



PRACTITIONERS' DISCUSSION OF IMPLEMENTING CLERY/TITLE IX

2014-2015 Academic Year

Report on the Summit

A WHITE PAPER

August 19-20, 2014
University of Wisconsin - Madison

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Executive Summary

The issue of sex discrimination is not a new one. For decades the subject has been discussed and debated in the halls of Congress as well as in the halls of college and university campuses. The topic has been parsed, analyzed, and viewed from various angles. With the 1972 passage of Title IX of the Educational Amendments to the 1964 Civil Rights Act, it appeared that the law, at least in educational institutions, was settled. It was not. The law was revisited and interpreted to include more than opportunities in athletics; it now underscored the right for all students, male and female, to achieve their educational goals without interruption by the sexual misconduct of others. Campuses and their police agencies have been handed various documents to follow and interpret, and while they may have seemed clear at first, they are anything but clear. Campus authorities certainly want to comply with the laws; the challenge they face in these circumstances are learning the law, overcoming the discrepancies, and most of all, protecting victims.

This Summit brought together campus officials from around the U.S. to discuss unresolved issues around Title IX and other related legislation including the Clery Act and the Violence Against Women Act (VAWA). Campus police administrators, deans of students, Title IX and Clery staff, and others met to work toward better compliance—not only with the letter of the law but, far more important, with the spirit of the law.

Summit participants worked hard to create a comprehensive list of issues, first from the case studies of the University of Connecticut and Amherst College, and then from their own experiences with Title IX and Clery. The concerns (addressed in more detail below) were in the broad areas of reporting, investigating, working with other partners (prosecutors, local police, advocacy groups, and other campus offices), training, providing victim services, and creating timely warnings. The group also felt that more thought was needed on the Title IX process itself and on the important question of how to encourage the reporting of sexual violence to the police. The list was long but certainly not all-inclusive. Yet the conversation generated more than enough substance to begin a deeper discussion on possible solutions or as it was termed, “promising practices.” Although a second Summit will build on the work of this Summit, there were some preliminary promising practices emerging that were discussed and are listed later in this paper.

The expectation is that with the possible partnership of the U.S. Department of Education (DoED) Office for Civil Rights (OCR) and others, a follow-up Summit will produce a more definitive list of solutions useful to everyone.

Introduction

We know that victims of sexual harassment and sexual violence can be of either gender. We also know that females are victims at a much higher rate than males. To avoid confusing and awkward construction in this paper, the female pronouns will generally be used when discussing victims and male pronouns will be used when discussing suspects or perpetrators. This in no way depreciates the male victims of sexual crimes. Also, use of the words *college*, *university*, and *institution* are interchangeable as are *victim* and *survivor*.

Since the Title IX “Dear Colleague” letter (DCL)¹ in 2011, campus police departments have been attempting to further define their role in handling cases of sexual violence. The advent of Title IX in 1972 seemed to have little impact on criminal violations and was often interpreted only for use in gender equality within sports programs. The police had little to do with that aspect of the Title IX legislation and, for the most part, continued to handle reports of sexual assault as they always did by treating these assaults as a crime. A sexual assault report would trigger an investigation, including interviews with the victim, a possible medical exam, and the roundup of the alleged perpetrators for interviews when possible. If there was probable cause, the suspect(s) would be arrested and potentially tried in the criminal justice system. The campus administrations often were not directly aware

of the assaults until much later if at all. Today new rules have been created and old rules have been rewritten or reinterpreted to comport with the intent of the law.

The softer approach on campuses of counseling students for their transgressions with a warning has now moved to the more adversarial, more judicial model even for what might have been considered minor violations related to underage drinking, minor theft, and vandalism. Similarly, the gradations of sexual harassment in Title IX have been expanded to include all kinds of sexual violence including sexual assault. Over time, the term rape was removed from the statutes and replaced with varying degrees of sexual assault. It is now clear that all forms of sexual assault are crimes.

Regardless of the level of the complaint, (from unwanted touching to rape) the Title IX process is the same. There is less discretion on the part of the Dean of Students or a Student Conduct board on how to proceed than there was in the past. Although the level of violation might nuance the final decision and consequence, the process still involves a complaint and respondent in an adversarial process, taking what might have been a part of the educational process, into the harsher area of punishment. Universities and colleges have generally followed a more collegial and educational model, and are still finding their way through this quasi-judicial practice. All of this is not to say that penalties should not be meted out to perpetrators; it is to say that the process is foreign to most college campuses and creates a less familiar role. New and changing roles of student judicial officers must now be integrated into the system.

Remarkably, the concept of consent and “date rape” harkens back to its first use in print in a 1975 book by Susan Brownmiller.² Yet, the idea of consent as a prerequisite of sexual activity is still debated and is not always clear to those beginning their independent lives on college campuses. This is where colleges and universities should shine—educating students, early and often, on the expectations regarding sexual harassment, et al. If done comprehensively and collaboratively from the beginning and throughout the educational experience, some of the discomfort of adjudicating behavior in a Title IX process should be alleviated.

The Department of Education (DoED) began investigations across the country through its OCR and has currently found over 70 colleges that are not in compliance. A new bill recently drafted by Senator Claire McCaskill, D-MO, has bi-partisan support. The Campus Accountability and Safety Act would require colleges to provide confidential advisers to victims of sexual assault, ratchet up training standards for on-campus personnel, and mandate that every college in the country conduct campus climate surveys. The latter is a recommendation from the White House as well. The bill would also require colleges to use a uniform process for campus disciplinary proceedings and prevent colleges from allowing athletic departments or other campus entities to handle sexual assault complaints themselves.

It is now incumbent upon colleges and universities to work through current and new proposed legislation to ensure their own compliance. Campus police agencies must concurrently review their roles and set policy as appropriate.

At this Summit, it became evident that full discussion of the issues alone, much less in depth identification of useful *promising practices* to pass on to campus officials, could not be completed in this meeting. Consensus was reached among the sponsors and attendees to complete the issues portion of the agenda. A second session scheduled within a few months will identify solutions and produce what were termed emerging or *promising practices*. The dissemination of this White Paper should provoke thoughtful and careful consideration of the issues that will inform the discussion on *what works* in a second Summit dedicated to creating the way forward.

