remedies when our investigation demonstrated gender-based discrimination. At NCHERM, we thought courts might be slow to pick up on the O'Connor dicta, but the lower courts were willing to apply it and to put the quality and substance of our institutional responses on the table. It was a warning shot across the bow starting in the early 2000's that Gebser and Davis might define the minimal contours of Title IX litigation, rather than the outer limits.

We expected the courts would persistently pry the lid back on both our practices and our remedies, until colleges and universities became more attentive to how we responded, and paid closer heed to the adequacy of our remedies. OCR[80] was not a significant player in this unfolding drama. The courts were dropping occasional crumbs to show us the trail. Then, without warning that it was impending, a series of tipping point was reached, and it changed the game. It is hard to pin down precisely when the tipping point occurred, as it is still unfolding in different courts around the country. Moreover, courts that tipped did so at different times and in different ways. The start occurred in the mid 2000's. The most substantial impact came in the latter part of the 2000's, with the federal appeals courts taking the lead. Even the Supreme Court has joined the charge, showing a willingness to permit new causes of action that belie its conservative majority.

Why is this happening, and why now? Simply, the courts are fed up with the pace of change by schools and colleges. Hoping to see internal reforms, the courts instead were treated to a litany of cases that should embarrass higher education, as a field. As a result, measured conduct restraint has given way to activism, legislation from the bench, and truly mindboggling settlements and verdicts. So, where are we now?

A TIPPING POINT

Some could argue the progressive transformation of Title IX started with Jackson v. Birmingham[81], but that Supreme Court case wasn't even the clue it could have been to how lower courts would subsequently use it to produce a $19.1 million jury verdict against California State University -- Fresno in 2008[82]. The first post-Davis Title IX settlement against a college in 2000 was a mere $75,000[83]; not enough to get some lawyers out of bed in the morning. For $19.1 million, some may never go to bed, though it should be noted that the judge did reduce that verdict to a mere $6.6 million[84]. Jackson, which will be discussed below, was pretty straight-forward. It aligned retaliation claims under Title IX with the scheme used for Title VII (employment) claims, and opened the door to third party claims of retaliation under Title IX. It did not signal the tidal wave of scores of retaliation cases that have now cost schools more than $60 million in the five years that courts have applied the Jackson retaliation theory. The fed up courts and juries made their mark post-Jackson. The last few years demonstrate the trend most clearly, not just with the retaliation claims, but with Title IX claims across the board. The legal underpinnings are nothing more than conduct "fed-up-ism," not conduct "activism." The courts are going to bang us till we get it, and they are banging as clearly and as hard as they can. Five cases are the clearest harbingers: the aforementioned Jackson, Simpson v. Colorado, Williams v. the University of Georgia, Jennings v. the University of North Carolina and Fitzgerald v. Barnstable. We must learn the lessons of this quintet of cases, lest we repeat the mistakes that have made them precedents.

Let's take a look at each of the Gamechangers.

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[80] The US Department of Education's Office for Civil Rights (OCR) enforces Title IX against schools and colleges in proceedings that are parallel to civil lawsuits.
[81] Jackson v. Birmingham Bd. of Ed., 544 U.S. 167 (2005)
[82] http://sports.espn.go.com/ncw/news/story?id=3237229
[83] Brzonkala v. Virginia Polytechnic Institute and State University, 132 F.3d 949 (1997)
[84] http://sports.espn.go.com/ncw/news/story?id=3237229

JACKSON V. BIRMINGHAM[85]

What Happened?

Roderick Jackson was employed by the Birmingham School District for over 10 years. In 1993, he was hired to serve as a physical education teacher and girls' basketball coach. When he was transferred to the high school in the district in 1999, he discovered that the girls' team was not receiving equal funding and equal access to athletic equipment and facilities. This lack of resources made it difficult for him to do his job as a coach. The following year he began complaining to his supervisors about the unequal treatment of the girls' basketball team. His complaints went unanswered and the school failed to remedy the situation. However, following his complaints to his supervisor, Jackson began to receive negative work evaluations. He was removed as a coach in 2001, although he was retained as a teacher.

Jackson brought a Title IX lawsuit against the school district, alleging that the school board retaliated against him because he had complained about sex discrimination in the high school athletic program. He alleged that such retaliation violated Title IX of the Education Amendments of 1972.

Analysis and Significance of the Case

The district court dismissed the complaint against the school on the grounds that Title IX's private right of action does not include claims of retaliation unless the complainant is the injured party. The 11th Circuit Court of Appeals upheld the district court. The U.S. Supreme Court overruled the lower courts, stating that "Title IX's private right of action encompasses claims of retaliation against an individual because he has complained about sex discrimination".

The court applied the following analysis to the facts presented:

1. When a funding recipient retaliates against a person because he complains of sex discrimination, this constitutes intentional "discrimination" on the basis of sex, in violation of Title IX;
2. The Supreme Court had previously held that Title IX implies a private right of action to enforce its prohibition on intentional sex discrimination, and that right includes actions for monetary damages by private persons;
3. Retaliation is, by definition, an intentional act, and in this case, was discrimination on the basis of sex because it was an intentional response to the nature of the complaint – an allegation of sex discrimination;
4. The Title IX statute is broadly worded and does not require that the victim of the retaliation also be the victim of the discrimination that is the subject of the original complaint. Where the retaliation occurs because the complainant speaks out about sex discrimination, the statute's "on the basis of sex" language is met;
5. Congress enacted Title IX not only to prevent the use of federal dollars to support discriminatory practices, but also to provide individual citizens effective protection against those practices. This objective would be difficult to achieve if persons complaining about sex discrimination did not have effective protection against retaliation;
6. The school board should have been put on notice that it could be held liable for retaliation by the fact that the Supreme Court's cases since 1998 have consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination.

[85] Jackson v. Birmingham Bd. of Ed., 544 U.S. 167 (2005)

We noted above that Jackson itself was not earthshaking, and you can see why. But, it led directly to the California State University – Fresno cases of 2008. In this series of cases, discriminatory actions within the athletics department led to settlements and jury verdicts totaling $28.5 million, not including legal fees[86]. In the cases that follow, we turn from retaliation to assault and harassment as the bases for Title IX liability and settlements.

THE SIMPSON CASE[87]

What Happened?

The University of Colorado at Boulder's football team was considered a national "powerhouse". The athletic department credited its success to its ability to attract talented players to their recruiting program. The program paired visiting recruits with an "ambassador" (usually female) and a current football player. The job of the ambassador and the player was to know how to "party", to entertain the recruits, and to show recruits a "good time" during their visit to campus.

On December 7, 2001, Anne Gilmore and Lisa Simpson, two CU students, were planning an evening at Ms. Simpson's off-campus apartment. A student tutor for the University of Colorado Boulder football team asked Ms. Simpson if four football players could come over for the evening and Ms. Simpson agreed. Twenty football players and recruits showed up at the apartment. At least one of the players was led to understand that the purpose of going to Ms. Simpson's apartment was to provide recruits a chance to have sex. In fact, one recruit who was leaving the apartment reported being told to stay because, "it was about to go down" which he understood to mean that the women would begin showing the recruits a "good time".

Ms. Simpson, who was intoxicated, went to her bedroom to sleep and locked her door. She awoke later to find two naked men removing her clothes. She was sexually assaulted, both orally and vaginally by recruits and players surrounding her bed. At the same time, three players or recruits were sexually assaulting Ms. Gilmore (who was too intoxicated to consent) in the other bed. That night, three other women were sexually harassed by players in the apartment and a fourth had non-consensual sex with two players after leaving the apartment. Simpson and Gilmore did not report the sexual assaults to the university. They filed a federal Title IX lawsuit alleging that the CU athletic department was aware of the incidents of alcohol consumption and sexual assault by football players and recruits, and the department created a known risk of sexual harassment, assault and discrimination against female students and other women as a result of their knowledge and deliberate indifference to the risk.

Analysis and Significance of the Case

The central issue in this case is whether the risk of such an assault on Ms. Simpson and Ms. Gilmore during football recruiting visits was obvious, since they did not report the assaults to the university prior to filing their Title IX lawsuit. The risk of sexual assault was not alleged to be generalized to the conduct of the entire CU student body; rather they argued the risk arose out of an official school program, the recruitment of high-school football athletes. The basis for

[86] California State University-Fresno faced multiple Title IX retaliation claims, all resolved in 2007 against the university. Two were decided by juries for $5.85 million (later reduced by a judge to $4.5 million) and $19.1 million (later reduced to $6.6 million). A third claim was settled by the University for $3.5 million. Each of the three suits was based on complaints of sex discrimination in the athletic department followed by the complaining employee's termination or demotion.

[87] Lisa Simpson; Anne Gilmore, v. University of Colorado Boulder, et al., (No. 06-1184, No. 07-1182; 2007 U.S. App. LEXIS 21478) U.S. Ct. of Appeals, 10th Circuit, September 6, 2007

their complaint was that CU sanctioned, supported and funded a program designed to "show recruits a good time", that, without proper control, would encourage young men to engage in alcohol consumption and sexual assault.

At the district court, the case was dismissed in favor of CU on summary judgment. The judge found that CU could not be liable under Title IX because it did not have actual notice of the discrimination suffered by the plaintiffs. Simpson and Gilmore appealed. In rejecting CU's motion for summary judgment, and reinstating the plaintiff's claims, the court of appeals went to great lengths to discuss the nature of recruiting as a school program and CU's responsibility to maintain oversight of the program. The significance of this ruling was the novel way in which the court interpreted the "deliberate indifference" standard. The court found:

1. That CU had an official policy of showing high-school football recruits a "good time" on their visits to the CU campus;
2. That the alleged assaults were caused by CU's failure to provide adequate supervision and guidance to player-hosts chosen to show the football recruits a "good time"; and
3. That the likelihood of such misconduct was so obvious that CU's failure was the result of deliberate indifference.

Significance as New Law

Under the traditional Title IX "deliberate indifference" standard, an educational institution that receives federal funding is liable in monetary damages only when its deliberate indifference effectively caused the discrimination. As required by Davis, there must be actual notice of sexual harassment to the institution and an institutional failure after becoming aware of the harassment to address it and exercise a means to control it or eliminate it. This ruling created a conductly-invented basis for Title IX liability, by expanding the definition of deliberate indifference to also include a "failure to train for obvious risks, such as sexual harassment, in a school program". The court stated that under Title IX, a college or university can be said to have intentionally acted in clear violation of the law when the violation is caused by official policy, which may be a policy of deliberate indifference to providing adequate training or guidance that is obviously necessary. In this case, there was evidence that the football coach was aware of the need to adequately supervise recruits and to provide training to their players and thus responded with deliberate indifference and even undermined efforts by multiple individuals to prevent the harassment. The court stated that CU's deliberate indifference amounted to a conscious decision to permit sex discrimination in a school's program.

The tarnished history of the athletics program provided fodder for the court. As early as 1989, there were signs that CU players were engaging in improper sexual conduct. A *Sports Illustrated* article written that year discussed the high number of sexual assault cases involving CU football players and commented that, "the school's football coach sometimes didn't seem to grasp the seriousness of the situation". In 1997, the local district attorney recommended that the university adopt a zero tolerance policy regarding alcohol and sex in recruiting programs; that the athletes receive annual training regarding sexual misconduct; and that the university develops policies for supervision of recruits on campus. The D.A. considered the university to be put on notice with this recommendation. Although CU adopted a revised sexual harassment policy the following year, it applied to all students and did not contain anything additional regarding recruiting or athletics.

By the time of the assaults on Ms. Simpson, Ms. Gilmore, and others, the CU football coach had general knowledge of the serious risk of sexual assault during college football recruiting efforts and that the need for more or different

training of players and hosts was so obvious that the failure to respond was clearly "deliberate indifference" to the need. The court found:

1. The head football coach had general knowledge of the serious risk of sexual harassment and assault during college football recruiting visits;
2. The coach knew that sexual assaults had occurred during prior recruiting visits;
3. Even with this knowledge, the coach continued to maintain an unsupervised player-host recruiting program designed to show recruits "a good time"; and
4. The head football coach was aware of prior incidents of sexual assault both because of incidents reported to him as well as the fact that he refused to work toward changing the culture regarding recruiting visits.

After this court of appeals ruling, the university chose to settle the lawsuit, agreeing to pay $2.5 million to Ms. Simpson, and $350,000 to Ms. Gilmore. Some have argued that this holding by the court of appeals oversteps the contours of liability as defined by the Supreme Court in Davis. We don't agree. We think it is a well-decided case that has significant precedential value. Davis was a case about adequacy of response, and so defined a standard on that basis. It did not address the implications for liability in a case where the institution created the discriminatory environment nor was a co-sponsor of it. Simply, the Simpson case asked a question that was not raised in Davis, and so sets out a liability scheme beyond the scope of Davis.

We'd also like to draw attention to an obvious, yet revolutionary, aspect of this holding. The assaults occurred off-campus, on private property, and were in part committed by non-students. Title IX's jurisdictional reach has always differed from that of a student conduct process, which may or may not address off-campus misconduct. For Title IX to apply, two jurisdictional elements must be present: institutional control over the harasser and institutional control over the context of the harassment[88]. Both existed here, regardless of the physical site of the discriminatory conduct, or whether the recruits were enrolled as students. Any doubters to the validity of this holding should compare it to the next case, in which another court of appeals clear across the country made remarkably similar findings at almost the same time.

THE WILLIAMS CASE[89]

What Happened?

On January 14, 2002 at 9:00 p.m., Tiffany Williams, a student at the University of Georgia (UGA), received a telephone call from UGA basketball player Tony Cole. Cole invited Williams to his room in the main residence hall for student-athletes on the university campus. Shortly after Williams arrived at Cole's room, the two engaged in consensual sex. Unbeknownst to Ms. Williams, Brandon Williams, a UGA football player whom Williams did not know, was hiding in Cole's closet. Cole and Brandon had previously agreed that Brandon would hide in the closet while Cole had sex with Williams. When Cole went to the bathroom and slammed the door behind him, Brandon emerged from the closet naked, sexually assaulted Williams, and attempted to rape her. Cole called a teammate, Steven Thomas, and encouraged him to come over because they were "running a train" on Williams. Thomas came to the room and sexually assaulted and raped Williams.

Williams returned to her residence hall and called Jennifer Shaughnessy. Williams was visibly upset and crying. Williams told Shaughnessy what had happened, and Shaughnessy told Williams that she had been raped and should call the

[88] King v. Board of Control of E. Michigan Univ., 221 F. Supp. 2d 783 (2002)
[89] Tiffany Williams vs. Board of Regents of the University System of Georgia, et al; 477 F.3d 1282 (2007)

police. Williams told Shaughnessy that she did not want to call the police because she was afraid. While Shaughnessy was with Williams, Thomas, who had never called Williams before that night, called Williams twice. Williams then called her mother, who notified UGA Police of the incident and arranged for Williams to have a sexual assault exam performed. Later that same day, Williams requested that UGA Police process the charges against Cole, Brandon Williams, and Thomas. After filing her complaint with UGA Police, Williams permanently withdrew from UGA.

