

DELIBERATELY INDIFFERENT

**Crafting equitable and effective remedial
processes to address campussexual violence**

By the NCHERM Partners:

**W. Scott Lewis, J.D.
Saundra K. Schuster, J.D.
and Brett A. Sokolow, J.D.**

www.ncherm.org

©2011 NCHERM. All rights reserved.

ABOUT NCHERM

- NCHERM is a law and consulting firm dedicated to best practices for campus health and safety.
- NCHERM is a repository for systems-level approaches and models that enhance and advance campus risk management and preventive law efforts.
- NCHERM emphasizes best practices for policy, training, and educational programming as proactive risk management.
- NCHERM specializes in advancing culture change strategies and problem-solving for the tough wellness, compliance and liability issues colleges and universities face today.

When colleges and universities engage the services of NCHERM, they benefit from the collective wisdom, experience and creative collaboration of our eleven consultants. As a not-for-profit corporation, our clients find the services of NCHERM to be both cost-effective and affordable. Our model has always been to use our thought- leadership to develop best practice models for higher education, and to give that intellectual property away for free. One of our vehicles for doing so is this annual Whitepaper. Only when colleges and universities seek to use our services to implement our models or provide training do we charge for our services. We hope this Whitepaper inspires you to consider making use of our expertise to enhance the safety of your campus community.

THE ELEVENTH NCHERM WHITEPAPER

Every year since NCHERM was founded, we have published an annual Whitepaper on a topic of special relevance to student affairs professionals, risk managers, student conduct administrators and higher education attorneys. The Whitepaper is distributed via the NCHERM e-mail subscriber list, posted on the NCHERM website, and distributed at conferences.

- In 2001, NCHERM published *Sexual Assault, Sexual Harassment and Title IX: Managing the Risk on Campus*.
- In 2002, NCHERM published *Complying With the Clery Act: The Advanced Course*.
- In 2003, the Whitepaper was titled *It's Not That We Don't Know How to Think—It's That We Lack Dialectical Skills*.
- For 2004, the Whitepaper focused on *Crafting a Code of Conduct for the 21st Century College*.
- Our 2005 topic was *The Typology of Campus Sexual Misconduct Complaints*.
- In 2006, the Whitepaper was entitled *Our Duty OF Care is a Duty TO Care*.
- The 2007 Whitepaper was entitled, *Some Kind of Hearing*.
- In 2008, NCHERM published *Risk Mitigation Through the NCHERM Behavioral Intervention and Threat Assessment (CUBIT) Model*.
- For 2009, NCHERM published *The NCHERM/NaBITA Threat Assessment Tool*.
- In 2010, our 10th Anniversary Whitepaper was entitled *Gamechangers: Reshaping Campus Sexual Misconduct Through Litigation*.

For 2011, the topic of the NCHERM Whitepaper is *Deliberately Indifferent: Crafting Equitable and Effective Remedial Processes to Address Campus Sexual Violence*. All previously published NCHERM Whitepapers are archived as free downloads at www.ncherm.org/whitepapers.html.

Why This Title?

We chose to call the 2011 NCHERM Whitepaper *Deliberately Indifferent* both as a nod to the legal standard by which college and university violations of Title IX are determined by the courts, and also as a reference to the widespread and systemic inability of colleges and universities to provide equitable remedies for sexual violence. This Whitepaper is intended to address the question of why that systemic inability exists and is so commonplace, and to offer practical solutions in addressing cases of sexual misconduct that will be transformative for every college and university. This, in turn, will serve to improve the quality of the educational experience for students and the safety of campuses.

We addressed sexual violence in the 2010 NCHERM Whitepaper, *Gamechangers*, where we comprehensively discussed the court-made paradigm shift occurring in Title IX litigation of campus sexual assault.¹ While that Whitepaper addressed the case law implications, we wanted to take this year's Whitepaper further, by providing a wide-ranging discussion of what colleges and universities need to do to accomplish the changes that are needed, and demanded, by courts and government agencies. While it is unusual for NCHERM to publish two successive Whitepapers on similar topics, we decided to stick with sexual violence again this year because the heat has been turned up even since our accounting of the "state of the legal developments" last year. This year, the US Department of Education launched a new initiative through its Office for Civil Rights (OCR) to enforce Title IX through general compliance reviews -- not just in response to a formal complaint -- to go public with its enforcement actions, and to recast each campus it investigates as a model for other campuses to emulate through a process of negotiated restructuring of policies, procedures and practices.² It started with Eastern Michigan University and Notre Dame College, and is now expanding to include the University of Virginia, Ohio State University, Harvard University and the University of Notre Dame. OCR has announced it intends to issue new guidance, as well, on standards of proof and other areas of frequent compliance gaps. Additionally, this year Security-on-Campus, Inc., released its blueprint³ for Title IX-compliant remedial practices, and has gone to Congress to ask for another revision of the Clery Act called the Sexual Violence Elimination Act (SAVE Act) to better address campus sexual assault victim's rights.⁴

