

the potential conflict or bias involves the Title IX Coordinator.

#### h. Recordkeeping

In implementing these procedures, records of all allegations, investigations, and resolutions will be kept by the Title IX Coordinator indefinitely in the electronic Title IX Coordinator database.

### **STATEMENT OF THE RIGHTS OF THE REPORTING PARTY**

- The right to investigation and appropriate resolution of all credible reports or notice of sexual misconduct or discrimination made in good faith to university officials;
- The right to be informed in advance of any public release of information regarding the incident;
- The right of the reporting party not to have any personally identifiable information released to the public, without his or her consent.
- The right to be treated with respect by university officials;
- The right to have university policies and procedures followed without material deviation;
- The right not to be pressured to mediate or otherwise informally resolve any reported misconduct involving violence, including sexual violence.
- The right not to be discouraged by university officials from reporting sexual misconduct or discrimination to both on-campus and off-campus authorities.
- The right to be informed by university officials of options to notify proper law enforcement authorities, including on-campus and local police, and the option to be assisted by campus authorities in notifying such authorities, if the student so chooses. This also includes the right not to report, if this is the victim's desire;
- The right to have reports of sexual misconduct responded to promptly and with sensitivity by campus law enforcement and other campus officials.
- The right to be notified of available counseling, mental health, victim advocacy, health, legal assistance, student financial aid, visa and immigration assistance, or other student services for victims of sexual assault, both on campus and in the community;
- The right to a campus no contact order (or a trespass order against a non-affiliated 3<sup>rd</sup> party) when someone has engaged in or threatens to engage in stalking, threatening,

harassing or other improper behavior that presents a danger to the welfare of the reporting party or others;

- The right to notification of and options for, and available assistance in, changing academic and living situations after an alleged sexual misconduct incident, if so requested by the victim and if such changes are reasonably available (no formal report, or investigation, campus or criminal, need occur before this option is available). Accommodations may include:
  - Change of an on-campus student's housing to a different on-campus location;
  - Assistance from university support staff in completing the relocation;
  - Transportation accommodations;
  - Arranging to dissolve a housing contract and pro-rating a refund;
  - Exam (paper, assignment) rescheduling;
  - Taking an incomplete in a class;
  - Transferring class sections;
  - Temporary withdrawal;
  - Alternative course completion options.
- The right to have the institution maintain such accommodations for as long as is necessary, and for protective measures to remain confidential, provided confidentiality does not impair the institution's ability to provide the accommodations or protective measures.
- The right to be fully informed of campus policies and procedures as well as the nature and extent of all alleged violations contained within the report;
- The right to ask the investigators to identify and question relevant witnesses, including expert witnesses;
- The right to review all documentary evidence available regarding the allegation, including the investigative report, subject to the privacy limitations imposed by state and federal law, at least 48 hours prior to the hearing;
- The right to be informed of the names of all witnesses who will be called to give testimony, at least two business day prior to the hearing, except in cases where a witness' identity will not be revealed to the responding party for compelling safety reasons (this does not include the name of the alleged victim/reporting party, which will always be revealed);
- The right not to have irrelevant prior sexual history admitted as evidence in a campus hearing;
- The right to regular updates on the status of the investigation and/or resolution.

- The right to have reports heard by hearing and appeals officers who have received [at least eight hours of] annual sexual misconduct training;
- The right to a panel comprised of representatives of both genders, if a panel is to be used;
- The right to preservation of privacy, to the extent possible and permitted by law;
- The right to meetings, interviews and/or hearings that are closed to the public;
- The right to petition that any member of the conduct body be recused on the basis of demonstrated bias;
- The right to bring a victim advocate or advisor of the reporting party's choosing to all phases of the investigation and resolution proceeding;
- The right to provide evidence by means other than being in the same room with the responding party;
- [The right to have the university compel the presence of student, faculty and staff witnesses, and the opportunity (if desired) to ask questions, [directly or indirectly], of all present witnesses [including the responding party], and the right to challenge documentary evidence].
- The right to be present for all testimony given and evidence presented during any resolution-related hearing;
- The right to make or provide an impact statement in person or in writing to the hearing officers following determination of responsibility, but prior to sanctioning;
- The right to be informed of the outcome and sanction of the resolution process in writing, without undue delay between the notifications to the parties, and usually within 1 business day of the end of the process;
- The right to be informed in writing of when a decision of the university is considered final, any changes to the sanction to occur before the decision is finalized, to be informed of the right to appeal the [finding and] sanction of the resolution process, and the procedures for doing so in accordance with the standards for appeal established by the university;

### **STATEMENT OF THE RESPONDING PARTY'S RIGHTS**

The rights of the responding party should also be prominently indicated. These should include, among others particular to your university:

- The right to investigation and appropriate resolution of all credible reports of sexual misconduct made in good faith to university administrators;
- The right to be informed in advance, when possible, of any public release of information regarding the report.
- The right to be treated with respect by university officials;
- The right to have university policies and procedures followed without material deviation;
- The right to be informed of and have access to campus resources for medical, health, counseling, and advisory services;
- The right to be fully informed of the nature, policies and procedures of the campus resolution process and to timely written notice of all alleged violations within the report, including the nature of the violation and possible sanctions;
- The right to a hearing on the report, including timely notice of the hearing date, and adequate time for preparation;
- The right to review all documentary evidence available regarding the allegation, including the investigative report, subject to the privacy limitations imposed by state and federal law, at least 2 business days prior to the hearing;
- The right to be informed of the names of all witnesses who will be called to give testimony, at least 2 business days prior to the hearing, except in cases where a witness' identity will not be revealed to the responding party for compelling safety reasons (this does not include the name of the reporting party, which will always be revealed);
- The right not to have irrelevant prior sexual history admitted as evidence in a campus resolution process;
- The right to have reports heard by hearing and appeals officers who have received [at least 8 hours of] annual training;
- The right to petition that any member of the conduct body be recused on the basis of demonstrated bias;
- The right to a panel comprised of representatives of both genders if a panel is to be used;
- The right to meetings, interviews and hearings that are closed to the public;

- [The right to have the university compel the presence of student, faculty and staff witnesses, and the opportunity to ask questions, [directly or indirectly], of all present witnesses, and the right to challenge documentary evidence].
- The right to have an advisor of their choice to accompany and assist in the campus resolution process.
- The right to a fundamentally fair resolution, as defined in these procedures;
- The right to make or provide an impact statement in person or in writing to the hearing officers board following any determination of responsibility, but prior to sanctioning;
- The right to a decision based solely on evidence presented during the resolution process. Such evidence shall be credible, relevant, based in fact, and without prejudice;
- The right to be informed of the outcome and sanction of the resolution process in writing, without undue delay between the notifications to the parties, and usually within 1 business day of the end of the process;
- The right to be informed in writing of when a decision of the university is considered final, any changes to the sanction to occur before the decision is finalized, to be informed of the right to appeal the [finding and] sanction of the resolution process, and the procedures for doing so in accordance with the standards for appeal established by the university.

**THE NCHERM GROUP/ATIXA WHITEPAPERS  
& WRITINGS**

***The Challenge of Title IX Responses  
to Campus Relationship and Intimate Partner  
Violence***

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# The Challenge of Title IX Responses to Campus Relationship and Intimate Partner Violence

## INTRODUCTION

In 1997 and again in 2001, the Office for Civil Rights (OCR) issued a Guidance Document,<sup>26</sup> which established a recommended response protocol a school or college should follow in compliance with Title IX<sup>27</sup>. The most fundamental elements of this response protocol included: engaging in action to stop sex/gender-based harassment; act to prevent the recurrence of the harassment; and take steps to restore victims of sexual harassment to their pre-deprivation status.<sup>28</sup> In the OCR Guidance, the term “sexual harassment” was defined broadly to encompass not only hostile environment, quid pro quo and retaliation, but also sexually violent and assaultive behavior.

A decade later, a national press conference by the Vice President of the United States and the Secretary of the U.S. Department of Education, and accompanying publication of a Dear Colleague Letter<sup>29</sup> by the Department of Education set educational entities on a “fast track” to revision of policies, protocols and responses in compliance with Title IX. The April 4<sup>th</sup>, 2011 Dear Colleague Letter was followed by passage of the Violence Against Women Act Reauthorization, incorporating many of the provisions of the Campus Sexual Violence Elimination Act (SaVE Act) on March 7<sup>th</sup>, 2013. Now known as VAWA Section 304, this law brings more than 70 new mandates for institutions to address not only sexual assaults, but also dating and domestic violence and stalking. The Spring of 2014 ushered in additional guidance from the White House Task Force on Sexual Assault and additional clarification of mandated responses by the OCR<sup>30</sup>. Finally, in October 2014, the Department of Education clarified the application of the legal mandates of VAWA Section 304 with the publication of the Final Regulations<sup>31</sup> implementing the act, with enforcement set to begin on July 1, 2015.

In a sincere effort to comply with the original 2001 Guidance from the OCR and the subsequent law, regulations, and recommendations from various federal entities (and some state-based legislation as well), institutions created response protocols to meet the “prompt and effective” response requirement of Title IX. Between 2011 and 2014, Institutions were further challenged by an unprecedented number (more than 97) of sexual discrimination investigations by the OCR based on complaints filed with the OCR by survivors, and subsequently lawsuits filed by accused students (approximately 50 at this writing). As a result, institutions sharpened their tools and reexamined best practices in an effort to be timely and responsive to stopping the harassing behavior. Greater use of interim suspensions, no-contact orders, and prompt investigations resulted. Unfortunately, in circumstances involving domestic/dating/relationship violence (referred to hereinafter as intimate partner violence or IPV), these good-faith actions exposed the recipient of psychological abuse, physical control or relationship violence to the potential for greater harm.

This whitepaper sets forth an in-depth exploration of the unique issues posed in addressing intimate partner violence on college campuses, including facts and statistics; the importance of understanding and implementing an initial risk assessment; and the need to develop a personalized safety plan for each person exposed to the risk of interpersonal violence. The NCHERM

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<sup>26</sup> United States Department of Education, Office for Civil Rights. (2001). *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties*. Washington, DC.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* See e.g.: p. 10.

<sup>29</sup> United States Department of Education, Office for Civil Rights. (2011). April 4, 2011 “Dear Colleague Letter”. Assistant Secretary for Education, Russlyn Ali, Washington, DC.

<sup>30</sup> White House Task Force to Protect Students From Sexual Assault (2014). *Not Alone: The First Report of the White House Task Force to Protect Students From Sexual Assault*, Washington, DC.

<sup>31</sup> 34 CFR 688 (2014).



Group is pleased to add a recognized victim's rights expert, Juliette Grimmett, as a co-author to this whitepaper, whose insights have helped us to deepen our understanding of this issue and its complexities.

As we delve into the topic, we think it is important to explicitly recognize that IPV impacts people of all races and cultures, ethnicities, nationalities, religions, ages, abilities, sexual identities, gender identities, gender expressions, and socioeconomics. All people can experience IPV, whether gay, lesbian, bisexual, or heterosexual. Cisgender (someone who identifies as the gender and/or sex they were assigned at birth), transitioning and transgender individuals are also impacted. We cannot assume that everyone's experience of IPV is the same, and we must take account of the context of IPV to best understand it and frame our efforts at prevention and response. Finally, this whitepaper uses the term "victim" as a convention, and all such uses should presume the reference is to both victims/survivors, without any intention to omit either.

## **OVERVIEW OF DATING/DOMESTIC VIOLENCE IN THE CAMPUS SETTING**

IPV and the related harm of stalking occur at alarming rates on the nation's college campuses. We offer statistics below from a number of reputable studies to offer context, rather than to touch off a debate on prevalence. Whether the studies are correct or not, one act of IPV or stalking on a college campus is one too many, and worth our efforts. How many actually occur really only impacts how hard we need to work to reduce that number. There are unique situations on college campuses that complicate the issues surrounding IPV and stalking. These include:

### **Accessibility/Proximity**

- The victims may continue to live in fear after an assault when their abuser may live in the same residence hall or attend the same classes.
- Students' predictable routines (i.e., class schedule, extracurricular activities, on-campus job, housing, and parking) may make it easier for their stalker to predict and/or track their movements.

### **Social Environment**

- Students may have a small or limited social network on campus once they leave home. This can be especially impactful in "closed communities" such as Greek life, ROTC, athletics, Student Government Association, etc.
- Students may feel trapped by the social networks and/or the closed environment of many campuses. This can be especially impactful in campuses with first-year (or longer) live-on requirements, rural/urban campuses with high residential percentages, etc.
- Social networking sites can provide easy access for abusers to attempt to (even anonymously) intimidate or control their partners/targets.

### **Family/Home**

- Students may feel isolated from their personal support networks and unable to access help because they are away from home. This is especially true if students are also from a different state or country.<sup>32</sup>
- Students might fear their parents may find out and take them out of school. They may be less likely to report as a result.
- Students and their families may not be able to afford supportive services.

### **Training/Knowledge**

- Administrators may not fully understand the scope of the problem and/or may not react appropriately (e.g., if professors and/or teachers are notified about IPV or stalking between two students).

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<sup>32</sup> Knowledge Networks for Liz Claiborne Inc. (2011). *College Dating Violence and Abuse Poll*. Break the Cycle.

- Students may not define their experience as abusive, particularly with verbal and emotional abuse that does not rise to physical violence.
- Support services and/or prevention and awareness programming may be lacking.

### **Facts/Stats**

A historically silent problem, IPV is now being identified on college campuses at rates similar to community incidence, as highlighted by the following data:<sup>33</sup>

- Forty-three percent of dating college women report experiencing some violent and abusive dating behaviors including physical, sexual, tech, verbal or controlling abuse.<sup>34</sup>
- One in five college women (22%) report actual physical abuse, sexual abuse, or threats of physical violence.<sup>35</sup>
- The same study revealed that more than half of college students surveyed (57%) said that it's difficult to identify dating abuse, and 58% said that they don't know what to do to help someone who is a victim of dating abuse.
- Twenty-one percent of students have experienced dating violence by a current partner while in college, and 32% have experienced such violence by a previous partner.<sup>36</sup>
- Among college students who were sexually assaulted, 35% of attempted rapes, 22% of threatened rapes, and 12% of completed rapes occurred on dates.<sup>37</sup>
- College women experienced the highest rates of stalking, compared to other groups of women, at 13% in one study, and of those stalked, 42% were stalked by a boyfriend or ex-boyfriend.<sup>38</sup>
- According to the Department of Justice, college-age women experience the highest rate<sup>39</sup> of nonfatal intimate partner violence, compared to other groups.
- More than 40% of LGBTQ+ (lesbian, gay, bisexual, transgender, queer, questioning and other non-binary, non-heterosexual identities) college students report that they have experienced intimate partner violence in their current relationships, a rate that generally aligns with the rate of violence among heterosexual couples.<sup>40</sup>
- Nearly one-third of college students reported having physically assaulted a dating partner in the previous 12 months.<sup>41</sup>
- According to the Department of Justice, college-age women experience the highest rate<sup>42</sup> of nonfatal intimate partner violence, compared to other groups.
- More than 40% of LGBTQ+ college students (lesbian, gay, bisexual, transgender, queer, questioning and other non-binary, non-heterosexual identities) report that they have experienced intimate partner violence in their current relationships, a rate that generally aligns with the rate of violence among heterosexual couples.<sup>43</sup>
- Nearly one third of college students reported having physically assaulted a dating partner in the previous 12 months.<sup>44</sup>

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<sup>33</sup> Carr, J. (2005). *American College Health Association Campus Violence White Paper*. [Journal of American College Health Association](#).

