Sexual Misconduct Issues in Patient Settings

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Agenda

1. Intro/Background
2. Legal Framework
   • Title IX Regulations
   • Clery Act
   • Patient Protection (§1557) & Affordable Care Act (ACA)
   • HIPAA/FERPA
3. Recent Regulatory Actions & Litigation
4. Practical Takeaways
Sexual Misconduct in the Healthcare Context

- **Inherent power imbalance:**
  - Between healthcare providers & their patients
  - Between physicians & other staff (e.g. nurses, trainees, medical assts)

- **Healthcare** is subject to its own rules & regulations: Licensures, credentials, patient privacy, grievance processes, and adjudication of misconduct allegations.

- **Academic institutions**: Student health services, sports-medicine for student-athletes

- **Health institutions (HRI’s)**: Medical facilities, hospitals, clinics, teaching facilities.
Title IX (Educational Amendments of 1972) prohibits discrimination **on the basis of sex** in **educational programs or activities** receiving federal financial assistance.

Anyone participating in or attempting to participate in **educational programs or activities**
“Education program or activity” under Title IX

Includes locations, events, or circumstances over which the institution exercises **substantial control** over both the respondent and the context in which the alleged sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by the institution.

- **Example** of a “building owned or controlled by a student organization”: Fraternity or sorority house that is occupied by students of the organization, and the student organization is a recognized organization with the institution.

*Source: Title IX Regulations (2020)*
Title IX

Sex Discrimination
Sexual Harassment
Retaliation
Definition of “Sexual Harassment” under Title IX

Conduct on the basis of sex that satisfies one or more of the following:

1. An employee of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual’s participation in unwelcome sexual conduct (Quid Pro Quo);

2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the institution’s education program or activity; or

3. “Sexual assault,” “dating violence,” “domestic violence,” or “stalking” as defined under Clery/VAWA.

Source: Title IX Regulations (2020)
Under Title IX: Institutions must reasonably respond in light of known circumstances…

1. Stop & prevent behavior from continuing or escalating

2. Remedies: Supportive measures & resources

3. Formal grievance process
• How IHE’s treat any party (CP, RP, Witness) in response to a SH complaint may itself constitute sex discrimination.

• IHE’s must provide equal opportunity for the parties to present expert witnesses, which can impact situations where expert opinions (e.g. standard of care, medical necessity) are necessary to make reliable determinations.

• IHE’s must recognize the limitations of accessing, considering, disclosing, or otherwise using any party’s medical records during the grievance process.
Jeanne Clery Act (1990)

Publish campus crime statistics & safety policies annually.
• HHS adopted ED/OCR’s definitions of sexual harassment et al.

• HHS Guidance “Effective Practices for Preventing Sexual Harassment” (Sept 2020) further clarifies and emphasizes IHE obligations in the patient care context.

• HHS oversees compliance with Patient Protection (§1557) & Affordable Care Act (ACA) which extends Title IX protections to “any health program or activity…”
Health Privacy Laws

HHS-OCR

ED-OCR
Regulatory Actions & Litigation
Failed to provide an equitable response to a complaint in 2014 in which Larry Nassar (RP) had allegedly sexually assaulted a CP during an appt at the university’s sports medicine clinic.

- **Medical experts** that MSU relied upon were found to be **not independent** (e.g. conflict of interest) due to their close/personal relationships with Nassar (RP).
- CP wasn’t given sufficient opportunity to present rebuttal evidence (e.g. expert medical witnesses).
Required policy changes:

- Revisions to MSU’s sensitive exam chaperone policy, to offer a chaperone to all patients, and obtain informed consent to all sensitive examinations, treatments, or procedures.
- Designation of Health Care Civil Rights Specialists (e.g. central, independent compliance unit at the university) to receive sexual misconduct complaints and assist with training, monitoring, and compliance efforts.
Michigan State University (MSU) 2019 ED/Clery Findings

- Failed to **properly classify reported incidents**
- Failed to **disclose crime statistics**
- Failed to **issue timely warnings**
- Failed to **notify campus authorities**
- Failed to **maintain administrative capacity**
Failed to respond effectively to possible sexual harassment by George Tyndall (RP), gynecologist in the university’s student health center.

