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**THE**

**NCHERM GROUP**

**WHITEPAPER**

**DUE PROCESS  
AND  
THE SEX POLICE**

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## CONTENTS

<b>Introduction</b>	<b>2</b>
Are You the Sex Police?	3
CASE STUDY #1 – LIZ AND NEVEAH	7
CASE STUDY #2 – WES AND TAMEKA	10
A Note about Tone	14
<b>The Intersection of Consent Theory and Due Process</b>	<b>15</b>
Due Process Commitment	17
The NCHERM Group Statement of Commitment to Due Process Protections	17
Due Process Checklist	17
The Wesley College OCR Determination	19
<b>Conclusion</b>	<b>19</b>
<b>About the Authors</b>	<b>21</b>

## Introduction

The authors started out writing the annual Whitepaper, and it turned into a book: [The ATIXA Playbook](#). We expect that *The Playbook* will become your essential “how to” guide for ensuring that the resolution of sexual misconduct allegations at your college is done right. The NCHERM Group has typically focused our annual Whitepaper on topics where gaps exist in the field so that we can accurately identify a weakness, and provide the practical advice that begins to move the field toward filling the gap with stronger practices. We have focused in the past on topics such as incident response and investigation, as well as the unique sociology of addressing intimate partner violence in a college environment. This year, the Whitepaper excerpts two sections of *The ATIXA Playbook*. The first is focused on advanced application of consent concepts to ensure that colleges don’t turn into the sex police. The second focuses on ensuring due process specific to sexual misconduct procedures, but has universal applicability to all forms of college conduct proceedings.

Some pockets in higher education have twisted the 2011 Office for Civil Rights (OCR) [Dear Colleague Letter](#) (DCL)<sup>1</sup> and Title IX into a license to subvert due process and to become the sex police. *The ATIXA Playbook* and this Whitepaper push back strongly against both of those trends in terms of best practices. By design, the models of proof provided in *The ATIXA Playbook* address the substantive due process of making a reliable determination, and we include in this Whitepaper a critical checklist tool for you on substantive and procedural due process. Our concerns around procedural due process are so significant that they continue to be a top priority in our trainings. In 2017, we’ll be offering a series of due process-specific trainings and tracks, to bolster the due process elements of our training curricula that have always been part of our emphasis.<sup>2</sup>

If you need an extensive written guide, the Foundation for Individual Rights in Education’s (FIRE) *Guide to Due Process and Campus Justice* says what needs to be said about this topic.<sup>3</sup> It is free and available online. Why re-invent the wheel? Where we depart from FIRE is that FIRE seeks to expand college due process and push it well beyond what the courts have required. We like college due process just the way it is, because we believe the protections that courts currently afford within college processes are well-balanced against the educational and developmental aims of the college conduct process. We believe higher education can acquit fairness without higher standards of proof, actual cross-examination, and full-on, adversarial hearings presented by attorneys.<sup>4</sup>

Ultimately, you will determine whether FIRE’s vision of expanded due process becomes the law of our land. The field is losing case after case in federal court on what should be very basic due process protections. Never before have colleges been losing more cases than they are

<sup>1</sup> <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>

<sup>2</sup> <https://atixa.org/events/training-and-certification/>

<sup>3</sup> <https://www.thefire.org/fire-guides/fires-guide-to-due-process-and-campus-justice/fires-guide-to-due-process-and-fair-procedure-on-campus-full-text/>

<sup>4</sup> We do agree with FIRE that definitions of hostile environment sexual harassment should be more rigorous, and ATIXA’s model policy has long-used the rigorous definition from the Supreme Court’s decision in *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

winning, but that is the trend as we write this. The courts are not expanding due process yet, but are insisting that colleges provide the full measure of college-based due process that has been required over almost 60 years of litigation by students. Now, OCR is adding pressure by holding colleges accountable for due process failures under Title IX. And, some courts are willing to hold private colleges to elevated procedural fairness, as if they were public universities. That backdrop means we all need to sharpen our games, or the courts and Congress may sharpen them for us.

Why are we systemically failing to protect the rights of all students? FIRE took a shot at higher education on January 19th, 2017, calling administrators amateurs in addressing sexual violence.<sup>5</sup> If you resent that characterization, we need to stop resembling it. Sharpen the qualifications of those at your colleges who are the custodians of due process and advance the level of training that is afforded to them. Read recent decisions involving George Mason University, James Madison University, and Brandeis University<sup>6</sup> to realize how far we still need to come in this field. Don't be fooled by the fact that higher education wins some of these lawsuits, as

*Sharpen the qualifications of those at your colleges who are the custodians of due process and advance the level of training that is afforded to them.*

the law favors institutions. The bar on due process lawsuits is high, and courts have been deferential to college disciplinary decisions, though that historical deference is eroding as judges lose patience with skewed college proceedings.

Now, higher education needs to start winning because of its excellence and because it is highly respectful of student rights. If being a custodian of due process is a mid-level management role on college

campuses, that does not mean it has to be a mid-level institutional priority. The courts can't expand due process if case after case shows judges that higher education is exceeding the due process floor set by federal law. We critique FIRE for its failure to advocate for the civil rights of victims, but FIRE is right about this. Our goal is to help the field fulfill the current mandates of law, and move out of the current cycle of tempting courts to turn college resolutions into exact replicas of the criminal justice process.

### Are You the Sex Police?

One of the reasons we prioritized re-issuing and updating The NCHERM Group's 2005 Whitepaper in the form of the [ATIXA Whitepaper](#) this year is to provide further corrective direction as higher education continues to veer off-course in its resolutions of college sexual violence allegations. The NCHERM Group is widely credited with helping to popularize and institutionalize consent-based policies in higher education. As such, we have a responsibility to the field to make sure that this body of knowledge is used correctly, and to continue our thought-leadership on the ways that consent is applied in theory and practice. As usual, we'll be blunt.

