



Addressing Sex And Gender Misconduct On Campus: A Legal Overview

presented by

Saundra K. Schuster, J.D.
Partner, The NHERM Group, LLC

www.atixa.org

MEET YOUR PRESENTER

© S. Schuster
2013 All
Rights
Reserved



Sandra K. “Saunie” Schuster, J.D. is a partner with The NCHERM Group. She was previously General Counsel for Sinclair College and Senior Assistant Attorney General for the State of Ohio. Prior to practicing law she was Associate Dean of Students at Ohio State University. She is an practicing attorney, author, and consultant focusing on higher education legal issues.

3

Title IX: Why Is This An Issue?

© S. Schuster 2013 ALL RIGHTS RESERVED

The Reality: Relevant Statistics

4

- 20% - 25% of college women will be victims of attempted or actual sexual assault
- 6% of undergraduate college men will be victims of attempted or actual sexual assault
- 13% of college women report being stalked each year
- 4 in 10 violent crimes against college students are committed by offenders perceived by the victim to be using drugs or alcohol

Campus Sexual Assault Study Final Report. (Christopher Krebs, et al.)

National Criminal Justice Service, 2007

© S. Schuster 2013 ALL RIGHTS RESERVED

Additional Important Statistics

5

- Between 80 and 90 percent of cases, victim and perpetrator know each other.
- Half of all student victims don't label the incident "rape." This is particularly true when no weapon was used, no sign of physical injury is evident, and alcohol was involved—factors commonly associated with campus acquaintance rape what are the implications for us??
- Fewer than 5% of student victims report to authorities or law enforcement

Impact of Sexual Assault on Those Involved

6

- Student Absences
- Dropping Grades
- Drop out/Fail out
- Financial Aid/ Tuition Loss
- Interference with academic, social and cultural experience
- Housing / Safety Issues
- Mental Health Issues
 - Depression, Post-traumatic stress disorder
 - Alcohol and drug use
 - Contemplation of suicide

© S. Schuster 2013 ALL RIGHTS RESERVED

Impact of Sexual Assaults on the Institution

7

- Impact of victim accommodations on system and people
- Retention
- Legal liabilities
- Reputation
- Demands on fiscal resources
- Demands on human resources
- Safety concerns for the community

© S. Schuster 2013 ALL RIGHTS RESERVED

8

Campus Legal Framework Regarding Title IX

© S. Schuster 2013 ALL RIGHTS RESERVED

Campus Legal Standards Regarding Sexual Misconduct

9

- **Understanding The Legal Landscape for Addressing Sex and Gender Misconduct:**
 - Title IX
 - OCR creates Guidelines & provides oversight
 - DOJ/DOE Compliance Requirements
 - Case law
 - Clery Act
 - “Campus Sexual Assault Victims Bill of Rights”
 - Violence Against Women (VAWA) Act & SaVE Act
 - College Policy
 - Reflects the law
 - Reflects campus mission & values

© S. Schuster 2013 ALL RIGHTS RESERVED

Civil Law Suits v. Administrative Action & Title IX

10

Law Suit

- ❑ **File in Federal Court**
- ❑ **Monetary damages, injunction**
- ❑ **Requires:**
 - ❑ Actual Notice
 - ❑ Employee with authority to take action
 - ❑ Deliberate Indifference

Administrative Action

- ❑ **Initiated by DOE or DOJ**
- ❑ **Voluntary compliance or findings**
- ❑ **Requires:**
 - ❑ Actual OR Constructive Notice (“knew or should have known”)
 - ❑ Investigate – End harassment – Remedy Impact – Prevent recurrence

© S. Schuster 2013 ALL RIGHTS RESERVED

11

Regulatory Oversight of Title IX

**U.S. Department of Education
Office of Civil Rights (OCR)**

© S. Schuster 2013 ALL RIGHTS RESERVED

Title IX

12

“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 educational program or activity receiving federal financial assistance.”

