



**An Open Letter to Higher Education about Sexual Violence
from Brett A. Sokolow, Esq. and The NCHERM Group Partners**

May 27th, 2014

Our goal is to help higher education embrace and empower gender equity through fair processes, which we all should share as a goal. Who we are and what we do is important to the message of this letter, because of the unique vantage point and perspective we have. We run The NCHERM Group, the largest higher education-specific law practice in the country, doing the legal work of more than 50 campuses. We consult with more than 300 campuses each year, in addition to those we represent as attorneys. We've had more than 3,000 higher education clients since 2000. We have a special expertise in Title IX law, and our law firm frequently represents campuses being investigated by the Department of Education's Office for Civil Rights (OCR), though we prefer to try to keep them from being investigated in the first place.

We are the founders of ATIXA, a membership association of more than 1,400 campus Title IX coordinators and investigators who both look to OCR for guidance and occasionally curse Washington for their workload. We have victim's advocate training, and our experience suggests victims tell the truth. We are all investigators who have done countless campus sexual misconduct investigations, which require a very different approach than victim advocacy. We are expert witnesses and litigation strategists in Title IX cases, both for and against campuses and schools. We represent both victims and accused students in campus hearings, though obviously never at the same time. We don't help rapists to get away with it. We wish campus attorneys and conduct officers would stop treating attorneys representing students in the conduct process as if it is an adversarial role. After all, we share the goal of protecting student rights, and assuring the equal dignity of all students.

It upsets some individuals in higher education that we are not always on the side of colleges in these cases, but that would just make us hired guns for money, not experts. Sometimes, campuses do this wrong; sometimes, they do it right. Our firm's record of success in cases suggests we rarely lose, and that is because we choose clients based on principle, and we choose based on who we believe has the right legal argument. We have trained thousands of campus civil-rights investigators and Title IX coordinators. As change-agents, we understand that we can be polarizing. We don't have just one job or

one role. We won't pick a side. Our loyalty is only to civil rights equity, and we see it from a unique 360° vantage point. This is what we see...

Colleges and universities struggled to fully embrace gender equity until April 4th, 2011. When OCR issued its April 4, 2011 Dear Colleague Letter (DCL), it changed higher education forever. For whatever reason, that day was simply a tipping point for the field. The broad strokes of that letter painted a clear picture, and sincere and earnest commitment followed. The details could have been better-defined, but credit for genuine change needs to be given to OCR and the White House. We have never seen higher education move, at once and in concert, in the same direction on a single issue with such dramatic fervor. Students sensed it, too, and reporting has dramatically increased as a result on almost every campus that has made serious changes to policies and procedures. On many, reporting has doubled. This is not a doubling of incidents, but a doubling of the willingness of victims to come forward. Thank you for trusting your campuses with your stories.

But, the pace of change is still too slow for groups like Know Your IX and Ed Act Now, as well as the President of the United States, and perhaps even for the OCR. It has been three years since the DCL was published, and some campuses still have not fully realized the changes that are needed. In the midst of the slow but steady progress campuses have been making, Congress compounded the compliance challenge with passage of the Campus SaVE provisions in the VAWA reauthorization in March of 2013. OCR has kept the pressure on by investigating an unprecedented number of campus complaints -- ninety at last count -- many catalyzed by the grassroots, decentralized, social network-based activism of groups like Know Your IX.

Ed Act Now wants OCR to put some teeth and transparency into its enforcement. OCR wants to transform campuses rather than punish them, and feels the heat of imperatives from the Vice President, the President and Congress, as well as push-back from higher education that they've gone too fast, and from organizations like the Foundation for Individual Rights in Education (FIRE) that they have gone too far. Campuses complain that OCR is creating change by slapping one campus at a time, rather than providing wider and more frequent guidance. Campuses are confused by varying messages from different OCR offices, and from the inconsistent enforcement actions being undertaken and publicized. It seems that OCR takes criticism from every side. So does higher education, and we hope OCR can see that, too.

