



The Regional Center for Investigation and Adjudication

A Proposed Solution to the Challenges of Title IX Investigations in Higher Education

By Gina Maisto Smith and Leslie M. Gomez

Under federal law, public and private educational institutions in the United States have broad and wide-ranging responsibilities to provide a safe and nondiscriminatory living, learning, and working environment. This includes the obligation to prevent sexual and gender-based harassment and interpersonal violence¹ — and to take immediate responsive action when such conduct occurs in connection with their programs or activities. While these high-level mandates are clear, the mechanics of how to fulfill the legal and moral obligations are more elusive. Without procedures that are clear, compassionate, effective, and fair, the millions of students covered by these mandates have no real access to prompt, equitable and reliable outcomes.

Despite significant attention to improving campus responses by all branches of the federal government, to date there is no definitive set of “best practices”

established by federal law or guidance. As a result, educational institutions have had great discretion in designing and implementing models for investigating and adjudicating reports of sexual and gender-based harassment and interpersonal violence. Indeed, Ted Mitchell, Undersecretary for the US Department of Education (DOE), recently declared that we are in the midst of a “national experiment” in campus responses.² What the DOE has not recognized, however, is that this experiment, while well intentioned, is failing in some respects — failing at the expense of our students, our administrators, and our communities. In this article, we explore the murky issues underlying the stark challenges facing educational institutions today and propose a collaborative, coordinated solution.

As former career prosecutors, we have spent the better part of four combined decades advocating for thousands of complainants/victims/survivors in the

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criminal justice context. As attorneys, educators, advisors, and consultants, we have a unique legal practice that focuses on the institutional response to sexual misconduct, and we have worked with hundreds of colleges and universities across the country in assessing and improving campus responses, developing policies and procedures, conducting investigations and audits, and providing education and training programs. Our advice and counsel are based on our understanding of the great need for improved systems, expanded resources, comprehensive training and education, and fair and impartial processes that incorporate trauma-informed practices and care for the welfare of students — both victims and alleged perpetrators.

The Foundation for an Effective Response

A coordinated response to sexual and gender-based harassment and interpersonal violence must integrate the following concepts:

- The complex legal and regulatory framework, including Title IX of the Education Amendments of 1972³ (Title IX), the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act⁴ (Clery Act or Clery), as amended by Section 304 of the Violence Against Women Reauthorization Act of 2013 (VAWA),⁵ the Family Educational Rights and Privacy Act of 1974 (FERPA),⁶ and other federal, state, and local laws, implementing regulations, guidance, and advisory materials;
- A nuanced understanding of the dynamics of sexual and gender-based harassment and interpersonal violence and the impacts of trauma on individuals and communities;

- An appreciation of each educational institution’s unique culture, climate, policies and procedures, personnel, resources, and underlying values.

Successful processes require that educational institutions integrate these concepts to develop a coordinated and holistic response that is trauma-informed, fair, impartial, principled, and balanced in its attention to the welfare and safety of students, faculty, staff, and community members. In short, effective implementation requires consistent, compassionate, competent, and legally compliant responses.⁷

Understanding the Law

The federal civil rights law known as Title IX provides that 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 education program or activity receiving Federal financial assistance.”⁸ Although Title IX is perhaps best known for its mission to achieve gender equity in athletic programming, its protections, and the resulting responsibilities for an educational institution, are much broader in scope. Title IX prohibits discrimination on the basis of sex in all programs and activities of an institution, including education programs and activities and employment, both on and off campus.⁹ Title IX also applies to a broad spectrum of conduct, including all forms of sex discrimination, sexual and gender-based harassment, sexual misconduct, and sexual violence committed by or against students, employees, and third parties.¹⁰ Under Title IX, an educational institution must maintain prompt and equitable grievance procedures for investigating and resolving reports of sexual and gender-based harassment and violence. If an investigation reveals the existence of a hostile environment, the institution must take prompt and effective steps reasonably calculated to eliminate the hostile environment, prevent its recurrence, and address its effects.¹¹

Additionally, the Clery Act, as amended by the Violence Against Women Reauthorization Act of 2013, provides statutory obligations for campus investigative responses. Clery, named for Jeanne Clery, a 19-year-old Lehigh University student who was raped and murdered in her campus residence hall in 1986, requires all educational institutions that receive federal financial assistance, either directly or indirectly, to

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keep and publish information about crime on or near their campus through a daily crime log, an annual security report, and timely warning notifications to the community.¹² Among the other provisions related to sexual offenses, the Clery Act mandates that educational institutions develop policies, procedures, and programs regarding sex offenses.¹³ In 2013, VAWA significantly revised and expanded the Clery Act's requirements with respect to education and prevention, reporting, and policy and procedures related to sexual assault and required the same steps for domestic violence, dating violence, and stalking offenses.