For the final hour of the Summit, the attendees were able to generate a draft list of the most *promising practices* to date (page 20). It was understood that such a list must be dynamic and have the understanding that what might be acceptable on one campus may not be feasible on another. Because there was not enough time to fairly address

actual solutions to many of the issues, the decision was made earlier to continue the discussion in the next Summit and begin to put together a comprehensive plan for campus law enforcement. This White Paper will be the foundation for those discussions and a final paper will be produced after the follow-on Summit.

Of note is that the National Center for Campus Public Safety, a partner in this Summit, has agreed to be the repository for all documents generated on Title IX/Clery policy and procedures from this Summit as well as from other sources who wish to contribute.

As often happens, there are unintended consequences with these law changes and updates, not the least of which are some apparent conflicts between state and federal statutes. It was with all of these redefined laws and corollaries that we opened the Summit to stimulate discussion and offer recommendations.

Background

On June 23, 1972, President Richard Nixon signed into law Title IX of the Education Amendments to the 1964 Civil Rights Act. The law prohibited sex discrimination in any educational program or activity for institutions receiving any type of federal financial aid.

In 1980 the U.S. Department of Education became operational and was given oversight of Title IX through their Office for Civil Rights (OCR). Nearly all of the legislative action from the initial passing of Title IX through 2010 related to equity in campus athletics.

In 1997³ the OCR issued (and revised in 2001⁴) a paper titled "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties." Those documents did not specifically address sexual violence, including sexual assault, but used more moderate terms such as the following:

"Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature."

The 2011 DCL was determined to be a *significant guidance document* which clarified for the first time that Title IX's protections against sexual harassment and sexual violence apply to all students, not just athletes. Sexual violence is more clearly defined than before and the interpretation of Title IX went far beyond gender equity in campus sports. Campus administrators and police chiefs were now required to take notice and provide services although the methodology was not always clear.

The DCL was followed by "Questions and Answers on Title IX and Sexual Assault," April 2014,⁵ which stated that the DCL and other documents still remain in full force and are considered guidance documents. The Questions and Answers document was intended to help clarify aspects of the 2011 DCL.

Also in April 2014, the White House issued its position paper, "Not Alone: The First Report of the White House Task Force to Protect Students From Sexual Assault."⁶

For police and campus staff who are only marginally familiar with the Title IX law and its myriad requirements, these five documents must be required reading in order to assimilate the knowledge necessary to provide the needed services.

The Campus Role

Title IX in its current iteration prohibits campuses that are receiving federal funding from discriminating on the basis of sex in educational programs or activities. Sexual harassment, now including sexual violence, is interpreted to be a form of sex discrimination prohibited by Title IX (DCL). Among the many requirements are the appointment of a Title IX Coordinator, Title IX Investigator(s), and the explicit training regarding these responsibilities. There are numerous requirements for training students as well as staff on how to access the necessary support when sexual violence occurs.

The campus must begin its own Title IX investigation regardless of whether the police are involved. A criminal investigation does not preclude the campus inquiry. It may be necessary for the campus to provide interim steps to assist the victim before the investigation is completed and the case resolved. The victim must be supported throughout the process. The campus must also protect the rights of the suspect by providing updates on the case, ensuring equal rights with regard to required hearing appearances, allowing the ability to cross-examine witnesses, and following appropriate FERPA regulations.

The Police Role

When a victim reports a sexual assault directly to the police today, it triggers an improved response than before the passing of the Title IX legislation in 1972. As the investigation begins, it is strongly recommended that the victim not be traumatized by numerous repetitive interviews with the responding officer, detectives, and others. The goal is to lessen the trauma, and in the longer run, to enhance a reporting system that encourages rather than discourages victims from reporting the crime. Where possible, a sensitive crimes detective or officer should respond to take the initial report and coordinate the police inquiry.

Summit Mission

With the advent of the DCL and the subsequent guidance issued by the OCR, it was clear that the entire college police community in the U.S. must take an active role in interpreting and enacting the changes within the intent of Title IX. The conflicts must be resolved, definitions created, and the process made as transparent as possible. The police establishment must also accept that some victims will never report the crime to the police, and these victims still need services to help them work through their issues. A sexual assault, by definition, is likely the worst kind of personal crime, short of homicide, and it is the victim's right to not report the crime to the police.

With the financial support of the National Center for Campus Public Safety, IACP, and IACLEA, the Summit attendees were able to dissect and discuss these and many other issues that all too often do not follow a neat, linear path; instead they require thoughtful actions to serve victims as well as the entire campus community.

As noted above, the original intent of this Summit was to review the issues related to Title IX along with two campus case studies where the OCR conducted audits and found the institutions to be non-compliant with Title IX. Through those case studies presented by their respective Chiefs of Police, the attendees absorbed some of the lessons learned which could help their own schools avoid some of the pitfalls.

Summit Overview

Associate Vice Chancellor Susan Riseling, Chief of the University of Wisconsin-Madison Police Department and host of the Summit, opened the meeting and welcomed the attendees. She stated that there was much work to be done to be sure that campuses were aware of their responsibilities with regard to Title IX and Clery. Chief Riseling

also noted that this Summit is intended to be a free exchange of ideas without judgment and noted that there were no media representatives in the room. Open, honest, and respectful discussion was encouraged to achieve the best results.

Vickie Weaver, Immediate Past President of IACLEA, noted that the conversation about holding this Summit began at the last IACLEA conference just six weeks earlier and it quickly took form with the goal of strategizing a collaborative approach to handle Title IX issues.

Jim Lyon, Vice-chair (now Chair) of the IACP Colleges and Universities Section, welcomed the group and remarked that there is unprecedented regulation in this area and that the document that comes out of this Summit will be shared across the country.

Kim Vansell, Director of the National Center for Campus Public Safety, greeted the attendees and explained that the Center provides resources on critical issues and generally works to enhance all campus safety.

After participant introductions, Chief Riseling observed that this group represented a range of institutions from less than 1,800 students to more than 50,000. Five of the institutions represented are also responsible for university hospitals. We began with the case study of the experience of a large public institution, the University of Connecticut (UConn), followed by the smaller private institution, Amherst College.

The UConn Experience

Barbara O'Connor - Chief, University of Connecticut
Storrs, Connecticut



The University of Connecticut (UConn) is a public, liberal arts, land/sea grant research university. The University has over 30,000 undergraduate and graduate students on six campuses.

