Sexual Assault: A Matter of Civil Rights and Title IX

Student-on-student sexual assault challenges colleges to formulate a response. Is the school acting in *loco parentis*? Is it involved whether or not the event occurs on campus? Does the offense fall under the code of conduct or is it a matter for the police?

Along with all of the above questions, student-on-student sexual assault—and the university's response to it—is coming to be viewed as a civil rights issue. Title IX prohibits unwelcome sexual contact so pervasive and offensive as to take away the victim's rights. This view makes sexual assault an extreme form of sexual harassment.

National Education for Higher Education Risk Management (NCHERM) provides legal consulting services related to campus health and safety. Its goal is to change how colleges and universities address sexual misconduct by working from within, helping schools to adopt sound practices to prevent lawsuits before they happen.

Managing partner **Brett Sokolow** and partners **Saundra Schuster** and **Scott Lewis**, all attorneys, addressed student affairs administrators at the NASPA annual conference in Chicago in March.

Brett Sokolow

Framing sexual assault through a civil right lens means the university as well as the student is accountable, if the assault could have been foreseen or prevented or if the response does not treat both parties fairly. Colleges can't foresee or prevent any assault, but they're liable under Title IX if they don't take appropriate action later to:

- End the discriminatory conduct.
- Act reasonably to stop it from happening again.
- Restore the victim to her wholeness before the assault.

Over the past decade a series of court cases has strengthened the role of Title IX and state civil rights law in determining what schools should be doing about sexual assault. Deliberate indifference by a school is a standard for identifying a Title IX violation.

The University of Colorado had a policy of promising to show football recruits a good time. When Lisa Simpson and Anne Gilmore sued the university over sexual assaults during an off-campus recruiting event, the circuit court of appeals found CU guilty of deliberate indifference to the obvious risk posed by failing to train or supervise the player-hosts charged with fulfilling the promise.

"Viewing campus sexual assault through a civil rights lens is not the way we're accustomed to thinking about it. If we did so, it would be cause for wholesale re-evaluation of how we process campus sexual assault complaints," Sokolow said. "It's time for that wholesale re-evaluation now."

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The right to know

Colleges may prefer to keep information about sexual assault under wraps, not wanting to scare off tuition-payers and donors. That's dangerous to students and puts the school at legal risk.

University freshman Jeanne Ann Clery was raped and murdered in her residence hall bed in April 1986. Students hadn't been told about 38 violent crimes on campus in the previous three years. In 1990 Congress passed what has become the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act.

Several later amendments expanded it beyond reporting to include victim's rights, registered sex offender notification, campus emergency response and protection from retaliation from bringing a complaint.

Responses to reports of sexual assault must be prompt and equitable. The accuser (usually but not always a woman) is entitled to every right that's extended to the person accused, including:

- Advocacy
- Advising
- Counseling
- Notice of hearing
- Preparation
- Right to appeal

Saundra Schuster

Just as for the accused, evidence of the accuser's previous conduct and sexual history must be excluded from consideration.

Victims' rights include being notified of the outcome of the case. Although behavior just covered by the campus code of conduct might stay under wraps because of the Family Educational Rights and Privacy Act (FERPA), a civil rights lens changes this. The Department of Education has said very clearly that FERPA can't justify a gag rule.

"No conditions can be placed on a sexual assault victim's right to know the outcome and sanction of the charges brought," Sokolow told *WIHE*. The same holds under Title IX for victims of gender-based harassment, stalking and relationship violence.

Reluctant victims

Do university officials have to tell the police? That depends on state law and the wishes of local law enforcement. "Better to clarify that now than to run afoul of the law while thinking you are doing a good thing by preserving a victim's confidentiality," he said.

At a minimum, schools are required to tell victims about their option to notify local law enforcement, under the terms of the Campus Sexual Assault Victims' Bill of Rights (Ramstad Act, 1992). Schools also have to tell students about available counseling services and offer options for changing their living and academic situations.

Sometimes the student who reports being assaulted doesn't want you to pursue it. What next? Apart from counselors, clergy and health professionals, few campus employees can legally promise confidentiality. That includes the people students are most likely to tell, such as coaches and RAs.

Explain to the student the difference between confidentiality and privacy, he suggests. The information will be shared, but only with a small group on a need-to-know basis. The data required by the Clery Act can be

Ten Critical Do's and Don'ts

Do:

1. View sexual assault in terms of civil rights.
2. Consider it both a campus code issue and a crime.
3. Problem-solve complaints by reluctant victims.
4. Investigate all complaints—no exceptions.
5. Sort out the relationship to sexual harassment.

