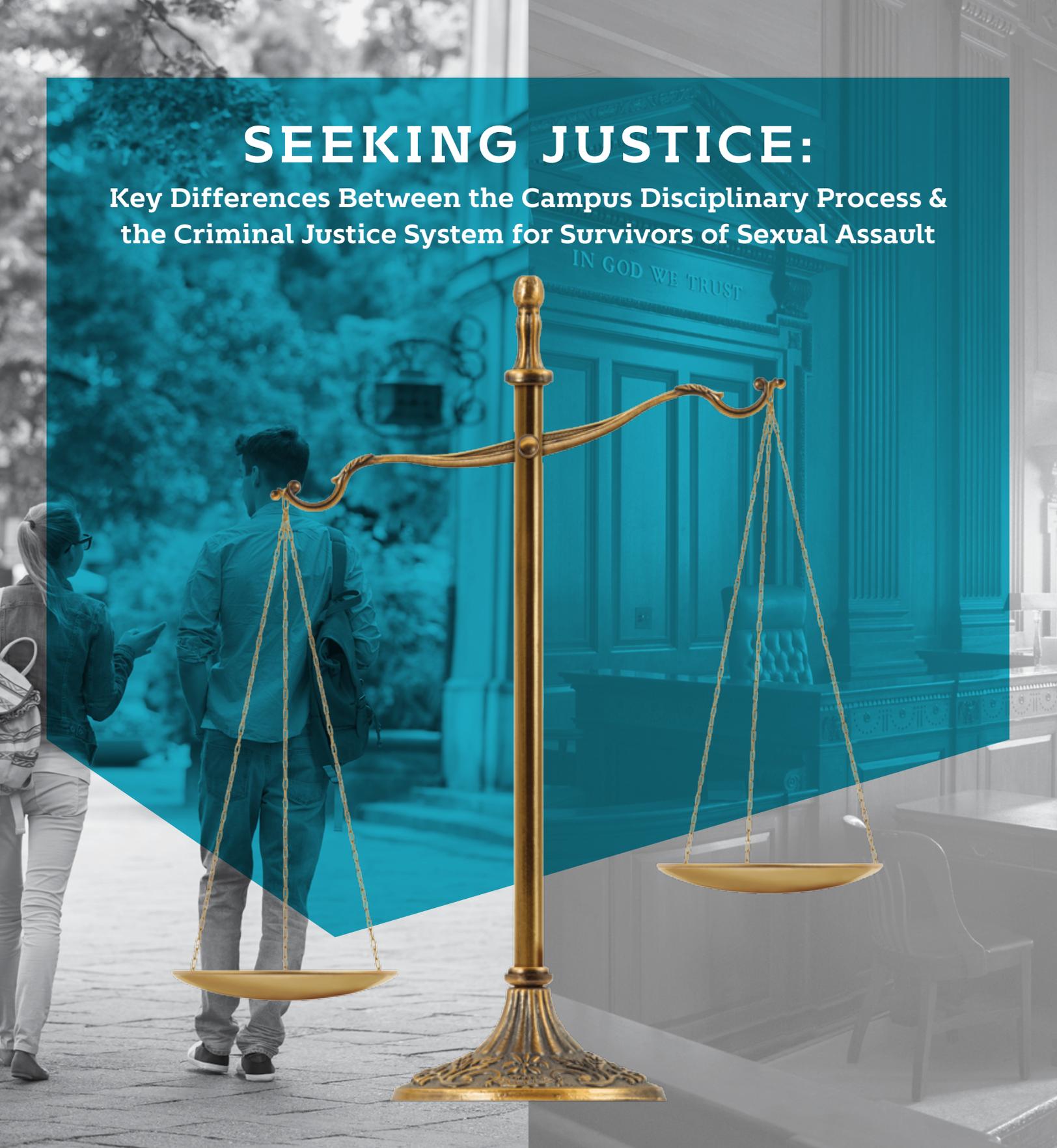


SEEKING JUSTICE:

Key Differences Between the Campus Disciplinary Process & the Criminal Justice System for Survivors of Sexual Assault



CALCASA
CALIFORNIA COALITION
AGAINST SEXUAL ASSAULT

ENVISIONING A WORLD FREE FROM SEXUAL VIOLENCE.

The mission of the California Coalition Against Sexual Assault (CALCASA) is to provide leadership, vision, and resources to rape crisis centers, individuals, and other entities committed to ending sexual violence.



ACKNOWLEDGEMENTS

AUTHOR

SARAH A. WILLIAMS

Sarah A. Williams is an associate with Ogletree, Deakins, Nash, Smoak & Stewart, P.C. Her practice emphasizes employment counsel and litigation, including representation of colleges and universities on issues including Title IX, the Clery Act, and California law.

PREPARED WITH SUPPORT FROM

JANET E. NEELEY

The author would like to thank Janet E. Neeley for her input regarding the criminal justice system, particularly as it pertains to sexual violence, and mentorship and support in the writing of this article.

