



LARA STEMPLER
ASSISTANT DEAN FOR GRADUATE STUDIES AND INTERNATIONAL STUDENT PROGRAMS
DIRECTOR, HEALTH AND HUMAN RIGHTS LAW PROJECT
Phone: (310) 206-4778
Email: stemple@law.ucla.edu

SCHOOL OF LAW
BOX 951476
LOS ANGELES, CALIFORNIA 90095-1476

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Introduction

The following represents the consensus reached by the working group appointed by Gov. Jerry Brown following his veto of SB 169. It makes recommendations concerning how best to address allegations of student sexual misconduct on college and university campuses in California.

To inform our analysis, we reviewed current state law, current and prior federal guidance, recommendations made by the American Bar Association, and published commentary by legal scholars and others.

These recommendations specifically pertain to sexual misconduct allegations between student parties. We note that many of the due process protections mentioned below would also be relevant when allegations include staff or faculty parties, but such an expansion of these recommendations would require the additional consideration of numerous factors.

Type of conduct

Policies should focus on sexual misconduct, which includes both “sexual assault” and “sexual harassment.”¹

Standard of proof

Assuming that all other requirements for fairness and due process are met, campuses may use a preponderance of the evidence standard when adjudicating sexual misconduct allegations.² Preponderance of the evidence means that the conclusion is supported by evidence that is persuasive, relevant, and substantial (we reject the trope that preponderance can mean 50 percent likely to have occurred “plus a feather”).³ Moreover, this standard is adequate only when procedures are transparent and fair, as outlined in more detail below.

Confidentiality in process

While the identities of the parties directly involved (complainant, respondent, and witnesses) must be disclosed to one another to ensure basic fairness,⁴ no party’s identity should be revealed to staff/faculty not involved in the process, the wider student body, or to the public by any of the offices or officials involved with the process.⁵ Some state and federal laws concerned with protection of confidentiality in the context of freedom of information may apply.⁶

Investigator independence

The “single-investigator model,” lacking separation between investigator and adjudicator(s), rarely meets due process requirements. The investigator may or may not be the campus Title IX Officer. However, the investigation and adjudication must feature distinct persons and processes.⁷ We note that some schools have developed robust evidentiary hearing procedures that may have sufficient due process protections.⁸

Investigator obligation

The Title IX Officer, or delegated investigator, must fully and impartially investigate all sides in a complaint.⁹ During the investigation, the Title IX Office must strive to be impartial and must not serve as an advocate on behalf of one party.¹⁰ The Title IX Office should provide both complainants and respondents with information about other campus resources where support may be available, including but not limited to confidential counseling.¹¹

Process: report, finding and outcome

If both parties agree that the facts in the report are correct (including a balanced notation of facts in dispute, if any)¹² and accept the investigator’s finding that misconduct did or did not occur, then a sanction, if warranted,¹³ may be issued at this point, preferably by an office other than the Title IX Office.¹⁴ If the sanction is accepted by both parties, the case is concluded. If the facts, finding of responsibility, or the sanction is disputed, a hearing may be requested by either party.¹⁵

Status of the investigator’s report in the hearing

If facts in the report are under dispute, the report, while available for consideration during the hearing, should not be given presumptive weight. If the facts in the report are not under dispute, the investigator’s report may stand, and the hearing need not repeat the process of learning the facts from the parties or witnesses.¹⁶

Live hearings

The live hearing must allow parties to provide and hear testimony in real time. However, in circumstances in which complainants do not wish to interact with respondents directly, campuses must make reasonable accommodations such that parties can avoid direct face-to-face interaction while participating in the live hearing.¹⁷ In such circumstances the use of accessible video technology or other devices should be employed to assist the parties and fact-finders in assessing witness credibility.¹⁸

Direct questioning and cross-examination

In a live hearing, there should be no direct questioning of any one party by another party.¹⁹ However, a party, or a party’s intermediary, is entitled to question the other party by

submitting questions to the adjudicator, who shall have discretion to determine the appropriateness and relevance of any question.²⁰

Right to counsel

Both parties should have the right to an advisor of their choice, including an attorney.²¹ Schools should not allow advisors to directly intervene in meetings or proceedings, but the advisor should be able to communicate questions and concerns to the party he/she represents in writing or through private consultation during the proceedings. Both parties should also have the right to bring a non-participating support person (e.g., a friend or a counselor) to proceedings.²²