The pressure identified as court-made in last year's Whitepaper isn't letting up. It is being backstopped by administrative enforcement and legislative action and the intensity will increase until a watershed occurs. We can't keep lurching from PR nightmare at Dominican College of Blauvelt to PR nightmare at the University of the Pacific to PR nightmare at Notre Dame University. So, what's the bottom line? As we see it, systemic failures of equitable remedies by colleges and universities could until now be ascribed to misfeasance. Going forward, however, colleges and universities that don't "get it" have no excuse.⁵ Awareness of the need to change must be a part of the mindset of every college administrator. The lessons on how to accomplish the change are legion, pushed by every campus women's center, advanced by Security-on-Campus, Inc., OCR, CALCASA, EVAW, NCHERM⁶ and countless other sources. The failure to do it now isn't misfeasance, it is malfeasance. The failure to change in the face of

¹ <http://www.ncher.org/documents/2010NCHERMWhitepaper.pdf>

² <http://www.publicintegrity.org/articles/entry/2747/>

³ <http://www.securityoncampus.org/pdf/SAFEblueprint.pdf>

⁴ <http://s3.documentcloud.org/documents/18205/perrie-036-xml.pdf>

⁵ By "get it", we mean that colleges and universities must engage in significant review and revision of their current practices and policies in alignment with the best practices that are emerging for the field.

⁶ The U.S. Department of Education Office for Civil Rights (www.ed.gov/ocr); The California Coalition Against Sexual Assault (www.calcasa.org); Ending Violence Against Women International (www.evawintl.org); The National Center for Higher Education Risk Management (www.ncher.org).

overwhelming demands to get it right isn't laziness, it isn't the machine of campus politics, it isn't a question of the right timing or a slow taskforce. The failure to get it right – now -- is deliberately indifferent to a culture of gender violence that is normative on college campuses. Those not acting to end that culture are helping to perpetuate it.

Failure to Provide Equitable Remedies

Lest our readers take from this the message that colleges and universities are wholly inept, please know that this Whitepaper is directed specifically at ineffective remedial models, and not at the broad swath of sexual assault initiatives that exist on many college campuses. For example, many campuses offer very effective models for victim intake and initial crisis intervention.⁷ Many campuses have established advocacy programs that are literally life-saving. In rural Georgia, a campus spearheaded the successful effort to bring rural counties together with local donors to create a forensic nursing (SANE) program where there was none. That is real, measurable progress. Victim services has come a long way on college campuses, but strength in those programs now allows college and university officials to claim proactive stances on the broader issues of sexual violence, and those proclamations on too many campuses are still hollow. Improving victim services is critical, but there are many advocacy programs out there hesitant to recommend to victims that they pursue campus grievances on their own campuses, because of the dysfunctional operation of the remedial processes. It is those processes on which we focus for the remainder of this Whitepaper.

By Equitable, Do We Mean a Victim-Centered Process?

No. An equitable process is focused on gender (race, age, religion, etc.) equity, where equity is defined as fair, balanced, leveling, equal and impartial. That may sound victim-centered, but that is because the process on many campuses for so many years considered only (or primarily) the rights and situation of the accused student. Thus, equity ends up feeling like a shift to the "other side," even though it is not. An equitable process on many campuses will force a victim focus, but only as a casualty of history. Let us explain. In 2010, the Association for Student Conduct Administration⁸ (ASCA, formerly ASJA) celebrated the 50th Anniversary of the landmark decision in Dixon v. Alabama.⁹

That case created for six African American students the right to due process prior to being expelled from Alabama State College. Their offense was to join the civil rights movement and to participate in peaceful non-violent protests against segregation. With its decision, the 5th Circuit Court of Appeals laid the foundation for the field of student conduct administration, which would thenceforth be charged with assuring that all students facing campus discipline would receive legally required notice, a hearing and other trappings of fair process. The casualty of history here is that while the student conduct field was birthed from the civil rights movement, the evolution of the case law that sprang from Dixon has allowed us to be myopic. The African American students in Dixon were respondents in the eyes of the law, assumed to have property rights in their education. Their rights accrued to them not as victims of misconduct, but as victims of arbitrary campus action whose rights derived from the 14th Amendment of the U.S. Constitution.

All of the cases that followed Dixon developed a body of law, then, around the rights of respondents. Campus conduct evolved as the exploration, implementation and protection of *their* rights. We forgot that ALL students have civil rights, to the point where in the 1990s we were so unfocused on victim's

⁷ <http://students.syr.edu/rapecenter/>

⁸ www.theasca.org

⁹ Dixon v. Alabama, 294 F. 2d 150 (5th Cir. 1961)

rights that Congress had to legislate repeatedly to encourage a more balanced focus from us.¹⁰ It wasn't until the late 1990s that a series of cases started to more fundamentally reshape the field of student conduct, this time into an exploration of the civil rights of victims of sexual assault. Those cases and their most recent progeny are addressed in last year's Whitepaper, and so will not be discussed further here.

Due Process is, by definition, a one-sided view of fairness, and now we are finally and belatedly filling in what the complainant's rights paradigm should be, with sexual assault being the touchstone.

This Whitepaper asserts the notion that the Campus Sexual Assault Victim's Bill of Rights (amending the Clery Act), FERPA and even Title IX, form the floor – not the ceiling-- for best practices to address sexual violence on college campuses. Most campuses are still striving to reach the floor, let alone the ceiling. Yet, we often think that if we comply with the rights and disclosure requirements of Clery and FERPA, we're doing what we need to be doing. That's not even close. OCR investigations of Title IX violations by colleges have added layer upon layer of procedural requirements, but OCR does it case by case, rather than giving colleges and universities broad-based guidance on the expectations of the law. For example, OCR publishes Title IX Guidance¹¹ that should be required reading for college administrators, but the legal mandates established by the OCR case investigations are not adequately reflected in the Guidance.

