

# **Student Privacy in the New Title IX Sexual Misconduct Formal Complaint Process**

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## **INTRODUCTION**

New Title IX administrative regulations<sup>1</sup> (hereinafter the “new rules”) establish a detailed process schools must follow for formal complaints of sexual misconduct. While the new rules are controversial, their impact on the privacy of student parties has flown largely under the radar. The new rules do create a few specific and narrow privacy protections for students. A new rape shield bars the sexual history of the complaining student from admission at the hearing, but this intimate information must be shared with parties and advisors. There is also a ban on non-consensual access to and use of privileged information and student party treatment records. These new privacy protections do not offset larger failings to meaningfully protect student privacy of student parties on both sides.

The new Title IX rules require schools to collect extensive and intimate information about the student parties which may include the complaining student’s sexual history, past sexual misconduct by the responding student, statements describing the details of the misconduct, academic records, disability information, and information about the honesty of the parties. Schools must then share this information with both parties and their advisors, on the agency’s unsupported legal theory that the information is the educational records of both parties under the Family Educational and Privacy Rights Act (FERPA).<sup>2</sup> Moreover, the new rules do not bar or limit the parties from redisclosing this information as they choose; a student party could share the other party’s

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1. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,072-30,079 (May 19, 2020) (codified at 34 C.F.R. Part 106).

2. 20 U.S.C. § 1232g (2018).

confession to the misconduct, or to fabricating the allegations. The new rules also fail to limit schools from redisclosing this intimate information. School redisclosure is left to FERPA, which permits, for example, a school to disclose the full Title IX formal complaint file to a new school in which a student party enrolls or plans to enroll.

Part I of this Article offers a brief overview of the relevant federal statutes. FERPA is the general student records privacy law. The Clery Act<sup>3</sup> governs complaints to colleges of certain forms of sexual violence. Title IX prohibits gender discrimination in schools including sexual harassment and misconduct. Part I then offers a brief overview of the formal complaint process under the new Title IX rules, pursuant to which schools investigate complaints, share the full investigation results with parties and advisors, and conduct an evidentiary hearing. Part II of the Article begins with an overview of the extensive and intimate student information schools collect and maintain under the new rules. Part II then reviews the limited protection for some of this information offered by the new specific provisions about treatment records and privilege and the rape shield. Part II then turns to the general approach to privacy for the bulk of the information. Schools are free to share the information and evidence as permitted by FERPA, for example if the school becomes a defendant in Title IX litigation brought by student parties. Moreover, this information is available to the parents not only of minor student parties, but also parents of adult students who are financial dependents. Finally, and most significantly, student parties and their advisors have a right to access and supplement this information, even including inadmissible information such as sexual history protected by the new rape shield, and without limits on their redisclosure of this information.

Part III of the Article posits that the approach to student privacy in the new rules is not supported by the agency's reasoning, is not legally required, and in fact conflicts with existing student privacy law. In particular, the requirement of student party access to even inadmissible information such as sexual history protected by the rape shield, and the failure to ban student party redisclosure of shared information, are outside any due process rights for student parties, and conflict with FERPA. The agency argument that virtually all Title IX information and evidence are the FERPA records of both student parties is wholly

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3. 20 U.S.C. § 1092 (2018).

unsupported, with far-reaching and unfortunate consequences for student privacy.

President Biden has characterized the new rules as an attempt to “shame and silence survivors”<sup>4</sup> and promised to “put a quick end to them,” recently issuing an executive order directing the agency to review the new rules.<sup>5</sup> In fact, a final repeal or revision of the new rules requires a notice and comment process that will take several years.

The new rules must be repealed or revised to provide real student privacy protection. Part III suggests specific revisions such as limiting schools’ redisclosure of formal complaint student information. While the new rules are in effect, the Article concludes that student parties need to familiarize themselves with their privacy aspects, and accordingly make informed decisions about participation in the Title IX formal complaint process. Moreover, schools need to consider policies and practices to protect the privacy of their students.

### **I. THREE FEDERAL STATUTES: FERPA GENERAL PROTECTION OF STUDENT PRIVACY, CLERY ACT SEXUAL MISCONDUCT OFFENSES AND HEARINGS, AND TITLE IX AND ITS NEW FORMAL COMPLAINT PROCESS**

Student privacy is generally protected by FERPA. In the realm of sexual misconduct involving students, student privacy is also impacted by the Clery Act and by Title IX. All three statutes are enforced by the U.S. Department of Education (DOE), albeit by different offices within the Department.<sup>6</sup>

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4. Bianca Quilantan, *Biden Vows ‘Quick End’ to DeVos’ Sexual Misconduct Rule*, POLITICO (May 6, 2020), <https://www.politico.com/news/2020/05/06/biden-vows-a-quick-end-to-devos-sexual-misconduct-rule-241715>.

5. Exec. Order No. 14,021, 86 Fed. Reg. 13,803 at § 2(i) (March 8, 2021) (directing review within 100 days). The agency has announced it will initiate a review process for the new rules. Office for Civil Rights, Dep’t of Educ, Letter to Students, Educators, and other Stakeholders re Executive Order 14021 (April 6, 2021), <https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/20210406-titleix-eo-14021.pdf>.

6. Within the DOE, the Student Privacy Policy Office enforces FERPA, the Office for Civil Rights enforces Title IX, and the Office of Post-Secondary Education enforces Clery.

