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

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

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ABOUT The NCHERM Group, LLC & ATIXA

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

THE THIRTEENTH NCHERM WHITEPAPER

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

The Whitepaper is distributed via The NCHERM Group and ATIXA e-mail subscriber lists, posted on The NCHERM Group and ATIXA websites and blogs and distributed at conferences.

- In 2001, NCHERM published *Sexual Assault, Sexual Harassment and Title IX: Managing the Risk on Campus.*
- In 2002, NCHERM published *Complying With the Clery Act: The Advanced Course.*
- In 2003, the Whitepaper was titled *It's Not That We Don't Know How to Think—It's That We Lack Dialectical Skills.*
- For 2004, the Whitepaper focused on *Crafting a Code of Conduct for the 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.*
- In 2011, NCHERM published *Deliberately Indifferent: Crafting Equitable and Effective Remedial Processes to Address Campus Sexual Violence.*
- For 2012, the topic of the NCHERM Whitepaper was *Suicidal Students, BITs and the Direct Threat Standard.*

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

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

THE TOP TEN LIST:

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

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

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

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

Staff-on-staff complaints and faculty-on-faculty complaints, both of which are employee-on-employee situations, fall within Title IX. That has been settled law since

the Supreme Court decided *North Haven v. Bell* 456 U.S. 512 (1982) thirty years ago. The mandates of the DCL apply to employees in much the same way as they apply to student-on-student cases, and they apply broadly -- not just to sexual harassment– but to all forms of gender and sex-based discrimination, including stalking, relationship violence, bullying and sexual violence.

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

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

If your campus has modified policies and procedures in cases of cross-constituent complaints (faculty-on-student, for example), we want to provoke deeper questions about equity in <u>all</u> of your remedial processes. In 2012, the AAUP challenged the DCL's mandate for the use of the preponderance of evidence standard believing that it would make faculty vulnerable to accusations by employees and students. AAUP's stance is mystifying, given that in cases of faculty-on-faculty harassment or discrimination, the preponderance standard better protects the victim who in this case is also a faculty member whose protection the AAUP professes to ensure. And, in an equitable environment, why should one campus constituency be more or less protected than any other? Victims deserve as much protection of their rights as the accused does and this has not been the case on many campuses prior to the issuance of the DCL. More importantly, the application of Title IX to these cases means that we have to provide that equitable protection of rights on our campuses, regardless of interest group advocacy.

The AAUP has long championed multi-tiered, hierarchical hearing and appeals processes to protect accused faculty members. But, consider what value that model will have in an environment of Title IX equity today? Every chance to appeal for an accused faculty member must also provide a chance for the complainant to appeal as well. Five levels of appeal now afford no more protection to an accused employee than one level or two, because equitable appeals under Title IX cannot be unilateral, by definition. The more appeals there are in an equitable framework, the more vulnerable to accountability an accused employee may be. We've dispensed with one-sided due process protections in our student-related procedures, and now it will make sense to do so with our employee-related procedures as well. Title VII is silent on equitable procedures, but Title IX now speaks loudly and carries a big stick.

Additional complexity is added by the fact that not all complaints are intra-constituency (student-on-student) or cross-constituency (employee-on-faculty), but are hybrids. Faculty members take classes; students teach them, and serve as our employees. The employee-student and the student-employee pose challenging questions of what policy and process will apply when there are multiple processes that could apply, all of which vary to some degree in the rights, privileges, benefits and opportunities they afford to their participants.

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

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

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

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

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

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

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

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

The amount of information that should be disclosed about the sanction or corrective action depends in large part on the identity of the respondent (i.e., the person accused), but also on how much the sanctions or corrective actions directly relate to the complainant (e.g., an apology requirement directly relates to the complainant, but a sensitivity training requirement may not), and on the type of offense. Different rules can apply for sexual assaults, because of their likelihood to have criminal code

implications and mandates imposed by the Clery Act, than for sexual harassment. Whether the rationale for the finding and/or sanctions is shared depends on whether it is your institutional practice to share a rationale with the accused individual. If so, it will be equitable to share a version with each party, though each version may not be completely identical, depending on the circumstances.