<sup>5</sup> <https://thefire.org/law-enforcement-involvement-key-to-protecting-students-from-sexual-assault/>

<sup>6</sup> <http://ia801309.us.archive.org/2/items/gov.uscourts.vaed.314481/gov.uscourts.vaed.314481.92.0.pdf>; <http://www.vawd.uscourts.gov/OPINIONS/DILLON/5.15cv35doevalger.3.31.16.pdf>; <https://www.documentcloud.org/documents/2799157-John-Doe-v-Brandeis-University-3-31-2016-Ruling.html>

**Some of you have become the sex police.**

Maybe you wound up in this role as the result of political pressures – real or imagined – that make you feel like you need to be policing student sexual mores. Or, for some of you, you took the 2011 DCL as a license to become the sex police that you always wanted to be. Or, maybe it has been a gradual and inadvertent shift for you. For whatever reason, if you have become the sex police, we want you to know that The NCHERM Group condemns what you are doing in the strongest possible terms and entreats you to change your thinking and your practices. Our tone in this section reflects the gravity and import of the situation.

Sex policing isn't working for you. The field is being hammered by an unprecedented wave of litigation, and higher education is losing! Do you remember the days when judges were deferential to the internal disciplinary decisions of college administrators? If those days are rapidly receding or are gone, you have to ask yourselves what role you have played in that. If you are the sex police, your overzealousness to impose sexual correctness is causing a backlash that is going to set back the entire consent movement. It is imperative that you self-correct and find a golden mean or middle path on this issue. You are sowing the seeds of your own destruction. We've been beating this drum since 2012, and we will get progressively louder and louder until you get it. If you persist, you will touch off a new wave of due process protections in the courts and in Congress, which will once again skew the playing field for victims and those who are accused – a playing field some of us have worked our entire careers to level. You don't want that because it will deeply inhibit your ability to spread the sexual correctness to which you are so very wedded. So, stop it. Now.

If you don't know what we mean by sex policing, it's happening on two levels: the substantive and the procedural. Procedurally, responding parties need to be accorded the full measure of their rights. The courts are starting to smack colleges down left and right when due process corners are cut, bias is in play, and politics motivate the imposition of corrupt outcomes. You need to get your procedural houses in order, because no one is served when the court overturns your decision, especially you, so why drive toward an outcome that won't be sustained by the scrutiny of the courts?<sup>7</sup> We want you to suspend and expel those who commit sexual violence at colleges. This has been a central theme of our work for almost 20 years. But, we need you to do it by the book.

If the preponderance of the evidence standard of proof is a fairly minimal standard on the continuum of proof, we need you to apply it with steadfast rigor. Preponderance is an on/off switch. You're either over 50% with the evidence you have found, or you're at 50% or under. Play it straight and keep your thumb off the scale. The NCHERM Group's Managing Partner, Daniel Swinton, says it best when he trains on Title IX: "If you picture the scales of justice, with evidence on either side, the Title IX Coordinator is the post in the middle, holding up the scales. The upright neutrality of the post allows the scale to tip, but does not cause it to do so. The evidence does, and nothing else should."

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<sup>7</sup> And we'll note, as we have since day one, that the offending colleges being slapped the hardest by the courts are not those who have shifted to the civil rights model, but those who still cling to using the traditional student conduct process to resolve allegations of civil rights discrimination.

For those of you who relish being the sex police, we don't respect what you are doing. Your thumb is on the scale, and if you intend to keep it there, we beseech you to at least be intellectually honest about it. Your students should know that you intend to examine their sexual decisions under a microscope. Your applicants should know that when choosing a college, you err on the side of caution and kick accused students out even if the evidence is uncertain. They should know you aren't just victim-centered, you are victim-favoring. Perhaps many students will like that. They will seek your college out because of your bias. But, for those that don't, the truth in advertising will help them to choose a college that values fairness and equity, if that is their preference. It's ours.

*Human interactions are messy, confusing, and illogical. That includes sexual interactions. You should be struggling to apply the consent rules at your college. You should be wrestling with them, challenging your understandings, and trying to find the right balance.*

The rest of you have your thumbs on the scale inadvertently. Some of you stumbled into sex policing and simply need some perspective to realize you've gone too far. You are willing to self-correct, and we are eager to help you. We want you to be victim-centered. Every college should be. But, being victim-centered is different than being victim-favoring, and we recognize and honor that you are intent upon learning how to find the correct balance and upon affording equal dignity to every student, regardless of their role in your resolution process.

You're our kind of administrator, so keep reading – this section is for you!

That brings us to the second form of sex policing, which is substantive. Put simply, you are misunderstanding or misapplying the rules. "Affirmative consent" policies are the norm now on college campuses, and they are a boon to the cause of equity, but they need to be used correctly or the entire concept will get a bad name. Consent is clear permission for sex by word or action. It's an elegant concept that is simple to capture in policy, but difficult to apply in practice. We can't change that for you. Human interactions are messy, confusing, and illogical. That includes sexual interactions. You should be struggling to apply the consent rules at your college. You should be wrestling with them, challenging your understandings, and trying to find the right balance between being the sex police and allowing free reign for abusive sexual practices. Some of you are off track because you are applying a utopian lens to consent. You consciously or unconsciously want sex to be ideal, every time. Get over that. Sex is rarely ideal, especially for those 18-24 in age. Having less-than-ideal sex is unfortunate, but probably universal at some point for all people who are sexually active. We have to be able to separate less-than-ideal sexual experiences from those that are sexually transgressive of our rules. How?

To do so, we must understand that consent is imperfect in both theory and practice. It wasn't meant as a perfect construct, but as a better construct than the force and resistance-based policies that defined sex offenses a generation ago. Because consent is an imperfect construct, applying it with rote literality will not produce good results. Consent is meant to be applied in context, not in a vacuum that assumes all students are equal and all sexual events have parity

to all other sexual events. Our consent rules need to be malleable to account for the vagaries of the human experience, and we need to be flexible enough to allow for the fact that human communication and interaction are imperfect. Late adolescence can teach people how to become sexual beings, but we can't expect that students arrive at college fully equipped to think and act as mature, respectful sexual partners. They will fumble a bit. They will fail to make each sexual interaction ideal. They will not live up to our standards or theirs. So, should we discipline them for that developmental failure? We should impose our discipline for abusive transgressions, those actions according to OCR that have a discriminatory effect on the basis of sex or gender. Rudeness, insensitivity to one's partner, having underdeveloped communication skills – these are behaviors that need to be corrected by appropriate intervention – but only the sex police believe they need to be disciplined.<sup>8</sup>

In being sensitive to our own tendencies to want to be the sex police, we also need to consider that issue of intent. Should we give someone a break if they transgress against another student, but didn't intend to do so? No, of course not. But, intent is much more complex than just the simple question of whether someone meant to transgress against another person's sexual boundary. At this point in our understanding of consent theory, we'd say that intent is an aggravating factor, for sure. If you have the intent to violate someone, that heightens the abusiveness of the act. But, lacking the intent can mean a lot of different things, depending on context. It can mean carelessness, recklessness, naïveté, drunkenness, and many other things which may equate to a violation of policy, or might not. It's not fair to say that the lack of intent means someone didn't violate the rules, but we need to become better at reading the context to know more precisely what the lack of intent means to our ultimate determination of an allegation.

