

EQUITY IS SUCH A LONELY WORD

**THE 2014 WHITEPAPER
Co-Published By
The NCHERM Group, LLC
and ATIXA**

Written by:

**W. Scott Lewis, J.D.
Saundra K. Schuster, J.D.
Brett A. Sokolow, J.D.
Daniel C. Swinton, J.D., Ed.D.**

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www.atixa.org

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ABOUT The NCHERM Group, LLC & ATIXA

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

THE FOURTEENTH NCHERM WHITEPAPER

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

- In 2001, NCHERM published *Sexual Assault, Sexual Harassment and Title IX: Managing the Risk on Campus*.
- In 2002, NCHERM published *Complying With the Clery Act: The Advanced Course*.
- In 2003, the Whitepaper was titled *It's Not That We Don't Know How to Think—It's That We Lack Dialectical Skills*.
- For 2004, the Whitepaper focused on *Crafting a Code of Conduct for the 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 offered a top ten list, *The Top Ten Things We Need to Know About Title IX... That the DCL Didn't Tell Us*.

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

Equity Is Such a Lonely Word

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

Equity is such a lonely word
Everyone is so untrue
Equity is hardly ever heard
And mostly what I need from you¹

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

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

Equity Defined

Equity should not be confused with equality or being equal, though we often see the two confused. Most often, we see the concept of equity applied in our society to Courts of Equity,

¹ "Honesty" by Billy Joel: "Honesty is such a lonely word, Everyone is so untrue, Honesty is hardly ever heard, And mostly what I need from you."

whose mission is fairness. Courts of Equity look to make someone whole again when they have faced a deprivation of some kind. Equity encompasses fairness, justice and most precisely, fairness under the circumstances. Fairness under the circumstances is intended to make someone whole, in this context when sex or gender is the basis for some form of deprivation or discrimination. Equality is defined as “the quality or state of being equal,”² or “the quality or state of being [the same for each person].”³ Certainly equality is one potential path to equity, but not the only one. You can also be equally inequitable. For our purposes, equity can mean access, it can mean equal opportunity, it can mean advantage, and it can mean reparation. An example can illustrate the larger concept of equity.

When the Founding Fathers crafted the Constitution, they decided to count each Black person as 3/5 of a person.⁴ Slavery and the 3/5ths compromise institutionalized inequity and inequality as the law of the land. When slavery ended, and emancipation came, Black people acquired greater freedoms, but not equity. Maybe 4/5ths? It was not until various civil rights acts were enacted and enforced that Black people acquired “equal” - 5/5ths status - legally. But, equity was still not achieved with 5/5ths (equality was). A Black American was legally equal to a White American, but history had created two Americas. Equity required not equality, but advantage, to attempt to right historically-derived oppression. Thus, racial preferences and Affirmative Action gave some African Americans the opportunity of 6/5ths (legally, though we know the result did not fully achieve the legal goal) as a way to achieve wholeness through equity, when equality was not enough.

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

² <http://www.merriam-webster.com/dictionary/equality>

³ See *Id.* and <http://www.merriam-webster.com/dictionary/equal>

⁴ This compromise, widely cited today as an institutionalization of inequity, was in its historical context not what it may seem. Free states did not want to count black slaves at all for the purposes of population. Slave states wanted full counting of slaves to get greater representation in the House of Representatives and Electoral College. 3/5 was the compromise, but counting a slave as a full human would actually have helped the slave-state cause and would have continued to perpetuate the institution of slavery. Special thanks to colleague Charles Schnur for the edifying history lesson on this point.

Creating (and De-constructing) Castles of Due Process

In February 1960, six African American students at Alabama State College were expelled after a sit-in at a public lunch counter in the basement of the Montgomery County Courthouse. The students were arrested for civil disobedience and Alabama State summarily expelled them from school. Their offense was to join the civil rights movement and to participate in peaceful non-violent protests against segregation. The students received no notice of the charges and no opportunity to present their story or provide Alabama State with evidence or witnesses of any kind. The expelled students filed a federal lawsuit against Alabama State, arguing a breach of basic due process – fairness. In Dixon v. Alabama State Board of Education⁵, the Fifth Circuit Federal Court of Appeals found in favor of the expelled students, holding that public institutions must provide students facing expulsion with at least notice of the charges and an opportunity to be heard. Stated differently, the Dixon court laid the foundation for what have become castles of due process on our campuses, built to protect accused students, by creating the minimum legal standards applicable to a public institution wishing to expel its students.