Title IX of the Education Amendments of 1972

Implementing Regulations at:

20 U.S.C. § 1681 & 34 C.F.R. Part 106

Role of the Office of Civil Rights

13

- In addition to the implementing regulations (C.F.R.) that accompany the law itself (U.S.C.), the guidelines for compliance with Title IX are provided by U.S. Department of Education, Office of Civil Rights
- The 2001 OCR Guidelines are found at:
www2.ed.gov/about/offices/list/ocr/docs/shguide.html

Role Of OCR & Title IX

14

- The Office for Civil Rights (OCR) is responsible for establishing the compliance standards to be applied in investigations and enforcement of Title IX regarding sexual harassment.
- OCR requires that once a school has notice of possible sexual harassment of a student, the school should take immediate and appropriate steps to:
 - Investigate what occurred
 - Take prompt and effective action to end the harassment
 - Remedy the effects
 - Prevent the recurrence.

© S. Schuster 2013 ALL RIGHTS RESERVED

Regulatory Standards Include

15

- If the institution has notice of sexual misconduct, these four steps are the school's responsibility whether or not the student who was harassed makes a complaint or otherwise asks a school to take action
- OCR acknowledges that there may be circumstances where the complainant requests confidentiality or refuses to participate, thus, the school's ability to take action may be limited...
 - BUT - the school is still required to take all reasonable steps to investigate and respond
- OCR applies a severe, persistent, pervasive standard when assessing if an incident of sexual misconduct was a discriminatory based violation

© S. Schuster 2013 ALL RIGHTS RESERVED

OCR Title IX Compliance Requirements

16

- **Publication of Policies and Procedures that includes:**
 - Non-discrimination Statement
 - Effective reporting and response protocol
 - Appropriate grievance procedures
 - Fair and equitable investigations
 - Equitable remedies
 - Prevent recurrence
 - Incorporate training
 - Appoint a Title IX Coordinator

© S. Schuster 2013 ALL RIGHTS RESERVED

Effective Reporting & Response Protocol

17

- Once you have actual notice, you have a legal duty to conduct an investigation.
 - That legal duty is **absolute!**
 - The investigation may be preliminary or comprehensive, but it must be done.
- **The “Promptness Requirement”**
 - 30-60 day resolution should be the goal
- **The “Effective Requirement”**
 - To stop the sexual harassment or sexual violence (ensure that the discriminatory conduct does not continue)
 - Remedy the effects of the discrimination on the student, to the extent practical and possible
 - Provide sanctions that are reasonably calculated to prevent the reoccurrence of the discriminatory conduct

© S. Schuster 2013 ALL RIGHTS RESERVED

Title IX Coordinator Role

18

- Each campus must identify at least one Title IX Coordinator
 - More than just a contact for DoED inquiries
 - Must publish contact information for coordinator
 - Coordinator oversees all complaints of sex or gender discrimination (harassment, or contact)
 - Coordinator oversees training of all students and employees
 - Coordinator assures equitable remedies are provided
 - Identifies patterns and systemic problems
 - Provides technical assistance to campus law enforcement on

© S. Schuler 2013. All Rights Reserved
Title IX compliance

Title IX Administrator and Multiple Institutional Procedures

19

- Title IX Coordinators should be:
 - ▣ Familiar with all of the institutional processes regarding sex and gender misconduct and discrimination and the interplay between them
 - ▣ Able to explain to complainants their options for filing complaints under the applicable procedures, how each procedure works, and their rights under each procedure
 - ▣ If multiple procedures are invoked, coordinate to ensure prompt and equitable results.

Preventive Training

20

- In order for investigations of sex discrimination complaints to be thorough and reliable, any individual who conducts them must have relevant and in-depth training and knowledge.
- VAWA requires training to all first year students, faculty, staff, hearing boards, all Title IX administrators

Responsible Employee & Training

21

- A responsible employee includes any employee who:
 - Has the authority to take action to redress the harassment,
 - Has the duty to report harassment or other types of misconduct to appropriate officials, OR
 - Is someone a student could reasonably believe has this authority or responsibility.
- Accordingly colleges and universities need to ensure that employees are trained regarding their obligation to report harassment to appropriate administrators.

© S. Schuster 2013 ALL RIGHTS RESERVED

Training For Responsible Employee

22

Colleges and universities should ensure that employees are trained so that:

- Those with authority to address harassment know how to respond appropriately
- Other responsible employees know that they are obligated to report harassment to appropriate officials, what to report and to whom
 - Who does this represent on your campus? Faculty?
Coaches? Trainers? Graduate Teaching Assistants? R.A.'s?

