of reviewing and responding to the large quantity of comments received something it must complete before the proposed regulations can be finalized and adopted. It is not clear exactly how long this will take, but it could be up to a year or more. In the event that the proposed regulations are adopted without

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[releases/secretary-devos-proposed-title-ix-rule-provides-clarity-schools-support-survivors-and-due-process-rights-all](#) (as of Apr. 19, 2019).

<sup>15</sup> CSU Comment to the NPRM, Docket ID ED-2018-OCR-0064 (January 29, 2019)

[https://www.sfchronicle.com/file/375/4/3754-](https://www.sfchronicle.com/file/375/4/3754-Chancellor%20White%20ltr%20DeVos%20Betsy%20NPRM%20-%20Title%20IX%201-29-19.pdf)

[Chancellor%20White%20ltr%20DeVos%20Betsy%20NPRM%20-%20Title%20IX%201-29-19.pdf](#) (as of Apr. 21, 2019); UC Comment to the NPRM, Docket ID ED-2018-CR-0064 (January 28, 2019)

<https://sexualviolence.universityofcalifornia.edu/files/documents/uc-title-ix-letter.pdf> (as of Apr. 21, 2019).



significant alterations, a number of organizations have indicated their intent to sue to halt their implementation.

As the proposed regulations are not yet law, they have no preemptive effect on this bill unless and until they are formally adopted. If that happens, any elements of this bill that are in conflict with the proposed regulations might preempted from that point forward. In the meantime, given her strong disagreement with the proposed federal regulation's interpretation of Title IX, the author has chosen a different path.

*b. Court decisions*

In the past year, a flurry of court rulings have been handed down elaborating on the "fair hearing" and due process rights of students in Title IX cases. Fair hearing rights apply to private academic institutions, while due process rights apply at public institutions.

In general, these decisions can be characterized as emphasizing that students responding to allegations of sexual harassment or violence are entitled to significant procedural protections even in spite of the fact that a Title IX hearing is civil and administrative in nature.

The most significant of these rulings was *Doe v. Allee* (2019) 30 Cal.App.5th 1036. In that case, the court set aside the expulsion of a student accused of sexual assault. The court heavily criticized the higher education institution's procedures for handling complaints of sexual assault and laid down the following minimal standard:

we hold that when a student accused of sexual misconduct faces severe disciplinary sanctions, and the credibility of witnesses (whether the accusing student, other witnesses, or both) is central to the adjudication of the allegation, fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross-examine those witnesses, directly or indirectly, at a hearing in which the witnesses appear in person or by other means (such as means provided by technology like videoconferencing) before a neutral adjudicator with the power independently to find facts and make credibility assessments. (*Doe v. Allee* (2019) 30 Cal.App.5th 1036, 1039.)

Unlike the proposed federal regulations, these court rulings are binding on California now. As discussed later in these Comments, refinements to the bill may, in some instances, help to ensure that it could not be misinterpreted to conflict with any aspect of those decisions.

3. Report from former Governor Jerry Brown's working group

In many ways, this bill follows in the footsteps of SB 169, Senator Jackson's 2017 bill that also sought to codify many elements of ED's 2011 "Dear Colleague" Letter. Then Governor Brown vetoed SB 169. He wrote that the issue deserved further thought and he convened a working group to present recommendations. That working group issued its findings on November 14, 2018.

Most of the working group's findings are consistent with this bill. For example, among other things, the governor's working group embraced the focus on sexual misconduct as involving both sexual harassment and sexual violence, the importance of training on trauma-informed investigatory practices, the use of the preponderance of the evidence standard, the right to legal counsel if desired, and the importance of ensuring that any cross-examination is conducted indirectly.

There are differences between some nuances of the working group's recommendations and some nuances of the content of this bill. For example, while the governor's working group embraced the preponderance of the evidence standard, it describes that standard as requiring "persuasive, relevant, and substantial" evidence, whereas the bill uses the more traditional explanation that preponderance of the evidence means "more likely than not." Similarly, while both the governor's working group and the bill emphasize that investigations must be impartial, and both endorse the importance of trauma-informed investigatory methods, the governor's working group also explicitly states that trauma-informed investigatory methods should not be used to undermine the impartiality of the investigation, whereas the bill assumes that such methods, used properly, enhance truth-finding and impartiality. It appears to be on the basis of such nuances that the opponents of this bill contend that it "ignores" the working group's recommendations.