Discussion of the complainant's sexual history

The presentation of evidence about either party's sexual history is generally prohibited. Sexual histories concerning outside parties are wholly irrelevant and potentially prejudicial. Evidence referencing the parties' sexual history with one another is prohibited *unless* it provides material evidence on a disputed issue of relevance to the misconduct charge or defense against it. Further, investigators and adjudicators must recognize that the mere fact of a current or previous consensual dating or sexual relationship between the two parties does not itself imply consent or preclude a finding of sexual misconduct.²³

Trauma-informed responses by investigators and adjudicators

"Trauma-informed" approaches have different meanings in different contexts.²⁴ Trauma-informed training should be provided to investigators so they can avoid re-traumatizing complainants during the investigation. This is distinct from a trauma-informed approach to evaluating the testimony of parties or witnesses. The use of trauma-informed approaches to evaluating evidence can lead adjudicators to overlook significant inconsistencies on the part of complainants in a manner that is incompatible with due process protections for the respondent. Investigators and adjudicators should consider and balance noteworthy inconsistencies (rather than ignoring them altogether) and must use approaches to trauma and memory that are well grounded in current scientific findings.

Informing parties of allegations, case status, evidence gathered, and outcome

Schools should provide respondents with prompt, detailed, written notice of the allegations against them.²⁵ The respondent and the complainant should have equal access to information²⁶ and should be given the opportunity to respond at designated intervals.²⁷

Once an allegation has been made, the school should prepare an investigation report.²⁸ Once prepared, the school should give notice to both parties contemporaneously of the availability of the report.²⁹ The report must contain a list of the evidence gathered during the course of the investigation.³⁰ Both parties must have a reasonable opportunity to review the report and

respond, in a statement, to any perceived errors of fact or interpretation in the report prior to a finding of responsibility.³¹

Final appeal process

Both parties have the right to appeal the outcome.³² No live hearing is required for the appeal. A majority of an impartial, three-member panel (at a minimum) must decide the appeal. Grounds for appeal should be limited to the following:³³

- New information not known or available at the time of the investigation has become known or available
- Procedural error materially affected the findings of fact (for example, improper exclusion or inclusion of evidence)
- The sanction imposed is disproportionate to the findings in the case (that is, too lenient or too severe)
- The conduct as found by the decision-maker does not violate school policy
- Evidence of biased decision-making

Interim measures

Prior to findings from an investigation or determination through adjudication, interim restrictive measures concerning housing and campus access may be implemented by the Title IX Office to protect the interests of the parties.³⁴ Efforts should be made to keep these measures reasonable and as minimally disruptive for both parties as possible. Upon a finding of non-responsibility on the part of the respondent, interim measures and restrictions must be lifted immediately. Minimal no-contact orders (no socializing, talking, texting, etc.) may remain in place.

Mandatory reporting to Title IX Office

Many schools have instituted “responsible employee” reporting requirements for faculty and/or staff.³⁵ We wish to note the drawbacks to designating faculty as such, including the disempowerment of victims to decide for themselves whether to report to the Title IX Office. In addition, it can negate faculty members’ ability to openly counsel and listen to students and colleagues, free from an obligation to act against the victim’s wishes. Even sensitive class discussions during which students may disclose past victimization can trigger this reporting obligation, which runs counter to the free and open exchange of ideas in the classroom.

Anonymous reporting

Under California SB 967, schools are required to implement “procedures for confidential reporting by victims and third parties.” Accepting such reports may be helpful for identifying patterns and understanding risks that exist for the campus.³⁶ However, identities must be disclosed upon the beginning of an investigation that could result in sanctions against the respondent.³⁷

Data collection beyond Title IX recordkeeping

The reports made to Title IX offices reflect only a subset of sexual misconduct incidents on campus. The majority of incidents go unreported. Therefore, campuses should support and undertake qualitative and quantitative research to understand the nature and prevalence of sexual victimization on campus and how to prevent it. Columbia University, UC Berkeley, and others have begun such undertakings, and campuses should be encouraged to follow suit.

Collecting demographic data from parties

Campuses should collect anonymous data on the characteristics of parties to identify patterns and systemic problems related to sexual victimization.³⁸ An optional, confidential exit survey about the parties' demographic characteristics would avoid posing questions that might seem intrusive or irrelevant if asked during initial intake or investigative processes.

Such data should be used to analyze whether use of the Title IX process suggests bias against complainants or respondents in relation to race, sex, sexual orientation, gender identity, disability, nationality, or other status. Where relevant, schools may wish to also track parties' involvement in athletics, membership in the Greek system, whether the parties are international students, and other factors in order to shed light on the problem.