To help us get there, we posit that you should look at consent more as transactional and contextual, meaning that we view the entire sexual interaction and the context of the larger relationship. We contrast that to an approach that is more particularized and occurrence-based, where finders-of-fact tend to hyper-focus on each touch within a sexual interaction and ignore the larger context of the relationship. There are always exceptions, but you will be best served by evaluating consent based on the perspective of a reasonable person who is viewing the totality of the circumstances. That means we look at the whole relationship or interaction (the transaction), not just one time that someone might have touched someone else problematically (the occurrence). And, we ask how a reasonable person would view the situation, and whether through that lens the behavior does or does not cross the line. Two case studies will demonstrate the reasonable person concept and the transaction concept. Approach them as if they are a Facebook™ quiz that lets you figure out your sex policing tendencies on a scale of 1 to 100.

Taking a different approach than we have in past Whitepapers, we've chosen to illustrate our points about consent with two case studies, offered below. The content of the case studies and discussion is graphic, as is this subject matter.

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<sup>8</sup> It is important to note that some may self-define as survivors based on such experiences and are entitled to access support services, if not resolution processes.

## CASE STUDY #1 – LIZ AND NEVEAH

Liz and Neveah are roommates on your campus. Liz is a virgin and identifies as straight. Neveah identifies as sexually fluid, and is very sexually experienced compared to Liz. One night after they have gone to bed, Liz heard Neveah masturbating along with the sound of a vibrator. The next day, Liz asked Neveah about it, and Neveah was very open with her, explaining that she has a “Bunny” which she described as a vibrator designed to allow her to penetrate herself while simultaneously stimulating her clitoris to climax. She was not apologetic or embarrassed that Liz overheard her masturbating, and asked Liz if she masturbates. Liz shyly said no and Neveah offered to teach her how if she is interested. She asked if Liz wants to see the Bunny. Liz seemed curious, so Neveah took it out and showed it to Liz. Liz immediately said she could never use it because she was diagnosed with vaginal hypoplasia, meaning a very narrow vaginal canal, and that the Bunny would never fit.

Neveah, sensing Liz’s growing interest, told her that she can use the Bunny on Liz if Liz would like, and go very gently with it to ensure that it doesn’t hurt. Alternately, she told Liz she can just use the Bunny’s “ears” on Liz, without penetrating her, if it’s too tight. Liz said she’ll think about it, and Neveah could see the flush on Liz’s face and how excited she was. Later that night, Neveah was more open about her masturbation and started to use the Bunny on herself while Liz was watching from across the room. She then asked Liz if Liz wants to try it. Liz agreed, but asked Neveah to show her how to do it, the first time. Neveah cleaned the Bunny, lubricated it, and slowly penetrated Liz with it. She asked Liz to tell her if it is painful at any point. Neveah began to use the Bunny on Liz, and Liz flinched in pain, telling Neveah to go slower. Neveah slowed down, and soon Liz was uncomfortable again. Neveah shifted the position of the Bunny and Liz became more comfortable. Neveah used the Bunny on Liz until she climaxed. Neveah tells Liz, “if you liked that, you should feel my tongue on you next time.” Liz smiled, and they go to bed.

The next night, Neveah again offers to use the Bunny on Liz. Liz agrees, but is immediately uncomfortable with the sensation of penetration by the vibrator. Neveah repositions it several times, but can’t find a comfortable position for Liz. Liz tells Neveah to stop because she is sore from the night before. Neveah stops penetrating Liz, and uses the “ears” of the Bunny to stimulate Liz without penetrating her. While doing so, Neveah also uses her tongue to bring Liz to climax, and Liz presses her hands against Neveah’s head as she does this. Afterward, Neveah asked Liz to use the Bunny on her, which Liz did. The women kissed and spent the night in the same bed.

The next night, Neveah climbed into bed with Liz, and began to perform oral sex on her. She told Liz she had lubed the Bunny and it was ready for her. Liz agreed and then allowed herself to be penetrated by the Bunny, and while it was still uncomfortable, it was less so than the night before. At one point, Liz cried out in pain, and Neveah repositioned the Bunny for greater comfort. Liz then seemed to get more into it, was arching her back and moaning with pleasure, and Neveah continued. Neveah also slapped Liz on the buttocks several times as they engaged in sexual contact. As Neveah continued with the Bunny, Liz called out in pain again, saying, “No. Stop.” Neveah withdrew the Bunny slightly and eased up on the speed settings of the vibrator. She repositioned the Bunny again to ensure Liz’s comfort, and penetrated her gently once again,

but Liz pushed her hand away, making her stop, crying that she was just too tight for it. They went to bed.

The next day, Liz was talking with Burke, a woman on the hall who identifies as lesbian. Burke asked Liz if Neveah had turned her into a “lez” yet. Liz pretended not to understand, and Burke said, “She’ll groom you and the next thing you know, she’ll turn you into one of us.” Liz suddenly realized that it was Neveah’s plan to seduce her all along. She became very uncomfortable with Neveah as a roommate, someone she thought was trying to help her become more sexually comfortable as a friend, but who was really coming on to her as a girlfriend. Liz went back to her room and told Neveah how uncomfortable she was, and that all sexual contact needed to end. Neveah, who had perceived her encounters with Liz as a budding romance, was shocked, but agreed to keep things platonic.

The more Liz thought about it, the more upset she became. She felt betrayed by her roommate. Three days later, she went to the Title IX office and reported what happened. Neveah was notified of three alleged offenses: Non-Consensual Sexual Contact for performing cunnilingus on Liz without consent during the second encounter; Non-Consensual Sexual Intercourse for continuing to penetrate Liz with the Bunny during the third encounter after Liz said, “No. Stop”; and intimate partner violence, for slapping Liz on the buttocks during sex without consent.