## A. FERPA

The student records statute FERPA<sup>7</sup> is part of GEPA, a statute establishing conditions on the receipt of federal education funds.<sup>8</sup> FERPA applies to all schools that receive federal education funding.<sup>9</sup> FERPA grants parents of minor students and adult/college students the right to access their own education records that a school creates or maintains.<sup>10</sup> FERPA also creates general confidentiality for student records by banning schools from disclosing education records or their contents to third parties without the written consent of the parent/adult student,<sup>11</sup> but this general confidentiality has many exceptions.<sup>12</sup> FERPA's enforcement mechanisms are limited. Complaints may be filed with the DOE, which can find that a school is not in compliance.<sup>13</sup> FERPA does not offer a private cause of action.<sup>14</sup> FERPA is not actionable under civil rights statutes.<sup>15</sup>

## B. Clery Act

The Clery Act applies to colleges that receive federal student financial aid.<sup>16</sup> Recent Clery amendments concern campus sexual violence.<sup>17</sup> In pertinent part, colleges must offer disciplinary

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7. 20 U.S.C. § 1232g (2018).

8. *See* 20 U.S.C. § 1221 (2018).

9. 20 U.S.C. § 1232g(a)(3) (2018) (FERPA applies to both public and private, preschool, K-12 and post-secondary schools).

10. 20 U.S.C. § 1232g(a)(1) (2018). FERPA also requires that parents and adult students who believe their education records are inaccurate or invasive of privacy have the opportunity for an internal and informal hearing, *id.* at § 1232g(a)(2), and an annual notice of rights to parents/adult students. *Id.* at § 1232g(e).

11. *Id.* at § 1232g(b).

12. *See generally id.* at § 1232g(b).

13. *Id.* at § 1232g.

14. *See, e.g.,* *Brown v. Texas State Univ. Bd. of Regents*, 2013 WL 6532025 (W.D. Tex. 2013) (dismissing FERPA and HIPAA claims by student athlete whose scholarship was revoked alleging school disclosed "very personal, private, confidential, extremely delicate medical information" to teammate).

15. *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (FERPA statute does not create individual enforceable rights, and hence FERPA violations are not actionable under 42 U.S.C. § 1983). Records violations of special education students are actionable under federal disability law. *See, e.g.,* *T.F. v. Fox Chapel Area Sch. Dist.*, 62 IDELR 74 (W.D. Pa. 2013) (examining claims that disclosure of student's severe allergy disability at PTA meeting violates federal disability law).

16. 20 U.S.C. § 1092 (2018).

17. *Id.* (Clery covers the offenses of domestic violence, dating violence, sexual assault, and stalking).

proceedings<sup>18</sup> that are “prompt, fair, and impartial[.]”<sup>19</sup> Several provisions address student privacy in Clery hearings. Both parties may see the information used in meetings and hearings.<sup>20</sup> However, “reporting or disclosure of privileged information” is not required.<sup>21</sup> Schools must provide “[i]nformation about how the institution will protect the confidentiality of victims, including how publicly-available record keeping will be accomplished without the inclusion of identifying information about the victim, to the extent permissible by law.”<sup>22</sup> Until its recent withdrawal by former DOE Secretary DeVos, the enforcing office’s Handbook stated that an advisor for a student party could act as a proxy with consent to access some evidence in the interest of protecting the parties’ privacy.<sup>23</sup> Like FERPA, Clery does not have a private cause of action, but administrative complaints may be filed with the DOE, and unlike FERPA, schools violating Clery may be assessed significant fines.<sup>24</sup>

### C. Title IX

Title IX bans gender discrimination in schools.<sup>25</sup> Unlike FERPA and Clery, private lawsuits are available under Title IX.<sup>26</sup> Administrative complaints may also be made to the Office for Civil Rights (OCR)

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18. 34 C.F.R. § 668.46(k)(3)(iii) (2020) (disciplinary proceedings include factfinding, investigation, meetings and hearings).

19. *Id.* at § 668.46(k)(2)(i).

20. *Id.* at § 668.46(k)(3)(B)(iii).

21. 20 U.S.C. § 1092(f)(10) (2018) (“[n]othing in this section shall be construed to require the reporting or disclosure of privileged information”).

22. *Id.* at § 1092(f)(8)(B)(v).

23. *See generally* DEPARTMENT OF EDUCATION, THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING (2016 ed.) at 8-20, *available at* <http://www.ed.gov/admins/lead/safety/campus.html>. Notice that the Handbook has been rescinded can be found at <https://www2.ed.gov/admins/lead/safety/campus.html>.

24. *See generally* 20 U.S.C. § 1092(f)(13)-(f)(14) (2018).

25. *See* 20 U.S.C. § 1681 (2018).

26. *See, e.g.*, *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 76 (1992); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283 (1998); *Davis v. Monroe City Bd. of Educ.*, 526 U.S. 629, 639 (1999).

within the DOE.<sup>27</sup> For all Title IX issues, schools must offer an internal grievance process that provides prompt and equitable resolution.<sup>28</sup>

Sexual harassment, including but not limited to sexual assault and the specific Clery offenses (hereinafter collectively referred to as “sexual misconduct”), is a form of gender discrimination banned by Title IX according to courts and the DOE.<sup>29</sup> Title IX and its regulations did not specifically address sexual misconduct before the new rules.<sup>30</sup> The new rules were finalized after more than 120,000 comments were filed and reviewed,<sup>31</sup> and took effect in August 2020. The new rules, which comprise eight pages in the Federal Register,<sup>32</sup> define<sup>33</sup> and establish a new internal formal complaint process<sup>34</sup> for sexual

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27. See 34 C.F.R. § 106.81 (2020).

28. See former § 106.8(b) (“A recipient [shall] adopt and publish grievance procedures . . . provid[ing] [for] prompt and equitable resolution of student and employee complaints alleging any action [which] would be prohibited by this part[.]”); current § 106.8(c):

*Adoption of grievance procedures.* A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30.

29. See, e.g., *Franklin*, 503 U.S. at 76; *Gebser*, 524 U.S. at 681; *Davis*, 526 U.S. at 630; Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,034-30,038 (hereinafter Preamble) (reviewing 1997-2017 DOE guidance, DCLs, and Q&As on sexual harassment in preamble to new rules).

