College Lawyers Confront a Thicket of Rules on Sexual Assault

By Eric Kelderman
Denver

Lawyers representing colleges have a host of worries about if and how their institutions can possibly meet a burgeoning list of federal rules for dealing with sexual violence on campuses.

The new, and still evolving, laws and guidelines have set off a scramble at institutions across the country. Colleges that can afford it are hiring staff members to investigate and help resolve sexual-assault complaints. Smaller institutions that may not be able to afford to hire their own staff are pondering alternatives, such as collaborating with other colleges. Nearly every institution is poring over its policies and procedures for how to manage cases of sexual violence.

And there is training—lots of training—for students, faculty members, nonacademic staff members, administrators, and even trustees on what they can and can’t do, and what individuals must do if a student reports a sexual assault to them.

In conversations with lawyers here at the annual meeting of the National Association of College and University Attorneys, nearly all stressed that colleges want to protect students from sexual violence, and that it is the right thing to do. But even as colleges work to do so—and to meet the administrative and legal requirements that now entail—lawyers here expressed frustration that their institutions were being held to a different standard than even law-enforcement agencies and were being given increasingly complex rules that sometimes go well beyond their capacity.

And though colleges have embraced the moral and legal imperatives of confronting sexual harassment and violence on their campuses, the issues are not unique to higher education, said
Leslie M. Gomez, a partner in the Philadelphia office of the law firm Pepper Hamilton. In many cases, she said, colleges are being held responsible for the wider failings of society and inconsistencies in the criminal-justice system, with little recognition of the broader context.

"Issues of rape culture are not unique to college campuses," said Ms. Gomez, a former district attorney in Philadelphia who prosecuted cases of sexual and domestic violence against minors.

A Flood of Information
The pressure on colleges to respond more comprehensively to sexual assaults has been increasing since 2011, when the U.S. Department of Education's Office for Civil Rights sent a letter to campuses explaining that a college's mishandling of complaints could lead to a finding that it was in violation of Title IX of the Education Amendments of 1972, which prohibits gender discrimination at educational institutions that receive federal money.

That pressure has grown significantly in recent months. In May the Education Department announced that the Office for Civil Rights was investigating more than 50 colleges for possible violations of Title IX in their handling of complaints of sexual violence or harassment. The number of colleges under investigation has since grown to more than 60.

In April, the White House issued stringent guidelines designed to help colleges prevent and respond to sexual violence and to offer students a "road map" for filing complaints against institutions that fall short in their responses.

That was followed by a 52-point series of questions and answers from the Education Department about specific issues relating to reporting and responding to incidents of sexual violence.

Proposed new rules specify a range of incidents of sexual violence and harassment that colleges will be required to track, report, and offer prevention programs for under the Clery Act, as amended through reauthorization of the Violence Against Women Act, which Congress passed last year. Those rules would require more
oversight not only of sexual assault but also of dating violence, domestic violence, and stalking. While the regulations have not been made final, colleges are still required to comply through a "good faith" effort, according to information presented at a session of the conference.

The flood of information about sexual violence and harassment has presented significant challenges to colleges. The various recommendations lay out broad responsibilities for campuses without always giving concrete guidance on what will satisfy the regulations, several college lawyers said. For example, there is no clear standard for how frequently students and faculty members have to be trained on issues of sexual assault.

Lawrence White, vice president and general counsel at the University of Delaware, said his institution was going forward with broad training programs, though the specifics of how to comply with the new regulations were not entirely clear.

"The surest route to disaster is for the Office for Civil Rights to find out we hadn't done training," he said.

**Not Acting Is Not an Option**

Beyond the issues of meeting the expanded federal requirements, college lawyers are asking if it's appropriate, or even practical, for academic institutions to take on the role normally played by law-enforcement agencies.

One problem is that federal and state laws are often at odds, said Ms. Gomez. Another is that colleges don't have the resources available to police departments and prosecutors.

Law-enforcement agencies have dedicated investigators, subpoena power, and the ability to collect and analyze forensic evidence, Ms. Gomez said. In addition, law-enforcement agencies can decline to prosecute a case without any legal repercussions.

"Colleges and universities lack the same tool kit, legal protections, or ability to decline a review," Ms. Gomez said. "On college campuses, Title IX requires the institution to take immediate and appropriate action in every case to eliminate a hostile..."
environment, prevent its recurrence, and address its effects, even if the victim requests that the college not take action," she said.

And taking action requires time and resources. At the same time that many colleges are still struggling to regain their financial footing after the recession, they feel compelled to hire staff members with legal expertise to investigate complaints and provide support services for students who file complaints. For example, hiring Title IX coordinators, a position required on campuses by federal law, is a "seller’s market," according to one legal consultant attending the conference.

Several lawyers pointed out that managing complaints of sexual violence requires several people, because the person doing the investigation has to be different from the person providing the support and advocacy services to the alleged victim.

But smaller campuses are wondering where the money will come from to hire people with such expertise, or whether they can manage with their existing staffs and procedures.

At Dickinson College, many people involved in resolving complaints of sexual assault are not trained as lawyers, said Dana Scaduto, the college’s general counsel. And even if the college spends the time training those people to understand complex legal concepts, that information may not be fresh or familiar by the time they have the opportunity to apply it, she said.

But she hastened to add that the college is committed to creating a "safe, hostile-free" environment. "No one is saying we’re opposed to complying."
Well, well, well. Exactly what some of us have been saying for a long time. Of course, this should have been obvious to anyone with an iota of common sense, which seems to rule out this Justice Department.

There really is little else that needs to be said beyond "Law-enforcement agencies have dedicated investigators, subpoena power, and the ability to collect and analyze forensic evidence". Colleges don't. Some people then fall back on the fact that it isn't a "legal proceeding" in the sense that it isn't a "real court" and that there is no potential jail time involved, at least from these procedures. But given that the proceedings are dictated by law, I would call that a legal proceeding, with very real and serious potential consequences that would have a huge impact on the life of the accused. And given the low threshold to be found guilty (50.1% of the judgement of those hearing the case, as opposed to reasonable doubt) and the inherent "he said, she said" nature of many, if not most of these cases, it is a travesty already happening and a bigger travesty in the making.

Some college needs to take the Justice Department to court over the rationale that this is a Title IX issue I thought Title IX as supposed to prevent gender