

## AB 1433 AND SB 967: NEW STATE LAWS WILL IMPACT SEXUAL ASSAULT POLICIES ON CALIFORNIA COLLEGE CAMPUSES

During the 2014 California legislative session, two bills which will have an impact on how college campuses deal with allegations of violent crimes were signed into law. These bills will have a far-reaching impact on California colleges and universities, which may struggle with how to place these new laws into the context of the state and federal law framework through which college campuses have to date addressed these allegations.

### **BACKGROUND AND FEDERAL LAW**

The federal statutes addressing sexual assault on or around institutions of higher education include Title IX and the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act). Below is a brief background on these federal statutes and what they require of postsecondary institutions with regard to preventing and responding to sexual violence against students.

Many people think of Title IX as the law that requires gender equity in college sports programs, but the law is much broader than that. Title IX and its implementing regulations prohibit discrimination on the basis of sex in any education programs or activities operated by recipients of federal financial aid. An educational institution's failure to adequately deal with reported acts of sexual harassment (including sexual violence) committed against students is considered a form of sexual discrimination under Title IX for which the affected student has access to both civil and administrative remedies. The implementing regulations of Title IX set forth various requirements of educational recipients of federal funds, which can be summarized as (1) disseminating a notice of nondiscrimination, (2) designating at least one Title IX Coordinator, and (3) adopting and publishing grievance procedures providing for the prompt and equitable resolution of student and employee sex discrimination complaints.

The Clery Act requires public and private postsecondary educational institutions that receive federal financial aid to disclose information about crimes on and around campuses through the maintenance of a public crime log and the publication of an Annual Campus Security Report. It also establishes certain rights for victims of sexual assault, including notification to victims of the right to file criminal charges, available counseling services, the results of disciplinary proceedings, and the option for victims to change their academic schedule or living arrangements.

The federal Campus Sexual Violence Elimination Act (SaVE), passed in 2013, amended the Clery Act. It requires postsecondary institutions to offer prevention and awareness programs to new students and employees regarding rape, domestic and dating violence, sexual assault, and stalking. Programs must include a definition of those offenses and consent with reference to sexual offenses. Institutions are also required to compile statistics of incidents of sexual assault, domestic violence, dating violence and stalking.

In 2001 and again in 2011, the United States Department of Education's Office for Civil Rights issued guidance regarding compliance with Title IX specific to sexual harassment and sexual violence. This guidance stated, among other things, that:

1. Institutions must use a preponderance of the evidence standard in order for the grievance procedures to be consistent with Title IX standards. This is a lower standard of proof than the criminal standard of “beyond a reasonable doubt,” and is often described as a “more likely than not” or more than 50% standard. It is generally easier to prove a case by a preponderance of the evidence.
2. Institutions are not relieved of their duty under Title IX to resolve complaints promptly and equitably whether or not a criminal investigation is underway.
3. Institutions need to ensure their employees are trained to know how to report harassment and how to respond properly.

## **NEW STATE LAWS**

### **AB 1433—Mandatory Reporting of Certain Crimes to Local Law Enforcement**

AB 1433 requires campus security at California postsecondary institutions to submit each report received by it from a victim of a Part I violent crime (willful homicide, forcible rape, robbery, or aggravated assault) sexual assault or hate crime committed on or off campus to the local law enforcement agency immediately (or as soon as practicably possible). The law requires the report to local law enforcement to withhold the identity of the victim unless the victim is informed of his or her right to have personally identifying information withheld and subsequently consents to being identified. If the victim does not consent to being identified to local law enforcement, the report to that agency is also prohibited from identifying the victim’s alleged assailant.

This is a change from prior state law which had previously provided that a report of a violent crime or hate crime be reported to the appropriate local law enforcement agency only if the victim consented. It also appears to be somewhat at odds with the most recent U.S. Department of Education (DOE) Guidance which provides that a complainant’s request for anonymity in the investigation of sexual harassment and assault must be weighed against certain factors, and that schools should inform complainants that they cannot ensure confidentiality including the victim’s age, whether there have been other complaints against the same accused, and whether the accused has a right to certain information under the Federal Education Rights and Privacy Act (FERPA.) In the absence of further clarification from the DOE, clients are advised to follow the state statute.

This bill became effective upon signing on September 29, 2014. As a condition for participation in the Cal Grant Program, postsecondary institutions must adopt and implement written policies and procedures to ensure this mandatory reporting requirement by July 1, 2015. The new law applies to all public postsecondary institutions with a full-time equivalent enrollment of more than 1,000 students, and all private postsecondary institutions receiving funds for student assistance with a full-time enrollment of at least 1,000 students.