## Discussion

STOP HERE. It’s time to analyze this fact-pattern and develop a gut check on what you think. Does your gut tell you that each of these behaviors does, technically, violate your consent policy? Many people would say so. But, take a step back and look at the totality of their interactions. Answer these questions:

- Does the totality of the evidence suggest an abusive series of encounters?
- Do you have evidence that Neveah was trying to groom Liz or sway her sexual orientation?
- Do you have evidence that Neveah intended to discriminate against Liz or cause her a hostile environment on the basis of sex?
- What assumptions did you make about Liz’s allegations?
- Do you have evidence that Neveah meant to transgress Liz’s sexual boundaries?
- What do you think Neveah’s responses to these allegations would be?

Neveah was shocked by the allegations. She realized that Burke might be interested in Liz, and was poisoning their budding relationship. She insisted that she had been incredibly respectful of Liz, not abusive. Neveah said that she constantly checked in with Liz during sex, repositioned the Bunny to ensure Liz’s comfort, and stopped when asked. She said she did not realize that Liz wanted her to stop that last time, thinking that like previous times, Liz meant she just needed to adjust the Bunny. Once she realized that Liz really meant stop, she stopped right away, and had only penetrated her once after she said to stop, to adjust the vibrator. So, is this a misunderstanding or a sex offense?

If you determined that this is sexual misconduct, you're confusing Liz's discomfort about her own sexual experimentation with a non-consensual sexual experience. Please understand that it is the unanimous consensus of all eight authors of this Whitepaper that Neveah should be found *not* in violation of the sexual misconduct policy. Maybe Neveah did seduce Liz. That's not against policy. Maybe Neveah did want Liz to explore her sexuality or sexual orientation. That's not uncommon in college, and as long as it isn't coercive, that isn't sexual misconduct. But, you might be thinking, don't Neveah's behaviors meet the definitions of sexual misconduct and intimate partner violence? Don't you have to stop when someone tells you to stop in the middle of sexual intercourse? Don't we teach our students that? Don't we tell them you can't touch someone sexually without getting permission first? We don't want our students slapping each other during sex, do we?

Becoming the sex police can be a little insidious, creeping up on us without our even realizing we are propagating an orthodoxy of sexual correctness. It's true that Liz told Neveah to stop during the third interaction, and that Neveah did not stop. If a male student kept thrusting when his female partner told him to stop, would we look at this differently? The [ATIXA model policy](#) says that if your partner withdraws consent, you must stop in a reasonably immediate time.<sup>9</sup> That is what Neveah did. One additional thrust of the vibrator was not meant to be abusive, but to try to make Liz more comfortable, and she stopped within several seconds of understanding what Liz really wanted. Thus, the context is what matters here. At first, Neveah was not clear whether Liz was telling Neveah to stop, or communicating that she was uncomfortable with the position of the Bunny. Liz is saying now that she wanted Neveah to stop, and maybe that is true, but Neveah was thinking about the second sexual interaction, and how she had to position the Bunny carefully so that it did not hurt Liz, just as she had done earlier in the third sexual interaction as well. She thought she could reposition it similarly during the third interaction when Liz said stop, to increase Liz's comfort and make sure it hurt less. Was this a reasonable interpretation by Neveah? Yes, Neveah's interpretation was reasonable when considered in the context of the totality of the circumstances surrounding their interactions.

Did she have reason to believe that Liz really wanted her to stop penetrating her entirely, or that she just wanted Neveah to be more gentle or to reposition the vibrator? If Neveah moved the Bunny and was then more gentle with it as the result of Liz's objection, wasn't she trying to make her partner more comfortable? How is that discriminatory? Doesn't no mean no, though? Well, during the second encounter, when Liz said stop, it meant a need to reposition. Isn't it reasonable to think the same context applied to the third encounter? After all, Neveah was clear that, after she tried to reposition the Bunny during the third encounter and Liz was still in pain, she needed to stop and she did. We can't chalk this up to a miscommunication about what Liz wanted, but Neveah's interpretation of the situation is reasonable given the totality of the circumstances.

Yes, but what about the oral sex during the second encounter? Taken together with what happened in the third encounter, doesn't the totality of the evidence show that Neveah was pushing Liz past her boundaries? I hope we can agree that when Neveah was using the Bunny's ears on Liz, and then began to use her tongue, Neveah did not have Liz's clear permission to do so. That was not consent, and most people can respect the distinction between agreeing to stimulation

<sup>9</sup> <https://atixa.org/resources/model-policies/>

by an object and the use of someone's tongue. Permission for one does not imply permission for the other. To understand why this isn't sexual misconduct, you need to understand the concept of ratification, which means retroactive consent demonstrated after the fact. This happens in sex ALL THE TIME, though we don't account for it in our policies. Liz continued to have sexual interactions and want sexual interactions with Neveah after the oral sex. They had oral sex a second time. Liz pressed Neveah's head toward her as Neveah performed cunnilingus. That ratifies it after the fact, even if Neveah didn't strictly ask for consent when she first did it.

Not objecting to something is not the same thing as ratification, so be careful not to confuse those two things. While it's entirely possible that Liz was comfortable with a friend teaching her how to use a sex toy, but wholly uncomfortable with engaging in sexual activity directly with another female without the sex toy as a buffer, that's not the evidence we have here. Should Neveah have asked first? Sure. But, is it a sex offense that she didn't? Not in this context. Failing to object is passive. Ratification is an active participation subsequent to an encounter that began without clear consent.

Well, what about the butt slapping, then? *Fifty Shades of Grey* was a movie that made more than half a billion dollars at the box office in 2015. Light bondage and practices drawn from the Bondage and Discipline, Dominance and Submission, or Sadism and Masochism (BDSM) world have gone mainstream. Again, context is everything. Was Neveah trying to abuse her partner? No. Should she have asked first? Sure, but to call a few slaps on the butt during sex a form of intimate partner violence is to water down what intimate partner violence is to the point of meaninglessness. ***If everything is discrimination, then discrimination means nothing.*** Many of our students are influenced by mainstream erotic and even hardcore pornography. You can't assume you can treat your partner the way it is depicted on screen, but we need to take into account that for many of our students, if they have learned their sexual mores from pornography, this is an opportunity to re-socialize them, educationally, in respectful sexual patterns. What they think is normative is potentially going to be different than our sexual norms.

