

State and Federal Laws Governing Mandatory Campus Sexual Assault Protocols and Procedures¹

I. California Law

California law² requires that in order to receive state funds for student financial assistance, the college (private or public) must adopt a policy concerning:

- sexual assault
- domestic violence
- dating violence
- stalking

as these are defined in the federal Higher Education Act of 1965 (20 U.S. C. § 1092(f).) The policy must address designated incidents against students that occur on or off campus.

The college must also enter into a memorandum of understanding with existing on-campus and community-based organizations, including rape crisis centers. Campuses must refer students to services or make services available to students, for counseling, health, mental health, survivor³ advocacy, legal assistance, and resources for the accused.

A. Policy Components of Campus Policy

The college must adopt a detailed and survivor-centered policy that, at a minimum, covers the following:

(1) A policy statement on how the institution will provide appropriate protections for the privacy of individuals involved,

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² Cal. Ed. Code, § 67385-67386.

³Survivors are no longer referred to as "victims."

including confidentiality. (Ed. Code, § 67386(b)(1).)

(2) Initial response by the institution's personnel to a report of an incident, including requirements specific to assisting the survivor, providing information in writing about the importance of preserving evidence, and the identification and location of witnesses. (Ed. Code, § 67386(b)(2).)

(3) Response to stranger and non-stranger sexual assault. (Ed. Code, § 67386(b)(3).)

(4) The preliminary survivor interview, including the development of a survivor interview protocol, and a comprehensive follow-up survivor interview, as appropriate. (Ed. Code, § 67386(b)(4).)

(5) Contacting and interviewing the accused. (Ed. Code, § 67386(b)(5).)

(6) Seeking the identification and location of witnesses. (Ed. Code, § 67386(b)(6).)

(7) Providing written notification to the survivor about the availability of, and contact information for, on- and off-campus resources and services, and coordination with law enforcement, as appropriate. Ed. Code, § 67386(b)(7).)

(8) Participation of survivor advocates and other supporting people. Ed. Code, § 67386(b)(8).)

(9) Investigating allegations that alcohol or drugs were involved

in the incident. Ed. Code, § 67386(b)(9).)

(10) Providing that an individual who participates as a complainant or witness in an investigation of sexual assault, domestic violence, dating violence, or stalking will not be subject to disciplinary sanctions for a violation of the institution's student conduct policy at or near the time of the incident, unless the institution determines that the violation was egregious, including, but not limited to, an action that places the health or safety of any other person at risk or involves plagiarism, cheating, or academic dishonesty. Ed. Code, § 67386(b)(10.)

(11) The role of the institutional staff supervision. Ed. Code, § 67386(b)(11).)

(12) A comprehensive, trauma-informed training program for campus officials involved in investigating and adjudicating sexual assault, domestic violence, dating violence, and stalking cases. Ed. Code, § 67386(b)(12).)

(13) Procedures for confidential reporting by survivors and third parties. Ed. Code, § 67386(b)(13).)

B. Outreach Programming

California law also requires that the college, in order to receive state funds for student financial assistance, implement comprehensive prevention and outreach programs addressing sexual violence, domestic

violence, dating violence and stalking. Outreach programming shall be included as part of every incoming student's orientation, and shall include, at a minimum, a process for contacting and informing students, campus organizations, athletic programs, and student groups about

- the campus sexual assault policy
- the affirmative consent standard
- rights and responsibilities of students

C. Affirmative Consent Standard

All campus policies in California must be based on the affirmative consent standard:

- Consent must be given by both parties
- Affirmative, conscious, and voluntary agreement are required to engage in sexual activity
- Each person involved is responsible for ensuring he or she has the affirmative consent of the other(s) to engage in the sexual activity
- Lack of protest or resistance is not consent
- Silence is not consent
- Affirmative consent must be ongoing and can be revoked at any time
- A dating relationship, or history of past sexual relations between the parties, should never by itself be assumed to be an indicator of consent

D. Disciplinary Proceedings

Under California law, the campus disciplinary process shall not accept as a valid excuse for conduct that the accuser believed there was

affirmative consent if the accused knew, or reasonably should have known, that the complainant was unable to consent to sexual activity because he or she was:

- Asleep or unconscious
- Incapacitated due to the influence of drugs, alcohol, or medication so that he or she could not understand the fact, nature or extent of sexual activity
- Unable to communicate due to a mental or physical condition

E. Confidentiality

College campus sexual assault protocols should clearly explain that a survivor's communications to campus advocates, faculty or staff may not be completely confidential under state law, and should encourage immediate involvement of the local rape crisis center or domestic violence victim service organization.