Don't:

1. Insist on proof beyond a reasonable doubt.
2. Ignore the victim or erect barriers.
3. Carry on business as usual.
4. Insist on using mediation alone.
5. Mandate reporting with names attached.

anonymous.

Tempting as it is for a school to comply when a student says "Drop it," that doesn't protect the next student. There's reason to assume the perpetrator of an assault will not stop at one.

Try to find out why the victim wants no formal action taken. You may have to go back through the person who first told you about the assault—that coach or RA—to find out. Did it happen long ago or far away? Does she blame herself? Is she worried about her privacy or being victimized a second time during a hearing?

With sound policies in place, you may be able to overcome these factors with these assurances about the campus process:

- It is private.
- Resolution is quick (ideally within 30 days).
- Predominance of evidence is the standard of proof, easier than in a criminal trial.
- She has a right to an advisor.
- She can testify from behind a screen or by closed circuit.
- Evidence of irrelevant previous sexual history of character is excluded.

Perhaps most persuasive, explain that perpetrators are likely to do it again. Unchallenged, he is likely to make someone else feel the same way she's feeling now.

If she's still not convinced, it's wise to have her sign a written waiver confirming that she asked you to take no further action. That can protect you in case of a future lawsuit. But it's a poor second choice to having her pursue a formal complaint.

For the safety of the community, you have to investigate whether or not there's a formal complaint. If the victim won't participate in a hearing, you can use police and medical records and statements she made to others. Student privacy rights under FERPA are limited by a health and safety exception, which applies here.

Even if the report is anonymous, you can check it against other reports to see if any patterns emerge. Patterns may guide you in placements of cameras or lighting, warnings and security patrols. Sometimes an anonymous third-party report does include the name of the accused, and you can check whether other reports have come in about him.

How far do you take an investigation? As far as you need to. The first investigation may settle the matter, perhaps by determining that the charges were groundless. But if the first look raises further suspicions, you may need to investigate in depth. Failure to investigate is failure to act, leaving you at great risk for legal charges of deliberate indifference.

Defining the deed

Don't match your campus code to criminal law. Your standard should be the lower one of "preponderance of the evidence." If you find him guilty, the accused won't lose his life, liberty or property, only his privilege of being part of your campus community.

"He-said-she-said complaints are mostly a fallacy or the result of insufficient investigation," Lewis told *WIHE*. It's emotionally appealing to see both sides and conclude that everyone involved shares partial responsibility. But most cases are reasonably straightforward if the investigator asks the applicable one of three questions:

Scott Lewis

- Was the sexual activity forced?
- Was it non-consensual?
- Was the victim incapacitated?

Force means physical force, overt or implied threats or coercion. Threatening to harm a third party or spread a rumor counts as force; so does action based on unequal power, as when an instructor promises to change a grade for sex.

Consent to one sexual act doesn't automatically mean consent to another. The investigative question is what specific words or actions by the alleged victim gave the alleged perpetrator a clear indication that she wanted to engage in the act in question.

Incapacity can be mental or physical. It can't be measured by blood alcohol level but depends on interference with judgment and awareness. Blacking out or passing out are blatant forms of incapacity. So what if he was drunk too? A man who's capable of sex is not incapacitated.

Process, sanction, empowerment

Don't treat sexual assault cases like every other conduct case; they are different. One goal under Title IX is to restore the victim to wholeness—a form of restorative justice.

Design your process for healing and recovery. The victim is not merely a witness. Can she ask questions? Can she confront, or have someone else speak on her behalf?

Mediation is not the answer, even if the alleged victim requests it. Mediation puts her under pressure and takes advantage of her self-doubts. It fails to resolve matters—how do you mediate violence? And it leaves other potential victims at risk from the same offender.

Both the accuser and the accused can appeal the outcome to challenge bias, admit new evidence, address procedural flaws or challenge the sanction. But appeals are not an automatic right; they must be based on error, not differences in judgment.

If your investigation finds the accused is guilty as charged, it doesn't make sense to suspend him for a semester or until the victim graduates. Expel him and keep him off campus, subject to arrest for criminal trespass.

Morally, ethically and legally, you can't afford to let a sexual predator assault again.

—SGC

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