<sup>34</sup> Knowledge Networks, 2011.

<sup>35</sup> Knowledge Networks, 2011.

<sup>36</sup> Sellers, C., 1996.

<sup>37</sup> Fisher, B. Cullen, T., Turner, M. (2000). *The Sexual Victimization of College Women*. U.S. Department of Justice.

<sup>38</sup> Id.

<sup>39</sup> U.S. Department of Justice, Bureau of Justice Statistics. Intimate partner violence [online]. [cited Jan. 7, 2011]. Available from <http://www.bjs.gov/content/pub/pdf/fvv.pdf>.

<sup>40</sup> Edwards, K. and Sylaska, K. (2014). Intimate Partner Violence Among LGBTQ+ College Students. *The Carsey Institute at the Scholar's Repository*.

<sup>41</sup> Knowledge Networks, 2011.

<sup>42</sup> U.S. Department of Justice, Bureau of Justice Statistics. Intimate partner violence [online]. [cited Jan. 7, 2011]. Available from <http://www.bjs.gov/content/pub/pdf/fvv.pdf>.

<sup>43</sup> Edwards, K. and Sylaska, K. (2014). Intimate Partner Violence Among LGBTQ+ College Students. *The Carsey Institute at the Scholar's Repository*

<sup>44</sup> Knowledge Networks, 2011.

### **Issues/Risks Posed**

There are a wide range of challenges to understanding the issues and risks posed by IPV on college campuses. At the heart of understanding these risks is the destructive nature any form of violence has on the stability and safety of the community itself. Threats of violence can be seen as a stone hitting an otherwise calm pond of water, the ripple effects reaching far beyond the initial disruptive action.

Working outward from the center of the initial incident of IPV, we can see the harm caused to the victims of such attacks. This harm often manifests in multi-faceted obstacles and difficulties, including:

- Physical (cuts, bruises, sexual trauma and intoxicants);
- Emotional (feeling overwhelmed, fearful, confused, angry, guilty and shameful);
- Psychological (depression, anxiety and post-traumatic stress symptoms);
- Financial (loss of work, loss of home, inability to find employment, medical costs, and loss of financial aid);
- Social (isolation, arguments and accusations);
- Academic (missed classes, lack of ability to complete assignments, failed classes, and social anxiety in the classroom).

Many of these layered and multi-faceted issues are well understood and researched pertaining to the primary impact of IPV. While it is necessary to start with the victims and provide services directly following IPV, it is essential to understand that the issues and risks posed to the campus community reach far beyond the victims.

Secondary effects create another impact circle. Such effects are equally multi-faceted and also raise concerns for the campus community. Without drawing away from the centrality of the experience of the victims, it is important to also move outward from the primary impact to address secondary impact. Indeed, it is common for friends, classmates, teammates, professors, staff and others who have witnessed or heard about instances of IPV to struggle with how to respond. These secondary effects are equally multi-faceted. Those trying to assist the victims of IPV may encounter reluctance on the victims' part to seek help, make changes, make an on-campus Title IX report, or file off-campus criminal charges. Those assisting may have their own personal experiences with IPV and may experience triggering from their own trauma. They may be conflicted about how to help and may, at times, feel helpless in cases where the victims are either unwilling or unable to take steps to keep themselves safe. Many victims choose to stay, in spite of the abuse, and details as to why can be found in the Emerging Best Practices section below.

While the central focus must be on victims, another circle of impact involves those who are directly involved in responding to these cases on campuses. While secondary or even tertiary in focus, there can be an emotional and mental toll on those called to be first responders (e.g., advocates, resident advisors and campus police); to investigate (e.g., Title IX staff, conduct officers, and the Deans of Students); and to offer support to victims (e.g., counselors, advocates, and health services personnel). Campuses would be wise to encourage self-care and facilitate opportunities for first responders to process their own interactions. Further, administrators balance the safety concerns for victims and the greater student body, along with the fear of future lawsuits that may impact their careers and livelihoods. While not approaching the difficulty faced by victims, school officials also must juggle the various public affairs impacts and the associated scrutiny in the aftermath of these events.

### **TITLE IX RESPONSE: CONFLICTS BETWEEN OCR STANDARDS AND VAWA SECTION 304**

As administrators strain to balance the myriad competing needs and interests, they also must balance the guidance from the Department of Education, Congress, and the courts, which do not speak with one voice. Indeed, the nature of IPV is, at times, seemingly in conflict with direct guidance from OCR and recent amendments to the Clery Act.

Title IX requires institutions to take prompt and effective action to stop the harassment, remedy its effects and prevent its recurrence. Title IX also relies on a notice-based standard, meaning that institutions have an obligation to address sex or gender discrimination of which they becomes aware (or, in some cases, could or should have been aware). While victims/survivors have

a voice in whether their institution proceeds with an investigation, OCR has clearly indicated that in cases where there is threat of further harm or violence or where there is imminent community danger, the institution may have an obligation to proceed with the investigative and disciplinary process regardless of a victims' wishes.<sup>45</sup> Additionally, the VAWA Section 304 Amendments to the Clery Act indicate that Campus Security Authorities must report all incidents of dating and domestic violence that occur within an institution's Clery geography in the Annual Security Report. At times, the institution may also have to issue a Clery Act Timely Warning to the campus if there is a serious ongoing threat to the safety of a member or members of its community. It would therefore seem that in many cases of IPV, an institution with jurisdiction over the matter has an obligation to proceed with an investigation and a disciplinary process, which can pose a significant problem given the nature of many IPV situations.

IPV is often both cyclical in nature and prone to spiraling. The vast majority of perpetrators of IPV engage in the behaviors over and over again and the severity of their actions tends to increase over time. Additionally, unlike most victims of sexual violence, IPV victims are often placed in harm's way if they report the matter to law enforcement or campus authorities; indeed, upon learning of the report or of the fact that police or authorities are involved, abusers may blame and try to punish their victims through additional violence. The abusers may view their victims' attempts to seek help as threatening, and as a result of feeling cornered, may act desperately. Accordingly, institutional administrators should approach incidents of IPV differently than they approach other forms of sex and gender harassment or discrimination, and differently than they would approach some forms of stalking as well.

In most cases, administrators should proceed with notifying abusers of an IPV situation only once a comprehensive risk assessment has been conducted, and a solid safety plan and other support mechanisms such as counseling have been put into place for the victims. This creates a space where the victims can begin to heal, knowing that their institution is taking action to keep them and the greater campus community safe. In cases where a formal institutional response (adjudicatory or investigatory) may be necessarily delayed, the institution's remedial action plan is typically implemented as soon as possible.

This approach may slow an institution's investigative process and may create some discomfort for those who feel the institution is exposed by not investigating immediately, failing to implement no-contact orders, interim suspensions, or going to the police. But ensuring that victims are safe and have means and opportunity to remain safe is consonant with the intent and spirit of Title IX and the Clery Act, even if it does not fit OCR's traditional view of notice triggering a prompt investigation in cases where threats or the risk of further harm are in play.

To be clear, OCR would not want a campus to apply frameworks developed for responding to sexual violence when a safe response to IPV or stalking requires a different approach. OCR's guidance to date has been specific to sexual violence, not IPV. To behave otherwise is to place the institution's fear of possible regulatory enforcement over the legitimate safety of members of its community. Are there instances of IPV where an institution may need to proceed immediately or issue a timely warning under the Clery Act? Yes. But such instances should be more rare than with the other forms of harassment and discrimination covered under Title IX and crimes under the Clery Act. One of the key areas of distinction is that OCR's seeming preference for remedial no-contact directives in sexual violence cases needs to be fundamentally challenged in IPV contexts.

#### **CHALLENGES WITH "NO-CONTACT" AND SIMILAR RESTRICTIVE ORDERS**

In IPV situations, college and university administrators will want to be particularly thoughtful and cautious about how and when they choose to use no-contact orders (NCOs).

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<sup>45</sup> U.S. Dept. of Education: Office for Civil Rights (2014). *Questions and Answers on Title IX and Sexual Violence*, pp.18-20. Washington, DC.

### **What is an NCO?**

Colleges and universities have the authority to issue campus-based directives to members of the campus community to have no contact with one or more persons. NCOs are often compared with civil restraining orders, which are often called Protection from Abuse orders (PFAs) when issued by magistrates and municipal authorities, though NCOs do not have the force of law. Civil restraining orders are often issued on request, though some jurisdictions mandate some showing of proof that a PFA is necessary. Campus NCOs are usually offered to victims, typically without more than an assertion of need, and are enforced, in the case of students, by the campus conduct process.

They are remedial tools for defusing conflict, creating distance, and inhibiting the recurrence of violence. They can limit proximity, distance, interaction and/or the nature of contact. They can carve out safe space, but are not guarantees. To be effective, NCOs rely on voluntary compliance by the parties on whom they are imposed. They are enforced after the fact, for the most part, so should not be seen as preventive, though they may have deterrent value. Some critics worry that NCOs can make victims feel safer while doing little in reality to make them factually safer. Research on the efficacy of NCOs is sparse at this time, so while they are common, there is no reason to see them as a panacea. They are a tool among many remedial options, not a default or an automatic choice, and should be employed only when appropriate.

### **OCR's Position on NCOs**

OCR seems to favor NCOs in sexual violence cases, but has cautioned that unduly restricting victims could create a retaliatory effect, and/or could result in the victims being deprived of access to campus programs and facilities, thus compounding the discriminatory effects of the underlying violence. OCR has not made public pronouncements regarding the application of NCOs to IPV situations, so we don't really know the government's views on their remedial value in this venue. IPV situations can include elements of sexual violence, emotional abuse, stalking, bullying and harassment, but an NCO that may be effective in a sexual violence situation may be quite dangerous in an IPV case, or interfere with an investigation in a situation involving a stalking allegation. We should, therefore, not assume their applicability translates across all issues covered by Title IX.

### **The ATIXA Position on NCOs for IPV cases**

Our general advice about these orders is to decide on their value and scope on a case-by-case basis. We are reluctant to see campuses use generic or templated NCO's, and hesitant to implement mutual NCO's unless a victim specifically wishes to be restricted. Our concerns exist on several levels. If a campus imposes restrictions on victims, it has to be willing to sanction them for violating the terms of the NCO. Not only are campuses hesitant to sanction victims, but we fear that doing so will often be seen to be — or in fact will be — retaliatory. Additionally, generic or templated NCOs may not speak to the risks or needs of particular situations.

For the NCO to be of optimal effectiveness, it needs to be custom-crafted to suit the situation, even if that is more work. It also critical to ensure that the victims fully understand all aspects of the NCOs and/or the reasons for not issuing the NCOs. We also have to be willing to modify the terms as circumstances change and modifications are warranted. Custom-crafting allows us to consider whether the NCO is to be unilateral or mutual. If mutual, is it to impose equal restrictions or skewed restrictions? For example, if the responding party cannot contact the reporting party, can the reporting party contact the responding party? If so, under what circumstances? If the reporting party does contact the responding party, can the responding party reply to that contact?

As we custom-craft NCOs, we can determine if we will limit contact, proximity, distance and/or interaction, or some combination. Perhaps restrictions on interaction are appropriate for class-based provisions of the NCO, and proximity restrictions are more appropriate for out-of-class or social interactions. Will the NCO apply on campus or off, or both? How long will the NCO endure? Should it be modified after an investigation? Should it be durable, so that it applies after sanctions have been satisfied, or should it end once sanctions are complete? Who should be notified about the NCO? Faculty? Campus police? RAs? Enforcement terms and consequences should also be made clear.

### **Emerging Best Practices**

Campuses would be wise to develop criteria delineating when an NCO is appropriate. Certainly, there is a need to think critically about what kind of restriction(s) we want to deploy, and it is smart to consult the victims for their input as we

define the terms and scope of the NCO. We should also keep the feasibility and enforceability of the NCO in mind. For example, use of an NCO can be problematic when the students involved in an IPV case are co-habiting.

In IPV cases, leaving the relationship is the most unsafe time for victims. Many victims try multiple times to leave before successfully doing so. Additional barriers to leaving include financial dependence, and fear for the safety of relatives, loved ones or children. Further, the abusers often threaten suicide if the victims leave the relationship. In the campus environment, the potential for returning to abusive partners could call into question whether an NCO is the right tool for that situation, or what the campus would do if NCOs were violated by the victims. Co-habiting partners are unlikely to abide by an NCO, and we must also consider the well-documented risks that PFAs are known to provoke violent and potentially deadly attacks from abusive partners when learned of by the abusers. The same can be true for campus-based NCOs.

Similar to the work of domestic violence shelters and agencies, campuses would be wise to impose NCOs only when viable safety plans are already in effect and demonstrably working. Have we addressed the reporting parties' financial dependence issues, need for shelter, need to access personal property, or safeguard possessions or children? Are there visa or citizenship concerns for international students? If so, and if the victims are sincerely ready and able to cut ties, we can help to relocate the reporting parties from abusive co-habitation environments, whether on- or off-campus. But, it is not advisable to force separation with an NCO or inform abusers of their victims' intentions to leave until we can reasonably assure that it is safe for the victims to do so.

It is common to suspend violent students or restrict those students from campus housing, but we cannot do so at the risk of imperiling the victims. Timing is critical, and the campus Title IX Coordinator can be a very powerful ally for abuse victims who are ready to leave and need campus resources to make a safety plan work. Swiftly taking action to restrict abusers from campus as we act to extricate the victims from those individuals' grasp needs to be a carefully orchestrated maneuver, coupled with the risk assessment that follows in this paper.

At the same time, campus administrators often don't feel they can ethically allow victims to return to known abusive living environments on campus if the victims are not ready to leave (or if a safety plan is still being implemented), and may need to enhance security patrols and oversight by campus residential life staff when partners either co-habitate on campus or both live on-campus, even if they reside in separate spaces.

Similar concerns apply to stalking situations, many of which arise when former intimate partners cannot release their abusive fixations on their victims. Where stalkers are not intimate partners, NCOs can be of some utility, but other tools should be considered and perhaps prioritized over the NCO. As mentioned above, there is also value in considering whether an NCO would tip stalkers off about investigations, and thereby jeopardize the ability of the campus to apply a more effective long-term solution than an NCO can afford.