Victims go to the media, file OCR complaints, and Title IX lawsuits. They've figured out they can put more teeth in their grievances by filing class-action complaints to the Departments of Education and Justice, complaining of Title IX, Title IV and Clery Act violations. Two historic fines for Clery Act violations are expected to be leveled any day now. Accused perpetrators have revived the "erroneous outcome" claim and are suing campuses and victims in increasing numbers, too, and using Title IX to do it. At least ten such suits are winding through the federal courts right now. Campuses flooded OCR

with 1,400 questions last year when it announced it was going to provide an FAQ on the DCL. OCR released it just last month as a 53-page document adding even more clarification to Title IX, and more work for colleges. And, as if that wasn't complicating enough, impact litigator Wendy Murphy recently filed a federal lawsuit to enjoin enforcement of the Campus SaVE Act as unconstitutional, and is telling campus presidents that the SaVE Act has compromised Title IX's efficacy, a claim that is widely debated in campus legal circles.

The Huffington Post now maintains a dedicated sub-site focused on campus sexual violence, *Breaking the Silence*, and rarely lacks for content. Less savvy media outlets still attack campuses for meddling in what is otherwise criminal behavior, and wonder why campuses are involved in rape cases at all? Many administrators may wonder similarly, but they understand what the public largely does not: campuses are mandated by Title IX to resolve and remedy all forms of sex and gender discrimination, which includes all acts of campus sexual violence. They also understand that the courts are virtually useless at prosecuting known-offender assaults on campuses where alcohol is often the key factor and recollections are anything but clear. In short, campuses have no choice, and consigning campus victims to the criminal justice process is often consigning them to no remedy at all. Campuses regularly address other "crimes" that students commit through administrative discipline processes. What would it look like if campuses addressed assault, drug dealing, weapons, arson, theft, etc., but not sexual assault? They would be accused of dodging the issue.

Caught in the middle of all this is the campus Title IX Coordinator (TIXC) who receives a complaint from a victim who is in pain. The TIXC pursues the complaint with diligent investigation within the requisite +/- 60 days, and then calls us in puzzlement over why they have now found text messages from the complainant both before and after the incident, describing it as consensual. It's easy for media outlets to paint uncaring campuses as the bad guys over and over again, but reality is often far more complex than that. Worse, FERPA – the federal student privacy law – leaves colleges unable to explain and defend the backstory to the cases they process.

Our generation and generations before us fought from our very cores for the right of victims to be believed, to be treated with respect, and to receive acknowledgment of their basic dignity from seemingly callous educational institutions that championed male privilege by merely slapping rapists on the wrists, if they punished them at all. We've been instrumental in seeing hundreds, if not thousands, of victims vindicated through campus resolution processes, which is why we're so pained that while the last twenty years has brought transformation, we've now arrived at the destination only to find that today's students have wholly redefined sexual experience – as every generation does – without reference to the rules we wrote. How can we demand respect for a generation that at times seems not demand it from themselves, or at least demands it on very different terms than we did? To illustrate what we mean, we can use just some of the

recent cases where our firm was asked to assist. Please note this **trigger warning** for graphic and rape-related content in what follows:

- A female student interviewed recently during an investigation had spread rumors by social media that she had been raped by a male student. When the rumors got back to the male student, he approached her about it, and she offered him a lengthy apology, and then put it in writing. We had to investigate nevertheless, and she told us that they'd had a drunken hook-up that she consented to. She was fine with what happened. We asked her why she called it a rape then, and she said, "you know, because we were drunk. It wasn't rape, it was just rapey rape." We asked her if she was aware of what spreading such an accusation might do to the young man's reputation, and her response was "everyone knows it wasn't really a rape, we just call it that when we're drunk or high." By the way, whomever popularized the term "rapey" deserves a special place in purgatory. For more on the drunk sex issue, click [here](#).
- A female student alleged a campus sexual assault based on non-consensual oral intercourse. Her texts both before and after the incident with the alleged perpetrator state that she enjoys swallowing and "dirty boys who cum in her mouth," all in reference to her actions with him. In her complaint that the oral sex was non-consensual, she informed the campus that she was appalled that he did not wear a condom. He insists it was consensual. We don't know that we'll ever know what happened, but we do know what can and can't be proven.
- A female student was caught by her boyfriend while cheating on him with another male student. She then filed a complaint that she had been assaulted by the male student with whom she had been caught cheating. The campus investigated, and the accused student produced a text message thread from the morning after the alleged assault. It read:
 - Him: How do I compare with your boyfriend?
 - Her: You were great
 - Him: So you got off?
 - Her: Yes, especially when I was on top
 - Him: We should do it again, soon
 - Her: Hehe
- A female student claimed multiple instances of sexual aggression, assault and coercion by her boyfriend over more than a year, but after making the complaint, she could not recall or provide ANY specifics of each instance in terms of location, time, or salient details. His corroborative evidence showed cooperation and even initiation by the complainant.
- A female student claimed a male student performed oral sex on her without her permission on October 3rd. He did so again on October 11th. On October 13th, they had consensual sexual intercourse. On November 2nd, he again performed oral sex on her without her consent. She complained about the three non-consensual acts, but not the consensual intercourse. The campus processed this

complaint to a fair outcome based on the October 13th violation, but it demonstrates how little black and white exists in some of these cases.

