Campus Safety
EXPERT SERIES

Making Sense of Affirmative Consent, Title IX, VAWA and Clery

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States and the federal government have recently enacted laws to address how colleges handle sexual assault claims. Here's the latest on some of the new laws, as well as best practices your campus should adopt.

BY TRACY WARREN AND SARAH WILLIAMS

UNIVERSITIES AND COLLEGES have numerous obligations when it comes to addressing sexual violence on campus. The Title IX of the Educational Amendments of 1972 ("Title IX") promotes equal opportunity by providing that no person may be subjected to discrimination on the basis of sex under any educational program or activity. Schools have an obligation under Title IX to prevent sexual harassment in higher education.

Title IX sets forth detailed requirements for a school's response to a report of sexual violence, dating/domestic violence and stalking, including investigation. Recourse for students pursuant to Title IX includes filing a civil lawsuit and/or filing a complaint with the federal Office of Civil Rights (OCR).

The primary purpose of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics ("Clery Act") was to promote transparency and awareness of campus crime. Like Title IX, the Clery Act applies to all schools that receive federal financial assistance.

Under the Clery Act, schools must publish an annual security report, maintain a public crime log, disclose crime statistics for incidents that take place on or near campus, issue timely warnings about crimes that pose a serious or ongoing threat to students and employees, devise an emer-

gency response and evacuation plan, compile and publish an annual fire safety report, enact policies and procedures to handle reports of missing students and publish policies and procedures for prevention of sexual violence and response to reports of sexual violence.

On March 7, 2013, President Obama signed the Violence Against Women Reauthorization Act (VAWA) of 2013, which intended to update, clarify and improve the Clery Act. Although there is no private right of enforcement under the Clery Act, the Education Department can fine schools for Clery violations.

In addition to the Title IX and the Clery Act, institutions of higher education must comply with state laws on campus sexual violence in their jurisdiction. Many state laws provide supplementary or overlapping requirements for reporting, investigation and disciplinary hearings, in particular regarding the due process rights for accused students who face suspension or expulsion.

'YES MEANS YES' V. 'NO MEANS NO'

Some states have enacted laws that use a new affirmative consent standard, colloquially referred to as "Yes Means Yes." These affirmative consent laws apply only in disciplinary proceedings for campus sexual assault in California and New York but not in criminal proceedings.

In other states, laws define sexual assault using the old consent standard ("No Means No") in terms of campus sexual assault, but may have some sex offenses that can be charged in the criminal justice system using an affirmative consent standard. (See Anderson, Michelle J., All-American Rape, 79 St. John's L. Rev. 625 (2005).)

There is no national, uniform definition of consent. Despite requests for a uniform definition for Clery Act compliance purposes, the Violence Against Women Act's (VAWA) recent final regulations didn't adopt a uniform definition since all sexual offenses reported to campus security must be included in Clery statistics. (See Dear Colleague letter [Gen-15-15: Implementation of the VAWA Final Regulations] dated July 22, 2015, http://ifap.ed.gov/dpcletters/GEN1515.html.)

However, according to the Department of Education's report on implementation of the VAWA final regulations, a "valid starting point" for defining consent is "the affirmative, unambiguous, and voluntary agreement to engage in a

specific sexual activity during a sexual encounter." Under this definition, someone who was asleep, or mentally or physically incapacitated, either through drugs or alcohol or for any reason, or who was under duress, threat, coercion or force, would not be able to consent. "Further, one would not be able to infer consent under circumstances in which consent was not clear, including but not limited to the absence of 'no' or 'stop' or the existence of a prior or current relationship or sexual activity," the report also states.

SILENCE IS NOT AFFIRMATIVE CONSENT

Recent California legislation requires that colleges and universities adopt affirmative consent as the standard for disciplinary proceedings for sexual assault. Such proceedings must be determined by a preponderance of the evidence (see Cal. Ed. Code §§ 67385-67386). New York adopted a similar affirmative consent standard for college campuses in 2015 (S5965-2015 [N.Y.]).

Under the "Yes Means Yes" model or affirmative consent standard, the victim must say yes to the sexual acts, either in words or by affirmative actions that a reasonable person would understand to mean yes. Under the affirmative consent standard, silence is not affirmative consent. Force or duress do not have to be proven in a campus disciplinary proceeding utilizing the new standard — just lack of affirmative consent.

Under the "No Means No" model, a victim of sexual vio-

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

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

Every administration wants to provide a safe campus for its students. The best way to protect students and limit legal liability at the same time is to be proactive. Adopting the following best practices will help your institution comply with Title IX, Clery, VAWA and, if you are in California or New York, the new affirmative consent laws.

PROVIDE STUDENTS WITH PROACTIVE SEXUAL ASSAULT PREVENTION EDUCATION

This training should begin as early as orientation but should not stop there. Schools should enlist support from fraternities and sororities and other campus organizations to provide continuing education about sexual violence on campus.

Peer intervention training is tantamount to preventing sexual violence. Schools must educate students so that they understand that sexual assault on college campuses is rarely stranger-on-stranger crime, but rather is usually committed by acquaintances, friends or friends of friends they make in the dorms or Greek systems, dates, etc.

