

Memorandum to: Dr. Susanna Baxter
From: John D. Marshall, Jr.

Subject: Confidentiality and Allegations of Sexual Misconduct

Background of Applicable Laws and Regulations:

When allegations of sexual misconduct are reported on a college campus, a variety of state and federal laws and regulations may be implicated.

Three of the pertinent federal statutes are:

1. Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681-1688, and its implementing regulations, (34 C.F.R., Part 106, prohibiting discrimination on the basis of sex in education programs and activities).
2. The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232 (g) and its implementing regulations, 34 C.F.R. Part 99, restricting disclosure of educational records, broadly defined to include any record maintained by an institution of higher education pertaining to an identifiable student.
3. The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (the Clery Act), 20 U.S.C. § 1092 (f), and its implementing regulations, 34 C.F.R. Part 668, as revised by the Violence Against Women Reauthorization Act of 2013 (VAWA) / Campus Sexual Violence Elimination Act (Campus SaVE Act), mandating the reporting of campus crime statistics (including sexual assault), publication of an annual security report, timely warnings to the campus community, and various procedural protections in investigations and disciplinary proceedings both for the accuser and the accused.

The U.S. Department of Education's (DOE) Office of Civil Rights (OCR) periodically issues what they have labeled "significant guidance documents" in the forms of "Questions and Answers" and "Dear Colleague" letters. While these documents are not regulations, OCR has declared that they are designed to "...inform recipients (of federal funds) about how OCR evaluates whether covered entities are complying with their legal

obligations.” In other words, these documents set forth what OCR believes the law and regulations mean and how they intend to enforce them.

Confidentiality and the Complainant who alleges Sexual Misconduct:

The April 4, 2011, “Dear Colleague” letter established that OCR considers acts of sexual harassment and sexual violence to be discrimination based on sex in violation of Title IX of the Education Amendments of 1972. In that same letter, OCR declared that:

“If the complainant requests confidentiality or asks that the complaint not be pursued, the school should take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation. If a complainant insists that his or her name or other identifiable information not be disclosed to the alleged perpetrator, the school should inform the complainant that its ability to respond may be limited.” (page 5)

Subsequently, in its April 29, 2014, “Questions and Answers on Title IX and Sexual Violence”, OCR re-emphasized its position in support of protecting a student’s confidentiality and stated:

*“OCR strongly supports a student’s interest in confidentiality in cases involving sexual violence. There are situations in which a school must override a student’s request for confidentiality in order to meet its Title IX obligations; however, these instances will be limited and the information should only be shared with individuals who are responsible for handling the school’s response to incidents of sexual violence...**A school should be aware that disregarding requests for confidentiality can have a chilling effect and discourage other students from reporting sexual violence.**”(emphasis added)(pp. 18-19).*

Most recently, on July 22, 2015, DOE issued a “Dear Colleague” letter indicating that the VAWA final regulations:

“Require institutions to have policies and procedures for victims or witnesses to report crimes on a voluntary, confidential basis for inclusion in the institution’s crime statistics.”

Thus, it seems clear that if a student reporting an act of sexual violence requests confidentiality, then the College is obliged under law and implementing regulations to honor that request whenever possible. However, the College is tasked with weighing the risk of the alleged perpetrator committing an additional act of sexual violence against the request for confidentiality, and if the College believes that there is such a risk, it must notify the student who reported the violence that the request for confidentiality cannot be honored. Further, if that student requests that the college inform the perpetrator that the student had asked the college not to investigate or seek discipline, then the College must so inform the alleged perpetrator. (Questions and Answers on Title IX and Sexual Violence, p. 22)

Federal law and regulations also encourage colleges to provide a variety of support services to students who report acts of sexual violence. OCR has taken the position that Title IX allows colleges not to require individuals working or volunteering in victim's advocacy offices, on-campus sexual assault centers, or women's centers to report acts of sexual violence if it would identify the student in any way, unless the student consents. OCR would allow colleges to designate these individuals as "confidential sources", although they would still be required to report non-confidential data about acts of sexual violence for Clery purposes. However, it is likely that Georgia law would not treat these individuals as having any testimonial or evidentiary privilege, so they would not be truly "confidential sources" in Georgia.