Finally, when barring abusers from campus, extra precautions should be taken beyond the common campus practice of implementing a trespass order or persona non grata (PNG) status. Abusers may not heed such restrictions, creating a false sense of security for the reporting parties. When and if abusers are barred from campus, appropriate officials and administrators must be informed of such bans and given physical descriptions of the abusers and details of those individuals' vehicles or other salient identifiers that can give campus authorities an early alert to their unauthorized presence. If the victims live on campus, it is recommended to supply the front desk of their residence halls with photos of the abusers. The campus must be willing to seek prosecution of the trespassers swiftly and effectively if the abusers are unwilling to adhere to the restrictions that have been imposed.

## **RECANTATION**

While not a common occurrence, campus administrators should be aware of the risks related to recantation of allegations of IPV. Once victims are brave enough to come forward, some quickly regret doing so. They often experience mixed feelings about reporting the abuse of an intimate partner. They can experience betrayal by family or friends who don't support them.

More worrying, they can be pressured to recant by their abusers once the abusers find out that their partners have told authorities about the abuse.

Recanting allegations of IPV is not an automatic signal to campus administrators to wind down an investigation or to declare it a “false complaint.” Instead, it is incumbent upon administrators to try to find out from the reporting parties why they may have recanted, and to doubt whether a recantation in fact means that the individuals are not being abused.

Often, the victims become inaccessible or unresponsive to campus administrators because they are being threatened, intimidated, and/or told not to communicate with officials. If that is occurring, campus officials need to redouble efforts to contact the victims, patrol in the vicinity of the victims, provide outreach, and keep a close eye on abusers who may be becoming more protective, abusive, and cloistered as they feel that officials are closing in on them or preparing to take action on the abuse reports.

### **MUTUAL DV HARM (NO CLEAR COMPLAINANT)**

We are starting to see a trend of cases where abuse is mutual between the parties in an intimate relationship, regardless of gender, occurring in heterosexual and same-sex relationships. As we work with colleges and universities across the country, we are also seeing an increase in violence committed by female students toward both male and female partners. This may be a result of increased reporting, increased incidence, or both, as the trend is merely anecdotal. Assumptions that the male partners in a relationship are the abusers are not always borne out by investigation.

The resolution of conflicts cannot simply be a matter of determining which students make it to university officials first. As with other Title IX cases, if students come forward to report abuse, we initiate investigations. Investigations can reveal that the victims are also abusers and the abusers are also victims. We are also seeing cases where abusers allege being victims in order to cover up abuse those individuals are in fact perpetrating.

Campuses need to address and remedy all instances of IPV; it is not a matter of who started it, who exacerbated it, or whose abuse was worse. Parties in conflict often try to influence us to think that these considerations are important, but they don't excuse abuse, and mutual abuse doesn't cancel out the misconduct of either partner. Instead, campuses will want to approach the abuse of each responding party as a distinct potential policy violation.

If Mark and Steve are abusive to each other in their relationship, and Mark alleges that Steve has burned him with cigarettes, Steve should be investigated and charged with that abuse as a violation of the code of conduct. If Steve responds that Mark has hit and pushed him, Mark should be investigated and those allegations that he has violated policy should be resolved separately, possibly in their own individual proceedings<sup>46</sup>. At the same time, we have to address the concerns raised above about continuing conflict and abuse between them. Sometimes, reports of abuse are made once a relationship ends, and other times we learn of the abuse while the relationship is continuing in some form.

Finally, we must address self-defense in abuse cases, and encourage campuses to do so with carefully crafted policies. Abuse victims often have a need and a right to defend themselves during attacks. Without unnecessarily escalating the violence, victims should be permitted by campus policy to engage in some reasonable level of self-defense without fear of being charged with violent acts themselves.

### **CONDUCTING RISK ASSESSMENTS**

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<sup>46</sup> In some instances, the investigations and adjudicatory proceedings may be joined as well as concurrent. This should only be done with advice and consent of the Title IX Coordinator.

The core element of any risk assessment is approaching each incident or system with a structured approach that allows the person or group assessing the risk to minimize or remove subjectivity and bias from the process.

Structured Professional Judgment<sup>47</sup> is one approach to systematically and objectively assess risk. Hart's work focuses on better understanding the factors that could increase risk, as well as identifying and implementing the inhibiting factors that can reduce risk. The process can be outlined in seven steps:

1. Gather information,
2. Determine the presence of risk factors,
3. Determine the relevance of risk factors,
4. Develop a good formulation of violence risk,
5. Develop scenarios of violence,
6. Develop a case management plan based on those scenarios, and
7. Develop opinions about violence risk.

Expanding on these:

1. Gathering information might seem obvious, but there is no more important step in risk assessment. We are limited in our risk assessment by the information we have at hand. This process involves a full and complete survey of the individuals and systems involved. This could include climate surveys, on-line portals for incident reports, linkages to the campus BIT, going beyond victims' self-reported accounts, and better training for front-line staff and faculty, etc.
2. Determining risk factors involves identifying the potential risk factors present within the system. This may involve focusing analysis on known environmental, cultural or cohort-based higher risk areas such as: first year students, Greek life, athletics, ROTC, band, certain departments, or international students. In terms of IPV, risk factors for abusers may include a lack of empathy, a misogynistic attitude, past experience with IPV in the family system, poor communication, a pattern of escalating threatening behaviors, using or abusing alcohol or other drugs, and unemployment or other life events that cause stress<sup>48</sup>. Surveys, research, and/or analysis of past incidents may also contribute to campuses having a better understanding of the risk factors specific to certain populations.
3. Determining the relevance of risk factors is the process of assessing how the identified risk factors apply to the situation at hand. When the risk factors have been identified and understood, the next step is to sort through those that are germane. A risk factor may be present, but it may not be relevant to the current situation. For example, while there is statistical evidence to suggest that IPV and sexual assault may be more prevalent with first-year students, this may not be the case at a particular institution.
4. Developing a good formulation of risk involves asking the questions, "Why might this behavior occur? What is the cause and/or motivation behind it?" This process involves assessing the driving forces behind an individual's or system's behaviors in an attempt to understand the progression and better establish a process to prevent violence. For example, a group of students may be driven by their shared past sexually addictive behaviors. This shared experience becomes a running contest among members and drives negative behavior.
5. Developing scenarios of violence requires the assessor to create a descriptive list of potential negative situations that might develop in the future. This imaginative process involves developing multiple scenarios of future IPV that might

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<sup>47</sup> Hart, S., & Logan, C. (2011). *Formulation of violence risk used evidence-based assessment: The structured professional judgment approach*. In P. Sturmey & M. McMurrin (Eds.), *Forensic case formulation* (pp. 83–106). Chichester, England: Wiley-Blackwell.

<sup>48</sup> Department of Justice, 2011; Max W, et al. (2004). *The economic toll of intimate partner violence against women in the United States*. *Violence and Victims* 19(3): pp. 259–72.; Black MC, et al. (2011). *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention; 2011.



occur. This might involve aggressors focusing on new relationships that could be at risk or escalating threats or ultimatums in existing relationships, especially based on the victims' desire to seek help or having done so already.

6. Based on the scenarios developed, mitigation plans are developed to reduce the risk. These plans are designed to address the risk and involve multi-disciplinary teams that include counseling, conduct, Title IX staff, behavioral intervention, and law enforcement/security working collaboratively.
7. Developing opinions about violence risk involves creating an overall estimation of how IPV occurred and moving a plan forward to address the risk of reoccurrence. This should happen at the individual level as well as on the systems level. It is especially critical in the closed communities that have been identified as having higher risk levels.

## **DEVELOPMENT OF A SAFETY PLAN**

A safety plan, informed by a risk assessment like the Structured Professional Judgment described earlier is a practical guide that helps lower victims' risk of being hurt by their abusers. It includes information specific to the victims' lives that will help keep the victims safe. A good safety plan helps the victims think through lifestyle changes that will help keep those individuals as safe as possible on campus, in the residence hall, in the workplace, and other places the victims go to on a regular basis.

Institutions should work with individual victims to customize a safety plan that will address daily movements, commitments, and support systems. It should reflect, to the extent possible, risk management strategies related to the reported behavior patterns, and the abusers' work or school locations. In order for this safety plan to work, victims will need to fill in personalized answers, so that they can use the information when it will be most needed. The victims should be instructed to keep their safety plans in accessible but secure locations and should consider giving a copy of their safety plans to trusted individuals.<sup>49</sup> Nothing in this or any safety plan is meant to imply that it is the job of victims to keep themselves safe, or that they are to blame if they do not. Abusers are responsible for abuse, and the failure of a safety plan is not an opportunity for victim-blaming.

### **EXAMPLE OF A SAFETY PLAN**

#### **Staying Safe on Campus:**

- The safest way for me to get to class/work is: \_\_\_\_\_.
- When leaving campus, I will drive the following route to my apartment:
- If my abuser follows me from campus, I will plan to do the following:
- These are places on campus where I often run into my abuser: \_\_\_\_\_  
\_\_\_\_\_. I will try to avoid those places as much as possible or try to go when my abuser won't be there.
- There may be places on campus where it is impossible to avoid my abuser. If I need to go to one of those places, I can make sure a friend can go with me. I will ask \_\_\_\_\_, and/or \_\_\_\_\_. Or, I will contact a campus escort to accompany me.
- If I feel threatened or unsafe when I am on campus, I can go to these public areas where I feel safe (dining hall, quad, etc.): \_\_\_\_\_ and/or \_\_\_\_\_.
- I could talk to the following people if I need to rearrange my schedule or transfer residence halls in order to avoid my abuser; or if I need help staying safe on campus: \_\_\_\_\_.
- If I feel confused, depressed or scared, I can call the following friends, family members or professional support resources:  
Name: \_\_\_\_\_ Phone #: \_\_\_\_\_  
Name: \_\_\_\_\_ Phone #: \_\_\_\_\_

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<sup>49</sup> RespectisLove.org

If I am living with my abuser I will engage in the following plan:

- If I decide to leave, the safest way to do so in an emergency is: (Retreat plan: Doors? Windows? Stairwells?).
- I will keep money, car keys, extra cell phone and charger, copy of drivers license, copy of birth certificate, change of clothes, medication, hidden but ready and put them: \_\_\_\_\_, or I will leave extra copies of these with: \_\_\_\_\_.
- I will create the following code word and share it with my family and friends in case I need help: \_\_\_\_\_. They will know this means to find me at:\_\_\_\_\_.
- If I need to leave quickly I will arrange with \_\_\_\_\_ to stay with them.

For Emergencies:

- For emergencies: 911
- Campus Law Enforcement station (phone, location).
- Campus Health Center (phone, location).
- Additionally, I can call the National Dating Abuse Helpline at 1-866-331-9474 for support and guidance.

Recommendations for ongoing safety considerations:

These are things I can do to help keep myself safe everyday:

- I will carry my cell phone and important telephone numbers with me at all times.
- I will ask my friends to keep their cell phones with them while they are with me in case we get separated and I need help.
- I will keep in touch with someone I trust about where I am or what I am doing.
- I will stay out of isolated places and try to never walk around alone.
- If possible, I will alert campus security about abuse in my relationship so that a No-contact, No-trespass Order or other protective factor can be put into place.
- I will avoid places where my abuser or my abuser's friends and family are likely to be. I will keep the doors and windows locked where I live, especially if I am alone.
- I will avoid speaking to my abuser. If it is unavoidable, I will make sure there are people around in case the situation becomes dangerous.
- I will call 911 if I feel my safety is at risk.
- I can look into getting a protective order.
- I will remember that the abuse is not my fault. I deserve a safe, healthy relationship.

Recommendations for staying safe on-line and with the cell phone:

- Set all online profiles to be as private as they can be.
- Save/keep track of any abusive, threatening or harassing comments, posts, or texts.
- Never give personal passwords to anyone.
- If the abuse and harassment do not stop, change usernames, email addresses, and/or cell phone number.
- Do not answer calls from unknown, blocked or private numbers.
- See if the phone company can block the abuser's phone number.
- Do not communicate with an abuser using any type of technology if unnecessary; any communication can be recorded and possibly used against me in the future.
- I can use a safety app on my smart phone, such as Circle of Six.

## CONCLUSION

While best practices are always hard to identify, especially in an emerging field of study, much of what we have offered here is intended to bring some coherence to disparate bodies of knowledge about IPV on college campuses. We hope that you will use this whitepaper to help inform and design your campus IPV protocols.

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# ***EQUITY IS SUCH A LONELY WORD***

**THE 2014 WHITEPAPER  
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and ATIXA**

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## **ABOUT The NCHERM Group, LLC & ATIXA**

- The NCHERM Group, LLC is a law and consulting firm dedicated to systems-level solutions for safer schools and campuses. The NCHERM Group, LLC represents 50 colleges and universities as outside counsel and deploys twenty-four consultants to higher education on a wide range of risk management topics.
- ATIXA, the Association of Title IX Administrators, is a membership association and leading source of expertise and professional development on Title IX for school and college officials with over 1,300 active members. ATIXA has certified more than 3,000 school and campus Title IX Coordinators and Investigators through its comprehensive training programs.

## **THE FOURTEENTH NCHERM WHITEPAPER**

Every year since The NCHERM Group, LLC was founded, we have published an annual Whitepaper on a topic of special relevance to college administrators and attorneys.

- 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 21<sup>st</sup> 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 10<sup>th</sup> Anniversary Whitepaper was entitled *Gamechangers: Reshaping Campus Sexual Misconduct Through Litigation*.
- In 2011, NCHERM published *Deliberately Indifferent: Crafting Equitable and Effective Remedial Processes to Address Campus Sexual Violence*.
- For 2012, the topic of the NCHERM Whitepaper was *Suicidal Students, BITs and the Direct Threat Standard*.
- For 2013, we offered a top ten list, *The Top Ten Things We Need to Know About Title IX... That the DCL Didn't Tell Us*.

For 2014, the topic we have chosen is, *"Equity is Such a Lonely Word."*

## Equity Is Such a Lonely Word

If you've figured out that the title of this year's Whitepaper is a riff on the Billy Joel song, "Honesty," you're officially old. Meaning, you have the wisdom of the ages, of course. And, that's a good thing, because navigating Title IX compliance has come to require the wisdom of Solomon. On our campuses, equity is the lonely word because it is so commonly misunderstood and misapplied. Think of the chorus to the song, adapted to suit our title:

*Equity* is such a lonely word  
Everyone is so untrue  
*Equity* is hardly ever heard  
And mostly what I need from you<sup>50</sup>

If your campus is untrue in its treatment of equity, this Whitepaper will be a practical guide to realizing full equity. We may give lip service on our campuses to being communities of inclusion, diversity and social justice, but without real equity, we don't walk our talk. If your campus is not equitable it may be because:

- You think equality is the same as equity
- You've built your investigation and resolution mechanisms into castles of due process
- Institutional policies and procedures are constituency-based, thereby privileging certain constituencies (faculty, staff, students) more than others
- Procedures to remedy different forms of discrimination are widely disparate from each other
- Your resolution processes are equitable, but your remedies are not
- Your remedies are equitable, but your resolution procedures are not
- Victims' rights are an afterthought
- You impose contact restrictions on victims that are too broad or punitive
- You think equity should only apply to issues of sexual violence
- On your campus, only the respondent is entitled to participate in an appeal, grievance, tenure revocation hearing or arbitration of a disciplinary action
- Your inability to revoke tenure within 60 days perpetuates discriminatory conduct
- Your resolution procedures don't recognize patterns and prior misconduct as evidence of present misconduct
- State laws or education codes inhibit Title IX compliance, and haven't been updated since the April 2011 DCL

## Equity Defined

Equity should not be confused with equality or being equal, though we often see the two confused. Most often, we see the concept of equity applied in our society to Courts of Equity, whose mission is fairness. Courts of Equity look to make someone whole again when they have faced a deprivation of some kind. Equity encompasses fairness, justice and most precisely, fairness under the circumstances. Fairness under the circumstances is intended to make someone whole, in this context when sex or gender is the basis for some form of deprivation or discrimination. Equality is defined as "the quality or state of being equal,"<sup>51</sup> or "the quality or state of being '[the same for each person].'"<sup>52</sup> Certainly equality is one potential path to equity, but not the only one. You can also be equally inequitable. For our purposes, equity can mean access, it can mean equal opportunity, it can mean advantage, and it can mean reparation. An example can illustrate the larger concept of equity.