Reports to campus advocates are not completely confidential unless those advocates are also certified sexual assault counselors who are employed by a rape crisis center, or are certified as domestic violence counselors, as defined by California law. (Evid. Code, §§ 1035.4, 1037.1.) A sexual assault or domestic violence counselor must have met statutory training and supervision requirements and hold a certificate for counseling sexual assault and domestic violence survivors from a California rape crisis center or domestic violence victim service organization. (Evid. Code, § 1035.2, 1037.1.)

A sexual assault counselor is someone employed by a California rape crisis center. (Evid. Code, § 1035.2, subd. (a).) A sexual assault counselor employed by a rape crisis center holds a legal privilege and cannot be compelled to disclose a statement made by a survivor, except by a court. (Evid. Code, § 1035.4.) A domestic violence counselor who

meets the training requirements could work for a campus program with a primary mission to provide services to victims of domestic violence. (Evid. Code, § 1037.1.) But a sexual assault counselor must be employed by the rape crisis center in order to hold the evidentiary privilege. (Evid. Code, § 1035.2.)

It is possible that the sexual assault counselor privilege applies in campus disciplinary proceedings as well, because the privilege applies in administrative proceedings in which testimony can be compelled. (Evid. Code, § 910 & Comments.)

F. California Sex Offenses

The following sexual offenses may later be charged if a report of sexual assault is made to law enforcement: sexual battery, assault with intent to commit rape, rape (forcible, while prevented from resisting by intoxicating/controlled substance, unconscious or asleep, by threat to retaliate), unlawful sexual intercourse with person under 18, rape of a spouse, rape committed in concert with others, forcible sodomy, forcible oral copulation, foreign object penetration.⁴

G. Survivor Confidentiality Under California Law

Campus and local law enforcement agencies are prohibited from disclosing information about most sexual assaults, if the survivor requests anonymity. (Pen. Code, § 293.) The time, substance, and location of all complaints or requests for assistance received by the agency and the time and nature of the response thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, the time and date of the report, the name and age of the victim, the factual circumstances surrounding the crime or incident, and

⁴ Pen.Code, §§ 243.4, 220, 261, 261.5, 262, 264.1, 286, 288a, 289.

a general description of any injuries, property, or weapons involved, must not be disclosed when the victim of most types of sexual assault requests confidentiality. (Govt. Code, §6254, subd. (f)(2).)

H. Yearly California Reports Required on Hate Violence and Other Offenses

California now requires institutions of higher education receiving funds for student financial assistance⁵ to compile statistics and submit a report about crimes committee on campus that involve “violence, hate violence,⁶ theft, destruction of property, illegal drugs, or alcohol intoxication.” (Ed. Code, § 67380.) Campuses must also report “**noncriminal acts** of hate violence” [emphasis added] which are encompassed within the statute’s definition of hate violence. If the act of hate violence is noncriminal, there must be a description of the act, and of victim and offender characteristics, if known. (Ed. Code, § 67380(a)(1)(B(2).) Violent crimes that must be reported to the California Legislative Analyst are defined the same as violent crimes that must be reported pursuant to the federal Clery Act, meaning a “Part 1 violent crime” as defined by the FBI’s Uniform Crime Reporting Handbook.

Occurrences of these acts or offenses must be reported to the governing board of the campus if they were reported to campus police, campus security personnel, or campus safety authorities. Campus

⁵ This section does not apply to California community colleges unless funding is made available by the Legislature for implementation. (Ed. Code, § 67380(f).)

