

Sexual Misconduct Issues in Patient Settings

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Spring 2023



1

1

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

2

2

Intro/Background



3

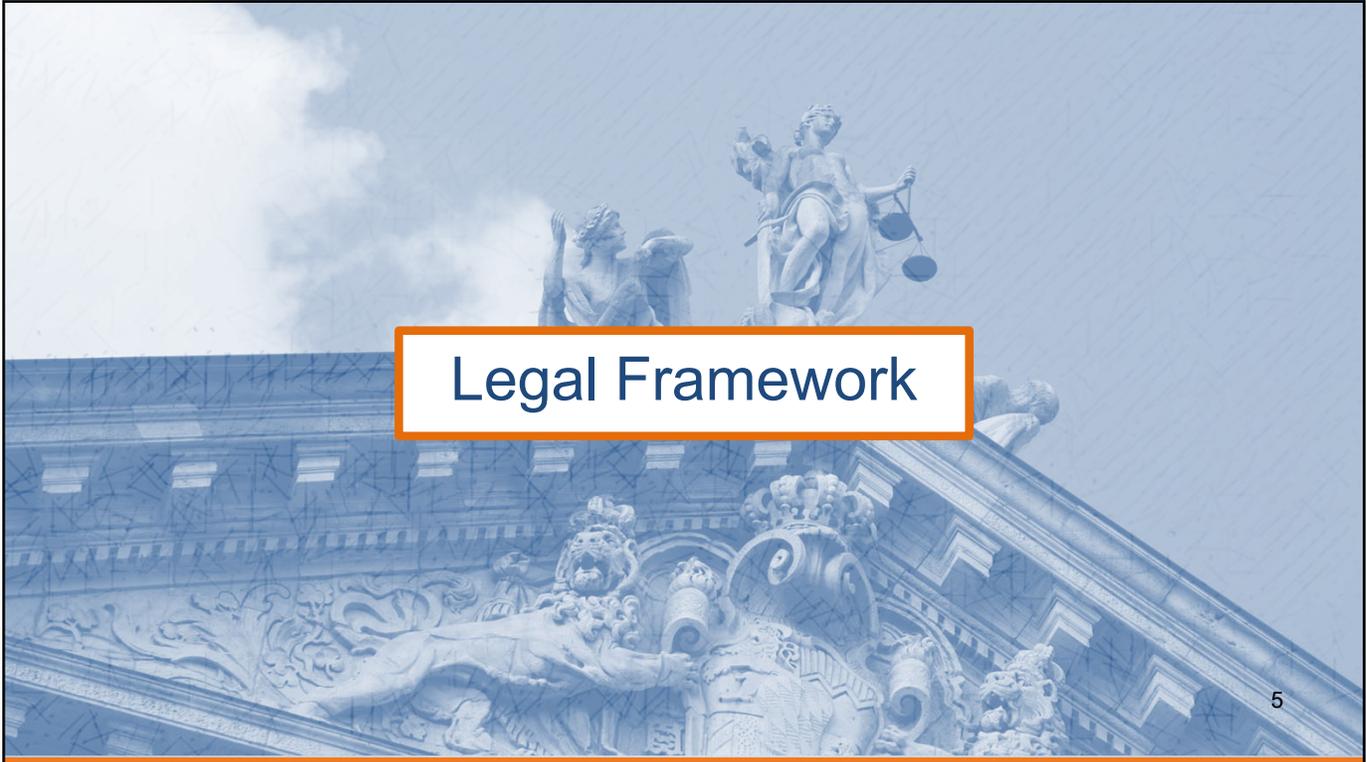
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Sexual Misconduct in the Healthcare Context

- 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.

4

4



5

5

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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



6

6

“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)

7

7

Title IX

Sex Discrimination
Sexual Harassment
Retaliation

IX



8

8

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.



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Source: Title IX Regulations (2020)

9

9

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



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10

10

Title IX Regulations – IHE Patient Care Context

ED-OCR

- 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.



11

11

Jeanne Clery Act (1990)



Publish
campus crime
statistics &
safety policies
annually



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12

12

Health and Human Services (HHS) – Office for Civil Rights

- 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...*”

13

13

Health Privacy Laws



HHS-OCR



ED-OCR



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14

14



15

Michigan State University (MSU) 2019 ED/OCR Findings

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).



16

16

Michigan State University (MSU) 2019 HHS/OCR Requirements

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.



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17

17

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**



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18

18



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University of Southern California (USC) 2020 ED/OCR Findings

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.

19

19



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University of Southern California (USC) 2020 ED/OCR Requirements

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**.

20

20



University of Southern California (USC) 2020 HHS/OCR Requirements

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.



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21

21

San Jose State University (SJSU) 2021 DOJ Findings

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.



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22

22

San Jose State University (SJSU) 2021 DOJ Requirements



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.



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23

23

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



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Institutional Litigation Risks (Patient Abuse)

Cause of Action (Examples):

- Title IX (deliberate indifference standard)
- Sex/gender discrimination (under state law)



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25

Practical Takeaways

26

26

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.



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27

27

Prevention Strategies: Title IX Office

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



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28

28

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.



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29

29

UT System's Employee Reporting Requirements

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

30

30

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.



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Source:

UT System Model Policy for Sexual Misconduct

31

31

Definition of “Failure to Report” for Responsible Employees

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.



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Source:

*UT System Model Policy for Sexual Misconduct;
Tex. Edu. Code Section 51.252-51.259*

32

32

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.



33

33

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



34

34

Employee Training

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**.

35

35

Triage Reports: Title IX Office

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?



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36

36

External/Other Reporting Factors

Type of Concern

Possible Action

Non-emergency behavioral or wellness issues(s)

Refer to Behavior Intervention Team (BIT) or campus equivalent

Immediate safety concerns (emergencies) or welfare check required

Report immediately to 911

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

37

Clery Geography

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)

38

38

Clery Geography (Cont.)

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

39

39

Campus Security Authorities (CSA's)

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

40

40

Interdisciplinary Case Mgt Team

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



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41

41

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.



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42

42

Medical Experts: Avoiding Conflicts of Interest

Investigating SM allegations in patient care 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).



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43

43

Q & A



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44

44

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45