Alternative models of conflict resolution: voluntary mediation versus restorative justice

Voluntary mediation is not recommended as an alternative model of conflict resolution in cases of sexual misconduct.³⁹ However, restorative justice practices may be appropriate as a response to a finding of sexual misconduct, if all parties agree to them. If restorative justice practices are recommended or requested, parties should be informed about them, how they operate, and what each party's role will be. Schools may limit the option of restorative justice approaches in cases of severe abuse in order to ensure campus-wide safety.

A public health approach to prevention

While fairness in reporting and adjudicatory processes are essential to all parties involved, these processes take place only after an incident has been reported. We wish to emphasize that prevention efforts, if meaningfully executed, have the potential to reduce the number of incidents occurring in the first place. A comprehensive public health approach, which seeks to inform populations and ensure that community conditions are conducive to safety and well-being, seems particularly apt for addressing many forms of sexual misconduct, and should serve as a vital counterpart to punitive approaches to the problem. Moreover, life skills concerning consent, communication, and boundaries are particularly important for young, newly independent students to learn.

Members of the Post SB 169 Working Group:

Wendy Brown, Class of 1936 First Chair, Political Science, UC Berkeley

Justice Carlos R. Moreno (Ret.)

Lara Stemple, Assistant Dean, UCLA School of Law

¹ See, U.S. DEPT. OF EDUC. OFF. OF CIVIL RTS., Q&A ON CAMPUS SEXUAL MISCONDUCT (2017) at 1 [hereinafter 2017 Q&A] (focusing on sexual misconduct); AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION, ABA CRIMINAL JUSTICE SECTION TASK FORCE ON COLLEGE DUE PROCESS RIGHTS AND VICTIM PROTECTIONS: RECOMMENDATIONS FOR COLLEGES AND UNIVERSITIES IN RESOLVING ALLEGATIONS OF CAMPUS SEXUAL MISCONDUCT 8 (June 2017) at 2 [hereinafter AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION (2017)] (“Sex discrimination includes sexual harassment and sexual misconduct.”); *But see*, Cal. Educ. Code § 94385 (focusing on sexual assault which “includes, but is not limited to, rape, forced sodomy, forced oral copulation, rape by a foreign object, sexual battery, or threat of sexual assault”); Cal. Educ. Code § 67385 (focusing on sexual assault which “includes, but is not limited to, rape, forced sodomy, forced oral copulation, rape by a foreign object, sexual battery, or threat of sexual assault”); Cal. Educ. Code § 67386 (“In order to receive state funds for student financial assistance, the governing board of each [institution] shall adopt a policy concerning sexual assault, domestic violence, dating violence, and stalking, as defined in the federal Higher Education Act of 1965 (20 U.S.C. Sec. 1092(f)) involving a student, both on and off campus.”).

² See, Cal. Educ. Code § 67386 (“A policy that the standard used in determining whether the elements of the complaint against the accused have been demonstrated is the preponderance of the evidence.”).

³ See, AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION (2017), *supra* note 1, at 7 (“[S]ome Task Force members did not agree with the common interpretation of ‘preponderance of the evidence’ as requiring a mechanical weighing of the evidence in which a mere feather is enough to tip the scales towards a finding of responsibility.”); 31 Cal. Jur. 3d Evidence § 91 (“The preponderance of the evidence standard is met when evidence on one side outweighs, preponderates over, is more than, evidence on the other side not necessarily in number of witnesses or quantity but in its effect on those to whom it is addressed...The preponderance rule requires evidence of such weight that, when balanced against that opposed to it, it has more convincing force. That is, a party...need prove only that it is more likely to be true than not true...There is no requirement, however, that the evidence must create conviction in the jury's mind beyond a reasonable doubt. Thus, it is not necessary in a civil case that the minds of the jurors be freed from all doubt.”).

⁴ See, 2017 Q&A, *supra* note 1, at 4 (“Once it decides to open an investigation that may lead to disciplinary action against the responding party, a school should provide written notice to the responding party of the allegations constituting a potential violation of the school’s sexual misconduct policy, including sufficient details and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved, the specific section of the code of conduct allegedly violated, the precise conduct allegedly constituting the potential violation, and the date and location of the alleged incident.”).