An NCHERM client recently voiced frustration about this, saying she'd be more than willing to comply with the expectations, but has no way to find them, keep up with them, or even know they exist because OCR does not publish its finding letters when it completes an investigation of a college. True enough, and that got us thinking about how we might make these finding letters more accessible beyond individual Freedom of Information Act (FOIA) requests. We learned that the Center for Public Integrity (CPI) had made those requests already, as part of its investigative article series on campus sexual misconduct.¹² Lead author of the article series Kristen Lombardi gave more than 200 finding letters to NCHERM, and we have now posted them on our website¹³, fully indexed, categorized and freely available to you. You need to know what is in these letters, and we thank CPI and Kristen for sharing them with us and a team of volunteer interns for formatting, organizing and indexing them so that we could share them with you.

What Do Complainant Rights Look Like?

This question is largely governed by Title IX, which not only protects victims of gender discrimination, but also requires gender equity in the proceedings used to remedy discrimination complaints. Thus, you can balance your process with the goal of equity by assessing what you do for one party (the respondent), and whether you ought to provide an equivalent right, privilege or opportunity for the other party (the complainant or alleged victim). The gender construct is based on the fact that almost all campus sexual violence complaints are made against men, and thus the protections of fair and due process accrue to men, as respondents. If you typically afford protections to men and not women, you engage in gender discrimination. Since most (nearly all) complainants are women, women are disadvantaged by the narrow view of due and fair process as accruing primarily to men. Title IX, then, has legislatively created something akin to a property right in an education and in educational access for

¹⁰ Amendments to the Clery Act in 1992 and to FERPA in 1998.

¹¹ <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>

¹² http://www.publicintegrity.org/investigations/campus_assault/

¹³ <http://www.ncherp.org/legal.html>

women (or anyone discriminated upon on the basis of gender) as a balance to the property-based due process rights which accrue to respondents who are typically men.

While it is up to you to audit your remedial processes to determine what rights, opportunities or privileges adhere to only one party that should adhere to all parties, we have provided a list of typical procedural elements where balance is needed, and may be demanded by law when it can be shown that they are provided in a way that creates a discriminatory or gender biased effect. Key to understanding the validity and applicability of these procedural elements are the following quotes from the OCR investigation of Title IX violations by Temple University in 2007:

The University's approach to sexual assault complaints fails to recognize the distinction between a Title IX complaint of discrimination alleging sexual assault and a disciplinary hearing against a student for violating the Code of Conduct's rule against sexual assault...§106.8(a) permits the use of a student disciplinary procedure not designed specifically for Title IX grievances to resolve sex discrimination complaints, as long as the procedure meets the requirements of affording a complainant a prompt and equitable resolution.¹⁴

Thus, OCR is in fact stating that it will not permit colleges and universities to use conduct proceedings to lawfully address gender discrimination under Title IX unless we adjust those processes with the equity lens of a civil rights remediation. Here are some elements of that lens:

- *Notice and Explanation of Process*

Just like many of us would sit down with a respondent and explain the process by which their alleged violation will be determined, it is both possible and beneficial to create the same opportunity for victims. They need to understand the parameters of the policy, and what it does and does not cover. They need to know how the conduct process plays out, and giving them a chance to ask questions will help to make what is to come more predictable and comfortable for them.¹⁵ It may clear up misunderstandings in advance, and help conduct administrators to set reasonable expectations with victims for what the process can and cannot accomplish. Several OCR decision letters explicitly require this.¹⁶

- *Notice of When Complaint Delivered to Respondent*

Some respondents are not aware in advance that a complaint is headed their way. Victims are rightfully apprehensive that a respondent who receives a complaint may respond with shock, anger and potentially even violence. Keeping the alleged victim in the loop as to exactly when notice will be given may help them to make protective decisions, and expect possible contact from the respondent soon after.

¹⁴ OCR Letter to Temple University, 2007.

¹⁵ This is **not** to include an administrator's (particularly a conduct administrator) guess as to the anticipated outcome of the hearing, as this may inappropriately impact or influence the alleged victim's decision.

¹⁶ OCR Letter to Temple University, 2007.

- *No-Contact Order*

Imposing a no-contact order between the parties to a complaint is becoming a more common practice, and as long as you take meaningful steps toward assuring that the no-contact order is enforceable, this type of protection can create a level of reassurance and conflict de-escalation that is helpful. Many victims are subsequently harassed by the person they accuse and their friends, and are subject to retaliation. A no-contact order is one of the mechanisms for us to proactively curtail potential harassment and retaliation provoked by the filing of the complaint. It is more functional than a civil restraining order, because it can be adjusted to address contact, presence, distance, and other aspects of safety, and then readjusted over time if needed. Victims are starting to press the case that no-contact orders imposed on them without their desire for them, or which unnecessarily restrict their movements or contacts with mutual friends, are potentially retaliatory. Many campuses are responding with skewed no-contact orders, both before and often after the end of the suspension of the accused student. Skewed no-contact orders restrict one party more than another, and/or spell out that victims will not be disciplined for inadvertent violations of the no-contact, which could be seen as retaliatory.