- Failed to conduct investigations into allegations made by multiple sources (students, chaperones).
- Failed to assess the need for interim measures.
- Failed to take steps to prevent reoccurrence of the alleged conduct.
Required institutional restructure:

- Designation of dedicated health care staff as part of the restructuring of the Title IX Office.
- Title IX compliance as part of all employee reviews.
- Enhance the responsible employee reporting processes and trainings.
- Include a data system that can better manage and identify allegations against repeat RP’s.
- Expand trainings campus-wide to focus on harassment in the patient care setting, with additional training requirements for employees that work in student health.
Required institutional changes:

- All students, employees, and patients must receive Title IX reporting information.
- Enhance employee training.
- Chaperones will be required to accompany patients at sensitive examinations.

HHS emphasized Title IX policies apply to Keck Medicine of USC, and USC must report KMUSC-related sex discrimination incidents to HHS/OCR on an ongoing basis.
Failed to respond to allegations of sexual harassment against an athletic trainer (RP) during physical therapy sessions with student-athletes.

- Failed to respond to repeated allegations against the same RP, and widespread knowledge of the alleged conduct.

SJSU retaliated against Athletic Dept employees (2) who reported RP’s alleged conduct

- Adverse actions against the employees included negative performance evaluation and employment termination.
Required institutional changes:

- Restructure the **Title IX Office**.
- Offer **supportive measures** to all female athletes.
- Realign the **Athletics Dept policies and procedures** with the **student health center**.
- **Recognize and compensate** the employees who experienced **retaliation** after reporting sexual harassment to the institution.
Institutional Litigation Risks (Patient Abuse)

- **MSU Settlement** (2018) of **$500 million** with approx. 300 patients (victims) of Larry Nassar
- **OSU Settlements** (2019/2020) of **$52 million** with approx. 208 patients (victims) of Richard Strauss
- **USC Settlements** (2021) of **$1.1 billion** with approx. 17,700 patients (victims) of George Tyndall
- **UCLA Settlements** (2021/2022) of **$688 million** with approx. 7,100 patients (victims) of James Heaps
- **Uni. of Michigan Settlement** (2022) of **$490 million** with approx. 1,000 patients (victims) of Robert Anderson
Cause of Action (Examples):
- Title IX (deliberate indifference standard)
- Sex/gender discrimination (under state law)
Practical Takeaways
Prevention Strategies: Patient Protections

1. Implement chaperone policies at all clinical locations.
2. Offer fact sheets to patients about sensitive exams.
3. Expand the scope of consent information given before treatment.
4. Increase the frequency of messaging/publicity for reporting options for patients and employees.
1. Ensure that the Title IX Office has **independent authority** to address and respond to reports of sexual misconduct.

2. Equip the Title IX Office to handle **healthcare-specific incidents**. Examples for need:
   - Increase staffing in the Title IX Office
   - Patient complaint capacity/campus-collaboration
   - Training for healthcare employees
Prevention Strategies: Employment Practices

For institutional policies:

Consider disclosure requirements for prior reports or allegations of sexual misconduct as a condition of hiring, credentialing, promotion, or reappointment of a healthcare provider affiliated with the institution.
Under the institution’s Sexual Misconduct Policy, **Responsible Employees** have a duty to report incidents and information reasonably believed to be sexual misconduct (prohibited conduct defined) under the Policy.

All employees are Responsible Employees (except Confidential Employees or police officers when a victim uses a pseudonym form). Responsible Employees include **all** administrators, faculty, and staff.

Responsible Employees must report all known information concerning an alleged incident of sexual misconduct to the **Title IX Coordinator**.

*Source: UT System Model Policy for Sexual Misconduct*
Definition of “Retaliation”

Any adverse action (including, but is not limited to, intimidation, threats, coercion, harassment, or discrimination) taken against someone because the individual has made a report or filed a Formal Complaint; or who has supported or provided information in connection with a report or a Formal Complaint; participated or refused to participate in a Grievance Process under this Policy; or engaged in other legally protected activities.

Note: Any person who retaliates against (a) anyone filing a report of Sexual Misconduct or Formal Complaint, (b) the parties or any other participants (including any witnesses or any University employee) in a Grievance Process relating to a Formal Complaint, (c) any person who refuses to participate in a Grievance Process, or (d) any person who under this Policy opposed any unlawful practice, is subject to disciplinary action up to and including dismissal or separation from the University.