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

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

The due process castle therefore protected only some students, leaving many of the most vulnerable unprotected. As we noted three years ago, “The casualty of history here is that while the student conduct field was birthed from the civil rights movement, the evolution of the case

⁵ 294 F. 2d 150 (5th Cir. 1961).

law that sprang from Dixon has allowed us to be myopic.”⁶ Ironically, Dixon - a case that began with a handful of students seeking equity on the basis of race - set in motion a castle construction project that today hinders and inhibits our ability to provide for equity by and through the conduct process.⁷ If most of us started our careers in judicial affairs during the era of due process, we’ll retire from our positions in student conduct during the equity era.

Major Construction – The Judicial Board

One of the primary components of our castles of due process is the Judicial Board.⁸ Indeed, to combat the oft-arbitrary decision-making of a single campus administrator as seen in Dixon, colleges and universities constructed jury-like “Judicial Boards” comprised of some combination of students, faculty and/or staff, with a Judicial Board Chair acting in a role similar to that of a judge in a jury trial. The Judicial Board renders findings of guilt on the basis of evidence presented at a hearing; often Judicial Affairs personnel, who in some cases serve in a quasi-prosecutorial role, present the evidence.

The Judicial Board gained traction following Dixon and really picked up steam following the U.S. Supreme Court’s declaration in Goss v. Lopez⁹ that students accused of violating institutional policies should be “given some kind of notice and afforded some kind of hearing.”¹⁰ While the structure, form and nature of this hearing have been largely left up to institutions, most have gravitated toward creation of some form of Judicial Board. Over time, the use of a Judicial Board became synonymous with fulfilling the Dixon and Goss requirements.

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

⁶ NCHERM 2011 Whitepaper, “Deliberately Indifferent”. Available at:

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

⁷ For example, the U.S. Department of Education and the U.S. Department of Justice recently criticized the University of Montana’s student conduct process as focusing only “one the perpetrator, his or her due process rights, and resolving possible violations of the SCC” such that the process “does not adequately address the Title IX rights of the victim.” See U.S. Department of Education: Office for Civil Rights & U.S. Department of Justice: Civil Rights Division (May 9, 2013). *Investigation Report: University of Montana, Missoula*. Submitted to President Royce Engstrom and Lucy France. p. 13.

⁸ Though more often referred to now in less criminalistics terms such as “Hearing Boards” or “Hearing Panels,” their function and construction remain fairly unchanged.

⁹ 419 U.S. 565 (1975).

¹⁰ *Id.* at p. 579.

one stopped to ask the question whether two-party cases should be handled the same as single-party cases. Had we been more thoughtful about it then, many of us would acknowledge it was an error, and that a better model was possible. No one asked whether Dixon and Goss should apply to two-party cases, we just kept building the castle.

While some defend Judicial Boards as the most impartial means of complaint resolution, Judicial Boards are not, by their nature, equitable. As a field, student affairs has placed window dressing on many quasi-judicial processes, referring to judicial affairs officers with a much improved term, “student conduct administrators.” We have substituted the term “Hearing Panel” or “Hearing Board” in place of “Judicial Board” and render findings of “responsibility” rather than “guilty,” but the core functioning of such boards remains largely unchanged.¹¹ Much like calling dorms “residence halls,” changing the label improves and better reflects the nature and function of the facility, but it ultimately remains a dorm. Why, then, are we using an inequitable form of resolution to address violations whose very nature demands an equitable process?

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

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

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

¹¹ It should be noted that all of the authors are big supporters of the student conduct profession and the dedicated professionals who fill these roles.