4. Key legal aspects of the bill

The shifting legal context and the differing perspectives on Title IX enforcement discussed in the preceding Comments play out throughout this bill. In some cases, practical or legal considerations mean that the bill's existing language could be further clarified, and the author proposes to incorporate a number of amendments to do so. (See Comment 4, below.) In addition, there are ongoing discussions between the author and representatives of California's higher education institutions in an effort to ensure that this bill is respectful of their efforts to eradicate sexual harassment and sexual violence that impacts their campus communities.

The key policy issues in the bill are addressed in turn, below:

*a. The campus nexus issue*

The bill in print states that higher education institutions must process complaints of sexual harassment or sexual violence, regardless of where the incident occurred. Similarly, the bill states that a higher education institution has a duty to take action in response to sexual harassment that could create a hostile environment on campus, whether the harassment took place on campus or off campus.

While there is consensus that Title IX does require higher education institutions to respond to incidents taking place off campus in some cases, the current language in the bill has raised some concern. Interpreted broadly, it could be read as suggesting that a higher education institution has a duty to investigate essentially any incident involving sexual harassment anywhere in the vicinity of the school or involving two people affiliated with the institution. Such a mandate would be difficult for higher education institutions to carry out and goes beyond what Title IX requires. Instead, there is general agreement that the key issue is whether off-campus incidents have a nexus to what happens on campus. In other words, will what took place off campus impact the ability of the people involved to access the educational opportunities that the institution offers? The key is finding a way to describe this nexus in a way that protects students, gives good guidance to the higher education institutions, and limits the likelihood of disputes.

To try to respond to this challenge, the author proposes to amend these sections of the bill to make the nexus requirement more explicit. To help clarify the meaning of the nexus requirement, the amendment pulls from language in a Tenth Circuit case involving incidents of sexual assault that took place at off-campus fraternity houses. (*Farmer, et. al. v. Kansas State University* (10th Cir., No. 17-3207) (March 18, 2019).) The higher education institution in question refused to take responsive action to these incidents on the ground that no subsequent incidents had taken place on campus. The court disagreed with this reasoning and held that higher education institutions have a duty to take action where an off-campus incident is grave enough and the likelihood that the victim will encounter the assailant on campus is high enough, that inaction would result in depriving the victim of equal access to educational opportunity. (*Id.* at p. 21.) The proposed amendment incorporates this standard.

*b. Cross-examination*

The bill in print states that parties to a campus sexual harassment or sexual violence proceeding shall not be subjected to any form of direct, live cross-examination from the other party or the other party's advisor. This aspect of the bill reflects the fact that, as a civil, administrative process, Title IX grievance proceedings are not like a criminal court. It also reflects what is arguably a healthy skepticism about the virtues of

unfettered cross-examination. Judges sometimes display a nearly worshipful devotion to the supposed power of cross-examination to elicit the truth.<sup>16</sup> In the process, they may fail to give full consideration to the possibility that unbridled cross-examination can intimidate, shame, and re-traumatize survivors of sexual harassment or sexual violence. The prospect of enduring cross-examination that is repetitive, harassing, or disrespectful could actually serve to dissuade some victims from coming forward to confront their assailants. Quite the opposite of eliciting the truth, therefore, unconstrained cross-examination could play a role in *burying* it.

