



SCOPE Tip of the Week Member Newsletter

November 19th, 2013

Mandatory Reporting for Title IX: Keep It Simple

[Originally published in The Chronicle of Higher Education, September 23rd, 2013](#)

Swarthmore College recently denied a resident-assistant position to a student who would not divulge the name of another student allegedly raped on the campus several years ago. The college has said that it needs the victim's name so that it can pursue an investigation as required by federal law. It has also said that resident assistants must, under the campus's mandatory reporting policy, provide this information.

Swarthmore's policy is in response to a 2011 "[Dear Colleague](#)" letter from the Department of Education's Office for Civil Rights that said colleges must pursue sexual-harassment and sexual-assault investigations or else be in violation of Title IX. Unfortunately, mandatory reporting related to Title IX is widely misunderstood on campuses, and in their zeal to deal with every single instance of sexual misconduct, college administrators are in danger of seeing a drop in reporting from victims.

Swarthmore, like many other colleges, seems to be operating a runaway train on mandatory reporting, and it needs to be brought back into the station. This overreaction to the Education Department's letter is not desirable, legally required, or good for victims. It sometimes feels as if administrators have become Rapist Hunters in some bizarre new reality show, expected to track down every allegation, rumor, gossip, or shred of notice so that no possible act of sexual violence falls through the cracks.

But they are forgetting that many victims want to fall through the cracks, at least initially. Title IX is intended to empower victims, not make them into observers who merely watch from the sidelines as administrators get carried away with resolving complaints that the victims never made.

RAs are being told to report every situation that students share with them. So are faculty members. This is out of control, and the desire to deal with every single potential case is going to backfire. Faced with campus policies that require reporting by every employee, victims lack a safe space and are going to go underground.

The Office for Civil Rights realizes that its instructions are being misinterpreted, and the office's lawyers have been working to assure campuses that counselors and advocates are not required reporters, and that the goal is to be as victim-driven as possible in how campuses respond to notices. Yes, there will be cases in which a campus must pursue an investigation despite a victim's unwillingness; after all, the campus must be protected from those who pose a threat.

But rooting out every instance of possible violation misses a key legal point under Title IX: If a victim reports an incident to a campus administrator and asks that administrator not to take action, that victim cannot then turn to the Office for Civil Rights and complain that the campus failed to act on the notice she gave when she specifically requested that no action be taken.

To help clear up confusion, the Association of Title IX Administrators, which I lead, has set forth a [policy model](#) for mandatory reporting. It recognizes that a simple rule is needed, given the disparate reporting

requirements of Title VII and Title IX, which deal with discrimination; the Clery Act, which requires colleges to disclose information about campus crime; and state child-abuse laws.

It's impossible to train all affected employees on each of those reporting requirements with any clarity. A supervisor under Title VII is not the same as a "responsible employee" under Title IX, which is not the same as a "campus security authority" under the Clery Act.

Instead, our association, called Atixa, is recommending that all employees be mandatory reporters of all behaviors and incidents covered by all of those laws. This makes great sense in the current legal environment, where in court an employer is more and more often expected to be aware of what is known to its employees.

But the ATIXA model does not impose the same mandate on all employees. Supervisors must report all incidents, with full detail, to the Title IX coordinator. Nonsupervisory employees (this would include RAs in the case at Swarthmore) are required to report but are empowered to make what we call Jane or John Doe reports, at least initially. Jane/John Doe reports include all details of an incident except for anything that would personally identify those who were involved. Those reports are also to be passed along to the Title IX coordinator.

Those steps ensure that the reporting duty is fulfilled but do not put the coordinator on notice in a way that creates institutional obligations to respond. In the rare case in which the coordinator determines that additional information is needed, he or she can seek it from the reporting employee. Employees should also be trained that when someone starts to make a disclosure, they are to clarify what they are required to do with the information that is shared with them, so that everyone has reasonable expectations around the duty to report.

Employees whose work assumes confidentiality, like campus counselors, advocates, and clergy members, also can make Jane/John Doe reports. The default is a reporting mandate, but confidential employees are empowered to omit reports entirely when they determine it would not be in the student's best interest to do so. This differs from the current legal threshold under the Clery Act, where counselors may volunteer Jane/John Doe reports but are not obligated to do so.

This approach is an effective compromise, allowing all employees to report but enabling some to withhold full information when a victim wishes them to or their confidential position requires it. With this approach, the coordinator follows up to investigate those claims that victims want investigated, without disempowering victims who may want resources and services rather than formal institutional action. Finally, this approach can be readily taught to employees without overcomplicating the legal duties.

Tip of the Week authored by Brett A. Sokolow, Esq., SCOPE Founder & Advisory Board Member; brett@nchem.org

This publication is a member-only publication and may not be disseminated to non-members or posted publicly without authorization from SCOPE.

©SCOPE 2013. All rights reserved.