Title IX compliance is a current issue and UConn has recently settled a Title IX lawsuit. The UConn Police Department responsibilities include not only the police but also a full-time fire department, EMS, and code enforcement. They have a total of 144 employees with 76 sworn officers over many campuses. UConn already had a Clery audit and was brought into Clery compliance in 2011.

In February 2012, there was a protest of the *rape culture* at UConn. The President had been in place for only six months, and the previous police chief was leaving in two months. An insensitive video produced at the student TV studio spurred a considerable number of complaints, a Facebook protest campaign, and a campus rally. It triggered a larger debate over the rape culture.

In May 2012, there was a student march on Gulley Hall where President Susan Herbst was asked to do something about the culture. Student Carolyn Luby sent an open letter to the [Feminist Wire](http://thefeministwire.com/2013/04/an-open-letter-to-uconn-president-susan-herbst/) (<http://thefeministwire.com/2013/04/an-open-letter-to-uconn-president-susan-herbst/>) telling her story of a sexual assault and asking that the campus reconsider their new, fiercer husky mascot brand image. Her letter implied that the new husky meant the President wasn't serious about some of the sexual violations that had occurred. The letter prompted negative and abusive comments on-line, and fearing more harassment, Luby came to the UCPD lobby with nine other students to report a crime. She then went public with multiple off-campus complaints. One comment published said, "Storrs police allegedly suggested she keep a low profile and wear a hat around campus." While true, this suggestion actually was part of a larger safety plan proposed by an officer.

UConn President's response to the protests and complaints was to form a Task Force on Civility in the summer of 2013. She asked for feedback on sexual assault complaints and held three open sessions and focus groups. At the forums, these issues were presented:

- Lack of police presence on campus
- Use of Timely Warnings
- Lack of community policing

The Task Force recommendations included:

1. Providing additional support and resources for services that specifically target sexual violence prevention, including training to help bystanders intervene in effective and appropriate ways when they witness events that may endanger their fellow students.
2. Expanding and enhancing programming on prevention of sexual violence, drug and alcohol abuse, and unhealthy relationships; better advertising for self-defense programs; and repeating mandatory training on sexual violence prevention at various times throughout students' years at UConn.
3. Supporting and assisting a student-led drive to eradicate the use of the alarming and unfounded nickname (Rape Trail) occasionally used to describe the wooded walkway to the Celeron apartment complex.

In October 2013, seven women filed a lawsuit with Gloria Allred as their attorney. The subsequent OCR complaint alleges the school failed to do enough in response to the women's allegations treating them with indifference or worse. The victims "have chosen to fight back," according to Allred.

UConn President Herbst defended the police response in a press conference and was vilified for her stance. However, as a result, UConn had already developed a Title IX sexual assault response protocol that requires mandatory reporting to the Title IX Coordinator by all staff except for counselors and pastoral staff in their official roles.

With frustration rising over the incidence of sexual assaults on college campuses, anger over instances of institutions actual and perceived mishandling of investigations, and exhibited indifference to victims, the politicians in Hartford and Washington scheduled public hearings to begin taking steps to address the issue.

A sweeping bill that strengthens the reporting requirement and institutes new policies to help victims passed unanimously in the Connecticut Senate after prior Assembly approval. In May 2014, Governor Malloy signed the bill that requires schools to establish trained sexual assault response teams and to work with sexual assault clinics to provide access to medical care. An additional mandate was drafted to keep track of all incidents and provide an annual report to the Connecticut General Assembly. In the end, UConn settled the case for \$1.3 million.



University of Connecticut - Storrs, Conn. (photo courtesy: www.uconn.edu)

The Amherst College Experience

John Carter - Chief, Amherst College Police Department
Amherst, Massachusetts



Amherst College is a small, private, and prestigious school with 1800 students spread over 1400 acres. Established in 1821 as an all-male school, it admitted the first woman in 1976. Fraternities were banned in 1984 but existed underground in some form until recently. John Carter became the Police Chief at Amherst in 1998. Biddy Martin arrived as the President at Amherst in 2011 after serving as the Provost at Cornell and the Chancellor at the University of Wisconsin-Madison.

Amherst has been the subject of a Title IX investigation by the Department of Education's Office for Civil Rights (OCR).

On October 17, 2012, Epifano's account of sexual assault was published in the Amherst Student. She reported that nine months after the assault, she was urged by a friend to seek counseling through a campus sexual health educator. Epifano stated that this person told her that she could not change dorms, that pressing charges would be useless, and asked her the question, "Are you sure it was rape?" Epifano said that the counseling center focused on her apparent psychological instability and placed her in a psychiatric hospital ward. She eventually dropped out of school and went to work on a dude ranch.

The essay had over 370,000 hits the first week and it started a firestorm on campus. Chief Carter noted that he first learned of the sexual assault when the essay was published. President Biddy Martin responded and admitted that mistakes were made and promised emphatically to make things better. She formed a Special Oversight Committee on Sexual Misconduct whose charge was to make recommendations to the President to prevent and address sexual assault on campus.

The Special Oversight Committee, comprised of two Trustees, faculty members, two students, staff, and a number of *Of Counsel* representatives, identified five keys areas needing attention:

Campus environment – Taking stock of Amherst's campus culture and identifying ways that it impedes or facilitates sexual respect among students. There was no resident life program and no resident assistants within the 38 dorms in the evening and overnight. There are only two police officers and a sergeant on duty at night.

Resources – Examining the structure and mission of Amherst Student Affairs and making recommendations on how to restructure and redistribute its resources. This included the Dean of Students office, the Health Center, and the Counseling Center.

Education – Recommending improvements of Amherst's sexual education programs to better promote gender equity and healthy sexual behavior on campus.

Recent history – Distilling lessons learned from recent instances of sexual misconduct at Amherst as well as from the experiences of other institutions.

Policy and Title IX – Providing a summary of recommendations for policy changes throughout the school including those associated with Title IX.

In late fall of 2013, with the continuous improvements in the structure, the Title IX team began to shift priorities from policy development to case facilitation. This team is now chaired by the Title IX Coordinator and includes the Chief Policy Officer and General Counsel, Associate General Counsel, Dean of Student Conduct, and, the Police Chief.

Amherst College received notification of a complaint filed with the OCR in January 2014. In March, the College has submitted a response to a substantial Initial Data Request and, in July, various College administrators met with a team from OCR to answer their questions. To date, the College continues to work cooperatively with OCR to resolve the complaint.



