



**Joint Guidance on Federal Title IX Regulations:  
Comparison of California Law and the 2020 Final Rules**  
May 20, 2020

**I. Introduction**

This document summarizes certain overlapping requirements between California law and the Final Title IX Regulations, identifying potential conflicts between California Law and the Final Rule. Other conflicts may arise as review of the Rule continues and the Department provides technical assistance and engages in application of its Rule.

**II. Section 67386 of the California Education Code**

Passed in September 2014, [Section 67386 of the California Education Code](#) addresses policies regarding sexual assault, dating and domestic violence, and stalking for those institutions of higher learning in California that receive state funding.

**Affirmative Consent Standard**

First, in cases of sexual assault, the statute requires that each school have an affirmative consent standard with the following elements:

1. An affirmative consent standard in the determination of whether consent was given by both parties to sexual activity. “Affirmative consent” must be defined as “affirmative, conscious, and voluntary agreement to engage in sexual activity.” The policy must also note that it is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.
2. The policy must state that it shall not be a valid excuse that the accused believed that the complainant affirmatively consented to the sexual activity if the accused knew or

reasonably should have known that the complainant was unable to consent to the sexual activity under any of the following circumstances:

- a. The complainant was asleep or unconscious.
  - b. The complainant was incapacitated due to the influence of drugs, alcohol, or medication, so that the complainant could not understand the fact, nature, or extent of the sexual activity.
  - c. The complainant was unable to communicate due to a mental or physical condition.
3. The policy must also state that it shall not be a valid excuse to the alleged lack of affirmative consent that the accused believed that the complainant consented to the sexual activity under either of the following circumstances:
- a. The accused's belief in affirmative consent arose from the intoxication or recklessness of the accused.
  - b. The accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain whether the complainant affirmatively consented.
4. The policy must state that the standard used in determining whether the elements of the complaint against the accused have been demonstrated is the preponderance of the evidence.
5. The policy should note that it covers both stranger and non-stranger sexual assault.

***Note regarding any potential conflict of Affirmative Consent standard with new regulations:***

**The new regulations specifically note that schools are not required to adopt any particular definition of consent with regard to sexual assault. Schools do not need to alter their Affirmative Consent policies after the Final Rule's effective date.**

Section 67386 further requires that institutions have a "detailed," and "victim-centered" policy regarding sexual assault, domestic or dating violence, and stalking, and that any such policy comport with "best practices and current professional standards."

***Note regarding any potential conflict of California provision that policy be "victim-centered" with new regulations:***

**The California statute requires that policies be victim-centered; the new regulations do not contain any specific requirements regarding policy language other than to note that "policies must not be offensive to fundamental notions of fairness," and that both policies and processes must be impartial and unbiased. No official involved in the process can have a bias in favor of complainants or respondents, either as a general matter or regarding a specific party.**

So long as a “victim-centered” policy enacted under California law was not designed or applied in a manner that favored “complainants,” as defined under the Final Rule, there is no express conflict between the laws. As such, the two concepts (victim-centered, and impartial and unbiased) are not mutually exclusive, as long as care is taken to ensure that being victim-centered in a school’s response to a report of sexual assault does not tip the scales during the investigation or adjudication processes.

For example, aspects of being victim-centered that do not reduce impartiality, or increase bias, include the offer of resources and supportive measures to the complainant, having individuals (such as counseling staff or victim advocates) trained to focus on the complainant’s needs, as well as a Title IX Coordinator who will listen in an impartial and unbiased manner to the complainant’s concerns. Being “victim-centered” does not, however, mean that the allegations are automatically believed and any that there should be any presumption that the respondent did violate policies prior to the completion of the entire adjudicatory process.

### **Minimum Policies and Protocols**

Under Section 67386, at a minimum, the policy and protocols used must include the following:

1. An explanation of the privacy or confidentiality protections that will be provided to those involved in the process.
2. The school’s initial response protocol, which is to include:
  - a. Assistance to the victim.
  - b. Information in writing about the importance of preserving evidence and the identification and location of witnesses.
  - c. Written notice 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

The school’s policy and protocols are also to include the participation of victim advocates and other supporting people.

*Note regarding potential additional requirement for California institutions regarding the participation of victim advocates and other supporting people:*

Because the new regulations require that “[a]ny provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment . . . must apply equally to both parties,” this California requirement to provide victim advocates indirectly requires the participation of a respondent-side advocate and other supporting people to the same degree and extent. Final Rule § 106.45(b).

