

Investigating Sexual Assault Claims - Even Private Colleges Are Vulnerable

E. Jason Tremblay

ARNSTEIN & LEHR LLP
120 SOUTH RIVERSIDE PLAZA | SUITE 1200
CHICAGO, IL 60606
P 312.876.6676 | F 312.876.0288
ejtremblay@arnstein.com

A recent Tennessee federal jury case involving a private university reminds the academy of the critical need to balance fairly the interests of the accused and accuser in investigating sexual assault cases. While private colleges and universities are not strictly obligated to follow the 14th Amendment due process restraints as are their public counterparts, their procedures must nonetheless be fair, balanced, and evenly applied. If not, the school can be liable, not just in contract for failing to follow its own rules (whatever they may be), but also in tort if actions taken are not reasonable and cause harm. On this basis, an institution can find itself both remediating a procedural failing and paying unlimited damages for emotional distress and similar non-contractual harms.

The recent case is *John Doe v. University of the South*, where a federal jury found in favor of a student who alleged that his reputation was damaged in the course of the university's investigation of rape allegations against him. Although the amount awarded by the jury was only a fraction of the millions of dollars the student originally claimed, the court nonetheless held the school liable under a negligence (personal injury) standard. *Doe* arose out of an allegation by a female student that John Doe sexually assaulted her on August 30, 2008. The female student complained to the local police department which, in turn, notified the university's administration. On September 16, 2008, the student made a formal charge of sexual assault against Doe under the university's procedures. Two days later, on September 18, 2008, the dean of students notified Doe that he had been accused of sexual assault and that he was obligated to appear before the university's Discipline Committee the following day. That committee met as noticed and, after just a few hours, concluded that Doe was guilty as charged. The university presented him with two options: (1) a one semester suspension with the sexual assault on his record, or (2) withdraw from the university for two semesters and no accompanying record. Either way, Doe would be forced to re-apply and be approved by the university's Admission Committee, if he wanted to continue his studies there. Doe ultimately chose not to reapply to the university and the student who accused Doe left the school for drug and alcohol treatment and did not pursue criminal charges.

The university's Sexual Assault Policies and Procedures were fairly detailed outlining not only what the procedures were for making a sexual assault complaint, but also what processes the university and its administrators must follow in conducting a student

disciplinary investigation and hearing. Notably, the policy provided, among other things, that: (1) the investigator must meet with each of the students named as being involved in the incident, as well as any other possible witnesses, (2) the investigator must ask the parties to submit a written statement, (3) the students involved must have an opportunity to see the other reports at the beginning of the disciplinary hearing, and (4) the investigation portion of the process should typically last 5-10 class days. There were also appeal rights afforded to an accused student.

The university did not follow these procedures. Not all possible witnesses were contacted, in turn meaning that written statements were not produced in all instances. The hearing concluded after only a few hours, not after days of careful review. Some testimony indicated that an administrator sought to discourage an appeal by telling Doe that appealing the decision could increase his punishment and result in criminal charges. In short, the procedure had the appearance of a rush to judgment based upon a presumption of guilt. Not only were the university rules not followed, the approach was not balanced either.

Complaints of sexual assault under schools' disciplinary procedures are on the increase nationwide at both public and private institutions and they are likely to increase even more. The new Department of Education guidelines require schools to modify the level of proof required in disciplinary procedures from the more limited "clear and convincing" stricture to the lower "preponderance of evidence" test (more likely true than not true). This change is intended to make a finding of guilty easier and thereby encourage the reporting of more student sexual assault charges.

This *Doe* case teaches that, considering the increase in numbers of complaints and the new emphasis on guilty findings, it is especially prudent for institutions to assure that:

- Disciplinary procedures are written so as to provide the accused procedural rights;
- The established procedures are meticulously followed; and
- Fairness is evident throughout.

Failing to do so in any respect could expose the school to a successful negligence lawsuit with the potential for substantial damages.

Should you have any questions regarding this case, properly handling a student disciplinary investigation or hearing, or the new U.S. Department of Education sexual assault guidelines, please contact E. Jason Tremblay at (312) 876-6676 or ejtremblay@arnstein.com or any other member of the Higher Education Law Group at Arnstein & Lehr LLP.