



The National Center for Higher Education Risk Management NCHERM and ATIXA Response to the Dear College Letter on Campus Sexual Violence

By Brett A. Sokolow, Esq., Managing Partner, NCHERM (www.ncherm.org)

The April 4, 2011, OCR Dear Colleague Letter on Campus Sexual Violence is aimed at improving the ways colleges and universities address complaints of sexual violence; yet misreading of the meaning and intent of the DCL may be creating more problems than it sought to resolve. Some campus officials have seized on language in the DCL to imply a duty to fully investigate AND remedy all complaints regardless of the wishes of a victim, which is an overreaction to OCR's clarification of its expectations for Title IX compliance. And Title IX is not the whole story here, as campuses have duties created by state and common law negligence actions, as well.

Advocates for victims believe compulsory investigations and mandatory reporting by all employees would disempower victims and chill reporting, and are trying to get clarity before students head back to school. When notice is given to a "re-

sponsible employee," someone who has authority to address sexual and gender-based misconduct on behalf of the university, Title IX imposes obligations. Responsible employees will vary from campus to campus, so campuses are advised to create a list. Mandating reports from all employees will create a chilling effect on reporting, especially since the law imposes no duty on RAs, faculty, and other nonsupervisory employees. Counselors, health providers, and advocates (working under a privilege statute) are also not obligated by Title IX to report incidents known to them, because reports to them by clients or patients are confidential by law and professional ethics. So, what must a campus pursue?

Brett A. Sokolow, Esq., who heads the National Center for Higher Education Risk Management (NCHERM) said, "The issue is one of interpretation of what OCR means by investigation, and they could

have been clearer. I have talked at length with OCR, and their intent is clear, if their words were not. Notice of sexual violence, whether actual or constructive, must be investigated. Period. But, the investigation is a 'small i' investigation, meaning that it is preliminary." Actual notice is best defined as notice including detail sufficient to permit an investigation, whether provided by a victim, a third party, or other source. Constructive notice is notice to a responsible employee who has an obligation to report to a supervisor, such that notice to the employee is chargeable as notice to the institution (whether the employee shares what she/he knows or not).

Upon receipt of notice, initial remedies or accommodations may be appropriate as the preliminary investigation is engaged, and the investigation may reveal what is a needed and/or appropriate remedy in the circumstances. The victim has no agency in whether a preliminary investigation is completed, but has agency in the sense that he or she may restrict information in a way that limits or prevents the investigation (e.g., by not revealing the identity of the accused student).

Sokolow continued, "Where the identity of the accused student or other details are known, preliminary inquiry into the potential for violence, into a pattern of offenses, and whether the alleged victim and/or others are at risk will be conducted in all cases. This might involve a review of conduct records, other com-

Continued on page 35



Corporate Snapshot

The National Center for Higher Education Risk Management

Contact Person: Brett A. Sokolow, Esq.
20 Callery Way
Malvern, PA 19355

Phone: (610) 993-0229
Fax: (610) 993-0228
Email: brett@ncherm.org
Website: www.ncherm.org

NCHERM is a law and consulting firm that is dedicated to best practices for campus health and safety.

plaints, or a verification of some or all of the alleged victim's assertions. This preliminary investigation will then allow the college or university to determine whether it can reasonably end the inquiry with the preliminary investigation, or whether it will need to continue. As is indicated in the DCL, the victim's consent to release of information will be critical here, and should be respected. The 'big I' comprehensive investigation may or may not be necessary. If not, initial accommodations and remedies will satisfy Title IX. If deeper investigation is needed, it should be undertaken. However, a victim's confidentiality (the OCR word, though campuses would be more likely to use 'privacy') should be respected if s/he does not consent to release of personally identifiable information. Where the 'big I' investigation indicates a need to pursue a formal resolution, colleges and universities will need to do so, if not to satisfy Title IX, to prevent future injury and to forestall liability in negligence for foreseeable harm."

"Still, this comprehensive investigation and/or resolution should not automatically disempower the alleged victim, as it may be conducted without his or her involvement, if sufficient independent evidence allows. Lack of consent to disclose the victim's personally identifiable information or lack of involvement by the alleged victim in the process may limit the range of remedies the college or university can pursue at this point."

"If the college or university takes the rare step of breaching the victim's privacy to pursue formal resolution, it may do so legally under the FERPA health and safety exception for a significant and articulable threat. That seemingly disempowering action can result in secondary trauma to the victim, but is intended to stem patterns that indicate a real risk of harm to the next victim or victims. The institution is caught in dynamic tension between honoring the wishes of the last victim and protecting the safety of the next. Right or wrong action is debatable when faced with competing goods, but many college administrators feel they cannot allow a victim to decide whether the institution acts to pro-

tect its community. At this point, the college or university takes this action because more limited remedies are insufficient to prevent the reoccurrence of harm, and disciplinary action or sanctions are needed that invoke the due process mechanisms of the institution. Victims are not being dragged involuntarily through a formal process — which often can rely on independent evidence — but a formal process is being undertaken to the fullest extent it can be. There is danger in this path too, because without a victim's participation, evidence may be too limited to make the finding necessary to separate the accused student from the institution. A hearing may not produce the ability to remedy any differently than without the hearing, but the accused student may be empowered by 'getting away with it' and may feel at liberty to retaliate or continue unabated in their violent patterns."

While this discussion is complex, Sokolow summarized best practices this way, "Investigate ALL complainants preliminarily. Pursue appropriate initial remedies and accommodations as indicated.

Take the complaint to a formal investigation when the potential for repeat offenses, patterns, predation and/or future violence is real. Apply any remedies that can be effective within the bounds of victim privacy. Breach victim privacy only when a comprehensive investigation and/or full formal resolution are required to prevent the future reoccurrence of the violence. Then, take the actions needed to end the discrimination, prevent its future reoccurrence, remedy the effects upon the victim and the community."

About the Author

Brett A. Sokolow, JD is the managing partner of the National Center for Higher Education Risk Management (www.ncherm.org) and the 2009 President of NaBITA, the National Behavioral Intervention Team Association (www.nabita.org).



Fast Facts About NCHERM

Counsel to 26 colleges and universities

Consultants to more than 1,400 colleges and universities

Six strategic partners

12 books, more than 70 articles

Monthly Webinars

Law, compliance, and risk management expertise

www.ncherm.org
www.nabita.org