

INTEGRATING THE CLERY ACT'S RIGHTS FOR ACCUSER AND ACCUSED INTO TITLE IX CONDUCT POLICIES

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THE CLERY ACT & TITLE IX

- COMPLIMENTARY & OVERLAPPING, BUT NOT INTERCHANGEABLE
- THE VAWA AMENDMENTS TO THE CLERY ACT “2013 (‘VAWA’), PUB.L. 113-4, 127 STAT. 54, 89-92 (2013), HAD NO EFFECT ON TITLE IX.” *DOE V. U.S. DEPT. OF HEALTH AND HUMAN SERVICES*, 85 F. SUPP. 3D 1, 5 (2015).
 - ALL TITLE IX OBLIGATIONS REMAIN
 - FINAL VAWA REGULATIONS TOOK EFFECT JULY 1, 2015
- “WHEN ADDRESSING ALLEGATIONS OF DATING VIOLENCE, DOMESTIC VIOLENCE, SEXUAL ASSAULT, OR STALKING, INSTITUTIONS ARE SUBJECT TO THE CLERY ACT REGULATIONS AS WELL AS TITLE IX.”-OFFICE FOR CIVIL RIGHTS 2017 Q&A
 - CLERY ACT OBLIGATIONS ARE IN ADDITION TO NOT IN PLACE OF TITLE IX

COMPLYING WITH CLERY CAN HELP AVOID ADVERSE COURT RULINGS



Students accused of sexual assault are suing colleges — and winning most of the time

#MeToo is about believing women who say they've been assaulted. But college students expelled for assault allegations are suing and winning in court.



INSIDEHIGHERED.COM

Rhodes College ruling opens the door for due process at private universities

A new federal court order may have significant implications for adjudicating campus rape cases.



INSIDEHIGHERED.COM

UVA barred from punishing student in unusual Title IX case

A federal judge stopped UVA from having a hearing that may have resulted in a student not receiving his degree for an alleged rape. The...

DUE PROCESS

SINCE THE "DEAR COLLEAGUE" LETTER, THERE HAVE BEEN 319 FEDERAL CASES IN WHICH SOME ACTION HAS BEEN TAKEN. UNIVERSITIES HAVE LOST 137 DECISIONS, MOSTLY MOTIONS TO DISMISS THE LAWSUIT. THEY'VE WON 119 TIMES. THEY HAVE ENDED CASES WITH CONFIDENTIAL SETTLEMENTS 63 TIMES.- DETROIT FREE PRESS (MARCH 15, 2019)

PROCEDURAL SAFEGUARDS

IN A RULING THAT COULD HAVE NATIONAL IMPLICATIONS FOR CAMPUS SEXUAL ASSAULT PROCEEDINGS, A FEDERAL JUDGE HAS SUGGESTED THAT A PRIVATE INSTITUTION IN AN ALLEGED RAPE CASE MAY NOT HAVE FOLLOWED DUE PROCESS STANDARDS -- A CONSTITUTIONAL CONCEPT THAT GENERALLY APPLIES ONLY TO PUBLIC UNIVERSITIES.- INSIDE HIGHER ED (JUNE 25, 2019)

JURISDICTION

IN AN UNUSUAL SEX-DISCRIMINATION LAWSUIT, A FEDERAL JUDGE BARRED THE UNIVERSITY OF VIRGINIA FROM HAVING A HEARING FOR A FORMER STUDENT ACCUSED OF RAPE, AS A CONSEQUENCE OF WHICH HIS DEGREE MIGHT BE WITHHELD, SAYING THE INSTITUTION MIGHT NOT HAVE AUTHORITY TO PUNISH HIM FOR THE ALLEGED INCIDENT THAT OCCURRED OFF CAMPUS.-INSIDE HIGHER ED (JULY 8, 2019)

SIGNIFICANT CLERY ACT FINES

- \$57,317 PER VIOLATION CIVIL PENALTIES
- ORIGINALLY \$25,000
- INDEXED FOR INFLATION ANNUALLY
(FEDERAL CIVIL PENALTIES INFLATION
ADJUSTMENT ACT IMPROVEMENTS ACT OF
2015)
- SIX FIGURE FINES NOW THE NORM



CHRONICLE.COM

A \$1-Million Fine for Violating the Clery Act? Expensive, but Not Unprecedented

COMPLYING WITH THE VAWA AMENDMENTS

- SEXUAL VIOLENCE POLICY STATEMENTS (SUMMARIES) MUST BE INCLUDED IN CLERY ACT ANNUAL SECURITY REPORT (ASR)
- MUST BE “CLEAR”-34 CFR §668.46 (K)
- INSTITUTIONAL OBLIGATION, REQUIRES COLLABORATION TO COORDINATE RESPONSE
- POLICY STATEMENTS MUST ACCURATELY REFLECT UNDERLYING POLICIES & PROCEDURES
 - TITLE IX POLICY
 - STUDENT CODE OF CONDUCT
 - FACULTY/STAFF HANDBOOK
 - ETC...