⁵ *E.g.*, U.S. DEPT. OF EDUC. OFF. OF CIVIL RTS., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001) at 16 [hereinafter REVISED SEXUAL HARASSMENT GUIDANCE (2001)] (“In all cases, schools should make every effort to prevent disclosure of the names of all parties involved—the complainant, the witnesses, and the accused—except to the extent necessary to carry out an investigation.”); REVISED SEXUAL HARASSMENT GUIDANCE (2001), *supra* note 5, at 18 (“Publicized accusations of sexual harassment, if ultimately found to be false, may nevertheless irreparably damage the reputation of the accused.”); AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION (2017), *supra* note 1, at 2 (with respect to confidential information that may be gathered during an investigation [not including parties’ identities], “[s]chools should put provisions in place to guard against the improper disclosure” of such information, including advising parties about the “scope and limits of the school’s ability to maintain confidentiality.” Examples of common types of evidence that would fall into this category were not included, nor guidance on what to do when confidentiality concerns conflict with notice/discovery obligations.); Cal. Educ. Code § 94385 (requiring schools to adopt written procedures to guarantee confidentiality and appropriately handle “requests for information from the press, concerned students,

and parents”); Cal. Educ. Code § 67385 (requiring schools to adopt written procedures to guarantee confidentiality and appropriately handle “requests for information from the press, concerned students, and parents”).

⁶ See, Cal. Educ. Code § 94385 (“Each private postsecondary educational institution and private vocational educational institution shall each adopt, and implement...a written procedure or protocols...The written procedures or protocols adopted...shall contain at least the following information:[...] (7) Procedures for guaranteeing confidentiality and appropriately handling requests for information from the press, concerned students, and parents.”); Cal. Educ. Code § 67385 (“The governing board of each community college district, the Trustees of the California State University, the Board of Directors of the Hastings College of the Law, and the Regents of the University of California shall each adopt, and implement at each of their respective campuses or other facilities, a written procedure or protocols...(b) The written procedures or protocols adopted...shall contain at least the following information: [...] (7) Procedures for guaranteeing confidentiality and appropriately handling requests for information from the press, concerned students, and parents.”); JEANNE CLERY DISCLOSURE OF CAMPUS SECURITY POLICY AND CAMPUS CRIME STATISTICS ACT (CLERY ACT) § 485(f)(8)(B)(V), 20 U.S.C.A. § 1092(f) (policy shall address “information about how the institution will protect the confidentiality of victims, including how publicly-available recordkeeping will be accomplished without the inclusion of identifying information about the victim, to the extent permissible by law.”).

⁷ See, AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION (2017), *supra* note 1, at 3 (“Should a school choose to use the investigatory model, the Task Force recommends that the investigator and the decision-maker be different persons.”).

⁸ For example, USC now conducts investigations with “adjudicatory-like” processes. The school provides distinct complainant and respondent advisors who help each party participate in an evidentiary hearing in which both parties have the opportunity to pose questions, present new information, bring an outside representative, etc. Following this meeting, the Title IX Officer issues a report finding whether a violation has taken places and, if so, refers the matter to an outside panel for sanctioning.

⁹ See, 2017 Q&A, *supra* note 1, at 4 (“An equitable investigation ... requires a trained investigator to analyze and document the available evidence to support reliable decisions, objectively evaluate the credibility of parties and witnesses, synthesize all available evidence—including both inculpatory and exculpatory evidence—and take into account the unique and complex circumstances of each case.”).

¹⁰ See, AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION (2017), *supra* note 1, at 5 (“As a matter of fundamental fairness, schools and their designated personnel must be fair, impartial, and free of conflicts of interest. Both the investigator and the decision-maker(s) should receive fair and balanced training on how to objectively investigate and adjudicate these matters.”); Dear Colleague Letter from the Dept. of Educ. Off. of Civil Rts. (Apr. 4, 2011) at 12 [hereinafter Dear Colleague Letter (2011)] (“In sexual violence cases, the fact-finder and decision-maker also should have adequate training or knowledge regarding sexual violence. Additionally, ...any real or perceived conflicts of interest between the fact-finder or decision-maker and the parties should be disclosed.”) (archived, no longer in effect).

