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Colleges Call in Legal Pros to Handle Sexual-Assault Cases



Kelvin Ma for The Chronicle

Djuna Perkins, a trial lawyer, opened a law firm in Massachusetts in 2012 to guide colleges through sexual-assault cases. She has worked on 35 such investigations with about a dozen colleges, she says.

By Robin Wilson

It's a story like those many colleges are hearing. A young man and woman were hanging out in her room, talking, doing shots. She drank so much, she says, that she passed out—and woke up to discover she was bleeding. The man, she says, had sexually assaulted her. But he says she'd had just a few drinks and consented to sex. How does the college determine who is more credible? In this case, administrators hired Allyson Kurker, a lawyer who investigates reports of campus sexual assault by conducting extensive interviews and reviewing cellphone and swipe-card records, photos, and videos. Interviews with students led her to two other women who described similar but as yet unreported experiences with the same man. The college found him responsible in all three cases and expelled him.

Legally obligated to respond to reports of sexual assault, colleges often find that students rely on them rather than law-enforcement agencies, which are seen as intimidating and unlikely to pursue charges. To meet the demand, colleges are turning to experts, setting up a kind of shadow justice system. It is now possible for an institution that receives a report of an assault to hire a former prosecutor to investigate the case and a former judge to help decide it.

The University of Pennsylvania just brought on staff a sex-crimes investigator from the Philadelphia district attorney's office. Ohio University and Southeast Missouri State University recently advertised investigator jobs. At Harvard University, where a panel of faculty members and students used to hear sexual-assault cases, that is now

the duty of a specially trained team. A retired Pennsylvania Supreme Court justice has presided over hearings at Swarthmore College.

Such moves reflect the high stakes. Colleges that get cases wrong can face lawsuits from either side. The U.S. Department of Education is investigating 96 colleges for possible violations of the gender-equity law known as Title IX. Coping can be costly, in terms both reputational and financial. United Educators, an insurance and risk-management firm, determined that in a recent three-year period, the company and about 100 of its member institutions spent more than \$17-million defending against and resolving claims involving sexual assault.

"The complexity of investigating and adjudicating these cases is so great that it is consuming student-affairs divisions, equal-opportunity offices, and Title IX professionals," says Gina Maisto Smith, a lawyer and former sex-crimes prosecutor who works with colleges. "Schools are trying to manage this, but they don't have the tool kit, the time, the resources, or in some cases the skill set to do it."

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To minimize risk as well as to better serve students, many colleges are moving away from traditional hearing panels and creating procedures separate from those for any other type of disciplinary charge, with new staff or outside consultants whose qualifications would seem to help.

Brown University announced in December that it would begin using trained investigators this semester; it plans to establish a special hearing process next academic year. "We're trying to address what we think were gaps and burdens on students and hearing panels that were not fully equipped" to conduct an effective hearing process, says Russell C. Carey, executive vice president for planning and policy and co-chair of a task force that recommended the changes.

The university said in a statement that "the use of investigators presenting comprehensive and unbiased accounts of the facts will make hearings better informed, less burdensome, and potentially less traumatic to students."

Educators often contend that they have a role in trying sexual-assault cases because it is their job to protect students, and they have long dealt with campus misconduct of all kinds. But given the increasing dependence on experts, some observers wonder if colleges should really be in this position at all.

"If you have an entirely different process for addressing sexual assault than for plagiarism, it becomes much harder to make the argument that what's going on here is somehow an educational process that colleges have been engaged in for decades," says KC Johnson, a history professor at Brooklyn College of the City University of New York, who has criticized colleges for their handling of assault cases. "What we are

getting is the functional equivalent of a law-enforcement structure embedded within colleges."

Then and Now

When Congress passed Title IX, in 1972, no one expected that colleges would end up adjudicating sexual assault. Lawsuits in the 1980s and policy decisions by the Obama administration have moved colleges in that direction. Since the Education Department's Office for Civil Rights admonished colleges in 2011 to take sexual assault more seriously—promptly and fairly investigating and resolving students' reports—colleges have been struggling to handle the task.

The way many have traditionally decided such cases is with some kind of panel (of students, faculty members, and/or administrators) reviewing allegations of assault, as it would other infractions. Panels wouldn't necessarily conduct substantial investigations; most would simply hold hearings to question the alleged victim and perpetrator. In general, over time, colleges have sought to make their disciplinary systems less court like.

But then came a wave of attention to campus sexual assault, with heightened expectations for campus administrators to do things for which they often lack training and experience, as well as legal protection, says Robb Jones, senior vice president and general counsel for claims management at United Educators. "Unlike judges and prosecutors," he says, "they aren't shielded from being sued by parties who may dispute the outcome."