- *Victim Receives Copy of Response to the Complaint*

We encourage you to shed light through your process, rather than to cloak it in secrecy and an information vacuum. When an alleged victim makes a complaint, we typically share that complaint with the respondent. If the respondent writes a formal response to the complaint (and s/he should), it is balanced to share a copy of that response with the alleged victim.¹⁷ Appropriate FERPA consents should be obtained, and you may need to redact certain information, but that is better than keeping the alleged victim in the dark about the respondent's specific responses to the allegations of the complaint.¹⁸

- *Interim Suspension*

An interim suspension can be an important way to protect the rights of a victim from a respondent who may pose a continuing threat of harm. The law of interim suspension is quite friendly to colleges, giving private institutions almost unfettered latitude. Public institutions are more confined, but generally are permitted to interim suspend for good cause for up to ten business days (two weeks), pending a hearing. Yet, what is good cause? Many campuses use the ongoing threat to the victim or the community standard, but the law would permit interim suspensions to preserve the integrity of the investigation, to thwart the destruction of evidence or collusion of witnesses, or to prevent retaliation. Many administrators are hesitant to use interim suspension authority, but we encourage more expansive use of the authority when any of these circumstances warrant a temporary separation. "OCR has recommended that whenever a student files a claim of hostile environment discrimination, a college seriously consider taking interim steps to protect the student from the potential of further discrimination or retaliation."¹⁹

Many administrators tell us they are reticent to disrupt a student's academics without proof of a violation, but how do we know an accused student is safe to stay? We're just guessing. Yes,

¹⁷ OCR Letter to South College, 2001.

¹⁸ We would recommend that this be shared in a personal meeting, with the alleged victim's advocate present as well.

¹⁹ OCR Letter to Riverside Community College District, 2005.

modifications to housing and no-contact orders might help, but we need to more effectively balance the disruption to the accused student that might come from a short suspension with the disruption to the alleged victim from the alleged assault, and the effects of permitting the accused student to remain on campus. It is also sometimes possible to separate a student from campus while still permitting them to continue academic coursework without being physically present in class. That is workable. Often, we think the hesitation to interim suspend comes because campuses move too slowly to complete the investigation and hearing. Solve that problem, and the interim suspension can potentially be shorter and less disruptive.

- *Right to Unbiased Decision-Makers Who Have Been Trained*

Making sure that victims are aware that you have a separate process for critical issues, and/or that your regular conduct decision-makers are specifically trained at handling relationship violence, stalking, discrimination and sexual misconduct can send a clear message that your process is attentive to their needs, sensitive to their concerns, and respectful of their experiences. Dozens of OCR finding letters critique campuses for insufficiency of training for Title IX Coordinators, for investigators, for hearing officers, and for appeals officers.²⁰ Title IX requires an investigation that is adequate, reliable and impartial,²¹ thorough, objective and independent.²² “A reasonable, equitable and reliable process requires an investigation that is logically thorough and applies the prevailing standards of law, not just in name, but also in substance.”²³ Doing so requires training that is detailed, comprehensive and accurate.

- *Right to a Closed Hearing*

Why some campuses persist in noting that a hearing can be open to the public under certain circumstances continues to baffle us. It can scare victims from reporting. In order to open a hearing to the public, you would need permission from all parties to the complaint, every student witness and any students who are participating as panelists on your conduct board. This is almost impossible, and even if you got such consensus, it would still be a bad idea. We can already publicize the results anonymously, and victims can in many circumstances discuss the results publicly (and so can the institution), so there really is no distinct additional benefit to an open hearing. Moreover, open hearings would violate federal law. We’re still puzzled as to why sexual misconduct hearings at Georgia state institutions are open to the public. We know there has been a state ruling on it, but state laws are trumped by Title IX, which has a confidential investigation requirement that cannot be superseded by state open meetings provisions.

- *Right to the “More Likely Than Not” Standard of Proof*

According to the US Department of Education²⁴, the appropriate standard of proof for discrimination claims is the preponderance of the evidence (more likely than not). Use a different standard at your own peril. They have corrected this standard at a number of campuses, when complaints were made, and now OCR says it plans to issue guidance to all institutions on it.

²⁰ See, e.g., OCR Letter to Berklee College of Music, 2004.

²¹ OCR Letter to South College, 2001.

²² OCR Letter to Westfield State College, 2002.

²³ OCR Letter to Riverside Community College District, 2005.

²⁴ See Letter to Jane Genster, General Counsel, Georgetown University, 2003, <http://www.nchem.org/documents/georgetownOCRletter12-16-03.pdf>

- *Complainant Standing*

OCR is clear that colleges and universities must more effectively recognize and empower victim standing in remedial proceedings. To OCR, the victim is the complainant, regardless of who brings the actual complaint (some universities bring complaints forward, rather than the student). OCR has stated, for example, that institutions cannot relegate complainants/victims to the position of witness in a hearing.²⁵ Victims have the right to have standing as complainants, if they choose. The complainant (victim) must be permitted to question witnesses if that opportunity is afforded to the accused student.²⁶ The complainant (victim) must be permitted to attend the entire hearing if that right is also given to the accused student (and by law it is in many states).

