



New York court concludes university's determination of dating violence was arbitrary and capricious

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A New York State court recently annulled a university student's suspension for dating violence, finding the university's failure to abide by its policies and procedures in addressing the matter constituted arbitrary and capricious action. See *In re Hall v. Hofstra University*, 2018 N.Y. Slip Op. 50549(U) (Sup. Ct., Nassau Cty. April 3, 2018). The case involved an incident that took place off-campus, during the complainant's spring sorority formal. The following day, the complainant reported to the university's public safety office that following an argument, her boyfriend acted aggressively towards her, pushed and cornered her, and threw pepper in her eyes. She further reported an alleged act of dating violence a few weeks earlier at her home where her boyfriend put his hands around her neck. An investigation by the university ensued, which included an interview of an eyewitness to the events (whose contact information was provided to campus security by the boyfriend).

The university's student policy prohibiting relationship violence allows interim measures upon receipt of a complaint, including mutual no-contact orders, which the university issued. The boyfriend's no-contact order prohibited him from entering any university residence hall, and the university distributed a "ban flyer" to all residence halls bearing his photo. Under the university's policy, interim no-contact orders are to expire at the earlier of (1) a final resolution of the complaint, (2) a final resolution in an alternative resolution process or (3) where students had not taken steps to file a complaint and begin the disciplinary process, fourteen days after issuance, unless otherwise directed by the university. After an initial investigation, the parties failed to reach an alternative resolution. However, satisfied with the no-contact order, the complainant chose not to proceed with a formal proceeding and the university took no further action.

Over nine months later, the complainant learned from the university's Title IX coordinator that her ex-boyfriend was seeking to appeal the no-contact order.¹ Fearful that this indicated he was still trying to contact her, the complainant sought formal proceedings against her ex-boyfriend based

¹ The no-contact order had been given full force and effect despite the fact that the ex-boyfriend never signed it. He never violated the order, and subsequently testified at the disciplinary hearing that he sought only to lift the ban from residence halls and to remove the ban poster from campus. He did not submit a written appeal.

on the events of the prior year, as well as his refusal to sign the interim no-contact order and unsuccessful attempts at reaching an alternative resolution. Over a month later, the university presented the ex-boyfriend with formal charges for violating the dating violence policy based on the original complaint. He did not accept responsibility, but rather opted for a hearing on the matter before a university board. In preparation for the hearing, the respondent student and his counsel reviewed the university's case file regarding the disciplinary proceeding. A university staff member told the respondent he was allowed to take notes, but his counsel was prohibited from doing so. The respondent asked the university to produce at the hearing the eyewitness whose information he had provided at the time of the initial investigation, as he no longer had contact information for the witness and could not reach him through the number campus safety provided. The university did not call the eyewitness.²

Following the hearing, the respondent was found responsible for the charges of relationship violence and, exactly one year from the date of the original incident, was notified that he would be suspended from the university for one academic semester. He filed two levels of appeal under the university's procedures, losing both. He then brought an Article 78 challenge.

In its decision, the court first noted its "restricted role" in reviewing the determinations of colleges and universities. Rejecting the respondent-petitioner's due process claims, the court held that the university was a private institution, and as such, was not required to provide petitioner with the "full panoply of due process guarantees." Accordingly, there was no error in the university's failure to call the alleged exculpatory eyewitness, or in the hearing board's consideration of hearsay statements by witnesses who were unavailable for cross-examination. As to the latter, the court observed that a private university can offer witness statement accounts in disciplinary hearings, even for their truth, and that cross-examination rights are limited in such hearings.

The court stated the proper test for reviewing a private university's disciplinary determination was "whether the university substantially adhered to its own published rules and guidelines for disciplinary proceedings so as to ascertain whether its actions were arbitrary or capricious." Following such a review, "[t]he determination must be annulled where a school acts arbitrarily and not in the exercise of its honest discretion, it fails to abide by its own rules or imposes a penalty so excessive that it shocks one's sense of fairness." Stating that "perfect adherence to every procedural requirement is not necessary to demonstrate substantial compliance," the court nonetheless ruled the university failed to *substantially comply* with its own policies and procedures in several respects, causing significant prejudice to the petitioner.