When the Founding Fathers crafted the Constitution, they decided to count each Black person as 3/5 of a person.<sup>53</sup> Slavery and the 3/5ths compromise institutionalized inequity and inequality as the law of the land. When slavery ended, and emancipation

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<sup>50</sup> "Honesty" by Billy Joel: "Honesty is such a lonely word, Everyone is so untrue, Honesty is hardly ever heard, And mostly what I need from you."

<sup>51</sup> <http://www.merriam-webster.com/dictionary/equality>

<sup>52</sup> See *Id.* and <http://www.merriam-webster.com/dictionary/equal>

<sup>53</sup> This compromise, widely cited today as an institutionalization of inequity, was in its historical context not what it may seem. Free states did not want to count black slaves at all for the purposes of population. Slave states wanted full counting of slaves to get greater representation in the House of Representatives and Electoral College. 3/5 was the compromise, but counting a slave as a full human would actually have helped the slave-state cause and would have continued to perpetuate the institution of slavery. Special thanks to colleague Charles Schnur for the edifying history lesson on this point.



came, Black people acquired greater freedoms, but not equity. Maybe 4/5ths? It was not until various civil rights acts were enacted and enforced that Black people acquired “equal” - 5/5ths status - legally. But, equity was still not achieved with 5/5ths (equality was). A Black American was legally equal to a White American, but history had created two Americas. Equity required not equality, but advantage, to attempt to right historically-derived oppression. Thus, racial preferences and Affirmative Action gave some African Americans the opportunity of 6/5ths (legally, though we know the result did not fully achieve the legal goal) as a way to achieve wholeness through equity, when equality was not enough.

Under Title IX, the mandate for institutions is for gender/sex equity, not equality. This Whitepaper will examine and propose means for achieving the requisite equity in institutional policies, procedures and practices. For those steeped in the due process-based adversarial model - that focused almost exclusively on the rights of the accused - shifting to or creating an equitable process may sound or feel 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. Thus, equity ends up feeling like a shift to victim’s rights, even though it is not. Ultimately, the pendulum should shift to the middle, rather than to either party, but because victims have been historically been accorded 3/5 of the rights of an accused individual (or less), and victims are typically women, equity may require institutions to recalibrate the pendulum to right the historical imbalance. An equitable process on many campuses will force a victim focus, but only as a casualty of history. Let us explain.

### **Creating (and De-constructing) Castles of Due Process**

In February 1960, six African American students at Alabama State College were expelled after a sit-in at a public lunch counter in the basement of the Montgomery County Courthouse. The students were arrested for civil disobedience and Alabama State summarily expelled them from school. Their offense was to join the civil rights movement and to participate in peaceful non-violent protests against segregation. The students received no notice of the charges and no opportunity to present their story or provide Alabama State with evidence or witnesses of any kind. The expelled students filed a federal lawsuit against Alabama State, arguing a breach of basic due process – fairness. In Dixon v. Alabama State Board of Education<sup>54</sup>, the Fifth Circuit Federal Court of Appeals found in favor of the expelled students, holding that public institutions must provide students facing expulsion with at least notice of the charges and an opportunity to be heard. Stated differently, the Dixon court laid the foundation for what have become castles of due process on our campuses, built to protect accused students, by creating the minimum legal standards applicable to a public institution wishing to expel its students.

The Dixon decision also gave birth to the field of campus judicial affairs (now typically known as student conduct administration), which became tasked with upholding the now-legally required banner of due process. Indeed, Dixon ushered in what we call the “due process era for campus discipline.” Dixon exemplified arbitrary campus action against accused students, ultimately giving directionality to the focus of the due process era. For the next four decades, the focus for the courts as well as institutions became the rights of the accused and the need to protect the accused from arbitrary campus action. Subsequent court decisions added to and embellished the rights conferred by Dixon.

In reaction, colleges and universities began constructing castles of due process, often looking to criminal courts as analogous processes for what due process was supposed to look like. Judicial affairs policies and procedures expanded rampart-style around the due process castle to “protect” the accused. It didn’t take long for due process to morph from the minimal protections of Dixon to a sentiment from administrators that “we should” provide protections beyond what the courts required. Then began the voluntary expansion, as we added a moat, a drawbridge, keeps, and even crenellations to our castles. Legalisms came to rule the day. An opportunity to be heard became a hearing. A hearing became a panel. A panel acquired a chair. The panel afforded presumptions of innocence, rights to attorneys, rights to remain silent. Rights, rights, rights. But, we forgot about victims along the way. This is ironic, given that the students in Dixon were victims, and it is only the procedural posturing of Dixon that resulted in a recognition of their rights as accused students, rather than as victims.

The due process castle therefore protected only some students, leaving many of the most vulnerable unprotected. As we noted three years ago, “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.”<sup>55</sup> Ironically, Dixon - a case that began with a handful of students seeking equity on the basis of race - set in motion a castle construction project that today hinders and

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<sup>54</sup> 294 F. 2d 150 (5th Cir. 1961).

<sup>55</sup> NCHERM 2011 Whitepaper, “Deliberately Indifferent”. Available at:

<http://ncher.org/documents/2011NCHERMWHITEPAPERDELIBERATELYINDIFFERENTFINAL.pdf>

inhibits our ability to provide for equity by and through the conduct process.<sup>56</sup> If most of us started our careers in judicial affairs during the era of due process, we'll retire from our positions in student conduct during the equity era.

### **Major Construction – The Judicial Board**

One of the primary components of our castles of due process is the Judicial Board.<sup>57</sup> Indeed, to combat the oft-arbitrary decision-making of a single campus administrator as seen in Dixon, colleges and universities constructed jury-like “Judicial Boards” comprised of some combination of students, faculty and/or staff, with a Judicial Board Chair acting in a role similar to that of a judge in a jury trial. The Judicial Board renders findings of guilt on the basis of evidence presented at a hearing; often Judicial Affairs personnel, who in some cases serve in a quasi-prosecutorial role, present the evidence.

The Judicial Board gained traction following Dixon and really picked up steam following the U.S. Supreme Court's declaration in Goss v. Lopez<sup>58</sup> that students accused of violating institutional policies should be “given some kind of notice and afforded some kind of hearing.”<sup>59</sup> While the structure, form and nature of this hearing have been largely left up to institutions, most have gravitated toward creation of some form of Judicial Board. Over time, the use of a Judicial Board became synonymous with fulfilling the Dixon and Goss requirements.

Judicial Boards had and have their place, but acquired a thoughtless inertia that is problematic today. Had there been a hearing in the Dixon case or the Goss case, it would likely have been one in which the institution and the accused students were the only parties. Adversarialism requires a two-party system, and these early cases were one-party cases. Alcohol violations, vandalism, arson, and other one-party cases work well with Judicial Boards, but then Judicial Affairs started to take on cases of hazing, fighting, sexual violence and other forms of interpersonal conflict. We applied the model we had. After all, we had built a castle out of it. We began to apply the Judicial Board to resolution of interpersonal disputes, and that is when the due process model took on the adversarialism it is known for today. In a two-party system, the complainant and the respondent make their cases, with the Judicial Board as referee. No one stopped to ask the question whether two-party cases should be handled the same as single-party cases. Had we been more thoughtful about it then, many of us would acknowledge it was an error, and that a better model was possible. No one asked whether Dixon and Goss should apply to two-party cases, we just kept building the castle.

While some defend Judicial Boards as the most impartial means of complaint resolution, Judicial Boards are not, by their nature, equitable. As a field, student affairs has placed window dressing on many quasi-judicial processes, referring to judicial affairs officers with a much improved term, “student conduct administrators.” We have substituted the term “Hearing Panel” or “Hearing Board” in place of “Judicial Board” and render findings of “responsibility” rather than “guilty,” but the core functioning of such boards remains largely unchanged.<sup>60</sup> Much like calling dorms “residence halls,” changing the label improves and better reflects the nature and function of the facility, but it ultimately remains a dorm. Why, then, are we using an inequitable form of resolution to address violations whose very nature demands an equitable process?

We have assisted hundreds of colleges and universities with hundreds of sexual violence cases. One of the problems we have seen repeatedly is that victims of sexual violence either do not report or do not want to pursue their allegation because they do not want to go through a Judicial Board hearing. They feel, appropriately so, that such a process is skewed towards the accused. Further, the last thing they want to do is tell a panel of students, faculty or staff about one of the most horrific experiences of their life. Also, victims do not want to sit in a room and answer questions posed directly or even indirectly by their attacker. These results are shown consistently, in climate surveys, over and over again across campuses.

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<sup>56</sup> For example, the U.S. Department of Education and the U.S. Department of Justice recently criticized the University of Montana's student conduct process as focusing only “one the perpetrator, his or her due process rights, and resolving possible violations of the SCC” such that the process “does not adequately address the Title IX rights of the victim.” See U.S. Department of Education: Office for Civil Rights & U.S. Department of Justice: Civil Rights Division (May 9, 2013). *Investigation Report: University of Montana, Missoula*. Submitted to President Royce Engstrom and Lucy France. p. 13.

<sup>57</sup> Though more often referred to now in less criminalistics terms such as “Hearing Boards” or “Hearing Panels,” their function and construction remain fairly unchanged.

<sup>58</sup> 419 U.S. 565 (1975).

<sup>59</sup> *Id.* at p. 579.

<sup>60</sup> It should be noted that all of the authors are big supporters of the student conduct profession and the dedicated professionals who fill these roles.

Unfortunately, many campuses exacerbate the inequitable nature of hearing boards through poor or limited training, reliance on the judicial board as investigators rather than simply as finders of fact, allowing an accused to directly question the accuser and relegating the victim to the position of being a witness, rather than a complainant.

Recognizing these inherent and other inequities in conduct processes, institutions are making accommodations to give the victim some empowerment – such as using privacy screens, allowing a victim to testify remotely, and refusing to allow direct cross-examination by the accused. Such approaches make the campus judicial process slightly less onerous and intimidating, but accommodations cannot create equity out of an inherently adversarial process. Why should we continue to make elaborate accommodations to an inherently flawed process when we can reach fair, impartial and equitable resolutions through a more appropriate, civil rights model designed for equity? An analogy we commonly make in training is that we can make a car float if we need to, but if there's a boat around, isn't that the preferred tool for the task? We've been retrofitting cars, hoping they will float our boat.

Indeed, sexual violence, sexual harassment and sex/gender discrimination resolution processes should reflect the civil-rights based nature of these actions. By definition, a conduct process is not designed to make a victim whole again. It is designed to impose discipline via due process of law. We encourage institutions to supplant inherently inequitable existing castles with a civil rights investigation and resolution model. Who really needs a castle anymore when everyone is downsizing these days?

### **The Civil Rights Investigation Model**

Institutions need not go far to find such a process, as many already use a form of this model for employee discrimination complaints, particularly for issues involving Title VII.<sup>61</sup> A typical civil rights investigation model consists of an investigator or investigators performing a prompt, thorough and impartial investigation once the institution receives actual or constructive notice of an alleged violation. The investigator interviews the complainant and the respondent as well as all witnesses and, once the investigator feels they have gathered all available evidence, compiles an investigation report summarizing their investigation as well as the evidence provided by the parties and witnesses. The investigator then reviews relevant portions of their summary with all witnesses including the parties, to ensure the report constitutes a full and accurate report. The investigator then finalizes the report and forwards it to the relevant department for a finding, responsive actions and remedies.

In a pure civil rights investigation model, the investigator also renders a finding, meaning they make a determination of responsibility pertaining to each of the alleged violations. The referring department typically determines sanctioning in a “pure” model (e.g.: Human Resources, Student Affairs, Academic Dean or Department Chair). Variations occur in a number of a hybrid approaches:

1. The investigator's report serves only as a summary of all available evidence and is forwarded to an administrator or a hearing panel for a determination of responsibility and sanctioning; or
2. The investigator and responsible administrator collaborate to reach a finding; or
3. The investigator recommends a finding and/or sanction to the responsible administrator or panel.

For human resources professionals, the civil rights investigation model is very familiar, but Title VII does not dictate the application of equity in the same way as Title IX. Thus, there is still a learning curve for human resources professionals who need to employ equitable resolution via a civil rights investigation. The model is far more foreign to other campus constituencies because the castles of due process have spawned separate disciplinary processes for students, faculty and staff. These distinct policies and procedures serve as complicating factors to adopting and implementing a civil rights investigation and resolution model. In fact, the disparities across these constituent-based due process models create inherent equity issues on almost every campus, and speak to the benefit of unifying policy and procedure.

### **Scattered Policies and Procedures**

Institutions have come by their scattered policies and procedures in organic, often reactionary fashion – creating new policies and procedures for specific constituencies based on lawsuits and court decisions, new or amended laws, regulations, and administrative guidance, as well as through collective bargaining. Such influences and requirements have, at varying times, focused only on a specific constituency (e.g.: tenured faculty, students, unions) creating a patchwork of policies and procedures across the institution. Additionally, the policies and processes for each constituency have matured at different times and relied

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<sup>61</sup> See NCHERM 2007 Whitepaper, “...Some Kind of Hearing...”. Available at: <http://ncher.org/pdfs/2007-whitepaper.pdf>

on different laws and court cases, leaving institutions with kaleidoscopic policies and procedures. For many institutions and their constituents, this array of policies and procedures creates not just confusion and overlap but inequity for the parties involved.

In the most simplified sense, colleges and universities are comprised of two main constituencies: Employees and Students. In reality, institutions have dozens of constituencies, all of which are sub-categories of these two main groupings, many of which have differing policies and procedures pertaining to civil rights-based violations. Institutions are currently littered with constituency-based policies and procedures, many of which give little thought to equity between complainant and respondent, having developed primarily with protections solely for the accused in mind. Further, in the current structuring of many college and university processes addressing matters such as sexual harassment and sexual violence, a victim's rights in the process are dependent upon the identity of their attacker. This only further disempowers victims and sends the overt message that the accused's rights trump those of the accuser, creating a situation that is fundamentally inequitable.