UGA Police conducted an investigation and the records showed that:

- Cole called Williams' room several times in the days immediately following the incident and Williams' withdrawal;
- Within forty-eight hours of the incident, UGA's chief of police notified UGA's director of conduct programs of the incident and provided her with a written explanation;
- On April 17, 2002, a lieutenant from UGA Police provided the director of conduct programs with additional information supporting Williams' allegations.

Because the sexual harassment policy at UGA at the time stipulated that student-on-student harassment be handled by student affairs, Cole, Brandon Williams, and Thomas were charged with disorderly conduct under UGA's code of conduct. A UGA judiciary panel, consisting of one staff member and two university students, held hearings almost a year after the January 2002 incident and decided not to sanction Cole, Brandon Williams, or Thomas. By the time of the hearing, Cole and Brandon Williams no longer attended UGA. Thomas left UGA in September 2003.

Their coaches also suspended the three from their teams after a grand jury indicted them in April 2002 (after basketball season and spring football practice were already completed). A jury later acquitted Brandon Williams, and the prosecutor dismissed the charges against Cole and Thomas.

The Basis for the Title IX Claim

Williams alleged that (former UGA Head Basketball Coach) James Harrick, Athletic Director Vince Dooley, and UGA President Michael Adams were personally involved in recruiting and admitting Cole, even though they knew he had a history of disciplinary and criminal problems involving harassment of women at other colleges. Cole was not academically qualified to attend UGA and was admitted under a "special admission" policy that required presidential approval by Adams. It should be noted that:

- When Harrick was at the University of Rhode Island, he recruited Cole to attend URI and helped Cole gain admission to the Community College of Rhode Island (CCRI). Cole was dismissed from CCRI after allegations that he sexually assaulted two employees by groping the women, putting his hands down their pants, and threatening them when they rejected his advances. Cole pleaded no contest to criminal charges of misdemeanor trespass in connection with the two sexual assaults;
- Harrick, Dooley, and Adams were aware of a protective order violation by Cole involving a friend of his foster mother;
- They were also aware of his dismissal from Wabash Valley College for disciplinary problems, including an incident in which he whistled at and made lewd suggestions to a female store clerk.

Additionally, Williams alleged that coaches failed to fulfill their duty to inform the student-athletes about UGA's sexual harassment policy and enforce it, specifically against basketball and football players.

Procedural History

Williams brought a $25 million lawsuit against:

1. UGA, the Board of Regents of the University System of Georgia and UGAA for violation of Title IX;
2. Adams, Harrick, and Dooley as individuals and in their official capacities as UGA and UGAA president, former head basketball coach, and athletic director of UGAA for violation of 42 U.S.C. § 1983;
3. UGA and the board of regents for violation of 42 U.S.C. § 1983; and
4. Cole, Brandon Williams, and Thomas for state law torts. She also sought "injunctive relief ordering the defendants to implement policies, and procedures to protect students from student-on-student sexual harassment prohibited by Title IX."

UGA, UGAA, the board of regents, Adams, Harrick, and Dooley all filed motions to dismiss her claims. Williams then moved to amend her complaint, adding additional factual allegations to support her claims, providing a more specific request for injunctive relief, and requesting declaratory relief against UGA, UGAA, and the board of regents. The district court dismissed Williams' Title IX and § 1983 claims, denied her requests for declaratory and injunctive relief, and denied in part and granted in part her motion to amend her complaint.

Williams appealed. The circuit court of appeals:

- reversed the district court's decisions to dismiss Williams' Title IX claims against UGA and UGAA;
- reversed the district court's decision to deny Williams' motion to amend her complaint;
- affirmed the other holdings of the district court, including the dismissal of the §1983 claims.

The case was then settled out of court for an undisclosed amount.

Analysis and Significance of the Case

The central issue revolves around Williams' Title IX complaint against the coach, the AD, and the president, all of whom were central UGA employees with authority, control and knowledge. In particular, the court considered whether their knowledge of Cole's prior acts coupled with the coaches' failure to inform student-athletes about and enforce the sexual harassment policy created deliberate indifference under Title IX.

Title IX states, in pertinent part: "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[90] To bring a civil suit to enforce Title IX, the four elements that must be shown are:

1) The defendant must be a Title IX funding recipient.[91]
2) An "appropriate person" must have actual knowledge of the discrimination or harassment the plaintiff alleges occurred. (Gebser)
    a. [A]n 'appropriate person' . . . is, at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination."
3) The funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities. (Davis)
    a. and the funding recipient's deliberate indifference "subjected" the plaintiff to discrimination.

[90] 20 U.S.C. § 1681(a).
[91] Floyd v. Waiters, 133 F.3d 786 (11th Cir.1998)

b. "deliberate indifference" is defined as a situation where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances

4) The discrimination must be "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." (Davis)

The court held that UGA clearly met the first criteria, and Dooley and Adams met the second. The court then devoted its analysis to the third question of deliberate indifference. The court found that the defendants' knowledge of Cole's prior acts constituted sufficient notice. Their failure to take immediate corrective action was deliberate indifference. Additionally, the court reasoned, given their knowledge of Cole's history and potential danger, their failure to "supervise" and "monitor" Cole (or even to let him know their specific expectations of him, given his history) also established deliberate indifference. This rationale parallels the reasoning of the Simpson court, when the university by its recruitment practices created the risk of discriminatory conduct toward Williams and others, much as CU's creation of discriminatory recruitment practices created the risk of harm to Simpson and Gilmore. The acts themselves met the fourth criteria.

Collateral Title IX Findings

This case is also instructive for the court's holding that UGA also failed to offer a prompt remedy in that its hearing process took eight months to process Ms. Williams' complaints (outcome notwithstanding), unnecessarily waiting for the resolution of the criminal process. The court also faulted UGA for waiting eleven months until any corrective action was taken, by which time two of the three assailants had left UGA. Finally, the court found that despite having corroborating evidence of Williams' claims, UGA took no action to prevent any future attacks on Williams by any of the alleged assailants. This resulted in her "reasonable" action of withdrawal from UGA, thus depriving her of the educational benefit guaranteed by Title IX. As mentioned earlier in this Whitepaper, this case represents one of the first circuit court decisions in which the court applied the Davis standard to a college or university to assess the institutional response qualitatively, and found that response clearly unreasonable in light of the known circumstances. Williams represents a two-fold liability analysis, applying the traditional deliberate indifference analysis of Davis to the institutional response, but also finding deliberate indifference along the same reasoning as the Simpson court, where the university creates the unreasonable risk of harm through discriminatory recruitment practices.

As we were composing this Whitepaper, your authors were quite struck at the way that Title IX analysis in both Simpson and Williams is oddly coming to resemble the foreseeable harm analysis of negligence liability. That convergence is a clear trend we'll see more of in the future, especially as courts expand "special relationships"[92] doctrine. Additional lessons of this case for school officials include the need to pay particular attention to the students they actively recruit, especially where they have (or should have) knowledge of past dangerous behaviors. Officials will have civil rights-based obligations to exercise appropriate control, issue appropriate warnings, provide training, explain policies and behavioral expectations. Or, here's a thought -- we could just stop recruiting athletes with known violent histories, especially histories of violence against women. Maybe that's what has the courts so fed up.

In light of the 2009 Supreme Court decision in Fitzgerald v. Barnstable, discussed below, the §1983 claims for individual liability against administrators will not be so easily dismissed in future cases.[93] When a college president

[92] Schieszler v. Ferrum College, 233 F. Supp. 2d 796 (W.D.Va. 2002)

[93] Final notes from the "you can't make this stuff up" file: Cole left UGA and became a whistleblower against Harrick, bringing down the UGA program. After leaving UGA, he was also charged with threatening a girlfriend with an Uzi (2003), writing bad checks in Georgia (2003), and was jailed "6 or 7 times" (by his own admission) for various other misdemeanors between 2003-2005. He later landed a job (with a reference from another basketball coach from LSU) as a civil servant in Cook County, and was dismissed from his HR job for not disclosing his past on

uses the college's special admissions policy to admit an otherwise unqualified athlete or student with a known history of violence because athletic success or any other factor trumps the right of female students to be safe, the courts (and certainly the juries) will not hesitate to make a quick example of the next college as a message to others whose ethics, values and priorities are similarly misguided.

THE JENNINGS CASE[94]

What Happened?

UNC Head Soccer Coach Anson Dorrance personally recruited Melissa Jennings, and she joined the UNC team in August 1996. He cut her from the team in May 1998, at the end of her sophomore year, for "inadequate fitness."

Dorrance engaged in sexually explicit conversations with his team, including asking them about their sexual activities and making sexually objectifying comments about their bodies. He also expressed his sexual fantasies about certain players and made advances towards at least one other player. These behaviors were made at all times the team was together, on or off campus. Some particularly egregious comments included:

- Asking one player "who [her] fuck of the minute is, fuck of the hour is, fuck of the week [is]," and whether there was a "guy [she] hadn't fucked yet," or whether she "got the guys' names as they came to the door or . . . just took a number.";
- Asking a second player if she was "going to have sex with the entire lacrosse team,";
- Advising another player to "keep your knees together . . . you can't make it so easy for them.";
- Asking another player "whether she was going to have a "shag fest" when her boyfriend visited and whether she was "going to fuck him and leave him.";
- Asking another player about the size of her boyfriend's genitalia;
- Regularly commented on certain players' bodies, referring to their "nice legs," "nice rack[s]," breasts "bouncing," "asses in spandex," and "top heavy[ness]," and referred to a player as "Chuck" (her name was Charlotte) because he believed that she was a lesbian.

Dorrance disclosed his sexual fantasies about several players. These included:

- Telling one player, Debbie Keller, that he would "die to be a fly on the wall" the first time her roommate, another team member, had sex;
- Telling a trainer that he fantasized about having "an Asian threesome" (group sex) with his Asian players;
- Asking Keller's roommate if she was "…out having sex all over Franklin Street?";
- Telling Keller that he "couldn't hide his affection for [her]" and told her that "in a lifetime you should be as intimate with as many people as you can.";

He also engaged in inappropriate and unwelcome advances, including:

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his application. His boss, Donna Dunnings was also fired after it was revealed she bailed Cole out of jail twice for violating a protective order filed by an ex-girlfriend. As of April 2009, he was in jail for probation violations. Thomas transferred to Middle Tennessee State, graduated, and was bypassed by the NBA. He now plays in the CBA and Polish leagues. Brandon Williams did not graduate and no update could be found. Harrick was fired/resigned from UGA, and drummed out of college coaching. He worked as a scout for the Denver Nuggets of the NBA and in basketball development in China. He now does regional color analysis for Fox Sports SW. Dooley resigned as AD in 2005, remained a consultant to UGA, and now serves as a consultant to Kennesaw State University in developing a football program.

[94] Melissa Jennings and Debbie Keller vs. The University of North Carolina at Chapel Hill, et al 482 F.3d 686 (2007)

- Frequently brushing Keller's forehead, hugging her, rubbing her back, whispering in her ear, dangling a hand in front of her chest, touching her stomach, and putting his arm around her.
- Meeting with his players 1-on-1 in a hotel room to assess their performance.

So, readers, how do you think this one is going to go for Dorrance? This isn't a hard one based on the conduct, is it? You'd be surprised. He's one of the most successful coaches in college sports history. During the fall of her freshman year, Jennings filed a complaint in a meeting with Susan Ehringhaus, Legal Counsel to the University and Assistant to the Chancellor, telling Ehringhaus everything she was aware of. Ehringhaus told Jennings to "work it out" with Dorrance. Jennings was cut from the team one year later. Jennings's parents submitted several complaints to the Chancellor's office about Dorrance's regular involvement in discussions about the sexual activities of his players. The Director of Athletics, Richard Baddour, conducted an administrative review pursuant to UNC's sexual harassment policy. Dorrance admitted making the comments, but claimed they were only "of a jesting or teasing nature." Baddour sent a letter of apology (signed by Dorrance) to Jennings's father and a brief, mild letter of reprimand to Dorrance. Baddour then sent a letter to Dorrance declaring it "inappropriate for [Dorrance] to have conversations with members of [the] team (individually or in any size group) regarding their sexual activity."

After filing the lawsuit in August 1998 (the start of her junior year), Jennings was threatened and harassed and told by UNC officials that they could not guarantee her safety on campus. She spent her senior year at another school and was then awarded a UNC degree.

Procedural History

Keller settled her claims and took a dismissal with prejudice for a six-figure settlement. A third player, Hill, settled for $70,000 prior to filing suit. Jennings' claims were litigated. The district court found in favor of the defendant university and its employees on a motion for summary judgment. The court of appeals affirmed, and the case was then reheard *en banc*. The *en banc* (all judges of the court, together) panel vacated the lower courts' rulings on the Title IX claim against UNC, and the §1983 personal liability claims against the coach and general counsel. In 2008, Jennings settled for $375,000, a required annual review of the UNC sexual harassment policy, and a requirement that Dorrance participate in annual sensitivity training. It is gratifying when our students try to teach us, isn't it? In addition to compensation for her damages, Jennings' goal was reform and prevention.

Analysis and Significance of the Case

The central issue revolves around Jennings' Title IX complaint against UNC, the coach, and the general counsel, as well as her §1983 claims against the coach and counsel. The court considered whether Jennings was subjected to verbal harassment by Dorrance based on her gender, and whether the harassment was sufficiently severe or pervasive to create a hostile or abusive environment. At a public university, freedom from harassment and free speech are countervailing rights. In order for verbal harassment to overcome Constitutional 1st Amendment protections, it must be particularly egregious. The court found that Dorrance's claims that the language was "teasing" were disingenuous. The court noted the disparity in the power structure of the coach-athlete relationship (particularly such a successful coach), and the age disparity of the coach and his players (he was 45). Further, the Court indicated that the conduct was severe enough that Jennings was unable to participate in the program, and that she suffered athletically and academically – as well as psychologically.

A Title IX sexual harassment victim can be considered deprived of access to educational opportunities or benefits in several circumstances, including when the harassment:

1. Results in the physical exclusion of the victim from an educational program or activity;
2. "So undermines and detracts from the victim['s] educational experience" as to "effectively deny [her] equal access to an institution's resources and opportunities"; or
3. Has "a concrete, negative effect on [the victim's] ability" to participate in an educational program or activity. (Davis)

By the court's analysis, UNC clearly met the first criteria and Jennings' meeting with Ehringhaus met the second. Jennings' pretextual removal from the athletics program met the third.

The §1983 claims against Dorrance and Ehringhaus survive[95]. Dorrance continues to coach the Tarheels, winning his 21st National title in 31 years in 2009. Seven of his players have been drafted into the professional leagues. He continues to attend his required sexual harassment trainings. Ehringhaus is no longer in the general counsel's office. Baddour is still the athletic director. Jennings is working back in her home state.