The IX Commandments

23

Thorough	Reliable	Impartial	Investigation
Prompt	Effective	Equitable	
End the Discrimination	Prevent its Recurrence	Remedy the effects upon the victim & community	Remedies

© S. Schuster 2013 ALL RIGHTS RESERVED

24

Clery Act

© S. Schuster 2013 ALL RIGHTS RESERVED

Clery Act

25

- **The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act or Clery Act**, passed in 1990 is a federal statute codified at 20 U.S.C. § 1092(f)
- The Act requires colleges who receive federal aid, to report campus crime information for all students and employees, and submit crime statistics to the Dept. of Ed.
- In 1992, the United States Congress enacted the "Campus Sexual Assault Victims' Bill of Rights"

© S. Schuster 2013 ALL RIGHTS RESERVED

Clery Act

“Sexual Assault Victim’s Bill of Rights”

26

- This law requires that all colleges and universities (both public and private) participating in federal student aid programs afford sexual assault victims certain basic rights.
- Schools found to have violated this law can be fined up to \$35,000 or lose their eligibility to participate in federal student aid programs. Complaints about schools that have failed to comply with this law are made with the U.S. Department of Education.

© S. Schuster 2013 ALL RIGHTS RESERVED

Essential Elements of Clery Act

“Sexual Assault Victims Bill of Rights”

27

- A statement about the institution's programs to prevent sexual assault and procedures to follow when a sex offense occurs
- A description of educational programs to promote the awareness of rape, acquaintance rape and other forcible and non-forcible sex offenses
- Procedures students should follow if a sex offense occurs, including procedures about who should be contacted, the importance of preserving evidence for the proof of a criminal offense and to whom the offense should be reported.

© S. Schuster 2013 ALL RIGHTS RESERVED

Essential Elements of Clery Act

“Sexual Assault Victims Bill of Rights”

28

- Information about a student's option to notify appropriate law enforcement authorities and that institutional personnel will assist in notifying the authorities
- Notification of on and off-campus counseling or other services for victims of sex offenses
- Notification that the institution will change a victim's academic and living situation after report of a sex offense

Essential Elements of Clery Act

“Sexual Assault Victims Bill of Rights”

29

- Procedures for campus disciplinary action in cases of an alleged sex offense
- Sanctions the institution may impose following a final determination of an institutional disciplinary proceeding for a sex offense
- Statement that the accuser and accused are entitled to the same opportunities to have others present during a disciplinary proceeding
- A statement that both the accuser and the accused must be informed of the outcome of any institutional disciplinary proceedings involving a sex offense

© S. Schuster 2013 ALL RIGHTS RESERVED

30

VAWA & SaVE Act Highlights

Signed into law by President Obama on March
7th, 2013

© S. Schuster 2013 ALL RIGHTS RESERVED

Annual Security Report: New Hate Crimes*

31

□ Hate Crimes

- Murder and non-negligent manslaughter
- *Forcible sex offenses*
- *Non-forcible sex offenses*
- Robbery
- Aggravated assault
- Burglary
- Motor vehicle theft
- Arson
- Larceny-theft
- Simple assault
- Intimidation
- Destruction/damage/vandalism of property
- **Domestic violence***
- **Dating violence***
- **Stalking***

© S. Schuster 2013 ALL RIGHTS RESERVED

VAWA & Prevention Programs

32

- (8)(A) states that the Annual Security Report of each institution must include “a statement of policy regarding –
 - ▣ “(i) such institution’s program to prevent domestic violence, dating violence, sexual assault, and stalking”
- (8)(B) “The policy described . . . shall address the following areas”
 - ▣ “(i) Education programs to promote the awareness of rape, acquaintance rape, domestic violence, dating violence, sexual assault, and stalking...”