Amherst College - Amherst, Mass. (photo courtesy: www.amherst.edu)

Identifying the Issues and Challenges

Reporting

Clery reports require accurate data, usually from many databases. Data must be crosschecked to avoid double or even triple counting. Even though it is known from confidential surveys that sexual assault is underreported, the data must be accurate and properly classified. Without good training and encouragement, Campus Security Authorities (CSA) and Responsible Employees may be reluctant to ask the right questions that will serve the victim best. At the same time, those employees and entities designated as confidential (e.g., counselors, pastors, rape crisis centers) must understand and cooperate with Clery requirements without releasing personal, identifying information.

Conflicting federal and state laws must be reconciled, or an agreement must be made regarding which laws take precedence assuming that there may not be a definitive answer for some time.

Jurisdiction issues may complicate reporting and as the onus of Title IX lies with campus authorities, the campus police must invoke Title IX when a student is involved. The investigation may eventually show that an off-campus assault did not come under Title IX authority; however, this must be documented and, if appropriate, the institution should be prepared to offer services to the student regardless.

Finally, the institution's legal counsel and the police must determine what can be released from sexual assault reports, especially considering FERPA, FOIA, and the rights of the victim and offender.

Emerging and Promising Practices for Reporting

Information sharing among all involved agencies (e.g., campus and local police, Title IX, Dean of Students) is important to avoid duplicative work and to provide coordination of services. Addressing this issue through an MOU will remove most if not all of the barriers.

Once federal and state laws are reconciled, the OCR should create a comprehensive manual detailing the objectives and the procedures to meet them.

Campuses should consider a unified reporting form that would be distributed to the other departments or offices involved (police, dean of students, Title IX, student conduct). A second form detailing all of the services in a checklist would provide documentation of what was offered to the victim. The form should include written acknowledgment by the victim to verify what was accomplished.

When a victim initially decides she does not want to report the incident to the police, the Title IX office will advise police investigators of the reported event so that the same incident reported in another way does not trigger a second investigation. An MOU with the Title IX office and surrounding police agencies would delineate who was notified and how the case would be handled to avoid compromising victim confidentiality. When appropriate, a follow-up call from a sensitive crimes detective to the victim can be made to offer and explain their services while still honoring her request for confidentiality. Police departments may want to include victim advocates in the MOU so they could facilitate a potential introduction to a police officer who would explain the process or services available.

Investigation

The Title IX process in part assists victims in terms of services, accommodations, and possible university sanctions for the suspect. Police criminal investigations are done in part to increase accountability, arrests, prosecutions, and adjudications.

To provide the best services to victims, both Title IX investigators and police detectives need to be specially trained in understanding rape trauma and the impact of multiple investigations and multiple proceedings on victims. Investigators and detectives need to be aware of the differences in the burdens of proof, (preponderance for Title IX, guilt beyond a reasonable doubt for the criminal justice system) even while conducting concurrent investigations. Investigators and detectives must know that alcohol or other drugs and the trauma itself can create distortion, memory issues, or increased feelings of shame.

The investigators and detectives also must know the different processes involved with student-on-student, or faculty-on-student assault incidents. The Title IX Investigators or police detectives must know that the requested confidentiality may be overridden when there may be imminent danger to the community. If the information cannot be kept confidential, a clear process for approval and documentation should be in place. The Title IX office and the victim must be made aware that confidentiality may be breached in those situations.

Small campus departments may have resource issues; however, regardless of size, it is necessary for the responding police to know the law and incorporate other resource assistance within the law's parameters.

A number of issues were raised about the role of the Title IX Investigator, especially where the victim has chosen not to report the assault to the police. Is it appropriate for the Title IX investigators to go to the scene? Should they collect evidence or do testing for drugs? Can they compel a suspect to give evidence? Can they request a SANE (Sexual Assault Nurse Examiner) exam?²⁷ If so, who keeps the anonymous evidence in the chain of custody? Where would the university obtain results from the tests conducted on the evidence? What about Miranda warnings? Or the protections afforded in the criminal justice system against self-incrimination? Should campus police assist with evidence collection even though the victim did not want a police report (the evidence may be helpful if the victim decides to report the incident to the police at a later date)? When there are concurrent investigations, which have priority? Should Title IX Investigators do stalking and domestic violence cases? These and many other issues need to be resolved on a global basis to create a best practice and ensure uniformity across the U.S.

What should be shared with the local police? What if the local police are the primary responders? Releasing information publicly from the Title IX investigation before the criminal case is complete can adversely affect the criminal case. In a criminal case, the Title IX investigation must still take place but Investigators must know that their case may be paused pending the criminal case. Can Title IX investigators take part in the police investigation to gather the information they may need? This is where an MOU can lay out expectations and responsibilities.

A larger issue, likely for the states to decide, is whether consent is needed to save the sexual assault evidence kits. If kits are kept anonymous, should they be tested or stored? If the kits are stored, they must follow the chain of evidence to have any value. How long can they be stored in evidence, and is the victim notified if the kit is to be destroyed?

If the police investigate and determine that a report is false, care must be taken with an unfounded report to avoid creating fear of reporting in other victims. Additionally, there may be confusion with victims about the kind of investigation (Title IX or criminal) and what the outcome may be (sanctions by the college or criminal penalties levied by the courts).

With different burdens of proof, it could be that the college could expel a perpetrator, but the criminal courts and juries may eventually find the defendant not guilty. Is the Preponderance standard (51 percent) fair to the accused? If Title IX makes a finding of responsibility (suspect), orders treatment, can the suspect return to campus when he completes that treatment? If a supposed plea bargain is reached in the Title IX investigation, is the victim involved in the decision?

The OCR suggests that most Title IX investigations wrap up within 60 days, but a criminal case will take longer. This could be interpreted as the system dragging its feet and increasing trauma for the victim.

Campus police departments must seek answers on the best way to deal with the parallel systems. Campus administrators must also find answers to some inequitable situations that seem to defeat the spirit of the Title IX laws. One example presented is that although a perpetrator may be sanctioned (e.g., suspended or expelled) at the end of the Title IX investigation, the institution may be prohibited from placing the hearing findings on the student's educational record and transcripts. This does not protect the next school to which the offender may apply nor does it offer protection to the community in the way a criminal proceeding would offer.