Implications of the Decision

Your authors find several aspects of this case worthy of Gamechanger status. The first is that it is rare for purely speech-based harassment to rise to the level of creating a hostile environment. At public universities, harassing speech must overcome the 1St Amendment protections, and to do so must be sufficiently severe and pervasive to effect a discriminatory deprivation. This case presents an excellent example of pervasive speech that rises to the actionable level, though a spirited dissent in the opinion makes strong points that Jennings heard some of the comments, Keller others, and that all comments cited above were not directed at or heard by the two plaintiffs. While that may be true, the notion of a pervasive hostility is one that literally pollutes the environment. It did so here, and over some time. The dissent seeks to argue that some of the players were discussing their own sexual exploits in detail, and Dorrance merely joined in. If you buy that logic, you should inform your employees that they can only make graphic and detailed sexual comments on the job when students are already doing so, and shouldn't add their own fantasies to the conversation. We don't recommend that course of action.

The second Gamechanging aspect of this case is remarkably subtle. Remember that deliberate indifference is a failure to act. Ehringhaus' apathy seems to be just the kind of deliberate indifference Title IX is intended to remedy. It is the basis for the majority opinion in this case, but the majority conveniently ignored the fact that while Ehringhaus may not have acted; Baddour did when he received a report of Dorrance's misconduct subsequently. He censured Dorrance and made him apologize. Why would the majority ignore the fact that UNC, through Baddour, actually did act? One employee was deliberately indifferent, but was the indifference systemic, if some action was actually taken by another employee with authority to act? This is a Gebser case, involving as it does misconduct by an employee directed at students. The Davis dicta, then, doesn't explicitly apply. The court isn't willing to ask whether the actions taken were clearly unreasonable in light of the known circumstances, but in some ways acted upon that standard without saying so. They ignored Baddour's remedies because they were ineffective, and because the discriminatory conduct persisted after Dorrance was chastised. We believe this case is a harbinger of more explicit convergence of the Davis and Gebser standards. Future cases will tell. We don't believe they will over time remain as distinct as some legal commentators believe them to be. We also wonder why a retaliation claim was not pursued in this case, given that Jennings removal from the team came after her complaints alleging deprivation of her civil rights.

[95] The case itself indicates this. Whether the case may have settled since is unknown.

FITZGERALD V. BARNSTABLE[96]

Your authors have debated the significance of this case, and unanimously concur that Fitzgerald is the most important case of 2009 affecting higher education, and arguably any supervisor anywhere. Time may also prove it to be the most significant case since Gebser and Davis, with respect to Title IX litigation. We struggle over the activism this case represents, from a Supreme Court not known for its activism, resulting in a unanimous decision. Typically, the High Court grants certiorari (agrees to hear a case) in one of two circumstances. The first is where there is a significant split between circuit courts of appeals, such that different circuits arrive at opposite holdings in similar cases, and the Supreme Court is needed to determine the controlling course the law should take for all courts. The second is where an issue represents a federal question of such burning social, political or religious import that the Court feels compelled to act. It is the first of these circumstances that prompted the Court to grant cert on Fitzgerald.

What is a §1983[97] Action?

Many civil rights statutes apply to employers, or governmental entities. §1983 was enacted to provide a private right of action against an official (government or otherwise) in their individual capacity for depriving someone of their federal civil rights while acting in an official capacity. The statute usually is applied to government officials and state employees, but the actual statute does not limit the scope of §1983 to state actors. Instead, it applies to all who act under color of state law. That may, on occasion, apply to private employees, such as those charged with implementing state anti-discrimination employment laws. It certainly applies to officials of public universities, and on occasion could apply to officials of private colleges and universities.

Why Are We Interested in the Application of §1983 to Title IX?

When Congress enacts statutes, it sometimes makes explicit whether it intends the statute to be the only route of enforcing the rights guaranteed by the statute. And sometimes, Congress fails to be explicit, thereby guaranteeing many billable hours for lawyers who will argue the question. The courts must divine whether Congress intended the statutory enforcement scheme to be the sole remedy, or whether other types of enforcement, such as §1983, should apply. Title IX is explicit in that it can only be enforced against federal educational funding recipients, and provides no recourse against individuals. Yet, nothing in the Title IX statute explicitly states that Congress intended institutional enforcement to be the sole remedy for gender based discrimination in educational settings. Thus, the door was left open for the courts to determine that the rights conveyed by Title IX could be enforced against individuals through a §1983 action.

What Happened?

In 2002, Robert and Lisa Fitzgerald of Hyannis, MA, sued their local school district, the Barnstable School Committee and school superintendent Russell Dever. The Fitzgerald's daughter, Jacqueline, was in the kindergarten at Hyannis West Elementary School during the 2000-2001 school year. Her parents complained to school officials that every time Jacqueline wore a skirt to school, a third grade boy on her bus would force her to lift her skirt, pull down her underpants or spread her legs, while other students watched and laughed. Officials and local law enforcement

[96] Fitzgerald et Vir v. Barnstable School Committee et al, 555 U.S. ___ (2009)
[97] 42 U.S.C. §1983, the only remaining provision in force from the Civil Rights Act of 1871.

investigated, and despite being unable to corroborate the accounts of the incidents, school officials offered various remedies to the Fitzgeralds. They suggested putting Jacqueline on a different bus, or segregating younger students from older ones on the bus. The Fitzgeralds proposed remedies of their own, including moving the harasser to a different bus, or putting a monitor on the bus, arguing that the remedies suggested by the school were punishing Jacqueline for the actions of others. School officials did not act on these suggestions, and so the Fitzgeralds began driving Jacqueline to school, to avoid the bus. The year was marked by a large number of absences from school for Jacqueline.

The boy allegedly continued to harass Jacqueline at school, and as a result, the Fitzgeralds brought suit under both §1983 and Title IX. They sought civil monetary damages and court orders to protect Jacqueline. The district court rejected the §1983 claim, holding that Title IX provided the only remedy. The court then ruled against the Fitzgeralds on their Title IX claim. While actual notice was given, the remedies offered were objectively reasonable, and did not constitute deliberate indifference. The 1st Circuit Court of Appeals affirmed.

What Did the Supreme Court Hold?

Following the precedent set by the Court in its Sea Clammers[98] decision, the Court applied the analysis that when the remedies provided by a statute are sufficiently comprehensive, a court may conclude that Congress intended them as the sole remedy. In Fitzgerald, the Court found that the statutory remedy under Title IX was specifically limited to administrative enforcement. This offered a limited rather than comprehensive enforcement scheme, such that the Court could infer that administrative enforcement was not intended as the sole remedy. In fact, the Court had previously inferred a private right of action against institutions with its Franklin v. Gwinnett[99] decision in 1990. The Court ruled, therefore, that violations of Title IX can give rise to suits against individuals via §1983 actions. The Court then remanded its decision to the district court, to reconsider the §1983 claims it had initially rejected. Those claims are still being litigated[100]. The district and circuit court decisions on the Title IX deliberate indifference claims were not considered by the Supreme Court because they were not raised by the Fitzgeralds.

Implications for Colleges and Universities

The Fitzgerald decision will essentially make it malpractice for a plaintiff's lawyer not to allege §1983 claims in any complaint against a college or university for a Title IX deliberate indifference or retaliation claim. Institutional officials, especially at public colleges and universities, will find themselves named personally in lawsuits. They may face personal liability for their administrative actions or inactions. Now more than ever, stepping up the Title IX compliance game is what will be required of administrators as a result of these Gamechanging cases. Courts are demanding of administrators the clarity of vision needed to see student complaints through a civil rights lens.

WHERE WE ARE GOING?

The case of McGrath v. Dominican College of Blauvelt[101] points the way. It's not a Gamechanger yet, but it may be if it is fully litigated. If nothing else, it points to the way lawyers will be framing Title IX cases in the years to come. In late November of 2009, the U.S. District Court for the Southern District of New York rejected the college's motion to

[98] Middlesex County Sewerage Auth. v. Sea Clammers, 453 US 1 (1981)
[99] Franklin v. Gwinnett County Public Schools. 503 U.S. 60 (1992)
[100] This is according to the case. Whether a settlement has been reached is unknown.
[101] McGrath v. Dominican College, 2009 WL 4249122 (S.D.N.Y. Nov. 25, 2009)

dismiss. In doing so, the court will allow key causes of action of the complaint to go to trial. Those causes of action include:

1. A wrongful death suit, because student Megan Wright committed suicide in 2006, allegedly distraught in the aftermath of her campus gang rape and the college's failure to address it;
2. A Title IX action for deliberate indifference;
3. A fraud accusation for allegedly covering up similar previous campus incidents;
4. And a §1983 claim against the president and dean of students for Title IX, Equal Protection and negligence-based civil rights deprivations.

Dominican College has already settled with the New York Attorney General's office[102] over state campus crime reporting law violations arising from this case. The alleged details of the case are sad and sordid, and won't be fully detailed here[103]. In short, the allegations include the assertions that the dean refused to investigate the alleged gang rape, the president refused to meet with the alleged victim and her mother (McGrath), and the college covered up previous incidents that it should have warned students about. Perhaps the most compelling assertion is that campus officials encouraged Wright to contact a local police officer to investigate the complaint, a police officer who was apparently on the college's payroll at the time, and who ensured the criminal investigation never went anywhere.

This case may wind up being a stunning precedent for personal liability as well as institutional liability once the facts are litigated, though cases like this often settle at this point. If there is any reason to litigate it for the college, it's the attempt to apply broad §1983 liability to the officials of a private college. We'll be watching closely to see how this case unfolds. Of great interest is the trend we are seeing in the bootstrapping of Title IX and negligence together in cases, which we believe will become a potent litigation weapon.

The allegations of the McGrath case, if true, highlight significant weaknesses in the campus conduct system that are not only issues for Dominican, but potentially for other colleges and universities, as well. At NCHERM, we measure a campus conduct process not only in its efficient processing of everyday alcohol violations, but by how it withstands its toughest cases. Sexual misconduct is the yardstick for how fair, effective and resilient any campus conduct process is. Here are just a handful of examples from campuses visited by NCHERM consultants in the last few years of what it looks like when the civil rights lens is not the primary prism through which sexual misconduct complaints are processed.

- At one university, sex is prohibited in the residence halls. Until last year, when victims came forward to allege sexual misconduct, the university would file charges against the alleged victim for having had sex in the residence halls.
- At another university, since all sexual assaults are "He Said/She Said" cases, the university files charges against both parties and leaves it to a campus conduct board to figure out who did what to whom.
- At another university they sanction male students found in violation of the sexual misconduct policy to university-directed, education-based rehabilitation programs.
- At another university, a student/faculty/staff board found an accused student not responsible for sexual assault. Why? The alleged victim was devoutly religious. She claimed to be a virgin. Yet, she admitted to performing consensual oral sex on the respondent prior to the alleged assault. If she would do that, she can't really be a

[102] http://www.insidehighered.com/news/2009/06/19/dominican
[103] http://abclocal.go.com/wabc/story?section=news/local&id=6259518

virgin. She's lying. If she's lying about that, she's not believable in alleging an assault. After all, she voluntarily performed oral sex.

- At yet another university, the policy is two-tiered. The most egregious offense involves proving intent. The lesser offense includes the same behaviors, but without intent. The board consistently defaults to the lesser charge because there is insufficient evidence of intent. This campus apparently has more than its share of accidental rapists.
- At another university, they use the clear and convincing evidence standard of proof in their conduct hearings. Their hearings rarely produce a finding of violation of the sexual misconduct policy. But, the board feels better, because it still has the option to offer the accused student some counseling on masculinity, objectification and gender bias if he is open to learning from his experience.
- At a final university, alcohol use by the alleged victim is pursued when it comes up in a sexual misconduct hearing. As a result, several women have decided not to pursue their legitimate complaints, for fear of facing retribution for their inappropriate use of alcohol prior to and during their assaults.

How do you think these processes will hold up to our NCHERM yardstick? How about in court? How did you do on your answers to the first four opening case studies in this Whitepaper? Yes is the right answer to each. Because the game is different now.

Below, you will find some useful suggestions for campus officials on effectively remedying sexual misconduct complaints.

SANCTIONING, TITLE IX AND THE "NOT CLEARLY UNREASONABLE" STANDARD

How we sanction for sexual misconduct is a big part of the remedial process. The case law gives us some guidance on what the courts expect from our remedies:

1. Bring an end to the discriminatory conduct;
2. Take steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct;
3. Restore the victim as best you can to his or her pre-deprivation status.

These guidelines make many common sanctions suspect. In an egregious case, can anything short of separation achieve the aims of points one and two? What about suspending for some period of time? Does time change behavior? Can we verify that it has? Suspending upon the satisfaction of conditions, or the demonstration that return is a safe decision might be more appropriate. Suspending the offender until the victim graduates is misguided. It assumes a contextual conflict, and that no one else is at risk. The research of our field does not support that assumption. It is not the job of a college or university to try to rehabilitate a sex offender, and very little research supports the notion that such rehabilitation is either possible or effective[104]. And while the risk of the student moving on to another institution is very real, it is real whether the student is suspended or expelled.

In satisfying Title IX, there is a very real clash with the typically educational and developmental sanctions of student conduct processes. In fact, sanctions for serious sexual misconduct shouldn't be developmental. They should protect the victim and the community. That's the point at which development ends and a different priority must control. Why? The research of David Lisak is one of the most compelling reasons. Lisak is a forensic psychologist and professor at the University of Massachusetts, Boston. To briefly summarize the findings of Lisak's 2002 study on undetected rapists[105], Lisak researched rates of perpetration among 1,882 male students at UMASS, Boston. 120

[104] http://psychservices.psychiatryonline.org/cgi/content/full/50/3/349
[105] http://www.crisisconnectioninc.org/pdf/undetected_rapist.pdf

men admitted to at least one of the four sexually violent acts identified (6.3%). However, the 120 men identified 483 total acts, with 76 of the 120 men (63%) admitting to 439 acts of repeat perpetration (an average of 6.6 acts each). Similar research by Antonia Abbey and Christine Gidycz supports these findings. So, unless you can distinguish whether an offender is one of the 63% of repeat perpetrators, or one of the 37% of one-time perpetrators (and you can't), can you really afford to take a chance with the safety of your community? We're fond of telling NCHERM clients, "if you're willing to let him back in, you also have to be willing to fix him up with your daughter on a date, because by reinstating him, you're vouching for his safety." Are you that sure?