Understanding the Dynamics

The dynamics of trauma and the impacts of gender-based harassment and interpersonal violence are complex, particularly given that individual responses are unique and evolve over time. Educational institutions must be prepared to meet the varied and diverse needs of the constituents they serve at each stage in the institutional response, which can be a tall order.

On a college campus, most incidents of sexual and gender-based harassment and interpersonal violence occur between individuals who know each other. There is significant underreporting and delayed reporting, both on college campuses and in society at large, and delays in reporting can result in the loss of whatever physical or other forensic evidence might have been available shortly after the incident. Eyewitnesses and physical evidence are rare. Investigating and evaluating an incident, therefore, often requires a subjective assessment of credibility and all available corroborative evidence or information.

For an educational institution, the fact-finding investigation of sexual and gender-based harassment and interpersonal violence is one of the most sensitive and difficult tasks in the institutional response. Our

experience has taught us that an effective investigation demands scrupulous rigor in fact-gathering by individuals with appropriate training or experience, a toolkit designed to access relevant and material information, and precise reconciliation and documentation of available information to support reliable decisions. The investigation and evaluation of credibility also require special expertise to identify relevant sources of information, including peripheral and corroborative evidence; synthesize all available information and reasonable inferences; and evaluate the unique and complex factors at play in each investigation. For most educational institutions already strained by limited resources, this kind of in-house rigor and expertise may be unattainable and unsustainable.

Understanding Institutional Culture

Any effective institutional response must take into account the individual culture, climate, history, resources, policies, procedure, and personnel of each institution. Every educational institution is unique in its characteristics, including size, student-body composition, institutional values, governance, public versus private status, and culture. In addition, Title IX applies to elementary, secondary, and post-secondary institutions, each of which serves a unique student population.

Acknowledging the diversity of educational institutions, the US Department of Education's Office for Civil Rights (OCR), the federal enforcement agency charged with enforcing Title IX and other civil rights laws, has stated, "depending on the circumstances, there may be more than one right way to respond."¹⁴ As a result, with respect to the implementation of Title IX, while some mandatory guideposts exist, institutions still have flexibility in designing grievance procedures, selecting investigative models, and developing sexual harassment and misconduct policies that fit their institutional framework and meet the unique needs of their community.

As educational institutions struggle to implement Title IX, Clery, and VAWA, administrators across the nation are seeking benchmarks and best practice models. While OCR called the University of Montana resolution agreement "a blueprint" and hailed the University of Virginia's Title IX policy as "exemplary," best practice models remain elusive.¹⁵ Even assuming

there is a perfect alchemy in policy language, administrators are clamoring for standards of care that serve the needs of complainants, respondents, and institutions tasked with providing a safe environment free from harassment and discrimination.

Who Should Investigate: Campus or Law Enforcement Authorities?

Investigating and adjudicating crimes of sexual violence are challenges traditionally reserved for law enforcement officers, prosecutors, and the criminal justice system, and many observers question why educational institutions should investigate criminal conduct at all. Under federal law, however, it is an adult complainant's decision to *notify or decline to notify* law enforcement of the incident.¹⁶ OCR notes that: "Title IX does not require a school to report alleged incidents of sexual violence to law enforcement, but a school may have reporting obligations under state, local, or other federal laws."¹⁷ Moreover, the Title IX obligation to resolve all complaints of sexual and gender-based harassment and interpersonal violence promptly and equitably in order to provide a safe and nondiscriminatory environment for all students is not discretionary.¹⁸

A criminal investigation and a Title IX investigation are two distinct processes, each with its own set of procedural protections and legal standards.¹⁹ In both the educational and law enforcement setting, investigators' skill, competence, experience, and training vary widely. The criminal justice system and the courts have long grappled with the dynamics of sexual, domestic, and dating violence, and an evolving body of law addresses what we know about the nature of sexual assault cases. Over the past several decades, societal understanding of the issues has evolved.

Most educational institutions, however, do not have access to the tools that are available to law enforcement, a set that includes subpoena power,

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access to forensic labs and expertise, a dedicated commitment of resources and personnel, investigating grand juries, and other significant assets. Colleges often find themselves investigating sexual assaults without sufficient tools or resources and evaluating allegations with only partial information. This deficiency — and its potential impact on the reliability of outcomes — harms complainants, respondents, and campus communities.