Emerging and Promising Practices for Investigations

Develop a standardized base training curriculum for all agencies involved with Title IX particularly for detectives/officers who are first to respond to sexual violence cases. Standardized training is not currently available; therefore, commercial training vendor curricula need to be reviewed for the desired content.

Develop a victim-centered approach that may include finding a soft, private interview room and arranging to have the right people in the room, or be able to listen in real time. This offers comfort and avoids having the victim retell her story which could increase the trauma.

Develop relationships with local police and advocacy groups so that cooperative efforts can begin at the start of an investigation. Smaller campuses may especially need these partnerships to provide timely, appropriate services.

Depending on campus size or staffing, the Title IX Coordinator may decide to use trained, independent investigators for sexual assaults.

Encourage MOUs between the campus police, Title IX offices, local law enforcement, and prosecutors detailing responsibilities, especially when the victim initially does not want to report to the police.

Every agency and service provider involved with a case should participate in an after-action phase to review the incident and the lessons learned to avoid difficulties in the future.

Prosecutors

Most district attorneys are elected and therefore may be more concerned about their *batting average* when deciding whether or not to prosecute. They may decline to prosecute using the justification that it was just *drunk sex* or the victim now has *buyer's remorse*. They also may assume that the college will act on its own and penalize the student via Title IX or the student code. There may be pressure to not prosecute when it may affect the suspect's athletic team standing (if applicable) or get him expelled from school.

However, victims and the police must acknowledge that these are difficult cases given the reasonable doubt criminal standard as well as lack of credible witnesses and physical evidence, especially if there was a delay in reporting. The need for judicial education on the dynamics of sexual assault victimization was also mentioned as important.

Emerging and Promising Practices for Prosecutors

The police and others can encourage prosecutors to take part in training regarding Title IX/Clery rules, VAWA topics, and other topics related to sexual violence prosecutions. Training is sometimes offered through the National District Attorneys Association⁸ or the state associations, and local prosecutors should be encouraged to participate. This education then may overcome some prosecutors' unwillingness to employ resources and hire experts in rape trauma. They must also be made to appreciate that campus police operate under different rules for Title IX than for a criminal case.

Develop relationships through MOUs with local DAs to encourage understanding on issues such as the fine line between incapacitation and intoxication and the proper education of the jury, particularly in the area of consent and rape trauma. Experienced special victims detectives can help the prosecutors define these issues.

Training

There are no national standards for Title IX training. Title IX, with all its complexity, does not lend itself to a standard training program for all employees. Currently, there does not seem to be any all-inclusive Title IX training available for all Responsible Employees, university leaders, investigators, Title IX Coordinators, university police, hearing officers, and other university personnel. There are training products on the market but they have not been vetted nor proven to meet a national standard.

Sensing a burgeoning cottage industry, commercial Title IX/Clery training providers are popping up across the country especially since numerous campuses are under investigation for possible non-compliance by the DoED OCR. Fearing that it may be their fate as well, some institutions are scrambling to offer training, whatever that might entail. There is no blueprint for training or an accepted curriculum; therefore, law firms, police associations, advocacy groups and others are creating courses ranging from four hours, to four days or more.

Additionally, Clery has its own requirements some of which overlap with Title IX and it is unclear whether it is possible to combine some trainings. Other challenges include adding VAWA and Campus SaVE into training curriculum.

Confusion still abounds around the differences in crime definitions vis-à-vis the Uniform Crime Report, Title IX, Clery, and VAWA. It is difficult to train if basic definitions are unclear.

Title IX/Clery concerns are further complicated by most local, state, and tribal police departments having little or no working knowledge of the requirements. Yet they may be called upon to assist or be the first responders to sexual violence calls involving students and university staff. Because Title IX applies to all schools, not just colleges, local police must have an understanding of the law when a violation occurs in their K-12 school system.

Title IX Coordinators, Title IX investigators, police detectives, hearing boards, or hearing officers will need training to a greater extent.

Municipal police departments and local prosecutors need awareness training on Title IX and the federal requirements that universities have to meet when they conduct a Title IX investigation regardless of the involvement of the police in an investigation. University and municipal police need to be trained beyond the alcohol-fueled acquaintance rape to include stalking, sexual assaults committed by strangers, and other domestic sexual violence.

Sexual assault cases and investigations in all their forms and complexity should be taught in the police academy in at least one four hour block. This foundation is minimal yet critical. Throughout an officer's career periodic training in these complex cases should be continued.

Campus community members (bystanders) should be trained in methods to intervene in appropriate ways when they witness events that may endanger their fellow students or co-workers.

Emerging and Promising Practices for Training

Training is specific to the employee role. The training may be presented in modules. For example, Responsible Employees may need only one training module covering what the expectations and duties are for a Responsible Employee. A Responsible Employee who is also a CSA for Clery would require a second module that teaches Clery responsibilities. Some campus administrators would need these two modules and a third about specific responsibilities of an administrator within both Title IX and Clery. A Title IX investigator needs the first two modules and then needs very specific training on conducting investigations.

The State of Massachusetts requires police investigators to complete a 40-hour certification in sexual assault investigations before they are allowed to conduct an inquiry.

Special victims units or specially designated detectives should be assigned sexual assault cases.

Use of experts like David Lisak, PhD, a well-known consultant who addresses sexual assault specific to campus environments, should be utilized whenever possible in the development of curriculum.

Bystander intervention training is gaining popularity and the University of New Hampshire's program is a promising practice.

Suggestions to Address Unmet Needs

Because there are federal mandates, a comprehensive and standardized training curriculum for Title IX, Clery, and VAWA should be available across the country with some system of certification. A document such as a "Chancellors'/Presidents' Guide to Title IX/Clery" would be helpful.

Regents, Trustees, and Boards of Governors should be engaged in the Title IX process through some educational programming as they would likely be considered Responsible Employees. They are ultimately accountable and therefore should be made aware of what is expected from their campuses.

Victim Services/Advocates

It is important to know the different reporting obligations for police departments, the dean of students, student health centers, residence life staff, or a women's advocacy center (e.g., a House Fellow [R.A.] vs. a student health counselor). Campuses must decide which employees will be Responsible Employees (Title IX), which will be Campus Security Authorities (Clery), and which can remain confidential. The food service worker or a custodian as a Responsible Employee may feel awkward giving a warning such as, "If you tell me something, I have to report it."