SANDRA HENRIQUEZ, CALCASA EXECUTIVE DIRECTOR

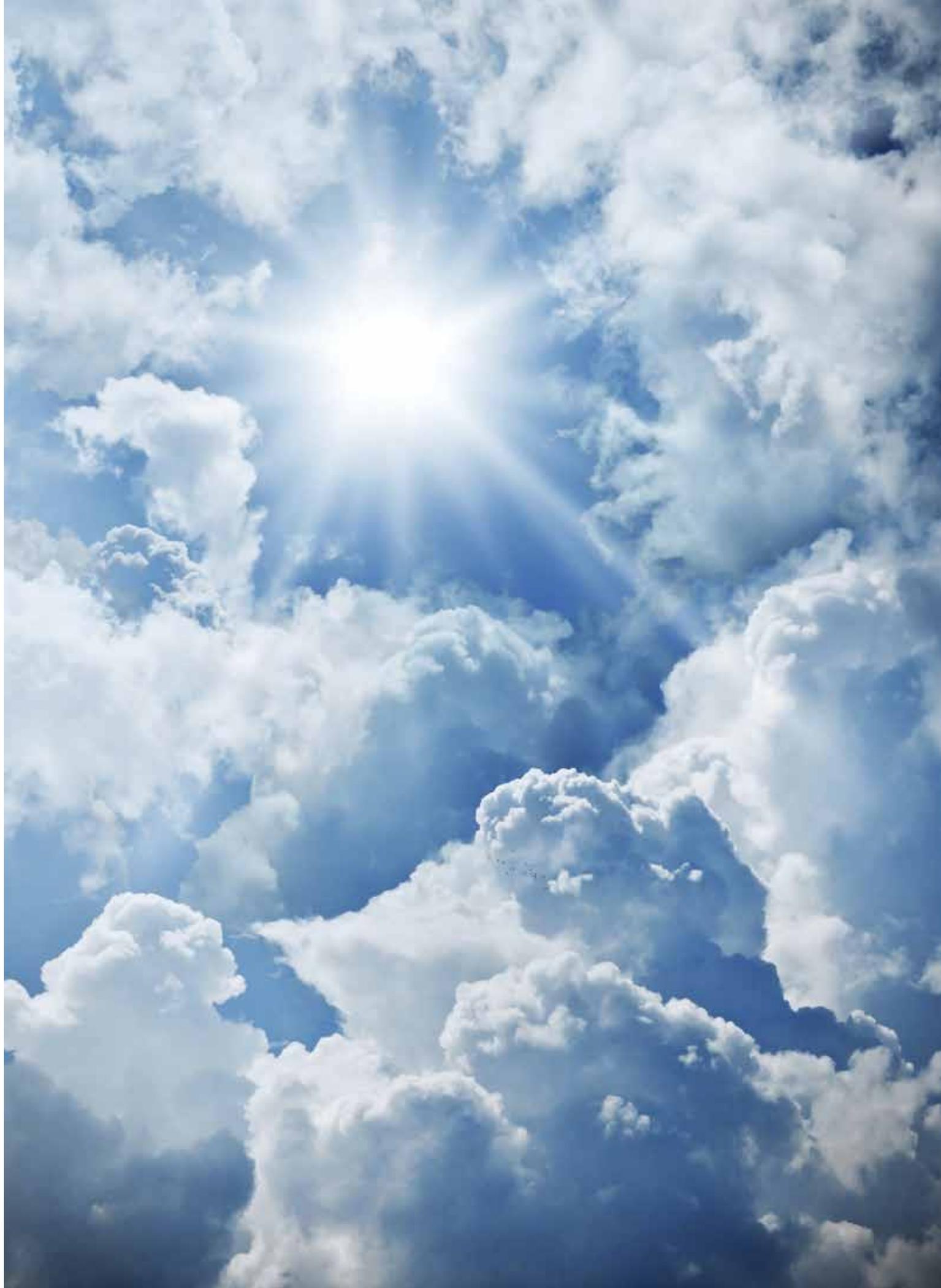
SHAINA BROWN, CALCASA PUBLIC AFFAIRS + COMMUNICATIONS MANAGER

LAYOUT + DESIGN

half rabbit design inc.

DISCLAIMER

This publication is supported by the California Office of Emergency Services (CalOES). This project/publication was supported by funding awarded by the Violence Against Women Act (VAWA) and the Victim of Crime ACT (VOCA), TE14 17 1578, through CalOES. The opinions, findings, and conclusions in this publication are those of the author and not necessarily those of CalOES. CalOES reserves royalty free, nonexclusive, and irrevocable license to reproduce, publish, and use the materials and to authorize others to do so.



KEY DIFFERENCES BETWEEN THE CAMPUS DISCIPLINARY PROCESS & THE CRIMINAL JUSTICE SYSTEM

BY SARAH A. WILLIAMS

There are key differences between the campus disciplinary process and the criminal justice system. A criminal prosecution looks at whether a criminal offense was committed. If an offender is found guilty of a criminal offense, the sanctions are imprisonment or other criminal penalties. Criminal defendants in the justice system are accorded numerous constitutional rights that do not apply in a campus disciplinary proceeding. These include the right to counsel, to a speedy trial, to a jury trial, the right against

self-incrimination, and the right to confront the witnesses against you.¹

Depending on the particular campus' disciplinary process, however, some rights that must be given to a defendant in a criminal case may also apply in a campus proceeding. For example, a campus may allow an accused perpetrator, or respondent², in a campus disciplinary hearing proceeding to have a support person or advocate present. But if it does so, the complainant, or survivor, must

Key Differences between the Criminal Justice System & Campus Adjudication System



CRIMINAL JUSTICE SYSTEM



CAMPUS ADJUDICATION SYSTEM

Preliminary Hearing	No Preliminary Hearing
Right to Jury Trial	No right to a jury trial or a formal hearing, only to a fair and impartial process.
Right to a Speedy Trial	Under Title IX, a campus has a duty to resolve complaints "promptly and equitably."
Right to Counsel	There is no right to have an attorney present although under Title IX, if a school permits one party to have lawyers or other advisors at any stage of the proceedings, it must do so equally for both parties.
Right to Confrontation	A campus does not have to permit the parties to question each other at an adjudication hearing, although if it allows one party to do so, the other must have the same right.
Burden of Proof: "Beyond a Reasonable Doubt"	Burden of Proof: "Preponderance of the Evidence"
California rape law requires proof of force or violence, or duress, menace or fear of immediate injury.	Affirmative consent or "yes means yes" laws apply to disciplinary proceedings for campus sexual assault in California.

be accorded the same right. (2014 Q&As, F-1.) There are differences in the campus adjudication process at public colleges and universities versus private colleges and universities. However, a campus disciplinary process can place limits on how evidence is presented which would not be permitted in a criminal trial, such as prohibiting advocates from speaking at the hearing, requiring questions to be submitted in advance, and reviewing evidence taken from prepared witness statements rather than live testimony.³



Criminal defendants in the justice system are accorded numerous constitutional rights that do not apply in a campus disciplinary proceeding.



THE CRIMINAL JUSTICE SYSTEM



REPORTING TO THE CAMPUS POLICE DEPARTMENT OR LOCAL LAW ENFORCEMENT

When a report of sexual assault, dating/domestic violence or stalking is made to a campus or local police department, the first concern of the interviewer will be to make sure the victim is safe. An advocate, campus or community-based, can help with making a safety plan and should be called by the law enforcement agency. The second goal of an initial interview by law enforcement will be to ensure that the campus or local community is safe as well. The campus is required under federal law to determine whether to issue an emergency notice or timely warning to the campus community.

The initial interview should be short if the assault was recent. The interviewer will need to learn enough about what happened to obtain search warrants from a judge in order to swiftly collect potential evidence before it disappears. Sometimes the police can obtain a telephonic search warrant (authorized by a judge over the telephone) when time is of the essence. Just because search warrants are obtained and evidence is collected does not mean the survivor is obligated to see the criminal justice process through to the end. The survivor retains the option later to decide not to go forward. (Pen. Code, § 13823.95.)

If the survivor wishes to keep his or her options open, a second, longer interview should take place after he or she has had a couple of days to recuperate from the assault—ideally after a couple of sleep cycles. At this interview, survivors should be asked to share their feelings, sensory perceptions, and memories about what happened. The survivor has the right under California law to have an advocate present at this second, lengthier interview. (Pen. Code, § 679.04.) California law requires that campus investigators have been trained about trauma, and understand trauma-informed forensic interview techniques that avoid the possibility of re-traumatizing the survivor. (Ed. Code, § 67386.)

Under Title IX, the campus police department is a “responsible employee” that must report at least the fact that the incident occurred, along with some details about where and when it happened, to the campus’ Title IX Coordinator. The campus or local police department is prohibited under California law from disclosing the victim’s name and personally identifying information to the Title IX Coordinator without the victim’s consent. (Pen. Code, § 293; Govt. Code, § 6254.) Instead, the Title IX Coordinator should be told where and when the assault occurred, without identifying

information about the victim, unless there is consent to the disclosure.

If the survivor reports to a campus responsible employee who is not in the police department, the victim’s name and personally identifying information must be disclosed to the Title IX coordinator unless the employee to whom the disclosure is made is a campus mental health counselor, pastoral counselor, social worker, psychologist, health center employee or any other person with a professional license requiring confidentiality, or who is supervised by such a person. In that case, the Title IX report should not identify the student unless the student consents. (2014 Q&As, E-3.)

Schools are encouraged to designate campus employees who are not professional or pastoral counselors, but who work in sexual assault centers, victim advocacy offices, women’s centers or health centers, as confidential sources who are not required to report to the Title IX Coordinator in a way that identifies the student, without the student’s consent. (2014 Q&As, E-3.)

When a survivor wants to see the perpetrator held accountable through the campus disciplinary system, he or she will also have to make a statement to a campus investigator, such as the Title IX Coordinator. The best procedure is for the law enforcement agency’s investigator and investigator for the campus disciplinary system to both be present during the interview by the campus (or local) police department. This may not be possible at an initial, shorter interview during the immediate aftermath of a crime, but should be arranged before the longer interview.