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

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

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

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

4. PROMPTNESS AND THE 60-DAY RULE

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

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

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

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

Regarding the "60" day period – where did that come from and, aside from law enforcement delays, is it a hard and fast rule? The OCR expects that schools will promptly address sexual misconduct without undue delay, in fact, they use the term "promptly" frequently in describing the manner in which a school must respond. The

OCR evaluates many elements to determine the extent to which a school has responded promptly, such as: creating prompt time frames for all major stages of a complaint, investigation and resolution; informing the parties of this time frame and updates on the status of the investigation; and maintaining a timeline of all actions, responses, calls, reasons for delays and all communications related to the case.

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

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

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

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

Certainly, the DCL advocates for investigations to seek to identify patterns and predatory situations. Yet, the OCR has recently advised that it views pattern and history evidence expansively. It could, for example, include past campus offenses by the same offender, but also criminal offenses. It might also include past good faith allegations, even if those allegations did not result in findings. Your current case might corroborate

a past investigation as a pattern, rather than the other way around. Finally, the OCR has suggested that similar incidents can evidence a pattern, and that similar means any behavior that falls within Title IX. Previous acts of stalking lend evidence to current accusations of sexual harassment. Previous acts of intimate partner violence lend evidence to current accusations of sexual misconduct. The OCR recognizes the continuum of gender-based violence, and that offenders often progress over time from lesser to more egregious acts of discrimination, and act to exert power and control in relationships with a common set of behaviors. Admitting and considering this information correctly requires an enhanced level of training for investigators, administrators, hearing officers and appellate panels members.

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

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

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

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

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

VII does disservice to Title IX. That said, a compromise approach can work.

Let's first appreciate the significant challenge campus legal counsel face in giving good advice on this question. Reporting of sexual assault by employees is required by three different federal laws[1], and some state statutes. Each of these laws creates its own reporting requirement, irrespective of the standards used by the other laws. So, should we be trying to train employees accurately on three varied reporting schemes (Title VII, Title IX and Clery) *and* state law? That is both impractical and a potential intellectual impossibility. So, we have come to favor the following approach. All employees should, by policy, be mandated reporters of what they know, within 24 hours of coming to know it. But, only some employees have to share ALL that they know (they are "responsible employees" under Title IX, and we will train accordingly). Employees not deemed "responsible employees" can satisfy their duty to report but may withhold personally identifiable information (at least initially), such that reporting can be accomplished (thus satisfying the Clery Act and Title IX) without starting the domino effect of actual or constructive notice without the consent of the alleged victim.

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

- All employees must report incidents of sex/gender misconduct and discrimination to the Coordinator or Deputy Coordinator within 24 hours of learning of the incident;
- Pass along all known information if the victim wishes you to;
- Some employees are empowered to make Jane/John Doe reports initially (i.e.: reports that omit personally identifiable information about those involved) if the employees are not supervisors or responsible employees. Note, however, that these employees may be expected to provide additional details later if the Coordinator needs them;
- Counselors, clergy and other confidential employees fulfill their reporting mandate by making John/Jane Doe reports for statistical purposes and pattern tracking, but do not divulge personally identifiable information without client consent.
    - An exemption can be created for discretion not to report when reporting is deemed by the confidential employee to not be in the client's best interests.
- Employees who are unsure of their duty to report or how much information to report, should ask the Coordinator and will be advised accordingly.
- As appropriate and required by law, the Coordinator will share information with campus law enforcement or public safety to satisfy the Clery Act.

Clarity on reporting duties requires training, but the DCL already made the need for

[1] Title VII, Title IX and Clery

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

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

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

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

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

If you don't take the approach recommended here, you really only have two other options. One is a blanket reporting mandate that all employees must report everything

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

The other option is to train all employees on their actual legal duties. You'll inform all "responsible employees" of what to report, when and to whom, when behaviors fall within Title IX. You'll create supervisory reporting duties to address compliance with Title VII. And, you'll train some of those same employees who are "campus security authorities" on their duty to report statistical and timely warning information in compliance with the Clery Act. Having done these trainings at the behest of clients all over the country, we can assure you that the end result of all this training is that you'll have created a confusing mush for your employees who can't keep all three reporting schemes straight, let alone also keep in mind your various campus hotlines, whistleblower policies, BIT-related reporting, and any applicable Sarbanes-Oxley requirements for reporting financial improprieties. We recommend the approach we've outlined here because we've seen all the other approaches fail. Ours isn't ideal and isn't the model of clarity we'd like it to be, but it is the best we've been able to come up with to address a complex and challenging set of inter-related but disconnected federal compliance standards.