- A male student performed demeaning, degrading and abusive sexual acts on a female non-student. They engaged in BDSM, and he ignored her protests throughout the entire sexual episode, despite her screaming in obvious pain and trying to get away from him. She filed a grievance with the campus, and we soon discovered instant messages in which she consented just before the incident to exactly these acts, and agreed to forgo the use of a “safe word” common in BDSM relationships.
- A female student accused a male student of sexual assault. When her complaint of sexual assault was heard by a campus panel, there was literally no evidence to support her complaint. He was found not responsible and decided not to press a complaint against her for a false allegation out of sensitivity to her serious mental health issues. Then, she went around campus telling anyone and everyone that he had raped her. The male student then filed a complaint against the female student for harassment. The female student then filed a complaint with the college for processing his complaint as an act of retaliation against her.
- In another recent case, a long-term relationship between two students involved many consensual sexual acts. The couple broke up. The male student started dating another student on campus, at which point the former girlfriend filed a complaint that there were non-consensual acts amongst many prior and subsequent consensual acts that they engaged in. Perhaps, but the timing is suspicious, and there is no evidence to suggest any concern about the behaviors during the time they were dating. Again, there is often a chasm between what is alleged and what evidence is able to prove.

We could go on and on with a litany of these complicated and conflicting cases. We hate that some of them provoke tired old victim-blaming tropes, such as the woman scorned and the cover-up of cheating. We hate even more that in a lot of these cases, the campus is holding the male accountable in spite of the evidence – or the lack thereof – because they think they are supposed to, and that doing so is what OCR wants. If you work on a college campus, we don’t have to point out the complexity of the complaints we receive. But, the public and the media need to understand that campus complaints are not as clear-cut as the survivors at Know Your IX would have everyone believe.

Sexual assault is rampant on campuses, no matter what study you read. Debating prevalence is futile, because one victim is one too many. But, not every complaint can be resolved, and not every allegation can be proved. We don’t see victims making many false complaints¹, but just as the OCR-mandated preponderance standard (what is more likely than not?) should be making it easier to determine what violates a policy, Millennial sexual mores are clouding the evidence. We see complainants who genuinely believe they have been assaulted, despite overwhelming proof that it did not happen.

¹ A malicious or false complaint made by someone knowing it to be untrue.

We fear for the mental health issues impacting many students, but in particular for those whose reality contact issues manifest in sexual situations they can't handle and campuses can't remedy. We hate even more that another victim-blaming trope – victim mental health – continues to have legs, but how do you not question the reality contact where case-after-case involves sincere victims who believe something has happened to them that evidence shows absolutely did not? How do campus and community mental health resources help someone who is suffering from real trauma resulting from an unreal episode?

It's futile, we know, to wish that this generation of students would stop inviting ambiguity into so many of their sexual interactions². But, we can tell them that the great majority of administrators we work with daily encourage reporting, and will receive their reports with open-mindedness, compassion and empathy. We know it may be a vain hope, but students, we really wish you would help us help you. We wish you would say yes when you mean yes, no when you mean no, and text in a way that reinforces what you said or did, rather than contradicts the allegations you have made. In a remarkable shift, the field is now finally sympathetic to victims, and societal victim-blaming tendencies are ebbing, but we fear the tide will shift again, against believing victims. None of our hopes above takes away from the fact the college messaging also needs to tell potential perpetrators to get consent, to stop raping, to avoid sex with those who have been drinking, and to intervene in potentially harmful situations, not as patriarchal protectors, but as empathic beings in inter-dependent communities.

We fear that other activists and the victim advocacy community will see this letter as anti-victim. Instead, we hope that the field will reject a victim-blaming analysis in favor of deeper exploration of the challenges we all are facing. Any person has the right to their autonomy, and the self-determination to claim it if they have been victimized. We cannot give that to them, and we cannot take it away. But, a victim's self-labeling does not make the person they are accusing a perpetrator. Only a campus resolution process, conducted under equitable rules in compliance with Title IX, can determine that an accused student violated campus policy (which doesn't make them a rapist, in a criminal sense). And, every campus owes services, resources and supports to every victim, regardless of whether a campus process is able to uphold their complaint or not.