Nonetheless, as previously discussed, the courts have ruled that live cross-examination before a neutral adjudicator must be allowed in order for a campus grievance procedure to meet the fair hearing standard. (*Doe v. Allee* (2019) 30 Cal.App.5th 1036, 1039.). Thus, the language in the existing bill may need further clarification so as to detail exactly what form of cross-examination would be permissible. The *Allee* decision makes clear that the required cross-examination need not be direct, and that witnesses may request to testify by live feed video from another room. The *Allee* decision is silent on the role that the neutral adjudicator is to have in the cross-examination process, but given that even judges sitting in a criminal matter have the authority to intervene to avoid duplicative, harassing, argumentative, or otherwise inappropriate questioning, it seems entirely consistent with the civil rights purpose of Title IX that the neutral adjudicator would have similar or perhaps even stronger authority to prevent both respondents and complainants from using the cross-examination process for purposes of harassment or intimidation.

With all of this in mind, the author proposes to amend the bill to provide for live, indirect cross-examination through the submission of written questions to the neutral adjudicator, who shall then pose the questions to the witnesses. The neutral adjudicator would be empowered, much like a judge in a courtroom, to strike or rephrase questions that are duplicative, harassing, or irrelevant. The process would also allow for the submission of follow-up questions. Such cross-examination would be consistent with *Allee* as well as the recommendations of Governor Brown's working group. It would allow all parties to question one another in a fair, impartial, and respectful manner, without permitting the process to devolve into an abusive or traumatic experience for anyone.

### *c. Separation of investigatory and adjudicatory functions*

Another key aspect of the *Allee* decision was its clear statement that a Title IX investigator cannot also serve in the role of deciding the outcome of a Title IX complaint. The bill in print makes it plain that both the investigator and the adjudicator must be impartial, but it does not currently state anywhere that the roles must be

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<sup>16</sup> See, e.g., *Doe v. Allee* (2019) 30 Cal.App.5th 1036, 1065-1066 (referring to cross-examination as, among other things, "the greatest legal engine ever invented for the discovery of truth.")

separated. To ensure that the bill could not be misinterpreted to conflict with *Allee*, the author proposes to amend the bill to require separation of the investigatory and adjudicatory roles. This would also be consistent with the recommendations of Governor Brown's working group.

*d. Exhaustion of administrative remedies*

In addition to authorizing enforcement by the Attorney General, the bill contains a private right of action, meaning that individuals who have had their rights under the bill violated could file suit in court seeking redress against the higher education institution responsible.

The higher education institutions in California that have weighed in on the bill are united in their concern over this private right of action. It is probably fair to describe this element of the bill as their primary worry about the bill. The higher education institutions assert that, in the context of requirements that are extensive and that may be open to interpretation in some instances, the private right of action could result in an enormous amount of litigation against them.

In response, the proponents of the bill point out that Title IX itself may be enforced through a private right of action, so it may not be so unreasonable to propose an equivalent remedy for violations of this bill. After all, the bill is in many ways just a more detailed explanation of what Title IX requires. The private right of action aspect of the bill will likely remain a source of contention and conversation assuming the bill advances.

In the meantime, there may be room to eliminate misunderstandings about the proposed private right of action. Specifically, as the bill reads currently, it is not to be construed to require exhaustion of "the administrative complaint process" before an individual plaintiff may pursue civil law remedies. The proponents of the bill intend this provision to mirror Title IX in the sense of not requiring individual plaintiffs to exhaust the ED's administrative civil rights enforcement process or any state equivalent before proceeding to court. Some stakeholders, however, have read the provision to mean that people could sue a higher education institution under the bill without even bothering to go through the campus grievance procedures.

In response to this potential for misinterpretation of the intent behind the bill, the author proposes to remove the reference to "the administrative complaint process." This would not mean that aggrieved parties would be stuck going through a grievance procedure that did not comply with the requirements of this bill. In such a situation, the aggrieved party could seek civil remedies in court right away. It should, however, alleviate the concern that aggrieved parties might simply skip the campus grievance procedure altogether and proceed directly to court, even if the grievance procedure was fully compliant with this bill.

5. Proposed amendments

In order to address the issues set forth in the Comments, above, the author proposes to incorporate amendments into the bill that would, among other things:

- clarify when a higher education institution has a duty to respond to incidents of sexual harassment and sexual violence taking place off campus;
- specify that the campus grievance procedure must separate the investigator and adjudicator roles;
- require live, indirect cross-examination before a neutral adjudicator with specified safeguards against the use of cross-examination for purposes of intimidation or harassment; and
- modify the requirements relating to the provision of a list of attorneys and other resources available to complainants and respondents.