¹¹ See, Dear Colleague Letter (2011), *supra* note 10, at 15-17 (“Title IX requires a school to take steps to protect the complainant as necessary, including taking interim steps before the final outcome of the investigation. The school should undertake these steps promptly once it has notice of a sexual harassment or violence allegation. The school should notify the complainant of his or her options to avoid contact with the alleged perpetrator and allow students to change academic or living situations as appropriate. For instance, the school may prohibit the alleged perpetrator from having any contact with the complainant pending the results of the school’s investigation. When taking steps to separate the complainant and alleged perpetrator, a school should minimize the burden on the complainant, and thus should not, as a matter of course, remove complainants from classes or housing while allowing alleged perpetrators to remain. In addition, schools should ensure that complainants are aware of their Title IX rights and any available resources, such as counseling, health, and mental health services, and their right to file a complaint with local law enforcement....remedies for the complainant might include, but are not limited to: providing an escort to ensure that the complainant can move safely between classes and activities; ensuring that the complainant and alleged perpetrator do not attend the same classes; moving the complainant or alleged perpetrator to a different residence hall or, in the case of an elementary or secondary school student, to another school within the district; providing counseling services; providing medical services, providing academic support services, such as tutoring; arranging for the complainant to re-take a course or withdraw from a class without

penalty, including ensuring that any changes do not adversely affect the complainant's academic record; reviewing any disciplinary actions taken against the complainant to see if there is a causal connection between the harassment and the misconduct that may have resulted in the complainant being disciplined."); Cal. Educ. Code § 67386 ("In order to receive state funds for student financial assistance, the governing board of each community college district, the Trustees of the California State University, the Regents of the University of California, and the governing boards of independent postsecondary institutions shall...make services available to students, including counseling, health, mental health, victim advocacy, and legal assistances, and including resources for the accused.").

¹² See, AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION (2017), *supra* note 1, at 4-5 ("Both parties should have a reasonable opportunity to review the report with their advisor...and to request information be included or removed by the school from the final report.").

¹³ See, AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION (2017), *supra* note 1, at 9 ("In the event of a finding of responsibility, the consensus of the Task Force is that a particular sanction should not be presumed or required. Instead, the Task Force proposes that sanctioning should be decided on an individualized basis taking into account the facts and circumstances including mitigating factors about the respondent, the respondent's prior disciplinary history, the nature and seriousness of the offense, and the effect on the victim and/or complainant as well as the university community.").

¹⁴ See, 2017 Q&A, *supra* note 1, at 6 ("The decision-maker as to any disciplinary sanction imposed after a finding of responsibility may be the same or different from the decision-maker who made the finding of responsibility.").

¹⁵ See, Dear Colleague Letter (2011), *supra* note 10, at 12 ("OCR also recommends that schools provide an appeals process. If a school provides for appeal of the findings, or remedy, it must do so for both parties."); S.B. 169, Reg. Sess. (Cal., Sept. 18, 2017) at 14-15 ("If both the complainant and respondent are students at the institution, [...and] the institution has an appeals process, [both parties] have equal opportunity to appeal the outcome of the disciplinary proceedings."); AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION (2017), *supra* note 1, at 5 ("The Task Force recommends that both parties have a right to appeal."); *But see*, 2017 Q&A, *supra* note 1, at 7 ("[I]f a school chooses to allow appeals...[it] may choose to allow appeal (i) solely by the responding party; or (ii) by both parties, in which case any appeal procedures must be equally available to both parties.").

¹⁶ See, AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION (2017), *supra* note 1, at 5 ("[T]he final investigation report [will be provided] to the decision-maker(s) for consideration of whether a policy violation has occurred."); AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION (2017), *supra* note 1, at 3 ("In the investigatory model, by contrast, the decision-maker(s) consider(s) only the investigation report in determining whether a violation occurred.").

¹⁷ See, U.S. DEPT. OF EDUC. OFF. OF CIVIL RTS., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014) at 31 [hereinafter 2014 Q&A] ("The school should also ensure that hearings are conducted in a manner that does not inflict additional trauma on the complainant.") (archived, no longer in effect).

¹⁸ See, AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION (2017), *supra* note 1, at 3 ("The adjudicatory model has a hearing in which both parties are entitled to be present, evidence is presented, and the decision-maker(s) determine(s) whether a violation of school policy has occurred. This does not require the parties to be present in the same room. For instance, the parties could be in two separate rooms but able to see and hear each other via video-conferencing. The Task Force emphasizes that the decision-maker(s) should be able to see and hear the parties in order to assess their credibility, and at a minimum, the parties should be able to hear one another."); *id.* at 9 ("[A] witness's cognitive limitations make it demonstrably more difficult for him to consistently answer spontaneous questions under live cross-examination if he is being insincere. In addition, there is certain observable behavior that has been linked to deception, such as vocal tension and pitch. At least one stud has shown that subjects are more than twice as effective at detecting deception when they are able to observe a speaker's body and hear his voice as opposed to simply reviewing a written transcript.").