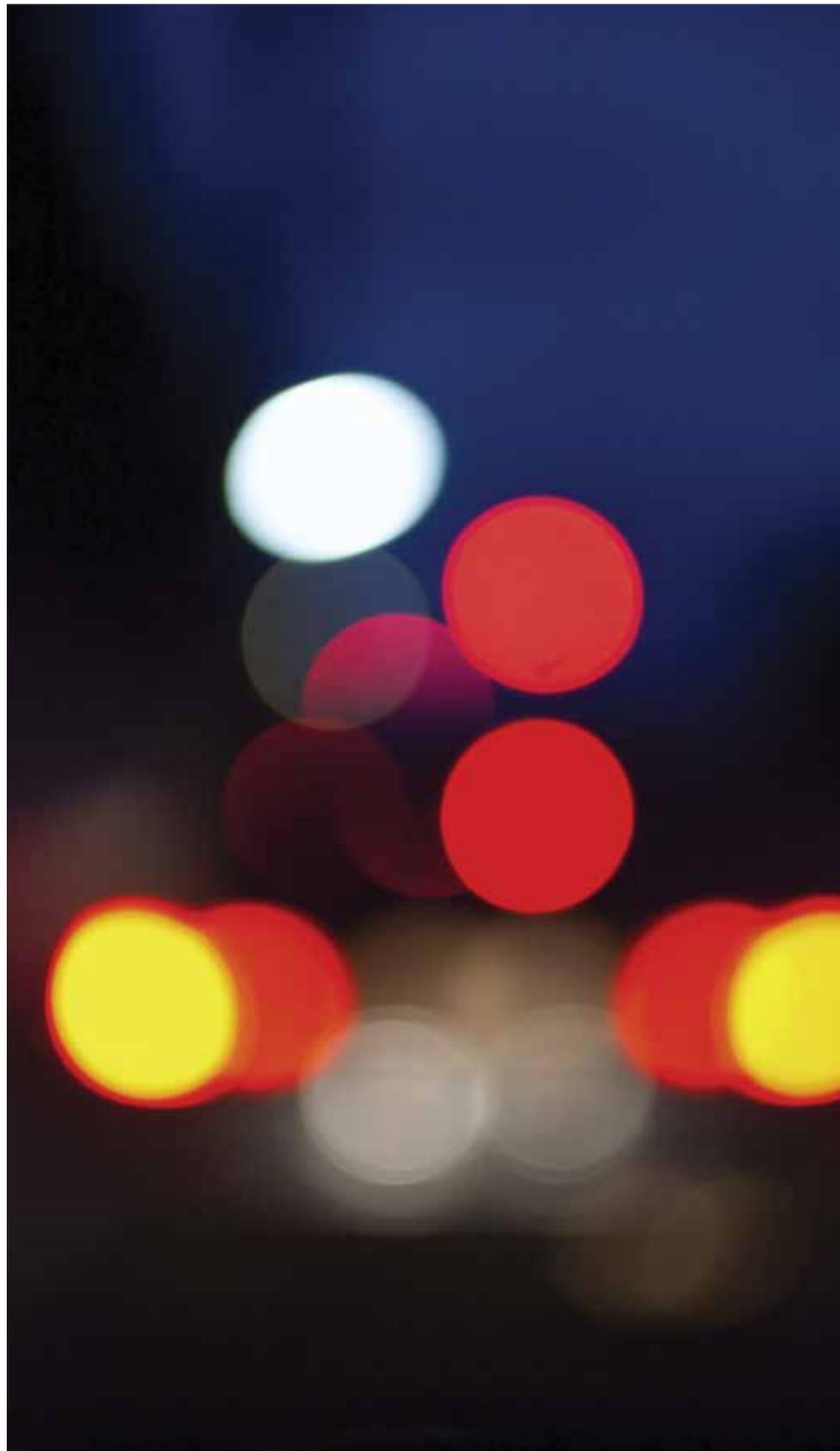
It is best to minimize the number of statements that a victim is asked to make. Since memory is often fragmented and incomplete, multiple interviews present the possibility that new

details and memories will emerge. The problem is that when new details are related, or memories change, the defense in a criminal trial will use the seemingly conflicting statements to cast doubt on the survivor's credibility. For this reason, the best practice is not to have two sets of full interviews, but a joint interview with the Title IX Coordinator present so that another interview is not needed for the campus disciplinary system.

It is inevitable that people recall more details of events when they have time to reflect after a traumatic situation. It is always useful at both a campus disciplinary procedure and criminal trial to have an expert on trauma testify to explain how trauma affects perception and memory.

If the prosecutor's office files charges, there will be a meeting prior to the trial with the deputy district attorney assigned to the case. It is also possible that follow-up interviews of the victim by campus or local law enforcement or the district attorney's investigator will be necessary. New evidence may suggest additional questions requiring a response from the victim after other witness statements have been taken and the physical evidence has been collected.

By the time of trial, there will have been multiple interviews of both parties (by the SART team, police department, district attorney's office, and sometimes in the campus disciplinary system). For instance, at a trial the defense will use either the consistencies or inconsistencies against the survivor: if she is consistent, the defense will argue she made up a story and stuck to it. If she is inconsistent, the defense will say it is evidence of fabrication. Both parties should expect that the other side will use the consistencies or inconsistencies in their statements against them at the time of trial or campus adjudication. The campus adjudication system allows both sides to present their side and introduce witnesses and evidence if a formal hearing is held. The criminal justice system follows formal rules of evidence and affords both the People and the defense the right to present expert testimony, when appropriate to the case, as well as the right to cross-examine an expert.



THE CRIMINAL JUSTICE SYSTEM



THE POLICE INVESTIGATION

An investigation in the criminal justice system is triggered when a survivor of sexual assault makes a police report to either a campus law enforcement agency or to a local law enforcement agency with jurisdiction over the place where the assault occurred. Under California law, if the victim requests confidentiality, his or her name cannot be publicly disclosed. (Pen. Code, § 293.)

Making a police report does not mean that the victim is then forced to ultimately testify at trial. But making a police report will trigger a criminal investigation. The investigation may uncover evidence which can be used at a trial to corroborate the victim's statement. Alternately, corroborating evidence can be used to persuade a criminal defendant to plead guilty to some or all charges. Witnesses' statements, texts, social media posts, and photographs on Instagram or cell phones are all examples of corroborating evidence. Evidence from a sexual assault medical examination and physical evidence on clothing, sheets or furniture can also be corroborating evidence. Such evidence would support taking a case to trial, if that is what the survivor later chooses to do.

