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ALERT

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ATTORNEYS IN THE STUDENT DISCIPLINARY PROCESS: REQUIREMENTS, RESTRICTIONS AND BEST PRACTICES

By Rebecca Lacher

Under the newly revised Clery Act, colleges and universities may not ban lawyers from attending and advising their clients at campus disciplinary proceedings involving sexual assault, domestic violence, dating violence and stalking. This is a significant change for many institutions that had previously limited advisors to members of the campus community or expressly barred attorneys. Compounding the change are new state laws, reviewed here, requiring public institutions to allow attorneys to "fully participate" in aspects of campus disciplinary proceedings.

For those students who can afford or have other access to legal services, the Clery Act requirements will almost certainly result in more students in campus proceedings being represented by attorneys. And because of the new requirements, attorneys are likely to be involved much earlier in the disciplinary process, from the initial meeting through a disciplinary hearing.

The presence of attorneys at campus proceedings may blur the distinction between internal campus proceedings about violations of school policies intended to keep students safe and prohibit discrimination, and those proceedings that relate to civil or criminal disputes between parties or between a party and the state. For example, unlike a trial, a student disciplinary proceeding is confidential, as required by FERPA. With respect to sexual misconduct, the Department of Education's Office for Civil Rights (OCR) has said that schools must use the "preponderance of the evidence standard," which is a much lower "more-likely-than-not" standard than what would apply in a criminal adjudication of similar charges.

However, institutions may—and many do—restrict the participation of the advisor, whether an attorney or not. Indeed, the Department of Education recognized that restrictions such as barring an advisor "from speaking during the proceeding, addressing the disciplinary tribunal, or questioning witnesses" are permitted. 79 Fed. R. 62773 (Oct. 20, 2014).

As colleges and universities seek to strengthen their policies, practices and compliance with OCR's pronouncements, some backlash has arisen from those who argue that schools are being forced to establish processes that are unfair to the accused. In April, two states passed laws permitting increased attorney participation. Arkansas' new law requires public institutions to permit attorneys to "fully participate" in the disciplinary appeals process for students who choose to be represented at the student's own expense. North Dakota's new law mirrors a North Carolina law passed in 2013, mandating that public institutions provide students with the right to "be represented" by an attorney at the student's expense (now provided to all students through the

VAWA amendments), and requiring the attorney be permitted to "fully participate during any disciplinary procedure" that could result in suspension or expulsion. South Carolina is considering a bill that would provide similar rights to accused students.

The Foundation for Individual Rights in Education (FIRE), an advocacy organization, has expressed support for these state measures, calling the legislation "sorely needed" and referring to the requirements as a "powerful new tool." On the other hand, a recent open letter by NASPA criticized these state laws for "injecting inequality" into the disciplinary process, citing the Department of Education's comments to the Clery Act final regulations. The Department's comments repeatedly emphasized an institution's ability to restrict advisor participation as a means of establishing "an equitable and appropriate disciplinary proceeding." Nonetheless, the Department acknowledged that state laws addressing participation of advisors (the North Carolina law was on the books at the time) are "not inconsistent" with the Clery Act and that state law would trump an institutionally imposed restriction on an advisor's participation. 79 Fed. R. 62774 (Oct. 20, 2014).

Significantly, although these state measures focus strictly on the rights of an advisor to an *accused* student, OCR (in its April 2014 Q-&-A) and the Clery Act require that such restrictions apply equally to both parties. Thus, to the extent an advisor for the accused is allowed to "fully participate" (an undefined term in the state laws), schools must allow the victim's advisor the same level of participation.

We expect that the Department will seek to further explore publicly the role of advisors and consistent enforcement of institutional rules restricting advisor participation in the coming year. For now, we offer the following practical pointers to assist campus administrators with the current regulatory framework.

Practical Pointers for Student Conduct Administrators

1. Do we have to allow attorneys to serve as advisors?

Yes. Students must be permitted to be "accompanied to any related meeting or proceeding by the advisor of their choice," and that choice cannot be limited. 20 U.S.C. 1092(f)(8)(B)(iv)(I); 34 CFR § 668.46 (k)(2)(iv).

2. Are we required to accommodate an attorney's schedule?

No, but you are required to give "timely notice of meetings" "so that the parties are aware of meetings before they occur." §668.46(k)(3)(i)(B)(2); 79 Fed. R. 62775 (Oct. 20, 2014). The Department encourages institutions "to consider reasonable requests to reschedule." 79 Fed. R. 62773.

3. Do we have to provide counsel to one party if the other party has counsel?

No. The Department clarified that institutions are not required to provide legal representation absent a clear and unambiguous statutory authority. 79 Fed. R. 62774. Even in states requiring full participation of attorney advisors, the legislation has clearly stated the attorney will not be provided at public expense. While you do not have to provide counsel, you should provide written notice of legal assistance available in the community, such as the phone number of your community bar association referral hotline or legal aid office. *Id.*; Department of Education Office for Civil Rights, *Q&A on Title IX and Sexual Violence* (Apr. 29, 2014) at 3.

4. Are we allowed to restrict the attorney's participation in the disciplinary proceedings?

Yes (barring any state law to the contrary- see question 5). "Institutions may restrict an advisor's role, such as prohibiting the advisor from speaking during the proceeding, addressing the disciplinary tribunal, or questioning witnesses." 79 Fed. R. 62773. However, any restrictions must be applied equally to both parties. *Id.*; *Q&A on Title IX and Sexual Violence* at 26. Review your policies to

ensure you clearly explain any limitations on an advisor's participation and train your conduct administrators to ensure they understand the restrictions and enforce them evenly.

5. What if our state has a law that addresses attorney participation?

State laws requiring participation trump an institution's restrictions on such participation. 79 Fed. R. 62774. However, both VAWA and OCR require that any restriction on an advisor be applied equally. Thus, even where such laws provide only that an accused have the opportunity for his or her advisor to participate fully, the victim would also have a right to equal participation by his or her advisor, whether an attorney or not.

6. Should we have an attorney present if a party has an attorney-advisor?

Talk to your counsel about what makes sense for the specific facts at issue and resources available. At a minimum, you should notify your counsel of any party who is represented by counsel and of any meetings with the represented student, whether or not the attorney will be participating.

7. What best practices should we follow when dealing with an attorney advisor?

You should treat all advisors the same- whether an attorney or not. However, when dealing with attorneys, you should be especially conscious of:

- Ensuring your counsel is aware that the advisor is an attorney;
- Clarifying the role of advisors in your policy and ensuring your administrators understand and apply these restrictions to all parties for complaints of sexual assault, domestic violence, dating violence and stalking;
- Providing counsel with a copy of your policy and reminding them that while they are welcome to serve as an advisor, their participation is limited to [describe your policy restrictions];
- Providing counsel with notice of any meetings or hearings at which you will be speaking with their client; and
- Providing counsel with notice of your appeals procedure and any restrictions on the participation of the advisor in those procedures (e.g., if the student is required to sign and submit the statement). ◆

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