


<p>California Department of Justice DIVISION OF LAW ENFORCEMENT Larry J. Wallace, Director</p> 	<h1>INFORMATION BULLETIN</h1>	
<p><i>Subject:</i> New and Amended Campus Safety Laws; Points of Collaboration between Campus Personnel and Law Enforcement</p>	<p><i>No.</i> DLE-2015-01</p> <p><i>Date:</i> January 27, 2015</p>	<p><i>Contact for information:</i> Jill Habig Special Assistant Attorney General California Department of Justice 415-703-1008</p>

TO: All California State and Local Law Enforcement Agencies, College/University Police and Security Personnel, and College/University Administrators

This information bulletin provides a summary of new and amended California state laws regarding campus safety in the context of existing state and federal laws, and highlights critical points of collaboration between law enforcement and campus authorities.

Changes in California Law – AB 1433 (Gatto, 2014) & SB 967 (De León, 2014)

AB 1433 – Reporting of Sexual and Hate Violence (Gatto, 2014)

Effective September 29, 2014, this law amends California Education Code section 67380 and adds section 67383. The statute leaves intact current record compilation and reporting requirements listed in section 67380.

Covered Institutions

This statute applies to the governing board of each community college district, the Trustees of the California State University, the Regents of the University of California, the Board of Directors of the Hastings College of Law, and the governing board of each private and independent postsecondary institution with more than 1,000 students that receives state Cal Grant funding.¹

Required Disclosures to Law Enforcement

As a condition for participation in the Cal Grant Program, this law requires campus security authorities² to immediately—or as soon as practicably possible—disclose to local law enforcement

¹ The required disclosure to law enforcement does not apply to the California Community Colleges unless and until the Legislature makes funds available to the California Community Colleges for the purposes of this section. (Ed. Code, §

² The statute incorporates the federal law definition of campus security authorities, which includes: (1) a campus police department or a campus security department of an institution, (2) any individual or individuals who have responsibility for campus security but who do not constitute a campus police department or a campus security department (for example, an individual who is responsible for monitoring entrance into institutional property), (3) any individual or organization specified in an institution's statement of campus security policy as an individual or organization to which students and employees should report criminal offenses, and (4) an official of an institution who has significant responsibility for student and campus activities, including, but not limited to, student housing, student discipline, and campus judicial proceedings. If

any report of a Part 1 violent crime,³ hate crime,⁴ or sexual assault,⁵ whether committed on- or off-campus. (Ed. Code, § 67380, subd. (a)(6)(A).) This includes reports victims make directly to campus security authorities as well as reports victims make to other campus employees that are then conveyed to campus security authorities. (*Ibid.*)

AB 1433 defines the “local law enforcement agency” that must receive the disclosure as the city or county law enforcement agency with operational responsibilities for police services in the community in which the campus is located, and with which the institution has a written agreement pursuant to Education Code section 67381. (Ed. Code, §§ 67380, subd. (a)(6)(A), 67383, subd. (d)(2).)

Education Code section 67381⁶ requires institutions to “adopt rules requiring each of their respective campuses to enter into written agreements with local law enforcement agencies that clarify operational responsibilities for investigations of Part 1 violent crimes occurring on each campus,” including designating which law enforcement agency has operational responsibility for the investigation of each Part 1 violent crime and establishing the geographical boundaries of each agency’s jurisdiction.

While the reporting disclosure of the act of violence itself is mandated, a victim’s identity may not be disclosed to local law enforcement unless the victim consents to being identified after being informed of his or her right to have identifying information withheld. If a victim does not consent to disclosing his or her identity, the alleged perpetrator’s identity may not be disclosed either.

Regardless of whether a victim consents to the disclosure of his or her identifying information, under state and federal law, a victim has: (1) the right to a Sexual Assault Forensic Medical Examination at no cost to the victim/patient and (2) the right to participate or not participate with the local law enforcement agency or the criminal justice system, either prior to the examination, or at any other time. (Pen. Code §§ 13823.7, 13823.13, 13823.95.) Additionally, a victim may agree to engage with local law enforcement and participate in the investigation and prosecution using a pseudonym (i.e. Jane or John Doe) instead of his or her true name.

such an official is a pastoral or professional counselor as defined in the regulations, the official is not considered a campus security authority when acting as a pastoral or professional counselor. (34 C.F.R. § 668.46.)

