

## 5 Lessons For Colleges From Stanford Sexual Assault Case

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The day after her attacker was sentenced to six months in county jail (which will likely be three months after a good behavior reduction), the woman who was violently sexually assaulted by former Stanford University student Brock Turner provided her victim impact statement to BuzzFeed for publication.[1] The statement immediately went viral. Her statement is a visceral account of a sexual assault that should be required reading for every incoming college freshman. Her statement is also a microcosm of the issues underlying campus sexual assaults worthy of study by every college and university administrator.

Although Turner's prosecution played out in a Santa Clara, California, courtroom, the issues identified by the victim in her statement are highly relevant to college and university sexual assault investigations and adjudications. Schools are engaged in a high-profile, high-stakes effort to fairly and justly address sexual assaults on campus. In order to do so, they must have a comprehensive plan for addressing each of the issues raised in this victim's powerful statement. In light of what we have learned from the Stanford victim's statement, college and university administrators should consider the five lessons below and work to incorporate each of these lessons into their sexual assault investigations and adjudications.

### 1. Student-Athletes Accused of Sexual Assault Cannot Receive Different Treatment

Any time a student-athlete is accused of sexual assault, the public and media's interest in the case will swell. As the Stanford victim recalled, she read an article that first graphically described her sexual assault and then concluded with a listing of Turner's swimming times.[2] While there may be pressure on schools to handle accusations against student-athletes discretely in order to avoid unwanted media attention, schools must resist the temptation to investigate and adjudicate accusations against student-athletes in a manner that is different from the way the school handles accusations against other students.

A 2014 report by Sen. Claire McCaskill, D-Mo., found that more than 20 percent of institutions in a national sample gave their athletic departments oversight of sexual violence cases involving student athletes.[3] The NCAA's executive committee subsequently issued a resolution that requires school's athletics departments to "cooperate with but not manage, direct, control or interfere with college or university investigations into allegations of sexual violence." [4] While this edict attempts to limit the influence of athletic departments in sexual



Anne Tompkins



Joseph Jay



Colleen Kukowski

assault cases, schools continue to struggle with ensuring that allegations of sexual assaults committed by student athletes are managed in the same manner as all other students.[5] Failure to do so, however, may result in both Title IX lawsuits and NCAA enforcement action, in addition to potentially causing reputational damage.

## **2. The Necessity of Parallel Proceedings**

When sexual assaults occur off-campus or do not involve a student victim (as in the Stanford case), schools may be tempted to take a backseat and allow local law enforcement to handle the investigation, victim assistance and adjudication. To do so, however, would both fail to protect students and run afoul of Title IX's requirements.[6]

The slow pace of the criminal justice system means that even when defendants are found guilty and punished, their punishment will not immediately remedy on-campus public safety issues or hostile environments that may result from sexual assaults. As Stanford demonstrated with its quick response to the victim's sexual assault (within two weeks of the sexual assault, the school conducted an investigation and permanently banned Turner from setting foot on campus), colleges and universities must act promptly after an assault occurs to protect the safety and well-being of their students, regardless of whether there is an ongoing criminal proceeding.[7]

Any school that knows, or reasonably should know, about a case of sexual assault must promptly investigate to determine what occurred and take appropriate steps to resolve the situation, regardless of whether a student, parent, or a third party files a complaint under the school's grievance procedures.[8] While schools are permitted to temporarily delay the fact-finding portion of their investigation while law enforcement gathers evidence, they must take immediate interim measures to protect the victim(s) and students on campus.[9] Schools that fail to conduct their own investigation while a criminal investigation is ongoing not only fail to protect and safeguard their student body, they also render themselves vulnerable to a Title IX enforcement action.

## **3. Due Process in Title IX Proceedings**

One of the more jarring passages in the victim's statement detailed how she went through the gut-wrenching process of preparing for and being cross-examined by the defendant's attorney during the trial. As painful as it may be for the victim, our criminal justice system guarantees defendants certain due process rights, including the right to cross-examine witness and present evidence in their defense. While schools are not required to have the same robust procedural protections that are present in the criminal justice system, they can be held liable for denying accused students adequate procedural protections during sexual assault investigations and adjudications.[10]

Because of the high stakes for the victim and the accused student — as well as Title IX requirements — schools must carefully calibrate the due process rights that they build into their investigative and adjudicative proceedings. While schools are under increasing pressure to aggressively investigate and adjudicate allegations of campus sexual assault, students who are accused of sexual assault are, at the same time, increasingly filing and winning lawsuits against colleges and universities for depriving them of their procedural protections during those investigations and adjudications.[11] The U.S. Department of Education advises schools to have a “balanced and fair process that provides the same opportunities to both parties.”[12] However, determining how to integrate and maintain that balance in sexual assault investigations and adjudications is a nuanced process in and of itself.[13] Schools must confront difficult questions — such as how they will allow accused students to offer an adequate defense while still

protecting the complainant from emotional and psychological damage — in order to conduct proceedings that do not infringe on the rights of disciplined students.

#### **4. Rules and Training on How to Evaluate Evidence**

Those who read the victim's statement likely recoiled at some of the questions that Turner's attorney posed to her, which examined "issues" such as her sexual activity with her boyfriend and whether she had a "history of cheating" on her boyfriend. Beginning in the 1970s, irrelevant evidence of a victim's sexual history has been largely barred by federal and state rape shield laws, and expert judges and attorneys are extensively trained on what is and is not permissible. Establishing clear and balanced rules on how to handle and evaluate relevant evidence, including guidance on the admissibility of an assaulted student's prior relationships or sexual history, is a critical component of collegiate sexual assault investigation and adjudication processes.