- *Right to a Prompt and Equitable Resolution*

Complainants have a right to prompt and equitable resolution, with promptness depending on the nature of the complaint. OCR expects policies that spell out clear timelines for resolution and every step of the process.²⁷ While there is no clear rule for what is prompt, you should establish a reasonable timeline and adhere to it unless you have a good reason to delay. For complaints involving discrimination or violence, we advise our clients to try to fast-track these complaints on a 30-day timeline, or 60-days at most. OCR has defined equitable in a variety of ways, and we address it concretely in the section on sanctions, below. These quotes may also help to shed light on OCR expectations:

At the conclusion of a case of sexual harassment or sexual assault ... regardless of the outcome of the case, the Title IX Coordinator will review all of the evidence used...to determine whether the complainant is entitled to any remedy under Title IX that may not have been provided for under the University's disciplinary procedures.²⁸

Steps must also be taken to undo any harm to the victim or victims. This may include reimbursement for counseling, reassignment to another teacher, repeating the course at no cost, tuition adjustments, private tutoring, assigning other qualified faculty to grade or re-grade the victim's work, correction of transcripts or other student records, etc.²⁹

- *Right to Have Substantiated Claims Forwarded to a Hearing*

If you want a process that appropriately incorporates civil rights into its balance, you cannot take the approach Harvard tried in 2002, of requiring independent corroborating evidence before you will proceed with a hearing.³⁰ All claims should be investigated, and where a reasonable belief exists that policy may have been violated, you should refer the complaint for a hearing. Corroboration or

²⁵ Where "witness" means being shut out of the hearing except while testifying, being treated as any other witness, unable to question other witnesses, etc.

²⁶ OCR Letter to Temple University, 2007.

²⁷ OCR Letter to Lassen Community College, 2003.

²⁸ OCR Letter to Temple University, 2007

²⁹ OCR Letter to Riverside Community College District, 2005.

³⁰ OCR Letter to Harvard University, 2003.

substantiation must exist at some level before you proceed (the Gatekeeper function), but it can be provided by any source, including a credible victim. It would be unfair to the respondent to refer a completely unsubstantiated complaint to a hearing, as Title IX also provides for the due process rights of those accused of gender discrimination.³¹

- *Advisor/Advocate*

Most conduct processes today offer the complainant an advisor or advocate. We suggest a trained cadre of advocates (or advisors, but advocates are more appropriate for sexual misconduct cases) who are familiar with the campus process, so that the complainant can choose a knowledgeable supporter, if desired. However, if the complainant wants some other person as an advisor or advocate, we think we should find a way to make that possible. Some campuses limit advisors to members of the community (in an effort to respect FERPA), but in doing so might limit an alleged victim from bringing a trusted friend, sister, local rape crisis center advocate, mom or other vital support resource. And, given the imperative for gender equity, what is offered to complainants in terms of advisor/advocate must also be afforded to the accused student.

- *Right Not to Have Complaints of Sexual Violence Mediated as the Primary Remedy*

OCR has directed colleges not to mediate sexual assault. Yet, many have argued that allowing for mediation of sexual violence is a way to accommodate victims who desire that approach. We agree, but mediation is not an acceptable approach to situations where there is a likelihood of continuing conflict and violence. Campuses can offer victims mediation (or even better--restorative justice) opportunities subsequent to and in addition to the normal resolution processes to which the complaint should be subjected, but not as a substitute for them. This applies to all complaints of sexual assault, but not to sexual harassment where there is no physically assaultive component.³²

- *List of Witnesses*

Complainants can often be upset by surprise witnesses who are called by the respondent or institution without notice. We recommend that all parties to a complaint submit and exchange a written list of witnesses at least 48 hours in advance of the hearing, to avoid the potential for surprise, and to allow all parties the utmost opportunity to prepare their arguments. This is necessary³³ because most campuses try to adapt their conduct system to address Title IX grievances, rather than deploying an appropriate investigation procedure. In a civil rights investigation process, all witnesses would be interviewed not by the parties, but by the institution, and no surprises would occur. Compelling complainants to coordinate their own investigations and call their own witnesses can violate Title IX as well, according to the OCR investigations of Temple University and the University of New Hampshire:

§106.8(a) permits the use of a student disciplinary procedure not designed specifically for Title IX grievances to resolve sex discrimination complaints, as long as the procedure meets the requirements of affording a complainant a prompt and equitable

³¹ OCR Letter to Westfield State College, 2002

³² See OCR Title IX Guidance at p. 21 (<http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>)

³³ OCR Letter to Temple University, 2007.

resolution... The [Temple] University's approach to sexual assault complaints fails to recognize the distinction between a Title IX complaint of discrimination alleging sexual assault and a disciplinary hearing against a student for violating the Code of Conduct's rule against sexual assault...³⁴

UNH did not provide an independent investigation of sexual harassment claims by students, instead requiring complainants to investigate and prove their own allegations of sexual harassment.³⁵

- *Copies of Documentary Evidence*

We recommend that all documentary evidence that will be introduced in the hearing be shared between the parties at least 48 hours in advance of the hearing, to avoid the potential for surprise, and allow the parties the opportunity to prepare their arguments.³⁶ OCR found that pre-hearing procedures at Temple University were not equitable, because the respondent was given a chance for a pre-hearing meeting, and given considerable information, including a summary of the evidence, that was not afforded to the complainant.³⁷

- *Right to Advance Notice of Board Composition and Right to Challenge*

Either the complainant and/or respondent could be unnerved by the presence of certain people on a conduct board, including faculty advisors, student friends or foes. All parties should be informed in advance of the hearing of who the hearing officers will be, and should be given an opportunity to object to any member of the board for cause. This not only accomplishes an equivalence of opportunities for both parties, it helps to assure the Title IX requirement of objective, impartial, unbiased decision-makers.