³ “Part 1 violent crime,” as used here, means: willful homicide, forcible rape, robbery, or aggravated assault, as defined in the Uniform Crime Reporting Handbook of the Federal Bureau of Investigation.

⁴ “Hate crime,” as described in section 422.55 of the Penal Code, means a criminal act committed, in whole or in part, because of one or more of the following actual or perceived characteristics of the victim: disability, gender, nationality, race or ethnicity, religion, sexual orientation, or association with a person or group with one or more of these actual or perceived characteristics. (Pen. Code, § 422.55.)

⁵ “Sexual assault” includes, but is not limited to: rape, forced sodomy, forced oral copulation, rape by a foreign object, sexual battery, or the threat of any of these. (Ed. Code, § 67380, subd. (c)(3).)

⁶ SB 1729, authored by state senator Mike Thompson, was signed by Governor Pete Wilson on August 19, 1998, and became effective January 1, 1999.

Required Policies and Procedures

To facilitate compliance with AB 1433's new disclosure requirements, covered institutions must adopt and implement *written policies and procedures* on or before July 1, 2015, to ensure reports of violent crime, hate crime, or sexual assault made to a campus security authority are immediately forwarded to the appropriate law enforcement agency. (Ed. Code, § 67383, subd. (a).) The "appropriate law enforcement agency" is the campus law enforcement agency, if one exists; otherwise, it is the local law enforcement agency as defined above.

This requirement adds to AB 1433's mandate that reports of specified crimes made to campus security authorities be disclosed to local law enforcement, regardless of whether a campus law enforcement agency exists. (Ed. Code, § 67380(a)(6)(A).) In order to comply with both sections, an institution's written policies and procedures should provide for reporting to both the campus law enforcement agency AND the local law enforcement agency. (Ed. Code, §§ 67380, subd. (a)(6)(A), 67383, subd. (d)(2).)

AB 1433 builds on state and federal requirements for campus and law enforcement collaboration. For instance, Education Code section 67381, as noted above, requires campuses to enter into written agreements with local law enforcement agencies. At the federal level, the Clery Act requires campus officials to reach out to local law enforcement officials to obtain accurate statistics about crimes reported on or near campus. (20 U.S.C. § 1092(f); 34 C.F.R. § 668.46(c)(11).) It also requires schools to publish policies detailing how campus security officials work with local and state law enforcement, and encouraging students and campus community members to report all crimes to appropriate local police agencies. (34 C.F.R. § 668.46(b)(4).)

Beyond statutory requirements, the U.S. Department of Education ("DOE") also encourages school officials investigating reports of sexual violence to coordinate and consult with local law enforcement (1) "to establish appropriate fact-finding roles" for criminal and school investigators, (2) to share information to avoid forcing a victim from having to give multiple statements about a traumatic event, (3) to learn when criminal investigators have completed gathering evidence, and (4) for assistance in interpreting forensic evidence. (U.S. Dept. of Education, Questions and Answers on Title IX and Sexual Violence (April 29, 2014) pp. 25, 28.) DOE also recommends that MOUs between schools and local law enforcement agencies address protocols for referring allegations of sexual violence, sharing information, and conducting contemporaneous investigations. (*Id.* at p. 28.)

SB 967 – Affirmative Consent Law (De León, 2014)

Effective January 1, 2015, this law adds section 67386 to the California Education Code. As a condition of receiving state funds for student financial assistance, the statute requires educational institutions to adopt comprehensive policies and disciplinary procedures concerning sexual assault, domestic violence, dating violence, and stalking, as defined in the federal Higher Education Act of 1965 (20 U.S.C. § 1092(f)), involving a student, both on and off campus.

The new state law includes policy requirements for: (a) the campus disciplinary process, (b) campus policies and protocols, and (c) outreach and programming.

Covered Institutions

This statute applies to the governing boards of each community college district, Trustees of the California State University, Regents of the University of California, and governing boards of independent postsecondary institutions. (Ed. Code, § 67386, subs. (a)–(c).)

