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Systems-level solutions for safer schools and campuses

HOW I SEE IT

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The NCHERM Group, LLC is one of the nation's leading higher education law firms, representing the legal interests of more than 70 colleges and universities. In a consulting capacity, The NCHERM Group's 30 consultants advise more than 400 colleges and universities each year, and The NCHERM Group has consulted with more than 4,000 colleges since being founded in 2000. The NCHERM Group is known for publishing model policies, templates, and materials that have become the industry standard for risk management in higher education. The NCHERM Group operates membership associations, [ATIXA](#) and [NaBITA](#), as part of its prevention mission. www.ncher.org

I run The NCHERM Group (The National Center for Higher Education Risk Management). We function at the epicenter of the campus sexual misconduct zeitgeist. I try, and inevitably fail, to keep up with the constant media coverage and rhetoric surrounding campus sexual misconduct, but none of the commentators describes it the way I would. I run a team of 16 [civil rights investigators](#). We're on the ground at schools and colleges investigating these incidents every day. I have served as a lawyer for victims and for students who are accused. I counsel and console their parents. My firm is [legal counsel](#) to more than 70 colleges and schools districts. I represent faculty members whose free speech rights are being trampled by Title IX overreach. I'm a trained victim's advocate. I have overseen the suspensions and expulsions of more than 1,000 students for various forms of sexual misconduct. I am called on as an [expert witness](#) in dozens of Title IX lawsuits on all sides of these cases. I represent Title IX Coordinators who are trying to do the right thing but are silenced by unethical and sometimes even corrupt employers. I brief presidents and Boards of Trustees. My organization has [trained](#) more than 8,500 campus Title IX Coordinators and Investigators. I've been doing this for 20 years, and I think I see this issue as globally as anyone possibly could.

Title IX and campus sexual violence are at a pivotal moment in our society. Students at Fordham University recently used social media to object to the very idea that sexual violence is politicized. Life will eventually show them just how political this issue is, but for now I don't begrudge them their naïveté. I am watching as the two "sides" square off. I wonder who else is

occupying the center? It is difficult to find others who are. Liberals tend to believe that rape is rampant on college campuses, that rape culture supports and encourages sexual violence, that the rights of victims are paramount, and that campuses should, as a default, believe survivors. Conservatives tend to deny that rape culture exists, believe that the statistics on sexual violence are flawed and exaggerated, and believe that the due process rights of those accused of sexual violence are being trampled by biased, victim-centered, campus administrators who drive Kangaroo Courts to foregone conclusions.

So, what side am I on? Neither. I'm on the side of Title IX; I believe that sex and gender equity in schools is an inherent good. When the Republicans are in control, and define compliance by their terms, I help schools to understand and implement those standards. When Democrats are in control, and define compliance by their terms, I help schools to understand and implement those standards. I'm certainly not agnostic or apolitical about Title IX, but I am able to see that each of these perspectives has merit on some level. To truly make progress on compliance with Title IX, we have to put the rhetoric aside and understand the reality of the issues. Now, more than ever, the stakes require us to get this right. So, let's set the record straight on a few issues so that we can sift myth from fact, and start from a foundation of reality, not hype:

- 1-in-5 women is raped in college. **PARTIALLY TRUE.** Campuses that study the frequency of sexual violence find results that range between 1-in-20 and 1-in-4 female students experience some form of sexual assault or attempted sexual assault. Large-scale studies often aren't as precise as campus-based climate measures that provide specifics about individual campuses. The 1-in-5 statistic is true in some places, lower in others, and higher in a few. Whatever the number, one is too many.
- We live in a rape culture. **TRUE.** We elect abusers as president. Enough said. Denying this makes you an ideologue and your bias is showing.
- Preponderance of the evidence (50.01%) is the lowest standard of proof used in the American system of jurisprudence. **FALSE.** Not even close to true. Substantial evidence is a lower standard. A mere scintilla is the lowest. Reasonable suspicion and probable cause are both lower standards than preponderance of the evidence. Law professors who keep stating this as fact in op-eds need to go back to law school.
- OCR (the Office for Civil Rights within the Department of Education) lowered the standard of proof to preponderance of the evidence in 2011. **FALSE.** OCR simply formalized its long-held position that preponderance of the evidence is the applicable legal standard for Title IX (and all civil rights) proceedings.
- Colleges across-the-board changed their standards of proof in 2011 because of the OCR's mandate. **FALSE.** Around 80% of colleges were using preponderance of the evidence standard already in 2011. For 60 years, courts all over the country have upheld the imposition of discipline on students for a variety of types of misconduct, all where the campuses were using the preponderance of the evidence standard. This is also the accepted standard for disciplinary decisions involving employment discrimination for all employers.