The sooner that a police report is made, the more likely it is that evidence, including witness' statements, can be obtained and preserved. The existence of corroborating evidence will be one factor considered by a prosecutor's office in determining whether charges should be filed. It will also be a factor in whether a defendant in a criminal case decides to plead guilty or go

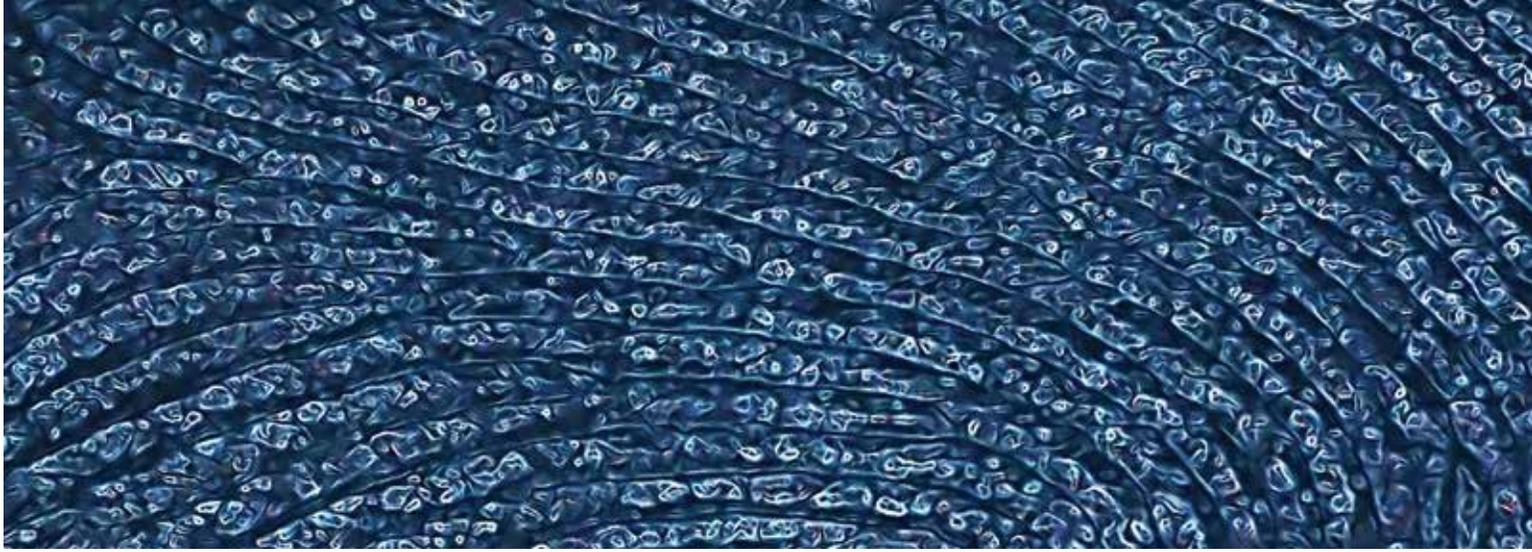
to trial. Once the campus police department or local law enforcement agency (depending on where the crime occurred) has determined that there is evidence to support the filing of criminal charges, it will forward the case to the District Attorney's office.

A survivor's statement alone can be enough to prove that a sexual assault occurred. There is almost always, however, some corroborating evidence, and law enforcement agencies are trained to help find it.

For example, occasionally the campus or local law enforcement agency will ask the victim to work with them by planning a phone call or text to the perpetrator in a case where the assault was by someone known to the survivor. This is called a "pretext phone call." The purpose of a pretext phone call or text is to gain an admission of guilt from the perpetrator. This technique may sometimes be used, at the direction of law enforcement, as part of the criminal justice process. It can provide corroboration of the survivor's account of the incident.

The sooner that a police report is made, the more likely it is that evidence can be obtained and preserved.





THE SART (SEXUAL ASSAULT RESPONSE TEAM) EXAM

After a sexual assault occurs, if it is reported within a reasonable amount of time after the assault, the survivor will be encouraged to have an examination to determine injuries and assess possible infections resulting from the sexual assault. A specially trained sexual assault nurse examiner and doctor will conduct a physical examination to look for physical evidence of nonconsensual sexual contact. They will be able to prescribe needed treatment.

The survivor will need to make a statement about what happened at the medical examination, but if he or she discloses that the reason for the visit is a sexual assault, medical personnel are required to contact law enforcement. (Pen. Code, § 11160.) If, however, the victim is positive that he or she wants an examination only to check for STDs, or for prophylaxis (e.g., the morning after pill), and does not disclose to the nurse or doctor that he or she is there because of a sexual assault, medical personnel in California do not have to report to police.

The choice not to disclose that the reason for the hospital or clinic visit is a sexual assault means evidence could be lost which might be critical to proving the case if the survivor later decides to go forward in the criminal justice system. In other words, just the fact of choosing to have a forensic examination may be crucial to the criminal justice process, regardless of the findings. Even if there is other evidence of sexual assault which can be used to corroborate the victim's statement

at trial, the fact that a victim declined to have a medical examination or failed to disclose to medical personnel that he or she was the victim of a sexual assault may be used against the victim by the defense if there is a trial.

To preserve the option of later deciding to go forward in the criminal justice system, it is best for the victim to have a physical examination. Since the examination can be painful and re-traumatizing, when campus or local law enforcement transport a survivor to the hospital, they must contact an advocate from the local rape crisis center to meet them at the hospital to support the survivor. The survivor can opt to have a second support person present as well. (Pen. Code, § 264.2.)

Physical findings may not be as crucial in proving the perpetrator's culpability in a campus disciplinary proceeding, although they can certainly support the victim's statement in the same way that they can at trial. The reason why the examination may not be as important in a campus disciplinary proceeding is the lesser burden of proof required in a campus disciplinary proceeding. Proof beyond a reasonable doubt is required for guilt to be proven at trial, whereas a campus proceeding requires proof only by a preponderance of the evidence, discussed in further detail below. Nevertheless, physical evidence collected in the criminal justice process should be used to corroborate the victim's statements in the campus disciplinary process.



THE CRIMINAL JUSTICE SYSTEM



VICTIM RESOURCES

Colleges and universities should make information available to student victims so that they can easily locate resources both on and off campus. Federal and state laws require that schools make information about existing resources readily available to victims. California law requires that “to the extent possible” colleges and universities 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, survivor advocacy, legal assistance, and resources for the accused. (Ed. Code, §§ 67385-67386.) Schools should make this information

easy for students to find. If a rape victim wants to seek medical attention, obtain a rape kit or make a report, it should be easy for the student to access the available resources.

Colleges and universities should consider discussing with their IT department how to make these resources the first hyperlink options to pop-up when typing in “rape,” “sexual assault” or “violence” in a school’s website search box. (For other ideas on making resources and policies on sexual assault easily accessible on the campus web site, see *Student Safety, Justice and Support: Policy Guidelines for California Campuses Addressing Sexual Assault, Dating/Domestic Violence and Stalking*, www.calcasa.org.)

THE BURDEN OF PROOF & THE DECISION TO PURSUE CRIMINAL CHARGES OR FILE A COMPLAINT ON CAMPUS

The burden of proof is higher in the criminal justice system than required in a campus disciplinary proceeding. In a criminal trial, the prosecution must prove the defendant is guilty beyond a reasonable doubt. In a campus disciplinary proceeding, the lower burden of proof is proof by a preponderance (majority) of the evidence that the sexual assault occurred. These different burdens of proof may help a survivor determine whether to pursue redress in one or both systems.

Once the campus police department or local law enforcement agency forwards a case to the District Attorney’s office, it is reviewed by the prosecutor’s office to determine if there is proof beyond a reasonable doubt of the defendant’s guilt. The police and prosecutor may believe the survivor, yet may not file charges in the case if they do not believe they can prove guilt at trial beyond a reasonable doubt. To determine whether that burden of proof can be met, the prosecutor reviews whether all the elements of a criminal offense can be proven. For example, to prove rape in California, the evidence (which can be based on the survivor’s statement alone

in some cases) must show lack of consent to penetration (verbal or nonverbal), or must show there was a withdrawal of consent.