Campus Disciplinary Process Requirements

The institution’s policy governing its campus disciplinary process must use an *affirmative consent standard* to determine whether a sexual assault complainant consented to the alleged conduct. (Ed. Code, § 67386, subd. (a)(1).) “Affirmative consent” is defined as an affirmative, conscious, and voluntary agreement to engage in sexual activity. Under the law, neither the lack of protest or resistance nor silence constitutes consent, and consent may be withdrawn at any time. Affirmative consent must be given by all parties to sexual activity. (*Ibid.*)

The policy must also make clear that, for the purpose of evaluating complaints during the campus disciplinary process, it is not a valid excuse that the accused believed the complainant consented if: (A) the accused’s belief arose from his or her own intoxication or recklessness, or (B) the accused did not take reasonable steps to ascertain whether the complainant affirmatively consented. (Ed. Code, § 67386, subd. (a)(2).)

Similarly, it will not be a valid excuse that the accused believed the complainant affirmatively consented where the accused knew or reasonably should have known that the complainant was unable to consent because he or she was: (A) asleep or unconscious, (B) incapacitated due to drugs/alcohol/medication, or (C) unable to communicate due to a mental or physical condition. (Ed. Code, § 67386, subd. (a)(4).)

Further, a campus’s policy must require the use of a preponderance of the evidence standard when adjudicating complaints in the disciplinary process. (Ed. Code, § 67386, subd. (a)(3).) To satisfy this standard of proof, the evidence must show that it is “more likely than not”—i.e., greater than 50% likelihood—that the victim did not consent.

These new requirements under SB 967 both mirror and extend beyond current federal-law requirements. DOE guidance⁷ on Title IX issued in April 2014 requires campuses to adopt a preponderance of the evidence standard “in any Title IX proceedings, including any fact-finding and hearings” conducted over the course of the campus disciplinary process. (U.S. Dept. of Education, Questions and Answers on Title IX and Sexual Violence, *supra*, p. 26.) New Federal Clery Act regulations, effective July 1, 2015, require campus policies to include a statement of the standard of evidence used, but do not prescribe a particular evidentiary standard. (34 C.F.R. § 668.46(k)(1)(ii) (July 1, 2015).) DOE does not require schools to adopt an affirmative consent standard to determine whether a student has given consent to sexual activity. However, under SB 967, all California postsecondary institutions receiving state funds for student financial assistance, as defined above, must now adopt such an affirmative consent standard in campus disciplinary proceedings.

⁷ DOE issues guidance to campuses that sets forth the standard for administrative enforcement of Title IX, which prohibits federally funded educational institutions from discriminating on the basis of sex. This prohibition includes acts of “sexual violence” and requires schools to investigate and take corrective action to end sexual violence of which it has knowledge, to prevent its recurrence, and to remedy its effects. (See, e.g., U.S. Dept. of Education, Questions and Answers on Title IX and Sexual Violence, *supra*, pp. 1-2.)

The provisions of SB 967 apply only to disciplinary proceedings at institutions of higher education, and are distinguishable from the standards applicable to criminal proceedings in certain ways. First, the affirmative consent standard does not apply in the criminal context. A criminal trier of fact may consider whether an individual affirmatively consented, but that alone is not determinative of whether the sexual activity was consensual. Other evidence of consent or lack of consent, such as body language or silence, may also be considered in the analysis of whether a crime occurred. Under the affirmative consent law, the question of whether a victim affirmatively consented is by itself determinative of whether wrongdoing occurred.

Second, the standard of proof in criminal proceedings is higher than the standard of proof used in campus disciplinary proceedings. In criminal proceedings, there must be evidence that proves beyond a reasonable doubt that unlawful sexual activity took place. In contrast, in campus disciplinary proceedings, a complaint is substantiated if a preponderance of the evidence shows that the complainant did not affirmatively consent.

There are, however, similarities between the elements of criminal and campus proceedings. For example, in the criminal context, if unconsciousness, disorder or disability, or intoxication render the victim unable to consent or prevent the victim from resisting, the resulting sexual activity is rape. (Pen. Code, § 261.)⁸ Similarly, in the campus disciplinary context, incapacitation due to alcohol or drugs, unconsciousness, or inability to communicate due to a mental or physical condition prevent the sexual activity from being consensual under the affirmative consent standard. (Ed. Code, § 67386, subd. (a)(4).)⁹

