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Driving Down the 493:

A Deep Dive into SB 493, Education Code 66281.8 and the Overlap with Title IX

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Meet Your Facilitators

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Agenda

1. An overview of SB 493, California FEHA, California court cases, and their intersection with the 2020 Title IX Final Rule;
2. How to procedurally resolve inconsistencies between SB 493 and Title IX Rule and ensure that that you are meeting obligations;
3. Steps for analyzing how a set of facts is covered and which laws apply;
4. An interactive discussion that will highlight unique complexities to help institutions foresee compliance challenges; and
5. Questions and answers.

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Learning Outcomes

Understand:

- The sources of legal requirements for processing claims of sexual harassment and sexual violence in California.
- How to apply these requirements when conducting an investigation or hearing.

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SOURCES OF LEGAL REQUIREMENTS

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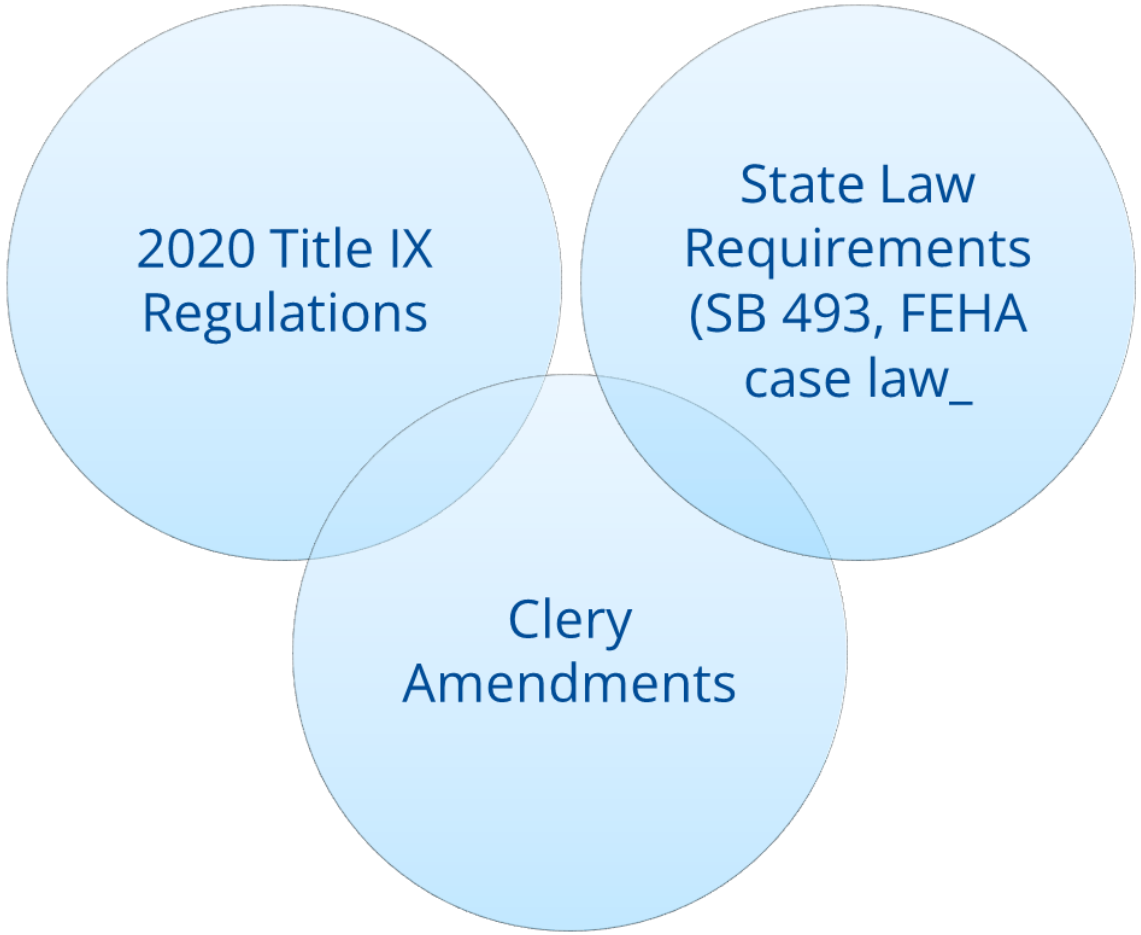
Sources of Legal Requirements in CA



GENERAL REQUIREMENTS UNDER SB 493 (Education Code 66281.8)

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SB 493

Scope of SB 493's Requirements

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

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SB 493

General Requirements

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

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SB 493

And Title IX

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

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SB 493

Notice and Training

- Notice to all students
  - Policies
- Notice to all faculty and staff
  - Policies
  - Obligations to report (where a Responsible EE)
  - Identifying sexual harassment and to whom it should be reported
- Notice to all volunteers
  - Policies
  - Some thoughts
  - An assignment
- Notice to all vendors
  - Policies
  - Some thoughts
  - An assignment

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SB 493

Notice and Training

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

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DEFINITIONS OF PROHIBITED CONDUCT UNDER SB 493

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Covered SB 493 Violations

- **Sexual harassment:**

  Unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting, under any of the following conditions:

  (a) Submission to the conduct is explicitly or implicitly made a term or a condition of an individual's employment, academic status, or progress.

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Covered SB 493 Violations

- **Sexual harassment:**

  Unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting, under any of the following conditions:

  (b) Submission to, or rejection of, the conduct by the individual is used as the basis of employment or academic decisions affecting the individual.

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Covered SB 493 Violations

- **Sexual harassment:**

  Unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting, under any of the following conditions:

  (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.