30. See Preamble, 85 Fed. Reg. at 30,028-30,029.

31. See Preamble, 85 Fed. Reg. at 30,055 (noting the receipt of more than 124,000 comments).

32. See 85 Fed. Reg. at 30,572-30,579.

33. See 34 C.F.R. § 106.30 (2020) (defining sexual harassment to include quid pro quo harassment and hostile environment sexual harassment limited to: 1) the four Clery Act sexual violence offenses and 2) conduct that is “unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity”). See also *id.* at § 106.8(d) (excluding misconduct that occurs outside of the U.S., such as in a study abroad program, and noting that most misconduct that occurs off campus is also excluded). See also *id.* at § 106.44:

For the purposes of this section, §§ 106.30, and 106.45, ‘education program or activity’ includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

See also *id.* at § 106.45(b)(3)(i) (explaining that schools must dismiss formal complaints of harassment outside the coverage of the new rules but may process these incidents under school conduct codes).

34. 34 C.F.R. § 106.45 (2020).

misconduct in which students may be parties or witnesses. The new rules also include a non-binding preamble of more than 550 pages.<sup>35</sup>

Prior to the new rules, there was some guidance from DOE,<sup>36</sup> giving schools discretion to use a variety of approaches to resolve sexual misconduct complaints. One approach started with the school investigating, followed by a resolution meeting or hearing pursuant to the school's general discipline policy. In colleges, a panel of students and faculty might conduct an informal hearing which might consist primarily of reviewing written statements and documents, or which might involve questioning witnesses by the panel.<sup>37</sup> Some students found responsible for sexual misconduct pursuant to this process sued their schools claiming due process violations and other procedural defects, with some successes.<sup>38</sup>

The new Title IX rules emphasize due process<sup>39</sup> and fundamental fairness for students accused of sexual misconduct<sup>40</sup> (respondents in the new rules), including equal treatment of respondents and alleged victims (complainants).<sup>41</sup> Treatment of a complainant or respondent may be actionable gender discrimination.<sup>42</sup> School officials conducting

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35. See Preamble, 85 Fed. Reg. at 30,026-30,572.

36. See *id.* at 30,034-30,038 (reviewing 1997-2017 DOE guidance, DCLs, and Q&As on sexual harassment).

37. See generally U.S. DEP'T. OF EDUC., OFFICE FOR CIVIL RIGHTS, *Questions and Answers on Title IX and Sexual Violence* (April 29, 2014) (hereinafter "2014 Q&A") at 24-26 (OCR 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; U.S. DEP'T. OF EDUC., OFFICE FOR CIVIL RIGHTS, *Q&A on Campus Sexual Misconduct* (Sept. 22, 2017) (hereinafter, "2017 Q&A") at 3-5 (OCR 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>. These documents were withdrawn by former Secretary of Education Betsy DeVos. See Letter from Candice Jackson, former Acting Assistant Sec'y for Civ. Rights, U.S. Dep't. Of Educ., to Title IX Coordinators (Sept. 22, 2017), ["Dear Colleague Letter"], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>.

38. See, e.g., *Doe v. Purdue Univ.*, 928 F.3d 652 (7th Cir. 2019), discussed *infra* at Part III.B.

39. See Preamble, 85 Fed. Reg. at 30,046-30,055.

40. *Id.*

41. See 34 C.F.R. § 106.45(b)(1)(i) (2020) (requiring equitable treatment of complainants and respondents); Preamble, 85 Fed. Reg. at 30,448 (noting that in narrow circumstances equitable treatment rather than strictly equal treatment is required); *id.* at 30,242 (certain sanctions and remedies issues are one such area).

42. See 34 C.F.R. § 106.45(a) (2020) ("A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.").

investigations and hearings must not be biased toward complainants or respondents.<sup>43</sup>

A full overview of the process under the new rules is provided in a companion article.<sup>44</sup> Briefly, the new rules require schools to offer supportive services to complainants even if there is not a formal complaint.<sup>45</sup> Schools must follow a detailed process to respond to a formal complaint, beginning with an investigation and collection of evidence, and preparation of an investigation report.<sup>46</sup> Schools lack subpoena powers to compel production of evidence.<sup>47</sup> Presumably, to the extent evidence is in records of a school's students or employees, the school could access most of those records pursuant to school student and personnel policies. The parties are also free to seek and offer their own evidence, and schools cannot limit them in doing so.<sup>48</sup> Schools must share the evidence and the report with

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43. See 34 C.F.R. § 106.45(b)(1)(iii) (2020):

[A]ny individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. . . . Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.

44. This overview of Title IX and the new formal complaint process is adapted from a companion article by the author. Lynn M. Daggett, *Female Student Patient "Privacy" at Campus Health Clinics: Realities and Consequences*, 50 U. BALTO. L. REV. 77 (2020) [hereinafter Daggett, *Female Student Patient*]. That article examined student patient privacy at school health clinics under FERPA, HIPAA, and otherwise, and included an overview of the new Title IX formal complaint process as to those records. This Article uses a broader lens of student privacy generally and elaborates on the varied kinds of student information involved in a Title IX formal complaint response in Part II.A. This Article focuses on privacy in the new Title IX formal complaint process for student parties as to schools, parents, and opposing parties, and as to others resulting from school and opposing party redisclosure. This Article interrogates the promulgating agency's position and reasoning as to student privacy and identifies concerning student privacy consequences beyond the Title IX formal complaint context. Finally, while it is currently unclear how the new formal complaint process will look after the agency's announced review process, this article identifies necessary minimum changes to the new formal complaint process to adequately protect student privacy.