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

The Civil Rights Investigation Model

Institutions need not go far to find such a process, as many already use a form of this model for employee discrimination complaints, particularly for issues involving Title VII.¹² A typical civil rights investigation model consists of an investigator or investigators performing a prompt, thorough and impartial investigation once the institution receives actual or constructive notice of an alleged violation. The investigator interviews the complainant and the respondent as well as all witnesses and, once the investigator feels they have gathered all available evidence, compiles an investigation report summarizing their investigation as well as the evidence provided by the parties and witnesses. The investigator then reviews relevant portions of their summary with all witnesses including the parties, to ensure the report constitutes a full and accurate report. The investigator then finalizes the report and forwards it to the relevant department for a finding, responsive actions and remedies.

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

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

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

¹² See NCHERM 2007 Whitepaper, “...Some Kind of Hearing...”. Available at: <http://ncher.org/pdfs/2007-whitepaper.pdf>

disparities across these constituent-based due process models create inherent equity issues on almost every campus, and speak to the benefit of unifying policy and procedure.

Scattered Policies and Procedures

Institutions have come by their scattered policies and procedures in organic, often reactionary fashion – creating new policies and procedures for specific constituencies based on lawsuits and court decisions, new or amended laws, regulations, and administrative guidance, as well as through collective bargaining. Such influences and requirements have, at varying times, focused only on a specific constituency (e.g.: tenured faculty, students, unions) creating a patchwork of policies and procedures across the institution. Additionally, the policies and processes for each constituency have matured at different times and relied on different laws and court cases, leaving institutions with kaleidoscopic policies and procedures. For many institutions and their constituents, this array of policies and procedures creates not just confusion and overlap but inequity for the parties involved.

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

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

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

the student conduct process accusing a student? Such inequity defies logic and any reasonable justification.¹³

The April 2011 OCR Dear Colleague Letter¹⁴ (DCL) indicated that institutions should aim for a 60-day resolution from the time of receipt of notice through the completion of the investigation of the complaint. “Investigate” in OCR-language encompasses everything from notice through conclusion of the appeal, and they use that terminology because they see an investigation-based resolution as the best path to an equitable outcome. At many institutions, a tenured faculty member accused of sexual violence is subject to an accused-centric investigative and resolution process that is likely to be complex, multi-layered, steeped in court-like due process rights and which confers multiple levels of appeal. The likelihood that it is resolved within 60 days is almost zero, leaving the complainant without resolution and full remedy for a period of time so excessive as to run afoul of the bounds of equity.

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

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

¹³ NCHERM 2013 Whitepaper, “The Top Ten Things We Need to Know About Title IX ... That the DCL Didn’t Tell Us”, p.5. Available at: <http://www.ncherm.org/wordpress/wp-content/uploads/2012/01/2013-NCHERM-Whitepaper-FINAL-1.18.13.pdf>

¹⁴ United States Department of Education, Office for Civil Rights. (2011). *April 4, 2011 “Dear Colleague Letter”*. Assistant Secretary for Education, Russlyn Ali, Washington, DC.

The Case for Unified Policies and Procedures¹⁵

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

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

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

The third avenue is to pursue a unified policy and process that governs all sex or gender discrimination complaints for all faculty, students and staff. In fact, the model we innovated¹⁶ allows resolution of all forms of discrimination using this approach, not just sex and gender. Frankly, equity applies to all discrimination, so using this approach only for sex and gender discrimination is a DCL-reactive decision. This unified approach supports the notion that the definitions of and procedures governing the violation of discrimination policies should not differ between constituent groups, rendering cross-constituency concerns inert. A unified policy addressing sexual misconduct and other forms of discrimination covers everyone with the same kind and degree of protection of their rights. Unification simplifies the investigation function and avoids duplicative training when there are multiple bodies all resolving the same kinds of

¹⁵ This section borrows directly and heavily from our 2013 Whitepaper, “The Top Ten Things We Need to Know About Title IX (That the DCL Didn't Tell Us).” We repeat much of this information because we feel it is central to achieving equity and we believe the field is more ready this year to accept the principles and reasoning behind unified policy and process to address all forms of civil rights based complaints. We have not cited directly to each segment pulled from the 2013 Whitepaper, as we found that the multitude of quotation marks and footnotes detracted from the flow of the paper. The 2013 Whitepaper can be accessed at:

<http://www.ncherp.org/wordpress/wp-content/uploads/2012/01/2013-NCHERM-Whitepaper-FINAL-1.18.13.pdf>

¹⁶ Contact Marianne Price at ATIXA for details on the “One Policy, One Process Model” (1P1P).