The accused's own intoxication or recklessness also play similar, though not identical, roles in the campus and criminal contexts. In a campus proceeding under SB 967, if the accused believed—due to the accused's own intoxication or recklessness—that the complainant consented, this belief is not a valid excuse for any lack of affirmative consent. (Ed. Code, § 67386, subd. (a)(2)(A).) Similarly, if the accused did not take reasonable steps to determine whether the complainant affirmatively consented, that is not a valid excuse for any lack of affirmative consent. (*Id.* at § 67386, subd. (a)(2)(B).) In the criminal context, the voluntary intoxication of the accused similarly does not constitute a defense to lack of consent. (Pen. Code, § 29.4, CALCRIM No. 3426.) However, involuntary intoxication of the accused may be part of a defense in a criminal proceeding, depending on the circumstances. (Pen. Code, § 26(4), CALCRIM No. 3427; CALCRIM No. 3425.)¹⁰

⁸ The Penal Code states that a crime of rape has occurred if the victim is incapable, because of a mental disorder or developmental or physical disability, of giving legal consent; or is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance; or is at the time unconscious of the nature of the act, due to being unconscious or asleep or not aware, knowing, perceiving, or cognizant that the act occurred. (Pen. Code, § 261.)

⁹ The Education Code states that a complainant is unable to give affirmative consent if he or she is 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 the sexual activity; or unable to communicate due to a mental or physical condition. (Ed. Code, § 67386, subd. (a)(4).)

¹⁰ A person is involuntarily intoxicated if he or she unknowingly ingested some intoxicating liquor, drug, or other substance, or if his or her intoxication is caused by force, duress, fraud, or trickery of someone else, for whatever purpose, without any fault on the part of the intoxicated person. (CALCRIM No. 3427.)

Campus Policy and Protocol Requirements

SB 967 requires that institutions adopt policies that are detailed, victim-centered, and consistent with best practices and current professional standards. (Ed. Code, § 67386, subd. (b).)¹¹

At a minimum, these policies and protocols must address:

- How the institution will provide appropriate protections for the privacy of individuals involved, including confidentiality;
- Institutional personnel's initial response to a report of an incident, including requirements specific to assisting the victim, providing written information about the importance of preserving evidence, and procedures for locating and identifying witnesses;
- The institution's response to reports of both stranger and non-stranger sexual assault;
- Interviews of the victim, including development of a victim interview protocol and a comprehensive follow-up victim interview protocol, as appropriate;
- Procedures for contacting and interviewing the accused, as well as identifying and locating witnesses;
- Provision to victims of written information regarding (1) on- and off-campus resources and services, including contact information for such resources; and (2) coordination with law enforcement, as appropriate;
- Provisions for the participation of victim advocates and other support people in the disciplinary process;
- Procedures for investigating allegations that alcohol or drugs were involved in the incident;
- Protecting complainants and witnesses from being sanctioned for violations of student conduct policies that occurred around the time of reported incidents, unless the institution finds the violations egregious;
- The role of the institutional staff supervision;
- The implementation of a specific trauma-informed training program for campus officials that are involved in investigating and adjudicating sexual assault, domestic violence, and stalking complaints; and
- Procedures for confidential reporting by both victims and third parties.

(Ed. Code, § 67386, subds. (b)(1)-(13).)

Several of these requirements mirror existing federal obligations. For instance, the federal Clery Act requires schools to issue policies regarding confidential reporting procedures and the importance of preserving evidence. (20 U.S.C. § 1092(f)(8)(A).) Federal law also requires institutions to issue policy statements describing their procedures once an incident is reported, explaining how they will protect the confidentiality of victims and other parties, and providing victims with written information about various on- and off-campus resources. (34 C.F.R. § 668.46(b)(11).) School policies must also state that proceedings will be fair, impartial, and conducted by officials who receive, at minimum, annual training on sexual violence and how to conduct an investigation and hearing process that protects victim safety and promotes accountability. (20 U.S.C. § 1092(f)(8)(B)(iv)(I).) Moreover, DOE encourages schools to work with local law enforcement to establish appropriate fact-finding roles for criminal and school investigations, share information to avoid the need for repetitive interviews, and receive assistance from law enforcement in interpreting forensic evidence. (U.S. Dept. of Education, Questions and Answers on Title IX and Sexual Violence, *supra*, pp. 25, 28.)

¹¹ If such a policy also includes the requirements for reporting crimes to campus and local law enforcement, this policy will also satisfy the requirements of section 67380, subdivision (a)(6)(A) and section 67383.