California rape law requires proof of force or violence, or duress, menace or fear of immediate injury. (Pen. Code, § 261.) Penetration can be slight, and the force used need only be that needed to accomplish the act. Rape can also be proven when the survivor was prevented from resisting due to intoxication/drugs, and that state was known or should reasonably have been known to the defendant; or if the survivor was unconscious or asleep or was not aware at the time that the act occurred. (Pen. Code, § 261.) Consent under California law means “positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the act or transaction involved.” (Pen. Code, § 261.6.)

A student who was a victim of sexual violence also has the option to file a formal complaint with the college or university. This formal complaint is separate and independent of the student victim’s decision to file criminal charges. Pursuing



resolution through the campus system does not preclude the victim from pursuing criminal charges or a civil lawsuit against the perpetrator. Every campus must have a designated Title IX coordinator who will serve as a resource for students who wish to report sexual harassment or violence. If the victim chooses to initiate a formal complaint of sexual assault, the campus has an obligation to promptly investigate and initiate grievance procedures. The well-known April 2011 Dear Colleague Letter sets forth detailed procedures for the disciplinary hearing process. (See http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/012507_good_guidance.pdf.)

CONFIDENTIALITY VERSUS PRIVILEGE

In the criminal justice system a survivor's disclosure to certain people is privileged. Privilege means that without the survivor's permission, the disclosure cannot be repeated to anyone else, not even to police or the campus Title IX Coordinator, unless compelled by a judge. If the survivor discloses what happened to a certified sexual assault counselor who is employed by a California rape crisis center or a domestic violence counselor, or to someone working on campus as a professional or pastoral counselor, California law ensures the disclosure is privileged. (Evid. Code, §§ 1035.4, 1037.1.) Campuses sometimes employ confidential advocates, but these advocates may still have a duty to report a disclosure to the campus' Title IX Coordinator, unless they are acting in the role of a professional therapist or pastoral counselor (2014 Q+As, D1-5)⁴.



THE CAMPUS ADJUDICATION SYSTEM



Public and private colleges and universities that receive any federal funding must comply with federal and state legislation governing sexual harassment and sexual assault on campuses. Federal and state legislation governs sexual violence prevention, crime reporting, investigation of sexual harassment and assault complaints on campus, accessibility of services to victims, and campus grievance/disciplinary procedures. The key pieces of federal legislation regulating sexual assault on campus are Title IX of the Educational Amendments of 1972 (“Title IX”), the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics (“Clery Act”), and the Violence Against Women Reauthorization Act (VAWA) of 2013. In addition to the federal regulations, institutions of higher education must comply with state laws on campus sexual violence in their jurisdiction. Many state laws provide supplementary or overlapping requirements for reporting, investigation, and disciplinary hearings, in particular regarding the due process rights for accused students who face suspension or expulsion.

TITLE IX⁵

Title IX sets forth detailed requirements for a school’s response to a report of sexual violence, dating/domestic violence, and stalking, including investigation. Recourse for students pursuant to Title IX includes filing a civil lawsuit and/or filing a complaint with the federal Office of Civil Rights (OCR). Schools are required by Title IX regulations to adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment, and to disseminate a policy against sex discrimination. A school policy should define sexual harassment, explain how to file a complaint and how the school will handle a complaint, investigation, and adjudication. (2014 Q&As, C-5.)

THE CLERY ACT

The primary purpose of the Clery Act was to promote transparency and awareness of campus crime. Like Title IX, the Clery Act applies to all schools that receive federal financial assistance. On March 7, 2013, President Obama signed the Violence Against Women Reauthorization Act (VAWA) of 2013, which intended to update, clarify, and improve the Clery Act. Although there is no private right of enforcement under the Clery Act, in 2015 the U.S. Department of Education could fine schools for Clery Act violations up to \$35,000 per violation.

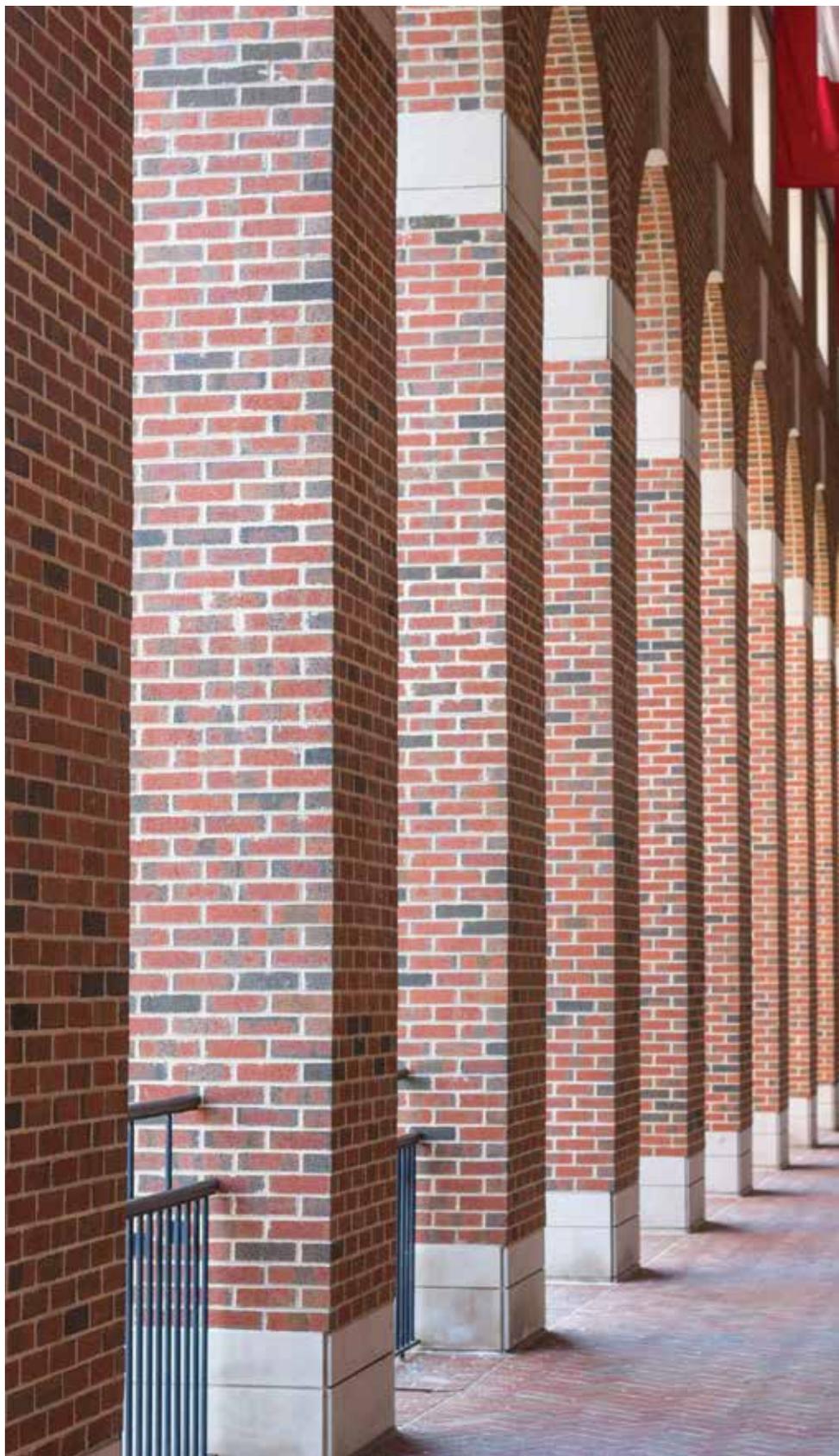
STATE LAWS⁶

In addition to Title IX and the Clery Act, institutions of higher education must comply with state laws on campus sexual violence in their jurisdiction. Many state laws provide supplementary or overlapping requirements for reporting, investigation, and disciplinary hearings, in particular regarding the due process rights for accused students who face suspension or expulsion. In California, recent legislation codified in the California Education Code imposes additional regulations on colleges and universities. (Ed. Code, §§ 67380 et seq.)

