

*Presented for*



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# TO FORESEE OR NOT TO FORESEE: *EFFECTIVE STUDENT PROTECTION & REPORTING*



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# To FORESEE OR NOT TO FORESEE: *EFFECTIVE STUDENT PROTECTION & REPORTING*

## Presentation Overview

- ▶ **College Obligation to Protect Students**
- ▶ **Reporting Requirements Under**
  - ▶ **The Clery Act**
  - ▶ **The Education Code**
  - ▶ **Title IX**
- ▶ **Protecting Student Records**
- ▶ **Mandatory Reporting**
- ▶ **Best Practices**

## Governing Law

- ▶ The Duty to Protect and Recent Case Law
- ▶ The Clery Act (20 U.S.C. § 1092.)
- ▶ Education Code § 67386
- ▶ Title IX (20 U.S.C. §§ 1681–1688.)

# Obligation to Protect Students

Duties and Potential Liability Arising from Acts or Failures to Act

## Obligation to Protect

What is Negligence?

### Negligence is:

A **breach** of an existing legal **duty** of care that proximately **causes injury**.

## Obligation to Protect

### Basic Duty of Care

- ▶ In general, each person has a duty to act with **reasonable care** under the circumstances.

Civ. Code § 1714(a)

Govt. Code § 820(a)

## To Foresee...

► **Foreseeability**, *n.* (1928)

The quality of being reasonably anticipatable.

*Black's Law Dictionary*

► **Anticipate**

To take care of beforehand; to preclude by prior action; forestall.

*Garner's Dictionary of Legal Usage*

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“ The extent of **foreseeable risk** depends on the specific facts of the case [...] **small changes** in the facts may make a **dramatic change in how much risk is foreseeable.** ”

RESTATEMENT 3D OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, § 7

## Obligation to Protect

Premises Liability

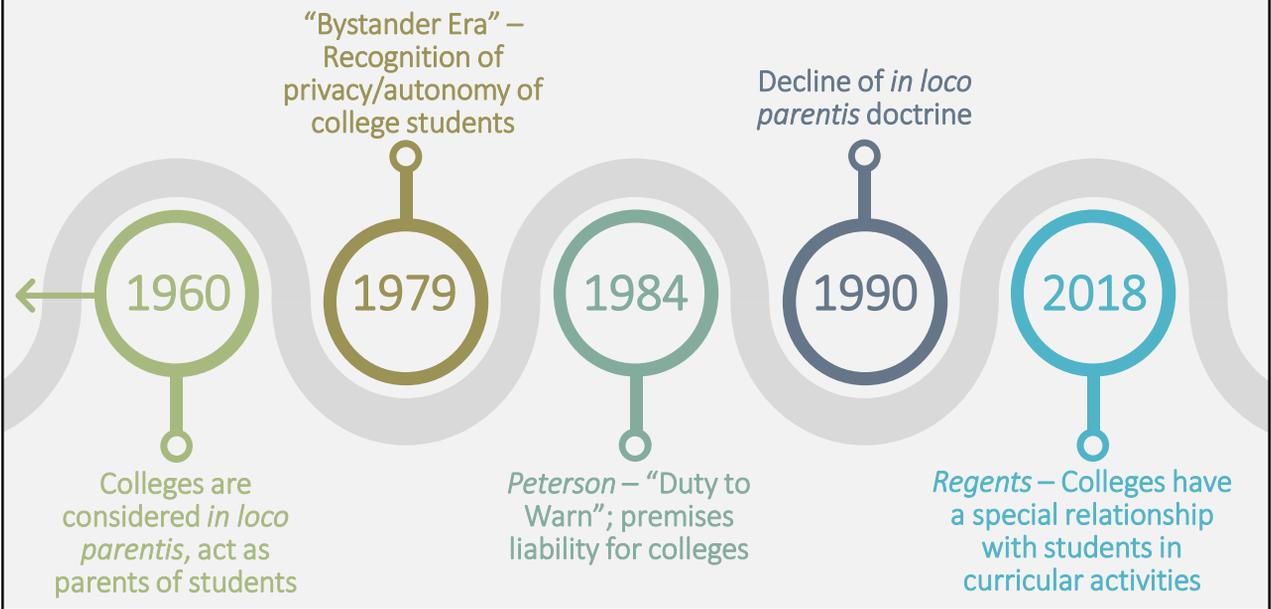
Colleges, like other public entities, have a basic duty to exercise **due care** to protect students from **reasonably foreseeable** dangerous conditions on the campus.

