Strategies for Addressing Student on Student Sexual Assault

A NAIS Webinar

□ December 17, 2015 □ 2:00 P.M. to 3:00 P.M.

Program Description: It’s been all over the news. For several years, the national media has reported on the incidence of student sexual assaults on college and university campuses, and the federal government’s response in mandating enhanced policies, procedures, training and reporting. Earlier this year, the spotlight turned to New Hampshire as the highly publicized trial of a senior boy at an independent school unfolded and resulted in guilty verdicts for sexual assaults and certain computer crime law violations. Schools across the country are doing an inside look into their own campus cultures, policies and procedures. Among the many questions being asked are: (1) do our school policies adequately address where to go for help and what happens when a concern of sexual assault is raised, (2) do our students understand what sexual assault or misconduct is, the laws in our state about age of consent, (3) do our administrators understand what the school’s responsive action should be, accommodations the school can offer, and mandatory reporting obligations, (4) do students and parents understand their options about filing criminal complaints or seeking medical help, (5) does our school address the needs of both students, the victim and the alleged perpetrator, when complaints of this nature occur, (6) are school employees promising confidentiality when that promise cannot be kept, (7) how does the school coordinate its obligation to conduct an internal investigation with an investigation being conducted by the police, and (7) what can and should be said and to whom about the allegation of, or conclusions about, a sexual assault.

Presenters: In this webinar, you will hear from Attorney Linda Johnson, Co-chair of the Education Law Group of McLane Middleton, Professional Association about what steps independent schools are taking proactively to address these concerns, and about how independent schools are responding to allegations of sexual assaults. You will also hear from Jane Hulbert, President of The Jane Group who will address the strategic, proactive and transparent communications a school can use in times of crisis including the unique issues about media and communications involved in situations of sexual assaults.

The following is provided courtesy of Linda Johnson, Esquire. Linda may be reached at linda.johnson@mclane.com or (603)628-1267. Linda focuses her practice on understanding and serving the needs of independent schools, and has been practicing for over 30 years.
A. Addressing Student on Student Sexual Assault

1. Legislative and Policy Context
   a. Federal laws - what’s going on at the college level
   b. State laws (e.g. sexual assault, sexting, bullying, harassment, other criminal laws, and reporting obligations)
   c. Duty of Care
   d. School Policies

2. What is sexual assault?
   a. Sexual Assault
   b. Sexual Harassment
   c. Bullying
   d. Statutory rape, and Romeo and Juliet laws
   e. Consensual Sexual Behavior

3. Response Procedures for Victims of Rape and Sexual Assaults
   a. Immediate support of student(s)
      i. Safety of the victim
      ii. Medical concerns/needs of victim
      iii. Counseling for the victim and accused
   b. Preservation of evidence
   c. Reporting to emergency and security divisions
   d. Police
   e. Abuse reporting or other reporting obligations
   f. Contacting parents
   g. Documentation
   h. Privacy
   i. Media
   j. Other communications (what, if anything, to say to whom? e.g. board, faculty, students, parents, school community, etc.)

4. Investigation Procedures and Considerations
   a. The school’s responsibilities – law and policy
   b. Coordinating with the police
   c. Balancing the needs of the accused
   d. Broader school community concerns
   e. Conducting the investigation
   f. Who conducts the investigations
   g. Insurance considerations e.g. UE ProResponse Coverage for PR Consultant and/or sexual assault investigator

5. Conclusions, Disciplinary and Other Responsive Action
   a. Consider interim measures
   b. Make conclusions and follow-up with disciplinary or other responsive actions needed
6. Longer Term Response Procedures  
a. Support of students in police interviews  
b. Media  
c. Continuing support for students  
d. Court attendance  
e. Needs of the greater school community  

7. Documentation, review and assessment  

8. Pro-active measures to address student assault  
a. handbook policies  
b. services for survivors  
c. training for faculty and staff  
d. education and training of students (including about “consent,” where to go for help, what help can be provided,)  
e. notice to parents of school policies and procedures, including reporting obligations  
f. training and handling of investigations  
g. anonymous reporting  
h. support of accused or other student witnesses  

B. Considerations for Complaint Response Procedures  

When an allegation of sexual assault or sexual misconduct is reported to any school employee, consider the following responsive action:  

❖ The school employee receiving the allegation shall report it with the greatest urgency feasible to the Head of School, or, if the Head of School is not reachable, then to another senior administrator.  