45. See 34 C.F.R. § 106.44(a) (2020).

46. See *id.* at §§ 106.44; 106.45.

47. See *id.* at § 106.44(b); see also *id.* at § 106.45(b)(3).

48. See 34 C.F.R. § 106.45(b)(5)(iii) (2020) (recipients must not restrict parties' ability to gather and present evidence); see Preamble, 85 Fed. Reg. at 30,432 ("These final regulations do not allow a Title IX Coordinator to restrict a party's ability to provide evidence. If a Title IX Coordinator restricts a party from providing evidence, then the Title IX Coordinator would be violating these final regulations and may even have a conflict of interest or bias, as described in 106.45(b)(1)(iii).").



the complainant, respondent, their advisors (who may be attorneys or lay persons including parents and friends), and in some cases their parents, that is “directly related to the allegations” in the complaint.<sup>49</sup> This includes evidence the investigator does not expect to be used in the hearing, and evidence the investigator thinks is not relevant.<sup>50</sup> The preamble indicates the investigator may redact information, including FERPA-protected information,<sup>51</sup> that is not directly related to the allegations, as well as barred information such as privileged information,<sup>52</sup> and information unlawfully obtained or unlawfully created.<sup>53</sup> The preamble indicates that schools in their discretion may require parties and advisors to sign non-disclosure agreements about the evidence,<sup>54</sup> but the preamble does not suggest schools must require non-disclosure agreements. Specific new privacy protections discussed below include a rape shield and a ban on non-consensual use of privileged

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49. *See* 34 C.F.R. § 106.45(b)(5)(vi) (2020).

50. *See id.*

51. *See* Preamble, 85 Fed. Reg. at 30,429:

Consistent with FERPA, these final regulations do not prohibit a recipient from redacting personally identifiable information from education records, if the information is not directly related to the allegations raised in a formal complaint. . . . A recipient, however, should be judicious in redacting information and should not redact more information than is necessary under the circumstances so as to fully comply with obligations under § 106.45.

52. *See id.* at 30,304:

With regard to the sharing of confidential information, a recipient may permit or require the investigator to redact information that is not directly related to the allegations (or that is otherwise barred from use under § 106.45, such as information protected by a legally recognized privilege, or a party’s treatment records if the party has not given written consent) contained within documents or other evidence that are directly related to the allegations, before sending the evidence to the parties for inspection and review.

53. *See id.* at 30,427:

The Department is not persuaded that these final regulations require a recipient to violate State law. If a recipient knows that a recording is unlawfully created under State law, then the recipient should not share a copy of such unlawful recording. The Department is not requiring a recipient to disseminate any evidence that was illegally or unlawfully obtained.

54. *See id.* at 30,304:

Recipients may require parties and advisors to refrain from disseminating the evidence (for instance, by requiring parties and advisors to sign a non-disclosure agreement that permits review and use of the evidence only for purposes of the Title IX grievance process), thus providing recipients with discretion as to how to provide evidence to the parties that directly relates to the allegations raised in the formal complaint.

information and party treatment records.<sup>55</sup> However, the investigator must share evidence with the parties and their advisors that is covered by the rape shield.<sup>56</sup>

In colleges, formal complaints are resolved in a formal live adversarial hearing that excludes statements by persons who do not submit to cross examination by the advisor for the opposing party.<sup>57</sup> K-12 schools can elect either a meeting or a hearing. Hearings are limited to relevant evidence.<sup>58</sup> Presumably the issues in a hearing are whether Title IX harassment occurred, which includes a requirement that it limited the complainant's equal access to the school's educational program, and if so what sanctions for the respondent and/or remedies for the complainant are appropriate.<sup>59</sup> As discussed below, witness credibility is relevant.<sup>60</sup> K-12 schools can resolve formal complaints via meeting or hearing.<sup>61</sup> In K-12 proceedings, parties must be allowed to submit written questions to parties and witnesses, learn of their answers, and submit limited follow up questions.<sup>62</sup> Moreover, the rape shield applies.<sup>63</sup>

In both colleges and K-12 schools, when the complainant and respondent are both students, they can voluntarily agree to mediation or other alternative informal resolution processes at any time.<sup>64</sup> The new rules do not provide privacy standards for informal resolution processes. Presumably the parties could condition agreement to an alternative

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55. These new protections are discussed *infra* in Part II.B.

56. *See* Preamble, 85 Fed. Reg. at 30,352 (“The Department disagrees that the evidence exchange provision in § 106.45(b)(5)(vi) negates the rape shield protections in § 106.45(b)(6)(i)B(ii). As noted by the Supreme Court, rape shield protections generally are designed to protect complainants from harassing, irrelevant inquiries into sexual behavior *at trial*.”).

57. *See* 34 C.F.R. § 106.45(b)(6)(i) (2020).

58. *See id.* at § 106.45(b)(6)(ii).

59. *See id.* at § 106.30 (limiting covered sexual misconduct to behavior that denied the complainant equal access to the educational program); *id.* at § 106.45(b)(7)(E) (requiring written decision that makes findings as to responsibility for the alleged misconduct, what sanctions if any, and whether remedies are appropriate).

60. *See id.* at § 106.45(b)(6)(i) (“The decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.”).

61. *See id.* at § 106.45(b)(6)(ii).

62. *See id.*

63. *See id.*

64. *See id.* at § 106.45(b)(9).

dispute resolution process on certain privacy protections, perhaps including greater privacy than that provided by Title IX and FERPA.

As a candidate, President Biden called the new rules an attempt to “shame and silence survivors” and promised “a quick end” to them.<sup>65</sup> Any end will almost certainly not be quick. The same years-long notice and comment process used to enact rules is required to repeal or revise them.<sup>66</sup> Whether the new rules will simply be repealed, meaning a return to the former approach giving schools discretion as to process (subject to limits identified by case law), wholly reworked, or amended in more modest ways cannot be predicted. This Article identifies the privacy standards currently in effect and the minimum changes that are necessary to adequately protect student privacy.

## II. STUDENT PRIVACY PROTECTIONS IN THE NEW TITLE IX RULES

The new Title IX rules require schools to collect and maintain extensive and intimate information about student parties.