## Hypotheticals

What are some real-world examples?



## The Evolving Duty to Protect



“

The determination whether a **particular relationship** supports a duty of care rests on....considerations of policy which lead the law to say that a particular plaintiff is entitled to protection.

”

*University of Southern California v. Superior Court* (2018) 30 Cal.App.5th 429, 439

**Special relationships may create a duty to control, warn, or protect.**

## Obligation to Protect

Premises Liability

Criminal Conduct  
on Premises

- ▶ A community college district has a duty “to **warn** its students of **known dangers** posed by criminals on campus.”

*Peterson v. San Francisco Community College Dist.*  
(1984) 36 Cal.3d 799, 807.)

- ▶ Limited, before there was a **special relationship** obligating colleges to protect and warn students.

“

The **special relationship** we now recognize....extends to activities that are tied to the school’s curriculum but not to student behavior over which the university has no significant degree of control. ”

*Regents of University of California v. Superior Court* (2018) 4 Cal.4th 607, 627

## Foreseeability

▶ The **Regents Court** asked:

Could a reasonable college foresee that its **negligent failure** to control a potentially violent student, or to warn students who were foreseeable targets, could **result in harm** to one of those students?

## Case Study

*Regents of University of California v. Superior Court*

- ▶ From the time Thompson enrolled until the incident, he had:
  - ▶ Made complaints about others making offensive remarks about him.
  - ▶ Had his dorm assignment transferred, and eventually expelled from housing, due to conflict with other residents.
  - ▶ Reported voices in his dorm walls.
  - ▶ Assaulted a fellow resident of the dorm.
  - ▶ Told a counselor he had auditory hallucinations.
  - ▶ Been ordered to attend counseling.

## Duty to Control, Warn or Protect

- ▶ A **duty to control** generally arises if there is a special relationship with the foreseeably dangerous person that entails an **ability to control** that person's conduct.

## Duty to Control, Warn or Protect

- ▶ A **duty to warn or protect** from foreseeable harm or a dangerous condition, generally arise from special relationships where the injured individual had a **dependence** on the other party for protection and that party had superior control over the means of protections.

## Duty to Control, Warn or Protect

- ▶ College students “can **reasonably expect** that the premises will be free from physical defects and that school authorities will also **exercise reasonable care** to keep the campus free from conditions which increase the risk of crime.”

*Regents of University of California v. Superior Court (2018) 4 Cal. 5th 607, 625*

## Duty to Act With Reasonable Care

Colleges have a duty to act with reasonable care when they are aware of a **foreseeable** threat of violence in a curricular setting.

*Regents of University of California v. Superior Court (2018) 4 Cal. 5th 607, 634.*

## Duty to Act With Reasonable Care

However, the Court noted that:

- ▶ Prior threats or acts of violence by the student;
- ▶ The opinions of mental health professionals; and
- ▶ Observations of others in the campus community *may*, or *should*, provide notice of **foreseeable** risk.

*Regents of University of California v. Superior Court (2018) 4 Cal. 5th 607, 631.*

## No One-Size-Fits Answer...

- ▶ Reasonable care will **vary** under the circumstances.
- ▶ Some assaults may be **unavoidable** despite a college's best effort to prevent them.
- ▶ Courts and juries should be cautioned to avoid judging liability based on **hindsight**.

*Regents of University of California v. Superior Court (2018) 4 Cal. 5th 607, 634.*

## Assessing (& Reassessing) Risk

- ▶ Colleges must promptly assess whether a situation presents unreasonable risk to the campus community;
- ▶ Because the circumstances of a situation often continue to develop, assessing the “right” answer is also an ongoing process.