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

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

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

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

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

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

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

8. WHILE THE DCL PRIMARILY ADDRESSED SEXUAL VIOLENCE, TITLE IX APPLIES TO ANY RULE VIOLATION IN WHICH SEX OR GENDER-BASED DISCRIMINATION OCCURS

Title IX prohibits sex/gender discrimination and the 2011 DCL defines sexual harassment as "unwelcome conduct of a sexual nature." Not all sexual harassment will be actionable under Title IX for purposes of lawsuits, even though such behavior may be a violation of

your campus policy. Sexual harassment has to be unwelcome, have a sex or gender-based discriminatory effect, and be sufficiently severe, pervasive (or persistent) and objectively offensive to cause that discriminatory effect (that is, the behavior limits or denies a persons access to or participation in their education or employment).

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

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

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

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

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

Title IX does not have geographically-defined jurisdiction. We can't say it applies to one place or another, or on- or off-campus. It is instead a nexus rule[2], applying to those situations with sufficient connection to the activities of a funding recipient such that the recipient is responsible for addressing them. The courts have uniformly applied a two-prong test to Title IX's applicability, assessing whether the institution has:

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

If both prongs are met, we are obligated to respond to notice in accord with Title IX. Yet, when we don't have control over the harasser and context, may we address off-campus conduct or conduct outside of school? The lawyer's answer: It depends. At public institutions, the leading cases (*J.S. v. Blue Mountain* and *Layshock v. Hermitage* out of the 3rd Circuit – other Circuits that have addressed the question come to similar conclusions) place limits on our ability to address purely off-campus speech, even if it is harassing, as 1st Amendment protected speech. Conduct is addressable more broadly than pure speech. Feel free to take off-campus jurisdiction over a sexual assault between students without fear of 1st Amendment implications and heed the expansive view of the court in *Simpson v. U. of Colorado* (2007), which seemed to expand what a "school sponsored" activity was to address an off-campus sexual assault on private property, calling it a result of behaviors and culture "created" by the institution.

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

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[2] As set forth by Justice O'Conner in the *Davis v. Monroe County* case.

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

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

> Students at School/University are annually given a copy of the *Code of Student Conduct*. Students are charged with the responsibility of having read, and agreeing to abide by, the provisions of the *Code of Student Conduct* and the authority of the student conduct process. The *Code of Student Conduct* and the student conduct process apply to the conduct of individual students and school/university-affiliated student organizations. Because the *Student Code of Conduct* is based on shared values, it sets a range of expectations for school/university students no matter where or when their conduct may take place; therefore, the *Code of Student Conduct* applies to behaviors that take place on the campus, at school/university-sponsored events and may also apply off-campus or outside of school when the administration determines in its discretion that the off-campus or outside-of-school conduct affects a substantial school/university interest. A substantial school/university interest is defined to include:
>
> - Any action that could constitute a criminal offense as defined by federal or state law. This includes, but is not limited to, allegations of single or repeat violations of any local, state or federal law in the municipality where the school/university is located;
> - Any situation where it appears that the student may present a danger or threat to the health or safety of him/herself or others;
> - Any situation that significantly disrupts the rights, property or achievements of self or others or significantly breaches the peace and/or causes social disorder; and/or
> - Any situation that is detrimental to the educational interests of the school/university (private schools and campuses, only).

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

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

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

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

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

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

enforcement. We can often rely on good communication from our own police and public safety departments, but that is not always the case with local police departments.

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

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

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

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

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

unnecessarily disempowering — and potentially illegal — campus policies and practices.

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

CONCLUSION

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

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