SB 967 also complements new requirements imposed by amendments to federal Clery Act regulations that will go into effect on July 1, 2015. Under these amended regulations, institutions must issue policies describing each step of the campus disciplinary process in cases of sexual assault, dating violence, domestic violence, or stalking. (34 C.F.R. § 668.46(k)(1) (July 1, 2015).) These policies must include the anticipated timelines for the process, as well as the procedure for filing a complaint and the sanctions the institution can impose. (*Ibid.*; see also 20 U.S.C. § 1092(f)(8)(B).)

As with SB 967, these policies under federal law must also allow a victim to have an advisor of his or her choice present at disciplinary proceedings; however, under federal law, both the accused and accuser must be given this right. (20 U.S.C. § 1092(f)(8)(B)(iv)(II).) This guarantee of equal opportunity for accused and accuser underlies several other federal requirements addressing disciplinary process policies. (See *id.* at § 1092(f)(8)(B)(iv)(III); 34 C.F.R. § 668.46(k)(2)(iv), (k)(3)(i)(B)–(C); U.S. Dept. of Education, Questions and Answers on Title IX and Sexual Violence, *supra*, p. 26 [“a school must give the complainant any rights that it gives to the alleged perpetrator”].)

The complete text of the amended regulations, which may impose additional requirements not addressed here, is available at <https://www.federalregister.gov/articles/2014/10/20/2014-24284/violence-against-women-act>.

As detailed above, SB 967 sets out several new and specific institutional requirements regarding the investigation of, and response to, reports of campus sexual assault. In developing the policies and protocols required by SB 967, and as envisioned by federal DOE guidance, institutions will have the opportunity to work in collaboration with campus and local law enforcement agencies. Law enforcement agencies can provide technical assistance given their expertise in conducting investigations, and specifically pertaining to preserving evidence, identifying and locating witnesses, and developing interview techniques.

Campus Referrals, Outreach and Programming Requirements

SB 967 also requires institutions to enter into agreements or collaborative partnerships with existing on-campus and community-based organizations to (1) refer students and (2) make health, counseling, advocacy, and legal services available to student victims and perpetrators. (Ed. Code, § 67386, subd. (c).) Institutions must also implement comprehensive prevention and outreach programs addressing sexual assault, domestic violence, dating violence, and stalking. (*Id.* at § 67386, subd. (d).)

Requirements include:

- Prevention programs must include a range of prevention strategies, including but not limited to: empowerment programming for victim prevention, awareness raising campaigns, and strategies for facilitating primary prevention, bystander intervention in assaults, and risk reduction on campus. (Ed. Code, § 67386, subd. (d).)
- Outreach programs must include, at minimum: a process for contacting and informing the student body, campus organizations, athletic programs, and student groups about the institution’s overall sexual assault policy; the implications of the affirmative consent standard; and students’ responsibilities under the policy. (*Ibid.*)
- Outreach programming must be included as part of every incoming student’s orientation. (*Id.* at § 67386, subd. (e).)

Similarly federal law requires campuses to issue policies addressing their programs on preventing sexual assault, domestic violence, dating violence, and stalking. (20 U.S.C. § 1092(f)(8)(B)(i).) This includes programs for incoming students and new employees, and for returning students and employees. (*Ibid.*) Policies describing these programs must include definitions of various crimes and consent, options for bystander intervention, and information about risk reduction. (*Ibid.*)

Local law enforcement agencies may play an integral role in assisting California's campuses in implementing portions of SB 967. In addition to the technical assistance regarding investigation procedures described above, law enforcement may be able to assist campus officials in developing and implementing educational and outreach programs by directing them to known resources in the community, including local sexual assault response teams (SARTs), and/or partnering to develop new resources.

For More Information

You may contact the California State Capitol Legislative Bill room to obtain copies of the bills, or access the full text of the bills via the Internet at:
<http://leginfo.legislature.ca.gov/faces/codesTOCSelected.xhtml>, under Title III of the Education Code.

Attorney General Harris is committed to reducing sexual violence on and off campus, and to seeking justice for every victim of sexual assault in California. In the coming months, the Attorney General's Office will release additional guidance suggesting ways in which law enforcement and campus personnel can comply with these requirements and collaborate to facilitate justice for victims and accountability for perpetrators. If you have questions or would like to participate in formulating these guidelines, please contact our office.

We look forward to working with you to improve the reporting, investigation, and prosecution of these crimes across our state.

Sincerely,



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For KAMALA D. HARRIS
Attorney General