VAWA APPLIES TO

- “PROCEDURES FOR INSTITUTIONAL DISCIPLINARY ACTION IN CASES OF ALLEGED DATING VIOLENCE, DOMESTIC VIOLENCE, SEXUAL ASSAULT, OR STALKING”-34 CFR §668.46 (K)
- “WHETHER THE OFFENSE OCCURRED ON OR OFF CAMPUS”-34 CFR §668.46 (B)(11)(VII)
- INSTITUTIONS MAY APPLY PROCESS TO BROADER RANGE OF OFFENSES

CONDUCT DISCLOSURES

- ALL POSSIBLE SANCTIONS
- RANGE OF PROTECTIVE MEASURES
- OFFICIALS MUST RECEIVE ANNUAL TRAINING

STANDARD OF EVIDENCE

- ASR MUST DESCRIBE “THE STANDARD OF EVIDENCE THAT WILL BE USED DURING ANY INSTITUTIONAL DISCIPLINARY PROCEEDING”-34 CFR §668.46 (K)(1)(II)

PROCEDURAL SAFEGUARDS APPLY EQUALLY TO BOTH ACCUSER AND ACCUSED

- ENUMERATED PROCEDURAL SAFEGUARDS APPLY *EQUALLY* TO BOTH “THE ACCUSER AND THE ACCUSED”-34 CFR §668.46 (K)(2)(III)
 - NEED NOT BE STUDENT OR EMPLOYEE, CLERY DISTINGUISHES RIGHTS WHICH APPLY ONLY TO STUDENTS AND EMPLOYEES WHEN THEY REPORT FROM CONDUCT PROCEEDINGS
 - THIS IS DISTINCT FROM TITLE IX REQUIREMENTS WHICH TYPICALLY REQUIRE AFFILIATION/BENEFIT
- INSTITUTIONS MUST AFFORD “A PROMPT, FAIR, AND IMPARTIAL PROCESS FROM THE INITIAL INVESTIGATION TO THE FINAL RESULT”-34 CFR §668.46 (K)(2)(I)

HAVING OTHERS PRESENT

- INSTITUTIONS MUST “PROVIDE THE ACCUSER AND THE ACCUSED WITH THE SAME OPPORTUNITIES TO HAVE OTHERS PRESENT DURING ANY INSTITUTIONAL DISCIPLINARY PROCEEDING”-34 CFR §668.46 (K)(2)(III)
 - ADVISOR OF CHOICE
 - WITNESSES
 - PARENTS
 - OTHER SUPPORT PERSON OR PEOPLE
 - MUST ALLOW AT LEAST ONE ADVISOR, MAY LIMIT NUMBER BEYOND THAT

ADVISOR OF CHOICE

- AN INSTITUTION MAY “NOT LIMIT THE CHOICE OF ADVISOR OR PRESENCE FOR EITHER THE ACCUSER OR THE ACCUSED IN ANY MEETING OR INSTITUTIONAL DISCIPLINARY PROCEEDING”-34 CFR §668.46 (K)(2)(IV)
 - ATTORNEY, PARENT, AFFILIATED, UNAFFILIATED, LAW ENFORCEMENT, WITNESS
- “ADVISOR MEANS ANY INDIVIDUAL WHO PROVIDES THE ACCUSER OR ACCUSED SUPPORT, GUIDANCE, OR ADVICE.”-34 CFR §668.46 (K)(3)(II)
- “THE INSTITUTION MAY ESTABLISH RESTRICTIONS REGARDING THE EXTENT TO WHICH THE ADVISOR MAY PARTICIPATE IN THE PROCEEDINGS, AS LONG AS THE RESTRICTIONS APPLY EQUALLY TO BOTH PARTIES”
 - “POTTED PLANT RULE”

CLERY PROCEEDINGS

- “PROCEEDING MEANS ALL ACTIVITIES RELATED TO A NON-CRIMINAL RESOLUTION OF AN INSTITUTIONAL DISCIPLINARY COMPLAINT, INCLUDING, BUT NOT LIMITED TO, FACTFINDING INVESTIGATIONS, FORMAL OR INFORMAL MEETINGS, AND HEARINGS.”
- PROCEEDING DOES NOT INCLUDE COMMUNICATIONS AND MEETINGS BETWEEN OFFICIALS AND VICTIMS CONCERNING ACCOMMODATIONS OR PROTECTIVE MEASURES TO BE PROVIDED TO A VICTIM.
- -34 CFR §668.46 (K)(3)(III)