The police have a responsibility to provide or direct the victim to services even when the victim does not want to report the crime to the police. It is part of the campus police responsibilities to educate students how to access campus and community resources without triggering an investigation. Police and advocacy groups should start a conversation early in the process regarding their specific roles. Consider using the S.A.R.T. (Sexual Assault Response Team)⁹ model with advocates as partners.

Once a victim tells a Responsible Employee about sexual violence, even without police involvement, the campus is deemed to have received notice and must offer interim measures that may include changing class schedules or living arrangements of the victim or the suspect. There may be limits on what can be done to accommodate a victim despite best efforts. But would the OCR and the White House agree? The DCL and other documents make it clear that *interim measures* must be taken even before any Title IX or criminal processes advance. This can present another issue that needs to be addressed namely the liability of changing a suspect's classes or dorm room before due process plays out. Campuses need additional clarity on the DCL and VAWA rules about what are reasonable accommodations and due process.

The police or any campus entity (dean of students, Title IX office) must document a victim coming forward who does not want to proceed with an administrative or criminal investigation. A standardized checklist listing the options that were explained and offered to the victim should be provided to the victim. A signature should appear on the campus copy acknowledging receipt of the information. Non-campus partners (advocates) should be included in the conversation and training to promote trust. A document signed by the victim declining to move forward should NOT be used.

Emerging and Promising Practices for Victim Services/Advocates

Enlist the help from one or more rape crisis or similar advocacy groups to serve on the Title IX team, S.A.R.T., or case management team. Make use of their expertise to provide interim and other services while recognizing that their priorities may differ in some ways.

Use advocacy groups to train police in what services are available so that officers can provide help to victims immediately.

Timely Warnings

Required by the Clery Act for Clery-reportable crimes, the timely warning is used to alert people in the immediate area that such a crime has occurred. Emergency notifications or alerts may be similar and can be used for non-Clery reportable crimes or for other emergency situations that are not crimes (fires, flooding, missing persons).

The Clery rules are well-defined regarding certain reportable offenses. Under certain circumstances, timely

warnings must be issued. An issue that was not settled included how to share information when a victim does not approve of the sharing. Where possible, use non-blaming language while providing necessary prevention tips, avoid identifiable victim information (some victims may still feel “identified”), and notify the victim prior to the warning being issued.

The answer is in the intent of the timely warning itself. If the threat is thought to be continuing, then certain information must be released to protect the public. To the extent possible without making the timely warning meaningless, the victim’s identifying information need not be included. Generally, location, time of the offense, and suspect description is necessary.

When the Title IX office gets a report, a mechanism should be in place to transmit this information to the campus agency (usually the police) responsible for issuing the warning. Timely warnings can be appropriate for non-stranger assaults (when the suspect is known but not in custody) even though the imminent risk may be low. Issuing a timely warning for this narrowly defined type of incident will likely need to be decided on a case-by-case basis. The process by which a determination is made regarding whether or not to issue a timely warning should be recorded and filed with other Clery documentation.

Emerging and Promising Practices for Timely Warnings

Develop documented best practices for timely warnings including what information can be withheld to protect the investigation. Use *trigger* warnings to avoid further traumatizing any victims who may read it. To avoid possible liability, be sure to include your *boilerplate trigger* warning each time. Although the warning should be as complete as possible, the issuer may decide to withhold certain information about the location of the incident or the suspect to avoid flight. Documentation of the articulable reasons for adding or withholding information is important and should be filed with other Clery documentation.

Timely warnings can include reasonable geographical boundaries. If possible, warnings should target relevant areas using current technology to avoid over-saturation and possible discounting of future warnings. When giving suspect descriptions, some agencies have used *racial disclaimers*. Consult with legal counsel on the need for these disclaimers and *trigger* warnings. Again, if such a disclaimer is used, it should be used consistently for all warnings.

Hearings

The structure of the hearing process varies from campus to campus. Title IX Coordinators should be aware of the parameters controlling Title IX hearings including their composition. Some hearing panels or conduct boards include student representatives. While this would be in accord with shared governance policies on many campuses, the use of students may have a chilling effect on victims’ willingness to report sexual violence because the circumstances and evidence would be presented to fellow students. More discussion is needed in this area as new legislation may address the issue. Campuses may decide to use a single hearing officer instead of a full panel depending on the advantages to the process of one over the other. Many of these questions may not be within the police purview other than to know the process. Campuses must decide, possibly through an MOU, if they will share university records with the police or if the police would need subpoenas or search warrants.

The Standard of Proof for Title IX (preponderance of the evidence) may create issues if the case progresses along two tracks. Police testimony at a Title IX hearing could compromise the criminal case; however, Title IX allows its investigations to pause while the criminal case progresses.

Emerging and Promising Practices in Hearings

The campus Title IX office should decide in consultation with the administration how hearings will be conducted and by whom. The key is consistency in the process while using the best guidance from Title IX documents. As of this writing, Title IX does not specify how hearing panels should be constituted nor does it require a panel at all. However, the Title IX Q & A document strongly discourages the use of students on a discipline panel and clearly states that the victim and suspect should not be allowed to cross-examine each other.

An MOU should be created regarding the exchange of student and police records consistent with applicable laws. Additionally, an agreement should be made to pause a Title IX investigation until the point where a police criminal case would not be compromised. This can then guide case procedure for future incidents.

Increasing Reporting to Police

Over the years, stories have evolved about how poorly sexual assault victims were treated by the police from the initial patrol officer to the follow-up detectives. Victims often complained that they were not treated with respect, they were subjected to repeated interviews, and they had their veracity challenged. Enlightened police agencies do not take this approach but are saddled with the reputation or with current reports of poor victim treatment from other departments.

Campus police agencies are aware of this sketchy history as well as the more recent Title IX rules, and most strive to provide the best possible environment of support to help bring justice and care for the victim. Knowing that it is in the best interest of the community to have sexual offenders held accountable, police want to encourage victims to report sexual violence to them. Police are also aware that some of the investigations are out of their control but within the control and wishes of victims. Even when the victim makes a report to the police, there are still confidentiality protections available to some extent although less than if she had only reported the crime to other campus authorities or medical professionals.