Finally, we are bound by the scrutiny of the courts and OCR, which will ensure our remedies are not clearly unreasonable in light of the known circumstances. While the courts have yet to give us much clarity on this standard, we have a few examples to consider. Undue delays are typical targets, as is deferring campus resolution during the pendency of criminal proceedings. One court has held that investigation alone is not sufficient to overcome a deliberate indifference accusation in a rape complaint.[106] OCR insists there must be a nexus between the sanctions and the discriminatory conduct which led to the sanctions. In another case, OCR also insisted that colleges and universities at least investigate allegations of online sexual harassment, even if the online forum may ultimately prove to be outside the control of the college or university.[107]

PRACTICAL RISK MANAGEMENT LESSONS FROM THESE CASES

- Investigate every complaint. No exceptions.
- Provide prompt (30-60 day) and equitable remedies for discriminatory conduct.
- Engage your campus in strategic prevention and comprehensive education on sexual harassment, campus policies, sexual assault and other high risk issues. Cases like Williams and Simpson create education and training requirements, and those requirements cannot focus solely on athletics programs, though that is a good place to start.
- Subject athletic recruitment practices to a risk assessment and mitigation process.
- Implement comprehensive civil rights investigation models for student complaints, just as you would for employee complaints.
- We need comprehensive reconsideration of student-athlete, and coach-as-god cultures.
- Make restorative justice or other healing/cathartic opportunities a part of your remedial processes.
- Find balance. Where fairness was once the goal of campus conduct and remedial proceedings, now fairness and balance must be the hallmarks. If you grant a right, privilege or procedural benefit to the accused individual, ask whether gender equity demands similar rights, privileges or benefits for the complaining individual. The 1992 Campus Sexual Assault Victim's Bill of Rights[108], which amended the Clery Act, sought to codify some basic equivalent rights for victims. Now, we need to go farther, to ensure that equivalent rights and benefits attach to all parties to complaints.[109]

CONCLUSION

It is fair to suspect the cases discussed in this Whitepaper could be cause for heartburn for many administrators. Faced with this unprecedented expansion of Title IX causes of action and liability, we fear the potential to overreact. Be mindful that most of these cases are federal circuit appeals decisions, and really only establish the law for that

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[106] Vance v. Spencer County Public Sch. Dist., 231 F3d 253 (6th Cir. 2000)
[107] OCR Investigation of Hofstra University, 2009. http://www.ncherm.org/documents/Hofstra02092051.pdf
[108] http://www.securityoncampus.org/index.php?option=com_content&view=article&id=133&Itemid=27
[109] The *Victim's Rights Paradigm for Campus Conduct Hearings* is discussed in greater depth at http://www.ncherm.org/pdfs/VICTIMS_RIGHTS_PARADIGM.pdf

circuit. We highlight them because they can and will persuade other circuits. The Supreme Court cases discussed here apply, of course, to all of us.

Lest we might overreact, we want to encourage campuses to get it just right. A final case stands as a caution on what happens when a college or university overcorrects in the opposite direction. A 2008 decision by the 3rd Circuit Court of Appeals in DeJohn v. Temple University[110] is just such a cautionary case. In this case, the 3rd Circuit struck down a campus sexual harassment policy as being unconstitutionally overbroad, prohibiting more speech than the Constitution allows. The culprit? Temple's sexual harassment policy restricted speech that had the *intent or effect* of creating a discriminatory environment, language taken from EEOC guidelines, it should be noted. Courts are interested in the effects of discriminatory speech and conduct, but not the intent. This case might only be mildly interesting for that holding, except that the court went on to hold that the president of Temple University could be held personally liable under a §1983 action for implementing an unconstitutional policy. The trend toward individual, personal liability rears its ugly head again.

It is clear, then, that we are in Three Little Bears territory with these cases, now numbering seven. We cannot be too hot or too cold, or the courts will rapidly remind us we are off course. We have to be just right. If you're not sure what will give your institution the right balance, NCHERM is here to help.

[110] DeJohn v. Temple University, 537 F.3d 301 (3d. Cir. 2008)

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DELIBERATELY INDIFFERENT

Crafting equitable and effective remedial processes to address campus sexual violence

By the NCHERM Partners:

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

www.ncherm.org

THE ELEVENTH NCHERM WHITEPAPER

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

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

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

Why This Title?

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

We addressed sexual violence in the 2010 NCHERM Whitepaper, *Gamechangers*, where we comprehensively discussed the court-made paradigm shift occurring in Title IX litigation of campus sexual assault.[111] While that Whitepaper addressed the case law implications, we wanted to take this year's Whitepaper further, by providing a wide-ranging discussion of what colleges and universities need to do to accomplish the changes that are needed, and demanded, by courts and government agencies. While it is unusual for NCHERM to publish two successive Whitepapers on similar topics, we decided to stick with sexual violence again this year because the heat has been turned up even since our accounting of the "state of the legal developments" last year. This year, the US Department of Education launched a new initiative through its Office for Civil Rights (OCR) to enforce Title IX through general compliance reviews -- not just in response to a formal complaint -- to go public with its enforcement actions, and to recast each campus it investigates as a model for other campuses to emulate through a process of negotiated restructuring of policies, procedures and practices.[112] It started with Eastern Michigan University and Notre Dame College, and is now expanding to include the University of Virginia, Ohio State University, Harvard University and the University of Notre Dame. OCR has announced it intends to issue new guidance, as well, on

[111] http://www.ncherm.org/documents/2010NCHERMWhitepaper.pdf
[112] http://www.publicintegrity.org/articles/entry/2747/

standards of proof and other areas of frequent compliance gaps. Additionally, this year Security-on-Campus, Inc., released its blueprint[113] for Title IX-compliant remedial practices, and has gone to Congress to ask for another revision of the Clery Act called the Sexual Violence Elimination Act (SAVE Act) to better address campus sexual assault victim's rights.[114]

The pressure identified as court-made in last year's Whitepaper isn't letting up. It is being backstopped by administrative enforcement and legislative action and the intensity will increase until a watershed occurs. We can't keep lurching from PR nightmare at Dominican College of Blauvelt to PR nightmare at the University of the Pacific to PR nightmare at Notre Dame University. So, what's the bottom line? As we see it, systemic failures of equitable remedies by colleges and universities could until now be ascribed to misfeasance. Going forward, however, colleges and universities that don't "get it" have no excuse.[115] Awareness of the need to change must be a part of the mindset of every college administrator. The lessons on how to accomplish the change are legion, pushed by every campus women's center, advanced by Security-on-Campus, Inc., OCR, CALCASA, EVAW, NCHERM[116] and countless other sources. The failure to do it now isn't misfeasance, it is malfeasance. The failure to change in the face of overwhelming demands to get it right isn't laziness, it isn't the machine of campus politics, it isn't a question of the right timing or a slow taskforce. The failure to get it right – now -- is deliberately indifferent to a culture of gender violence that is normative on college campuses. Those not acting to end that culture are helping to perpetuate it.

Failure to Provide Equitable Remedies

Lest our readers take from this the message that colleges and universities are wholly inept, please know that this Whitepaper is directed specifically at ineffective remedial models, and not at the broad swath of sexual assault initiatives that exist on many college campuses. For example, many campuses offer very effective models for victim intake and initial crisis intervention.[117] Many campuses have established advocacy programs that are literally life-saving. In rural Georgia, a campus spearheaded the successful effort to bring rural counties together with local donors to create a forensic nursing (SANE) program where there was none. That is real, measurable progress. Victim services has come a long way on college campuses, but strength in those programs now allows college and university officials to claim proactive stances on the broader issues of sexual violence, and those proclamations on too many campuses are still hollow. Improving victim services is critical, but there are many advocacy programs out there hesitant to recommend to victims that they pursue campus grievances on their own campuses, because of the dysfunctional operation of the remedial processes. It is those processes on which we focus for the remainder of this Whitepaper.

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

No. An equitable process is focused on gender (race, age, religion, etc.) equity, where equity is defined as fair, balanced, leveling, equal and impartial. That may sound victim-centered, but that is because the process on many campuses for so many years considered only (or primarily) the rights and situation of the accused student. Thus, equity ends up feeling like a shift to the "other side," even though it is not. An equitable process on many campuses will force a victim focus, but only as a casualty of history. Let us explain. In 2010, the Association for Student Conduct Administration[118] (ASCA, formerly ASJA) celebrated the 50th Anniversary of the landmark decision in Dixon v. Alabama.[119]

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[113] http://www.securityoncampus.org/pdf/SAFEblueprint.pdf
[114] http://s3.documentcloud.org/documents/18205/perrie-036-xml.pdf
[115] By "get it", we mean that colleges and universities must engage in significant review and revision of their current practices and policies in alignment with the best practices that are emerging for the field.
[116] The U.S. Department of Education Office for Civil Rights (www.ed.gov/ocr); The California Coalition Against Sexual Assault (www.calcasa.org); Ending Violence Against Women International (www.evawintl.org); The National Center for Higher Education Risk Management (www.ncherm.org).
[117] http://students.syr.edu/rapecenter/
[118] www.theasca.org
[119] Dixon v. Alabama, 294 F. 2d 150 (5th Cir. 1961)

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

All of the cases that followed Dixon developed a body of law, then, around the rights of respondents. Campus conduct evolved as the exploration, implementation and protection of *their* rights. We forgot that ALL students have civil rights, to the point where in the 1990s we were so unfocused on victim's rights that Congress had to legislate repeatedly to encourage a more balanced focus from us.[120] It wasn't until the late 1990s that a series of cases started to more fundamentally reshape the field of student conduct, this time into an exploration of the civil rights of victims of sexual assault. Those cases and their most recent progeny are addressed in last year's Whitepaper, and so will not be discussed further here. Due Process is, by definition, a one-sided view of fairness, and now we are finally and belatedly filling in what the complainant's rights paradigm should be, with sexual assault being the touchstone.

This Whitepaper asserts the notion that the Campus Sexual Assault Victim's Bill of Rights (amending the Clery Act), FERPA and even Title IX, form the floor – not the ceiling-- for best practices to address sexual violence on college campuses. Most campuses are still striving to reach the floor, let alone the ceiling. Yet, we often think that if we comply with the rights and disclosure requirements of Clery and FERPA, we're doing what we need to be doing. That's not even close. OCR investigations of Title IX violations by colleges have added layer upon layer of procedural requirements, but OCR does it case by case, rather than giving colleges and universities broad-based guidance on the expectations of the law. For example, OCR publishes Title IX Guidance[121] that should be required reading for college administrators, but the legal mandates established by the OCR case investigations are not adequately reflected in the Guidance.

An NCHERM client recently voiced frustration about this, saying she'd be more than willing to comply with the expectations, but has no way to find them, keep up with them, or even know they exist because OCR does not publish its finding letters when it completes an investigation of a college. True enough, and that got us thinking about how we might make these finding letters more accessible beyond individual Freedom of Information Act (FOIA) requests. We learned that the Center for Public Integrity (CPI) had made those requests already, as part of its investigative article series on campus sexual misconduct.[122] Lead author of the article series Kristen Lombardi gave more than 200 finding letters to NCHERM, and we have now posted them on our website[123], fully indexed, categorized and freely available to you. You need to know what is in these letters, and we thank CPI and Kristen for sharing them with us and a team of volunteer interns for formatting, organizing and indexing them so that we could share them with you.

What Do Complainant Rights Look Like?

This question is largely governed by Title IX, which not only protects victims of gender discrimination, but also requires gender equity in the proceedings used to remedy discrimination complaints. Thus, you can balance your process with the goal of equity by assessing what you do for one party (the respondent), and whether you ought to provide an equivalent right, privilege or opportunity for the other party (the complainant or alleged victim). The gender construct is based on the fact that almost all campus sexual violence complaints are made against men, and

[120] Amendments to the Clery Act in 1992 and to FERPA in 1998.
[121] http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html
[122] http://www.publicintegrity.org/investigations/campus_assault/
[123] http://www.ncherm.org/legal.html

thus the protections of fair and due process accrue to men, as respondents. If you typically afford protections to men and not women, you engage in gender discrimination. Since most (nearly all) complainants are women, women are disadvantaged by the narrow view of due and fair process as accruing primarily to men. Title IX, then, has legislatively created something akin to a property right in an education and in educational access for women (or anyone discriminated upon on the basis of gender) as a balance to the property-based due process rights which accrue to respondents who are typically men.

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

> The University's approach to sexual assault complaints fails to recognize the distinction between a Title IX complaint of discrimination alleging sexual assault and a disciplinary hearing against a student for violating the Code of Conduct's rule against sexual assault…§106.8(a) permits the use of a student disciplinary procedure not designed specifically for Title IX grievances to resolve sex discrimination complaints, as long as the procedure meets the requirements of affording a complainant a prompt and equitable resolution.[124]

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

- ***Notice and Explanation of Process***

  Just like many of us would sit down with a respondent and explain the process by which their alleged violation will be determined, it is both possible and beneficial to create the same opportunity for victims. They need to understand the parameters of the policy, and what it does and does not cover. They need to know how the conduct process plays out, and giving them a chance to ask questions will help to make what is to come more predictable and comfortable for them.[125] It may clear up misunderstandings in advance, and help conduct administrators to set reasonable expectations with victims for what the process can and cannot accomplish. Several OCR decision letters explicitly require this.[126]

- ***Notice of When Complaint Delivered to Respondent***

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

- ***No-Contact Order***

  Imposing a no-contact order between the parties to a complaint is becoming a more common practice, and as long as you take meaningful steps toward assuring that the no-contact order is enforceable, this type of

[124] OCR Letter to Temple University, 2007.
[125] This is **not** to include an administrator's (particularly a conduct administrator) guess as to the anticipated outcome of the hearing, as this may inappropriately impact or influence the alleged victim's decision.
[126] OCR Letter to Temple University, 2007.

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

- ***Victim Receives Copy of Response to the Complaint***

We encourage you to shed light through your process, rather than to cloak it in secrecy and an information vacuum. When an alleged victim makes a complaint, we typically share that complaint with the respondent. If the respondent writes a formal response to the complaint (and s/he should), it is balanced to share a copy of that response with the alleged victim.[127] Appropriate FERPA consents should be obtained, and you may need to redact certain information, but that is better than keeping the alleged victim in the dark about the respondent's specific responses to the allegations of the complaint.[128]

- ***Interim Suspension***

An interim suspension can be an important way to protect the rights of a victim from a respondent who may pose a continuing threat of harm. The law of interim suspension is quite friendly to colleges, giving private institutions almost unfettered latitude. Public institutions are more confined, but generally are permitted to interim suspend for good cause for up to ten business days (two weeks), pending a hearing. Yet, what is good cause? Many campuses use the ongoing threat to the victim or the community standard, but the law would permit interim suspensions to preserve the integrity of the investigation, to thwart the destruction of evidence or collusion of witnesses, or to prevent retaliation. Many administrators are hesitant to use interim suspension authority, but we encourage more expansive use of the authority when any of these circumstances warrant a temporary separation. "OCR has recommended that whenever a student files a claim of hostile environment discrimination, a college seriously consider taking interim steps to protect the student from the potential of further discrimination or retaliation."[129]

Many administrators tell us they are reticent to disrupt a student's academics without proof of a violation, but how do we know an accused student is safe to stay? We're just guessing. Yes, modifications to housing and no-contact orders might help, but we need to more effectively balance the disruption to the accused student that might come from a short suspension with the disruption to the alleged victim from the alleged assault, and the effects of permitting the accused student to remain on campus. It is also sometimes possible to separate a student from campus while still permitting them to continue academic coursework without being physically present in class. That is workable. Often, we think the hesitation to interim suspend comes because campuses move too slowly to complete the investigation and hearing. Solve that problem, and the interim suspension can potentially be shorter and less disruptive.

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

Making sure that victims are aware that you have a separate process for critical issues, and/or that your regular conduct decision-makers are specifically trained at handling relationship violence, stalking, discrimination and sexual misconduct

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[127] OCR Letter to South College, 2001.
[128] We would recommend that this be shared in a personal meeting, with the alleged victim's advocate present as well.
[129] OCR Letter to Riverside Community College District, 2005.

can send a clear message that your process is attentive to their needs, sensitive to their concerns, and respectful of their experiences. Dozens of OCR finding letters critique campuses for insufficiency of training for Title IX Coordinators, for investigators, for hearing officers, and for appeals officers.[130] Title IX requires an investigation that is adequate, reliable and impartial,[131] thorough, objective and independent.[132] "A reasonable, equitable and reliable process requires an investigation that is logically thorough and applies the prevailing standards of law, not just in name, but also in substance."[133] Doing so requires training that is detailed, comprehensive and accurate.