CLERY PROCEEDINGS

- ASR MUST DISCLOSE-
 - “EACH TYPE OF DISCIPLINARY PROCEEDING USED BY THE INSTITUTION”
 - “THE STEPS, ANTICIPATED TIMELINES, AND DECISION-MAKING PROCESS FOR EACH TYPE OF DISCIPLINARY PROCEEDING”
 - “HOW TO FILE A DISCIPLINARY COMPLAINT”
 - “HOW THE INSTITUTION DETERMINES WHICH TYPE OF PROCEEDING TO USE”
- -34 CFR §668.46 (K)(1)(I)
- “THE INSTITUTION’S PROCEDURES FOR THE ACCUSED AND THE VICTIM TO APPEAL THE RESULT OF THE INSTITUTIONAL DISCIPLINARY PROCEEDING, IF SUCH PROCEDURES ARE AVAILABLE;”- 34 CFR §668.46 (K)(2)(V)(B)

PROMPT PROCEEDINGS

- “COMPLETED WITHIN REASONABLY PROMPT TIMEFRAMES DESIGNATED BY AN INSTITUTION’S POLICY, INCLUDING A PROCESS THAT ALLOWS FOR THE EXTENSION OF TIMEFRAMES FOR GOOD CAUSE WITH WRITTEN NOTICE TO THE ACCUSER AND THE ACCUSED OF THE DELAY AND THE REASON FOR THE DELAY;”-34 CFR §668.46 (K)(3)(I)(A)
 - MUST BE A SPECIFIED TIMEFRAME (I.E. 60 DAYS, 90 DAYS, ETC...), SUBJECT TO REASONABLENESS STANDARD

CONSISTENT & TRANSPARENT

- “CONSISTENT WITH THE INSTITUTION’S POLICIES AND TRANSPARENT TO THE ACCUSER AND ACCUSED”-34 CFR §668.46 (K)(3)(I)(B)(1)
 - NO SURPRISES
 - DON’T DEVIATE FROM UNDERLYING POLICIES OR WHAT HAS BEEN PROMISED TO PARTIES
 - ENSURE CONSISTENCY WITH ASR & VARIOUS INSTITUTIONAL CODES
 - IF THERE ARE CHANGES (WHICH SHOULD BE RARE), FOR ANY REASON (DISABILITY, LITIGATION, ETC...), ENSURE PARTIES CLEARLY UNDERSTAND THEM AND WHY THEY ARE BEING MADE

TIMELY NOTICE

- PROVIDE “TIMELY NOTICE OF MEETINGS AT WHICH THE ACCUSER OR ACCUSED, OR BOTH, MAY BE PRESENT”-34 CFR §668.46 (K)(3)(I)(B)(3)

IMPARTIAL

- PROCEEDINGS MUST BE “CONDUCTED BY OFFICIALS WHO DO NOT HAVE A CONFLICT OF INTEREST OR BIAS FOR OR AGAINST THE ACCUSER OR THE ACCUSED.”- 34 CFR §668.46 (K)(3)(I)(C)
 - PARTIES MUST HAVE EFFECTIVE OPPORTUNITY TO KNOW WHO OFFICIALS ARE, AND OBJECT TO POTENTIAL CONFLICTS OF INTEREST OR BIAS
 - BIAS IS WIDE-RANGING AND NOT LIMITED TO SEX-DISCRIMINATION

NOTICE OF RESULTS

- POLICY MUST “REQUIRE SIMULTANEOUS NOTIFICATION, IN WRITING, TO BOTH THE ACCUSER AND THE ACCUSED, OF-”
 - “THE RESULT OF ANY INSTITUTIONAL DISCIPLINARY PROCEEDING”
 - “ANY CHANGE TO THE RESULT; AND”
 - “WHEN SUCH RESULTS BECOME FINAL.”
- -34 CFR §668.46 (K)(2)(V)

NOTICE OF RESULTS

- “RESULT MEANS ANY INITIAL, INTERIM, AND FINAL DECISION BY ANY OFFICIAL OR ENTITY AUTHORIZED TO RESOLVE DISCIPLINARY MATTERS WITHIN THE INSTITUTION.”-34 CFR §668.46 (K)(3)(IV)
 - SANCTIONS IMPOSED (INCLUDING DURATION)
 - RATIONALE – RESULT & SANCTIONS (FOR PURPOSES OF ASSESSING APPEAL, BUT REQUIRED WHETHER OR NOT AN APPEAL IS OFFERED)
 - COMPLIANCE DOES NOT VIOLATE FERPA

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