The President of the United States wants us to solve the campus sexual assault problem. So we have some thoughts about how we all can be more effective stakeholders in the solution. Here's a suggestion for each of us:

- **President Obama.** Please continue to give your task force on campus sexual violence a true mandate for prevention. Empower it to advocate for the

² And, we don't like to label a rape as an "interaction," but neutral terms work best in these circumstances, because we can't assume an accused student is a perpetrator, either.

resources that campuses need to fully embrace the compliance and prevention missions that the law imposes.

- **Campus Presidents.** Allocate at least \$250k annually to a prevention budget. You'll make it up in the long run through loss prevention. Really. Additionally, we beseech you to streamline your policy-making process. OCR and the courts are averaging at least two pronouncements each year that require revisions to campus policy. Your campus policymaking process needs to be agile enough to keep up with this new pace of change, and on most campuses, that process is woefully unable to do so.
- **Chief Student Affairs Officers.** Campus SaVE Act Compliance (VAWA Section 304) is largely going to fall on your division, and it is time to get ready. Prevention must be professionalized under your division, with something like a Campus Prevention Services Office or Campus Prevention Committee that is well-staffed and well-resourced.
- **Orientation and First Year Experience Professionals.** Please lead conversations on your campuses for how to mandate educational and prevention programming beyond the first year and work with faculty to develop cross-curricular programming in these and related areas.
- **Deans of Students.** Devise a points system or other effective mechanism to get student butts in the seats, so that they attend the presentations you provide. No one will benefit from campus prevention efforts if those efforts are not delivered to the audience who needs to hear them. Conduct regular campus climate surveys with a three-year action plan to address the survey findings and remedy any hostile climate issues that are evident.
- **Campus investigators.** Do more than attend the two-day ATIXA training. We've done investigations for more than fifteen years to learn what we know how to do. With two days of training, you've made a start, but to do right by all of our campus constituents, and to do justice to the complexity of these cases, you must invest in your own professional development with diligence and hard work. If you make training a continual task, excellence will follow.
- **Title IX Coordinators.** Make sure your president and trustees understand the enormity of your role. Yours is a full-time, dedicated role, whether your position is or not. Fight for your authority to be the final say on Title IX on your campus. You need a budget, a direct or dotted line to your president, and the authority to effectuate the changes compliance requires. Oh, and in your spare time, help your campus Public Safety and Student Affairs professionals to meet the prevention, education and training mandates of the SaVE Act. They're big.
- **FIRE.** Live up to your name. Don't just fight for the rights of accused students. Fight for the individual rights of all students. If a campus puts a gag order on a victim, where is your voice in favor of her rights to share her story?
- **Student Conduct professionals.** You can't be too hot or too cold, you need to get it just right. Some of you are too hot, meaning that you hold men accountable for drunken hook ups that shouldn't violate campus policies.

Charging only the male if both parties are drunk (not incapacitated) is gender discrimination. In some cases where you find a preponderance, some of you have your thumbs on the scales of justice. A tie must go to the accused student. In other cases, you're too cold, and you don't ensure that victims get their due, and that perpetrators are kicked out. The just right bowl of porridge is neither too hot nor too cold, and the equal dignity we owe to all of our students requires that we get it right, every time. We also ask you to become more effective gatekeepers on the process. Not every complaint deserves a hearing. Many complaints can be resolved through investigation, and when the investigation shows that no misconduct took place, bring the gate down and stop the process. It can be victimizing to all parties to continue the process beyond that point. Please reconsider imposing gag orders on the parties to a complaint. Title IX requires *you* to maintain the confidentiality of an investigation. It does not give you the right to deprive students of their right to talk about their experiences and tell their stories. We also suggest you get used to welcoming attorneys as advisors in your processes. We're coming sooner or later (now that the SaVE Act is in effect), and we can't imagine many students involved in sexual misconduct complaints navigating the campus process very well without us, to be blunt.