- ***Right to a Closed Hearing***

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

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

  According to the US Department of Education[134], the appropriate standard of proof for discrimination claims is the preponderance of the evidence (more likely than not). Use a different standard at your own peril. They have corrected this standard at a number of campuses, when complaints were made, and now OCR says it plans to issue guidance to all institutions on it.

- ***Complainant Standing***

  OCR is clear that colleges and universities must more effectively recognize and empower victim standing in remedial proceedings. To OCR, the victim is the complainant, regardless of who brings the actual complaint (some universities bring complaints forward, rather than the student). OCR has stated, for example, that institutions cannot relegate complainants/victims to the position of witness in a hearing.[135] Victims have the right to have standing as complainants, if they choose. The complainant (victim) must be permitted to question witnesses if that opportunity is afforded to the accused student.[136] The complainant (victim) must be permitted to attend the entire hearing if that right is also given to the accused student (and by law it is in many states).

- ***Right to a Prompt and Equitable Resolution***

  Complainants have a right to prompt and equitable resolution, with promptness depending on the nature of the complaint. OCR expects policies that spell out clear timelines for resolution and every step of the process.[137]

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[130] See, e.g., OCR Letter to Berklee College of Music, 2004.
[131] OCR Letter to South College, 2001.
[132] OCR Letter to Westfield State College, 2002.
[133] OCR Letter to Riverside Community College District, 2005.
[134] See Letter to Jane Genster, General Counsel, Georgetown University, 2003, http://www.ncherm.org/documents/georgetownOCRletter12-16-03.pdf
[135] Where "witness" means being shut out of the hearing except while testifying, being treated as any other witness, unable to question other witnesses, etc.
[136] OCR Letter to Temple University, 2007.
[137] OCR Letter to Lassen Community College, 2003.

While there is no clear rule for what is prompt, you should establish a reasonable timeline and adhere to it unless you have a good reason to delay. For complaints involving discrimination or violence, we advise our clients to try to fast-track these complaints on a 30-day timeline, or 60-days at most. OCR has defined equitable in a variety of ways, and we address it concretely in the section on sanctions, below. These quotes may also help to shed light on OCR expectations:

> At the conclusion of a case of sexual harassment or sexual assault … regardless of the outcome of the case, the Title IX Coordinator will review all of the evidence used…to determine whether the complainant is entitled to any remedy under Title IX that may not have been provided for under the University's disciplinary procedures.[138]

> Steps must also be taken to undo any harm to the victim or victims. This may include reimbursement for counseling, reassignment to another teacher, repeating the course at no cost, tuition adjustments, private tutoring, assigning other qualified faculty to grade or re-grade the victim's work, correction of transcripts or other student records, etc.[139]

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

If you want a process that appropriately incorporates civil rights into its balance, you cannot take the approach Harvard tried in 2002, of requiring independent corroborating evidence before you will proceed with a hearing.[140] All claims should be investigated, and where a reasonable belief exists that policy may have been violated, you should refer the complaint for a hearing. Corroboration or substantiation must exist at some level before you proceed (the Gatekeeper function), but it can be provided by any source, including a credible victim. It would be unfair to the respondent to refer a completely unsubstantiated complaint to a hearing, as Title IX also provides for the due process rights of those accused of gender discrimination.[141]

- ***Advisor/Advocate***

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

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

OCR has directed colleges not to mediate sexual assault. Yet, many have argued that allowing for mediation of sexual violence is a way to accommodate victims who desire that approach. We agree, but mediation is not an acceptable approach to situations where there is a likelihood of continuing conflict and violence. Campuses can offer victims mediation (or even better--restorative justice) opportunities subsequent to and in addition to the normal resolution

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[138] OCR Letter to Temple University, 2007
[139] OCR Letter to Riverside Community College District, 2005.
[140] OCR Letter to Harvard University, 2003.
[141] OCR Letter to Westfield State College, 2002

processes to which the complaint should be subjected, but not as a substitute for them. This applies to all complaints of sexual assault, but not to sexual harassment where there is no physically assaultive component.[142]

- ***List of Witnesses***

Complainants can often be upset by surprise witnesses who are called by the respondent or institution without notice. We recommend that all parties to a complaint submit and exchange a written list of witnesses at least 48 hours in advance of the hearing, to avoid the potential for surprise, and to allow all parties the utmost opportunity to prepare their arguments. This is necessary[143] because most campuses try to adapt their conduct system to address Title IX grievances, rather than deploying an appropriate investigation procedure. In a civil rights investigation process, all witnesses would be interviewed not by the parties, but by the institution, and no surprises would occur. Compelling complainants to coordinate their own investigations and call their own witnesses can violate Title IX as well, according to the OCR investigations of Temple University and the University of New Hampshire:

> §106.8(a) permits the use of a student disciplinary procedure not designed specifically for Title IX grievances to resolve sex discrimination complaints, as long as the procedure meets the requirements of affording a complainant a prompt and equitable resolution… The [Temple] University's approach to sexual assault complaints fails to recognize the distinction between a Title IX complaint of discrimination alleging sexual assault and a disciplinary hearing against a student for violating the Code of Conduct's rule against sexual assault…[144]
>
> UNH did not provide an independent investigation of sexual harassment claims by students, instead requiring complainants to investigate and prove their own allegations of sexual harassment.[145]

- ***Copies of Documentary Evidence***

We recommend that all documentary evidence that will be introduced in the hearing be shared between the parties at least 48 hours in advance of the hearing, to avoid the potential for surprise, and allow the parties the opportunity to prepare their arguments.[146] OCR found that pre-hearing procedures at Temple University were not equitable, because the respondent was given a chance for a pre-hearing meeting, and given considerable information, including a summary of the evidence, that was not afforded to the complainant.[147]

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

Either the complainant and/or respondent could be unnerved by the presence of certain people on a conduct board, including faculty advisors, student friends or foes. All parties should be informed in advance of the hearing of who the hearing officers will be, and should be given an opportunity to object to any member of the

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[142] See OCR Title IX Guidance at p. 21 (http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf)
[143] OCR Letter to Temple University, 2007.
[144] OCR Letter to Temple University, 2007.
[145] OCR Letter to the University of New Hampshire, 2003.
[146] Balancing this with a speedier process can prove a challenge to colleges, but not as insurmountable as students asked to provide this information may indicate. Campuses would do well to remember that they should be compiling these reports and calling these witnesses in for statements, and should be mindful of attempts at delaying processes by students attempting to graduate, finish the term, etc.
[147] OCR Letter to Temple University, 2007.

board for cause. This not only accomplishes an equivalence of opportunities for both parties, it helps to assure the Title IX requirement of objective, impartial, unbiased decision-makers.

- ***Sexual History/Character***

  It is generally acknowledged that past sexual history and character usually has little relevance in investigating sexual misconduct, but this can be tricky. A published rule excluding sexual history and character evidence can be helpful. OCR approved the exclusion of sexual character evidence in its investigation of Georgetown University.[148] But, should all such evidence be excluded, or only when it is introduced by one party against another? What are the mechanics? Can students introduce their own history and/or character? One approach is an absolute bar on this type of evidence, another is to say that normally this kind of evidence is not permitted, unless it meets a high relevance threshold (that it would be "manifestly unfair" not to consider the information). The policy should clarify whether the bar extends to evidence of behavior between the alleged victim and respondent, or just between the alleged victim or respondent and uninvolved third-parties? And, in what will be a substantive departure for many campuses, we must adjust our processes to allow the investigation to consider a pattern of complaints and/or behavior. This is one of the main disconnects that occurs when using a conduct process to resolve a civil rights grievance. Civil rights investigations are charged with determining whether discrimination occurred, and the OCR Guidance is chock with descriptions of how patterns can and do provide evidence of discrimination.[149] Failure to investigate patterns can violate Title IX.[150] This runs counter to the student conduct practice of considering each case on its evidence, and only bringing previous violations into consideration at the sanctioning phase. Again, conduct processes can be used to remedy gender discrimination, but only if they adjust to the mandates of civil rights remediation. And, if campuses adopt a civil rights investigation model rather than an adversarial hearing model for resolution, it will be unlikely that pattern investigation will prove to be a violation of the accused student's due process rights.

- ***Separate Testimony Options***

  When this accommodation was challenged in the Gomes[151] case, the court found that allowing the alleged victim to testify from behind a screen did not prejudice the rights of the accused students. The case rested on due process grounds, again ignoring the square-peg-in-a-round-hole aspect of trying to use conduct proceedings to remedy gender discrimination complaints. For OCR, this would be a no-brainer, and courts have used such protections for victims for years. It does not prejudice the fairness of those proceedings. We recommend that you create a procedural rule, and make it clear to the parties that you can use separate meetings, screens or partitions, live closed-circuit technology, and very often now, Skype™, to allow the parties to testify outside each others' direct physical presence or sightline. While it would be unfair to require any party to testify remotely, if **any** party wants to be in a separate room or behind a screen, we need to be willing to accommodate that reasonable request, and even offer it without being asked.

- ***Right to Present Own Complaint or Use Proxy***

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

[148] OCR Letter to Georgetown University, 2004.
[149] http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html
[150] OCR Letter to Riverside Community College District, 2005.
[151] Gomes et. al. v. Univ. of Maine System et. al., 365 F. Supp. 2d 6 (USDC, Me, 2005).

where someone speaks for the parties and/or they never hear from each other. If a party wants or needs a proxy, we should allow it. But, why should our procedures require it?

- ***Right to Know Outcome and Sanctions***

  Every complainant/victim should be given the right, under your policies, to know the outcome and sanctions of any hearing involving discrimination or violence. "Final results" as described in the law does not mean the final finding of an appeal. No laws bar us from sharing this information and the Clery Act requires us to do so for sexual assault, but Title IX requires it for all gender discrimination complaints (sexual harassment, bullying, stalking, relationship violence, etc.). We should provide this information in writing[152], and should place no conditions on our willingness to share it. In 2008, any FERPA re-disclosure restrictions were lifted, and so the parties are able to share this information with others without FERPA implications. Please understand that while FERPA and the Clery Act are considered the primacy sources of best practice for victim notification, changes to those laws only came about to effectuate the requirements of Title IX to apprise complainants of the status of investigations, their findings, AND THE RATIONALE THEREFOR.[153] This is the legal standard, yet on most campuses, victims are told they cannot know the rationale. The Title IX Guidance is quite clear that FERPA cannot be construed to conflict with or prevent compliance with Title IX.[154]

- ***Appeal***

  If you provide the respondent with a right of appeal, equity requires you extend similar rights to the complainant. Dozens of OCR letters concur.[155] Title IX also requires the complainant to be informed of the status of the appeals request, processing and outcome, regardless of which party files the appeal. FERPA does not bar this, as some people believe, because as stated above, Title IX is controlling on this question.

- ***Amnesty***

  OCR has repeatedly danced around the amnesty question, but here is what we do know. Two OCR letters to Boston University failed to find that charging sexual assault victims with alcohol violations was retaliation under Title IX.[156] They so found for two reasons that may be somewhat unique to BU. First, BU had a legitimate non-discriminatory reason for the alcohol complaints that was not retaliatory, namely that BU was enforcing a zero tolerance policy even-handedly.[157] Second, OCR could find no evidence that BU's practice created a systemic impediment to reporting of sexual assault by victims. Had there been evidence that victims failed to come forward for fear of conduct code-based reprisal, OCR would likely have reached a different conclusion. Simply, it is fair to conclude that OCR expects colleges and universities to use amnesty policies or other means to ensure that victims are not dissuaded from reporting by the imposition of charges for collateral misconduct that come to light through their initiation of gender discrimination grievances.

- ***Retaliation***

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

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[152] See Program Review, Miami University of Ohio, 2007, and See OCR Letter to South College, 2001.
[153] See, e.g., OCR Letter to South College, 2001.
[154] http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html
[155] See, e.g, OCR Letter to South College, 2001.
[156] OCR Letters to Boston University, 2003
[157] This should not be interpreted as an endorsement of zero-tolerance policies by OCR or NCHERM

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

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

  This is more art than science, but many campuses incongruously charge students for engaging in sexual misconduct without charging them with sexual harassment, though by committing sexual misconduct they have by definition committed a form of sexual harassment (in the form of unwelcome sexual advances – the courts almost always hold that one instance of sexual assault is severe enough to create a hostile environment). We shouldn't bury sexual misconduct in a sexual harassment policy and it seems that OCR expects colleges and universities to charge with both.[158] The art here is ensuring that boards do not default to sexual harassment as a lesser offense when they ought to be remedying the incident as a sexual assault or rape.

Does an Equitable Process Require a Victim-Centered Outcome?

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

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

Thus, community protection and remedying discrimination must become our top priorities. Education, development and rehabilitation necessarily take a back seat in outcomes, though this may be hard to accept. The three guidelines above should make many common sanctions suspect. In satisfying Title IX, there is a very real clash with some of the typically educational and developmental sanctions of student conduct processes.[159] In fact, sanctions for serious sexual misconduct shouldn't be developmental. They should protect the victim and the community. That's the point at which development ends and a different priority must control. Why? The research of David Lisak is one of the most compelling reasons. Lisak is a forensic psychologist and professor at the University of Massachusetts, Boston. Lisak's 2002 study on undetected campus rapists[160] found that 63% of the campus offenders were repeat offenders and that 91% of the offenses identified were committed by repeat offenders.

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

When we provide conduct trainings, we find it helpful to remind the boards, committees and panels we train of a line from the movie *The Usual Suspects*, "The greatest trick the devil ever pulled was convincing the world he didn't exist." We ask those boards, committees and panels to pull back the wool that may be covering their eyes. Despite the fact that our students are bright, or from good families, or have never been in trouble before, when they insist in the face of a conduct charge that it was just a misunderstanding, they're not a rapist, she's a woman scorned, she's just being vindictive, it's only regretted sex, and he was drunk, too, we go soft. Student development becomes offender enabling. Boards want to give the benefit of the doubt to a fresh-faced young man who has his whole life ahead of him. And, they prey on our instincts as educators, and our human sympathies, and count on our sanctions

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[158] OCR Letter to Temple University, 2007.

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

[160] http://www.crisisconnectioninc.org/pdf/undetected_rapist.pdf

to give them the benefit of the doubt.[161] One quarter suspension. One semester. Maybe two. The student convinces the Board, so that on many campuses we won't separate them permanently until they've raped twice. Is that what our field stands for? We let them back in assuming our sanctions have somehow changed them because we are deeply invested in the bedrock belief that developmental sanctions change people.