*To understand why this isn't sexual misconduct, you need to understand the concept of ratification, which means retroactive consent demonstrated after the fact.*

A second case study will challenge us to apply the reasonable person lens.<sup>10</sup>

## CASE STUDY #2 – WES AND TAMEKA

Tameka was flirting with Harris at the party. She told him if he agreed to date her, she would hook up with him that night. He told her he wasn't the dating type. Later, friends saw Tameka flirting with another student, Wes. The friends also testified that they saw Tameka and Wes walking hand-in-hand away from the party toward her residence hall. Surveillance video from the hall

<sup>10</sup> Some people think it's important to debate the reasonable person standard. We do not. OCR says it's the reasonable member of a college community. For our purposes, we always interpret the standard to be a reasonable person in the same or similar circumstances, so it is contextual.

cameras shows that the two entered her residence hall at 11:14pm and proceeded to the common lounge, which was empty. While there is no audio, the video showed the two kissing, and then showed Tameka on top of Wes while he was lying on the couch. The video showed that she was grinding on him as he fondled her breasts, first over and then under her shirt. At one point, her breasts were clearly exposed on camera. They were on the couch for 23 minutes. The video then shows them getting up, and Tameka leading Wes down the hall by the hand. Their stories diverge at this point.

Tameka stated that she was going to see Wes out, but had to go to the bathroom. She stopped at her room on the way out. She let him into her room to wait and asked him to be quiet because her roommate was sleeping. She went into the bathroom and said that after she used the bathroom, he pushed his way inside the door and closed it behind him, before she had a chance to put her pants back on. She said that he then told her she couldn't leave him hanging, referring to their activity in the common lounge. He asked her for a handjob, and she agreed. He took off his shorts. She proceeded to rub his penis with her hand. He then asked her for a blowjob, but she said no, and continued with the handjob. As she gave him the handjob, he fondled her breasts and they kissed. He then began to rub between her legs and she allowed this and continued the handjob. He then penetrated her with his finger. She moved his hand away, stopped rubbing his penis, and told him he needed to leave. His account differed considerably.

Wes said that while on the couch in the common room, he suggested they go to her room and continue things more privately. She told him that her roommate was there and would be asleep at that hour. She then suggested they could go in her bathroom. They agreed, got up from the couch and she led him by the hand to her room, reminding him they needed to be quiet because her roommate would be asleep. They entered the room, and then went into the adjoining bathroom. There, she took off his shorts and hers and began to give him a handjob. He asked for a blowjob, but she said no and continued to rub his penis. During the handjob, they kissed and he fondled her breasts. He then began to rub her between her legs and she continued the handjob and was making moaning sounds. He teased her that she needed to be quiet or she'd wake her roommate. He then penetrated her vagina with his finger, and she immediately moved his hand away from her. She continued the handjob until he climaxed. Video shows that she escorted him from the residence hall at 12:24am, shows that she held the door open for him as he exited, and that they kissed as he left.

At 10:04am the next day, Tameka texted Wes, asking him how she should refer to their "couple status" when she told her roommate about the night before. At 10:18am, Wes texted her that he felt really guilty about what they did the night before because he had a girlfriend. He told Tameka that she was really nice, but that she needed to stay in the friend zone and that he hoped he hadn't led her on. When she got the text, she immediately removed him from her contacts and blocked him on social media. She told her roommate that she needed to find someone who was ready for a serious relationship, and that the night before with Wes had been a mistake. Wes told his roommate that he felt bad that he had led her on.

By that evening, rumors were circulating that Wes had assaulted Tameka. He heard the rumors from a friend and decided he needed to address them. He texted Tameka at 8:40pm, "Please

tell people I didn't rape you. Some people are spreading a rumor." She texted back at 8:42pm, "but u did rape me. Don't contact me again." The next morning, Wes went to the dean to address these rumors because he wanted to be clear that he had not raped Tameka. When he recounted to the dean what had happened, and concluded that they hadn't even had sex, so he couldn't have raped her, the dean informed him that it sounded from the story like he might have raped her. Wes was placed on interim suspension and an investigation was initiated. Wes tried to file a counter-claim that the handjob was not consensual, but the Title IX Coordinator decided it was retaliatory and did not take it forward.

## Discussion

STOP HERE. Do you agree with this dean? Is she a steadfast protector of student welfare, or a card-carrying member of the sex police? If you consider the totality of the circumstances, there is a clear subtext to the allegations, right? Tameka was looking for a relationship. She rejected Harris when all he wanted was a hookup. She then attempted a relationship with Wes, but wound up being used by him and feeling rejected. That rejection could have been motivation to tell people that Wes assaulted her (she later filed a formal allegation and participated in the investigation), but that only addresses her motivation to report, and not the underlying question of whether what she was reporting was a violation policy. Are we troubled by the fact that she did not consider it sexual misconduct that morning, and came out of the interaction thinking that they were dating? Sure. It goes to her credibility. For some people, though, the reality of victimization takes a while to dawn on them, whether out of shock, denial, or a failure to self-identify. When that is the reason for delay, it is not a credibility concern.

You might think that Wes described a situation to the dean that is arguably sexual misconduct, regardless of Tameka's motivation to report it, right? Let's break it down. Wes and Tameka agreed that the sexual activity on the couch was consensual. But, what about the sexual activity in the bathroom? She performed the handjob voluntarily. It wasn't coerced or forced. Thus, she consented to it. Whether he consented to being touched is a question we will address shortly. Their kissing was mutual, according to both of them, and she did not raise the fondling of her breasts as an issue. However, if you are a literalist about consent, he did fondle her breasts without consent. You can make a ratification argument here, though, because he didn't ask to fondle her breasts in the common room, either, but she participated when he did. There is an interesting question, too, about whether her consent to fondling her breasts earlier in the common room remained valid ten minutes later in the bathroom. We would say it did. And, we would argue that he had consent to touching her vulva and fondling her genital area by ratification. In the course of a sexual transaction, she permitted him to touch her, and continued to touch him as she did so, without objection. That's ratification. So, the only remaining question is whether his act to penetrate her with his finger was without consent. We believe a reasonable person would believe that act was consensual. How can this be? He penetrated her without asking, and her response clearly shows she did not welcome his penetration.