**As such, in those sexual assault cases falling within the new, narrower definition of Title IX as set forth in the regulations, California institutions may be obligated to provide respondent-side advocates in circumstances and for purposes that schools outside California are not. This could involve the participation of an advocate alongside the mandated “advisor” during the Title IX grievance process.**

3. There must be a procedure for confidential reporting by victims and third parties.
4. Interview protocols are required to include:
  - a. A preliminary victim interview and, as appropriate, a comprehensive follow, along with the development of a victim interview protocol.
  - b. The accused is to be contacted and interviewed.
  - c. The investigator is to seek the identification and location of witnesses.
  - d. Investigating allegations that alcohol or drugs were involved in the incident

***Note regarding potential conflict of the provision that the accused be contacted and interviewed:***

**Simply contacting an accused student and then conducting an interview will be insufficient to comply with provisions in the new regulations specifically, the notice requirements of Section 106.45(b)(2).**

5. Each covered institution must also have an amnesty policy for complainants or witnesses, stating that they 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, which may include an action that places the health and safety of any other person at risk, or involves plagiarism, cheating, or academic dishonesty.
6. The policy must include an explanation of the role of the institutional staff supervision.

### **Partnerships with Supportive Resources**

Section 67386 also requires that schools enter, to the extent feasible, into memoranda of understanding, agreements, or collaborative partnerships with existing on-campus and community-based organizations, including rape crisis centers, to refer students for assistance or make services available to students, including counseling, health, mental health, victim advocacy, and legal assistance, and including resources for the accused.

### **Trauma-Informed Training**

The statute further requires a “comprehensive, trauma-informed training program for campus officials involved in investigating and adjudicating sexual assault, domestic violence, dating

violence, and stalking cases,” as well as a comprehensive prevention program.” The prevention program is to include:

- A range of prevention strategies, including, but not limited to, empowerment programming for victim prevention, awareness raising campaigns, primary prevention, bystander intervention, and risk reduction.
- Outreach programs to make students aware of the institution’s policy on sexual assault, domestic violence, dating violence, and stalking. At a minimum, an outreach program is 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.
- Outreach programming, as part of every incoming student’s orientation.

*Note regarding potential conflict of provision that training be “trauma-informed” with new regulations:*

**While not an explicit conflict, California’s requirement that institutions provide trauma-informed training may expose institutions to attack on the ground that the training conflicts with the new regulations’ requirements that individuals involved in the Title IX process not “have a . . . bias for or against complainants or respondents generally” and that materials used to train those individuals “not rely on sex stereotypes.” On the other hand, the new regulations note that “practitioners and experts believe that application of such [trauma-informed] practices is possible . . . to apply in a truly impartial, nonbiased manner.” 85 Fed. Reg. 30026, 30,256 (May 19, 2020). For more considerations regarding training and trauma-informed practice under the Title IX regulations, see the Joint Guidance section on Training.**

### **III. California Code of Civil Procedure Section 1094.5**

The California Code of Civil Procedure Section 1094.5 (“Section 1094.5”) allows litigants to challenge the fairness of private administrative hearings in court. In recent years, respondents in Title IX conduct proceedings began using Section 1094.5 to overturn discipline issued against them. This trend culminated in the California Court of Appeal’s 2019 decision in *Doe v. Allee*, in which the court held that “[f]or practical purposes, common law requirements for a fair disciplinary hearing at a private university mirror the due process protections at public universities.” *Doe v. Allee*, 30 Cal. App. 5th 1036, 1061 (2019).

Those due process protections, the *Allee* court held, applied whenever “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.” *Id.* at 1066. As such, all institutions in California must “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 . . . before a neutral adjudicator with the power independently to find facts and make credibility assessments.” *Id.* at 1069.

While the due process requirements recognized in *Allee* largely mirror those required under the new Title IX regulations, distinctions in the language used to define the geographical areas to which institutions must apply their policies differ. California requires institutions to respond to incidents “on and off campus,” while the new Title IX regulations limit the institution’s responsibility to “locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs. Final Rule § 106.44(a). This difference may result in California’s affirmative consent law (Cal. Ed. Code § 67386, discussed above) requiring hearings where Title IX would not apply. Such hearings, however, could be conducted with indirect live questioning, and would not require that schools provide each party with a person who will conduct the questioning of the other party, or of witnesses.

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