All too often, campus responses are complicated by the institutional structure and framework. In the criminal justice system, separate and distinct entities handle each step of the process: the police department is responsible for emergency response and investigation; the prosecutor's office handles additional investigation, charges, and prosecution; a defense attorney is responsible for legal representation and advocacy for a defendant; a judge or jury takes on adjudication and sanctioning; and many more specialists are involved at various steps in the process. In contrast, in the educational setting, the institution is required to be all things to all people — to foster a climate that prevents incidents and fosters reporting; to provide support and advocacy for a complainant and a respondent; to provide an impartial, reliable and thorough investigation; to provide prompt and equitable grievance procedures; and to provide impartial adjudication and appeal. Many, if not most, institutions lack the resources and dedicated personnel to separate and fulfill each of these roles effectively. Even if schools had the resources to do so, exercising oversight of the entire process could lead to significant challenges.

Perhaps the biggest challenge for colleges and universities is overcoming the perception of bias, the idea that if administrators make a mistake, they do so to protect the institution. If the institutional failure results in harm to a complainant or respondent, discerning the nature of the failure is often a distinction without a difference.

(A word of caution, here, however: in taking steps to improve campus practices and remedy past harms, we should take the time to understand most administrators' good intentions and common reasons for failing to respond properly, including insufficient training, incompetence of one or more individuals in the system, human error, and lack of coordination. In the current climate, few recognize that most college and university

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administrators genuinely want to work collaboratively to educate and transform current practices.)

The current federal enforcement efforts require educational institutions to provide thorough, impartial, and equitable evaluations of facts without the necessary resources or tools that would enable institutions to access important and material information in assessing credibility cases — information such as text messages, Snapchat history, Facebook posts, physical or forensic evidence, or surveillance data. Campus processes are limited by time, resources, and an inability to gather important relevant information, a reality that serves neither complainant nor respondent and undermines everyone’s trust in the process and the outcome.

While the federal government’s goal is noble and we wholeheartedly endorse the requirements of education, training, and rigor in investigations, both the national dialogue on these issues and the federal enforcement efforts fail to take into account the tremendous complexity of the issues, the context of educational institutions, privacy considerations, and other impediments to effective implementation of Title IX on college campuses. Indeed, the current enforcement framework and evolving expectations of the courts seem to be requiring educational institutions to subsume a criminal justice function without the resources to do so effectively. Colleges and universities are designed to educate — this is what they do well. The more federal obligations force colleges and universities to act like prosecutors and courts, the less able educational institutions will be to carry out their basic mission of educating.

As a Solution, an Entirely New Approach

To help those impacted by interpersonal violence and sexual and gender-based harassment and the institutions that are struggling to respond effectively,

we have long advocated for an entirely new approach: a network of regional investigation and adjudication centers using multi-disciplinary practices similar to those used in child advocacy centers. These regional centers, which would represent a partnership between federal and/or state government, law enforcement, and institutions of higher education, could be a significant resource for resolving reports of misconduct that violate both Title IX and state criminal law. Regional centers could provide the forum for sensitive interviews by independent, forensically trained, and experienced investigators; fact-finding by independent, neutral, experienced adjudicators; and, through partnerships with other local agencies, access to victim advocacy and forensic examination services.

While there may be a variety of viable models, a regional center could operate as an independent nonprofit organization, an arm of a prosecutor’s office, or a newly created government agency. Funding for the regional center could come from several sources, including federal grants, state grants, institutions of higher education, and law enforcement. Once an incident of sexual and gender-based harassment and interpersonal violence has been reported (to college and university officials, law enforcement, or directly to the regional center), the regional center would be responsible for carrying out the investigative and adjudication responsibilities outlined by Title IX and VAWA. Importantly, educational institutions would maintain their Title IX obligations regarding support, interim measures, sanctions, tracking of patterns, and identification of individual and community remedies to address the effects of any discrimination or harassment. While the regional centers could supplant critical investigative functions, educational institutions would continue efforts to eliminate sex and gender-based discrimination and harassment within the unique context of their institutional policies, resources, culture, and climate.

A regional center, we believe, could resolve many of the challenges identified in this article, providing a forum for objective and independent fact-finding that could reduce barriers to reporting for complainants who may be reluctant to notify either campus or law enforcement authorities. Much like child advocacy centers, the regional center could serve as a neutral resource that helps a complainant maintain agency and autonomy in the disclosure and dissemination of information — all without the perception of

institutional bias. To ensure continued attention to the needs of individual complainants, the regional centers could be staffed by experienced and sensitive case managers who would coordinate with both educational institutions and law enforcement agencies about the wishes of a complainant and the available facts and circumstances to determine the path of each case. The regional center also would offer helpful separation of support and advocacy services from those involving investigative and adjudication. Complainants could choose to access support services from their educational institution, in the place and with the people they know, or from the community-based advocacy services associated with the regional center, both of which would be unconnected to the interview and investigative process.