Additionally, public colleges and universities must afford their students certain constitutional due process protections that may not apply to private colleges and universities. Private colleges and universities, on the other hand, are free to establish their own policies and disciplinary procedures. However, this does not mean that private colleges and universities do not need to provide student victims of sexual assault with redress or students accused of sexual misconduct with a fair process. Since the majority of private colleges and universities receive federal funds, they must still comply with federal and state legislation governing sexual assault on campus.

PRIVATE COLLEGE & UNIVERSITY ADJUDICATIONS

Private colleges and universities are not considered governmental entities and therefore are not governed by the Fifth and Fourteenth Amendments to the United States Constitution. The concept of legal due process of law afforded to citizens under these constitutional amendments does not apply to private institutions. Rather, disciplinary adjudications at private institutions are governed by the contract the school has entered into with its students. However, almost every college and university in the United States receives federal funds and is therefore required to comply with Title IX, VAWA, and the Clery Act. As a result, private colleges and universities must have formal procedures for adjudicating complaints of sexual misconduct that comply with these requirements, and they must follow their own policies and procedures. Such statutory requirements for investigating and adjudicating sexual assault complaints also apply to public colleges and universities in addition to the due process requirements delineated above.





TITLE IX, VAWA⁷ & CLERY ACT⁸ REQUIREMENTS IN SEXUAL ASSAULT CASES FOR ALL COLLEGES AND UNIVERSITIES RECEIVING FEDERAL FUNDING

The Clery Act requires that colleges and universities receiving federal funding create and publish formal rules for cases involving charges of sexual assault. Title IX requires that all colleges and universities that receive federal funds take immediate action to eliminate sexual discrimination by following these procedures:

- publish a notice of nondiscrimination
- designate a Title IX coordinator to ensure the school complies with and carries out its responsibilities under Title IX
- adopt and publish grievance procedures

Sexual discrimination has been interpreted to include sexual assault and sexual misconduct complaints. See the United States Education Department's Office of Civil Rights' "Dear Colleague" Letter dated April 4, 2011 which states "Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX."

Every college and university that receives federal funding needs to have fair, prompt, and equitable grievance procedures in place for a sexual misconduct student victim to seek redress. (2014 Q&As, F-1.) According to the Office of Civil Rights, mediation is never an appropriate resolution procedure to resolve sexual assault complaints. Thus, the process following a sexual harassment complaint typically culminates in a formal campus disciplinary hearing before an impartial panel. Title IX does not necessarily require a formal hearing. Rather, Title IX provides that if one party is given the opportunity to explain or comment in person to an adjudication panel, both parties must be given the same opportunity, but not necessarily at the same hearing. However, in sexual misconduct cases where the perpetrator faces suspension or expulsion, the majority of colleges and universities typically choose to hold a formal hearing.

Under Title IX, both the student victim and the accused student (respondent) are entitled to:

- **Notice of the grievance procedures**
- **An adequate, reliable, and impartial investigation of sexual harassment and sexual violence complaints**
- **Designated and prompt time frames in the school's grievance procedures**
- **Notice of the outcome of the complaint and any appeal in writing (2014 Q&As, C-5.)**

The grievance procedures must be detailed and made widely available (i.e., posted on the school's web site and/or widely distributed). Once a complaint of sexual assault is made, the school should notify the victim of the right to file criminal charges, and explain the importance of preserving evidence.

If there is a hearing, both students may have a representative of their choosing accompany him/her. At a hearing, both parties have the right to have the matter heard before an impartial panel and to present witnesses and other evidence if a hearing is provided. Under Title IX, there is no right to cross examine the other party. Typically, the students will provide the panel with questions and the panel will ask the questions it deems relevant. There are no formal rules of evidence applied to admissibility of evidence in campus disciplinary proceedings. Instead, the panel is left to decide admissibility based on a general concept of fairness.



EVIDENTIARY STANDARD IN ALL CAMPUS ADJUDICATIONS

In a campus adjudication, the evidentiary standard applied is “preponderance of the evidence” which means that the panel must determine it was more likely than not the conduct occurred. This burden of proof is a much lower standard than the criminal justice system standard of proof “beyond a reasonable doubt.” As a result, conduct may constitute sexual assault or rape under Title IX, even if the conduct cannot be proven in a criminal trial.

AFFIRMATIVE CONSENT LAW IN ALL CAMPUS ADJUDICATIONS

In 2014, California enacted a new affirmative consent standard, colloquially referred to as “Yes Means Yes” consent model, for campus disciplinary adjudications in sexual assault cases. Such proceedings must be determined by a preponderance of the evidence. (Ed. Code, § 67386). These affirmative consent laws apply only in disciplinary proceedings for campus sexual assault in California, not in the criminal justice system.

Under the “Yes Means Yes” model or affirmative consent standard, the victim must say yes to the sexual acts, either in words or by affirmative actions (e.g., a nod or touch) that a reasonable person would understand to mean yes. This consent standard means that in a campus disciplinary system in California, there must be evidence that the survivor did not affirmatively consent to the sexual contact. Under the affirmative consent standard, silence is not affirmative consent. Force or duress do not have to be proven in a campus disciplinary proceeding utilizing the new standard — just lack of affirmative consent.

At the time this article was published, California and New York were the only states that had enacted the affirmative consent standard in campus adjudications. California and New

York’s affirmative consent standards for campus sexual assault were adopted in 2014 and 2015, respectively, and there is not yet any judicial guidance on how this may change the outcomes in campus sexual assault cases. Since the criminal justice standard requires proof beyond a reasonable doubt while in a campus disciplinary proceeding the evidentiary standard requires a preponderance of the evidence, it is possible that the disciplinary proceeding is more likely to achieve justice for victims. However, recently there has been an increase in the number of accused students raising questions about due process in these proceedings, highlighting another area of liability for public colleges and universities.

Under the “No Means No” model, a victim of sexual violence must affirmatively express lack of consent in words or actions. With the “Yes Means Yes” model, passive acquiescence or silence must be construed as nonconsent because words or actions are required to indicate consent. The “No Means No” standard can be particularly difficult to meet in the context of the type of sexual violence that typically takes place on campus where most sexual assault takes place between acquaintances and alcohol is often involved.

THE CAMPUS ADJUDICATION SYSTEM



PUBLIC COLLEGE & UNIVERSITY ADJUDICATIONS

Public colleges and universities must afford their students – both the complainant and the respondent – with certain due process rights. *Goss v. Lopez* (1975) 419 U.S. 565, the seminal case in campus disciplinary adjudications, established that, at a minimum, public schools must provide, in a campus disciplinary proceeding, notice of the charges being brought against the accused, a summary of the evidence the school has to support the charges, and an opportunity to present his/her side to an impartial panel and dispute the charges. The due process rights afforded to students at public colleges and universities are not as broad as the due process rights afforded to defendants under the criminal justice system. However, courts have held that due process still requires that public colleges and universities provide a fair process. Moreover, public colleges and universities must comply with Title IX, the Clery Act, and VAWA requirements governing sexual assault in addition to procedural due process requirements.