## Withdrawing Consent to Remain on Campus

- ▶ Whenever there is reasonable cause to believe an **authorized person has willfully disrupted** the orderly operation of such campus or facility, the Chief Administrative Officer or designee may notify the individual that consent to remain on the campus has been withdrawn.
- ▶ Consent may be withdrawn for up to 14 days;
- ▶ Individual is entitled to hearing upon request;
- ▶ Violating the Request to Leave is a misdemeanor.

*California Penal Code Section 626.4.*

## Stay Away Orders Generally

When an **unauthorized person** is on campus and reasonably **appears** likely to interfere with the peaceful conduct of campus activities, then:

- ▶ Chief Administrative Officer or designee may issue a Request to Leave Public School Grounds;
- ▶ Remains in effect for up to seven (7) days;
- ▶ Violating the Request to Leave is a misdemeanor.

*California Penal Code Section 626.6.*

## Hypotheticals

What are some real-world examples?



# The Clery Act

THE JEANNE CLERY DISCLOSURE OF CAMPUS SECURITY POLICY AND CAMPUS  
CRIME STATISTICS ACT

## The Clery Act (20 U.S.C. § 1092.)

Under the Clery Act, institutions of higher education that receive federal funding have a **duty** to **prepare**, **maintain** and **disclose** information about crime on and near their respective campuses.

## The Clery Act

20 U.S.C. § 1092

### Key requirements include:

- Annual Security Report
- Daily Crime Logs
- Timely Reporting
- Disciplinary Policies and Procedures
- Notifications to Campus Community

## The Clery Act (20 U.S.C. § 1092.)

By October 1 of each year, the college must prepare, publish and distribute the security report containing **crime statistics** for the following:

<u>General Criminal Offenses</u>	<u>Hate Crimes</u>	<u>VAWA</u>	<u>Arrests or Disciplinary Action</u>
Murder	Any general criminal offense	Domestic Violence	Liquor Law Violations
Sex Offenses	Crimes involving bodily injury	Dating Violence	Drug-related Violations
Robbery	Larceny-Theft	Stalking	Weapons Possession
Aggravated Assault	Simple Assault		
Manslaughter	Intimidation		
Burglary	Destruction, damage, vandalism		
Arson			
Motor Vehicle Theft			

## Annual Security Report

The Annual Security Report must also include the campus security policies concerning:

- (1) **Reporting** criminal actions and other emergencies occurring on campus;
- (2) **Security and access** to campus facilities and security considerations;
- (3) **Campus law enforcement**, including, authority of campus security and working relationship with State and local law enforcement agencies;
- (4) **Monitoring and recording** off-campus criminal activity of student organizations;
- (5) **Emergency response** and evacuation procedures;
- (6) Unlawful possession, use, or sale of **alcohol or illegal drugs**.

## Policies and Procedures

► Emergency response and evacuation procedures must include:

- (1) **Immediate notification** to the campus community of a significant threat or dangerous situation;
- (2) **Annual notice** of emergency response and evacuation procedures; and
- (3) **Annual testing** of emergency response and evacuation procedures.

## Policies and Procedures

Colleges must **develop** and **publish** procedures for when an incident of domestic violence, dating violence, sexual assault, or stalking has been reported.



## Policies and Procedures

Policies must address:

- ▶ Procedures a victim may follow if a sex offense or VAWA crime has occurred;
- ▶ Disciplinary procedures of the college in cases of alleged sexual assault or VAWA offense, including the standard of evidence to be used;
- ▶ Possible sanctions or protective measures the college may impose following a final determination of a disciplinary proceeding regarding rape, sexual assault or a VAWA crime.

## Education & Awareness Programs

Colleges must develop and distribute policies regarding education programs to prevent domestic violence, dating violence, sexual assault, and stalking;

- ▣ Education programs must **promote awareness** of rape, acquaintance rape, domestic violence, dating violence, sexual assault, and stalking; and
- ▣ Provide information for how the college will **protect the confidentiality** of victims, to the extent permissible by law.

## Education & Awareness Programs

Student and employees must receive notice regarding:

- ▶ Existing options for counseling, mental health, and physical health;
- ▶ Victim advocacy,
- ▶ Legal assistance, and
- ▶ Other services available for victims both on-campus and in the community.