### A. School collection of extensive and intimate student information to respond to formal complaints

Schools maintain extensive FERPA records on students: academic information such as grades, standardized test scores, teacher records, and student work product such as papers and exams; disciplinary information such as records of suspensions and investigations; student health information; information on students with disabilities such as documentation of disability and Individual Education Programs (IEPs) and accommodations plans; and other information such as parking passes and tickets, and financial aid information at colleges.<sup>67</sup> School officials may also have extensive information on students that is not recorded, gained through firsthand experience with the student. For

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65. Quilantan, *supra* note 4.

66. *See* 5 U.S.C. §§ 551(5), 553 (2018).

67. *See* 34 C.F.R. § 99.12 (2020); Dep’t of Education, What is an Education Record? <https://studentprivacy.ed.gov/faq/what-education-record> (last visited April 11, 2021); *see generally* Lynn M. Daggett, Bucking Up Buckley I: Making the Federal Student Records Statute Work, 46 Cath. L. Rev. 617, 624-25 (1997) (reviewing the various records covered by FERPA).

example, a teacher's letter of recommendation may share not only information from the student's records such as the grades the student earned in the teacher's class, but also the teacher's observation-based assessment of the student's work ethic, interpersonal skills, character, and peer relationships.

Schools commonly investigate student misconduct and collect relevant information. As discussed immediately below, the new Title IX rules for formal complaints of sexual misconduct require schools to collect, share, and synthesize extensive and uniquely intimate student information in an investigative report.<sup>68</sup> Schools have at least two incentives to zealously seek information in Title IX investigations. First, thorough investigation is required to meet the burden of proof<sup>69</sup> to find the respondent responsible. Second, failure to do a thorough investigation may result in lawsuits by student parties claiming this reflects bias toward one party.<sup>70</sup> Treatment of a respondent or complainant is actionable under the new rules.<sup>71</sup>

Consider an example where a complainant student reports sexual assault by another respondent student. The details of what occurred are obviously intimate. The school must investigate and collect evidence, creating records of interviews and other orally provided information, for use in the hearing. The investigation might gather information<sup>72</sup> such as:

- interviews with the student parties if they are willing,
- interviews with any eyewitnesses or other fact witnesses (perhaps, for example, witnesses saw relevant events, or overheard relevant statements by a student party after the reported assault),
- transcripts and other academic records for the complainant (which may show lower grades after the reported assault, relevant as

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68. See 34 C.F.R. § 106.45(b)(5)(vii) (2020) (requiring preparation of an investigation report that includes all relevant evidence).

69. See 34 C.F.R. § 106.45(b)(1)(vii) (2020).

70. See *id.* at § 106.45(b)(1)(iii).

71. See *id.* at § 106.45(b)(1)(i)-(iii), (b)(5).

72. In addition to the evidence and information initially gathered by the school, either party may supplement the evidence gathered by the school and the hearing will produce new information via testimony and perhaps otherwise. The listed categories of information are ones the author has gathered in conducting many sexual misconduct investigations for schools.

discussed above to both whether the reported assault occurred and its impact on the learning environment),

-any disciplinary records for the respondent as relevant to sanctions if found responsible for sexual assault,

-any disability information about student parties as relevant to their state of mind, relevant to sanctions if the respondent is found responsible for sexual assault, or relevant to impact on the complainant's learning environment,<sup>73</sup>

-any relevant treatment records of the parties shared with their consent, or of others such as pattern witnesses,

-any relevant video surveillance footage (for example video at the time and place of the reported sexual assault may show a party to be present or elsewhere at that time),

-any relevant video and audio recordings (for example some cases of targeted sexual assault are filmed),

-any relevant sexual history and reputation/character of the parties, perhaps including statements from pattern witnesses who claim sexual misconduct by the respondent,

-any relevant social media posts by or about the parties,

-any relevant physical evidence such as clothing, and

-any relevant campus security or police records.

The investigation will also gather credibility evidence. Sexual assault often occurs without eyewitnesses. Absent police involvement, DNA or other forensic evidence is not typically available. Hence, the statements of the parties about what happened are uniquely important evidence. For these reasons, and because credibility questions and evidence are specifically allowed in

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73. Consent may be required for disability records that are considered treatment records. See Preamble, 85 Fed. Reg. at 30,427 (suggesting that IEPs and Section 504 plans for covered students with disabilities are treatment records).

hearings,<sup>74</sup> school investigators will seek credibility evidence for the parties, and for any eyewitnesses or other key witnesses such as experts, alibi witnesses and pattern witnesses. Credibility evidence includes bias<sup>75</sup> (for example, does the complainant dislike the respondent, is the respondent's alibi witness their close friend); capacity<sup>76</sup> (for example, was a party intoxicated limiting their ability to accurately perceive and remember what happened, was an eyewitness fully able to see given darkness and distance); prior (in)consistent statements<sup>77</sup> (for example, did either party make a statement to police, a friend, the school's investigator, or a parent, that is consistent with or different from their testimony); contradiction<sup>78</sup> (are there other witnesses or evidence that tells a different story from the party's testimony); and reputation for honesty<sup>79</sup> (for example, character witnesses as to a party's (dis)honesty, or a party's prior dishonest acts).

The information gathered includes sexual information about both parties and also information about their honesty. The information concerns one or more specific students: the complainant, the respondent, and any student witnesses, and is maintained by the school for at least seven years<sup>80</sup> under the new rules. Hence, access to and redisclosure of this information is regulated generally by FERPA.<sup>81</sup>

## B. The new Title IX rules' specific privacy protections

The new rules add specific student privacy protections for some of this information by creating a rape shield, and forbidding school non-

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74. See 34 C.F.R. § 106.45(b)(6)(i) (2020).

75. See generally CHRISTOPHER MUELLER AND LAIRD KIRKPATICK, FEDERAL EVIDENCE §§ 6:26, 6:75, 6:76-6:79 (4<sup>th</sup> ed. 2009 and May 2020 update).