But, in an egregious case, can anything short of separation achieve the aims of points one and two above? What about suspending for some period of time? Does time change behavior? Can we verify that it has? Suspending upon the satisfaction of conditions, or the demonstration that return is a safe decision might be more appropriate. Suspending the offender until the victim graduates is misguided. It assumes a contextual conflict, and that no one else is at risk. The research of our field does not support that assumption. It is not the job of a college or university to try to rehabilitate a sex offender, and very little research supports the notion that such rehabilitation is either possible or effective.[162] And while the risk of the student moving on to another institution is very real, it is real whether the student is suspended or expelled. Don't let them withdraw when facing charges, and note the sanctions on their records or transcripts.

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

Conclusion

If you read our Whitepapers, you probably get all of these ideas already. Yet many on our campuses do not. To get their attention, we need to learn how to recast stalking, relationship violence, sexual harassment and sexual assault as issues that our presidents, vice presidents, trustees and boards can relate to. They care about retention, graduation rates, student success and alumni giving. Those today exemplify return on investment for the corporate university. According to dozens of studies, gender violence impacts 25% to 50% of our male and female college student populations. Some of those who are victimized may be able to maintain their grades and course load, but most do not. Most suffer academically. Some reschedule exams and assignments. Some reduce their academic loads. Some change majors. Some transfer. Some lose their loyalty to their school of choice. Some take their own lives. As a climate issue easily affecting half our students, why isn't addressing gender violence a cornerstone of retention and student success initiatives? Being harassed, abused, stalked or assaulted interferes with the institutional mission, the acquisition of knowledge and the academic enterprise. Let's redouble our efforts so that our communities recognize what we already know: that meaningful prevention is essential to the academic enterprise and a vital tool of completion and retention.

[161] This discussion pertains only to sanctioning, not to findings. We do not believe that an offender is in violation until evidence shows that it is more likely than not (admittedly a low evidentiary threshold) that s/he has violated the policy.
[162] http://psychservices.psychiatryonline.org/cgi/content/full/50/3/349

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THE CIVIL RIGHTS INVESTIGATION MODEL

2007 Whitepaper - Updated

By Brett A. Sokolow, J.D.

www.ncherm.org

The Civil Rights Investigation Model by Brett A. Sokolow, Esq.

The intention of this Whitepaper is to suggest that colleges and universities consider implementing a Civil Rights Investigation Model as the most effective resolution model for student-on-student interpersonal violence and discrimination claims. My sense is that the student conduct administration field is shifting in this direction already. Campuses are embracing investigation-based approaches to greater and lesser extents as more traditional hearing models are proving to be less effective means of resolving disputed claims in which one student claims victim status and another student is accused of the victimization.

The Civil Rights Investigation Model really has no direct applicability to victimless violations (such as alcohol possession), and does not in any way impact on the widespread and welcome implementation of alternative dispute resolution approaches on many campuses, which usually precede or supplant hearings. The greatest applicability of the model is to interpersonal conflicts where what really happened--the facts--do not readily and clearly assert themselves.

The law has imposed upon the student conduct process the general due process requirement that we provide students accused of code violations with "some kind of notice and some kind of hearing." (Goss v. Lopez, 419 U.S. 565 (1975)). Wisely, the courts have largely left it up to student affairs professionals to determine what kind of hearing format "some kind of hearing" will take. From early days of paternalistic "Dean's Discipline," we have evolved to adversarial hearings before panels representing a cross-section of the community. From there, many campuses modified the hearing model to prevent direct confrontation, when that proved a detriment to civility and the educational aims of the process. We have also implemented informal proceedings, often applying them to less severe violations and uncontested allegations. A hallmark of these hearings, whether formal or informal, is the passive receipt of information by the panel from the parties and their witnesses. Where greater information is needed, campus police are often tapped as the most experienced investigators on campus. Today, we see campus conduct administrators occasionally engaged in active acquisition of information, as they take on more of an investigator's role, but it is more by necessity than design.

Same Issue…Different Processes

When I first entered this field, I in part made my mark by asserting the somewhat novel idea that campus sexual violence was a federal civil rights issue, impacted by Title IX and potentially governed by it. Student-on-student sexual assault was a form of egregious sexual harassment. Yet, as I learned about the processes by which universities resolved sexual harassment complaints, an odd dichotomy became clear. Almost all colleges and universities used a civil rights investigation and complaint process to address sexual harassment between employees. Almost all colleges and universities used a hearing process to address sexual harassment between students. Internal to one institution were two completely different procedures used to address the same issues. Why? Do two divergent resolution procedures make sense? Were we simply failing to realize that date-rape and sexual harassment were on the same continuum of behavior? I tend to think it was more the compartmentalized nature of so many institutions, so that we respectively applied traditional models of employee dispute resolution to the employment realm and traditional models of student conflict resolution to students, seeing the issue as one of constituency rather than as having a common basis in civil rights resolution.

While I have yet to truly understand how two such differing approaches evolved[163], there exists today a simple important fact. On our campuses, professionals in Human Resources, Affirmative Action, EEO and others offices that deal with employee civil rights issues possess a body of specialized knowledge that is of great potential benefit to the student conduct process. The converse is also true, because student conduct administrators deal with sexual assault more often than do the HR/AA/EEO administrators, who are more accustomed to sexual harassment claims that lack a significant physical component. If nothing else comes out of the writing of this Whitepaper, my hope is that it will encourage you to create liaisons on your campus between student conduct administrators and HR/AA/EEO administrators. Call on each other and get to know your own internal resources. Share information and compare processes and learn from each other specialized knowledge that each of your departments may need to gain from the other.

Investigating Employee Misconduct

The process that HR/AA/EEO uses to address sexual harassment is frequently a civil rights investigation process. Rather than using a hearing model that more-or-less passively relies on the parties to the complaint to prove their positions, an investigation model is an active gathering of information by the investigator or investigators. In the investigation model, it is not the job of the parties to prove whether a policy was violated. It is the job of the institution to determine whether its policies were violated by engaging in an active accumulation of information from all possible sources.

In seminars around the country, I have shared with student conduct administrators my belief that a civil rights investigation process will eventually supplant the adversarial model we mainly use at present to resolve interpersonal conflict between students. Again, I am assuming those conflicts have not previously been resolved through mediation or other alternative dispute resolution (ADR) approaches. The civil rights investigation model assumes that previous ADR efforts have failed or that the nature of the complaint does not lend itself well to ADR.

Immediate and Intuitive Connection

In my seminar presentations, I am struck by how the civil rights investigation model immediately and intuitively connects with the student affairs professionals and student conduct administrators in attendance. They see immediately how it will help them to address their most difficult complaints. They have struggled for years to resolve interpersonal conflicts without adequate information about who did what to whom. Two people occupied the same space for long enough to come into physical conflict, but their stories are 180 degrees from each other. Their filters shape their versions of the event. Getting at the truth is a rarity, often because of the "he said, she saids" flying around, the "but, he started its", the "he wanted us to haze him, he cooperated", excuses and more. Worse, we must acknowledge that our students lie to us. Many of them. Most of them? Some blow opaque smoke into our faces and smugly challenge us to try to see through it. Sometimes we do. Sometimes we can't.

Current Investigation Models

The limitations of the adversarial hearing process have revealed themselves to me over what is as of the publication of this Whitepaper now ten years of work in this field. I have seen hearing boards struggle to decide who did what to whom when both of the parties to the complaint made strategic decisions not to identify a witness who might have been detrimental to both parties. Yet, it was this one witness who would have been in the best position to

[163] Well, I did eventually figure it out. See the 2011 NCHERM Whitepaper for details at www.ncherm.org

explain to the board what really happened, and answer the board's questions. But, identifying witnesses was not an administrative function; it was left to the parties. I have seen boards vote to find a student responsible simply because the student was too nervous or not sufficiently erudite to adequately explain himself. I have seen boards go into deliberations without critical information they needed to assess a complaint, because none of the parties or their witnesses provided it. Information about alcohol and how the body processes it was needed for the board to make a cogent determination. Or, the board needed a better understanding of rape trauma syndrome in order to explain the victim's delay in reporting the assault, but they had no access to it. Adversarial models that rely on the parties are going to be limited to the relative skills of the parties and their abilities to anticipate (guess) what questions a board will have and what information it will ultimately need.

Some campuses have adapted, giving an investigative responsibility to a student conduct administrator, or by relying on an investigation by campus police. Both of these adaptations are useful, but still create some limitations that are ameliorated by the civil rights investigation model I propose below. First, let's look at the limitations of investigation by student conduct administrators. The main limitation is that comprehensive investigations of complex interpersonal conflicts are time consuming. Conduct administrators are already overburdened with the caseload, without adding more responsibility to investigate. A second limitation is that student conduct administrators have to be cautious about wearing too many hats in the process. You cannot be chief investigator, presenter of the complaint, custodian of the conduct process, and implementer of sanctions for the same complaint without an appearance of impropriety or potential compromise of objectivity. If many of our conduct offices are already understaffed, an investigative function will only increase the burden and potentially compromise the objectivity of those who administer the process.

Limitations of Using Police as Investigators of Student Misconduct

Campus police are frequent go-to resources for investigations. They are probably the best trained campus personnel for investigative skill. Yet, if you have a duly constituted police force, their first obligation is to investigate whether the incident violated the law. This is different than investigating a potential violation of policy, in most instances. And, their loyalty must be to sharing investigation results with the prosecutor, and only thereafter (and often much later) with the student conduct office. Even if your campus security function is not provided by a sworn force, limitation abound. Security officers may not have the same level of investigation training and experience as police officers. And, all campus safety personnel, regardless of the formality of the police function, have a limitation that they will immediately agree is the most profound. They are the most authoritative officials on campus, and people are not likely to be as forthcoming in an interview setting with police or public safety officers as they might be in a less formal setting with less authoritative interviewers. The blue uniforms either elicit immediate information as a result of the intimidation of the encounter, or they cause students to clam up for fear that talking is going to get them into trouble. Yet another reason to want, at least in some situations, to avoid police-led interviews is that we have crafted our processes to be educational. Encounters with law enforcement may lack a developmental perspective that confrontations with conduct officers may be better able to provide.

The Civil Rights Investigation Model

Though many of you have experienced my involvement with the field as involvement with the student conduct process, I spend an equal amount of time consulting with the HR/AA/EEO side of the house. I do internal investigations, train investigators, deal with government investigations of our investigations, structure complaint procedures, do sexual harassment and anti-discrimination trainings, etc. I have had the opportunity to structure civil

rights complaint and investigation processes for dozens of campuses, and to study and learn from complaint processes that we have improved by tinkering and changing over time. I've done dozens of internal investigations, learning more each time I do one. That learning process has informed my desire to encourage conduct administrators to explore the applicability of a version of this model to their toughest complaints.

Maximizing Information Accumulation

What I have learned is that if you have as the simple goal of an investigation process the accumulation of the maximal amount of available information about a complaint, a team-led investigation process is best able to produce that result. For this reason, many HR/AA/EEO offices are shifting from a department-led investigation (often by the Director of HR or a similar official) to decentralized grievance processes in which faculty members, staff, administrators and students are empowered to do intake of complaints. This also serves well a secondary goal of encouraging more complainants to come forward when their rights are violated.

Consider this question for a moment. If you wanted to obtain information from a student about a conduct complaint, and that student felt it might be in their best interests to be less than fully forthcoming, who on your campus would have the best opportunity to elicit that information from the reluctant student? Would it be campus law enforcement? Maybe, if you feel an authoritative approach might meet with the most respect. Or, it might just as easily cause the student to shut down. Would being questioned by faculty help? How about questioning by someone from HR or a student conduct administrator? No clear advantage there.

Peer-Led Investigation Teams

My answer is that in most situations, questioning by a well-trained fellow student is going to be the means by which we obtain more information and higher quality information as a result of the interview process. This conclusion is based on considerable experience with trying different interview techniques and formats. The most successful interview technique with a reluctant witness is –as any decent investigator will tell you—to build a rapport with the interview subject. This is part of the foundation of the approach often diminished as "Good Cop…Bad Cop." Good Cop is busy building a rapport. But, it is hard for Good Cop to convince the subject that he is an ally. Imagine how much easier it is for a fellow student to convince an accused student of that. Creating a rapport is often much easier when it is done intra-cohort, whether that cohort is staff, students, faculty or administrators.

The key idea is to structure an investigative team, and to do so strategically, to accrue the information you are seeking. Institutional culture and politics may help you to choose the right investigative team for each complaint. At one institution, faculty are rubbed the wrong way by being investigated by staff, and so the investigations are led by other faculty members. At another institution, senior faculty did not respond well to being questioned by junior faculty, so we adjusted the investigation team to address this power imbalance. While it may not work in every case, peer-led interviewing tends to produce results better than most of the other investigation techniques I have tried, as long as the investigators are well-trained.

One Model of a Civil Rights Investigation Approach

There are many ways to shape a civil investigation model, and many permutations for investigation teams. Let me share the model of one institution as an example. This small university created a Critical Issues Grievance Process. They gave

this process exclusive province, university-wide, over all complaints of discrimination, harassment, stalking, relationship violence, generalized violence, sexual assault, and hate acts. They appointed a Critical Issues Board of ten people, two faculty, two staff, two administrators, two students and two university police officers. For each complaint, five members of the Board are designated as hearing officers, in the event that the complaint goes to a hearing.

The remaining five members are detailed to collaborate on the investigation. They determine a witness list, strategize who will interview each witness and collect all available information, and then the team compiles a report. The police members are used when it makes sense to deploy their particular investigation skill set, and when obtaining, maintaining and securing evidence are of importance.

The investigation team reaches a finding based on the results of their investigation. They then share this result with the person accused of the policy violation. If the person accused accepts the findings, the matter is referred to the remaining board members for sanctioning, and they hold a hearing limited to sanction only. If, however, the accused person rejects the finding of the investigation team, the alleged violation is referred to the remaining five board members to hear the complaint, and determine a sanction, if applicable. Normal appeals routes may follow. During the hearing, the board may determine whether it will take cognizance of the findings of the investigation team, which are presented at the hearing by the investigators. The investigation findings are not binding on the board, which may call any or all of the witnesses identified by the investigators. This hearing may be conducted with the parties present, or with separate non-confrontational meetings, depending on whether the board feels it would learn anything from the direct confrontation of the parties.

One of the hallmarks of this process that I think makes it work so well is that it is university-wide, but such a process is not right for every campus. Another success factor for this process is its extreme flexibility. Each complaint is addressed by a process designed to maximize the information available to the board, but that process may differ dramatically from complaint to complaint. Each accused person receives an appropriate measure of fair process and a full opportunity to defend themselves. Our usual result is that the findings of the investigation are compelling enough that the accused person does not dispute them, leaving only the sanction to be resolved.

All board members are astonished at how much more information they have going into hearings than they had with their old model, which was a more passive information-gathering approach. They are also deeply appreciative of the role the investigators play later when there is a hearing. They summarize the interview results, give information about the credibility of interview subjects, and have had a chance to think though and synthesize their findings in advance, which the board has not yet had a chance to do. It is rare that the board disagrees with the findings of the investigation team, but it is important that they reserve the right to do so when the interest of fairness requires it. Another benefit is that sometimes investigators have untangled webs of lies in advance, and the board can confine its inquiry purely to the difference between a party's story to investigators and their later contentions.