Marianne@atixa.org.

complaints across the campus. Unification allows consistent sanctions and responsive actions for the same types of misconduct, whether a student, faculty or staff member commits the violation. Unification fosters collaboration across the departments that are stakeholders, including HR, student conduct, and academic affairs while retaining their needed voice in the resolution process. Critically, a unified process can also be essential to the detection and tracking of patterns of misconduct, to limit the frequency of repeat offenses that vex campuses. Each of these benefits supports what we are seeing as the expansion and empowerment of the Title IX Coordinator in the form of institutional equity officer.

The shift to unify policies and procedures across the institution is greatly supported by the central and crucial role played by the Title IX Coordinator. The role and function of the Title IX Coordinator at institutions requires a level of oversight pertaining to all Title IX-related policies and procedures. OCR's guidance has been quite clear: "The coordinator's responsibilities include overseeing all Title IX complaints and identifying and addressing any patterns or systemic problems that arise during the review of such complaints."¹⁷

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

In its May 2013 Investigation Report pertaining to its Title IX and Title IV investigation of the University of Montana, the Department of Education's Office for Civil Rights (OCR) in conjunction with the Department of Justice (DOJ) expressed significant concern about the multitude of divergent, conflicting and duplicative Title IX-related policies and procedures.¹⁸ The Report noted that "the University has eight policies and procedures that explicitly or implicitly cover sexual harassment and sexual assault" and that "their sheer number and the lack of clear cross references among them leaves unclear which should be used to report sexual harassment or sexual assault and when circumstances support using one policy or procedure over another."¹⁹ OCR and DOJ noted that the multiple policies and procedures have "inconsistent and inadequate definitions of 'sexual harassment'"²⁰ that also lead to both "confusion about when and to whom to report sexual harassment"²¹ and "wide variation in who investigated and resolved complaints in sexual assault and harassment."²² As a solution,

¹⁷ April 4, 2011 DCL, p. 7.

¹⁸ Investigation Report: University of Montana, Missoula (May 9, 2013).

¹⁹ *Id.* at p. 7.

²⁰ *Id.* at p. 8.

²¹ *Id.*

²² *Id.* at p. 10.

OCR and DOJ called for clearer, more uniform policies and procedures that encourage reporting and focus on the hallmarks of Title IX compliance: prompt and equitable.

Addressing sex/gender-based violations through a different process is also complicated by the fact that often the sex/gender-based elements of a violation are not apparent at the time of the complaint. Accordingly, institutions find themselves halfway through an investigative process that is not Title IX compliant only to find that they have to backtrack and attempt to duct tape equity onto what has already been done. It is much better to have a unified, equitable set of policies and procedures from the start and then allow the investigation to unfold through a uniform process. In fact, the Developmental Model Code of Student Conduct²³ published by The NCHERM Group in 2013 moves so far toward equitable resolution that the model contemplates the use of the civil rights approach for all conduct violations, not just those that are discriminatory.

Remedies and Equity

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

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

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

²³ A Developmental Framework for a Code of Student Conduct: The NCHERM Group Model Code Project (2013). Available for free at www.modelcode.wikia.com

Equity requires fairness under the circumstances, which can and often should lead institutions to create skewed remedies that place more restrictions and requirements on respondents. Equity demands that complainants should be inconvenienced only as far as absolutely required to remedy the discrimination. The U.S. Supreme Court basically said as much in Davis v. Monroe County Board of Education.²⁴ Our default should no longer be to automatically inconvenience the complainant; we should instead examine of the totality of the circumstances and find the most equitable remedies available.

Conclusion

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

²⁴ 526 U.S. 629 (1999).