❖ The Head of School should seek legal advice from the outset.  

❖ The school will take action, where warranted, to protect the complainant, school community, and any individual or groups within the community.  

❖ Immediate medical care: It is particularly important to get appropriate medical care at a hospital emergency room as soon as possible when a rape or sexual assault has occurred. Students can seek the medical treatment on their own or can ask the school for assistance. As part of the exam the doctor will also do evidence collection. Showering, bathing, and douching all decrease the likelihood that evidence may be collected, as does a delay from the time of the assault to the hospital visit. A hospital visit is highly recommended in the immediate aftermath of a rape or sexual assault because of special services the hospital can provide a victim. This can include the morning after pill and protection against, or treatment for, sexually transmitted diseases.
The school should maintain the **privacy** of all individuals involved in a report of sexual assault or sexual misconduct to the extent possible in line with the school’s duties to take appropriate responsive action including any mandatory reporting obligations.

The school will look at the facts and circumstances of each incident on a **case-by-case** basis.

The school may, in its discretion, recommend **interim protections, accommodations, or remedies** for the parties and/or witnesses involved. This may include separating the parties, placing limitations on contact between the parties, making alternate classroom course scheduling or dining arrangements or sending one or more, or all, of the individuals involved in the alleged sexual assault (alleged victim(s) and alleged perpetrator(s)) home from school, until asked to return, for considerations of safety, or the best interest of any student(s), or in the best interest of the school or school community at large. Arrangements may be made to allow for students to continue their schoolwork while away from school. This measure should not be construed as punishment or disciplinary action, but, rather, as a mechanism to allow the school to continue to carry out its mission, obligations or investigation without undue disturbance as the allegations are addressed.

The school will initiate an **investigation**, and/or take immediate action, without the necessity for agreement to do so by any of the parties involved in the incident. The school will also proceed forward in order to address the situation properly within the school community.

The school may **refer investigation** of the allegations to one or more persons or entities experienced in conducting investigations to find facts, and to provide input, conclusions, and/or recommendations to the school regarding the alleged incident. The school will consider the results of the investigations in its decision of action to be taken. Persons and entities to which a referral is made shall have complete access to all student records and school information, except as protected from disclosure by law.

Persons who have experienced **criminal sexual assault or misconduct**, and their parents will be advised of their right to report the incident to **law enforcement**. The school will cooperate fully with law enforcement, as applicable.

The school will comply with all **applicable laws**, and will **report** allegations to law enforcement and/or child protective services as required by law.

The school may take **any and all measures** that it deems necessary to protect the complainant, parties, school community and remove any threat or potential threat from the school community and/or the campus.
Appropriate disciplinary action may be taken against any individuals involved in a sexual assault incident, up to and including expulsion or termination from employment.

The school should ensure protection from retaliation or threats of retaliation or intimidation against any person who brings a complaint of sexual assault or sexual misconduct, or against any person involved in an investigation or who assists or supports a victim.

A word about bystander responsibilities: The school expects that any student who is present, witnesses, or has knowledge that a sexual assault is occurring or has occurred, will not aid or abet the sexual assault or sexual misconduct, will not stand by and let it occur, and will not simply leave the scene without notifying parents, law enforcement, school employees, or other individual with authority. It is expected that a student will take reasonable steps to stop any sexual assault or sexual misconduct from occurring or prevent it from going any further by notifying a parent, law enforcement, teacher, or other individual with authority as soon as such notification is feasible. It is also the school’s expectation that any such student present, witnessing or with knowledge of a sexual assault or sexual misconduct will notify a school employee of the incident.