In California, education about the affirmative consent standard is now mandatory on college campuses, and the new law specifically requires that campuses address a range of prevention strategies, such as victim empowerment, programming

for victim prevention, awareness raising campaigns, primary prevention, bystander intervention, and risk reduction (See Cal. Ed. Code §67386).

MAKE INFORMATION AVAILABLE AND COMMUNICATE ABOUT THE PROCESS

Federal and state laws require that schools make information about existing resources readily available to victims. Schools should make this information easy for students to find. If a rape victim wants to seek medical attention, obtain a rape kit or make a report, it should be easy for the student to access the available resources.

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

Once a student reports a sexual assault, communicate with her or him about the process. Be honest with the victim about what will be confidential and what a school is obligated to report.

UPDATE POLICIES AND PROCEDURES REGULARLY TO ENSURE COMPLIANCE WITH LAWS

Sexual assault laws are evolving and progressing quickly. For example, in California, SB 967 (pending 2015) could impose even more new reporting obligations on California campuses in 2016. Do not wait until you have a report of sexual assault or a U.S. Department of Education Office of Civil Rights (OCR) investigation to update your policies. By then it will be too late in terms of legal liability. Audit your policies and procedures now to ensure that they are in compliance with Title IX, Clery, state law and OCR's investigative standards.

PROVIDE TRAINING TO APPROPRIATE CAMPUS PERSONNEL

These individuals should include Title IX officers, Clery coordinators, campus adjudicators, campus security, campus police and others who might receive notification of an assault. They

must understand the consent standard and evidentiary standards. They should be aware of the reporting, investigative and disciplinary hearing requirements, as well as what resources are available on their campus. When a sexual assault incident is reported, these persons should know their role.

ACT QUICKLY WHEN A SEXUAL ASSAULT IS REPORTED

Never try to dissuade a victim from filing a report or talking to the police. Ensure that the victim is aware of his/her right to report to local law enforcement, what counseling resources are available and whether the counseling will be confidential.

Provide the victim with redress as swiftly as possible. Separate the students by moving the alleged perpetrator, if necessary, or suspending the alleged perpetrator pending a disciplinary hearing when warranted.

CONDUCTS A PROMPT, COMPREHENSIVE AND UNBIASED INVESTIGATION

Consider bringing in a neutral outside counsel or investigator to conduct the investigation. Obtain evidence immediately before it can be deleted or destroyed. In this digital age, much of the evidence available will be text messages and social media. Act fast or students are likely to destroy evidence once they hear about the report and investigation.

Try to avoid characterizing the accuser as a "victim" or "survivor" and the accused as a "perpetrator." Instead, stick with neutral terms such as "accuser" and "accused."

UNDERSTAND DUE PROCESS AND IMPLEMENT IT IN DISCIPLINARY HEARINGS

Universities have competing responsibilities. Understandably, most of the laws regarding campus sexual assault focus on resources for the victim and supporting survivors of sexual violence. Remember that disciplinary hearings are subject to review by the court. Although the due process requirements do not rise to the level of full constitutional rights afforded to an accused in a criminal trial, the accused is entitled to some semblance of due process.

Due process in college disciplinary proceedings in which the accused student faces expulsion requires (1) a statement of specific charges/grounds that would justify expulsion, and

(2) a hearing in which the college disciplinary board hears both sides in considerable detail. However, due process, especially in a hearing where a short suspension is the likely outcome, does not require that the perpetrator be allowed to confront or cross-examine witnesses, or a right of the accused to call witnesses to verify his or her version of an incident (Goss v. Lopez (1975) 419 U.S. 565).

Note that due process protections are more stringent at public institutions than private ones, but even private colleges must abide by what they have promised students in the school's own policies and procedures. Private schools must follow the minimal requirements set forth in Goss v. Lopez and in Dixon v. Alabama (1961) 294 F2d 150, 160 fn. 3, as well as their own policies.

It is becoming more common for students to appeal a disciplinary decision in the courts. Courts are going to look at the transcript of the disciplinary hearing to determine whether it was fair and the accuser and the accused were afforded due process. It is imperative that colleges and universities understand that a university's investigation and hearing process cannot be equitable unless it is impartial and affords both the accuser and the accused their due process rights.

Be even-handed and make a clear record of the disciplinary hearing and the panel's findings. While the laws are primarily drafted to assist victims, campuses are open to liability if they fail to afford either party a fair hearing.

DOING IT RIGHT IS A DELICATE BALANCE

Campuses have competing responsibilities in establishing policies, investigating victim complaints and administering disciplinary hearings. It's a delicate balance that must be achieved: protecting victims, avoiding civil liability under Title IX based on "deliberate indifference" when sexual violence is reported, while conducting an unbiased investigation and being fair to the accused.

This article only touches the surface of college and university obligations for prevention and investigation of sexual violence. It is imperative that colleges and universities provide continuing education for students and training for staff. Academic institutions must also consult with counsel knowledgeable in higher education law to ensure compliance with the numerous obligations imposed by new laws and regulations.

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