¹⁹ See, Dear Colleague Letter (2011), *supra* note 10, at 12 ("Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.").

²⁰ See, AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION (2017), *supra* note 1, at 6 ("The complainant and respondent may not question one another or other witnesses directly, but should be given an ongoing opportunity during the proceeding to offer questions to be asked through the decision-maker(s), who will determine whether to ask them. The investigator should be available for questioning by the decision-maker(s) and the parties.").

²¹ See, Dear Colleague Letter (2011), *supra* note 10, at 12 (“While OCR does not require schools to permit parties to have lawyers at any stage of the proceedings, if a school chooses to allow the parties to have their lawyers participate in the proceedings, it must do so equally for both parties.”); JEANNE CLERY DISCLOSURE OF CAMPUS SECURITY POLICY AND CAMPUS CRIME STATISTICS ACT (CLERY ACT) § 485(f)(8)(B)(iv)(II), 20 U.S.C.A. § 1092(f) (gives both parties the right to an advisor of their choice in sexual assault cases: “[T]he accuser and the accused are entitled to the same opportunities to have others present during an institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice.”); 2017 Q&A, *supra* note 1, at 5 (“Any process made available to one party in the adjudication procedure should be made equally available to the other party [for example, the right to have an attorney or any other advisor present and/or participate in an interview or hearing].”); AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION (2017), *supra* note 1 at 4 (“The Violence Against Women Authorization Act of 2013 requires that in cases of sexual assault, both parties have the right to an advisor of their choosing, who may be an attorney or third party advocate. All advisors, including attorney advisors must adhere to all conditions and obligations required by the school’s process. The school should provide the advisor with the same access to information available to the party. Minimally, the advisor should have the right to communicate with the party in oral or written form during all meetings and proceedings. Should a party prefer, the school should provide the party with an advisor who has been trained in the school’s sexual misconduct policies and can assist the party. The school should have more than one advisor to give the party choice, but is not required to provide an attorney advisor. Where a student is working with an advisor and that advisor has an obligation to report to the university, the student should be made aware of the potential conflict of interest.”).

²² Not explicitly mentioned, but not contrary to California law or federal guidance.

²³ See, 2014 Q&A, *supra* note 17 at 31 (“Questioning about the complainant’s sexual history with anyone other than the alleged perpetrator should not be permitted. Further, a school should recognize that the mere fact of a current or previous consensual dating or sexual relationship between the two parties does not itself imply consent or preclude a finding of sexual violence.”); Cal. S.B. 169 § 10 (“The institution shall include, but is not limited to including, a statement regarding the limitations on the use of past sexual history within the scope of a sexual harassment investigation.”); AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION (2017), *supra* note 1, at 6 (“In general, evidence may be presented during a hearing if it is relevant, not unduly repetitious, and the sort of information a reasonable person would find reliable. Evidence is relevant if (1) it bears on a fact of consequence in the case, or (2) it reflects on the credibility of a testifying party or witness in a material way. Evidence may be excluded if it is unfairly prejudicial or if it is needlessly duplicative. Character and reputation evidence regarding the parties [both positive and negative] should be excluded from the decision-making stage. Evidence of the past sexual history of the parties should be disfavored and admitted only when it provides compelling evidence on a disputed issue of relevance to the misconduct charge or its defense.”).

²⁴ Cal. Educ. Code § 67386 (“At a minimum, the policies and protocols shall [include]...A comprehensive, trauma-informed training program for campus officials involved in adjudicating sexual assault, domestic violence, dating violence, and stalking cases.”); 2014 Q&A, *supra* note 17 at 31-35 (“The school should also ensure that hearings are conducted in a manner that does not inflict additional trauma on the complainant...Remedies for the broader student population may include, but are not limited to: Designating an individual from the school’s counseling center who is specifically trained in providing trauma-informed comprehensive services to victims of sexual violence to be on call to assist students whenever needed.”); See, AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION (2017), *supra* note 1, at 9-10 (“Although the Task Force recognizes the importance of questioning, it also acknowledges the value of protecting victims from unnecessary trauma. The Task Force believes that allowing questions to be asked through the decision-maker balances these two important interests. Although the Task Force recognizes that such a process interrupts the spontaneity of direct questioning, it has the benefit of having an independent person assess whether the question is relevant and appropriate. It also removes the potential trauma from having a victim be directly questioned by her assailant. Although such a barrier may not be appropriate in the criminal justice context, the Task Force believes it is appropriate in the school context.”).