⁶ “Hate violence” is defined as “any act of physical intimidation or physical harassment, physical force or physical violence, or the threat of physical force or physical violence, that is directed against any person or group of persons, or the property of any person or group of persons because of the ethnicity, race, national origin, religion, sex, sexual orientation, gender identity, gender expression, disability, or political or religious beliefs of that person or group.” (Ed. Code, §67380(c)(1).)

police, security or safety authorities are, for purposes of this law, included in the meaning of “state or local police agency” and “state and local law enforcement agency” pursuant to Government Code section 6242(f).

The information compiled relating to “hate violence” must be reported to the governing board, trustees, board of directors or regents, which body shall submit a report no later than January 1 of each year to the California Legislative Analyst’s office, and make the report available to the public on the campus’ web site. The information must be available within two business days to any student, employee, or applicant for admission to the campus, or to the media, unless the information is exempt from disclosure pursuant to Govt. Code section 6254(f), or if the victim has requested confidentiality. (Ed. Code, § 67380(a)(3)(A).)

II. Federal Law

A. Clery Act/Campus SaVE Act⁷

The Clery Act and Campus SaVE Act require schools to have a written statement that they prohibit acts of sexual violence, as defined in those statutes. These Acts require that a published campus sexual assault protocol must:

- Tell students how to make a report of a crime or incident involving sexual assault to the campus and, if desired, to police

⁷ Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act, 20 U.S.C. § 1092(f), as amended by the Violence Against Women Reauthorization Act of 2013, Section 304, Campus Sexual Violence Elimination Act (Campus SaVE Act); implementing SaVE Act regulations at 79 C.F.R. 62751). The discussion herein summarizes federal requirements but is not intended to be the sole source of guidance to campuses about legal requirements, which are set out in greater detail in the Acts and implementing regulations.

- Explain that a student who chooses not to report will still receive support and services from the campus
- Explain the importance of preserving evidence
- List procedures, contact persons, for survivors to follow
- Explain confidentiality laws and procedures
- State that the school will assist a survivor in notifying local or campus police, if desired
- Give written notice about available on and off-campus services for mental health, survivor advocacy, legal assistance, and other community resources
- Provide information about changes in academic schedule, exam schedule, housing, or other assistance *even if no formal report is made*
- Provide a written explanation of rights and options regardless of whether the crime occurred *on or off campus*
- Explain the campus disciplinary system, including the right to have others present at a disciplinary hearing
- Explain notification of outcome of a disciplinary hearing
- State that the college cannot expressly or impliedly retaliate against a person reporting under the Act, nor urge a complainant not to file charges, or threaten a complainant's academic standing or ability to graduate
- Indicate the school sends out timely warnings about threats to the campus community

Schools must provide education about bystander intervention, and implement risk reduction programs so students recognize and can avoid abusive behaviors or potential attacks. The Clery Act also requires the campus to maintain a daily crime log available to students and post availability of the log on the campus web site, at the campus police

department, and in the student handbook. The log must be updated within two days of a report (unless it would jeopardize an ongoing police investigation).

The campus must disseminate crime statistics to students every year. The campus must also designate a person to be in charge of Clery Act compliance. The annual security report issued each October must address the last three years' crimes reported on campus for stalking, intimidation, dating violence, domestic violence, sexual assault, and hate crimes, as defined in the Clery Act. The Clery Act does not require the college to initiate an investigation into these crimes, nor does it permit the release of identifying information about a victim. The Clery Act report must include only the date the crime report was made to the campus, date of crime, and general location of the crime on campus.⁸

The Campus SaVE Act⁹ requires "prompt, fair and impartial" disciplinary proceedings:

⁸ Certain off campus areas must be included in the report, such as Greek houses or public property adjacent to the campus, and remote classrooms and buildings owned by campus groups.