Procedural due process stems from the United States Constitution (the Fifth and Fourteenth Amendments). Procedural due process refers to the procedures put in place to make a determination. The federal and state governments may not deprive any person “of life, liberty, or property, without due process of law.” Due process simply means that the government cannot take away a person’s rights afforded under the Constitution without “due process of law,” i.e., a fair and just process. What that process is will vary depending on the liberties at stake. The more serious the potential punishment, the more procedural safeguards are in place. For instance, in a criminal proceeding a defendant has numerous due process rights, including the right to confront his accuser and the right to be tried by a jury of his peers.

State colleges and universities must afford their students due process of law to ensure that a student’s right to education is not taken away without a fair administration of justice. However, the most serious punishment at stake, in a campus adjudication (i.e., suspension or expulsion), is not as severe as the possible loss of freedom (i.e., jail or other criminal penalties) at stake in the criminal justice system. Courts have

found that since the potential punishment is not as severe in the campus adjudication context, the due process procedures required are limited.

In a sexual assault case at a public university, both the victim and the accused (who may be facing potential suspension or expulsion) must be afforded certain basic due process rights. In a campus adjudication process, both the victim and the accused are entitled to a prompt and impartial investigation, the right to receive detailed information regarding the college or university’s grievance procedures used for all similar cases and campus resources available, a fair hearing before an impartial panel where each party can present his/her side (although both parties need not be present at the same time, since the accused has no right to confrontation), and notice of the outcome.

In a campus adjudication hearing, the victim has the right to decide whether to report and how. No pressure should be placed on a victim either way from the campus. The victim also has the right to be informed of options for notifying local law enforcement and the right to campus cooperation in securing evidence necessary for criminal proceedings. A victim has the right to be informed of resources available for sexual assault victims (counseling, medical and support both on and off campus). To the extent at all possible, a victim of sexual assault has the right to live, attend classes, and work free from dealing with or seeing the alleged perpetrator. To that end, the victim has the right to be informed of possible options for academic accommodations and living arrangements. Additionally, the victim also has all of the same due process rights afforded to the accused.

The accused is entitled to receive a detailed written statement delineating the specific charges being brought against him/her and to be made aware of the university’s evidence to be brought against him/her in the adjudication process, such as the names of witnesses and their anticipated testimony. The accused must be given adequate time to prepare a defense. The accused has a right to notice of the outcome of the disciplinary hearing and any sanctions imposed by the disciplinary panel.



During a hearing, if one is provided where the parties are present:

- **Both the victim and the accused student may bring someone for support**
- **Evidence may be presented according to the school's policy about how evidence should be presented**
- **Both students may ask questions (but not necessarily through counsel), and the school's policy may require that questions may be submitted ahead of time rather than at the hearing**
- **Both students must have a fair opportunity to present their side, including their view of the facts, witnesses, and affidavits**
- **If the school permits one party to submit expert testimony, it must do so equally for both parties (2014 Q&As, F-1.)**

In the adjudication process, both the complainant and the respondent should have an opportunity to present their evidence and their side of the story.⁹ No formal rules of evidence are required to be applied. Students are guaranteed a fair

adjudication process, but there is no right to cross-examine witnesses. Public universities must adhere to the Fourteenth Amendment and provide "equal protection", which means that all similarly situated individuals should be treated the same. However, all colleges and universities should have clear written procedures explaining how sexual assault cases will be handled.

Sexual assault laws are evolving and progressing quickly. For example, in California, SB 967 was signed into law last year. The law sets forth the affirmative consent standard which is now required in campus adjudication proceedings. Additionally, it requires campuses adopt certain sexual assault policies and protocols and requires the governing boards, "to the extent feasible," to enter into memoranda of understanding or other agreements or collaborative partnerships with on-campus and community-based organizations to refer students for assistance or make services available to students. The new law requires campuses to implement comprehensive prevention and outreach programs addressing sexual assault, domestic violence, dating violence, and stalking.

COMPARING THE CRIMINAL JUSTICE SYSTEM TO THE CAMPUS ADJUDICATION SYSTEM



THE PRELIMINARY HEARING

When criminal charges are brought, the defendant is entitled to a preliminary hearing, which allows a judge to determine whether the evidence is sufficient to move forward to trial. The purpose of the preliminary hearing is to determine whether there is probable cause to conclude that the defendant has committed the offense charged. (*People v. Wallace* (2004) 33 Cal.4th 738.) In California, an officer is permitted to testify about the survivor's statement to police. This is called a Prop. 115 preliminary hearing. (Cal. Const., art. I, § 30, subd. (b), added by Proposition 115, states that "hearsay evidence" is admissible at preliminary hearings; see Pen. Code, § 872(b).)

Use of an officer's testimony to explain the survivor's statement at the preliminary hearing is an exception to the hearsay rule (Evid. Code, § 1203.1.) If the case goes to trial, the survivor will have to testify. (See Right to Confrontation, below.)

Compare to Campus Adjudication System

There is no equivalent to the preliminary hearing in the typical campus adjudication system, although a campus may require statements about the evidence to be submitted in advance of a campus adjudication hearing.

RIGHT TO A SPEEDY TRIAL

A criminal defendant has a constitutional right to a speedy trial, meaning that unless the right is waived (and it most often is, to allow the defense adequate time to prepare a case), the accused must go to trial within 60 days of the filing of criminal charges in an indictment or information. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15, cl. 1.)

Compare to Campus Adjudication System

The Office of Civil Rights indicates that the length of time to elapse from the initial complaint to the disciplinary hearing will vary depending on the circumstances of the case, but states that a typical investigation takes 60 days.

However, there is no absolute right to adjudication within any specified period of time. Rather, the campus has a duty to resolve complaints "promptly and equitably." (2014 Q&As, at F-2.)

A school must not wait for the criminal trial before proceeding with an adjudicatory hearing or decision on campus. (2014 Q&As at F-3.) While a school may need to delay its investigation while a police investigation is in the active evidence-gathering stage, it must not wait until the criminal justice process is complete to go ahead with its own investigation and hearing or determination. (2014 Q&As at F-3.)

RIGHT TO COUNSEL

In a criminal trial the accused has a right to counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 13.) If the alleged defendant cannot afford an attorney, the state pays for his defense. The attorney speaks for the defendant at the trial and questions witnesses, unless the defendant elects to represent himself (act “in propria persona,” or pro per). A pro per defendant questions the witnesses at trial. This means there is the potential at trial for the defendant to question the survivor on the witness stand.

Compare to Campus Adjudication System

Campuses determine whether the parties are allowed to speak at a hearing, or whether written statements and questions submitted ahead of time will be used. There is no right to have an attorney present although Title IX states that if a school permits one party to have lawyers or other advisors at any stage of the proceedings, it must do so equally for both parties. (2014 Q&As, F-1.)



COMPARING THE CRIMINAL JUSTICE SYSTEM TO THE CAMPUS ADJUDICATION SYSTEM



RIGHT TO A JURY TRIAL

Every defendant in a criminal case has the right to trial by a jury of his peers. (U.S. Const., 7th Am.; Cal. Const., art. I, § 16.) Most criminal cases never go to jury trial because the defendant decides to plead guilty, often to a lesser charge or to fewer charges than were initially brought against him. Plea bargains do not occur as often when sexual assault charges are filed. Defendants are less likely to accept a plea in a case of sexual assault because it is sometimes difficult for the prosecution to prove force, duress, coercion, or lack of consent beyond a reasonable doubt. The typical defense is either a denial that the sexual violence occurred, or that consent was given. In the absence of physical injury, cases depend on the amount of corroborating evidence that supports the survivor's statement.