76. See generally CHRISTOPHER MUELLER AND LAIRD KIRKPATICK, FEDERAL EVIDENCE §§ 6:26, 6:75, 6:80 (4<sup>th</sup> ed. 2009 and May 2020 update).

77. See FED. R. EVID. 613; see generally CHRISTOPHER MUELLER AND LAIRD KIRKPATICK, FEDERAL EVIDENCE §§ 6:98-6:102 (4<sup>th</sup> ed. 2009 and May 2020 update).

78. See generally CHRISTOPHER MUELLER AND LAIRD KIRKPATICK, FEDERAL EVIDENCE §§ 6:26, 6:75, 6:85-6:90 (4<sup>th</sup> ed. 2009 and May 2020 update).

79. See FED. R. EVID. 608, 609; see generally CHRISTOPHER MUELLER AND LAIRD KIRKPATICK, FEDERAL EVIDENCE §§ 6:29-6:57 (4<sup>th</sup> ed. 2009 and May 2020 update).

80. See 34 C.F.R. § 106.45(b)(10)(i) (2020).

81. See 20 U.S.C. § 1232g(a)(4)(A) (2018).

consensual access and use of privileged information and student party treatment records.

1. *Evidence of the parties' sexual history, character, or reputation and the new Title IX rape shield.*<sup>82</sup>

The new rules create a rape shield for complainants somewhat akin to the approach in criminal cases under the federal evidence rule.<sup>83</sup> Most evidence of the complainant's sexual history and sexual character/disposition is inadmissible in college hearings and K-12 school hearings and meetings.<sup>84</sup> The rape shield does not apply to voluntary informal resolution processes.<sup>85</sup> Title IX's rape shield includes two exceptions similar to certain of the exceptions in the federal evidentiary rape shield in criminal trials. First evidence offered to prove that someone other than the respondent committed the conduct alleged by the complainant,<sup>86</sup> for example sexual activity with someone else close in time to the alleged sexual assault that explains the complainant's bruising or other injuries, is admissible. Second, prior consensual activity between the parties as evidence that the complained of sexual assault was also consensual sexual activity is not barred.<sup>87</sup> The Title IX rape shield references the complainant,<sup>88</sup> and thus appears not to apply to pattern witnesses who are not parties in the hearing. In contrast, the federal evidence rule refers to evidence concerning "a

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82. This brief overview of the Title IX rape shield is adapted from a more detailed overview in a companion article. Daggett, *Female Student Patient*, *supra* note 44.

83. *See, e.g.*, FED. R. EVID. 412.

84. *See* 34 C.F.R. § 106.45(b)(6)(i) (2020) (discussing grievance hearings in higher education):

Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

*See also id.* at § 106.45(b)(6)(ii) (explaining grievance adjudication procedures in K-12 schools).

85. *See id.* at § 106.45(b)(9).

86. *See id.* at § 106.45(b)(6)(i); FED. R. EVID. 412(b)(1)(A).

87. *See* 34 C.F.R. § 106.45(b)(6)(i) (2020); FED. R. EVID. 412(b)(1)(B).

88. *See* 34 C.F.R. § 106.45(b)(6)(i) (2020).

victim.”<sup>89</sup> The rape shield does not protect information gathered in the school’s investigation<sup>90</sup> from being shared with the parties and their advisors, and a respondent may try to admit such evidence in the hearing.

The Title IX rape shield does not apply to respondents and thus does not bar evidence of the respondent’s sexual history and character, including past sexual assault or harassment. In the example, the school’s investigation may uncover pattern witnesses (other students or persons who claim sexual assault by the respondent). Federal rules of evidence expressly make some sexual misconduct pattern behavior of defendants admissible in some sexual misconduct civil and criminal trials.<sup>91</sup>

In the example, some of the information the school collected about the complainant’s sexual history and reputation will be barred by the rape shield from the investigation report and the hearing. However, it will be shared with the parties and advisors and maintained by the school which can redisclose it as permitted by FERPA. As to the sexual history and reputation of the respondent, perhaps including statements and other information from pattern witnesses, the rape shield does not apply and it will be shared with the parties and advisors and maintained by the school which can redisclose it as permitted by FERPA.

## 2. *Privileged information.*<sup>92</sup>

Privileged information that is not waived is also excluded and cannot be accessed or used by schools.<sup>93</sup> The preamble specifically mentions attorney-client privilege and also notes the possibility of respondents asserting their Fifth Amendment privilege against self-

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89. See FED. R. EVID. 412.

90. See Preamble, 85 Fed. Reg. at 30,352 (“The Department disagrees that the evidence exchange provision in § 106.45(b)(5)(vi) negates the rape shield protections in § 106.45(b)(6)(i),(ii). As noted by the Supreme Court, rape shield protections generally are designed to protect complainants from harassing, irrelevant inquiries into sexual behavior *at trial*.”).

91. See FED. R. EVID. 413-15.

92. This brief overview of privilege in Title IX hearings is adapted from a fuller overview in a companion article. Daggett, *Female Student Patient*, *supra* note 44.

93. See 34 C.F.R. § 106.45(b)(1)(x) (2020) (schools may “not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.”).



incrimination, in which case the respondent's statements would be inadmissible and no inference from failure to testify could be drawn.<sup>94</sup>

Some privileges including attorney-client, physician-patient, and therapist-patient apply only to confidential communications.<sup>95</sup> Conversations in places where it is reasonably foreseeable that third persons may hear may not be confidential, and not privileged.<sup>96</sup> External law also limits reasonable expectations of privacy and hence confidentiality.<sup>97</sup> Student medical records are subject to FERPA and not the HIPAA Privacy Rule and may thus have limited confidentiality, perhaps rendering them unprotected by therapist and physician privileges.<sup>98</sup> However, state law may add further confidentiality requirements to these records.<sup>99</sup> Communications do not include observations.<sup>100</sup> For example, testimony that a party was observed (not) to have injuries is an observation rather than a communication and thus outside most privileges.