While schools, unlike courts, are not designed to be adjudicative bodies, schools must adapt to this responsibility of implementing rules about what evidence can and cannot be introduced during a sexual assault proceeding. Schools must also train those involved in Title IX processes, including investigators and adjudicators, on how to impartially evaluate and weigh evidence. Finding the balance between allowing in evidence for an adequate defense and protecting the sexual history of a victim from being exposed (and knowing how to apply those rules) is difficult. Prosecutors, defense attorneys and judges alike dedicate countless hours and resources studying how to handle evidence in sexual assault cases. Schools should take a cue from the criminal justice system and invest their own time and resources on developing balanced evidence rules and training investigators and adjudicators on those rules.

#### **5. Crafting a System of Effective Remediation and Discipline**

There is a collective national sentiment that Turner's sentence of six months in county jail does not reflect the seriousness of his crime. The victim wrote, "The fact that [Turner] was an athlete at a private university should not be seen as an entitlement to leniency, but as an opportunity to send a message that sexual assault is against the law regardless of social class."<sup>[14]</sup> One of the principal goals of criminal sentencing is general deterrence — deterring future crime by setting an example of the criminal's punishment. Many believe that Turner's sentence wholly failed to achieve that goal. In light of the outcry over Turner's sentence, schools must consider the goals of their disciplinary proceedings and the array of possible sexual assault sanctions, and how to craft sanctions that can best achieve those goals.

Sanctions should be appropriately tailored to reflect the severity of the offender's actions, help rehabilitate the offender and comport with due process considerations. Moreover, schools must be cognizant that under Title IX's requirements, just taking disciplinary action against those found to have committed sexual assaults is not enough. In cases of student-on-student sexual violence, effective remediation may also include providing counseling for the complainant, adjusting the complainant or the perpetrator's class schedules or living arrangements, or arranging for the complainant to have extra time to complete a class without a penalty. Additionally, schools and universities may need to institute remedies for the broader student population to eliminate hostile environments that may exist on campus. Failure to apply appropriate sanctions and effectively institute remedies exposes schools to lawsuits from both the victim and the offender, as well as a Title IX enforcement action.

#### **Conclusion**

The Stanford case is just one example of the tragic consequences of sexual assault. But the eloquent and

powerful statement of the victim is a wake-up call that reminds us that schools can and must do better at investigating and adjudicating sexual assaults. Our criminal justice system's policies and procedures for sexual assault cases have evolved and improved over time and no doubt, will continue to be refined. Likewise, schools' efforts to develop a working investigative and adjudicative system will take time and will not be easy, but it is a challenge that they must accept.

—By Anne Tompkins, Joseph Jay, and Colleen Kukowski, Cadwalader Wickersham & Taft LLP

*Anne Tompkins is a partner in Cadwalader's Charlotte, North Carolina, and Washington, D.C., offices and former U.S. attorney for the Western District of North Carolina.*

*Joseph Jay is special counsel in the firm's Washington office and served a leading role in the independent investigation and report on academic irregularities at the University of North Carolina and the investigation into certain conduct by enforcement staff at the National Collegiate Athletic Association.*

*Colleen Kukowski is an associate in the firm's Washington office and a former intelligence analyst in the Federal Bureau of Investigation's Counterterrorism Division.*

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[1] Katie Baker, Here Is The Powerful Letter The Stanford Victim Read Aloud To Her Attacker, BuzzFeed, June 3, 2016, available at [https://www.buzzfeed.com/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra?utm\\_term=.unWPB5A83#.phGa3m97V](https://www.buzzfeed.com/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra?utm_term=.unWPB5A83#.phGa3m97V) (hereinafter "Victim Impact Statement").

[2] Victim Impact Statement.

[3] Claire McCaskill, Sexual Violence on Campus, July 9, 2014, 11, available at <https://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf>.

[4] NCAA, Executive Committee Statement on Sexual Violence Prevention and Complaint Resolution, Aug. 8, 2014, available at <http://www.ncaa.org/governance/committees/executive-committee-statement-sexual-violence-prevention-and-complaint-resolution>.

[5] The University of Tennessee, for example, recently settled a lawsuit brought by six women that alleged that the school violated Title IX regulations and created a "hostile sexual environment" through a policy of indifference toward assaults by student-athletes.

[6] See, generally, 34 C.F.R. § 106 et seq.

[7] Press Release, Stanford University, Stanford University Statement Regarding Brock Turner Case (June 6, 2016) available at <http://news.stanford.edu/2016/06/06/stanford-university-statement-regarding-brock-turner-case/>.

[8] Department of Education, Office for Civil Rights, Dear Colleague Letter, Apr. 4, 2011, available at <http://www.ed.gov/ocr/letters/colleague-201104.html>.

[9] Department of Education, Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence, Apr. 29, 2014, available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> (hereinafter “OCR Frequently Asked Questions”).

[10] See, e.g., *Dixon v. Alabama*, 294 F. 2d 150 (5th Cir. 1961) (holding that students are entitled to notice and some opportunity for a hearing prior to expulsion from a public college or university).

[11] See Jake New, *Several Students Win Recent Lawsuits Against Colleges that Punished Them for Sexual Assault*, *Inside Higher Ed*, Apr. 4, 2016, available at <https://www.insidehighered.com/news/2016/04/14/several-students-win-recent-lawsuits-against-colleges-punished-them-sexualassault?width=775&height=500&iframe=true>.

[12] OCR Frequently Asked Questions.

[13] As many school administrators have been quick to note, schools are not designed to be investigative and adjudicative bodies – they are educational institutions that have had these additional responsibilities thrust upon them by regulation and moral responsibility. While some critics suggest that schools should remove themselves from sexual assault complaints and let the criminal and civil authorities handle sexual assault complaints, schools do need to responsibly address misconduct in their community – particularly misconduct that threatens the safety of members of the community.

[14] Victim Impact Statement.