The specific amendments are as follows:

Amendment 1

In the header, after “Jackson” insert:

(Coauthor: Senator Mitchell)

(Coauthors: Assembly Members Bauer-Kahan, Limón and Petrie-Norris)

Amendment 2

On page 3, in line 30, strike out “by themselves” and after “probative” insert:

by themselves

Amendment 3

On page 4, in line 26, strike out “acknowledges” and insert:  
notes

Amendment 4

On page 4, in line 29, after “proceeding.” insert:

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.

Amendment 5

On page 5, in line 11, strike out “consent.” and insert:  
affirmative consent, as defined in section 67386(a)(1).

Amendment 6

On page 5, in line 12, after “give” insert:  
affirmative

Amendment 7

On page 5, in line 25, after “regardless” insert:  
of

Amendment 8

On page 5, in line 28, strike out “prostituting of another person”  
and insert:  
trafficking of another person, as defined in Penal Code section  
236.1, without that person’s consent.

Amendment 9

On page 5, in line 31, strike out “nakedness.” and insert:  
nakedness, without that person’s consent.

Amendment 10

On page 5, in line 36, strike out “disclosure and objected to the”

Amendment 11

On page 6, in line 17, strike out “each higher”, strike out lines 18 to  
20 inclusive, and insert:  
each:

- (A) employee of the higher education institution;
- (B) volunteer who will interact with student more than ten hours in  
a calendar year; and
- (C) individual under contract with the higher education institution  
to perform any service at the institution.

Amendment 12

On page 6, strike out lines 32 to 40, inclusive

Amendment 13

On page 7, strike out lines 1 and 2

Amendment 14

On page 7, in line 3, strike out “(B)” and insert:  
(A)

Amendment 15

On page 7, in line 10, strike out “(B)” and insert:



(C)

Amendment 16

On page 7, in line 14, strike out “on a schoolbus,” and insert:  
during travel,

Amendment 17

On page 7, strike out lines 16 to 25, inclusive, and insert:

(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.

Amendment 18

On page 7, in line 26, strike out “(E)” and insert:

(D)

Amendment 19

On page 7, in line 28, strike out “determine whether to”

Amendment 20

On page 8, after line 5, insert:

(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 live hearing before a neutral adjudicator with the power independently to find facts and make credibility assessments.

Amendment 21

On page 8, in line 6, strike out “(C)” and insert:

(E)

Amendment 22

On page 8, after line 8, insert:

(F) They shall provide both parties the opportunity, during the hearing, to cross examination 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 who 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, follow up 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."

Amendment 23

On page 8, in line 9, strike out "(D)" and insert:

(G)

Amendment 24

On page 8, in line 14, strike out "(E) They shall determine the timeframes" and insert:

(H) They shall determine a reasonably prompt timeframe

Amendment 25

On page 8, in line 15, strike out the second "the" and insert:

a

Amendment 26

On page 8, in line 16, strike out "timelines," and insert:  
timeline for good cause only,

Amendment 27

On page 8, in line 27, strike out "(F)" and insert:

(I)

Amendment 28

On page 8, in line 30, strike out “(G)” and insert:  
(J)

Amendment 29

On page 8, in line 36, strike out “(H)” and insert:  
(K)

Amendment 30

On page 9, in line 1, strike out “(I)” and insert:  
(L)

Amendment 31

On page 9, in line 4, strike out “(J)” and insert:  
(M)

Amendment 32

On page 9, strike out lines 39 and 40

Amendment 33

On page 10, in line 1, strike out “an attorney advocates list” and insert:  
a notice regarding appropriate legal and counseling resources

Amendment 34

On page 10, in line 3, strike out “assault” and insert:  
violence

Amendment 35

On page 10, strike out lines 5 to 23, inclusive, and insert:

(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 continue 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.

Amendment 36

On page 11, after line 8, insert:

(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.

(O) 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:

(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.