To increase reporting to the police, it was agreed that all campus police must be well trained in sexual violence and the rape culture. The patrol officer who is the first point of contact will set the stage for future cooperation. Departments can enhance reporting by having a sexual assault protocol that may include calling in a trained special victims detective or officer to take the report.

Departments can form a Sexual Assault Response Team (S.A.R.T.) that advises investigators as the case progresses. If possible, there should be a dedicated SANE nurse at the campus medical facility, or encourage local hospitals to provide SANE services to the public. Additionally, the campus message about sexual assaults should be clear and quickly accessible. If the institution encourages Title IX reporting, the police need to encourage the Title IX staff to promote reporting to the police. Use a case management approach with many partners to discuss all cases, barriers, and related issues.

The response to sexual violence must be a community approach because assaults occur on and off campus. This approach can enhance the relationship with the police and partners so they will support reporting the crimes.

Any sexual assault information on campus websites or in printed materials should acknowledge the stigma of reporting as well as the advantages of a prosecution. The material can also take notice of the pressure by peers to not report an incident. Friends can create guilt by stating “it was just drunk sex” or “don’t ruin his life over this.” Acknowledging this can help defuse it.

Occasionally there will be false reports of a sexual assault, and the police reaction to those reports may affect others who are fearful they will not be believed. Unfortunately, the police must be open to the public about false reports to allay fears in the community. A statement that only 2 to 10 percent of rape reports turn out to be false¹⁰ may help convince victims to come forward.

Even with a report to the police, victims and others must realize that the police are just the portal to the criminal justice system. The outcome of the case, penalty or not, may not feel like justice to the victim or the community. There are also limits to incarceration or any other outcome.

Emerging and Promising Practices for Increasing Reporting to the Police

- Continue to review sexual assault policies and practices to ensure that they are victim-centered.
- Create a supportive posture on the police department website where many victims may search first for help. Make it easy to find information spelled out in lay terms where possible.
- Create yearly in-service training sessions to review and emphasize policies to all sworn staff.
- Develop a sexual assault response protocol for primary report takers to follow to provide support and services as soon as possible.
- Develop and assemble a Sexual Assault Response Team (S.A.R.T.)
- Establish a community-policing approach with the campus community that can assist in developing trust between police and community members.



Promising Practices to Consider

1. Campus police officers must know the campus standards on a Title IX response because they may likely be the first official a victim will speak to after an incident. They must activate a pre-set action plan that includes getting the Title IX-trained investigator involved as soon as possible. These campus officers need to understand that their obligations and responses will likely diverge from those of the local police (municipal/county) when they (local law enforcement) investigate a non-campus related incident. Title IX only applies to sexual harassment or sexual violence involving a student or campus employee; however, because Title IX also applies to students and employees in the K-12 school systems, municipal law enforcement should also be familiar with those requirements.
2. Operationalize ways to get the information out to victims and all students (online and paper folders with all relevant information) before students arrive on campus. Disseminate printed information on Title IX/Sexual Violence through the housing or residence life programs, making sure resident assistants/house fellows distribute these materials to residents, particularly the most vulnerable, freshmen. This could be done in a group, house, or floor meeting as soon as residents are settled. RAs should follow up with missing residents or late arrivals on an individual basis. The dean of students or other appropriate office can also provide written materials.
3. The campus home page should also provide a link to the same information online. For a baseline, test the campus website(s) as students would look for relevant, easy to access information. A total of no more than four clicks is recommended to get to the needed information. If it is complicated, fix it.
4. Review the work of Professor David Lisak,¹¹ UMASS-Boston, for some best practice recommendations.
5. Develop a case management team (Title IX officer, student conduct representative, detective, advocate) to meet on a routine basis to track and move cases forward. This is not the same as the threat assessment team, but it could have overlapping membership. Within this team, create a survivor support website with all other information linked. Use an audit of sexual assault cases to get more information for improving practices. Use this group to plan for a wrap-around approach to services.
6. Develop a process for on-going information sharing with local police agencies as needed for better analysis and also for Clery reporting. Involve local police with the S.A.R.T.
7. Explore the possibility of the U.S. Attorney (or the State Attorney General if there is jurisdiction) taking a case as a civil rights violation if the district attorney will not advance a solid case.
8. If a Title IX complaint is filed against the school and an audit becomes a possibility, it is crucial that there is one contact person to convey information. The old adage of *document, document, document* is especially true regarding sexual misconduct and Title IX compliance. All Title IX activity must be documented and kept in one place for easy reference at any time particularly during an audit. Creating a Title IX operational plan early if audited and networking with schools that may have been in a similar circumstance is helpful.
9. Although the new McCaskill CASA bill (if passed) would require that advocates be assigned to victims, campuses may want to get ahead of the pending legislation and find a way to do this now through their dean of students or similar offices. It will help the victim navigate the process but also assure that the intent of Title IX rules are taken seriously. It was acknowledged that adding these new positions, such as investigators, advocates, and Clery Directors, is an unfunded mandate; however, those costs could pale in comparison to any fines levied for non-compliance.

10. While gearing up your campus for compliance with the many Title IX rules, it is imperative to identify the Responsible Employees early and train them how to respond to reports of sexual misconduct. To avoid future issues, employees should be trained on what information should and should not be included in emails, memos, social media, blogs and websites, so they are sensitive to liability concerns prior to writing and sending a communication using campus communication channels. All of this *chatter* (social media, blogs, and websites) may be discoverable in a court case.
11. Chancellors or Presidents should be champions of Title IX from the beginning and allocate the necessary resources. If needed for some particularly complex issue, a task force with a specific charge could be created and populated with decision makers.
12. Use the National Center for Campus Public Safety as a repository for training and other Title IX/Clery documents as well as a resource when Title IX questions arise. Adopt a victim-centered approach when dealing with sexual assault reports while being mindful of all due process rights of the suspects.
13. Sexual violence on campus is not just one department's responsibility—it is shared among all on campus, especially the police, dean of students, student health, student conduct, and advocacy groups. Prevention is vital and can be enhanced by media programs, informational handouts, and social media awareness campaigns from the departments involved. Creation of a Sexual Assault Response Team (S.A.R.T.) with cross-campus and local partners can help perpetuate awareness.
14. Include prevention programs that specifically engage men in gender violence prevention.

