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Survivors, College, and the Law: Challenges in Rewriting Campus Sexual Misconduct Policy

Kristin Lang

In September 2008, two top University of Iowa officials were fired as a result of the university's mishandling of a 2007 sexual assault case. A review conducted by an external law firm found many significant flaws in the university's response and its sexual assault policy. Colleges are rewriting their sexual assault policies to include more precise and/or legal definitions of terms such as sexual misconduct, sexual harassment, consent, and incapacitation. This article examines why it is necessary to have inclusive language in sexual misconduct policies and how campus officials are incorporating victim's bill of rights, responsibilities, and confidential resources, in order to educate students, staff, and faculty. Looking to recently updated sexual misconduct and assault policies deemed "model" as a basis for reference, this article aims to explore the challenges university officials face in rewriting policy.

In 2007, an undergraduate athlete at the University of Iowa accused two other athletes of sexual assault. The incident occurred in their shared residence hall and the survivor asked the university to relocate the alleged perpetrators to no immediate avail. The university was not quick to act in its investigation of this incident. Adequate services were not provided to the survivor regarding information about medical and legal options, and in turn, the survivor's family sued the university (Jordan & Rood, 2008).

The Vice President of Student Services and Vice President for Legal Affairs and General Counsel were terminated after an external law firm reviewed the university's handling of the case and found flaws ranging from the language of the sexual assault policy in place at the time to the university's response. In the wake of high-profile sexual assault and harassment cases, colleges and universities across the country are responding to the urgent need to update and clarify their sexual misconduct policies to not only prevent future terminations and lawsuits

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but to provide services for student survivors as well.

Clery Act

The way in which universities viewed sexual assault policies shifted with the Crime Awareness and Campus Security Act of 1990. Now known as the Clery Act, this law requires colleges and universities to collect, retain, and disclose information about crime on or near their campus in a timely manner. Universities participating in federal financial aid programs are subject to fines if this information is not collected and disseminated (Lombardi, 2009). In 1992, the Clery Act was amended to add provisions for sexual assault survivors, now called the Campus Assault Victims' Bill of Rights. These supporting documents, according to federal law, are to include the following information:

- Accuser and accused must have the same opportunity to have others present at all steps of the process.
- Both parties shall be informed of the outcome of any disciplinary proceeding.
- Survivors shall be notified of options for counseling services.
- Survivors shall be informed of their options to notify law enforcement.
- Survivors shall be notified of options for changing academic and living situations.

(Public Law: 102-325, section 486(c))

Despite this recommendation, not all universities have clear victims bill of rights in their sexual assault policies. The information may be included within the policy but not as a separate listing of rights, making it difficult to access.

Title IX

Students' Title IX rights are not often discussed in sexual assault policies. Under Title IX of the Educational Amendments of 1972, gender equity is guaranteed in education (Kelderman, 2006). Title IX is most often utilized in situations regarding athletics, but a 1999 Supreme Court decision declared that universities can be held legally responsible for failing to address student-on-student harassment throughout campus, including sexual assault (Jones, 2010).

In cases regarding sexual misconduct, the Supreme Court has developed a four-part legal test to determine if universities are in violation of Title IX. The first part of this test can find a university liable if a university official was aware of an act of sexual harassment or assault, was in an authority role over the accused, and acted indifferent in taking steps to stop the crime (Kelderman, 2006). Only a handful of institutions have been charged with violating Title IX in instances of sexual

assault. What remains unknown is if universities are addressing harmful behaviors and passing the Supreme Court's legal test, or if they have not been charged to pass the legal test because students are unaware of the university's responsibility to stop any harmful behavior brought to their attention.

Definitions

Definitions of terms have become integral parts of campus sexual assault policies. *Sexual misconduct* is an umbrella term adopted by campuses to encompass all forms of non-consensual contact. Types of sexual misconduct vary in severity and situation, but range from non-consensual or forced sexual intercourse to sexual harassment. Institutional policies must define the language they use to achieve clarity. If an institution chooses to have a sexual misconduct policy as opposed to a sexual assault policy, it is their responsibility to the campus population to define what exactly these broad terms entail, as well as providing examples of behaviors that fit into each definition.

Title 13 in the State of Vermont Statutes (1977) defines consent as “words or actions by a person indicating a voluntary agreement to engage in a sexual act.” The University of Vermont (2006) goes further in its current sexual assault policy statement to define consent as an “informed agreement” that is “not achieved through manipulation, intimidation, or coercion of any kind or given by one who is mentally or physically able of giving clear consent.” The National Center for Risk Education Management (NCHERM) (2010) goes as far as to mention “effective consent” as “informed; freely and actively given; mutually understandable words or actions; which indicate a willingness to engage in mutually agreed upon sexual activity” (p. 25). According to NCHERM, effective consent is informed, but also indicates a mutual agreement by two parties able to give consent. Who is unable to give consent? Someone incapacitated by alcohol is unable to give consent. Alcohol incapacitation is dependent on many factors, such as tolerance, body weight and type or amount of alcohol consumed (Sokolow & Koesthor, 2010). In many cases, incapacitation cannot be assessed until after the incident takes place. There are signs of incapacitation, such as vomiting and slurred speech, but the reality of reviewing incapacitation in a student conduct hearing, according to NCHERM, comes down to the fact that “if the complainant is incapacitated and the respondent knows or should reasonably have known of the incapacity, the indications of consent are irrelevant” (Sokolow & Koesthor., 2010, p. 32). In other words, incapacitation equals an inability to give effective consent.