ABOUT THE AUTHORS

W. Scott Lewis, J.D. is a partner with The NCHERM Group, LLC and formerly served as the Assistant Vice Provost at the University of South Carolina. He is serving currently as the 2013-2014 president of NaBITA, the National Behavioral Intervention Team Association, an organization he co-founded. He also serves as an advisory board member and co-founder of ATIXA. Scott brings over twenty years of experience as a student affairs administrator, faculty member, and consultant in higher education. He is a frequent keynote and plenary speaker, nationally recognized for his work on behavioral intervention for students in crisis and distress, and has trained thousands of faculty and staff in these areas. He is noted as well for his work in the area of classroom management and dealing with disruptive students. He presents regularly throughout the country, assisting colleges and universities with legal, judicial, and risk management issues, as well as policy development and implementation. He serves as an author and editor in a number of areas including legal issues in higher education, campus safety and student development, campus conduct board training, and other higher education issues. He is a member of NASPA, ACPA, and served as a past President of ASCA. He did his undergraduate work in Psychology and his graduate work in Higher Education Administration at Texas A&M University and received his Law degree and mediation training from the University of Houston.

Saundra K. Schuster, J.D. is a partner with The NCHERM Group, LLC. She was formerly General Counsel for Sinclair Community College in Dayton, Ohio, and Senior Assistant Attorney General for the State of Ohio in the Higher Education Section. Saunie is a recognized expert in preventive law for education, notably in the fields of Sexual Misconduct, First Amendment, ADA, Risk Management, Student Discipline, Campus Conduct, Intellectual Property and Employment Issues. Prior to practicing law, Saunie served as the Associate Dean of Students at The Ohio State University. Saunie has more than thirty years of experience in college administration and teaching. She served as the 2011-2012 president of the National Behavioral Intervention Team Association (www.nabita.org), and was the President of ASCA. She currently serves on the Foundation Board for ASCA, and on the Board of Directors for NaBITA and SCOPE. She is a frequent presenter on legal, employment and student affairs issues for higher education and has authored books, articles and journals. Saunie holds Masters degrees in counseling and higher education administration from Miami University, completed her coursework for her Ph.D. at Ohio State University, and was awarded her juris doctorate degree from the Moritz College of Law, The Ohio State University.

Brett A. Sokolow, J.D. is a higher education attorney who specializes in high-risk campus health and safety issues. He is recognized as a national leader on campus sexual violence prevention, response and remediation. He is the president and CEO of The NCHERM Group, LLC, which serves as legal counsel to fifty colleges and universities. He is also the Executive Director of ATIXA (www.atixa.org). He frequently serves as an expert witness on sexual assault and harassment cases, and he has authored twelve books and more than 50 articles on campus safety and sexual assault. The NCHERM Group, LLC has provided services to than 3,000 college and university clients. Sokolow has provided strategic prevention programs to students at more

than 2,000 college and university campuses on sexual misconduct and alcohol. He has authored the conduct codes of more than eighty colleges and universities. The ATIXA Model Sexual Misconduct policy serves as the basis for policies at hundreds of colleges and universities across the country. NCHERM has trained the members of more than 700 conduct hearing boards at colleges and universities in North America. He serves as the Executive Director of NaBITA, the National Behavioral Intervention Team Association (www.nabita.org), and is a Directorate Body member of the ACPA Commission on Student Conduct and Legal Issues. He is a graduate of the College of William & Mary and the Villanova University School of Law. He is a member of the advisory boards of the National Hazing Prevention Collaborative, the NASPA Enough Is Enough Campaign and SCOPE, the School and College Organization for Prevention Educators (www.wearescope.org).

Daniel Swinton, J.D., Ed.D. serves as Senior Executive Vice President of The NCHERM Group, LLC. Prior to that, he served as Assistant Dean and Director of Student Conduct and Academic Integrity at Vanderbilt University. He received his Bachelor's degree from Brigham Young University, his law degree from the J. Reuben Clark Law School at BYU, and a doctorate in higher education leadership and policy from Vanderbilt University's Peabody College. He is a member of the Tennessee State Bar. He has presented nationally on issues such as sexual misconduct on college campuses, legal issues in student affairs and higher education, student conduct policies and procedures, mediation and behavioral intervention teams. Daniel has also served as president of the Association for Student Conduct Administration (ASCA) in 2010-2011, and now also serves as Associate Executive Director of ATIXA, the Association of Title IX Administrators (www.atixa.org).