Practices Needing Further Study

Title IX Investigators may decide to visit the scene of the assault and may decide to collect evidence, especially when a victim initially requests not to have police involved. There were reports that Title IX trainers were encouraging these practices. These practices need further review to be sure that evidence is not compromised particularly when there is a chance that the victim may later decide to report to the police. Furthermore, these practices raise issues of jurisdiction, health and safety concerns, and a lack of training for crime scene investigations.

Where police are not initially involved in a sexual assault case at the request of the victim, the Title IX investigator, as part of an overall case management program, may still involve the police for evidence collection and possible coordination with local law enforcement. This is still a controversial topic and the police must realize that even though a crime has been committed, the victim's wishes (with few exceptions) are important. This also means that the police should help facilitate the investigation where possible.

Moving Forward – What's Next?

Summit attendees made clear that Title IX is not only the law; it is the right thing to do. It was noted that we all want to fully comply with Title IX, but it seems that OCR could be a part of the problem by making institutions spend too much time and other resources trying to jump through various bureaucratic hoops losing the focus on helping the victim. The group acknowledged that there have been egregious violations on some campuses and audits may be in order, but OCR should help schools keep in compliance through leadership and not be seen as punitive when a procedural violation is found. The group recommends OCR should help find and publish best or promising practices.

Some participants felt the need for campuses and law enforcement to push back on the bureaucracy to help create an environment of mutual problem-solving. On the other hand, it was noted that institutions must also realize that the US Department of Education and its OCR must be responsive to Congress about their efforts in enforcement of the laws.

As successful as this Summit was in identifying some of the issues that need clarification around Title IX, Clery, and VAWA, there was not enough time to move toward producing a single thoughtful, positive, and effective list of promising practices. The short list above is but a sampling gleaned from the discussions.

A second Summit is being considered in January of 2015 which will bring together a group of invited participants from colleges small and large, public and private, Native American and African American. A suggestion was made that representatives from the Office for Civil Rights be invited as well to hear our thoughts and offer their suggestions.



Acknowledgments

This project was supported by Grant No. 2013-MU-BX-K011 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking. Points of view or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.

Thanks go to the International Association of Chiefs of Police, University and College Section, International Association of Campus Law Enforcement Administrators, and the National Center for Campus Public Safety for their support, financial and otherwise, to make this Summit timely and productive. A special thank you to Chief O'Connor and Chief Carter for their candid presentations on their institutions' OCR audits and response.

Thanks are also due the University of Wisconsin-Madison Police Department and its Chief, Susan Riseling for hosting and moderating the event. Keeping the Summit moving smoothly, Captain Kari Sasso, and Chief Riseling's Assistant, Rachel Laubmeier, deserve credit for much of the behind the scenes organization and coordination.



Footnotes

¹ Dear Colleague Letter (DCL) April 2011

<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>

² Against Our Will: Men, Women, and Rape

http://www.susanbrownmiller.com/susanbrownmiller/html/against_our_will.html

³ "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties."

<http://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html>

⁴ "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties." <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>

⁵ "Questions and Answers on Title IX and Sexual Assault," April 2014 <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

⁶ "Not Alone: The First Report of the White House Task Force to Protect Students From Sexual Assault" http://www.whitehouse.gov/sites/default/files/docs/report_0.pdf

⁷ SANE information https://www.ncjrs.gov/ovc_archives/bulletins/sane_4_2001/186366.pdf

⁸ National District Attorneys Association http://www.ndaa.org/sexual_violence_training.html#tadv2

⁹ OJP Resources for Sexual Assault Response Teams <http://ovc.ncjrs.gov/sartkit/>

¹⁰ David Lisak, False reports of rape

Lonsway, K.A., Archambault, J. & Lisak, D. (2009). False reports: Moving beyond the issue to successfully investigate and prosecute non-stranger sexual assault. *The Voice: American Prosecutors Research Institute*, Vol. 3, No. 1, p. 1-11.

¹¹ David Lisak, PhD, papers and training on Sexual Assault, <http://www.davidlisak.com/>

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Resources/Information

Amherst College Title IX

https://www.amherst.edu/aboutamherst/sexual_respect

Amherst Special Committee on Oversight report

https://www.amherst.edu/aboutamherst/sexual_respect/committees/oversight_cmte/report_2013_january

Amherst Checklist of Actions Taken

https://www.amherst.edu/aboutamherst/sexual_respect/checklist-of-action-taken

Amherst Student, Angie Epifano article

<http://amherststudent.amherst.edu/?q=article/2012/10/17/account-sexual-assault-amherst-college>

Evergreen State, Olympia, WA. Good Title XI web page with definitions and links

<http://www.evergreen.edu/titleIX/home.htm>

Leslie Gomez, Title IX trainer, often with Gina Smith

http://www.pepperlaw.com/LegalStaff_Preview.aspx?LegalStaffKey=1025

Gina Smith, Title IX trainer, often with Leslie Gomez

http://www.pepperlaw.com/LegalStaff_Preview.aspx?LegalStaffKey=1024

UConn website info – START page

<http://police.uconn.edu/administration/s-t-a-r-t-home/>

Campus SaVE Act

<http://thecampussaveact.com/>

Ohio State University Band Director Firing Report

<http://www.osu.edu/assets/pdf/Investigation-Report.pdf>

Montana complaint and report

<http://www.justice.gov/crt/about/edu/documents/montanaagree.pdf>

Know Your IX website – Dana Bolger, co-founder

<http://knowyourix.org/>

RAINN (Rape, Abuse, and Incest National Network)

<https://www.rainn.org/>

RAD (Rape Aggression Defense) Training, commercial vendor

http://www.rad-systems.com/rad_package.html

McCaskill proposed bill – Campus Accountability and Safety Act

<http://www.mccaskill.senate.gov/media-center/news-releases/campus-accountability-and-safety-act>

Bystander Intervention UMASS

<http://www.umass.edu/umatter/be-active-bystander>

Bystander Intervention UNH

<http://cola.unh.edu/prevention-innovations/bystander>

University of North Carolina campus security initiative report

<http://www.northcarolina.edu/?q=campus-security-initiative>

Niner, Niner, Title IX'er: What Educational Institutions Need to Know About Sex Discrimination

National Law Review, September 10, 2014

<http://www.natlawreview.com/article/niner-niner-title-ix-er-what-educational-institutions-need-to-know-about-sex-discrim>