Amendment 37

On page 11, in line 25, strike out “and victim centered” and insert: investigatory and hearing practices that help ensure an impartial and equitable process,

Amendment 38

On page 11, in line 27, strike out “complaint and” and insert: complaint, best practices for

Amendment 39

On page 11, in line 32, strike out “data-based information” and insert: statistics

Amendment 40

On page 11, in lines 33 and 34, strike out “assault in education, the rate of accuracy in reporting by complainants,” and insert: sexual violence in the educational setting,

Amendment 41

On page 11, in lines 36 to 38, strike out “on campus to ensure that campus procedures are grounded in best practices.” and insert: in the educational setting.

Amendment 42

On page 11, in line 38, strike out “data” and insert: statistics

Amendment 43

On page 12, in line 3, strike out “trauma-informed training for handling” and insert: training on trauma-informed handling of

Amendment 44

On page 12, strike out lines 7 to 40, inclusive

Amendment 45

On page 13, strike out lines 1 to 6, inclusive

Amendment 46

On page 13, in line 26, strike out “General.” and insert: General, consistent with the Attorney General’s existing authority under Cal. Const., art V., § 13 and Gov. Code § 1180 et seq 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.

Amendment 47

On page 13, in line 34, strike out “either” and insert:  
any

Amendment 48

On page 13, in line 18, strike out “Nothing in this” and strike out lines 19 to 21, inclusive.

6. Arguments in support of the bill

According to the author:

Title IX of the Education Amendments of 1972 (20 U.S.C. Sec. 1681 et seq.) prohibits sex discrimination in educational programs and activities. Title IX protections apply to all schools, public and private, that receive federal funding, including K-12 and postsecondary schools. Existing California law already requires higher education institutions that receive state funding to incorporate trauma-informed policies when addressing sexual assault, domestic and dating violence, and stalking involving students, both on and off campus.

Senate Bill 493 would amend the California Education Code to enumerate necessary requirements for schools to follow when responding to reports of sexual assault and harassment.

As sponsor of the bill, Equal Rights Advocates and the Women’s Foundation of California, Women’s Policy Institute write:

It has been widely studied and documented that sexual harassment, including sexual assault, on college and university campuses is rampant. Students who experience sexual harassment and/or assault suffer not only physically and emotionally, but also in their right to equitable access to education, as required by law. It is therefore critical that schools have appropriate policies and procedures in place to prevent and respond to such incidents, that the processes for reporting and addressing claims of sexual harassment and assault are clear and straightforward, and that the processes and standards for investigating and adjudicating such complaints are clear, transparent, and fair for all students involved.

7. Arguments in opposition to the bill

In opposition to the bill, Stop Abusive and Violent Environments writes:

SB 493 is designed to resurrect due process-eroding policies like those vetoed in SB 169, thus undermining accuracy and reliability in campus decision-making [...]. SB 493 ignores California's experts recommendations, heedlessly tramples CCP §1094.5(b)'s requisite fair hearing process, and repudiates several thoughtful and reasoned California Court of Appeal decisions [...]. Recent appellate and lower courts in California have held that robust procedural protections such as live hearings, cross-examination, and impartial decision-makers are essential when students are facing suspension or expulsion for sexual misconduct [...]. California lawmakers must reject SB 493's effort to eliminate equitable and due process procedures that are precisely designed to maximize the likelihood of accurate and reliable decision making.

In further opposition to the bill, Families Advocating for Campus Equality writes:

Please take off your political hat and open your eyes to what's happening to innocent students who could be your sons and daughters – because doing what's right no longer protects you in this scary 'accusation = guilt' world – teenagers and young adults who've lost faith in our justice system, are emotionally destroyed and their lives permanently and irrevocably changed because of a seriously flawed process with a 30 percent likelihood of error.