As I write this, I regret that we have the need to redesign a process so as to make it harder for parties and witnesses to deceive us. Yet, by lying, participants often inhibit our ability to safeguard our communities and satisfy our legal duties. While this tendency to avoid responsibility is not a situation of our making, it is a situation to which we must respond. I think we need to make it harder for participants to lie to us, and I don't feel that this is adversarial or that we are attempting to "catch" them. Our process is designed to determine whether a policy is more likely than not to have been violated, and part of making that determination is sifting the credible from the incredible.

Some Kind of Notice, too.

Another example of the advantage of the civil rights investigation approach is in how notice is handled. In most hearing models, step one is to receive a complaint and step two is to give the accused person notice of the complaint. They then have time to fabricate a story and find friends to swear to it before they respond. This does not allow notice to be strategic. It should be. In an investigation model, we often interview the accused person last. We don't want any party to taint the witness pool by playing on loyalties. It is not just the parties who lie to us, but their partisans as well. Getting statements from witnesses in advance of interviewing the accused student minimizes the potential for coordination of stories, and also gives us the ability to share conflicting accounts with the accused person once we have collected them. With this approach, you often see an accused person attempt to lie to investigators only to find quickly that their ducks are not in a row, and contrary information has already been obtained. Dissembling tends to break down very quickly at this point, and you don't have to deal with the lies that would otherwise vex a board at a hearing under a more traditional model.

Variations on the Model

Some campuses do not use university-wide approaches, instead having parallel processes for student misconduct and employee misconduct. Other campuses use an investigation model for all alleged violations, while others use the investigation approach on a more limited set of complaints than were outlined in the example above. Some boards prefer that the investigators just present the information obtained from interviews rather than reaching a finding, so that the responsibility for reaching a finding remains with the board in all complaints. One small campus did not have the resources for a board or large investigation team, and so deputized one administrator as their lead investigator, and made sure that person was well-trained for the task. Their complaints do not tend to involve multiple witnesses, but another advantage of a large investigation team if you have the resources is that you can divide interviewing responsibilities and interview large numbers of witnesses more quickly than with a smaller pool of investigators.

Often, in the process of investigating the complaint, interviewers find they have need of expertise outside their range. They can then identify additional witnesses or sources of information they need to inform their judgment. This may include information on alcohol, rape trauma, drug interactions, technology, etc. Then, the investigation team can supply this expertise to the board, so that they too can access the level of sophisticated information they need in order to make a determination on the complaint.

The Risk Management Function

Better information leads to better decisions. Peer-led interviews help to invest participants in the process, and instill respect and humanity in the process, all of which has the potential to reduce the risk of lawsuit. A civil rights based process also has great potential to balance the rights of the parties, as it is characterized by an intentional effort to equalize procedural and support mechanisms. For example, civil rights complaint procedures typically provide a right of appeal for all parties to the complaint, not just the accused person. These procedures usually allow all parties access to advisors/advocates (this does not imply a right to an attorney), and afford the accused person access to findings prior to the hearing, which is a strong procedural protection for the accused person. It often creates a give-and-take between the accused person and the investigators and subsequently the board that is often lacking in more typically adversarial hearings.

How to Train Your Investigation Team

If you decide to implement some form of civil rights investigation model, your investigators will need training, a detailed investigation protocol, recordkeeping procedures and internal communication parameters. When you look for training resources, you may find they are readily available from your HR department or your office of legal counsel. NCHERM provides webinars and seminars on investigation training, and provides custom-tailored training for individual institutional clients. We also offer consultation on formulating a civil rights investigation approach that will suit your institutional needs, politics and culture.

CONSENT

Defining proscribed sexual misconduct is difficult. Many colleges adopt definitions derived from state laws. Yet, many state criminal codes are antiquated, at best. Colleges are on the cutting edge with so many issues, ideas, and research. Sexual misconduct should be no different, and is an area in which colleges really can and do lead the way. The shift in this country away from defining sexual violence as force-based conduct has been championed by many colleges, and is now the law in a majority of states. Consent-based definitions of sexual violence should be the basis for college misconduct policies. The distinction is a subtle, but all-important one. Such a concept violates basic notions of our personal sovereignty. We have the right not to be acted upon unless we permit it. If a would-be mugger demands your wallet, he has no right to take it unless you permit it. Your silence is not consent to be robbed. Similarly, the silence of a victim is not consent to have sexual intercourse.

Often, force-based policies contain an evidentiary standard that the sexual action is against the will of the victim. This starts us sliding down a very slippery slope. How do we know if it is against the victim's will? If she says "No?" If she fights back? Must she leave a scratch or bite mark, or have his skin under her fingernails to prove her resistance? Might that provoke a sadistic perpetrator to cause greater harm? What if she is having a flashback to an instance of childhood sexual abuse? Should we still require her to fight back or otherwise demonstrate that the sexual action is against her will?

Or, is there a higher standard of personal sovereignty that shifts responsibility in these cases? Should it be the responsibility of the person being acted upon to announce their intention, or should it be the responsibility of the sexual initiator, the sexual aggressor--the one who wants to do the act--to get consent before proceeding? Put another way, if a fraternity brother awakens after passing out in the middle of the party to find a naked, HIV-positive woman on top of him having unprotected sex, is it okay if she stops when he objects, or should she be required to get his permission first? Why should sex offenses be the only offense where the resistance of the victim is required? Should we say that it is not murder unless the victim tried to stop it? You are not mugged unless you tried to thwart the thief. For all of these reasons, defining sexual misconduct as an offense of force is an antiquated, outmoded, senseless structural impediment to a victim's ability to self-identify and report incidents of sexual violence. Please consider adopting consent-based definitions for sexual violence.

WHAT CONSENT MEANS

- In the absence of mutually understandable words or actions (a meeting of the minds on what is to be done, where, with whom, and in what way), it is the responsibility of the initiator, or the person who wants to engage in the specific sexual activity to make sure that he or she has consent from their partner(s).
- Consent to some form of sexual activity does not necessarily imply consent to other forms of sexual activity.
- Mutually understandable consent must be obtained by the initiator at every stage of sexual interaction.
- Mutually understandable consent is almost always an objective standard. Consent is mutually understandable when a reasonable person would consider the words or actions of the parties to have manifested a mutually understandable agreement between them to do the same thing, in the same way, at the same time, with one another. The only context in which mutually understandable consent may be considered in its subjective sense (what did Tom and Sue understand their words/actions to mean) is in the context of long-term relationships where couples have established patterns of communicating consent that alter/replace the consent construct elaborated here.

- Consent which is obtained through the use of fraud or force (actual or implied) whether that force be physical force, threats, intimidation, or coercion, is ineffective consent;
  - ◊ physical force exists, for example, when someone acts upon you physically, such as hitting, kicking, restraining or otherwise exerting their physical control over you through violence.
  - ◊ threats exist where a reasonable person would have been compelled by the words or actions of another to give permission to sexual contact they would not otherwise have given, absent the threat. For example, threats to kill you, themselves, or to harm someone your care for are sufficient to constitute threats.
  - ◊ intimidation (implied threat) exists where someone uses their physical presence to menace you, though no physical contact occurs, or where your knowledge of prior violent behavior by an assailant, coupled with menacing behavior, places you in fear as an implied threat.
  - ◊ coercion exists when a sexual initiator engages in sexually pressuring and/or oppressive behavior that violates norms of respect in the community, such that the application of such pressure or oppression causes the object of the behavior to engage in unwanted sexual behavior. Coercion may be differentiated from seduction by the repetition of the coercive activity beyond what is reasonable, the degree of pressure applied, environmental factors, such as isolation, and the initiator's knowledge that the pressure is unwanted.

- **Consent may never be given by:**
  1) A minor to an adult
     Someone under the age of ?? (depends on the state) cannot give consent to someone over the legal age of consent (18), absent a legally valid marriage or court order.
  2) Mentally disabled persons
     Cannot give consent to sexual activity if they cannot appreciate the fact, nature, or extent of the sexual situation in which they find themselves. The mental disability of the party must be known or reasonably knowable to the non-disabled sexual partner, in order to hold them responsible for the violation. Therefore, when mentally disabled parties engage in sexual activity with each other, such knowledge may not be possible.
  3) Physically incapacitated persons
     One who is physically incapacitated as a result of alcohol or other drug consumption (voluntary and involuntary), or who is unconscious, unaware, or otherwise physically helpless, is incapable of giving consent. **One may not engage in sexual activity with another who one knows or should reasonably know to be physically incapacitated.** *Physically incapacitated persons are considered incapable of giving effective consent when they lack the ability to appreciate the fact that the situation is sexual, and/or cannot rationally and reasonably appreciate the nature and extent of that situation.*
- **How incapacitation complaints are addressed**

This should be a part of your conduct training, but you will need to decide if it merits inclusion in the policy or as an appendix to provide additional guidance and information to students. Selective editing and inclusion of certain parts may be the best approach):

Incapacitation is a determination that will be made after the incident, in light of all the facts available. Incapacitation is difficult to assess because people reach incapacitation at different points and as the result of

different stimuli. They exhibit incapacity in different ways. Incapacity is dependent on many or all of the following factors:

1. Body weight, height and size;
2. Tolerance for alcohol and other drugs;
3. Amount/type of alcohol/other drugs consumed/mixture taken;
4. Amount of food intake prior to consumption;
5. Voluntariness of consumption;
6. Vomiting;
7. Propensity for blacking-out (mentally or physically);
8. Genetic predisposition.

Assessing incapacity is completely fact-dependent. For complex allegations, the conduct board may ask an independent substance abuse, toxicology or chemistry expert to render an opinion. Understanding terms is important. With regard to alcohol, there are multiple levels of effect, along a continuum. The lowest level is impairment, with occurs with the ingestion of any alcohol at all. A synonym for impairment is "under the influence." Intoxication is the next higher level of alcohol ingestion. Also called drunkenness, intoxication corresponds to the state's drunk driving limit, and a blood alcohol level of .08 or .10. Incapacity is the next higher level of alcohol ingestion. The highest level is overdose, or alcohol or blood poisoning, which may lead to coma or death. Incapacity is a hazier state than drunkenness. Some drunk sex will violate this policy, but not all. Only when the drunkenness produces incapacity will the standard be reached. Evidence of incapacity can be detected from context clues, such as:

1) One person may know how much the other person has consumed;
2) slurred speech;
3) bloodshot eyes;
4) the smell of alcohol on the breath;
5) shaky equilibrium;
6) vomiting;
7) outrageous or unusual behavior;
8) unconsciousness.

None of these facts, except for the last, will constitute--in and of itself--incapacitation. The process of finding someone responsible for a violation of the incapacitation clause of the sexual misconduct policy involves an accretion of evidence, amounting to a sufficient or insufficient meeting of the standard of proof. This standard may be met with some combination of the first seven, or all eight factors. For example, incapacity might exist if someone is passing in and out of consciousness, and there is a high probability they could pass out again. Or, it might exist if someone is vomiting so violently and so often that they are simply in such bad shape that they cannot be said to have capacity. Sometimes, it may happen that a student has done things that, in the absence of the alcohol, would be clear indications of consent. There may even be unmistakable evidence of verbal and non-verbal consent. If the complainant is incapacitated, and the respondent knows or should reasonably have known of the incapacity, the indications of consent are irrelevant. *Because of the incapacity, the complainant is held at a disability where he/she cannot give effective consent, thus nullifying any factual consent that may be given.*

The eight context clues listed above will help the conduct board to assess and determine the extent of the respondent's knowledge, given her/his awareness of whether the complainant exhibited any of these "symptoms."

Another issue that often deserves attention in these cases is what toxicologists call "blacking out" or "black time." Blacking out or black time has two different possible manifestations, apart from being obviously unconscious. Black time does not affect all drinkers (only about 16%), but some will lose all conscious awareness or memory of their actions, though they may maintain physical ability and control. Thus, they do things that they cannot remember doing. In contrast, some people who experience black time experience it as physical paralysis, with mental clarity. Thus, they have a mental awareness of the situation, but a physical inability to react to it, because the alcohol is inhibiting their motor skills. It is important to realize that both manifestations are possible, and that both describe someone who is incapacitated and cannot give effective consent.

ADDITIONAL CLARIFYING RULES OF CONSENT

- A person who is the object of sexual aggression is not required to physically or otherwise resist a sexual aggressor;
- Silence, previous sexual relationships, and/or current relationship with the respondent (or anyone else) may not, in themselves, be taken to imply consent. Consent cannot be implied by attire, or inferred from the buying of dinner or the spending of money on a date.
- Intentional use of alcohol/drugs by the respondent is not an excuse for violation of the sexual misconduct policy.
- Attempts to commit these offenses are also prohibited under this policy, as is aiding the commission of sexual misconduct as an accomplice.
- Consent to sexual activity may be withdrawn at any time, as long as the withdrawal is communicated clearly (because you cannot be expected to read the mind of your sexual partner(s)), and all sexual activity must cease.
- "intent" is not required under the Non-Consensual Sexual Intercourse policy. Unlike murder, for which there must be an intent to kill, sex offenses are not an intent-based concept. The requisite intent for Non-Consensual Sexual Intercourse is demonstrated by engaging in the act of intercourse intentionally. Intent may be an appropriate consideration in some Non-Consensual Sexual Contact complaints (such as when a man brushes up against a woman in a sexual manner in a crowded room), and in attempt-based offenses.
- *In the absence of the use of any type of force*, a capable complainant's unreasonable failure to communicate his/her expectations to his/her partner may be grounds for departure from the standard recommended sanctions of this policy, but it is not, alone, grounds for a finding of no policy violation. This clause works together with the rules above regarding silence and resistance. It is to be applied to situations where there is some-- usually nonverbal--communication from the complainant, but that communication is ambiguous. Instead of clarifying, the respondent acts on his/her incorrect assumptions, and engages in or heightens the level of sexual activity. The complainant, though not wanting to engage in this behavior, or heighten the level of sexual activity, does not indicate this clearly to the respondent, and passively endures the sexual activity. For example, this rule would not apply to a situation where two students are fooling around, they mutually kiss, mutually pet, and then the respondent simply engages in intercourse with an unresponsive complainant. In this case, the rules on silence and resistance would indicate a clear policy violation. However, it would apply to the case where the two students are fooling around, the respondent asks for sex (meaning vaginal intercourse, but an ambiguous demand), and the complainant responds by removing her clothes (an easily misunderstood response, but one meaning to her that she is willing to engage in mutual oral sex, but go no further), but the complainant does not communicate this to the respondent. He then engages in vaginal intercourse with her, during which she is passive, and to which she does not voice any complaint. This still represents an improper assumption on the part of the respondent, but it may not be a violation that warrants a sanction as strong as the standard recommended sanction.

- Consent has an expiration date. Consent lasts for a reasonable time, depending on the circumstances. For example, On Thursday night, Rob and Jenn are together in Jenn's room. Jenn consents to sex with Rob, but just at the point of intercourse, the phone rings. Jenn is on the phone with her mother for an hour. After the phone call, Rob and Jenn can engage in intercourse without re-consenting, though it is safest to check, just to be sure. However, suppose that after the phone call, Jenn is no longer in the mood. Rob goes home. He comes over again on Friday night. He cannot apply Thursday's consent to Friday night like a coupon. Jenn's consent on Thursday has probably expired, and they should check with each other before engaging in sexual activity.