The construct of consent in sexual interactions is governed by policies, but as we noted above, it is not a perfect construct, in the sense that theory and practice do not fully align. Policies require clear actions or words indicating permission. So, if you think about it, there is no way to

kiss someone without asking first, if you take the concept of consent literally. If I move in to kiss someone, I cannot know the conduct is agreed to unless I ask, because even if they move in to kiss me, they cannot know I am consenting unless they ask. So, rather than strictly adhering to such rigidity, we allow some non-verbal, unspoken rules to govern our sexual interactions. Many of us move in for a kiss, mutually, on the basis of context, without asking. And, in certain circumstances, consent can be assumed; for example, if you kiss me, I can kiss you back. I don't have to ask or clarify that. I am not expected to simply passively receive the kiss. The "clear words or action" part of the policy takes over from there. We can kiss, but what happens next has to be the result of agreement by word or conduct, if the interaction is to escalate sexually. Think of it as being akin to levelling up in a video game. Once you unlock a level, you are free to explore that level, but you can't move on to the next level until you unlock the achievement for that level (in this case, by having clear consent).

If a female student is voluntarily stroking a male student's penis, he is within the bounds of consent to reciprocate by touching her vulva and using his fingers to penetrate her vagina. This is really no different – in terms of reciprocity – than if a woman begins to stroke a man's chest, and he responds by fondling her breasts. It is artificial in the extreme to expect verbal requests in such a context, "I see that you are touching my pecs...does that mean I can caress your breast? If so, left, right, or both? And, is that your left or my left?" That's not how sexual communication works, as noted in describing the kiss, above. Consent is designed to allow such reciprocation without resorting to asking, **but** clarifying communication **is** required if one or both of the partners wish to elevate or progress the level of sexual interaction. If the partners are now caressing each others' chests, and one wants to touch the genitals of the other, that cannot be assumed to be okay, based on the sexual activity already taking place. To move to genital contact, there again must be communication that establishes consent. Consent theory supports this. Some acts are mutual, others require additional communication and clarification.

When a female student is voluntarily giving a male student a handjob, and he reciprocates by touching and fingering her vulva and vagina, if she denies having consented to being touched/penetrated solely because he didn't ask, we would say that a preponderance of evidence shows that they engaged in mutually consensual fondling of each other's genitals. To conclude otherwise would require that the male partner to say something like, "I see your hand is on my penis, may I now place my hand between your legs?"

That is not how sexual communication occurs, and it is not how consent policies were intended to function. To see the logic of this, take it to its extreme. Imagine that sexual intercourse is taking place. The female partner raises her hips on her male partner's penis. When she does, he hesitates, and says, "May I thrust my penis in response?" If the female partner says "yes," he may thrust back. How many times? Once? Many times? Does he need to clarify that, or is it assumed once they are having intercourse that thrusting is going to occur, positions may be changed, and there will likely be an ejaculation as a result? It is assumed, but according to policy, it's really not explicitly agreed to, is it?

Some of you will make a distinction with Wes and Tameka out of the fact that the sex acts weren't really mutual. They fondled each other's genitals, but she was penetrated and he was not. To

that, we say that is a distinction that arises solely from anatomy, but it is no more invasive to a man to have a non-consensual handjob than it is to a woman to be fingered without consent. A man can be subject to sexual misconduct without being penetrated, so we need to stay focused on the video game metaphor. What Tameka did to Wes and what Wes did to Tameka each occurred on the same level of the game. No one upped the level without asking, and Wes respected her instruction to stop when he did something that went beyond her boundaries. This does not make him in violation of policy. That's what a reasonable person would say. I can fondle you if you are fondling me; I don't have to ask you. For anyone who wishes to insist that he is in violation of policy, we require you to be consistent. If your purist approach to consent demands that you find him in violation of policy for penetrating her, then you must also be willing to find her in violation for giving him a handjob without his consent.

If that is your preferred approach, we think you are being absurd, but at least you will keep the legal profession gainfully employed for many years to come.

*As you can now see, a consent policy is viable in theory, but can become absurd in practice if taken to an extreme. You are the guardians of applying the reasonable person standard to these interactions.*

As you can now see, a consent policy is viable in theory, but can become absurd in practice if taken to an extreme. You are the guardians of applying the reasonable person standard to these interactions. We know this challenges an orthodoxy that may be widely accepted in the field, but the question is whether we are trying to govern every nuance of sex as if we are the sex police, or whether we are trying to establish reasonable rules to regulate inherently ambiguous human behavior in a way that minimizes the risk of harm to those involved? If you need a litmus test for whether you have become the sex police, ask yourself whether the college-age version of you would hate what you have become. If so, let's recalibrate. One way to do so is to refocus and rededicate ourselves to due process and protecting the rights of ALL students.

### A Note about Tone

There are some readers who might perceive this publication to be less victim-centered than our previous body of work. We'd suggest that perception is only accurate in comparison to the tone of our past work, which was needed at the time we wrote it, to catalyze an important shift needed in the field at that time. Now, the tone of this publication is appropriate to the environment in which we are writing today. As times change, our guidance has to as well. We intend this publication to build on the strong foundation of victim-centered (not victim-favoring) work we have done, rather than to weaken it. With a solid history of writing about and advancing those procedural protections for victims/survivors, we can now also see the need to ensure those protections are just as strong for responding parties.

Additionally, the overall tone of this Whitepaper and *The ATIXA Playbook* is about striking the right balance between student rights, with the understanding that being off-balance in the long run isn't good for victims/survivors or for those accused. There are always unintended conse-

quences to showing favoritism. If a college is known to be biased toward responding parties, this can chill the willingness of victims/survivors to report. If a college is known to be biased toward reporting parties, a victim/survivor's sense of safety or justice based on the campus outcome in the short run may be quickly compromised by a court order or lawsuit reinstating the responding party, giving her a Pyrrhic victory, at best.<sup>11</sup> What is needed for all of our students is a balanced process that centers on their respective rights while showing favoritism to neither. Not only is that best, it is required by law.

Title IX Coordinators write to us, worried that their annual summaries show that they are finding no violation of policy 60% of the time in their total case decisions. They feel like somehow that is wrong, or not as it should be, as if there is some proper ratio of findings that we are supposed to be reaching. We wrote in 2014 of our concerns with the types of allegations being made on college campuses,<sup>12</sup> but that is inevitable. With all the training and education being directed at students, more are coming forward, and that education brings allegations of all kinds out of the woodwork, some based strongly in fact, others that are baseless, and most that are somewhere in between.