C. Other handbook policies to consider that may assist in addressing student sexual assault situations:

Many of the complaints by students and parents about the school’s handling of sexual assault situations include:

1. the school having no policy specifically about sexual assault resulting in students not knowing where to go for help,
2. failure of the school to provide accommodations to the victim,
3. students not understanding what sexual assault or misconduct is,
4. students and parents not knowing that complaints to the police or seeking medical attention were options,
5. schools or school employees promising confidentiality when that could not be kept,
6. not understanding the school’s responsive action or mandatory reporting obligations following a complaint, and
7. failing to provide support for the accused student as well as the complainant.

Numerous schools have begun to address the issue of sexual assault on their campuses by adding or amending student handbook policy language. Among the policies that some schools have adopted are policies about “healthy relationships,” “responses to sexual activity,” revised “community expectations,” “intervisitation protocols and expectations” (at a residential school), and one school that is adopting a comprehensive “Living in Community” policy that addresses issues like social and emotional education, self-management, social awareness, responsible decision-making, and relationship skills. One school is adopting a “Sexual Assault
Protocol” which is a statement that students can raise concerns about sexual assault, the school will take it seriously and will conduct an investigation and take whatever disciplinary response it deems appropriate. Schools should consider adopting a specific sexual assault policy that sets forth what sexual assault or misconduct is, where to go for help, what support the school can provide, what the school will do in response to notice of a sexual assault, ramifications of behavior and protection from retaliation.

Other considerations for handbook changes that could assist in handling student sexual assault situations include:

1. **Students who turn 18**: We have had several situations in recent years in which a student who has turned 18 (age when a person is considered an adult in NH) has stated, for instance, “you cannot tell my parents that I am suicidal,” or “you cannot tell my parents that I have been raped.” This has created some difficult situations. Accordingly, we are now recommending that, as a condition of continued enrollment, students who turn 18 must agree in writing to allow the school to continue to communicate with their parents and agree to abide by the student handbook, or they can be asked to withdraw. The school sends a “Happy Birthday” letter of sorts nicely reminding the student of this handbook policy and requiring their signature. A possible policy to consider is:

   **Turning Eighteen**: As a condition of continued enrollment, students and/or parent (or guardians) agree that when any student turns 18 while a student is enrolled at the school, the school shall have the right to communicate with his or her parent(s) (or guardian(s)) regarding any matter whatsoever regarding the student including but not limited to, about academics, discipline, medical, mental health, behavior, conduct, social or education matters, or any issue whatsoever that the school wants to communicate with the parent (or guardian) concerning the activities or best interests of the student or the greater school community. Once the student turns eighteen, the student and parent(s) (or guardian(s)) will receive a reminder about this obligation as well as the overall obligation that the student agree to abide by the student handbook. If a student refuses to confirm these conditions of enrollment in writing, the student may be asked to withdraw.

2. **Student record requests**: Increasingly schools are getting requests, more often demands, from parents to receive a copy of an investigation report or, for instance, all email communications between school personnel about their child. This can create difficult school to parent conversations. We, therefore, are recommending that schools adopt a student handbook policy along the following lines:

   **Student records**: A student and/or parent (or guardian) shall, upon request, be entitled to receipt a copy of the student’s official school record. A student’s official school record shall include the student’s transcript, academic records, advisor reports, and medical records created and maintained by the school. A student’s record does not include email communications to or about the student, records of disciplinary actions, investigation records of any kind (such as disciplinary, harassment, hazing, bullying etc. except for any record placed
in the student file such as letter home to parent, etc.), recommendations provided to the school regarding the student’s admission, or any other record deemed by the school to be confidential records of the school, which have not been printed and placed in a student’s official institutional record.