- *Sexual History/Character*

It is generally acknowledged that past sexual history and character usually has little relevance in investigating sexual misconduct, but this can be tricky. A published rule excluding sexual history and character evidence can be helpful. OCR approved the exclusion of sexual character evidence in its investigation of Georgetown University.³⁸ But, should all such evidence be excluded, or only when it is introduced by one party against another? What are the mechanics? Can students introduce their own history and/or character? One approach is an absolute bar on this type of evidence, another is to say that normally this kind of evidence is not permitted, unless it meets a high relevance threshold (that it would be "manifestly unfair" not to consider the information). The policy should clarify whether the bar extends to evidence of behavior between the alleged victim and respondent, or just between the alleged victim or respondent and uninvolved third-parties? And, in what will be

³⁴ OCR Letter to Temple University, 2007.

³⁵ OCR Letter to the University of New Hampshire, 2003.

³⁶ Balancing this with a speedier process can prove a challenge to colleges, but not as insurmountable as students asked to provide this information may indicate. Campuses would do well to remember that they should be compiling these reports and calling these witnesses in for statements, and should be mindful of attempts at delaying processes by students attempting to graduate, finish the term, etc.

³⁷ OCR Letter to Temple University, 2007.

³⁸ OCR Letter to Georgetown University, 2004.

a substantive departure for many campuses, we must adjust our processes to allow the investigation to consider a pattern of complaints and/or behavior. This is one of the main disconnects that occurs when using a conduct process to resolve a civil rights grievance. Civil rights investigations are charged with determining whether discrimination occurred, and the OCR Guidance is chock with descriptions of how patterns can and do provide evidence of discrimination.³⁹ Failure to investigate patterns can violate Title IX.⁴⁰ This runs counter to the student conduct practice of considering each case on its evidence, and only bringing previous violations into consideration at the sanctioning phase. Again, conduct processes can be used to remedy gender discrimination, but only if they adjust to the mandates of civil rights remediation. And, if campuses adopt a civil rights investigation model rather than an adversarial hearing model for resolution, it will be unlikely that pattern investigation will prove to be a violation of the accused student's due process rights.

- *Separate Testimony Options*

When this accommodation was challenged in the Gomes⁴¹ case, the court found that allowing the alleged victim to testify from behind a screen did not prejudice the rights of the accused students. The case rested on due process grounds, again ignoring the square-peg-in-a-round-hole aspect of trying to use conduct proceedings to remedy gender discrimination complaints. For OCR, this would be a no-brainer, and courts have used such protections for victims for years. It does not prejudice the fairness of those proceedings. We recommend that you create a procedural rule, and make it clear to the parties that you can use separate meetings, screens or partitions, live closed-circuit technology, and very often now, Skype™, to allow the parties to testify outside each others' direct physical presence or sightline. While it would be unfair to require any party to testify remotely, if **any** party wants to be in a separate room or behind a screen, we need to be willing to accommodate that reasonable request, and even offer it without being asked.

- *Right to Present Own Complaint or Use Proxy*

We have written previously on the failure to make the conduct process work well in sexual misconduct cases, which has prompted some campuses to try to invent better models. That has resulted in some bizarre variations on the theme, such as trying to use shuttle diplomacy in which the parties never see, encounter, confront or question each other. We have also seen efforts to use representatives to present evidence, to take the pressure off the students. We feel it is disempowering to refuse to allow a victim to present his/her own complaint, if s/he wants to. "Making the case" can be cathartic, and an important step on the road to healing. That can't happen in a shuttle meeting environment. It is also less educational to impose a proxy-based hearing process, where someone speaks for the parties and/or they never hear from each other. If a party wants or needs a proxy, we should allow it. But, why should our procedures require it?

- *Right to Know Outcome and Sanctions*

Every complainant/victim should be given the right, under your policies, to know the outcome and sanctions of any hearing involving discrimination or violence. "Final results" as described in the law

³⁹ <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>

⁴⁰ OCR Letter to Riverside Community College District, 2005.

⁴¹ *Gomes et. al. v. Univ. of Maine System et. al.*, 365 F. Supp. 2d 6 (USDC, Me, 2005).

does not mean the final finding of an appeal. No laws bar us from sharing this information and the Clery Act requires us to do so for sexual assault, but Title IX requires it for all gender discrimination complaints (sexual harassment, bullying, stalking, relationship violence, etc.). We should provide this information in writing⁴², and should place no conditions on our willingness to share it. In 2008, any FERPA re-disclosure restrictions were lifted, and so the parties are able to share this information with others without FERPA implications. Please understand that while FERPA and the Clery Act are considered the primacy sources of best practice for victim notification, changes to those laws only came about to effectuate the requirements of Title IX to apprise complainants of the status of investigations, their findings, AND THE RATIONALE THEREFOR.⁴³ This is the legal standard, yet on most campuses, victims are told they cannot know the rationale. The Title IX Guidance is quite clear that FERPA cannot be construed to conflict with or prevent compliance with Title IX.⁴⁴

- *Appeal*

If you provide the respondent with a right of appeal, equity requires you extend similar rights to the complainant. Dozens of OCR letters concur.⁴⁵ Title IX also requires the complainant to be informed of the status of the appeals request, processing and outcome, regardless of which party files the appeal. FERPA does not bar this, as some people believe, because as stated above, Title IX is controlling on this question.