- Campus decisions would change if the standard was raised to clear and convincing evidence, a standard higher than preponderance. **MOSTLY FALSE.** I suspect more than 90% of decisions would remain the same if the standard changed, both because of the amount of evidence available in many cases, and because college decision-makers make reasonable findings. Many hearing officers and panelists aren't rigidly formalistic about applying the preponderance standard now, for the most part. Thus, they may not be rigid in applying a higher standard in the future, either.
- OCR caused the current crisis in due process that exists on many college campuses. **FALSE.** This confuses effect with cause. OCR is the excuse that some administrators have used to improperly put their thumbs on the scale, but there is nothing in OCR guidance that actually directed any administrator to ignore or subvert the existing due process protections that courts have afforded to accused students. In fact, OCR's mandate for equitable process does afford strong protection of due process if implemented appropriately. OCR directed administrators to balance due process rights and Title IX rights, but some have done so better than others. Some biased administrators read into OCR guidance what they want to see or perceive OCR's intentions as a directive to favor victims, but OCR is not making decisions on college campuses: administrators are. We also need to accept that bias and corruption are not the sole culprits leading to bad decisions; a lack of training is also a significant source.
- Colleges are Kangaroo Courts that are inept at addressing sexual misconduct. **PARTIALLY TRUE.** By a rough estimate, colleges have addressed at least 40,000 allegations of sexual misconduct since 2011. Based on the number of lawsuits and OCR complaints, about 1,000 students have challenged those decisions as unfair since 2011. Of course, not everyone who could do so chooses to sue, and some who do have no real basis to do so. In every case, the campus resolution process creates a winner and a loser. No one likes to be the loser. But, even if there are 4,000 wrong decisions, that's 10%. 90% of college decisions on sexual misconduct allegations are therefore good decisions. For the 10% or so of students who are treated unfairly, that's an unacceptable reality and we need to keep working until that number is zero. But, this is far less than the rate of error in the criminal justice system. So, for all the critics of campus justice, please realize it may already be one of the fairest resolution systems there is. Unfairness results because some number of college administrators are inept, incompetent, and or corrupt, which is far less than the frequency of those plagues in most other industries.
- Roughly 2-8% of reported sexual assaults are false reports. **FALSE.** The study that was the basis for this statistic is ancient and doesn't apply to college campuses, but to crimes (and even then, it was neither a thorough nor impressive study). We actually don't know how many reports of sexual assault in schools and on college campus are false (meaning fabrications that are known to be false by the person making the claim, not including those that are merely unproven or unsubstantiated), but the number is likely higher than 10%, and the quality of reports appears to have dropped precipitously since 2011. Current measures and data are needed before we have any accurate sense of the frequency of false reports.
- Due process protections need to be stronger in college disciplinary proceedings. **PARTIALLY TRUE.** If all colleges (public and private) fully implemented existing due

process protections as mandated by the courts, accused students would be well-protected from unfairness in college proceedings. Conservatives want to expand due process beyond the current parameters by mandating protections such as unanimous decisions, direct cross-examination, and full adversarial representation by attorneys. If courts choose to expand due process to require these protections, so be it. But I am focused on getting colleges to accord the *current* level of procedural protections that courts say is due. A large part of the problem is that schools aren't even meeting the floor set by existing due process litigation. It is important to consider the impact of expanding due process in the ways for which due process advocates push. Turning the campus resolution process into criminal trial has a myriad of downsides that could far outweigh the value of the protections that would be afforded, on the whole.

In sum, Title IX has had a 45-year trajectory. That trajectory ebbs and flows with the political winds, and with the progressive evolution of American society. The pendulum swung after 2011 toward victims, and much of that swing was welcome and necessary. Alas, the pendulum swung too far, and in some cases, the rights of accused students were neglected. Now, the Department of Education has announced its intention to rebalance the process to assure due process rights for those accused. Whether OCR can do so without compromising the necessary and hard-fought gains that survivors have achieved over the last six years remains to be seen. But, we can't have a constructive conversation about what should change without a de-politicized view of where we are and where we need to go. Hopefully, I've offered a starting point.