VAWA & Prevention Programs: Consent

33

- (8)(B)(i)(I) “Primary prevention and awareness **programs** for all incoming students and new employees which shall include—”
 - ▣ (cc) the applicable jurisdiction’s “**definition of consent** in reference to sexual activity”

- SCOPE Consent Statutes by State:
 - ▣ <http://wearescope.org/resources/consent-statutes/>

VAWA & Prevention Programs: Bystander Intervention

34

- (8)(B)(i)(I) “Primary prevention and awareness **programs** for all incoming students and new employees which shall include—”
- (dd) “safe and positive options for **bystander intervention**” targeted to “prevent harm or intervene” in cases of domestic violence, dating violence, sexual assault or stalking
- (ee) “information on risk reduction to recognize warning signs of abusive behavior and how to avoid potential attacks”

VAWA & Procedures: Annual Training of Officials

35

- Institutional disciplinary procedures for such cases must clearly state that the proceedings will
 - “be conducted by officials who receive **annual** training on the issues related to”:
 - **The four types of cases:** Domestic violence, Dating violence, Sexual assault, Stalking
 - **How to conduct an investigation** “that protects the safety of victims and promotes accountability”
 - **How to conduct a “hearing process** that protects the safety of victims and promotes accountability”

36

DOJ & DOE Compliance Reviews

© S. Schuster 2013 ALL RIGHTS RESERVED

Common OCR Findings

37

- OCR identifies several areas where institutions fall short in meeting their Title IX obligations, common findings include:
 - ▣ Failure to designate and/or adequately train at least one employee to serve as the Title IX Coordinator
 - ▣ Failure to have and disseminate notice of the institutional non-discrimination policy
 - ▣ Failure to adopt or publish required Title IX grievance procedures to address sex discrimination claims that meet the prompt and effective standard

OCR Engages Campuses By.....

38

- OCR Receives a complaint
- OCR will provide technical assistance at the request of the school
- OCR launches its own proactive investigation without a complaint (“Voluntary Compliance Review”)
- From 2009-2012 OCR launched 37 proactive large-scale compliance reviews – 11 pertained to sexual violence

OCR Compliance Audits

39

“Voluntary” Audits

- College of Notre Dame (September, 2010)
- Eastern Michigan University (November, 2010)
- University of Notre Dame (July, 2011)

“Grievance Based Audits

- Glenville State College (January, 2012)
- Yale University (June, 2012)
- Xavier University (July, 2012)
- University of Montana (May, 2013)

OCR Advise from Voluntary Compliance Reviews

40

- Issue “No Contact Orders” to all parties
- Engage in and document all remediation – all medical, counseling and pastoral support must be provided to complainants, accused and witnesses
- Prohibit retaliation
- Designate Title IX Coordinators and clearly define job responsibilities

More Compliance Advise

41

- Adopt a preponderance of the evidence standard
- Understand role and timing of criminal action in relation to institutional response requirements
- Always investigate
- Provide annual training to all individuals involved with processing, investigating or resolving complaints

Some OCR Advise to Yale

42

- Publication of policies and grievance procedures must be in print and on line
- Title IX Coordinator must:
 - ▣ Track Trends and address patterns or systemic problems
 - ▣ Assess overall efficacy of the coordination of addressing sex/gender misconduct on campus
 - ▣ Solicit feedback on efficacy of institutional response to sexual misconduct

Advise to Yale About Training

43

- Conduct annual training for all staff engaged in addressing sex/gender misconduct, including campus police
- Conduct training for all freshman students on sexual misconduct policies, campus resources, reporting requirements, bystander intervention
- Annual training for sophomore students on bystander intervention
- Annual training for all student organization leaders and varsity teams

Lessons from Xavier

44

- Insure the Title IX Coordinator provides supervision and oversight of the Title IX grievance process
- Provide time frames for all major stages of an investigation
- Insure the institution will implement remedial steps during the law enforcement investigation period
- Clarify what will be done if complainant requests confidentiality

Message to Xavier About Training

45

- Provide annual training to any university official, including campus police, who are involved with the sexual misconduct process
- Conduct training on how to document and conduct adequate, reliable and impartial Title IX investigations
- Invite staff and faculty to participate in one or more in-depth training sessions
- Send faculty and staff annual notices that address sexual misconduct on campus
- Require all freshman take a course that highlights connection between alcohol abuse and sexual harassment and violence

© S. Schuster 2013 ALL RIGHTS RESERVED

OCR Message From Montana Investigation

46

- This was a joint agency investigation – DOE and DOJ
- This Resolution Agreement was distinctive because it was created not only for University of Montana but as a “Blueprint for Colleges and Universities throughout the country to protect students from sexual harassment and assault”