That [2014 Open Letter](#) took issue with growing imbalance in the field, and we fear three years later that it is taking far too long for higher education to self-correct. This Whitepaper roadmaps what that self-correction should look like. We hope that our readers do not see the rights of the parties as a zero sum game, where protecting one requires compromising the other. Responding parties should want their colleges to provide strong victim services, and reporting parties should insist that the full measure of due process be accorded to those who are being accused. We believe – strongly – that colleges can and should provide the full measure of student rights and accord equal dignity to all parties to an allegation of sexual misconduct.

## The Intersection of Consent Theory and Due Process

Consent as a concept is one whose time has come because of the resonant way in which the idea of consent ratifies the right we all have to bodily autonomy. We all have the right not to be acted upon by someone else unless and until we give permission for it. Consent is a requirement for mutual respect, and the need to communicate that respect by word or action. Ideally, consent is neither given nor received, but exchanged. Bodily autonomy is key here, because other than defining sex offenses by consent, the only other two choices are to define it by force or by resistance. But, it is not true that someone's autonomy is only violated if they are forced, or if they resist the act. Autonomy is not respected any time something is taken from someone without their consent.

There are those, however, who believe that consent-based policies are unfair. They've conveniently linked affirmative consent to a due process failure, but that is just sleight-of-hand because they don't want to be seen as simply opposing the concept of consent outright, which is what they are actually doing. Still, part of the goal of this Whitepaper is to ensure that you are using the consent construct correctly, so this must be briefly addressed for any of you who might misunderstand or misapply it.

<sup>11</sup> We in no way intend to minimize or negate the experiences of men who are victims.

<sup>12</sup> <https://www.ncher.org/wordpress/wp-content/uploads/2012/01/An-Open-Letter-from-The-NCHERM-Group.pdf>

The assessment of consent is a determination by the institution, not something proved by the reporting party or the responding party. The college determines whether its policy was violated, and has the burden to do so. The college does not place the burden on the reporting party to prove non-consent, and it does not place the burden on the responding party to prove consent. The concept of the presumption of innocence is based in criminal law, and really doesn't apply to college processes in a linear legal fashion.<sup>13</sup> However, it is important to state that while colleges don't really presume anything, because presumptions are a criminal construct, we certainly cannot presume that a responding party is in violation of our policies unless and until he<sup>14</sup> can prove he obtained consent. It is not the burden of the responding party to show consent, but the burden of the college to prove non-consent.

Put another way for simplicity, if the parties are equally persuasive as to their assertions of consent and non-consent, the college has not met its burden and the responding party cannot be found in violation of the sexual misconduct policy. The opponents of consent insist that "affirmative" consent is burden-shifting by design, and that the shift in burden is a violation of due process and unconstitutional. Precision is important here. By design, consent shifts the burden to a sexual initiator or actor to obtain consent, from a policy perspective, but it does not shift the burden to them to prove that consent if sexual misconduct is alleged. Put succinctly, it shifts the burden in the bedroom, but not in the college "courtroom."

*The assessment of consent is a determination by the institution, not something proved by the reporting party or the responding party. The college determines whether its policy was violated, and has the burden to do so.*

Due process hawks won't agree, and will continue to insist that the consent construct offends the U.S. Constitution, but we consider ourselves due process hawks, and we have a question: If "affirmative" consent is unconstitutional, why then isn't the burden-shifting in robbery unconstitutional, too? You see, if someone takes something from you without your permission, it's a robbery. But, if they take it from you with your permission, it is borrowing, or a gift. Thus, property crimes like robbery, theft, and larceny are consent crimes. Take the property without consent and you have committed a crime. Take the property with consent and you have a brand new bicycle. If it isn't unconstitutional burden-shifting to undergird property crimes with consent, it isn't a due process issue to do it with sexual misconduct, either, as long as you don't misapply it by placing a burden of proof on the responding party that a consent-based policy does not require. Another analogy might be to fighting. Do it on the street, without the other person's okay, and you could be arrested for assault or battery. Do it in a ring, with the other person on board, we'll call it boxing, and you could be paid for it. Or at least get a good workout. Consent. It turns a crime into a sport, and it's a perfectly viable and constitutional legal concept.

<sup>13</sup> Mostly because the Fifth Amendment does not strictly apply to college processes in the way it does to criminal proceedings.

<sup>14</sup> He or she or they or other terms that recognize fluid or non-binary identities.

## Due Process Commitment

We've been thinking about ways to advance the commitment of the field to due process, and since administrators are always asking students to sign pledges as a symbol of prevention, we came up with the idea for this oath or commitment statement as a pledge you can make to prevent due process violations in your conduct or resolution process. Maybe you'll frame it and hang it on your wall?

### The NCHERM Group Statement of Commitment to Due Process Protections

As a college administrator, you have my commitment to your due process rights. Specifically, I commit to the following ten assurances...

1. I promise to provide you with a neutral, unbiased, impartial, and objective decision on whether your behavior(s) violates college policy.
2. I commit to understanding and owning my own biases and to check them at the door.
3. I promise to recuse myself from the process should I identify a conflict-of-interest, or should a conflict be brought to my attention.
4. I promise to follow college procedures without material deviation.
5. I promise to honor your humanity and the equal dignity of all participants in the conduct process, and to conduct the process with as much transparency as I can.
6. I commit that I will not find you in violation of college policy unless a preponderance of the evidence establishes that a violation occurred.
7. I promise that the college has the burden of proving whether you violated policy or not; that burden is not on either party.
8. I commit to afford equitable procedural protections to all parties to an allegation of misconduct.
9. I promise not to prejudge the allegations that have been made, and to reserve judgment until all evidence has been gathered.
10. I commit to sufficient annual training and professional development to assure the competence of my role.

## Due Process Checklist

Below, we've crafted a practical checklist of due process protections that should be afforded by every college. If you are intrigued by this content, please attend one of our upcoming [due process trainings](#)<sup>15</sup> to learn more about how to operationalize these ideas.