Students' Title IX complaints and lawsuits describing colleges' missteps have prompted changes, as have recent regulations and guidance from the Education Department requiring or recommending special training for adjudicators, for example, and removing students from hearing panels. Colleges must also now allow alleged victims and perpetrators to bring lawyers to meetings and hearings, a point of debate last spring, when federally appointed negotiators hashed out new rules.

That last change in particular has made campus officials feel they need to hire professionals. "Colleges were worried; we are going to have a chemistry professor trying to run a hearing with lawyers in it," says Dennis C. McAndrews, a prosecutor and criminal-defense lawyer who started the Higher Education Decisions Group late last year to work with colleges on sexual-assault cases.

The approach now becoming more common goes something like this: When a student reports an assault, an investigator delves into the details and turns over the findings to an administrator, panel, or consultant to decide the case. That might involve a hearing, or the decision may simply turn on the investigator's report.

Pennsylvania State University plans to hire a full-time Title IX investigator and is replacing its five-person hearing boards, which had included students, with a "panel of

trained decision makers" that will rule without hearings. Students have endorsed the new process, in part because victims will have to tell their story to only one person rather than a roomful.

At Penn, the new sexual-violence investigative officer will provide information to a panel of three faculty members with intensive training who will operate independently of the student-conduct office. "That's not to say our office of student conduct isn't professional," says Joann Mitchell, vice president for institutional affairs. But now, "if people have questions or concerns, they recognize there is someone with special expertise handling the process and ensuring these cases are handled with the sensitivity and care they deserve."

The credentials of one independent investigator, a psychologist working with Duke University, came into question in December. The North Carolina Department of Public Safety sent a cease-and-desist letter to the psychologist, Celia Irvine, saying she wasn't properly licensed, according to a local television station, WRAL. The state's Private Protective Services Board, which has jurisdiction in the case, is expected to hold a hearing in April.

Most consultants in that role, it seems, are lawyers. About a third of colleges that have used hearing panels are shifting to the investigator model, says Brett Sokolow, president of the National Center for Higher Education Risk Management, a consulting and law firm, which last summer announced "resolution services" for campus sexual assault. Outside investigators typically charge \$5,000 to \$20,000 per case. And at least one insurer seems to think the expense is worth it. United Educators will reimburse member institutions up to \$10,000.

'Best Panelists'

Not everyone believes in that kind of expertise. Faculty members and students, too, are capable of judging responsibility in sexual-assault cases, says Chris Loschiavo, associate dean of students at the University of Florida. "If they can sit on a jury trial and send someone to the electric chair with 30 minutes of instructions," he says, "it doesn't make sense to me that we can't train them to handle a civil-rights case on campus." At Florida, the campus-conduct staff investigates a complaint and determines whether it should go before a hearing panel of professors and students. Before students can serve, they must pass a semester-long three-credit course that covers how to weigh evidence, ask appropriate questions, and determine credibility. Professors get 10 hours of similar training.

"Students have unique insight that makes them the best panelists and decision makers," says Mr. Loschiavo, "because they know what the culture here is like." Still, some people argue that doing this work well takes years of training and experience. The lawyers that colleges are hiring may be less likely to blanch when discussing explicit details. In one case that Djuna Perkins handled for a college, a female student had been texting with a male classmate about S&M. Ms. Perkins, an outside investigator, determined that while the two had exchanged messages about

their interest in such sexual activities, the young man was responsible for assault because the woman had never consented to an actual encounter.

"I know how to ask the questions in a way that makes students feel comfortable but that also makes them as candid as possible," says Ms. Perkins, who was a trial lawyer for 20 years before she opened a law firm in 2012 exclusively to help colleges handle sexual-assault cases. She has worked with about a dozen colleges on 35 investigations, she says.

Campus panels may fail to ask tough questions of the students on both sides of an accusation, says Mr. Sokolow, the consultant. He often works with colleges when they are finishing an investigation or a hearing to review their process.

In a recent case, a young woman had accused a male classmate of forcing her to perform oral sex. The college's panel had found him responsible, and the young man had appealed. When Mr. Sokolow went over the evidence and the findings, he had several questions for the panelists: Had they asked the young woman how long the encounter took? What position was the couple in? Was she on her knees, or were they in bed? Was he holding her head to force her?

The panelists weren't sure, says Mr. Sokolow. "They looked at me like, How can we possibly ask those questions? I said, because that's the job."

The panel on that campus has reopened the case. It has yet to issue a final judgment. Robin Wilson writes about campus culture, including sexual assault and sexual harassment. Contact her at robin.wilson@chronicle.com.