## Daily Crime Logs

Colleges that maintain police or security departments must **make, keep** and **maintain** a daily log recording all crimes reported, including:

- (1) Nature, date, time, and general location of each crime; and
- (2) The disposition of the complaint, if known.

## Daily Crime Logs

With few exceptions, **all entries** into the crime log must be open to public inspection within two (2) business days of the initial report.

Additionally, new information regarding a crime entered into the log must be **added** to the log within two (2) business days of it becoming available.

## Timely Reporting



- ▶ Colleges must make **timely** reports to the campus community regarding a crime or crimes that are or may be a **threat** to other students and employees.

## The Clery Act Penalties



Colleges found to have substantially misrepresented the number, location, or nature of the crimes required to be reported will have a civil penalty imposed.



The penalty adjusts annually with inflation.



As of February 1, 2019, the penalty is **\$57,317** per violation.

## Student Safety in the Education Code

### Education Code Section 67386

In order to receive state funds for student financial assistance, community college districts must:

- ▶ Adopt detailed policies and protocols that are “**victim-centered**”;
- ▶ To the extent possible, create partnerships with organizations offering **assistance** or services to students, including the accused;
- ▶ Develop and implement comprehensive **prevention** and outreach programs.

## Education Code Section 67386 cont'd

District's must also adopt policies and implement protocols concerning sexual assault, domestic violence, dating violence, and stalking, for instances involving a student, on- or off-campus.

## Title IX Obligations

THE EDUCATION AMENDMENTS OF 1972 (20 U.S.C. §§ 1681–1688)

“

No person in the United States shall, **on the basis of sex**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance... ”

20 U.S.C. § 1681(A)

## Title IX Prohibits

- ▶ Harassment of all students, without regard for the sex of the harasser.
- ▶ May include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping.

## Title IX

### Prohibits

Sexual harassment is unwelcome conduct of a sexual nature, and may include:

- ▶ Unwelcome sexual advances;
- ▶ Requests for sexual favors; or
- ▶ Other verbal, nonverbal, or physical conduct of a sexual nature.

Under Title IX, sex discrimination includes sexual harassment.

*Meritor Savings Bank v. Vinson*  
(1986) 447 U.S. 54

## Title IX (34 C.F.R. §§ 106.8-106.9)

Pursuant to Title IX, colleges receiving federal funds must:

- ▶ **Designate** at least one (1) employee to coordinate its efforts to comply with Title IX regulations and investigate any complaints;
- ▶ **Disseminate** its Title IX policy to students, employees, parents and others;
- ▶ **Adopt and publish** grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints;
- ▶ **Promptly act** to confront and prevent or eliminate discrimination or harassment and address its effects.

## Duty to Act Under Title IX

- ▶ Under Title IX, a school has a duty to take immediate action to **eliminate** sex discrimination or misconduct that creates a hostile environment, **prevent** its recurrence, and **address** its effects.
- ▶ The duty is triggered when a “**responsible employee**” of the school knows about the misconduct, or should know by exercising reasonable care.

*Davis v. Monroe County Bd. of Educ.*, (1999) 526 U.S. 629, 649-50  
*Gebser v. Lago Vista Ind. Sch. Dist.*, (1998) 524 U.S. 274, 281

## Private Right of Action Under Title IX

- ▶ Title IX provides a **private right of action** to enforce its prohibition on sex discrimination.

*Cannon v. University of Chicago*, 441 U.S. 677 (1979).

- ▶ Private parties may also seek **monetary damages** for intentional acts of discrimination in violations of Title IX.

*Franklin v. Gwinnett County Public Sch.*, 502 U.S. 60 (1992).

## Liability Under Title IX

Monetary damages may be imposed on districts when a school official – with the authority to stop the alleged discrimination – had **actual knowledge** of the misconduct and displayed deliberate indifference.

1. Gender-oriented conduct was severe, pervasive and objectively offensive;
2. Conduct denied the student an equal opportunity or benefit to an education;
3. The district had actual knowledge of the misconduct;
4. The district was deliberately indifferent to the misconduct;
5. Damages results from the misconduct.