Most prejudicial, in the court's view, was the failure to promptly adjudicate the complaint. The court noted the university's policy explicitly stated the university would act with "reasonable promptness" following reports, and that the entire process, excluding appeals, would "last up to 60 days," depending on a variety of factors which were not present in petitioner's case. The court observed the applicable policy was "replete with references that promptness is required at each state of the process." In petitioner's case, however, the court found the record "unequivocally reflect[ed] that the [u]niversity materially delayed initiating formal proceedings." In particular, the

² At the hearing, university witnesses attributed the delay in bringing formal charges to two factors: (1) the complainant planned a study abroad in the fall semester and said she wanted to use that time to consider her course of action relating to the complaint, and (2) the petitioner did not register for the fall semester. When the university learned both students were returning to campus for the following spring term, alternative resolution having been unsuccessful, they issued formal charges.

ten-month delay between the filing of the original complaint and the petitioner's referral to disciplinary proceedings "ostensibly served as the imposition of a significant penalty against the [p]etitioner."

Failures to adhere to university policy also included the issuance of the "ban poster," which university policy allowed as a sanction to be imposed only *after* a student had been found responsible for a violation. The university departed from its procedures by issuing the ban as an interim sanction. While a no-contact order was certainly a permissible "interim measure," the court stated, "implicit in the term is the temporary nature of its imposition." Here, the court ruled, "the [u]niversity's unreasonable delay in affording the petitioner a prompt review of the charges effectively fixed a significant punishment indefinite in its duration."

Further, the court found the university's proffered reasons for the lengthy delay in bringing formal charges were not "legitimate justification." There were no changed circumstances other than that petitioner had not registered for classes during the fall semester. The petitioner's failure to sign the no-contact order and declination of alternative resolutions existed at the time of the initial complaint. The court found the complainant had no interest in pursuing a complaint originally, and the "real reason" for her change of mind was the university telling her petitioner was seeking to appeal the no-contact order. In light of these facts, "the [u]niversity should have adhered to its own procedures by closing the case due to inactivity, or at the very least, inquiring [of the complainant] into the reason for the delay" when she filed a second complaint. The court found the lengthy delay "crippled the [p]etitioner's ability to adequately prepare a defense," and as an example, cited the petitioner's inability to locate the eyewitness who might have been available if the hearing had been prompt.³

The court further found a substantial departure from the university's procedures in the failure to apply the relationship violence policy "in an even-handed fashion." Specifically, the court observed that the case file and hearing transcript were "replete with admissions by the [c]omplainant that she acted as the initial aggressor and physically assaulted the [p]etitioner on multiple occasions." Additionally, "other than the parties, not a single eyewitness who testified at the hearing stated that the [p]etitioner struck or threatened to strike the [c]omplainant." Notwithstanding this "overwhelming evidence," the university failed to discipline the complainant, and also failed to discipline her for admittedly engaging in "self-help" measures to obtain her belongings from petitioner in violation of the no-contact order.

"As an aside," the court found "troubling" that petitioner's counsel had been prevented from taking notes during his review of the case file. This limitation, not reflected anywhere in the university's policy or in its advisor form, "further thwarted the [p]etitioner's ability to adequately prepare a defense." The court concluded that while dating violence was a matter of legitimate concern to the university, the court could not "in good conscience find the [u]niversity's determination was rendered in accordance with its published procedures," or that "it was based upon the [u]niversity's exercise of honest discretion after a full review of the operative facts." As a result, the determination against the petitioner was arbitrary and capricious, and, along with the resulting sanctions, was annulled and expunged from the petitioner's student file.

³ The court made clear it did not find error on the part of the university for not calling the witness; rather, error was grounded in the significant delay, which resulted in the petitioner's inability to locate the witness.

The court's decision reinforces the absolute necessity of abiding by college and university policies in disciplinary actions, in an even-handed manner as to all parties. Interim measures imposed following a complaint should be only those allowed by policy, and the necessity for such measures should be considered over time. Where no formal action ensues, the school's policies regarding the duration of interim measures, such as no-contact orders, must be followed closely. In addition, institutions should ensure that restrictions placed on advisors are contained in school policies and advisor forms. Finally, the court's analysis suggests institutions cannot rely solely on a respondent student's voluntary withdrawal from campus for a period of time as a basis for a delay in bringing formal charges, absent other changed circumstances. However, a specific policy addressing such a situation that allows the school to commence proceedings upon the student's return would support subsequent action. Nixon Peabody will continue to monitor case developments regarding student disciplinary issues and will provide alerts on significant cases.

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