- *Amnesty*

OCR has repeatedly danced around the amnesty question, but here is what we do know. Two OCR letters to Boston University failed to find that charging sexual assault victims with alcohol violations was retaliation under Title IX.⁴⁶ They so found for two reasons that may be somewhat unique to BU. First, BU had a legitimate non-discriminatory reason for the alcohol complaints that was not retaliatory, namely that BU was enforcing a zero tolerance policy even-handedly.⁴⁷ Second, OCR could find no evidence that BU's practice created a systemic impediment to reporting of sexual assault by victims. Had there been evidence that victims failed to come forward for fear of conduct code-based reprisal, OCR would likely have reached a different conclusion. Simply, it is fair to conclude that OCR expects colleges and universities to use amnesty policies or other means to ensure that victims are not dissuaded from reporting by the imposition of charges for collateral misconduct that come to light through their initiation of gender discrimination grievances.

- *Retaliation*

OCR, as you can tell by now, largely leaves questions of substantive indifference to the courts, preferring to enforce primarily on procedural grounds. One of the glaring exceptions to that OCR practice is in cases of retaliation, which it takes a particular interest in preventing. OCR expects clear policies prohibiting retaliation, and strong protection from colleges and universities to ensure that retaliation does not occur. When it does, OCR applies the same remedial requirements as it does to

⁴² See Program Review, Miami University of Ohio, 2007, and See OCR Letter to South College, 2001.

⁴³ See, e.g., OCR Letter to South College, 2001.

⁴⁴ <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>

⁴⁵ See, e.g., OCR Letter to South College, 2001.

⁴⁶ OCR Letters to Boston University, 2003

⁴⁷ This should not be interpreted as an endorsement of zero-tolerance policies by OCR or NCHERM

address the underlying discrimination complaint, i.e., the need for the institution to make the victim whole, restoring her or him to their pre-deprivation status. This has interesting implications in many areas, but one of note is the need to address retaliatory grading with an administrative grade change procedure. Most colleges and universities have this capacity, but some still do not, and Title IX is a strong argument for why that lack of capacity needs to change.

- *Clarify and Empower the Intersection of Sexual Harassment and Sexual Assault*

This is more art than science, but many campuses incongruously charge students for engaging in sexual misconduct without charging them with sexual harassment, though by committing sexual misconduct they have by definition committed a form of sexual harassment (in the form of unwelcome sexual advances – the courts almost always hold that one instance of sexual assault is severe enough to create a hostile environment). We shouldn't bury sexual misconduct in a sexual harassment policy and it seems that OCR expects colleges and universities to charge with both.⁴⁸ The art here is ensuring that boards do not default to sexual harassment as a lesser offense when they ought to be remedying the incident as a sexual assault or rape.

Does an Equitable Process Require a Victim-Centered Outcome?

Yes and no. The law requires that our outcomes protect our communities. And, if you find the respondent to be in violation for an offense governed by Title IX, we must also assure that we accord the victim the remedies required by federal law:

- 1) Bring the discriminatory conduct to an end;
- 2) Take steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct;
- 3) Restore the victim to his or her pre-deprivation status, to the extent practical and possible.

Thus, community protection and remedying discrimination must become our top priorities. Education, development and rehabilitation necessarily take a back seat in outcomes, though this may be hard to accept. The three guidelines above should make many common sanctions suspect. In satisfying Title IX, there is a very real clash with some of the typically educational and developmental sanctions of student conduct processes.⁴⁹ In fact, sanctions for serious sexual misconduct shouldn't be developmental. They should protect the victim and the community. That's the point at which development ends and a different priority must control. Why? The research of David Lisak is one of the most compelling reasons. Lisak is a forensic psychologist and professor at the University of Massachusetts, Boston. Lisak's 2002 study on undetected campus rapists⁵⁰ found that 63% of the campus offenders were repeat offenders and that 91% of the offenses identified were committed by repeat offenders.

So, unless you can distinguish whether an offender is one of the 63% of repeat perpetrators, or one of the 37% of one-time perpetrators (and you can't), can you really afford to take a chance with the safety of your community?

⁴⁸ OCR Letter to Temple University, 2007.

⁴⁹ We are troubled when we hear Conduct administrators ask about what "educational sanctions" we suggest instead of suspension and expulsion. This is indicative of a mindset that ignores the reality that suspension and expulsion can be very educational and developmental for an individual, particularly one still at the dichotomous stage of student development.

⁵⁰ http://www.crisisconnectioninc.org/pdf/undetected_rapist.pdf

When we provide conduct trainings, we find it helpful to remind the boards, committees and panels we train of a line from the movie *The Usual Suspects*, “The greatest trick the devil ever pulled was convincing the world he didn’t exist.” We ask those boards, committees and panels to pull back the wool that may be covering their eyes. Despite the fact that our students are bright, or from good families, or have never been in trouble before, when they insist in the face of a conduct charge that it was just a misunderstanding, they’re not a rapist, she’s a woman scorned, she’s just being vindictive, it’s only regretted sex, and he was drunk, too, we go soft. Student development becomes offender enabling. Boards want to give the benefit of the doubt to a fresh-faced young man who has his whole life ahead of him. And, they prey on our instincts as educators, and our human sympathies, and count on our sanctions to give them the benefit of the doubt.⁵¹ One quarter suspension. One semester. Maybe two. The student convinces the Board, so that on many campuses we won’t separate them permanently until they’ve raped twice. Is that what our field stands for? We let them back in assuming our sanctions have somehow changed them because we are deeply invested in the bedrock belief that developmental sanctions change people.