*Gebser v. Lago Vista Independent School Dist.*  
(1998) 524 U.S. 274

### Case\* Study

**McCluskey v.  
University of Utah**

*\*Parent's civil rights action,  
filed June 27, 2019,  
seeking \$56 million*

- ▶ On October 22, 2018, Lauren McCluskey, 21, was shot to death by her ex-boyfriend after he abducted her from the parking lot outside her campus dorm.
- ▶ Prior to her death, Lauren had made numerous reports to the University's Police Department regarding the threats she received from her assailant, whom she had recently broken up with after discovering that he was a registered sex offender released on parole.
- ▶ An investigation into the actions of the Police Department, identified instances where the Department missed opportunities to assist Lauren.

## Case Study

McCluskey v.  
University of Utah

- In part, recommendations included:
1. Thoroughly train employees on the "full array" of indicators relating to domestic/dating violence, including a focus on the actions of the perpetrator and not what the victim believes or perceives;
  2. Improving relationships, communication and cooperation amongst employees, departments and other agencies;
  3. Discussing matters with potential to escalate to violence;
  4. Small Police Departments need to ensure qualified officers;
  5. Ensure policies and procedures recognize the nuances of campus policing.

## Safety & Security Best Practices

## Promote A Culture of Safety & Security

- ▶ **Educate** the campus community
- ▶ Encourage **reporting**
- ▶ Record, maintain and monitor **reports of behaviors** that threaten the safety and security of the campus community
- ▶ Ensure access to **resources**

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## Foster an Environment of Safety & Security



Consider creating a team focused on the prevention of, and response to, sexual violence;