- **Public Safety.** Continue to train officers to believe victims and not to blame them. You're not the ultimate deciders of fact, and don't need to take sides. Consider that higher crime statistics mean safer campuses, not the other way around. Assist campus civil rights investigations, and partner with the Title IX Coordinator and Student Affairs to deliver the training and prevention content the law requires.
- **Know Your IX, Ed Act Now, End Rape on Campus and other student voices.** Continue to push higher education and OCR to do better, partner with us where you can, teach us about your expectations, and be open to the possibility that some of the cases you believe in are harder to prove than you think, and in some cases, may not constitute a violation of policy.
- **OCR.** Go further to make your case decisions open and transparent. Publish regular, consistent guidance. Higher education is hungry for it. Open a technical assistance department staffed just as well as your enforcement division. If you do, you might slowly realize you'll need your enforcers less, and that compliance will improve.
- **Faculty.** Please be open to changing your privileged discipline processes, because you are the only ones who can. Equity is an inherent good for all of us, and complex, drawn-out discipline processes, multiple layers of appeal, grievance processes and tenure revocation systems all impede equitable resolution of sex and gender discrimination complaints involving faculty. We must protect our faculty members who are accused, but we must equally protect those who accuse them.
- **Human Resources.** It is no longer acceptable to be unaware that Title IX applies to employees in any situation where Title VII also applies to address sex/gender discrimination on a college campus. Many of the mandates for prevention and

- training in Title IX and the Campus SaVE Act apply to employees. They are breathtakingly broad and your institution is going to need more than the same animated online tutorial on sexual harassment every year to address them.
- **Campus LGBTQI Resources.** We shouldn't need this reminder, but please keep institutions focused on the ways that Title IX covers gender identity discrimination, transgender individuals, those in transition, and those who are gender nonconforming, and make sure we continue to acknowledge that not every case of sexual violence is male-on-female or occurs in exclusively heterosexual contexts.
 - **Campus Victim Advocates.** Victims need at least one human being who believes them 100%. It may not be their parents, friends, or loved ones. Be there for them unequivocally, but please understand that institutions are obligated to protect not just the victim you are helping, but future victims as well. Campuses try to honor each victim's wishes, but if they pursue a complaint against the wishes of the victim, it is not to harm him or her, but to protect others from the same harm. If the campus does not uphold your victim's complaint, it may not be that they don't believe him or her. It may be that they don't have the evidence to show a violation. But, campuses still need to provide services, supports and remedies no matter what.
 - **Athletics.** Strive for equity of facilities, participation, scholarships, uniforms, coaching, and athletics opportunities. Report what you hear to the Title IX Coordinator, and never forget that your athletes are, first and foremost, our students. Their status as athletes doesn't change the fact that they are protected by campus policies and subject to campus rules. Special training for athletes and coaches is needed to address the circumstances inherent in closed campus athletic communities.
 - **Counselors and Health Services.** You know more about campus victimization rates than anyone else. But, many of you do not report statistics on sexual violence (and soon, dating violence, domestic violence, and stalking). I ask you to voluntarily invert the Clery Act reporting paradigm. At present, counselors may volunteer statistics when they choose to. We suggest that reporting anonymous, non-personally-identifiable, statistical information should be the standard for you. But, you can make discretionary decisions not to report if you believe it would harm your client or patient to do so. Will you help us understand our climate and the extent of campus crime if it won't harm your clients in any way?
 - **Students.** A community is a place where the members look out for one another. When you are a bystander to the safety of the community, you fail to contribute to making your campus a socially just community. Engage, intervene and look after each other. You won't always make the best choices, but a safety net can help to ensure you don't always suffer for them.
 - **Victims.** If anyone has sexual contact with you by force, without your clear consent by word or by action, or where they know or should know that you are physically incapacitated (often by alcohol or other drugs), you have the right to

- have your college remedy the effects of what has happened to you. You can make a confidential report, or a formal complaint, and/or report to police. Title IX also protects you if you are stalked, if you experience intimate partner violence, sexual harassment, or other forms of sex/gender discrimination.
- **Sexual Aggressors.** Take no for an answer. Ask for a yes. Don't make assumptions. You're not entitled to sex, and if you take it without permission, you're going to get kicked out of college.
 - **Registrars.** And, the institution is going to note it on your transcript. It's the ethical thing to do.
 - **The NCHERM Group.** We will continue to support all of you as you work earnestly to achieve compliance. This summer, we'll release our strategic prevention curriculum, to provide you with the content you need to comply with the education and training mandates of Title IX and the Campus SaVE Act. We have an online suite of trainings already available for mandated reporters, hearing boards and appeals officers. More online trainings are scheduled throughout 2014-2015 on the topics you need to assure gender equity within your campus communities.

Thank you for your dedication and determination.

Sincerely,

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