A related wrinkle exposing deep-seeded strands of inequity arises with cross-constituency complaints, where the complainant and the respondent belong to different constituencies, as in the case of an employee-on-student complaint, or a student-on-faculty complaint. In such situations, the complainant is again beholden to the policies and procedures in place for the respondent's constituency group, which have not been intentionally designed to accommodate cross-constituency complaints, and for which specific training is rarely provided. As we noted in our 2013 Whitepaper:

Under student conduct policies revised in accordance with the [Dear Colleague Letter], a faculty accuser of a student has rights as a complainant in the student conduct process that they likely lack when accusing another faculty member of the very same misconduct. Compare your processes and ask why a faculty member should be more protected as an accused person in the faculty process than if they were a complainant in the student conduct process accusing a student? Such inequity defies logic and any reasonable justification.<sup>62</sup>

The April 2011 OCR Dear Colleague Letter<sup>63</sup> (DCL) indicated that institutions should aim for a 60-day resolution from the time of receipt of notice through the completion of the investigation of the complaint. "Investigate" in OCR-language encompasses everything from notice through conclusion of the appeal, and they use that terminology because they see an investigation-based resolution as the best path to an equitable outcome. At many institutions, a tenured faculty member accused of sexual violence is subject to an accused-centric investigative and resolution process that that is likely to be complex, multi-layered, steeped in court-like due process rights and which confers multiple levels of appeal. The likelihood that it is resolved within 60 days is almost zero, leaving the complainant without resolution and full remedy for a period of time so excessive as to run afoul of the bounds of equity.

Title IX does not have a tenured faculty exception or exemption; institutions are under the obligation to investigate and resolve Title IX complaints within +/-60 days regardless of the identity of the complainant and the respondent. Simply allowing a complaint against a faculty member, by definition, to take longer to resolve than an identical complaint against a student is inequitable. Similarly, campuses that permit grievance processes face the same challenge. Those processes allow employees to grieve discipline by the institution. They are a form of appeal. They are inequitable as constructed, because they remove the complainant from any involvement in this "appeal" process. They are also inequitable if the complainant cannot also file a grievance, and inequitable if only employees can file grievances, and students cannot. Further, campuses where collective bargaining agreements permit employees to submit discipline decisions to binding arbitration foster yet another layer of appeal that fails to be equitable for all of the same reasons as cited with respect to grievance processes.

Failing to adjust and amend policies and procedures accordingly is therefore inequitable. The clearest and indeed the only equitable path for institutions, is to shift to a unified set of policies and procedures utilizing a civil rights investigation model.

### **The Case for Unified Policies and Procedures<sup>64</sup>**

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<sup>62</sup> NCHERM 2013 Whitepaper, "The Top Ten Things We Need to Know About Title IX ... That the DCL Didn't Tell Us", p.5. Available at: <http://www.ncher.org/wordpress/wp-content/uploads/2012/01/2013-NCHERM-Whitepaper-FINAL-1.18.13.pdf>

<sup>63</sup> United States Department of Education, Office for Civil Rights. (2011). *April 4, 2011 "Dear Colleague Letter"*. Assistant Secretary for Education, Russlyn Ali, Washington, DC.

<sup>64</sup> This section borrows directly and heavily from our 2013 Whitepaper, "The Top Ten Things We Need to Know About Title IX (That the DCL Didn't Tell Us)." We repeat much of this information because we feel it is central to achieving equity and we believe the field is more ready this year to accept the principles and reasoning behind unified policy and process to address all

In determining how and whether a campus incorporates the principles of equity into its policies, procedures and practices, campuses really have three potential avenues to explore.

The first is to maintain the legacy processes for students, faculty, and staff (collective bargaining units, etc.). As described above, this disparate kaleidoscope is historically accused-centric and riddled with inequities, unnecessary and inefficient duplications, disparate protections, and does nothing to solve the problems of cross-constituency complaints. Absent major and comprehensive adjustments, this avenue runs the risk of continued non-compliance with Title IX as well as the violating the principles of equity. Piecemeal adjustments of sufficient magnitude and scope to achieve equity are, in reality, unlikely because of the adversarial underpinnings of the resolution structures.

The second avenue is to take all of the resolution processes a campus utilizes and, while keeping them separate, move them to mostly align with each other and reflect similar rights, privileges, benefits and opportunities. This is a better approach than the first, but retains some of the inequity problems for matters such as cross-constituency complaints and effective oversight by the Title IX Coordinator. This avenue also maintains potentially disparate protections that can undermine equity based on vested interests (e.g., the faculty won't approve the change, and we can't change their processes unless they agree to the changes). This approach leaves institutions with three or more parallel processes to manage and oversee – processes distinguished only by the constituency of those involved – and only solves some of the problems raised by cross-constituency complaints.

The third avenue is to pursue a unified policy and process that governs all sex or gender discrimination complaints for all faculty, students and staff. In fact, the model we innovated<sup>65</sup> allows resolution of all forms of discrimination using this approach, not just sex and gender. Frankly, equity applies to all discrimination, so using this approach only for sex and gender discrimination is a DCL-reactive decision. This unified approach supports the notion that the definitions of and procedures governing the violation of discrimination policies should not differ between constituent groups, rendering cross-constituency concerns inert. A unified policy addressing sexual misconduct and other forms of discrimination covers everyone with the same kind and degree of protection of their rights. Unification simplifies the investigation function and avoids duplicative training when there are multiple bodies all resolving the same kinds of complaints across the campus. Unification allows consistent sanctions and responsive actions for the same types of misconduct, whether a student, faculty or staff member commits the violation. Unification fosters collaboration across the departments that are stakeholders, including HR, student conduct, and academic affairs while retaining their needed voice in the resolution process. Critically, a unified process can also be essential to the detection and tracking of patterns of misconduct, to limit the frequency of repeat offenses that vex campuses. Each of these benefits supports what we are seeing as the expansion and empowerment of the Title IX Coordinator in the form of institutional equity officer.

The shift to unify policies and procedures across the institution is greatly supported by the central and crucial role played by the Title IX Coordinator. The role and function of the Title IX Coordinator at institutions requires a level of oversight pertaining to all Title IX-related policies and procedures. OCR's guidance has been quite clear: "The coordinator's responsibilities include overseeing all Title IX complaints and identifying and addressing any patterns or systemic problems that arise during the review of such complaints."<sup>66</sup>

Also making the case for a unified set of policies and procedures is the varied nature of Title IX related violations. The April 4, 2011 DCL commanded us to make processes related to sexual violence equitable, but that commandment applies to all behaviors covered by Title IX, not just sexual violence. It applies to sexual harassment, sex/gender-based stalking, relationship violence/Interpersonal violence, sex/gender-based bullying etc., when those behaviors have a discriminatory effect on the basis of sex/gender. Developing policies and procedures that apply equitable standards to resolve sex/gender-based hazing, but not other forms of hazing defies logic.

In its May 2013 Investigation Report pertaining to its Title IX and Title IV investigation of the University of Montana, the Department of Education's Office for Civil Rights (OCR) in conjunction with the Department of Justice (DOJ) expressed significant

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forms of civil rights based complaints. We have not cited directly to each segment pulled from the 2013 Whitepaper, as we found that the multitude of quotation marks and footnotes detracted from the flow of the paper. The 2013 Whitepaper can be accessed at: <http://www.nchem.org/wordpress/wp-content/uploads/2012/01/2013-NCHERM-Whitepaper-FINAL-1.18.13.pdf>

<sup>65</sup> Contact Marianne Price at ATIXA for details on the "One Policy, One Process Model" (1P1P). [Marianne@atixa.org](mailto:Marianne@atixa.org).

<sup>66</sup> April 4, 2011 DCL, p. 7.

concern about the multitude of divergent, conflicting and duplicative Title IX-related policies and procedures.<sup>67</sup> The Report noted that “the University has eight policies and procedures that explicitly or implicitly cover sexual harassment and sexual assault” and that “their sheer number and the lack of clear cross references among them leaves unclear which should be used to report sexual harassment or sexual assault and when circumstances support using one policy or procedure over another.”<sup>68</sup> OCR and DOJ noted that the multiple policies and procedures have “inconsistent and inadequate definitions of ‘sexual harassment’”<sup>69</sup> that also lead to both “confusion about when and to whom to report sexual harassment”<sup>70</sup> and “wide variation in who investigated and resolved complaints in sexual assault and harassment.”<sup>71</sup> As a solution, OCR and DOJ called for clearer, more uniform policies and procedures that encourage reporting and focus on the hallmarks of Title IX compliance: prompt and equitable.

Addressing sex/gender-based violations through a different process is also complicated by the fact that often the sex/gender-based elements of a violation are not apparent at the time of the complaint. Accordingly, institutions find themselves halfway through an investigative process that is not Title IX compliant only to find that they have to backtrack and attempt to duct tape equity onto what has already been done. It is much better to have a unified, equitable set of policies and procedures from the start and then allow the investigation to unfold through a uniform process. In fact, the Developmental Model Code of Student Conduct<sup>72</sup> published by The NCHERM Group in 2013 moves so far toward equitable resolution that the model contemplates the use of the civil rights approach for all conduct violations, not just those that are discriminatory.

## Remedies and Equity

One of the primary concepts in an equitable process is the provision of remedies. Remedies are primary instruments by which someone is made whole. An institution can have equitable policies and procedures, yet fall short of providing equitable remedies. The converse is also true: an institution can deploy equitable remedies, yet have policies and procedures that are not equitable. Procedural equity and outcome equity are both required.

Remedies take a number of forms and include interim measures, permanent measures, sanctions and directives. Informed by their castles of due process, institutions have historically implemented remedies inequitably. When approached by a complainant many institutions have, by default, inconvenienced the complainant, rather than the respondent. The due process logic is that one should not inconvenience the respondent or alter their schedule because there has not been any finding of misconduct. The agonizingly slow resolution of complaints has helped support this approach; if a complaint takes two months to resolve, institutions have felt they cannot inconvenience someone against whom an accusation has been made for so long. These approaches are antithetical to making someone whole again.

Often complainants are recipients of unnecessarily broad (and therefore potentially retaliatory) remedies such as a no contact directive. Certainly no contact directives are a valuable and oft-employed remedy, but this is one area where equity and equality are often improperly conflated, such that complainants and respondents are given identical directives and instructions. The DCL indicated that we must deconstruct part of the due process castle by more equitably employing remedies. Remedies are, by their nature, intended to restore the complainant to their pre-discrimination status. Yet directives and actions that unnecessarily restrict or amend the complainant’s behavior, schedule, movement etc., fail to achieve this requisite intent.

Equity requires fairness under the circumstances, which can and often should lead institutions to create skewed remedies that place more restrictions and requirements on respondents. Equity demands that complainants should be inconvenienced only as far as absolutely required to remedy the discrimination. The U.S. Supreme Court basically said as much in Davis v. Monroe County Board of Education.<sup>73</sup> Our default should no longer be to automatically inconvenience the complainant; we should instead examine of the totality of the circumstances and find the most equitable remedies available.

## Conclusion

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<sup>67</sup> Investigation Report: University of Montana, Missoula (May 9, 2013).

<sup>68</sup> *Id.* at p. 7.

<sup>69</sup> *Id.* at p. 8.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at p. 10.

<sup>72</sup> A Developmental Framework for a Code of Student Conduct: The NCHERM Group Model Code Project (2013). Available for free at [www.modelcode.wikia.com](http://www.modelcode.wikia.com)

<sup>73</sup> 526 U.S. 629 (1999).

Achieving sex and gender equity in education is more than an ephemeral goal; it is a mandate under Title IX. Unfortunately, the principles of equity are often missing in current campus complaint, investigation and resolution procedures as institutions have spent decades constructing accused-centric and constituency-based castles of due process. The result is a fractured kaleidoscope of policies and procedures addressing issues of discrimination and harassment. These scattered policies and procedures leave equity beyond the castle walls. There is a better way. It is time to rethink, recalibrate and restructure using the principles of equity – fairness under the circumstances – as a backdrop, and work towards one policy and one process to address all forms of discrimination in education. As we noted at the beginning, “Equity is hardly ever heard. And mostly what I need from you.”

## ABOUT THE AUTHORS

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# **The Top Ten Things We Need to Know About Title IX (That the DCL Didn't Tell Us)**

**THE 2013 WHITEPAPER**  
**Co-Published By**  
**The NCHERM Group, LLC AND ATIXA**

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## **ABOUT The NCHERM Group, LLC & ATIXA**

- The NCHERM Group, LLC is a law and consulting firm dedicated to systems-level solutions for safer schools and campuses. The NCHERM Group, LLC represents 35 colleges and universities as outside counsel and deploys twenty-four consultants to higher education on a wide range of risk management topics.
- ATIXA, the Association of Title IX Administrators, is a membership association and leading source of expertise and professional development on Title IX for school and college officials with over 1,000 active members. ATIXA has certified more than 2,000 school and campus Title IX Coordinators and Investigators through its comprehensive training programs.

## **THE THIRTEENTH NCHERM WHITEPAPER**

Every year since NCHERM (now The NCHERM Group, LLC) was founded, we have published an annual Whitepaper on a topic of special relevance to school and college administrators and attorneys.

The Whitepaper is distributed via The NCHERM Group and ATIXA e-mail subscriber lists, posted on The NCHERM Group and ATIXA websites and blogs 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 21<sup>st</sup> 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 10<sup>th</sup> Anniversary Whitepaper was entitled *Gamechangers: Reshaping Campus Sexual Misconduct Through Litigation*.
- In 2011, NCHERM published *Deliberately Indifferent: Crafting Equitable and Effective Remedial Processes to Address Campus Sexual Violence*.
- For 2012, the topic of the NCHERM Whitepaper was *Suicidal Students, BITs and the Direct Threat Standard*.

For 2013, we have chosen the topic *"The Top Ten Things We Need to Know About Title IX ... That the DCL Didn't Tell Us*.

Our top ten list was culled from a much longer list to reflect our 2013 priorities for this topic. Despite the “Top Ten” format, this Whitepaper does not rank the importance of Title IX topics. If it did, child abuse reporting, retaliation and pregnancy would surely have been included. Instead, *our* top ten list is framed around some of the more commonly misunderstood areas of Title IX practice we are seeing on campuses, allowing us to maintain the practical focus for which our Whitepapers have become well-known.