3. **Disciplinary Policy Changes to Consider:** In the area of disciplinary policies, schools want to ensure the maximum flexibility possible, and also to make clear that the school’s disciplinary policy is not like a court trial. Policies you might consider for The Academy are:

**Disciplinary Process in Private Schools:** The primary goals of the Academy in its discipline system are to educate students and to treat them as fairly as possible when rules are broken. It should be kept in mind that the Academy is a private school and not subject to the same rules as public schools; the discipline system is not intended to be a “trial” as contemplated by a court system; and rules of evidence do not apply.

**Flexibility to Deviate From Disciplinary Committee Process:** The Head of School and/or Dean of Students has the discretion to respond to cases of misconduct in several ways. The Head of School or Dean of Students may resolve the situation him/herself, refer the case to the Discipline Committee ("DC"), or to the Head of School. In serious cases or any situation when the Dean or Head of School deems it necessary, the student may be immediately suspended or asked to go out on a Dean’s leave pending dispensation of the case. Depending on the circumstances of each situation, the disciplinary response may range from a warning up to and including dismissal from school. The Head of School makes all final decisions regarding serious cases of discipline. When deemed necessary by the Head of School or Dean of Students, the student may not be required to appear before the Discipline Committee; rather, the case will be reviewed by the Dean of Students and/or the Head of School in consultation with such other administrators as the Dean or Head of School deems appropriate. On these occasions, these administrators will review the facts of the case, as known, and any interviews with the appropriate students and faculty involved in the situation, and conduct such other inquiry and review as may be deemed necessary by them before making a decision about appropriate responsive or disciplinary action.

**Publicizing Disciplinary Responses:** The entire school may be informed about any aspect of a disciplinary matter when, in the sole judgment of the Head of School, it is deemed appropriate to help further the educational or learning experience of the school community.

**Catch-all of Disciplinary Responses:** The Discipline Committee may recommend disciplinary actions up to and including expulsion. …[School usually lists kinds of disciplinary action that can occur, such as warning, probation, suspension, expulsion, etc. The school should also include a catch-all provision such as the following:]
Other Disciplinary Responses: Depending on the circumstances, other disciplinary or nondisciplinary responses may be required such as community service, counseling, research and essay, alcohol or drug assessment or testing, restitution, or whatever other disciplinary or responsive action the Head of School or his/her designee may determine to be appropriate under the circumstances.

4. Overall introductory handbook statement: I feel very strongly that schools should have an introductory statement that sets forth the school’s right to deviate from the student handbook policies as may be needed in particular or unique circumstances. As the following policy points out, no handbook can cover every conceivable set of circumstances that might arise at a school.

**Introductory Handbook Statement About School’s Right to Deviate From Handbook Guidelines, Policies, or Procedures as Needed:** This Student handbook is intended to serve as a guide to help you to understand what is expected of you as a student at Johnson Academy, and includes information about Academy rules and policies. Students and parents (or guardians) should understand that the rules, policies and procedures outlined in this handbook apply under “normal” circumstances. However, no set of rules or guidelines can cover every conceivable set of circumstances that may actually arise at a school. From time to time, there are situations that may require immediate or nonstandard responses. In such circumstances, the Academy reserves the right to take actions deemed to be in the best interest of the Academy, its faculty, its students and/or the greater school community and its member, and to deal with individual circumstances as they occur as deemed necessary by the school. The Student Handbook does not limit the authority of the Academy to alter its rules and procedures to suit any unusual or changed circumstances, or as deemed necessary by the school. In addition, these handbook provisions may be revised even during the school year, and you will be advised of any changes should they occur.

Another issue that arises in these situations of sexual assaults, is how to deal with questioning the accused student for the school’s internal investigation when there is the possibility of criminal charges. If the school requires the accused student to be interviewed, the school’s records of the interview can be subpoenaed by the police and the school, in effect, has waived the student’s 5th Amendment right against self-incrimination. A very tricky area. It is recommended that schools seek legal advice about how to maneuver these competing interests.

**IMPORTANT NOTE:** The above overview should not be relied upon as legal advice. Rather, in any specific situation involving sexual assault or misconduct, legal advice should be sought. In addition, before a school adopts any handbook policy or procedure, it should be reviewed by legal counsel.