In the example, the new treatment records exception discussed immediately below precludes school access to or use of party treatment records without consent,<sup>101</sup> but nonparty treatment records might be

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94. See Preamble, 85 Fed. Reg. at 30,352:

As discussed above, we have revised § 106.45(b)(6)(i) to direct a decision-maker who must not rely on the statement of a party who has not appeared or submitted to cross-examination not to draw any inference about the determination regarding responsibility based on the party's absence or refusal to be cross-examined (or refusal to answer other questions, such as those posed by the decision-maker). This modification provides protection to respondents exercising Fifth Amendment rights against self-incrimination though it applies equally to protect complainants who choose not to appear or testify.

95. See, e.g., *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996) (creating a therapist privilege for confidential communications between therapists and patients).

96. See, e.g., CHRISTOPHER MUELLER AND LAIRD KIRKPATICK, FEDERAL EVIDENCE § 5:18 (4th ed. 2009 and May 2020 update) (examining confidentiality element for attorney-client privilege).

97. See, e.g., *Humphers v. First Interstate Bank*, 696 P.2d 527, 527-28 (Or. 1985); *Pence v. Aspen Educ. Grp.*, No. 05-6199-HO, 2006 WL 3345192, at \*3 (D. Or. Nov. 16, 2006).

98. See, e.g., *Doe v. Northern Ky. Univ.*, No. 2:16-CV-28, 2016 WL 6237510 at \*1 (E.D. Ky. October 10, 2016) (imposing sanctions for refusing to answer deposition questions citing FERPA, because FERPA does not create a privilege).

99. See, e.g., WASH. REV. CODE ANN. §§ 70.02.005–.905 (West 2020).

100. See, e.g., CHRISTOPHER MUELLER & LAIRD KIRKPATICK, FEDERAL EVIDENCE § 5:18 (4th ed.) (discussing limitation of attorney-client privilege to confidential communications); *id.* at § 5:40 (discussing same limitation for marital communications privilege); *id.* at § 5:43 (discussing same limitation for therapist privilege).

101. See *infra* Part II.B.3.

protected by therapist or physician privileges.<sup>102</sup> In this event schools could not use or access them.<sup>103</sup> If the treatment took place on campus and is hence regulated by FERPA they may arguably be outside any privilege because they are not confidential as to the school and school proceedings.<sup>104</sup> Statements from eyewitnesses, even by their attorneys, as to observations of the parties would be outside privilege.<sup>105</sup> Looking at medical or therapy documents as a memory aid during testimony at a hearing waives any applicable privilege.<sup>106</sup> To the extent records are not privileged, the school must share them with the parties and advisors<sup>107</sup> and could redisclose them in accordance with FERPA.<sup>108</sup>

### 3. *Treatment (medical/counseling) records.*<sup>109</sup>

A new provision, not part of the proposed Title IX rules, provides that schools may not access or use a party's medical/psychological treatment records without voluntary written consent:

*Investigation of a formal complaint.* When investigating a formal complaint and throughout the grievance process . . .

(i) . . . the recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under this section (if a party is not an

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102. *See infra* Part II.B.3.

103. *Id.*

104. *See supra* note 98 and accompanying text.

105. *See supra* note 100 and accompanying text.

106. *See generally* CHRISTOPHER MUELLER AND LAIRD KIRKPATICK, FEDERAL EVIDENCE §§ 6:12, 6:97 (4<sup>th</sup> ed. 2009 and May 2020 update).

107. *See infra* Part II.C.3.

108. *See generally* 20 U.S.C. § 1232g(b) (2018).

109. Student medical privacy generally is examined in a companion article. Lynn M. Daggett, *The Myth of Student Medical Privacy*, 14 HARVARD L. & POLICY REV. 467-530 (2020). This overview of the new Title IX treatment records provision is adapted from a companion article. Daggett, *Female Student Patient*, *supra* note 44.

eligible student, . . . then the recipient must obtain the voluntary, written consent of a parent. . . ).<sup>110</sup>

The text of this provision is not limited to records of on-campus party treatment generally, nor to treatment in school health clinics specifically, but covers records of treatment by both off-campus providers and by on-campus providers in school health clinics and otherwise such as a nurse or counselor employed by a K-12 school.<sup>111</sup> Moreover, party consent to use of treatment records is limited to use in the formal complaint process.<sup>112</sup>

Other aspects of the ban on treatment records are narrow. The ban on school access is limited to the Title IX formal complaint process.<sup>113</sup> It thus does not apply to other Title IX activities, such as when a school initiates an investigation without a formal complaint, or engages in individualized safety and risk analysis to determine if a respondent student presents an immediate threat to the physical health or safety of any student or other individual justifying emergency removal.<sup>114</sup> It also does not ban use of party treatment records in litigation such as Title IX lawsuits against schools. Moreover, because the provision is limited to the treatment records of parties,<sup>115</sup> schools presumably can access and use treatment records of non-parties such as those of pattern or other witnesses, or friends of the parties as relevant to the credibility of the parties or of other victims. Any such records would be shared with the parties and advisors, who may redisclose them.<sup>116</sup> In a recent Title IX case, a school employee sought campus health clinic records of parties and also nonparty witnesses.<sup>117</sup>

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110. *See* 34 C.F.R. § 106.45(b)(5)(i) (2020).

111. *See id.*

112. *See id.*

113. *See id.* (treatment records ban provision begins with “When investigating a formal complaint and throughout the grievance process . . .”).

114. *See id.* at § 106.44(c).

115. *See* 34 C.F.R. § 106.45(b)(5)(i) (2020).

116. *See* Preamble, 85 Fed. Reg. at 30,434 (noting that when a party consents to release of treatment records, normally both parties and their advisors will have full access to those records).