#### **THE TOP TEN LIST:**

1. Title IX applies to employees, too (and faculty members are employees!)
2. Title IX requires reconciling multiple campus resolution processes to create equity for faculty, students and staff
3. The equitable release of investigation and hearing outcomes to all parties
4. Promptness and the 60-day rule
5. Appropriately incorporating pattern and previous history evidence in our processes
6. Mandated reporting and mandatory reporters – who has to tell what, to whom, and when?
7. What role does consent of the victim play in whether or how the institution pursues notice of their victimization?
8. While the DCL addressed sexual violence, Title IX applies to any rule violation in which sex or gender-based discrimination occurs
9. Title IX and off-campus behavior – what can we, must we, and should we do?
10. Best Practices for reporting campus sexual misconduct to public safety and/or local police

#### **1. TITLE IX APPLIES TO EMPLOYEES, TOO (AND FACULTY MEMBERS ARE EMPLOYEES!)**

College and university administrators have been working diligently since April of 2011 to implement the mandates of the OCR Dear Colleague Letter addressing campus sexual violence under Title IX. We’re witnessing a sea change on this issue, touching campuses all across the country at the same time in an unprecedented way. We have much work to do, but we have come very far, very quickly. The dramatic increases in the number of reports of incidents by students on our campuses are evidence of the effectiveness of our efforts.

Yet, many campuses are still missing one key point about Title IX that went unremarked in the DCL, but must be acknowledged if we’re going to get Title IX right. Title IX applies to employees. You knew that already. Title IX controls an employee-on-student or student-on-faculty complaint of sex or gender discrimination, and you’ve adapted your policies and procedures accordingly. But that’s not the whole story.

Staff-on-staff complaints and faculty-on-faculty complaints, both of which are employee-on-employee situations, fall within Title IX. That has been settled law since the Supreme Court decided *North Haven v. Bell* 456 U.S. 512 (1982) thirty years ago. The mandates of the DCL apply to employees in much the same way as they apply to student-on-student cases, and they apply broadly -- not just to sexual harassment-- but to all forms of gender and sex-based discrimination, including stalking, relationship violence, bullying and sexual violence.

We’re not suggesting that Title VII doesn’t apply to an employee-on-employee complaint of sex or gender discrimination. It does. But, Title IX is an additional overlay, and colleges and universities must be compliant with both laws. We have made strides to bring equity to our campus student conduct processes. Rights, privileges, benefits or opportunities in those processes that are typically afforded to males are now also typically afforded to females, and vice versa. We need to carry those changes into the faculty and employee resolution processes as well, and into our renegotiations of our collective bargaining agreements.

#### **2. TITLE IX REQUIRES RECONCILING MULTIPLE CAMPUS RESOLUTION PROCESSES TO CREATE EQUITY FOR FACULTY, STUDENTS AND STAFF**

If your campus has modified policies and procedures in cases of cross-constituent complaints (faculty-on-student, for example), we want to provoke deeper questions about equity in all of your remedial processes. In 2012, the AAUP challenged the DCL’s mandate for the use of the preponderance of evidence standard believing that it would

make faculty vulnerable to accusations by employees and students. AAUP's stance is mystifying, given that in cases of faculty-on-faculty harassment or discrimination, the preponderance standard better protects the victim who in this case is also a faculty member whose protection the AAUP professes to ensure. And, in an equitable environment, why should one campus constituency be more or less protected than any other? Victims deserve as much protection of their rights as the accused does and this has not been the case on many campuses prior to the issuance of the DCL. More importantly, the application of Title IX to these cases means that we have to provide that equitable protection of rights on our campuses, regardless of interest group advocacy.

The AAUP has long championed multi-tiered, hierarchical hearing and appeals processes to protect accused faculty members. But, consider what value that model will have in an environment of Title IX equity today? Every chance to appeal for an accused faculty member must also provide a chance for the complainant to appeal as well. Five levels of appeal now afford no more protection to an accused employee than one level or two, because equitable appeals under Title IX cannot be unilateral, by definition. The more appeals there are in an equitable framework, the more vulnerable to accountability an accused employee may be. We've dispensed with one-sided due process protections in our student-related procedures, and now it will make sense to do so with our employee-related procedures as well. Title VII is silent on equitable procedures, but Title IX now speaks loudly and carries a big stick. Additional complexity is added by the fact that not all complaints are intra-constituency (student-on-student) or cross-constituency (employee-on-faculty), but are hybrids. Faculty members take classes; students teach them, and serve as our employees. The employee-student and the student-employee pose challenging questions of what policy and process will apply when there are multiple processes that could apply, all of which vary to some degree in the rights, privileges, benefits and opportunities they afford to their participants.

While the following example may be an outlier, it proves the point the one time it is relevant on any campus. Imagine the nightmare of the master degreeed non-tenure track faculty member who is taking doctoral classes, works part time in the rec center, serves as the graduate student rep to student government and plays a sport. That's potentially 5-6 separate processes that a complainant may have to endure to "be heard." It's obvious that no complainant would want to pass through such a gauntlet (you wouldn't) and explains why guidance on Title IX is compelling us to "clean up the mess" and merge the processes.

Title IX also poses an additional challenge to our tendency to resolve complaints based on role-defined rather than gender-defined rights. A faculty member accused in a faculty process has certain protections. Their faculty accuser may not under your current policies. But, under student conduct policies revised in accordance with the DCL, a faculty accuser of a student has rights as a complainant in the student conduct process that they likely lack when accusing another faculty member of the very same misconduct. Compare your processes and ask why a faculty member should be more protected as an accused person in the faculty process than if they were a complainant in the student conduct process accusing a student? Such inequity defies logic and any reasonable justification.

Accordingly, campuses really have three options in considering the implications of the DCL and its applicability to employees. One is to maintain legacy processes for students, faculty, and staff (collective bargaining units, etc.) that have historically been disparate and will remain so, though at the risk of non-compliance with Title IX guidance. A second option is to take however many resolution processes your campus utilizes and, while keeping them separate, move them to mostly align with each other and reflect similar rights, privileges, benefits and opportunities. A third and final option is to move to a unified single policy and process that governs all sex or gender discrimination complaints for all faculty, students and staff. Campuses could even use this model to address all forms of discrimination, not just those based on gender or sex.

The advantages of a unified policy and process are clear. Options one and two either create disparate protections that can undermine equity, or they create unnecessary and inefficient duplication of resources by leaving us to manage three or more parallel processes, distinguished only by the constituency of those involved (except when they cross constituencies or present a hybrid incident).

A unified policy addressing sexual misconduct and other forms of discrimination covers everyone equally with the same kind and degree of protection of their rights. A unified process can be centrally administered and overseen, often by expanding the Title IX Coordinator role in the form of an institutional equity officer. Unification simplifies the investigation function and avoids duplicative training when there are multiple bodies all resolving the same kinds of complaints across the campus. Unification allows consistent sanctions and responsive actions for the same types of misconduct, whether it is committed by a student, faculty or staff member. Unification fosters collaboration across the departments that are stakeholders, including HR, student conduct, and academic affairs while retaining their needed voice in the resolution process. Critically, a unified process can also be essential to the detection and tracking of patterns of misconduct, to limit the frequency of repeat offenses that vex campuses.

Ultimately, we believe unified models will become the standard accepted practice. For those who fear that campus cultures or politics will not accept a unified approach, we suggest that the momentum created by the DCL make may this the right window of time to champion such sweeping change. It will also be easier in the long run to fix it right the first time, rather than to band aid existing processes not designed for equity in the hopes they will suffice. If we wait, the OCR and the courts will continue to enforce, legislate and remonstrate with what we do in these instances until we end up at a single process. Our hope is that now is the time to envision what can and should be done, and to lay the groundwork for a unified policy and resolution model on your campus. A model policy and procedure is available from ATIXA.

### **3. THE EQUITABLE RELEASE OF INVESTIGATION AND HEARING OUTCOMES TO ALL PARTIES**

We feel it most instructive to focus separately on the finding, sanctions and rationale as three releasable pieces of information in Title IX complaints, and how and when they should be released to the parties to a complaint. Title IX requires institutions to share the “outcome” of the complaint in writing with the complainant. The DCL seems to cause confusion as to what “outcome” means, because it could potentially include the finding, the finding and sanction, or the finding, sanctions and rationale therefor. Ultimately, Title IX requires institutions in all cases (regardless of whether students, employees or faculty are involved) to provide the complainant with written notice of the finding(s).

The amount of information that should be disclosed about the sanction or corrective action depends in large part on the identity of the respondent (i.e., the person accused), but also on how much the sanctions or corrective actions directly relate to the complainant (e.g., an apology requirement directly relates to the complainant, but a sensitivity training requirement may not), and on the type of offense. Different rules can apply for sexual assaults, because of their likelihood to have criminal code implications and mandates imposed by the Clery Act, than for sexual harassment. Whether the rationale for the finding and/or sanctions is shared depends on whether it is your institutional practice to share a rationale with the accused individual. If so, it will be equitable to share a version with each party, though each version may not be completely identical, depending on the circumstances.

For any sex or gender-based discrimination complaints where the respondent is a student, institutions should disclose – in writing – the finding and any sanctions pertaining to the complainant – which would include a student being suspended, no-contact orders, etc. FERPA typically precludes sharing any results that do not directly relate to the complainant (e.g.: required counseling, remedial education, etc.). It is important to note that under the Clery Act, when a complaint involves sexual assault, institutions must disclose the finding(s), sanctions and rationale to the complainant, but this applies only to sexual assault, and not to all forms of sex or gender misconduct that fall within Title IX. This provision is not student-specific, and therefore applies to all acts of sexual assault on campus, regardless of the status of the complainant or respondent.

Another lens suggests this may be too narrow an interpretation, though it is the one embraced by the DCL. Equity demands that we act with fairness under the circumstances. To withhold some details of a sanction from a victim may deprive him or her of an equitable result. Why would we do so? To honor FERPA? Yet, FERPA is construed to give way to Title IX in the event of a conflict, so perhaps FERPA is not a significant barrier.

Another way to frame this is that institutions have a duty to remedy, and to prevent reoccurrence. How can a victim know this duty has been satisfied without fully understanding the entire range of sanctions? Yet another argument is that a victim cannot play a full role in helping to monitor and enforce the terms of a sanction if s/he is not fully informed of those terms. In an equitable process, a victim can appeal what a respondent can appeal. But, if not fully informed of the sanction, how can the victim meaningfully exercise the right to challenge the sanction – a right that many appeals procedures afford? Many campuses simply apply the equitable rule that what they share with one party they share with the other, but it is always wise to consult campus counsel on the FERPA implications of such a practice.

When a faculty member is the respondent, FERPA plays no role in protecting their records and Title IX, as federal law, still requires revelation of the outcome, regardless of state-based employment privacy laws. Accordingly, a complainant should be notified as to both the finding and any attendant sanctions/responsive actions, to ensure they are informed as to how Title IX's remedial requirements have been met. Student complainants will, again, have a right to any sanction information that directly relates to them, under FERPA (FPCO construes this narrowly, and it will be interesting to see if the OCR does, should it ever be raised in a case).

#### **4. PROMPTNESS AND THE 60-DAY RULE**

The Office of Civil Rights (OCR) has articulated a “prompt and effective” standard for addressing notice of sexual misconduct on campuses. The general standard to be applied is a 30-60 day time frame to meet the promptness requirement, not just for the investigation (information gathering) phase of the process, but for the entire process from notice through to the final determination of any appeals and the implementation of any sanctions and remedial actions. Many schools have been concerned that the OCR will target them for failure to comply when their investigation runs over the sixty-day period, but the reasons why a campus might exceed sixty days matter. The OCR requires that schools (1) investigate (2) stop the harassing behavior (3) engage in remedial support for the victim and the community (4) take action to reasonably prevent the reoccurrence of the harassing behavior, and to do so in a prompt, equitable and effective manner. When a school delays their investigation and resolution processes beyond the sixty-day requirement, they are failing to adequately meet the mandated elements as set forth by the OCR for compliance with Title IX.

There have been many cases over the past decade (since the 2001 OCR Title IX Guidance was published) in which colleges and universities allowed unreasonable delay of their resolution processes. Sometimes schools were waiting for criminal processes to complete; sometimes there were administrative delays; sometimes delays were caused by the parties and sometimes, sadly, to allow an athletic season or important playoff to complete. Whatever the reason, undue delays in resolution of allegations of sexual misconduct allow for continued harm to the victim(s).

The DCL spoke specifically to the delay in institutional resolution of sexual misconduct cases resulting from accompanying criminal investigations. The OCR stated that law enforcement investigations are not to be the sole response by an institution. The OCR stated that institutions may temporarily delay their investigation to enable law enforcement to gather evidence and to engage in preliminary investigation of a sexual misconduct matter that may also violate the state criminal code. However, the OCR cautions that this delay “typically takes 3-10 calendar days”.

Our advice to schools is that any delay created by the need for exclusive law enforcement investigation without concurrent institutional investigation should not exceed this 3-10 day time period unless there are absolutely extenuating circumstances that the institution has duly documented. Of course, during this delay period, the school should be engaged in all efforts to provide remedial support and assistance to the victim/survivor and the community.

Regarding the “60” day period – where did that come from and, aside from law enforcement delays, is it a hard and fast rule? The OCR expects that schools will promptly address sexual misconduct without undue delay, in fact, they use the term “promptly” frequently in describing the manner in which a school must respond. The OCR evaluates many elements to determine the extent to which a school has responded promptly, such as: creating prompt time frames for all major stages of a complaint, investigation and resolution; informing the parties of this time frame and

updates on the status of the investigation; and maintaining a timeline of all actions, responses, calls, reasons for delays and all communications related to the case.

The NCHERM Group team has spoken with OCR representatives from most of the regional offices and D.C. and we hear varying comments regarding the “60 day rule”. The OCR views days as “business days”, but the general consensus is that the OCR is forgiving of a delay for few days over a holiday break in school (again, as long as remedial support is provided and documented). But, delays that are a result of the break from Spring Term to Fall Term are not acceptable nor are excessive delays that are a result of administrative foot-dragging, caseload, insufficient staffing, resources, or internal factors the campus can control. Delays requested by a victim are often seen as reasonable, but not those caused by the accused individual. Delays caused by external factors wholly outside the control of the campus are typically seen as reasonable, but not if the institution has the ability to control or influence the external factors.

The best advice is to create a reasonable timeframe for your investigation and resolution process early on in your strategy development, keeping the “60 day rule” as your guideline for timeline development. Inform the parties of your timeline, keep them informed throughout the process and document all actions, particularly anything that creates a delay in your timeline as you work diligently toward resolution within sixty days.

## **5. APPROPRIATELY INCORPORATING PATTERNS AND PREVIOUS HISTORY EVIDENCE IN THE RESOLUTION PROCESS**

The NCHERM Group has always had a rather progressive stance on this topic, but recent information from the OCR seems to be even more expansive than our previous advocacy position. Our view advocated for consideration of pattern and history at the finding stage, where previous similar acts lent evidence of the currently alleged violation. Traditionally, the student conduct process has looked to history and pattern only in sanctioning an offender. Previous violations have not been considered as evidence at the *finding* stage of the resolution process, to prove whether the currently alleged violation is more likely than not. Multiple violations by the same offender have been addressed through separate processes when they have involved separate victims. Sexual misconduct offenses tend to be pattern or repeat offenses.