This section excerpted from Creating a Proactive Campus Sexual Misconduct Policy, Brett A Sokolow, J.D., author

THE RELUCTANT VICTIM: WHAT TO DO WHEN A STUDENT REPORTS A SEXUAL ASSAULT BUT THEN ASKS THAT NO ACTION BE TAKEN?

By: Brett A. Sokolow, JD

This is a complex issue that is informed by two federal laws, student affairs best practices, good victim services, the Department of Education, and negligence law. While no one perspective dictates how we address reluctant victim situations, taken together, a cohesive approach can be created.

Clery First

Let's start with the Clery Act, and its role in this issue. The Clery Act is an absurd law, in its execution. It tells colleges to collect crime reports from campus security authorities, which it defines as any institutional official who has significant responsibility for student and campus activities. It then splits hairs to tell us this will include some faculty but not others. It includes student services personnel, but not the support staff talking with the student in the waiting room while they wait to see the Dean. It does not include counselors, but may include a non-counselor administrator who runs the counseling center. These are not reasonable hairs to split on a college campus if you are interested in accurate compliance. Responsibilities of college employees are constantly changing. A faculty member who assumes a role as a student organization advisor mid-year may not receive training on reporting until the following year, depending on your training schedule. Who is on the list and who is not on the list of mandated reporters for Clery is a moving target that is not easy to hit. It is just easier (and very reasonable) to tell ALL institutional employees that it is part of their job to report all crimes about which they become aware within 24 hours of becoming aware. That way, nothing slips through the cracks. This includes reports of sexual assault made in confidence, because nothing in the Clery Act requires the revelation of personally identifiable information. Counselors, clergy and medical services personnel can complete a report without violating their professional ethics.

Once you have created an all-employee reporting requirement, employees can be trained that when a student reports sexual assault, they cannot promise confidentiality, and need to make that clear to the student who comes to them (unless of course, you are among the limited number of university employees who can actually promise statutorily or ethically conferred confidentiality).

Best Practices Tip—Explain This to a Victim as the Difference Between Confidentiality and Privacy:

"Thank you for coming to talk to me about such a serious issue. I want you to know that we are going to do all we can to help you. I need to make clear that I am not someone who is able to maintain the confidentiality of what you share with me. I can and will protect your privacy, and will only share your information on a need-to-know basis with a small group of key administrators. We will make every effort to respect your wishes as far as how we respond to your report. If you desire a confidential conversation, I can take you to the counseling center, or help you to set up a meeting with one of our campus staff members who is a confidential resource."

Acting on the Reports You Receive

A predicate to liability under Title IX is notice to campus official(s) who have remedial authority to address gender-based discrimination (in any of its forms, including sexual violence). Let's assume for purposes of this article that you are such an official. Once you have established a campus-wide crime reporting network as discussed above, you will hear more often about campus crime generally, and you probably will receive more sexual assault reports, specifically. Not all of these reports will include personally identifiable information, but some will. Once you receive a report, various laws govern your response and you MAY have to provide some or all of the following.

After each item listed below, the law that mandates or influences it is identified:

- Crime statistic (Clery)
- Interim suspension (tort law – negligence)
- Timely warning (Clery)
- No contact order (student affairs best practice)
- Investigation (Title IX)
- A prompt and equitable resolution (Title IX)
- A hearing (state/federal due process or contract law)
- Sanctions (Title IX, tort law – negligence, due process)
    - To bring an end to the discriminatory conduct; and
    - To take steps reasonably calculated to prevent the reoccurrence of the discriminatory conduct
- Remedies (Title IX)
    - To restore the victim, as much as possible, to his/her pre-deprivation status and/or undo the effects on the victim of the gender-based discrimination they have experienced.
- Notice of outcome (Clery Act)
- Appeals (contract law and Title IX)
- Post-sanction enforcement (Title IX, tort law – negligence)
- Follow-up to determine if remedies are effective (Title IX)

Upon receiving a report, whether anonymous or not, you will need to determine if the alleged victim wishes to make a complaint. If so, you will follow the proper procedures on your campus for making a complaint and begin the investigation process. If not, you will need to find out why not. Perhaps the assault occurred long ago, or off-campus.

Perhaps the victim is going to the police to pursue criminal prosecution. While you may be able to determine directly why no formal action is requested by the victim, you may have to go through the employee who initially received the report before it was passed along to you. They may be able to dialogue with the victim to find out reasons why the victim wants no action taken. I think you or the employee who is in contact with the victim should try to problem-solve with him/her any impediments to filing a complaint.

Best Practices Tip: Convincing a Reluctant Victim?

I think we should make a good faith effort to persuade (not pressure) a victim to make a formal complaint. Often, victims are reticent to pursue a campus hearing because they fear for their privacy, they blame themselves, and they don't want to subject themselves to a process they fear will be a secondary victimization. I think we can overcome some of these reasons for hesitation. We can make sure that the victim understands how well-suited the campus conduct process is to meeting the needs of many victims. I think we should explain that the campus process is private, that resolution is quick (can we shoot for 30 days?), that we use a standard of proof (more likely than not) that makes it twice as easy to prevail in a campus hearing than in a criminal trial, that we provide victim-friendly accommodations, such as the right to an advisor, to testify from behind a screen or by closed-circuit, and that we actively prohibit evidence of a student's irrelevant sexual history or character. I also think we need to be clear that we are not going to throw the book at a victim for his/her own policy violations, if they decide to make a complaint. It is also worth it to explain to a victim that perpetrators recidivate, and if left unchecked, they may assault again and are likely to make someone else feel the way they now feel. Their action in filing a complaint can help to prevent future victimization, and I think we should at least get them thinking about their duty to other potential victims and members of their community. Once we have said our piece, though, I think we need to back off and let them choose for themselves what is in their best interests.

The Requirements of Title IX

If you are not successful in encouraging the victim, directly or indirectly, to file a formal complaint, your legal duties are not over. In fact, they may just be starting. Once you have actual notice under Title IX, your duty to investigate the report is absolute. There are no exceptions. Yet, investigation is a very broad term, and may indicate merely a preliminary

inquiry, or it may include a much more elaborate inquisition into the facts. With an anonymous report, your ability to investigate is more limited. You would satisfy your legal duties of due diligence by checking the report against other recent anonymous and formal reports, to determine if a trend or pattern may be apparent. If so, you might decide to take some action based on the composition of assaults, rather than on just the one anonymous report you have received. You may even gain information on repeat perpetrations in a single location, and this may allow you to target a high-risk population or location with enhanced enforcement, patrols, lighting, cameras, timely warnings, etc. In addition to the duty to investigate, you may have a duty to attempt some form of remedial response, even to an anonymous report. For example, if you learn of multiple perpetrations by the same individual (anonymous reports sometimes include the name of an alleged perpetrator or enough detail for you to figure out who the alleged perpetrator is), or multiple perpetrations at the same event, you may decide to alert the alleged victim to this information to see if this makes him/her more willing to file a formal complaint, or you may decide to launch an investigation into the campus event that produced multiple reports (such as a party at which multiple drinks were laced with GHB).

Where a victim comes to you to make the report directly, your duty to investigate is the same, but is enhanced by the additional information you may have by receiving the report directly rather than through a third-party. Assume that the alleged victim, as with the anonymous victim, asks that you take no action. At this point, one of the purposes of the investigation is to allow you to determine whether you can honor the victim's wishes. OCR tells us that we should make every effort to do so, but not at the expense of compromising our duty to provide a prompt and equitable remedy under Title IX.

Negligence

Tort law plays a role here too, as we must make a determination whether the report gives us notice of foreseeable future harm. If so, our legal duty is to act to warn (and perhaps protect) foreseeable victims from that known potential for harm. If, as a result of our investigation, we reasonably believe that there is no continuing threat of harm to the alleged victim, or to any member of our community, we have no legal obligation to pursue the allegation through a hearing. We may, however, have other equitable duties of remedy, such as a need to provide an education program to the community, or to a target population, to post prominent bulletin board information about the issue, or to give a clear warning without singling out any particular individual by enlisting a coach, RA, greek advisor or student organization advisor to raise the issue indirectly at an appropriate meeting.

If you decide not to have a hearing, it would be wise at such a point to have the alleged victim acknowledge that s/he has requested that you take no action, and that they understand they may be preventing you from taking future action by failing to cooperate in the investigation. If they ever make a Title IX claim against the institution, you attorneys can use this acknowledgement to help them to claim an estoppel defense (it is unfair for a victim to sue you for not taking action when you decided not to take action at his/her request and instigation). Of course, we should make clear that if the alleged victim ever changes his/her mind, we stand ready to re-open the investigation, to the extent practical and possible.

Where the results of the investigation do not give you reasonable assurance as to the safety of your community, you have a duty to act irrespective of the victim's wishes. You cannot force them to participate in a hearing, but you should initiate one with the institution as complainant, and you may use written statements of the victim, statements by the victim to witnesses, police and medical records as needed in lieu of participation by the alleged victim as complainant. No need to worry about FERPA. You have a right to use this information even without the alleged victim's consent, under the health and safety exception.

Each complaint is governed by the principle that you take it as far as you need to. If you commence a preliminary inquiry, and that inquiry leads to further suspicion, you will broaden the inquiry to a full-fledged investigation. An investigation itself, even one that clears an accused student, is a response under Title IX. It may be all that is required, depending on the findings. If you are challenged under Title IX by a lawsuit or OCR investigation, you may be accused of deliberate indifference. One of the best ways to prove that you were not deliberately indifferent is to show that a comprehensive civil rights investigation was completed and documented.

CRITICAL SEXUAL MISCONDUCT PANEL TRAINING COMPETENCIES

1. Understand that campus conduct decision-makers are not asked to determine if someone did right or wrong. Their highest priority and most important discipline is to determine if someone violated policy. This is a key distinction. Most of us apply our personal ethics to campus conduct decision-making, rather than submitting to the true ethic of student conduct—enforcing the standards of the community.

2. Understand and apply the standard of proof in context, meaningfully. All of us know the meaning of "more likely than not". Yet, most of us are not observant of our campus standard of proof, in practice. We tend to heighten the standard when the sanctions are tougher, and it is tougher than any of us will admit to overcome our social conditioning to always look to see if we have "proof beyond a reasonable doubt."

3. Understand that the question of whether someone violated policy is distinct from factors that aggravate or mitigate the severity of the violation. If someone is contrite, if they lacked intent, if they made an error in judgment, we are all too willing engage in a logical fallacy and take that into account in making our determination of whether policy was violated. Mostly, such considerations are irrelevant. So too are decisions to find someone "not responsible" because we feel that if they are found "responsible", the sanction will be too harsh. We must be disciplined to distinguish our decision on the finding from our decision on the sanction. If you feel someone made a mistake, or is contrite, take this into account by making the sanction proportionate to the violation. Don't use it to find someone "not responsible."

4. Assess information carefully. What are the facts, opinions, and circumstances? How does the information add up?

5. Police yourselves. When a line of inquiry or deliberation veers into bias or irrelevance, correct the problem. When a procedural error is made, cure it.

6. Train conduct boards on the rudiments of development theory as it applies to the campus conduct context. This will help them to keep developmentalism in perspective. So many times, especially with student boards, you'll hear things like "I know she made a bad decision, but she's only nineteen…" This is developmentalism run amok. We need to encourage students to mature, and challenge their decisional ethics, but encouraging is different than excusing. You can't say that because someone is nineteen, policy is not violated, if with respect to the same behavior by a thirty-year old, you would argue they should know better. Behavior either violates policy or it doesn't. It isn't a function of age or maturity.

7. We're not training our campus conduct boards that their decisions MUST be made based ONLY on information gained from the investigation or admitted at the hearing. Bring your common sense to the table, but not your common knowledge. It is a skill to know that you don't know something, rather than to assume that you do.

8. Because we're being called on to decide more and more sophisticated complaints, we need to realize that our depth of knowledge may need supplementing from sources of expertise, such a textbooks, professionals, studies and research.

9. If you need expertise in a campus hearing, utilize it intelligently. Figure out what you need to know in advance, and arrange to get the information you need introduced at the hearing. Don't rely on the parties for this. It is your job

to make sure you have the information you need to make a decision. Bring the expert, text or other source into the hearing as a neutral resource for the decision-makers, rather than as a partisan of the complainant or respondent. Give all the parties notice of the expertise you will be using, and give them an opportunity to challenge it.

THE PURPOSE OF HEARING SEXUAL MISCONDUCT COMPLAINTS

It is popular on college campuses today to choose to view the campus conduct system as a vehicle and opportunity for educational resolutions to policy violations. This is a healthy approach to the extent that it means differentiation of the college campus conduct system from the criminal justice system. College hearings are not criminal trials. No one can be put in jail as a result of a college hearing. Differences include the levels of proof required, the format, who adjudicates, and the involvement of attorneys, to name but a few. College hearings are not entirely civil either, since loss of liberty and property rights are at stake. Civil proof standards are used in campus hearings, but evidentiary rules and certain constitutional rights are drawn from both the civil and criminal legal fields. Thus, college hearings are very much a hybrid entity of the two systems, while also incorporating other aspects, which make college hearings unique within the administrative law field.

Hearing a complaint of sexual misconduct, though it may be called something else on campus, is a serious matter. These offenses may be equivalent to felony-level crimes in most states. Yet, when a respondent is found to be responsible for violation of an institution's policy on non-consensual sexual intercourse, this may be viewed purely as an educational opportunity. Remedial action is required by Title IX, and while educational sanctions may work in some situations, college administrators must also be willing to discipline, when necessary.
Too many colleges, in an effort to retain an educational conduct focus, are reticent to suspend or expel student violators. Colleges must acknowledge and accept that their role at times demands a separation from the institution in order to remedy a Title IX discrimination and protect members of the community. In the absence of serious mitigating factors, colleges have to be prepared to mete out separation-based sanctions, not just educational sanctions, for severe sexual misconduct. To fail to deal swiftly and assertively with sexual violence is a failure of institutional duties under negligence law, and quite possibly Title IX.

It is also an untenable morally relativistic position to give only educational sanctions where the same complaint tried in criminal court could result in imprisonment. Suspension and expulsion need to be the default sanctions for severe violations of your sexual misconduct policy, or you are courting a risk management nightmare. Serious sanctions are also necessary if your policy is to have any deterrent effect. Otherwise, students who are aware that you fail to deal meaningfully with sexual violence will feel as if they have an unfettered ability to commit conduct violations.

HEARING BEST PRACTICES

- ***Sexual Misconduct Hearing Board***

The first issue is whether or not to create a discrete hearing board specifically for sexual misconduct complaints. Many colleges have adopted separate boards, but this is not the only way to do it. As long as the board is well-trained to hear sexual misconduct complaints, whether it is a separate body or a board that hears general college misconduct complaints is really only a matter of institutional preference. If your college possesses the resources and is so inclined, creating a separate board just for sexual misconduct complaints can have the benefit of helping to reduce another structural impediment to reporting. Seeing that the college has established and trained a hearing