⁹ 20 USC 1092(f)(iv): Procedures for institutional disciplinary action in cases of alleged domestic violence, dating violence, sexual assault, or stalking, which shall include a clear statement that

(I) such proceedings shall--

(aa) provide a prompt, fair, and impartial investigation and resolution;
and

(bb) be conducted by officials who receive annual training on the issues related to domestic violence, dating violence, sexual assault, and stalking and how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability;

- Officials conducting disciplinary proceedings must be trained annually on sexual violence investigation and process
- Complainant and accused have the right to choose an advisor to be present during the disciplinary process
- Complainant and accused have the right to appeal disciplinary proceeding decisions

The Clery Act requires a "timely" warning after an incident of sexual assault, stalking, domestic or dating violence is reported if there is a serious or ongoing threat to the campus community. Stranger sexual assaults usually trigger such warnings but campuses should also consider partnering with law enforcement to investigate whether acquaintance rape situations involve previously undiscovered serial perpetrators.

(II) the accuser and the accused are entitled to the same opportunities to have others present during an institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice; and

(III) both the accuser and the accused shall be simultaneously informed, in writing, of--

(aa) the outcome of any institutional disciplinary proceeding that arises from an allegation of domestic violence, dating violence, sexual assault, or stalking;

(bb) the institution's procedures for the accused and the victim to appeal the results of the institutional disciplinary proceeding;

(cc) of any change to the results that occurs prior to the time that such results become final; and

(dd) when such results become final.

B. Title IX¹⁰

Title IX applies to all colleges which are recipients of federal financial assistance and requires:

- A published notice of nondiscrimination which is widely distributed and specifically states prohibited discrimination includes sexual harassment and violence, and provides examples of types of conduct covered
- Immediate steps to address sex discrimination, sexual harassment or sexual violence on campus, including a no contact directive to the accused to prevent interaction with the complainant
- Elimination of a hostile environment caused by such discrimination, harassment or violence, about which the campus knew or reasonably should have known, along with remedies for the harm caused and action to prevent reoccurrence
- Information about, and assistance in obtaining, a court restraining order if desired

¹⁰ Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq., and implementing regulations, 34 C.F.R. Part 106; augmented by 2011 "Dear Colleague" letter, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; see also Questions and Answers on Title IX and Sexual Violence, The Department has determined that this document is a "significant guidance document" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), *available at* www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf; and see Title IX Resource Guide, issue April 2015 (<http://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf>).

- Assistance to complainants for reasonable changes to housing, class or sports schedules, campus jobs or extracurricular activities and clubs to enable ongoing education free from discrimination, harassment or violence, before a formal complaint, investigation, hearing or final decision is made in the case
- The burden of reasonable accommodation should not limit a complainant's educational opportunities; an accused can be required to change classes or school activities to prevent a hostile educational environment
- Prompt, mandatory investigation of complaints, whether or not reported to police, to be concluded within a semester (60 days is recommended)
- Information for complainants about how to report any retaliation or harassment by others resulting from the complaint (e.g., by friends of the perpetrator)
- Use of a preponderance of evidence standard in disciplinary proceedings (discipline should result if it is more likely than not discrimination, harassment or violence occurred)
- Use of mediation in lieu of a formal hearing is prohibited in sexual violence cases
- Schools to discourage the practice of allowing an accused to question a survivor in a sexual assault hearing
- A written final decision following disciplinary proceedings, provided to survivor and accused, and appealable by both
- Schools cannot discourage survivors from continuing their education, remaining on campus, or force them to quit a team, club or class
- Adverse action may not be taken against a student for his or her complaint

- Students should be aware a formal Title IX complaint can be filed with the U.S. Department of Education
- Title IX does not require the campus to report incidents of sexual violence to law enforcement, but schools must notify complainants of the right to file a criminal complaint and not dissuade them from doing so
- Campuses must hire a Title IX coordinator for the campus to manage complaints, with contact information for the coordinator posted on the campus web site
- The Title IX coordinator should also conduct periodic assessments of student activities and campus climate to ensure the school is free of sexual harassment and violence
- Campuses must establish a confidential tracking system for reports of sexual misconduct
- Offer counseling and training for students and employees about sexual harassment or violence
- Develop and widely disseminate materials on sexual harassment and violence, explaining counseling and victim services and how to contact the school's Title IX coordinator

In April 2015 the federal Office of Civil Rights issued a new Title IX Resource Guide. (<http://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf>).