Certainly, the DCL advocates for investigations to seek to identify patterns and predatory situations. Yet, the OCR has recently advised that it views pattern and history evidence expansively. It could, for example, include past campus offenses by the same offender, but also criminal offenses. It might also include past good faith allegations, even if those allegations did not result in findings. Your current case might corroborate a past investigation as a pattern, rather than the other way around. Finally, the OCR has suggested that similar incidents can evidence a pattern, and that similar means any behavior that falls within Title IX. Previous acts of stalking lend evidence to current accusations of sexual harassment. Previous acts of intimate partner violence lend evidence to current accusations of sexual misconduct. The OCR recognizes the continuum of gender-based violence, and that offenders often progress over time from lesser to more egregious acts of discrimination, and act to exert power and control in relationships with a common set of behaviors. Admitting and considering this information correctly requires an enhanced level of training for investigators, administrators, hearing officers and appellate panels members.

## **6. MANDATED REPORTING AND MANDATORY REPORTERS – WHO HAS TO TELL WHAT, TO WHOM, AND WHEN?**

Does the law require every employee to report knowledge of sexual misconduct on campus? Not necessarily, but policy might. While Title VII (employee-on-employee) complaints have led to widespread reporting mandates on college campuses, Title IX only requires reporting from “responsible employees” which for purposes of policy can be defined to include:

1. Those with authority to address and remedy sex and gender-based discrimination and harassment; and/or
2. Those with responsibility to report sexual misconduct to a supervisor; and/or
3. Those who a student would reasonably believe have such authority or obligation.

Like Title VII, all supervisors are responsible employees, but not all responsible employees are supervisors. Unlike Title VII, the OCR has tried to meaningfully give victims control over reporting through Title IX. This empowerment will be impeded by a reporting mandate on all employees framed only with Title VII in mind.

A broad reporting mandate is where campus attorneys and sexual misconduct victim's advocates collide, because the same issues that raise the question of mandated faculty reporting (academic freedom is not an issue here, though some faculty members insist it is), raise the issues of reporting by "counselors" (a term that means many things on many campuses), campus advocates, and anyone else who is not clearly a "responsible employee." Advocates want broad rights to preserve privacy while some campus attorneys want reporting by every employee, to ensure that no complaint slips through the cracks. Both these goals have merit, but we don't agree with many of our attorney colleagues that all employees must report everything they know, immediately. Their argument for broad mandates is based on potential exposure to liability. But is failing to act on 3rd party notice (to an employee who has no remedial authority to address gender discrimination) of an incident that the victim doesn't necessarily want the institution to act on somehow a realistic exposure to liability under Title IX? It's not in our view, but it is another area where the familiarity of employment lawyers with Title VII does disservice to Title IX. That said, a compromise approach can work.

Let's first appreciate the significant challenge campus legal counsel face in giving good advice on this question. Reporting of sexual assault by employees is required by three different federal laws<sup>74</sup>, and some state statutes. Each of these laws creates its own reporting requirement, irrespective of the standards used by the other laws. So, should we be trying to train employees accurately on three varied reporting schemes (Title VII, Title IX and Clery) *and* state law? That is both impractical and a potential intellectual impossibility. So, we have come to favor the following approach. All employees should, by policy, be mandated reporters of what they know, within 24 hours of coming to know it. But, only some employees have to share ALL that they know (they are "responsible employees" under Title IX, and we will train accordingly). Employees not deemed "responsible employees" can satisfy their duty to report but may withhold personally identifiable information (at least initially), such that reporting can be accomplished (thus satisfying the Clery Act and Title IX) without starting the domino effect of actual or constructive notice without the consent of the alleged victim.

Perhaps the simplest summary of this complex policy issue is the following:

- All employees must report incidents of sex/gender misconduct and discrimination to the Coordinator or Deputy Coordinator within twenty-four hours of learning of the incident;
- Pass along all known information if the victim wishes you to;
- Some employees are empowered to make Jane/John Doe reports initially (i.e.: reports that omit personally identifiable information about those involved) if the employees are not supervisors or responsible employees. Note, however, that these employees may be expected to provide additional details later if the Coordinator needs them;
- Counselors, clergy and other confidential employees fulfill their reporting mandate by making John/Jane Doe reports for statistical purposes and pattern tracking, but do not divulge personally identifiable information without client consent.
  - An exemption can be created for discretion not to report when reporting is deemed by the confidential employee to not be in the client's best interests.
- Employees who are unsure of their duty to report or how much information to report, should ask the Coordinator and will be advised accordingly.
- As appropriate and required by law, the Coordinator will share information with campus law enforcement or public safety to satisfy the Clery Act.

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<sup>74</sup> Title VII, Title IX and Clery



Clarity on reporting duties requires training, but the DCL already made the need for enhancing our training programs very clear. The use of a reporting form available to students and employees online, with optional and mandated fields clearly noted, can effectively guide employees on reporting expectations, options and requirements, while also helping public safety to accurately categorize and classify offense statistics under the Clery Act.

The value of John/Jane Doe reporting is in preserving as much victim autonomy and agency as possible, thereby controlling what actions the institution takes, while still tracking patterns and satisfying other reporting mandates, such as those in the Clery Act. Some campuses call this “anonymous reporting,” but that can be confused with a right for the reporter to withhold their own personally identifiable information, which this approach does not permit. Reporting employees must be fully identified, but some may withhold personally identifiable details about those who were involved in the incident. Another exception to this policy would be that a harassed or victimized employee would not be required to report their own victimization under this approach, again to foster victim empowerment, but who could make an anonymous report.

Once the Coordinator (or other appropriate administrator or investigator) receives the report, they would conduct what we call a “small i” preliminary inquiry or investigation, looking into the incident description, history file, whether the report matches any other recent reports, etc. With any sign of pattern, predation, violence, or threat, institutional obligations cannot be determined solely by what the victim wants, but we can take gradual “next steps,” such as requiring more information from the reporter, meeting with the alleged victim, and deciding what remedial actions are needed, desired and possible. (Note: this is **not** to be construed as a requirement that the Title IX Coordinator must meet with every victim – that requirement may be, in and of itself, re-victimizing and discouraging of future complaints – a practice antithetical to Title IX.)

For that reason, no employee should ever promise absolute confidentiality, though some (such as licensed counselors) are better able to protect information than others (though even licensed counselors, etc. have some situations where they must report if they have a duty to warn). Ombuds are not exempt from expectations of reporting.

The approach described above is set up so that we can “push over one Domino™ at a time,” giving the victim as much control as possible. But we know and need the victim to know that we may need to push over more Dominos than they want us to, depending on whether the circumstances indicate a need to protect the community. Training should teach all employees that reports are private, but not confidential (unless made to a confidential resource), and train employees on ways to convey this to victims without chilling the victim’s willingness to report. It takes tact, but it can be done.

If you don’t take the approach recommended here, you really only have two other options. One is a blanket reporting mandate that all employees must report everything they know (with an exception for privileged or confidential employees who are working in roles covered by a state statute or their licensure, though federal law creates no such exception explicitly). This approach will backfire. Its intent is to make sure that all reported incidents are known to appropriate administrators. But, it will instead create a chilling effect on reporting where less is known about campus incidents, not more. Victims need some safe space, and the OCR is not encouraging us to zealously hunt down notice from unwilling victims. That is not the point of the DCL, though on some campuses, it is being mistranslated that way. Chilling of reporting has been the effect on every campus that has adopted and publicized such a broad requirement. We’ve seen this mistake made over and over again on many campuses, and we hope yours can avoid it.

The other option is to train all employees on their actual legal duties. You’ll inform all “responsible employees” of what to report, when and to whom, when behaviors fall within Title IX. You’ll create supervisory reporting duties to address compliance with Title VII. And, you’ll train some of those same employees who are “campus security authorities” on their duty to report statistical and timely warning information in compliance with the Clery Act. Having done these trainings at the behest of clients all over the country, we can assure you that the end result of all

this training is that you'll have created a confusing mush for your employees who can't keep all three reporting schemes straight, let alone also keep in mind your various campus hotlines, whistleblower policies, BIT-related reporting, and any applicable Sarbanes-Oxley requirements for reporting financial improprieties. We recommend the approach we've outlined here because we've seen all the other approaches fail. Ours isn't ideal and isn't the model of clarity we'd like it to be, but it is the best we've been able to come up with to address a complex and challenging set of inter-related but disconnected federal compliance standards.

## **7. WHAT ROLE DOES CONSENT OF THE VICTIM PLAY IN WHETHER OR HOW THE INSTITUTION PURSUES NOTICE OF THEIR VICTIMIZATION?**

What do we do when the victim of an offense tells us s/he doesn't want us to pursue notice or won't participate in our process? We don't likely know based on notice alone whether the act is singular, individually targeted in nature, part of a pattern or predatory. We can only guess if respecting the victim's wishes will leave him or her and/or the campus community exposed to a risk we could potentially prevent by acting on the notice.

If you read the DCL, you can feel the tension the OCR understood when it wrestled with this all too real dilemma. And the OCR landed firmly in the middle, even if perhaps the language it used muddied its intent. The OCR took the position that a victim's failure to participate does not alleviate a campus of the duty to respond and remedy, though it may limit what the campus can do. We have a greater duty to the many than to the one, a principle all campus administrators understand.

The muddying came from the OCR's use of the term consent, which refers to victim participation in the process, not consent to whether the campus proceeds. In all cases and without exception, the campus must preliminarily investigate notice (the "small i" investigation) to determine what actions it needs to take.

What does the preliminary investigation entail? Every case is different, but typically the Coordinator, investigators and/or other appropriate administrators talk to the victim or complainant (if not the victim), if possible. They try to learn why the victim does not wish to proceed. They check files for recent similar offenses, and may check the disciplinary files on the accused individual, for pattern information. They might check criminal backgrounds, or consult with the campus BIT (behavioral intervention team) on indicia of threat or predation. They will catalogue the potentially available independent evidence, and try to assess how viable pursuing the case may be without the victim's cooperation. Rarely will a preliminary inquiry involve contacting witnesses or the accused individual. This inquiry will conclude with a decision on whether to proceed, and if so, how.

In some cases, the "small i" will lead to the "big I", which is a thorough, reliable and impartial full investigation. In other cases where the preliminary investigation does not indicate pattern, predation, threat or violence, the campus has more latitude to respect the wishes of the victim. Remedies in such cases can take the form of accommodations to the victim, education and policy reinforcement directed (even if indirectly) to the offender/offending population, but will not extend to discipline of the alleged offender.

Yet, where pattern, predation, threat or violence are indicated as possible by the initial or preliminary investigation, the campus will have to pursue the notice to the fullest extent possible, understanding that victims still have the right to consent or refuse to participate. In some instances, the physical evidence – rape kits, pictures, messages, and witness information are sufficient for the resolution to take place without any victim involvement. The tact involved in explaining this nuance to a victim is a skill that student conduct administrators and Coordinators need to acquire and practice. Just putting it in a policy will be too cold and impersonal, and leaving it to a victim's advocate (if you have one) may miss the opportunity to problem-solve around why the victim does not wish the campus to proceed. Finally, this discussion really applies to student-on-student complaints, only. There isn't really the same institutional latitude to proceed or not proceed in Title VII cases (employee-on-employee), once notice is given.

## **8. WHILE THE DCL PRIMARILY ADDRESSED SEXUAL VIOLENCE, TITLE IX APPLIES TO ANY RULE VIOLATION IN**

## WHICH SEX OR GENDER-BASED DISCRIMINATION OCCURS

Title IX prohibits sex/gender discrimination and the 2011 DCL defines sexual harassment as “unwelcome conduct of a sexual nature.” Not all sexual harassment will be actionable under Title IX for purposes of lawsuits, even though such behavior may be a violation of your campus policy. Sexual harassment has to be unwelcome, have a sex or gender-based discriminatory effect, and be sufficiently severe, pervasive (or persistent) and objectively offensive to cause that discriminatory effect (that is, the behavior limits or denies a persons access to or participation in their education or employment).

Campus policies can cover a broader range of conduct than what creates the foundation for a Title IX lawsuit, but public institutions are wise to use the Title IX standard when policing harassing speech, so as to respect 1<sup>st</sup> Amendment protections. The OCR defines a hostile environment to exist when conduct is severe, pervasive or persistent, which is arguably a slightly broader standard than the one used by the courts when assessing Title IX liability. Regardless of the terms that form the basis of campus policy, there will be low-level harassing conduct that fails to rise to the level of being discriminatory under Title IX.

Further, the OCR deems **all** acts of non-consensual physical sexual contact (i.e. “sexual violence”), such as “rape, sexual assault, sexual battery, and sexual coercion” as sexual harassment and therefore within Title IX’s purview (See OCR April 4, 2011 DCL, p. 1-2). Accordingly, all incidents of sexual violence must be viewed and approached using a Title IX lens and Title IX-appropriate investigations and remedies. This could include matters of hazing – such as the alleged alcohol enema incident at the University of Tennessee – or bullying behavior that is sex or gender-based. To be sex or gender-based, conduct must either be directed at someone because of their actual or *perceived* sex (male or female) or gender (masculine or feminine – and thus addressing the often asked questions about how Title IX protects our LGBTQ community members). Or, it must be sexual in nature (as in dealing with sex acts, private parts, prurient behavior, etc).

Other areas that typically fall outside of the “sexual violence” label, but can fall within Title IX and require the prompt and effective response includes actions motivated by gender or sex, such as: bullying, stalking, hazing, relationship violence, vandalism, arson and program equity decisions, such as admission, athletics or club participation, hiring, firing, promotion, etc.

Further, any rule or policy of a school or college — if violated on the basis of the victim’s actual *or perceived* sex or gender — could fall within a Title IX set of policies and resolution procedures if the behavior was sufficiently severe, pervasive or persistent to cause a discriminatory effect. Some information only comes to light once the investigation begins, which, if the school is not using a Title IX-appropriate process, may result in the school failing to approach the situation in a manner commensurate with its Title IX responsibilities (immediately stop the harassment, remedy its effects and prevent its recurrence). This is one of the many reasons we encourage campuses to bring all their investigation and resolution procedures into compliance with Title IX.

## 9. TITLE IX AND OFF-CAMPUS BEHAVIOR – WHAT CAN WE, MUST WE, AND SHOULD WE DO?

Title IX does not have geographically-defined jurisdiction. We can’t say it applies to one place or another, or on or off-campus. It is instead a nexus rule<sup>75</sup>, applying to those situations with sufficient connection to the activities of a funding recipient such that the recipient is responsible for addressing them. The courts have uniformly applied a two-prong test to Title IX’s applicability, assessing whether the institution has:

1. control over the harasser (subject to our rules) **and**
2. control over the context of the harassment (on our property, in our programs, on land we lease or control, or at events we sponsor).