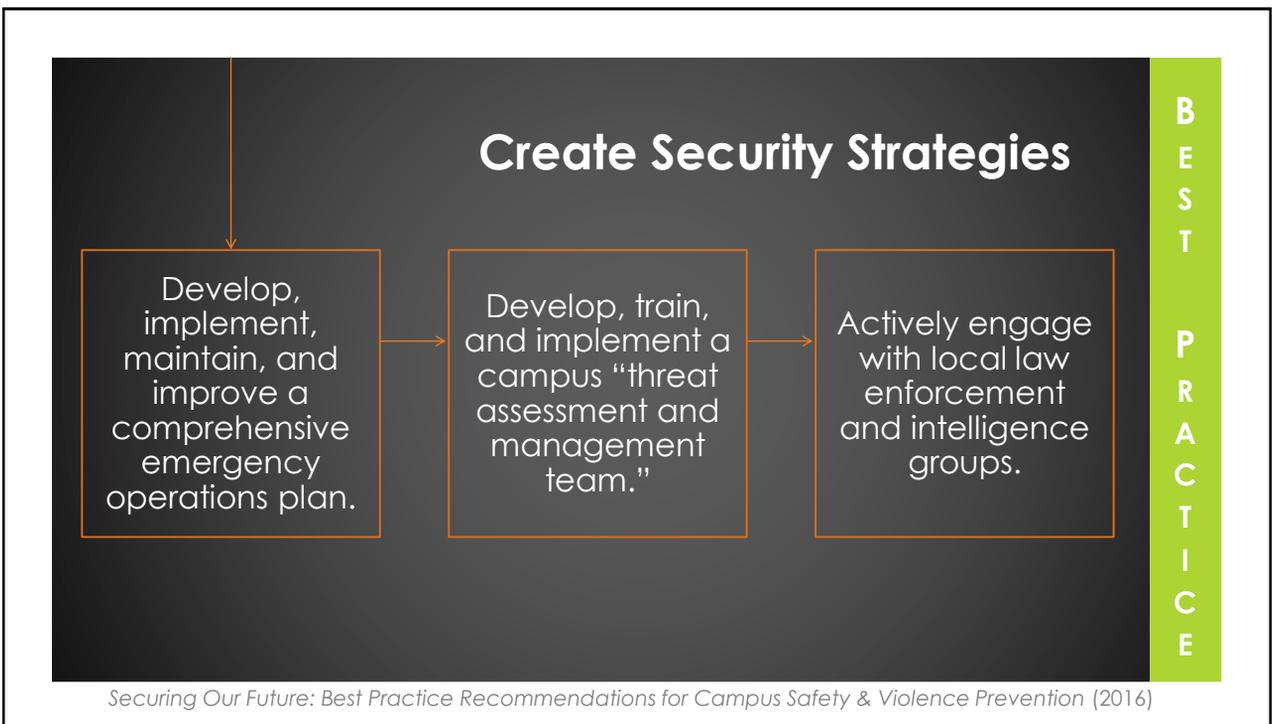
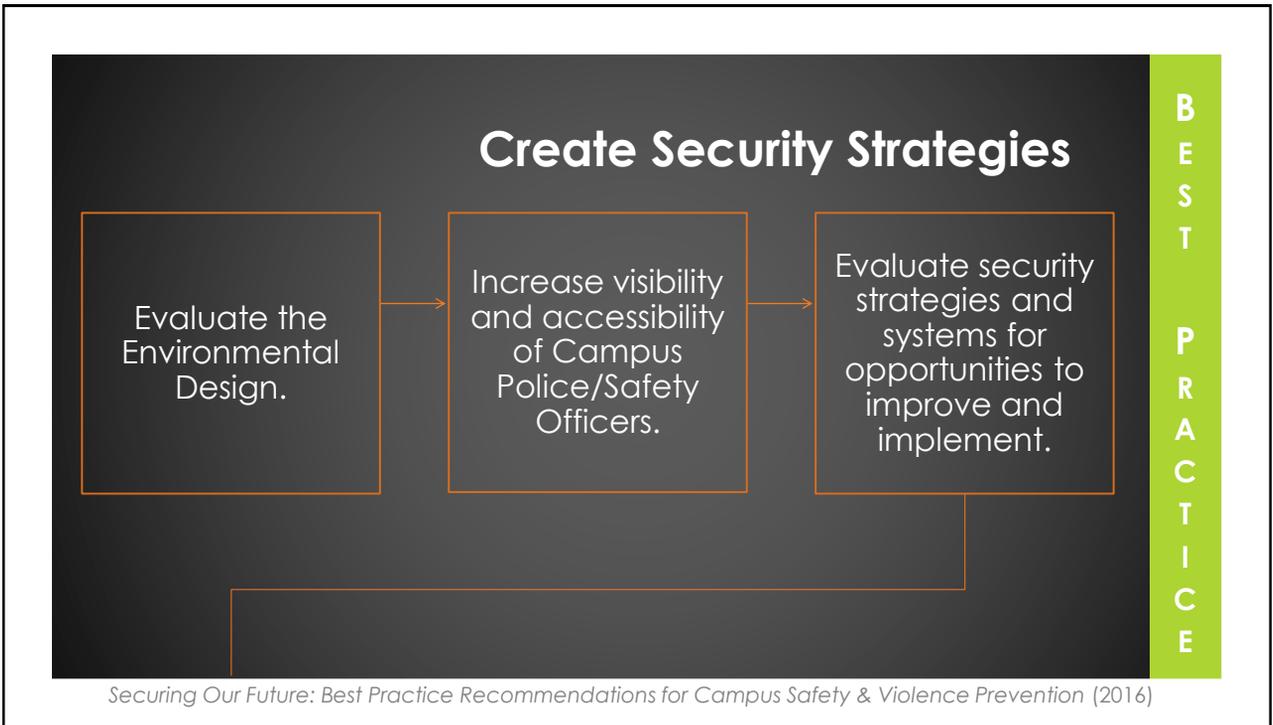


Expand access to confidential resources and clarify the difference between "responsible employees" and those that will maintain near or complete confidentiality;



Consider and accommodate the needs of differing communities, e.g., LGBTQ, students with disabilities, international students, former foster youth, homeless students, and undocumented students.

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# Effective Response Strategy

## Response Strategy

**Investigate Promptly**

# Response Strategy

Act with **appropriate care** to **remedy** the situation and **protect** from further harm.

# Response Strategy

**Communicate** with interested parties **promptly** to implement protective measures.

# Response Strategy

Execute comprehensive  
emergency operations plan.