Source: UT System Model Policy for Sexual Misconduct
If a Responsible Employee knowingly fails to report all information concerning an incident the employee reasonably believes constitutes Sexual Misconduct (including stalking, dating violence, sexual assault, or sexual harassment) committed by or against a student or employee at the time of the incident, the employee is subject to disciplinary action, including termination.

Source:
UT System Model Policy for Sexual Misconduct; Tex. Edu. Code Section 51.252-51.259
Who are Confidential Employees?

• Employees that receive information confidentially, through *privileged communications under law*, such as healthcare & mental health care providers, other medical providers, or attorneys; or

• Employees *designated by the institution* as a person that *students* may speak with confidentially concerning sexual harassment, sexual assault, dating violence, or stalking.
Examples of Confidential Employees

Privileged communication under law:
- Licensed counselors, psychologists
- Doctors, physician assistants
- Nurses, nurse assistants
- Attorneys
- Licensed social workers in a clinical or medical setting

Commonly designated “confidential” employees:
- Victim Advocates (who work with students)
- Student Ombuds
- Members of the clergy
1. **Training topics:**
   - Sexual Misconduct in Patientcare Setting
   - Employee Reporting Requirements
   - Anti-Retaliation Policy
   - Boundaries

2. Increase participation of trainings by:
   a) Requiring **attestations of compliance**;
   b) Making participation a part of the credentialing/re-credentialing process and/or employee’s performance review.
Due diligence review:

1. The **nature, circumstances, & seriousness** of the alleged conduct;
2. The **safety & risk of harm** to others;
3. Any **pattern evidence**, other similar conduct or allegations of the **RP**;
4. **RP’s affiliation** with the institution & **applicable options** for institutional action; and/or
5. Other relevant factors in the specific matter?
# External/Other Reporting Factors

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<th>Type of Concern</th>
<th>Possible Action</th>
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<td>Non-emergency behavioral or wellness issues(s)</td>
<td>Refer to Behavior Intervention Team (BIT) or campus equivalent</td>
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<tr>
<td>Immediate safety concerns (emergencies) or welfare check required</td>
<td>Report immediately to 911</td>
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| Clery reportable crimes that meet Clery geography requirements and/or timely warning requirements | **Timely Warnings**: Report immediately to campus law enforcement  
**Clery Crime Reporting**: Report to the campus Clery Manager |
| Alleged abuse and/or neglect of minors                                         | Report immediately to Dept. of Family & Protective Services (DFPS): 800-252-5400 |
| Clinical conduct/patient safety concern(s)                                     | Report to the applicable licensing board                                         |
Campus geographic regions include:

a) On-campus property (main-campus geography, additional campuses too)

b) Residence halls (sub-set of on-campus property)

c) Non-campus property (owned/controlled, and students can regularly access)

d) Adjacent to campus property (perimeter)
Non-campus property must:

1) Be owned or controlled by the institution;
2) Be used in direct support of or in relation to the institution’s educational purposes;
3) Be frequently used by students; and
4) Not be within a reasonably contiguous geographic area of the institution.
Considerations for CSA’s in Patientcare Setting:

1) All campus police officers & security officials
2) Employees (faculty/staff) with significant responsibility over student clinical training programs
3) Title IX officials of the institution
1. Address **unique complexities** of investigating sexual misconduct allegations in the **patientcare context**. Members likely will include:
   - Title IX delegate
   - Senior medical officer (or designee)
   - Senior nursing officer (or designee)
   - Legal affairs designee

2. Ensure **compliance** with the following:
   - Title IX and other federal/state laws
   - Health regulatory standards
   - Patient safety and privacy provisions
Interim Measures (Examples in Patientcare Context)

- Placing Provider on Administrative Leave
- Interim Suspension of Clinical Privileges
- Issuing a Mutual No Contact Directive
- Arranging a Different Provider for Patient
- Offering Support Services to Patient
- Assigning a Healthcare-related Advocate to Patient

**Note:** Medical staff likely will have independent jurisdiction on a healthcare provider/employee to initiate interim measures during the pendency of an investigation.
Medical Experts: Avoiding Conflicts of Interest

Investigating SM allegations in patientcare settings may necessitate **medical experts** to opine on whether the alleged conduct meets **clinical indications** or applicable **standard of care**.

**Medical experts** utilized must have **no personal, professional, or financial conflicts of interest** with the complainant CP or respondent (RP).
## Contact Information

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