

Title IX: Role of Sexual Assault Nurse Examiners in Campus Sexual Assault Proceedings

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ABSTRACT

The work of sexual assault nurse examiners, traditionally introduced as evidence in criminal prosecutions, is used with growing frequency in institutional investigations and adjudications of campus sexual assault. This article explains what Title IX of the 1972 Education Amendments requires of institutions with respect to investigating sexual assault allegations, and how sexual assault nurse examiners can expect to interact with institutional Title IX staff and systems.

Keywords: campus rape, campus sexual assault, forensic nurse examiner, sexual assault, SANE, SAFE, Title IX

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Sexual assault nurse examiners (SANEs)¹ who conduct sexual assault medical forensic examinations know that the knowledge required for such work extends beyond the medical arena. Indeed, just as those examinations have a dual purpose² in serving both the medical needs of the patient and the evidentiary needs of the criminal justice process, so too must the nurse understand both the medical and legal worlds connected to the examination.²(p. 121-122) To fulfill those knowledge needs, the training of SANEs entails learning a host of information related to the role of the SANE examination in the criminal process.³

With growing frequency, the work of the SANE has implications beyond the criminal arena. As reports of campus sexual assault continue to rise at a significant rate,⁴ documentation of medical forensic exams is now being considered by college and university staff in the context of campus sexual misconduct proceedings. The reasons for the increase in reporting rates of campus sexual assault are complex and the subject of debate, but a contributing factor is likely the significant attention in recent years—from the federal government, from institutions of higher education, and from students—on Title IX's requirement⁵ that educational institutions investigate and adjudicate allegations

of sexual violence separately from criminal investigations into the same conduct. As institutions continue to come into compliance with this mandate of Title IX, SANEs can be increasingly called upon as valuable contributors to campus investigations and adjudications of sexual assault.

This new context for medical forensic evidence has important implications for SANEs. SANEs have the potential to provide important guidance to institutional staff involved in investigating and adjudicating campus sexual assaults, and they can provide valuable contributions to the drafting of relevant institutional policies. Indeed, SANEs have the unique experience of interacting with the patient and collecting the medical forensic evidence. For SANEs who work near campus communities, it will be important for them to have a voice in the development of those institutions' sexual misconduct policies and procedures. Moreover, as the work of the SANE becomes introduced with growing frequency into campus proceedings, SANEs will need to learn how these proceedings function and how the nurse may be called upon to provide information within those proceedings.

As discussed below in more detail, Title IX does not proscribe the exact manner in which a SANE may be involved with a campus sexual assault

proceeding, and institutions have wide latitude to establish sexual misconduct policies and procedures that will vary from campus to campus. Therefore, the observations and lessons shared in this article are drawn less from statutory language and more from the author's experience of having been involved in hundreds of criminal and Title IX sexual assault investigations. From the perspective of someone who has interacted on numerous occasions with SANEs, this article provides SANEs with information about Title IX and campus sexual misconduct processes that will help them understand the implications their work has for patients who may be involved not only with the criminal justice system but with their campus process as well.

I. TITLE IX: LEGAL FRAMEWORK FOR REGULATION CAMPUS SEXUAL ASSAULTS

The federal statute at the heart of the regulatory framework for how institutions address campus sexual assault is Title IX of the 1972 Education Amendments ("Title IX").⁵ Title IX provides "[n]o 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."⁵ Title IX applies to all educational institutions that receive federal funds, both public and private. Almost all colleges and universities must follow Title IX and its implementing regulations,⁶ because they receive federal funding through federal financial aid programs used by their students.^{5,6}

Originally applied to the discriminatory practices of university admissions and to the gender disparities of college sports, Title IX's prohibition of sex discrimination has come to be interpreted through case law and federal guidance documents as including sexual harassment and sexual assault. The significant federal guidance documents related to Title IX's mandates⁷ for campus sexual assault are the April 2011 Dear Colleague Letter⁸, the April 2014 Questions and Answers on Title IX and Sexual Violence⁹ and various resolution agreements between the Department of Education's Office for Civil Rights and individual institutions (<http://www2.ed.gov/about/offices/list/ocr/docs/investigations/index.html?exp=2/>).

Collectively, the federal statute and these guidance documents set forth the specific requirements that institutions must follow with respect to investigating and adjudicating sexual assault.

II. CAMPUS INVESTIGATIONS AND ADJUDICATIONS OF SEXUAL ASSAULTS UNDER TITLE IX¹⁰

For most institutions, the 2011 DCL significantly changed the way they understood their Title IX obligations. First among those new understandings was the directive that institutions have an affirmative obligation to review (and potentially investigate and adjudicate) allegations of campus sexual assault independently from any criminal review that might also be occurring with respect to the same incident. Institutions are not permitted to rely on police investigations—even those conducted by their own campus police departments—into allegations of sexual assault.^{8(pp. 4,10)} This means that one incident of sexual violence can potentially give rise to two separate investigations/adjudications and that one medical forensic exam could potentially be considered within the two separate processes.

A. Investigating Campus Sexual Assault

1. Triggering an institution's obligation to investigate under Title IX. Title IX requires institutions to review allegations of sexual assault that they know or should know of.^{8(p. 4)} Rather than the victim complaint-driven system that characterizes police investigations, institutions' obligation to investigate is triggered when any "responsible employee" of the institution becomes aware of possible sexual misconduct.^{9(p. 2)} A responsible employee is, generally, one who has authority or duty to redress sexual misconduct or who the student might reasonably think has such authority or duty.^{9(p. 15)} Although the term is implemented differently from campus to campus, the category of "responsible employees" typically includes teaching assistants, resident assistants and housing staff, faculty with any advisory or student oversight role, academic advisors, coaches, and campus safety personnel. Responsible employees have a mandatory obligation to report concerns of sexual violence to the Title IX coordinator, and the institutional review of those concerns can then occur without any complaint

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