- Right to notice of investigation that includes a reasonable description of the allegations
- Right to access to an advisor of your choice throughout the process
- Right to the least restrictive terms necessary if interim suspension is implemented, and a right to challenge the imposition of the interim suspension

<sup>15</sup> <https://atixa.org/events/training-and-certification/>

- Right to uninfringed due process rights, as detailed in the college's procedures, if subject to interim actions
- Right to clear notice of the policies allegedly violated if and when the formal allegation is to be made
- Right to clear notice of any hearing in advance, if there is to be a hearing
- Right to receive COPIES of all reports and access to other documents/evidence that will be used in the determination, reasonably prior to the determination (these may be provided in redacted form)
- Right to suggest witnesses to be questioned, and to suggest questions to be asked of them (excluding solely character witnesses)
- Right to decision-makers and a decision free of demonstrated bias/conflict of interest (and advance notice of who those decision-makers will be)
- Right to clear policies and well-defined procedures that comply with state and federal mandates
- Right to a process free of (sex/gender/protected class etc.) discrimination
- Right to an investigation interview conducted with the same procedural protections as a hearing would be (because the interview is an administrative hearing)
- Right to a fundamentally fair process (essential fairness)
- Right to know, fully and fairly defend all of the allegations, and respond to all evidence, on the record
- Right to a copy of the investigation report prior to its finalization or prior to the hearing (if there is one)
- Right to know the identity of the reporting party and all witnesses (unless there is a significant safety concern or the identity of witnesses is irrelevant)
- Right to regular updates on the status of the investigation/resolution process
- Right to clear timelines for resolution
- Right to have procedures followed without material deviation
- Right to a process that conforms to all pertinent legal mandates and applicable industry standards
- Right to have only relevant past history/record considered as evidence
- The right to have the burden of proving a violation of policy borne by the college
- Right to the privacy of the resolution/conduct process to the extent of and in line with the protections and exceptions provided under state and federal law
- Right to a finding that is based on the preponderance of the evidence
- Right to a finding that is neither arbitrary nor capricious
- Right to be timely informed of meetings with each party, either before or reasonably soon thereafter (unless doing so would fundamentally alter or hamper the investigation strategy)
- Right to sanctions that are proportionate with the severity of the violation and the cumulative conduct record of the responding party
- Right to the outcome/final determination of the process in writing as per VAWA §304
- Right to a detailed rationale for the finding/sanctions
- Right to an appeal on limited, clearly identified grounds
- Right to competent and trained investigators and decision-makers
- Right to a written enumeration of these rights

## The Wesley College OCR Determination

[OCR's Wesley College resolution](#) is an important harbinger of the increased focus on due process that we can expect from Washington, D.C. going forward. For those of you who need deeper insight into the transformative OCR ruling on the Wesley College investigation, here is a brief overview. First, this is only one of three OCR letters to address the issue of due process (Minot State<sup>16</sup> and Christian Brothers<sup>17</sup> being the other two) but the most direct letter we have that makes the case for Title IX-derived due process rights at a private college.

Whether OCR sees Title IX as an independent source of these rights, or is simply reflecting on rights OCR believes are otherwise legally protected which OCR should be enforcing, this decision is notable as more and more courts seem to be affording due process rights (or the equivalent) to students enrolled in private colleges, including recent decisions at the University of Southern California<sup>18</sup> and Brandeis University.<sup>19</sup>

Second, and perhaps more important, OCR defied expectations in issuing a letter that seems broader in protective scope than many anticipated. OCR signaled in 2016 that it intended to issue resolutions protecting the rights of accused students, but the big question was how far would OCR go? Would OCR protect men from discrimination on the basis of sex, as it must under Title IX, or would OCR take the further step of determining that responding parties have rights under Title IX, whether they are men or not. OCR chose the latter, bolder, and broader approach.

The question of whether responding parties have independent rights under Title IX, or rights only as men who may experience discrimination, is important, as OCR has couched this as an equity issue, not an explicit issue of sex-based discrimination. Maybe OCR sees those as the same thing, but if OCR meant to issue a narrowly tailored resolution, they could have done so. OCR did not, but it also didn't give us significant explanation for the source or basis of these rights. If this body of knowledge evolves as OCR issues more resolution letters, we'll be sure to keep you abreast as they do. This is a revolutionary approach for OCR that changes the entire fabric of Title IX enforcement and fully reflects the idea that Title IX focuses on equity for both parties, not just the reporting party.

## Conclusion

Many of you have been on a journey with us for almost 20 years. What a ride! Together, we are reshaping sexual conduct at colleges toward healthier and more respectful norms. Many in our field act out of a sense of obligation or to satisfy a compliance mandate, but we all can operate from our higher selves, better versions, or whatever you wish to call it. To do so, you have to be willing to accept constructive criticism and decide how you want to let it impact you. In this Whitepaper, we've been tough critics of some of you in the field. We hope you see it as constructive criticism. We're not inherently critical of higher education. We'd say nothing but glowing things

<sup>16</sup> <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05142061-a.pdf>

<sup>17</sup> <https://www.ncherp.org/documents/80-ChristianBrothersUniversity-04032043.pdf>

<sup>18</sup> <http://cases.justia.com/california/court-of-appeal/2016-b262917.pdf?ts=1459881022>

<sup>19</sup> <https://www.documentcloud.org/documents/2799157-John-Doe-v-Brandeis-University-3-31-2016-Ruling.html>

if you deserved nothing but glowing things. Instead, we are agents of change and we know you are on an evolutionary path as professionals. Our role is to provoke you, to challenge you, and to call you to do better when we know you can. If we're successful, we speed and smooth your evolutionary path, helping you to grow as professionals, and become more successful practitioners. If this Whitepaper helps you to do so in any way, we will count it a success.

*Together, we are reshaping  
sexual conduct at colleges  
toward healthier and more  
respectful norms.*

This Whitepaper is adapted from the 120-page publication, [\*The ATIXA Playbook: Best Practices for the Post-Regulatory Era\*](#), a comprehensive guide to addressing the resolution of sexual misconduct allegations on college campuses. Visit <https://atixa.org/resources/playbook> for more information and to learn how you can access the *Playbook* today. Additionally, information on and electronic access to the Association of Title IX Administrators (ATIXA) companion Whitepaper, [\*The ATIXA Rubric for Addressing Campus Sexual Misconduct\*](#), can be found at <https://atixa.org/resources/whitepapers/>.

*Founded in 2000, The NCHERM Group, LLC is one of the country's foremost higher education law and consulting firms. The NCHERM Group manages the membership associations, ATIXA and NaBITA. In the last seventeen years, The NCHERM Group has served over 3,000 school and college clients, and has represented more than 250 colleges and universities as legal counsel. The NCHERM Group proffers 30 consultants and employs 15 executive staff members, with offices in Berwyn, PA, Columbus, OH, and Denver, CO.*

*For more information, visit [www.ncherms.org](http://www.ncherms.org)*

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