If both prongs are met, we are obligated to respond to notice in accord with Title IX. Yet, when we don’t have control over

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<sup>75</sup> As set forth by Justice O’Conner in the *Davis v. Monroe County* case.

the harasser and context, may we address off-campus conduct or conduct outside of school? The lawyer's answer: It depends. At public institutions, the leading cases (*J.S. v. Blue Mountain* and *Layshock v. Hermitage* out of the 3rd Circuit – other Circuits that have addressed the question come to similar conclusions) place limits on our ability to address purely off-campus speech, even if it is harassing, as 1st Amendment protected speech. Conduct is addressable more broadly than pure speech. Feel free to take off-campus jurisdiction over a sexual assault between students without fear of 1<sup>st</sup> Amendment implications and heed the expansive view of the court in *Simpson v. U. of Colorado* (2007), which seemed to expand what a “school sponsored” activity was to address an off-campus sexual assault on private property, calling it a result of behaviors and culture “created” by the institution.

The somewhat over-simplified legal rule is that we may address off-campus or out-of-school harassment in public forums (Internet speech, Facebook, etc.) only when those off-campus or out-of-school acts have a demonstrable and significant on-campus or in-school disruptive impact. For private schools and colleges, you will have the ability to address off-campus and out-of-school speech and conduct more broadly than public institutions. The DCL seems to imply the need to take off-campus jurisdiction, and certainly no campus can refuse to, when a Title IX issue occurs off-campus at a campus-sponsored activity or event. Yet, there is no obligation to pursue purely private off-campus conduct that is not connected to the institution other than by occurring between two of its students. The language in the DCL is referring to the need to take jurisdiction to address the downstream or collateral effects of the off-campus conduct that occur or are felt on-campus. To do that, it is effective to address the initial behavior as well.

There also seems to be some confusion over extra-territorial jurisdiction to Title IX. The OCR has said it does not apply outside the United States. Yet, some of our Title IV funding is spent to support programs outside the US, and courts have applied Title IX to incidents outside the US (see e.g. *King v. Board of Control of E. Michigan Univ.*, 221 F. Supp. 2d 783 (2002)). Without more definitive guidance, it may be prudent to establish structures that allow your campus to apply Title IX resolution procedures to incidents occurring abroad that meet the two-prong standard.

Perhaps the better question is whether we need the OCR to tell us to assume jurisdictions over our own off-campus programs or can we just do the right thing? We encourage you to implement a policy that allows you to take off-campus/out-of-school jurisdiction when you deem it appropriate and necessary. To that end, we offer model policy language on jurisdiction\*, with due credit to Penn State University for originating the excellent nexus language upon which this model is based:

Students at School/University are annually given a copy of the *Code of Student Conduct*. Students are charged with the responsibility of having read, and agreeing to abide by, the provisions of the *Code of Student Conduct* and the authority of the student conduct process. The *Code of Student Conduct* and the student conduct process apply to the conduct of individual students and school/university-affiliated student organizations. Because the *Student Code of Conduct* is based on shared values, it sets a range of expectations for school/university students no matter where or when their conduct may take place; therefore, the *Code of Student Conduct* applies to behaviors that take place on the campus, at school/university-sponsored events and may also apply off-campus or outside of school when the administration determines in its discretion that the off-campus or outside-of-school conduct affects a substantial school/university interest. A substantial school/university interest is defined to include:

- Any action that could constitute a criminal offense as defined by federal or state law. This includes, but is not limited to, allegations of single or repeat violations of any local, state or federal law in the municipality where the school/university is located;
- Any situation where it appears that the student may present a danger or threat to the health or safety of him/herself or others;
- Any situation that significantly disrupts the rights, property or achievements of self or others or significantly breaches the peace and/or causes social disorder; and/or
- Any situation that is detrimental to the educational interests of the school/university (private schools and campuses, only).

\*Please cite ATIXA/Penn State University as the source for any use or adaptation of this policy language.

## **10. BEST PRACTICES FOR REPORTING CAMPUS SEXUAL MISCONDUCT TO PUBLIC SAFETY AND/OR LOCAL POLICE**

As we made our visits to colleges and universities this past year, we have been seeing a problematic practice more common than we expected, and we write this in the hope that we can encourage campuses to make a necessary shift. We refer to the mandated reporting of all Title IX-related matters to campus and/or local police by campus employees, administrators and Title IX Coordinators. We support mandated reporting policies for all employees (as detailed above), but it matters where the mandate tells our employees to take the information they may have.

Perhaps the popularity of police-based mandated reporting policies is a knee-jerk reaction to the Sandusky case at Penn State, but a blanket requirement to notify police has the potential to undermine an institution's efforts to appropriately address sex discrimination in the educational setting. That said, we do support a practice of reporting to police in situations involving abuse of minors, some individuals with disabilities/diminished capacity, clear threats of harm to others, and in any case where the victim welcomes police involvement. Outside of those exceptions, we believe a police-based mandate will do far more harm than good, may violate the law, and will stifle the willingness of victims to report.

To comply with Title IX, we need policies that create the expectation that responsible employees will report sexual harassment and/or discrimination to appropriate school officials, such as a Title IX Coordinator or the employee's supervisor. However, Title IX does **not** require responsible employees to report such matters to campus or local police, though some states may impose such a mandate by statute. While state mandates cannot be ignored, campus legal counsel should be consulted on how administrators should balance the state duty to report against the Title IX requirement that campuses conduct confidential investigations that are largely driven by the willingness of the victim. A federal confidentiality mandate can be argued to supersede state reporting requirements with respect to adult victims.

Another reason to avoid a blanket police reporting mandate is that many sexually harassing acts and other forms of discrimination that fall under Title IX may violate institutional policies, but are not crimes. Accordingly, such reports have the potential to distract police from their sworn duties and present them with information that should be kept confidential by the institution. Worse, by funneling victims to the wrong resource, we run the risk of misdirecting situations that need to be resolved by the Title IX Coordinator (or other appropriate administrator). To compensate, campuses will have to add an extra step to refer and communicate information from police to the appropriate campus official. Such a path is not ideal, and communication breakdowns on some campuses will result in failures to act in the face of the obligation to act. This is especially true when the reporting mandate is to local police, not campus law enforcement. We can often rely on good communication from our own police and public safety departments, but that is not always the case with local police departments.

A related argument that does not receive sufficient attention is that mandated reporting of Title IX matters to local OR campus law enforcement can arguably violate the Family Educational Rights and Privacy Act (FERPA). Where a student is victimized, records of his or her victimization kept by campus administrators are protected by FERPA as part of the student's education record. That protection is important. Reports to campus law enforcement may not be FERPA-protected, and reports to local law enforcement are not.

We must also address the path from the reporting employee to campus or local police. FERPA permits internal (intra-institutional) sharing of private education record information when there is consent from the student, or without consent when there is a "legitimate educational interest." While campus police and public safety departments can have a "legitimate educational interest" in some cases, they do not in all cases. This includes even cases of sexual violence, in which their interest may be a law enforcement interest, not an educational interest.

Certainly, local law enforcement can never have a legitimate educational interest (as defined by FERPA), and so any mandated reporting to them without the consent of the record owner (the victim) will violate FERPA unless an emergency health and safety concern is present. Without victim consent, a reporting mandate in all Title IX-related matters will undermine the interest colleges and universities have in encouraging reporting and empowering victims. Given the lack of success in prosecuting such cases in almost every jurisdiction, one can only wonder at the rationale supporting such a mandate.

Accordingly, it is not advisable to mandate reporting of all Title IX-related incidents to police or public safety, on or off-campus. Victims often seek out a campus remedy specifically because they have no desire to report an incident to the police. Victims articulate many reasons for this hesitation. A few of the more commonly cited reasons: they are uncomfortable interacting with police, they feel the institution's administrative approach will be less stressful, they are uncomfortable with the formality of the police process, they desire to keep the matter more confidential than public police records permit, and many do not self-identify as victims of a crime (as a side-note, this is one of the many reasons institutions should always inform victims of crimes of their right to file a report with the police).

An argument can be made that a policy of mandated reporting to police is in fact retaliatory, as it may require victims who wish to seek institutional assistance to first waive their right of confidentiality in order to do so. In most cases, victims should have the right to choose whether police will be involved. Let's not add to their burden with unnecessarily disempowering — and potentially illegal — campus policies and practices.

Finally, this discussion should not distract from the fact that campus law enforcement and security officials are "responsible employees" and thus mandated reporters for those reports that do originate with them. There is no state law or investigation exception that applies, and thus what is reported to campus law enforcement must be duly shared with the campus Title IX Coordinator or other appropriate officials.

## **CONCLUSION**

We hope our 2013 Whitepaper has been a valuable read for you. Please feel free to share it with colleagues and/or post it publicly. That is why we wrote it. This kind of topic exploration is exactly the kind of depth our clients count on from The NCHERM Group, and yet this Whitepaper only includes ten of the fifteen topics we prepared for this year. We invite our clients who are subscribers to The Bundle, and those who have retained The NCHERM Group through our Special Counsel Program to log in at [www.ncherm.org](http://www.ncherm.org) to access five additional topics exclusively available to Bundle and retainer clients. If you currently don't have access, we hope you will consider subscribing to The Bundle or retaining The NCHERM Group in 2013.

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## **GAMECHANGERS:**

# **The NCHERM 10<sup>th</sup> Anniversary Whitepaper 2000-2010**

**By the NCHERM Partners:**

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

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## **FRAMING THE TOPIC THROUGH CASE STUDIES**

Scenario # 1: A male student is suspended for drugging a female student's drink and then sexually assaulting her. An uproar ensues, with many members of the campus community arguing that a suspension minimizes the severity of the incident. Despite calls for expulsion, the suspension stands. During the course of the suspension, the male student is reported to be on campus several times, in violation of the terms of the suspension. His trespass is reported by several friends of the victim to campus law enforcement and the Dean of Students office, but no action is taken. Both the Dean and the Chief of Campus Police believe the friends are trying to force an expulsion, and do not take the reports seriously or follow-up.

- Could the Dean and Chief be held personally liable for violating Title IX?

Scenario #2: A female student reports a sexual assault, and is told by the Director of Student Conduct that the offense is a crime, and that it must be reported to police. The female student reports it to police, but also asks to file a campus conduct complaint. The Director of Student Conduct refuses, asserting that criminal actions cannot be addressed by campus hearings, and insists the matter must be handled by local police before the university will take any action.

- Could the Director of Student Conduct be held personally liable for violating Title IX for failing to proceed?
- Could the institution be found in violation of Title IX?

Scenario #3: Rachel claims she was gang raped. Robert, one of the accused students, produces a video of the incident. The video depicts a clearly inebriated and barely functional Rachel writing "I want sex" on a piece of cardboard, which the men then hold up to the camera. Robert argues the video is proof the sex was consensual. Rachel claims to remember none of it. Based on the video, the Dean of Students refuses to consider campus charges against the men, and refuses to investigate any further. Rachel commits suicide.

- Could the Dean of Students be held personally liable for violating Title IX?
- Could the institution be liable for wrongful death?

Scenario #4: The President of a public university hires its first female VPSA. Part of her charge is to improve the campus climate for women. The new vice president is an ardent feminist, and seeking to redress historical gender inequality on campus, convinces the president to expand the campus sexual harassment policy to be more protective of women. New provisions make it an offense to objectify women, to sexually demean them, or to subject them to derogatory language on the basis of their sex.

- Could the president of the university be held personally liable for violating the 1<sup>st</sup> Amendment rights of members of the community while seeking to be more proactive in complying with Title IX?

You know what you want the answers to be.

You fear what they might be.

Read on to know what they could be...

## **INTRODUCTION**

Ten years ago, NCHERM was founded with the intention of changing how colleges and universities address sexual misconduct. Rather than sue colleges and universities, NCHERM would work for change from within the field. The

changes NCHERM has catalyzed are gratifying, as is the blossoming of our mission over the last ten years. NCHERM has become an attractor in the field for like-minded practitioners. But, as the recent article series from the Center for Public Integrity<sup>76</sup> demonstrates, not enough has changed in ten years on the issue NCHERM was formed to address. And, so, in our tenth anniversary year, the NCHERM team has decided to use our annual whitepaper to take us back to our roots, to revisit the ground from whence we sprang – sexual misconduct.

When NCHERM drew attention to this topic in 2000, we predicted a surge of litigation against colleges and universities. NCHERM was applying a civil rights lens to an issue that was not yet viewed in that way in our field. Ten years has confirmed the validity of the civil rights approach that we advocate, and has taught us much, but there is more for us to do to fully embrace the concept of seeing and treating sexual misconduct as a civil rights issue.

### **THE HISTORY OF TITLE IX AS APPLIED TO SEXUAL ASSAULT<sup>77</sup>**

History is important here. Let's go back to see if we can get a better vantage point on where we were, where we are and where we are heading. Arguing for the civil rights lens was controversial ten years ago. It's a given now. Arguing that Title IX would govern student-on-student sexual assault cases was a strong possibility then. No one was betting against that interpretation, and the courts ratified it. It is now settled law. We started to get comfortable with the boundaries laid down by the landmark Supreme Court cases of Gebser v. Lago Vista<sup>78</sup> and Davis v. Monroe County<sup>79</sup> in the late 1990's. Institutional liability under Title IX existed not for the occurrence of student-on-student sexual assault, but for our failure to address it institutionally when it became known to us. The scheme of liability was straightforward. There was no personal liability for administrators under Title IX, but if administrators had *actual notice* and responded with systemic *deliberate indifference*, civil damages could result against institutions for administrative inaction. It has taken ten years, but million dollar Title IX judgments and settlements against colleges and universities no longer surprise us.

At the same time, Title VII was relatively stable as a body of law. Stagnant even. Did we see the same trajectory for Title IX? No. At NCHERM, we feared our field would become complacent with the Title IX liability scheme. We knew that Title IX case law applying Gebser and Davis would change and mature in the courts, and so we pushed harder to anticipate and prepare. What would the implications be as courts started to distinguish Davis from Gebser? What would the courts do with Justice O'Connor's clever aside (called *dicta* in a legal opinion) from the Davis majority, inviting courts not to assess deliberate indifference alone, but to ensure as well that the institutional response was not "clearly unreasonable in light of the known circumstances?" It did not take long to realize the courts took the hint that O'Connor intended, and began to feel at liberty to assess institutional action and remedies qualitatively.

### **DELIBERATE INDIFFERENCE UNPACKED**

The Davis *dicta* differs meaningfully from the Gebser deliberate indifference standard, which is both deferential and minimal (recall that Gebser covers employee-on-student harassment contexts). Under Gebser, if we act at all, that is enough. The reasonableness of our actions really isn't on the table in a Gebser case, as long as we did something, and did not fail to act. General Counsel's offices accordingly instructed us to investigate and apply prompt and equitable

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<sup>76</sup> [http://www.publicintegrity.org/investigations/campus\\_assault/](http://www.publicintegrity.org/investigations/campus_assault/)

<sup>77</sup> (20 U.S.C. § 1681(a))

<sup>78</sup> Gebser v. Lago Vista Independent School Dist., 524 U.S. 274 (1998)

<sup>79</sup> Davis v. Monroe County Bd. of Ed., 526 U.S. 629 (1999)