Some General Advise About Montana Agreement

47

- An important element is the emphasis on creating greater uniformity between its many sexual harassment policies and procedures
- The Agreement requires Montana to ensure that their policies and procedures provide an easily accessible and user friendly system, using consistently defined terms and reporting options

OCR Message about Mandatory Reporting

48

- The Montana Agreement notes the institution's policies and procedures must include a requirement that all employees who are aware of sex-based harassment, except those who are statutorily prohibited from reporting, must report it to the Title IX Coordinator within 24 hours, regardless of whether a formal complaint was filed (pp 3-6)

More Important Montana Messages

49

What About Potential Criminal Conduct?

- In cases of potential criminal conduct, the institution must determine, consistent with state and local law, whether appropriate law enforcement or other authorities should be notified
- Remember that a Title IX investigation is different from law enforcement investigation and a law enforcement investigation does not relieve the university of its obligation to conduct an internal investigation and take immediate steps to protect the recipient of the unwelcome behavior (p. 5)

© S. Schuster 2013 ALL RIGHTS RESERVED

More Important Montana Messages

50

Some Guidance on Policies & Procedures

- The institution must ensure the content, distribution and location of policies and procedures effectively inform students, faculty and staff (don't put them all in an HR or Discrimination Policy)
- Make your website easy to navigate and include all the information in hyperlink (Use the "3 Click Rule")
- Insure that there is specific information on where to report a complaint (p. 11)

More Important Montana Messages

51

Some Guidance About Policies

- Be cautious about multiple (and often conflicting policies). Sex and gender discrimination policies should apply to the entire community
- Make sure, if you have multiple policies that they are all consistent (p. 8)

More Important Montana Messages

52

Reporting and Responsible Employees

- All employees, including law enforcement, except for those who are statutorily bared from reporting, must report sexual assault and harassment of which they are aware
- The institution must coordinate with campus law enforcement to ensure in instances where a complaint involves conduct of a criminal nature the institution will still be able to meet its obligations under Title IX, by, at a minimum, providing witnesses information about their rights and resources for victims and how to initiate a complaint (p. 12)

More Important Montana Messages

53

Training for Students

Training for students must include:

- Insure students are aware of the institution's prohibition against sex discrimination, harassment, assault and retaliation
- Insure students can recognize all forms of sex discrimination when they occur
- Insure students understand how and with whom to report any incidents of sex discrimination, including options for filing complaints with the institution and law enforcement

© S. Schuster 2013 ALL RIGHTS RESERVED

More Important Montana Messages

54

Climate Surveys

The institution must develop annual climate surveys for all students that includes:

1. Assess students' attitudes and knowledge regarding sexual harassment, assault and retaliation
2. Gather information regarding students' experiences with sex discrimination while attending the institution
3. Determine whether students know when and how to report sex misconduct (p. 29)

More Important Montana Messages

55

Climate Surveys

4. Gauge students' comfort level with reporting sex misconduct
5. Identify any barriers to reporting
6. Assess students' familiarity with the institution's outreach, education and prevention efforts to identify which strategies are effective
7. Solicit student input on how the institution can encourage students to report sexual misconduct and better respond to such reports (P. 29)

Other Important DCL's

56

- October 29, 2010 – Bullying
- January 25, 2013 - Athletics & ADA
- April 24, 2013 – Retaliation
- June 25, 2013 - Pregnancy

57

Leadership Guidance

© S. Schuster 2013 ALL RIGHTS RESERVED

Suggestions for Institutional Leaders

58

- **Audit policies**
 - Student /Employee sexual harassment policies
 - Code of Student Conduct Policy
 - Campus conduct procedures
 - Institutional Violence Policy
 - Policies on Bullying, Inter-personal Violence, Stalking
 - Harassment and Discrimination Policies

- **Require annual report**
 - Identify scope of issues
 - Responses
 - Trends

© S. Schuster 2013 ALL RIGHTS RESERVED

Thank You!!

Questions??

Saunie Schuster, Esq.

Saundra@NCHERM.org

www.ATIXA.org