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Covered SB 493 Violations

- **Sexual harassment:**

  Unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting, under any of the following conditions:

  (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.

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Covered SB 493 Violations

- **Sexual violence**
  - Physical sexual acts perpetrated against a person without the person's affirmative consent, including:
    - **Rape,** defined as penetration, no matter how slight, of the vagina or anus with any part or object, or oral copulation of a sex organ by another person, without the consent of the victim.

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Covered SB 493 Violations

- **Sexual violence**
  - Physical sexual acts perpetrated against a person without the person's affirmative consent, including:
    - **"Sexual battery"** means the intentional touching of another person's intimate parts without consent, intentionally causing a person to touch the intimate parts of another without consent, or using a person's own intimate part to intentionally touch another person's body without consent.

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Covered SB 493 Violations

- **Sexual violence**
  - Physical sexual acts perpetrated against a person without the person's affirmative consent, including:
    - **"Sexual exploitation"** means a person taking sexual advantage of another person for the benefit of anyone other than that person without that person's consent, including, but not limited to, any of the following acts:
      - (A) The prostituting of another person.
      - (B) The trafficking of another person.

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Covered SB 493 Violations

- **Sexual violence**
  - Physical sexual acts perpetrated against a person without the person's affirmative consent, including:
    - **"Sexual exploitation"** means a person taking sexual advantage of another person for the benefit of anyone other than that person without that person's consent, including, but not limited to, any of the following acts:
      - (C) The recording of images, including video or photograph, or audio of another person's sexual activity or intimate parts, without that person's consent.
      - (D) The distribution of [such] images, if the individual distributing the images or audio knows or should have known that the person depicted in the images or audio did not consent to the disclosure.
      - (E) The viewing of another person's sexual activity or intimate parts, in a place where that other person would have a reasonable expectation of privacy, without that person's consent, for the purpose of arousing or gratifying sexual desire.

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SB 493

& Title IX

- Compare to Title IX
  - Sexual harassment quid pro quo
  - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's education program or activity
  - Clery crimes
    - Domestic violence
    - Dating violence
    - Sexual assault
    - Stalking
- SB 493 covers a wider range of behavior to protect students;
- FEHA covers a wider range of behavior to protect employees.

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RESPONSIBLE EMPLOYEES UNDER SB 493

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Responsible Employee

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

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

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SB 493

& Title IX

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

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INTERIM MEASURES AND NO-CONTACT ORDERS

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SB 493 No Contact Orders

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

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SB 493

& Title IX

- Mutual versus one way NCO

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

- So…

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SB 493 GRIEVANCE PROCEDURES (GENERAL REQUIREMENTS AND SCENARIO)

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SB 493 Grievance Process

General principles:

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

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SB 493 Grievance Process

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

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Investigations or Hearing?

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

Scenario

- Which allegations are covered under Title IX? Only SB 493?
  - Sexual Assault
  - Sexual Exploitation
  - Sexual Harassment

- At what point was the University put on notice of Cirkel's allegations? Do we need more information?
  - Title IX
  - SB 493

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SB 493 GRIEVANCE PROCEDURES (EVIDENTIARY RULES)

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SB 493 Grievance Process:

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

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SB 493 Grievance Process

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

SB 493 Grievance Process

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

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SB 493

& Title IX

- Compare SB 493 provisions on past sexual history to Title IX “rape shield law”
- Title IX covers complainant’s past sexual history (ED declined to apply it to respondents)
- Questions deemed not relevant, unless:
  - Offered to prove that another person committed the conduct; or
  - Specific incidents used to prove consent (this does not allow for evidence of sexual history with another person beside the accused).

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SB 493 GRIEVANCE PROCEDURES (NOTICES & PROCEDURAL RIGHTS)

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SB 493 Grievance Process:

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

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SB 493 Grievance Process:

- Outline possible:
  - Interim measures during an investigation
  - Supportive measures in absence of investigation
  - Disciplinary outcomes, remedial measures, and systemic outcomes following final finding of responsibility

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SB 493 Grievance Process:

- Respect confidentiality unless reason to overcome:
  - Multiple report against respondent
  - Use of weapon, physical restraints, or battery
  - Respondent is faculty or staff with student oversight
  - Power imbalance
  - Complainant believes they will be less safe if their name is disclosed or investigation conducted
  - Institution can investigate without complainant participating

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SB 493 Grievance Process:

When honoring requests for confidentiality:

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

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Scenario

- No Contact Orders
  - How might you respond to Cirkel's request?
  - Is there a need to reevaluate this response at some point?
- Prior Sexual History
  - How would you address Cirkel's request to introduce new evidence of Rabalder's prior conduct under Title IX? SB 493?

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SB 493 GRIEVANCE PROCEDURES (INFORMAL RESOLUTION RULES)

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SB 493 Grievance Process

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

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Scenario

- How would you evaluate Rabalder's 75-page response to the evidence?
  - Title IX
  - SB 493

- How would you evaluate Cirkel's eve-of-hearing submission of screenshots?

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SB 493 GRIEVANCE PROCEDURES

(CONDUCTING A HEARING)

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SB 493 Grievance Procedures

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

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SB 493 Grievance Process

At hearings:

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

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SB 493

& Title IX

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

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SB 493 GRIEVANCE PROCEDURES (APPEALS)

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SB 493 Grievance Process

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

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SB 493

& Title IX

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

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SB 493

& Title IX

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

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Scenario

- What if Cirkel had alleged conduct that was solely covered by SB 493?
  - Is a hearing required under SB 493? *Doe v. Allee*?
- What if Trost participated during the investigation, but did not show up for the hearing?
  - Can the Hearing Officer rely on her statements under Title IX? SB 493? Doe v. Allee?

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Questions & Answers

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