### **SB 967—New Requirements for Campus Policies on Violence Policies**

SB 967 conditions California postsecondary institution receipt of state funds for student financial assistance to the adoption of a comprehensive range of policies and procedures concerning sexual assault, domestic violence,

dating violence, and stalking. In many respects, these policies go well beyond existing federal law. Specifically, such policies must include:

1. An “affirmative consent” standard (defined as affirmative, conscious and voluntary agreement) for determining whether consent was given by both parties to sexual activity. This has been the most widely reported aspect of the new law and it marks a departure from the ways in which some have commonly understood consent. The law specifies that neither “lack of protest or resistance” nor “silence” equals consent. It further states that affirmative consent “must be ongoing through sexual activity and can be revoked at any time.” Moreover, it cannot be construed from “the existence of a dating relationship between the persons involved, or the fact of past sexual relations between them.”
2. In the evaluation of complaints in any disciplinary process, it shall not be a valid excuse to alleged lack of affirmative consent that the accused believed that the complainant consented to the sexual activity if either:
  - a. The accused’s belief arose from the accused’s own recklessness or intoxication; or
  - b. The accused did not take reasonable steps under the circumstances known to the accused at the time to ascertain whether the complainant affirmatively consented.
3. In the evaluation of complaints in the disciplinary process, it shall not be a valid excuse that the accused believed the complainant affirmatively consented if the accused knew or reasonably should have known that the complainant was unable to consent because:
  - a. The complainant was asleep or unconscious;
  - b. The complainant was so incapacitated due to drugs, alcohol or medication so as not to understand the fact, nature or extent of the sexual activity;
  - c. The complainant was unable to communicate due to a mental or physical condition.
4. A preponderance of the evidence standard for complaints of sexual assault. This provision will ensure that California postsecondary institutions are in compliance with the corresponding Title IX standard announced in recent administrative guidance.

SB 967 also provides that in order to receive state funds for student financial assistance, the governing boards of postsecondary institutions must adopt “detailed and victim-centered policies and protocols” regarding sexual assault, domestic violence, dating violence, and stalking involving a student that “comport with best practices and current professional standards.” At a minimum, these policies and protocols must cover thirteen elements:

1. A policy statement on how the institution will provide appropriate protections for the privacy of individuals involved, including confidentiality.
2. Initial response by the institution’s personnel to a report of an incident, including requirements specific to assisting the victim, providing information in writing about the importance of preserving evidence, and the identification and location of witnesses.

3. Response to stranger and nonstranger sexual assault.
4. The preliminary victim interview, including the development of a victim interview protocol, and a comprehensive follow-up victim interview, as appropriate.
5. Contacting and interviewing the accused.
6. Seeking the identification and location of witnesses.
7. Providing written notification to the victim about the availability of, and contact information for, on- and off-campus resources and services, and coordination with law enforcement, as appropriate.
8. Participation of victim advocates and other supporting people.
9. Investigating allegations that alcohol or drugs were involved in the incident.
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.
11. The role of institutional staff supervision.
12. A comprehensive, trauma-informed training program for campus officials involved in investigating and adjudicating sexual assault, domestic violence, dating violence, and stalking cases.
13. Procedures for confidential reporting by victims and third parties.

SB 967 also contains a provision requiring institutions to educate the student body on the new policies. Specifically, it requires postsecondary institutions to implement “comprehensive prevention and outreach programs addressing sexual violence, domestic violence, dating violence, and stalking.” At a minimum, these programs are to include 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 practical implications of an affirmative consent standard, and the rights and responsibilities of students under the policy.

Finally, SB 967 requires postsecondary institutions to enter into memoranda of understanding, agreements or collaborative partnerships with existing on-campus and community-based organizations, to the extent feasible. These organizations may refer students for assistance or make services available to students, including counseling, health, mental health, victim advocacy, and legal assistance and may also include resources for the accused.

## **NEXT STEPS**

The federal law on these issues is likely to continue to evolve and the new California statutes may well help set federal standards. The White House announced on January 22, 2014, the establishment of a Task Force to

Protect Students from Sexual Assault, directing the Office of the Vice President and the White House Council on Women and Girls to lead an interagency effort to address campus rape and sexual assault, including coordinating federal enforcement efforts and helping institutions meet their obligations under federal law. In the meantime, California postsecondary institutions will need to ensure compliance with both the federal and state laws concerning sexual violence on campus.

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