However, what ramifications are involved if that student is underage or using illegal drugs? This becomes a grey area for university officials to define in a victims' bill of rights. When universities states students will not be held in violation with any student conduct policies if they were drinking or using drugs, they cannot act on

a repeated violation. Some law enforcement agencies work with universities, such as the University of Iowa (2010), to resolve charges for improper use of alcohol and will not be pursued in any sexual assault cases.

Reporting and Judicial Procedures

According to a 2005 U.S. Department of Justice study, between 80-90% of surveyed college women identifying as survivors of sexual assault knew their attacker prior to the assault. Through this study, the researchers inferred that “non-stranger rapists are rarely convicted of their crimes” (U.S. Department of Justice, 2005, p. 8). These statistics can discourage survivors from reporting, especially if reporting options are not clearly laid out in a sexual assault policy. Administrators surveyed also believed students’ anonymity and use of confidential resources promotes reporting. Each institution has to work with their local and university police force to decide if anonymous reporting is an option on their campus (U.S. Department of Justice, 2005).

The convictions of the accused that take place through disciplinary or student conduct boards often lead to expulsion, probation, or a loss of privileges (Karjane et al., 2005). Some institutions are turning to restorative, or healing, proceedings instead of relying solely on expulsion or suspension. In one example, it was shared that a dean found the accused to have “gotten it,” acknowledging and accepting his actions and the impact on his partner, and was able to continue as a student serving his sanction through volunteering at a rape crisis center and writing about the impact of sexual assault (Lewis, Schuster, & Sokolow, 2010, p. 4).

Although conduct procedures are not necessarily covered in an average campus sexual misconduct policy, certain items are to be included to protect liability. In order to follow the Clery Act, campuses must include in their policy that survivors will be notified on the outcome of a judicial proceeding against the accused in a timely manner (Lombardi, 2009). Policies should include equitable rights between the accused and the accuser in access to legal resources.

Model Policies

Brett Sokolow (2004) and NCHERM emphasized people and protocol as two essential elements in a model for campus sexual assault response. People include trained university officials survivors can turn to, from resident advisors to counselors, to women’s center staff members, and student affairs administrators. Protocol is a written list of guidelines for trained parties to follow. The goal of establishing a set protocol is survivor-based. By providing confidential resources, services, and choices, survivors have the autonomy to make important decisions within the set protocol (Sokolow, 2004). NCHERM also recommended establishing a sexual assault response coordinator to train and organize this group of people

around the protocol (Sokolow, 2004, p. 9).

In response to a worst case scenario regarding sexual assault response, the University of Iowa hired the first Sexual Misconduct Response Coordinator for their Women's Resource and Action Center in 2008. The university's policy now reads, "No employee is authorized to investigate or resolve student complaints without the involvement of the Sexual Misconduct Response Coordinator" (University of Iowa Sexual Misconduct Policy, 2010). Having this type of position in place as an employee of a university also incorporates another aspect of Title IX: confidentiality. A Sexual Misconduct Response Coordinator would be considered to "have the authority to provide a remedy" (Sokolow et al., 2010, p. 10). A remedy in this situation means giving a survivor appropriate information concerning medical and legal resources and campus sanction policy. Title IX requires a complete investigation and appropriate action taken when a college official such as this is notified of an incident (Sokolow & Koesther, 2010, p. 10).

Notifying survivors and the accused of confidential resources is another aspect of a model sexual assault policy. Confidential on-campus and community resources are to be included in a policy, often in line with a victims bill of rights. Sharing resources that are not confidential is as important as sharing non-confidential resources. In many cases, a campus victims' advocate or sexual assault response coordinator is one of the only confidential campus officials, outside of a counseling center. Equipping university employees with information about the limits of their own confidentiality and mandatory reporting rights can save a campus from future headaches concerning lack of knowledge.

Conclusion

The reality is that many universities today are understaffed and underfunded. A challenge to adopting model sexual misconduct policies and procedures is finding the time to employ a committee of skilled and knowledgeable officials to draft a new policy. Universities may think that their policy is fine as is because they have not been sued for a mishandled case. Having an outside legal consultant, such as a lawyer from NCHERM, come to review a policy can prove beneficial in the long run.

The end result of having a clear, concise sexual misconduct policy is to afford the best services to survivors. No university wants to address a sexual misconduct incident without having policies, people, and protocol in place. Education is the key. The more informed university community members are of their rights and responsibilities, the smoother the process. In a perfect world, non-consensual sexual contact would never take place, but we are far from this ideal. Therefore, universities owe their students, through advocacy and counseling to remove the bureaucracy that inevitably comes with policy and offer the best services available.

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