**SUPPORT**

Equal Rights Advocates (sponsor)

Women's Foundation of California, Women's Policy Institute (sponsor)

Alliance of Californians for Community Empowerment

American Association of University Women of California

Asian Americans Advancing Justice, California

California Association for Health, Physical Education, Recreation and Dance

California Commission on the Status of Women

California Partnership to End Domestic Violence

California Women's Law Center

Child Care Law Center

Children's Defense Fund - California

The Cooperative Restraining Order Clinic

Courage Campaign

Empowering Pacific Islander Communities



End Rape on Campus  
End Violence Against Women International  
Family Violence Law Center  
Girls, Inc.  
Motivating Individual Leadership for Public Advancement  
National Association of Social Workers, California Chapter  
National Women's Law Center  
National Women's Political Caucus  
Nancy O'Malley, District Attorney, Alameda County  
Nevada County Citizens for Choice  
Peace Over Violence  
Public Counsel  
Santa Barbara Women's Political Committee  
United Food and Commercial Workers, Western States Council  
Ten individuals

### **OPPOSITION**

Families Advocating for Campus Equality  
Stop Abusive and Violent Environments  
Three individuals

### **RELATED LEGISLATION**

Pending Legislation: None known

Prior Legislation:

SB 169 (Jackson, 2017) was substantially similar to this bill, but would also have applied to K-12 educational institutions. In his message vetoing SB 169, then Governor Jerry Brown wrote: "Given the strong state of our laws already, I am not prepared to codify additional requirements in reaction to a shifting federal landscape, when we haven't yet ascertained the full impact of what we recently enacted. We have no insight into how many formal investigations result in expulsion, what circumstances lead to expulsion, or whether there is disproportionate impact on race or ethnicity. We may need more statutory requirements than what this bill contemplates. We may need fewer. Or still yet, we may need simply to fine tune what we have." Governor Brown went on to ask a group of experts to study the matter.

SB 1375 (Jackson, Chapter 655, Statutes of 2016) required all schools receiving federal funding post the following information on their website: the name and contact information of their Title IX Coordinator; the rights of a pupil and the public, and the responsibilities of the school under Title IX; a description of how to file a complaint under Title IX. SB 1375 also required the State Superintendent of Public Instruction to electronically send an annual letter to all schools notifying them of this responsibility.

SB 1435 (Jackson, Chapter 633, Statutes of 2016) requested that the “Health Framework for California Public Schools” include comprehensive information on the development of healthy relationships and be age and developmentally appropriate.

AB 2654 (Bonilla, Chapter 107, Statutes of 2016) required postsecondary educational institutions to post their written policy on sexual harassment on their websites. AB 2654 also required the policy to include information on the complaint process and the timeline for the complaint process. The policy must include information on where to obtain the specific rules and procedures for pursuing available remedies and resources, both on and off campus.

SB 186 (Jackson, Chapter 232, Statutes of 2015) enabled the governing board of a California community college district to exercise jurisdiction over student conduct that occurs off district property in cases of sexual assault and sexual exploitation, regardless of the victim’s affiliation with the college.

SB 665 (Block, 2015) would have required the Attorney General to establish a statewide Title IX Oversight Office, required postsecondary educational institutions to report specific data to this office and required each student to complete training on rape and sexual assault awareness and prevention annually. SB 665 was held in the Senate Appropriations Committee.

SB 695 (De León, Chapter 424, Statutes of 2015) required K-12 school districts that require completion of a course in health education as a condition of high school graduation to include instruction in sexual assault and violence.

SB 967 (DeLeón, Chapter 748, Statutes of 2014) required the governing boards of California community college districts, the Trustees of the California State University system, and the Regents of the University of California, as well as the governing boards of independent postsecondary institutions in California to adopt victim-centered sexual assault, domestic violence, dating violence, and stalking policies as a condition of receiving state funds for student financial assistance.

AB 1433 (Gatto, Chapter 798, Statutes of 2014) required all California campuses to have policies in place to ensure immediate reporting and disclosure to law enforcement.

AB 3133 (Roos, Chapter 1117, Statutes of 1982) enacted the Sex Equity in Education Act, which, similar to its federal Title IX counterpart, prohibits discrimination in California schools on the basis of sex.

**PRIOR VOTES:**

Senate Education Committee (Ayes 6, Noes 0)

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