Just as importantly, regional centers could serve as the hub for collaborative interaction between higher education and criminal justice responses to streamline the investigation and adjudication process in a way that respects the agency and autonomy of an adult victim and incorporates principles of due process. The use of a formal, forensic interview could reduce the need for multiple interviews of the complainant, respondent, and witnesses. With the complainant's consent, a recorded interview could be shared with law enforcement and campus administrators. Based on state law provisions, the regional centers could also allow for the sharing of information between law enforcement and higher education by creating exceptions to current prohibitions on information-sharing under FERPA or state criminal law confidentiality provisions. In addition, regional centers, in collaboration with local law enforcement agencies, could have access to traditional law enforcement investigative tools to gather material evidence that might not otherwise be available to educational institutions, helping ensure that investigations are conducted efficiently, promptly, and comprehensively. The potential long-term benefits of increased collaboration could be educational for campus and law enforcement processes, enhance relationship building, and provide greater transparency throughout.

The regional centers could also fill a current gap — while prosecutor's offices have jurisdiction over campus crimes, many overworked and underfunded local prosecutors decline to take the consent-based cases occurring on college campuses, leaving victims with no recourse other than campus processes.

By providing additional investigative resources to aid local law enforcement and prosecutors, the regional center could increase access to justice for cases that typically never see the inside of a courtroom.

As we travel the nation to address these complex issues, we continue to work with state and government officials to explore the idea of regional centers. Most recently, we provided an outline of this proposal to officials in Virginia and are gratified that their 2016 budget dedicates funds to study the viability of such a center for Virginia colleges and universities.²⁰ Wherever we go, our goal is to ensure that students have consistent access to trauma-informed, fair, and impartial processes — in short, equal access to effective campus and law enforcement processes that provide prompt, equitable, and reliable outcomes. ■

Endnotes

1 While not perfect, this phrase is meant to include sexual harassment, gender-based harassment, sexual assault, dating violence, domestic violence, stalking, retaliation, and related conduct.

2 Ted Mitchell, Under Sec'y, Dep't of Educ., Address at the National Association of College and University Attorneys (June 30, 2015); see also, THE WHITE HOUSE, NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT (2014).

3 20 U.S.C. § 1681.

4 20 U.S.C. § 1092(f).

5 Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 89 (2013).

6 20 U.S.C. § 1232g.

7 For additional discussion about effective practices, see Gina Maisto Smith & Leslie Marie Gomez, *Effective Implementation of the Institutional Response to Sexual Misconduct under Title IX and Related Guidance*, The National Association of College and University Attorneys (2013),

http://www.nacua.org/securedocuments/programs/June2013/05D_13-06-38.pdf.



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8 20 U.S.C. § 1681(a).
 9 20 U.S.C. § 1681(a); 34 C.F.R. § 106.11; 34 C.F.R. Part 106 ; Questions and Answers on Title IX and Sexual Violence, Office for Civil Rights, April 29, 2014 (Title IX Q & A) at 29.
 10 U.S. Dep't of Educ., Office for Civil Rights Dear Colleague Letter, 1 April 4, 2011 (2011 DCL); *supra* note 9. Questions.
 11 *Id.* at 2-3, 14-18.
 12 See generally 20 U.S.C. § 1092 (f) (2015); 34 C.F.R. § 668.46 (2016).
 13 20 U.S.C. § 1092 (f)(8); 34 C.F.R. § 668.46(b)(11).
 14 U.S. Dep't of Educ. Office of Civil Rights, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES OTHER STUDENTS OR THIRD PARTIES iii (2001).
 15 U.S. Dep't of Educ., *U.S. Education Department Reaches Agreement With The University Of Virginia To Address And Prevent Sexual Violence And Sexual Harassment*. 2015. Web. 25 Apr. 2016. <http://www.ed.gov/news/press-releases/us-education-department-reaches-agreement-university-virginia-address-and-prevent-sexual-violence-and-sexual-harassment>; U.S. Dep't of Justice &

U.S. Dep't of Educ., DOJ Case No. DJ 169-44-9, OCR Case No. 10126001, (2013) <http://www2.ed.gov/documents/press-releases/montana-missoula-letter.pdf>.
 16 Violence Against Women Reauthorization Act of 2013, *supra* note 5.
 17 Title IX Q&A, *supra* note 9 at 27.
 18 *Id.*
 19 *Id.*
 20 See <http://budget.lis.virginia.gov/item/2016/1/HB30/Enrolled/1/146/> (designating \$100,000 to design a pilot program to create a regional center for the investigation of incidents of sexual and gender-based violence based on partnership between higher education, law enforcement, and state government; the regional center would allow criminal incidents of sexual and gender-based violence to be reported directly to the center for independent and neutral investigation by trauma-informed investigators who would coordinate with both colleges and universities and law enforcement to carry out the investigative responsibilities outlined by Title IX and Clery(VAWA).

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