Any  
questions?



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# REQUEST TO LEAVE PUBLIC SCHOOL GROUNDS

In accordance with the provisions of California Penal Code Sections 626.4, you are hereby requested to immediately leave the [District] grounds and to refrain from returning to the [District] grounds for [Number of Days, no more than fourteen (14) days].

For purposes of this Request, the [District] grounds include any streets, sidewalks, or public ways adjacent to the school grounds.

This Request to Leave is based upon my conclusion that that you have willfully disrupted the orderly operation of our campus, and your continued presence on [District] grounds likely poses a substantial and material threat to the orderly operation of the campus.

If you fail to leave the [District] grounds immediately upon receipt of this notice, you will be subject to misdemeanor charges and may be punished by a fine not exceeding five hundred dollars (\$500), by imprisonment in the county jail for a period of not more than six months, or by both the fine and imprisonment, pursuant to Sections 626.4 of the Penal Code.

Pursuant to Penal Code sections 626.4, if, after leaving pursuant to this request, you return to the school grounds within [Number of days, no more than fourteen (14) days], you will be subject to misdemeanor charges and may be punished by a fine not exceeding five hundred dollars (\$500), by imprisonment in the county jail for a period of not more than six months, or by both the fine and imprisonment, pursuant to Sections 626.4 of the Penal Code.

You have the right to a hearing regarding this decision. You must request a hearing in writing within the period for which consent has been withdrawn. The written request must state the address to which notice of hearing is to be sent. The District will grant you a hearing not later than seven (7) days from the date of receipt of the request and will notify you by mail of the time, place, and date of the hearing.

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
[RESPONSIBLE ADMINISTRATOR]

# REQUEST TO LEAVE PUBLIC SCHOOL GROUNDS

In accordance with the provisions of California Penal Code Sections [626.6 and 626.7, you are hereby requested to immediately leave the [DISTRICT] Community College District grounds and to refrain from returning to the [DISTRICT] Community College District grounds for at least seven (7) days.

For purposes of this Request, the [District] Community College District grounds include any streets, sidewalks, or public ways adjacent to the school grounds.

This Request to Leave is based upon the conclusion of [RESPONSIBLE DISTRICT OFFICIAL], or her designee, that that your continued presence on the [District] Community College District grounds would likely interfere with the peaceful conduct of the activities of the [District] Community College District grounds.

If you fail to leave the [District] Community College District grounds immediately upon receipt of this notice, you will be subject to misdemeanor charges and may be punished by a fine not exceeding five hundred dollars (\$ 500), by imprisonment in the county jail for a period of not more than six months, or by both the fine and imprisonment, pursuant to Sections 626.6 and 626.7 of the Penal Code.

Pursuant to Penal Code sections 626.6 and 626.7, if, after leaving pursuant to this request, you return to the school grounds within seven (7) days, you will be subject to misdemeanor charges and may be punished by a fine not exceeding five hundred dollars (\$ 500), by imprisonment in the county jail for a period of not more than six months, or by both the fine and imprisonment, pursuant to Sections 626.6 and 626.7 of the Penal Code.

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
[RESPONSIBLE ADMINISTRATOR]

**PROOF OF PERSONAL SERVICE**

I declare that I am employed in the County of **[County]**, California. I am over the age of 18 years; my business address is **[Full Address]**. On **[Date]**, 2019, I served the attached:

**[Document Title(s)]**

by personally delivering said documents to:

**[NAME]**

Executed on **[Date]**, 2019, at **[City]**, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

**[Name of Declarant]**

**PROOF OF SERVICE VIA U.S. MAIL**  
**REGISTERED/CERTIFIED, RETURN RECEIPT REQUESTED**

I declare that I am employed in the County of **[County]**, California. I am over the age of 18 years; my business address is **[Full Address]**.

On **[DATE]**, 2019, I served the attached:

**[Document Title(s)]**

by placing the original thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail, Certified/Return Receipt Requested at **[City]**, California, and addressed as follows:

**[NAME AND ADDRESS]**

Executed on **[DATE]**, 2019, at **[CITY]**, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

**[INSERT NAME OF DECLARANT]**