²⁵ See, AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION (2017), *supra* note 1, at 4 (“Both parties should be provided with written notice as contemporaneously as is practical that a school or its designated investigator will commence a formal investigation. This notice should include the date of the alleged incident if known, a summary of the alleged facts, a summary of the specific policy violation(s) under investigation by the school, and instructions on

how to access the relevant policy and adjudicatory process.”); 2017 Q&A, *supra* note 1, at 5 (Should provide prompt, detailed, written notice of allegations).

²⁶ Dear Colleague Letter (2011), *supra* note 10, at 11 (“The complainant and the alleged perpetrator must be afforded similar and timely access to any information that will be used at the hearing.”); 2017 Q&A, *supra* note 1, at 5 (Should provide prompt, detailed, written notice of allegations and equal access to discovery including investigation report); *Id.* at 6 (Both parties must be notified of the outcome of the complaint, including sanctions imposed); S.B. 169, 2017 Leg., Reg. Sess. § 10 (Cal.2017) (Both parties must be notified of the outcome of the complaint, including sanctions imposed and the reasoning for those sanctions).

²⁷ See, AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION (2017), *supra* note 1, at 4 (“Both parties should have a reasonable opportunity to review the report...and to request information be included or removed by the school from the final report.”); 2017 Q&A, *supra* note 1, at 5 (“The parties should have the opportunity to respond to the report in writing in advance of the decision of responsibility and/or at a live hearing to decide responsibility.”).

²⁸ See, AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION (2017), *supra* note 1, at 4 (“The school should prepare an initial comprehensive investigation report and should notify both parties contemporaneously of the availability of the report. This report should include information such as party statements, witness statements, and any inculpatory or exculpatory information collected during the investigation.”); 2017 Q&A, *supra* note 1, at 5 (“The decision-maker(s) must offer each party the same meaningful access to any information that will be used during informal and formal disciplinary meetings and hearings, including the investigation report.”).

²⁹ See, AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION (2017), *supra* note 1, at 4-5 (“Once the final investigation report is prepared, both parties...should have reasonable access to it.”).

³⁰ See, AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION (2017), *supra* note 1, at 4 (The “report should include information such as party statements, witness statements, and any inculpatory or exculpatory information collected during the investigation. Schools should disclose a list of information obtained during the course of the investigation even if it was not considered relevant evidence for the decision-maker[s].”).

³¹ See, AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION (2017), *supra* note 7, at 4-5 (“Both parties should have a reasonable opportunity to review the report ... and to request information be included or removed by the school from the final report...Once the final investigation is prepared, both parties...should have reasonable access to it and should have the right to provide a reasonable written response.”); 2017 Q&A, *supra* note 1, at 5 (“The decision-maker[s] must offer each party the same meaningful access to information...including the investigation report. The parties should have the opportunity to respond to the report in writing in advance of the decision of responsibility and/or at a live hearing to decide responsibility.”).

³² See, REVISED SEXUAL HARASSMENT GUIDANCE (2001), *supra* note 5, at 20 (“Many schools also provide an opportunity to appeal the findings or remedy, or both.”); Dear Colleague Letter (2011), *supra* note 10, at 12 (“OCR also recommends that schools provide an appeals process. If a school provides for appeal of the findings or remedy, it must do so for both parties.”); S.B. 169, 2017 Leg., Reg. Sess. § 10 (Cal.2017) (“If both the complainant and respondent are students at the institution, [...and] the institution has an appeals process, [both parties] have equal opportunity to appeal the outcome of the disciplinary proceedings.”); 2017 Q&A, *supra* note 1, at 7 (“If a school chooses to allow appeals from its decisions regarding responsibility and/or disciplinary sanctions, the school may choose to allow appeal (i) solely by the responding party; or (ii) by both parties, in which case any appeal procedures must be equally available to both parties.”).

³³ See, AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION (2017), *supra* note 1, at 5 (“The grounds for appeal should be limited to (1) new information not known or available at the time of the hearing; (2) procedural error that materially affected the findings of fact (this includes improperly excluding or including evidence); (3) the imposition of a sanction disproportionate to the findings in the case (that is too lenient or too severe); or (4) the conduct as found by the decision-maker does not violate school policy.”).