Also, most sexual assault is committed against a friend, acquaintance, intimate partner, or person otherwise known to the defendant. Prosecutors can and do win non-stranger sexual assault cases, but they often have to go to trial on the case because the defendant is less likely to plead guilty.

Compare to Campus Adjudication System

There is no right to a trial or even a formal hearing in the campus adjudication system, but whatever proceeding is used must be fair to both parties.

RIGHT TO CONFRONTATION

In a criminal trial, the defendant's right to confront the witnesses against him is an element of federal due process. (*Pointer v. Texas* (1965) 380 U.S. 400.) The Confrontation Clause (U.S. Const., 6th Am.) allows admission of an out-of-court testimonial statement only if the witness is unavailable and there was prior opportunity for cross-examination. (*Crawford v. Washington* (2004) 541 U.S. 36.) This means that the survivor's statements to investigators prior to trial cannot be used at trial. The survivor must testify, barring her absence due to death, coma, or a similar reason for unavailability at trial.

Compare to Campus Adjudication System

It is up to the school to determine whether to have the complainant and respondent in the same room at the same time. The school cannot require the complainant to be present at the hearing as a prerequisite for proceeding with a hearing. (2014 Q&As, F-5.)

The right to confrontation at a criminal trial means the defense has the right to cross-examine witnesses. A campus does not have to permit the parties to question each other at an adjudication hearing, although if it allows one party to do so, the other must have the same right. The Office of Civil Rights strongly discourages schools from allowing the parties to personally question or cross-examine each other during a hearing on alleged sexual violence. (2014 Q&As, F-6.)



BURDEN OF PROOF

In a criminal justice proceeding, the prosecution has the burden of proving the guilt of the accused beyond a reasonable doubt. This means “[a] defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether... guilt is satisfactorily shown, [defendant] is entitled to a verdict of not guilty.” (CALJIC 2.90.)

This presumption means the prosecution has the burden of proving at trial that a criminal defendant is guilty beyond a reasonable doubt. The jury instruction that must be given is: “Reasonable doubt” is not just possible doubt, “because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.” (CALJIC 2.90.)

Compare to Campus Adjudication System

In a campus disciplinary proceeding, Title IX and California law (Ed. Code, § 67386) both require the campus to use the preponderance of evidence standard as the burden of proof. This means that the majority of evidence must support the complainant’s allegations.

There is a world of difference between the criminal justice system’s focus and that of the campus adjudication process. The focus of the criminal justice system is on guaranteeing that the criminal defendant receives due process and every right accorded by the Constitution. The goal of the campus disciplinary system is to ensure that the right of the survivor to an education in a safe environment is secure, while at the same time being fair to both parties.

It is much more difficult to prove guilt beyond a reasonable doubt at trial than it is to prove in a campus disciplinary proceeding that a sexual assault occurred by a preponderance (more than 51%) of the evidence.

CALIFORNIA RAPE SHIELD LAW

California law, like the law in most states, shields a survivor from having her sexual history disclosed at a criminal trial. (Evid. Code, § 1103.) Similarly, the way a survivor was dressed at the time of the assault is generally not admissible on the issue of consent.

Compare to Campus Adjudication System

The complainant’s sexual history with anyone but the alleged perpetrator should not be mentioned at an adjudication hearing. A current or past consensual dating or sexual relationship does not by itself imply consent or preclude a finding of sexual violence. (2014 Q&As, F-7.)

COMPARING THE CRIMINAL JUSTICE SYSTEM TO THE CAMPUS ADJUDICATION SYSTEM



SANCTIONS AND PENALTIES

A criminal trial that results in a guilty verdict will require a sentencing hearing. At the sentencing hearing, the survivor is entitled to make a victim impact statement. A judge will impose the sentence, which can mean imprisonment in county jail or state prison, or probation supervision, and may include the requirement of other sex offender monitoring measures and participation in a specific sex offender treatment program or domestic violence treatment program.

Compare to Sanctions in the Campus Adjudication System

The sanctions available after a campus disciplinary proceeding range from writing an essay to expulsion. The most common remedy is probably suspension for a specified period of time. In 2015 the governor vetoed A.B. 967, which would have required California institutions of higher education to uniformly impose specified sanctions (expulsion, suspension, loss of institutional financial aid or scholarships, loss of activity privileges, and removal from student housing) in sexual misconduct cases. The proposed law would have required a minimum penalty of suspension for at least two years up to, and including, expulsion, for the most serious violations of sexual assault policies on campus. (A.B. 967, 2015 Leg. Sess., vetoed.)

CONCLUSION

In recognition of the differences between the criminal justice system and the campus adjudication system, it is essential to consider that both systems can hold perpetrators accountable and provide survivors with a sense of justice. It is important to remember that the accused perpetrator has numerous constitutional due process rights in the criminal justice system, and some degree of due process rights in public college and university adjudications. Title IX provides student victims with additional rights and mandates a fair process for both the victim and the accused in campus adjudications. However, both systems can also be re-traumatizing for the survivor. Trauma-informed policies and procedures should be adopted to support survivors who decide to engage in these processes. Colleges and universities should consult “Student Safety, Justice, and Support: Policy Guidelines for California Campuses Addressing Sexual Assault, Dating/Domestic Violence and Stalking”⁹; for examples of trauma-informed policies. When resources are available for survivors, they are more likely to participate in the criminal justice and campus adjudication system.

WORKS CITED

- 1 See Questions & Answers on Title IX and Sexual Violence, F-2; Office of Civil Rights (2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>, hereinafter 2014 Q&As.
- 2 The California Education Code now refers to “victims” as “survivors.” The terms are used interchangeably throughout this article. Notably, it is a best practice during the investigation stage, and prior to adjudication, to refer to the parties generally as “complainant” and “respondent.”
- 3 In addition to the various California Penal Code and Education Code statutes referenced throughout the text, the author relied on federal and California legislation, including Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq., and implementing regulations, 34 C.F.R. Part 106; Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics (“Clery Act”), and the Violence Against Women Reauthorization Act (VAWA) of 2013; The Campus Sexual Violence Elimination (SaVE) Act. Additionally, the author relied on opinions and interpretive literature issued by the U.S. Department of Education’s Office of Civil Rights, including the following resources: Questions & Answers on Title IX and Sexual Violence, Office of Civil Rights (2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>, hereinafter “2014 Q&As”; U.S. Department of Education, Office for Civil Rights, Title IX Resource Guide (Apr. 2015), available on the Office for Civil Rights’ web site at <http://www.ed.gov/ocr>; 2011 “Dear Colleague” letter available at <http://www2ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; 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 Implementation of the VAWA Final Regulations, Office of Postsecondary Education (2015) available at <http://ifap.ed.gov/dpccletters/GEN1515.html>.
- 4 U.S. Department of Education, Office of Post-Secondary Education, *The Handbook for Campus Safety and Security Reporting*, Washington, D.C., 2011.
- 5 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://www2ed.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>).
- 6 Cal. Ed. Code, § 67380 et seq.
- 7 Title IV, sec 40001-40703 of the Violent Crime Control and Law Enforcement Act of 1994.
- 8 The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act of 1990 codified at 20 U.S.C. § 1092(f) with implementing regulations in the U.S. Code of Federal Regulations at 3 C.F.R. 668.46.
- 9 Student Safety, Justice and Support: Policy Guidelines for California Campuses Addressing Sexual, Dating/Domestic Violence and Stalking. (2015). California Coalition Against Sexual Assault (CALCASA). <http://www.calcasa.org/resources/publications/>.