But, in an egregious case, can anything short of separation achieve the aims of points one and two above? What about suspending for some period of time? Does time change behavior? Can we verify that it has? Suspending upon the satisfaction of conditions, or the demonstration that return is a safe decision might be more appropriate. Suspending the offender until the victim graduates is misguided. It assumes a contextual conflict, and that no one else is at risk. The research of our field does not support that assumption. It is not the job of a college or university to try to rehabilitate a sex offender, and very little research supports the notion that such rehabilitation is either possible or effective.⁵² And while the risk of the student moving on to another institution is very real, it is real whether the student is suspended or expelled. Don’t let them withdraw when facing charges, and note the sanctions on their records or transcripts.

Sanctioning sex offenders is about protecting the community, and remedying discrimination. Educating the offender has to come second. We’re fond of telling NCHERM clients, “if you’re considering not separating an offender, or you’re willing to let one back in, you also have to be willing to fix him up with your own daughter on a date, because by reinstating him, you’re vouching for his safety.” Are you that sure? You’re in essence fixing him up with someone else’s daughter, whose safety is your responsibility.

Conclusion

If you read our Whitepapers, you probably get all of these ideas already. Yet many on our campuses do not. To get their attention, we need to learn how to recast stalking, relationship violence, sexual harassment and sexual assault as issues that our presidents, vice presidents, trustees and boards can relate to. They care about retention, graduation rates, student success and alumni giving. Those today exemplify return on investment for the corporate university. According to dozens of studies, gender violence impacts 25% to 50% of our male and female college student populations. Some of those who are victimized may be able to maintain their grades and course load, but most do not. Most suffer academically. Some reschedule exams and assignments. Some reduce their academic loads. Some change majors. Some transfer. Some lose their loyalty to their school of choice. Some take their own

⁵¹ This discussion pertains only to sanctioning, not to findings. We do not believe that an offender is in violation until evidence shows that it is more likely than not (admittedly a low evidentiary threshold) that s/he has violated the policy.

⁵² <http://psychservices.psychiatryonline.org/cgi/content/full/50/3/349>

lives. As a climate issue easily affecting half our students, why isn't addressing gender violence a cornerstone of retention and student success initiatives? Being harassed, abused, stalked or assaulted interferes with the institutional mission, the acquisition of knowledge and the academic enterprise. Let's redouble our efforts so that our communities recognize what we already know: that meaningful prevention is essential to the academic enterprise and a vital tool of completion and retention.

About the Authors

Brett A. Sokolow, J.D., is the Managing Partner of NCHERM. He has 13 years of experience as a higher education attorney, and has served over 1,500 colleges and universities as a consultant. NCHERM represents sixteen public, private and community colleges as legal counsel. Sokolow is a widely-acknowledged expert on Title IX, and often serves as an expert witness in school and college sexual misconduct, harassment, gender discrimination and other Title IX cases. Sokolow is the author of eleven books and more than fifty articles, including publications in peer-reviewed journals. Sokolow has written the conduct codes of more than sixty colleges and universities, and he has trained conduct boards on more than 500 college and university campuses. He is the Executive Director and past founding president of NaBITA, the National Behavioral Intervention Team Association. He serves on the Board of Trustees of the Council on Law in Higher Education, and on the ACPA Commission for Student Conduct and Legal Issues Directorate Body. Brett@ncherm.org.

W. Scott Lewis, J.D. is a Partner with NCHERM and Associate General Counsel for Saint Mary's College in Indiana. Scott brings over fifteen years of experience as a student affairs administrator, faculty member, and consultant in higher education. He is a frequent keynote and plenary speaker, nationally recognized for his work on Behavioral Intervention for students in crisis and distress. He is noted as well for his work in the area of classroom management and dealing with disruptive students. He presents regularly throughout the country, assisting colleges and universities with legal, judicial, and risk management issues, as well as policy development and implementation. He serves as an author and editor in a number of areas including legal issues in higher education, campus safety and student development, campus conduct board training, and other higher education issues. His recent works include, "The Returning Veterans" (Magna Publications) and "College and University Liability for Violent Campus Attacks" (Journal of College and University Law, April 2008). He is a member of NASPA, ACPA, CAI, SCCPA, and serves on the Board of Directors for ASCA as its 2010 President. He completed his undergraduate work in Psychology and his graduate work in Higher Education Administration at Texas A&M University and received his Law degree and mediation training from the University of Houston. Scott@ncherm.org

Sandra K. Schuster, J.D., is a Partner with NCHERM. Ms. Schuster has over twenty years experience in college administration and teaching. Prior to practicing law, she was the Associate Dean of Students at The Ohio State University and served as a faculty member at The Ohio State University, Miami University and Columbus State Community College and created the Developmental Education Program for Miami University. She has presented extensively on legal issues in higher education, and provides consultation on many legal issues to colleges and universities throughout the country. She has provided assistance with policy review and development of sexual harassment and sexual misconduct policies for students and employees for many institutions across the country, including a recent invitation by the Iowa Board of Regents to develop student sexual misconduct policies for all the State of Iowa higher education institutions. Ms. Schuster is co-author of, "The First Amendment: A Guide for College Administrators", and contributing author to "Campus Conduct Practice". Saunie@ncherm.org

More about the authors and electronic copies of this Whitepaper can be found at www.ncherm.org