³⁴ See, Dear Colleague Letter (2011), *supra* note 10, at 15-16 (“Title IX requires a school to take steps to protect the complainant as necessary, including taking interim steps before the final outcome of the investigation. The school should undertake these steps promptly once it has notice of a sexual harassment or violence allegation. The school should notify the complainant of his or her options to avoid contact with the alleged perpetrator and allow students to change academic or living situations as appropriate. For instance, the school may prohibit the alleged perpetrator from having any contact with the complainant pending the results of the school’s investigation. When taking steps to separate the complainant and alleged perpetrator, a school should minimize the burden on the

complainant, and thus should not, as a matter of course, remove complainants from classes or housing while allowing alleged perpetrators to remain.”); Cal. Educ. Code § 94385 (“Each victim of sexual assault should receive information about the existence of at least the following options:...the availability of...alternative housing assignments, and academic assistance alternatives.”); Cal. Educ. Code § 67385 (“Each victim of sexual assault should receive information about the existence of at least the following options:...the availability of...alternative housing assignments, and academic assistance alternatives.”); 2014 Q&A, *supra* note 17, at 32 (“Title IX requires a school to take steps to ensure equal access to its education programs and activities and protect the complainant as necessary, including taking interim measures before the final outcome of the investigation.”).

³⁵ See, REVISED SEXUAL HARASSMENT GUIDANCE (2001), *supra* note 5, at 13. (“A responsible employee would include any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility.”); 2014 Q&A, *supra* note 17, at 14-15 (“A responsible employee must report...all relevant details about the alleged sexual violence that the student or another person has shared and that the school will need to determine what occurred and to resolve the situation. This includes the names of the alleged perpetrator (if known), the student who experienced the alleged sexual violence, other students involved in the alleged sexual violence, as well as relevant facts, including the date, time, and location. A school must make clear to its responsible employees to whom they should report an incident of alleged sexual violence.”); See Cal. Educ. Code § 94385 and § 67385 (schools should publish information about mandatory reporters and their obligations: “Legal reporting requirements, and procedures for fulfilling them.”).

³⁶ See, REVISED SEXUAL HARASSMENT GUIDANCE (2001), *supra* note 5, at 18 (“[B]y investigating the [anonymous] complaint to the extent possible ... the school may learn about or be able to confirm a pattern of harassment based on claims by different students that they were harassed by the same individual. In some situations there may be prior reports by former students who now might be willing to come forward and be identified, thus providing a basis for further corrective action.”); Dear Colleague Letter (2011), *supra* note 10, at 5 (“If a complainant insists that his or her name or other identifiable information not be disclosed to the alleged perpetrator, the school should inform the complainant that its ability to respond may be limited...if the complainant continues to ask that his or her name or other identifiable information not be revealed, the school should evaluate that request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students. Thus, the school may weigh the request for confidentiality against the following factors: the seriousness of the alleged harassment; the complainant’s age; whether there have been other harassment complaints about the same individual; and the alleged harasser’s rights to receive information about the allegations if the information is maintained by the school as an ‘education record’...The school should inform the complainant if it cannot ensure confidentiality.”); *Id.* (recommends that schools “pursue other steps to limit the effects of the alleged harassment and prevent its recurrence” even when a request for confidentiality precludes formal sanctions).

³⁷ See, 2017 Q&A, *supra* note 1, at 4 (“Once it decides to open an investigation that may lead to disciplinary action against the responding party, a school should provide written notice to the responding party ...[including] the identities of the parties involved.”).

³⁸ See, 2017 Q&A, *supra* note 1, at 2 (the Federal Clery Act requires postsecondary institutions to report statistics on crimes that occur on campus); 2014 Q&A, *supra* note 17 at 23-4 (“In order to identify patterns or systemic problems related to sexual violence, a school should collect aggregate data about sexual violence incidents from non-professional counselors or advocates in their on-campus sexual assault centers, women’s centers, or health centers. Such individuals should report only general information about incidents of sexual violence such as the nature, date, time, and general location of the incident and should take care to avoid reporting personally identifiable information about a student.”).

³⁹ See, REVISED SEXUAL HARASSMENT GUIDANCE (2001), *supra* note 5, at 21 (“In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis.”); Dear Colleague Letter (2011), *supra* note 10, at 8 (“[I]n cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis.”); Cal. Educ. Code § 94385 (“Each victim of sexual assault should receive information about the existence of at least the following options: criminal prosecutions, civil prosecutions, the disciplinary process through the college, the availability of mediation, alternative housing assignments, and academic assistance alternatives.”); Cal. Educ. Code § 67385 (“Each victim of sexual assault should receive information about the existence of at least the

following options: criminal prosecutions, civil prosecutions, the disciplinary process through the college, the availability of mediation, alternative housing assignments, and academic assistance alternatives.”).