117. *Bowen v. Methodist Fremont Health*, No. 19CV270, 2020 WL 1904832, at \*1–2, \*6 (D. Neb. Apr. 16, 2020) (discussing college supervisor who claimed a FERPA legitimate educational interest related to compliance with Title IX obligations to demand that college nurse

In the example, the school could not access or use any treatment records of the parties without their consent. It is not completely clear to what extent disability records might be considered treatment records. The Preamble suggests that special education Individual Education Programs (IEPs) are treatment records and thus consent is required to access and include them in a Title IX investigation.<sup>118</sup> Treatment records of nonparties such as pattern witnesses would not be protected.<sup>119</sup> Treatment records of nonparties and similar records of parties outside of the ban, and consented to party treatment records could be accessed by the school and if so must be shared with the parties,<sup>120</sup> and the school can redisclose them as permitted by FERPA.<sup>121</sup>

#### 4. *Other specific privacy protections.*

The new rules require schools to keep names of parties and witnesses to formal complaints confidential except as permitted by FERPA, as required by law, or as required for Title IX procedures.<sup>122</sup> While FERPA permits colleges to publicly release names of students found responsible for certain sexual misconduct,<sup>123</sup> recent subregulatory guidance from the agency indicates names may not be released for retaliatory reasons.<sup>124</sup> Counseling and other supportive services that are

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provide confidential student patient information for both a sexually assaulted student and other college students).

118. Preamble, 85 Fed. Reg. at 30,427 (also taking same position for Section 504 plans for covered students with disabilities).

119. *See supra* note 115 and accompanying text.

120. *See infra* Part II.C.3.

121. *See generally* 20 U.S.C. § 1232g(b) (2018).

122. *See* 34 C.F.R. § 106.71(a) (2020):

The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by . . . FERPA . . . , or as required by law, or to carry out the purposes of § 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

123. 20 U.S.C. § 1232g(b)(6)(B) (2018).

124. Office for Civil Rights, Questions and Answers Regarding the Department's Final Title IX Rule at Q. 10 (September 4, 2020), available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-part1-20210115.pdf>.

confidential<sup>125</sup> must be offered to complainants, and may be offered to respondents.<sup>126</sup>

### C. The general student privacy approach of the new Title IX rules

As the discussion immediately above makes clear, little of the extensive information schools gather to respond to a Title IX formal complaint is covered by the new rules' privacy protections. The great bulk of the information is left to the new rules' default approach: 1) requiring schools to share this extensive and intimate student information with all parties and advisors, even including some inadmissible information such as sexual history protected by the new rape shield; 2) with no ban on redisclosure of this information by the parties; 3) under FERPA allowing schools to non-consensually redisclose this information internally and externally in myriad circumstances; 4) allowing schools to use this information to defend Title IX lawsuits brought by student complainants and respondents; and 5) in some respects lessening privacy of adult students in this information vis a vis their parents. The details of this information privacy approach as to schools, parents, and opposing parties and their advisors are explored below.

While the primary focus of this Article is information privacy, decisional autonomy is another facet of privacy. The general approach of the new Title IX rules provides some decisional autonomy. For example, parties may choose not to participate in interviews or other aspects of the investigation, or in the hearing.<sup>127</sup> Parties may gather their own evidence, and may not be limited in doing so, and may ask the school to gather specific additional evidence.<sup>128</sup> Complainants normally decide whether to file a formal complaint.<sup>129</sup> However, some

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125. See 34 C.F.R. § 106.44(a) (2020); see also *id.* at § 106.30(a) (“The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.”). For example, removing a student from a class cannot be done with complete confidentiality.

126. See *id.* at § 106.44(a).

127. See *id.* at § 106.71(a).

128. *Id.* at § 106.45(b)(5)(iii) (right to gather and present evidence); see also Preamble, 85 Fed. Reg. at 30,310 (supplementing evidence at party request).

129. See 34 C.F.R. § 106.45(b)(3)(ii) (2020).

complainants, and all respondents, become involved in the formal complaint process (with its attending information privacy consequences) other than by choice. Formal complaints may be filed by the school's Title IX coordinator,<sup>130</sup> and parents may file or participate on behalf of (minor) children.<sup>131</sup> The new rules indicate that if FERPA does not provide access rights to the parent (such as a minor college student who has by enrollment in college become the holder of FERPA rights but is not yet a legal adult), the parent who has filed the formal complaint has the right to access the evidence and investigative report.<sup>132</sup> When a parent or the Title IX Coordinator files the formal complaint or otherwise acts for a student, the agency asserts that the student (even if a young child) is still the complainant/respondent, and thus has access to the evidence and investigative report.<sup>133</sup>

Decisional autonomy of a sort results from the ban on statements by persons (both parties and nonparty witnesses) who do not submit to full cross examination.<sup>134</sup> Both parties and witnesses can keep their statements from admission at the hearing by refusing to submit to full cross examination.<sup>135</sup> Statements by witnesses who are unavailable to

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130. *See generally id.* at § 106.30(a) (defining formal complaints to include complaints signed by Title IX Coordinator); *see* Preamble, 85 Fed. Reg. at 30,213 (“[T]he Title IX Coordinator signs a formal complaint, after having considered the complainant’s wishes and evaluated whether an investigation is not clearly unreasonable in light of the specific circumstances.”).

131. *See also* 34 C.F.R. § 106.6(g) (2020).

132. *See* Preamble, 85 Fed. Reg. at 30,453 (“However, in circumstances in which FERPA would not accord a party the opportunity to inspect and review such evidence, these final regulations do so and provide a parent or guardian who has a legal right to act on behalf of a party with the same opportunity.”).

133. *See* 34 C.F.R. § 106.30(a) (2020) (Title IX Coordinator is not complainant, even if they file the complaint); *see also* Preamble, 85 Fed. Reg. at 30,432 (when parents file complaints “parties who are students would have a right to inspect and review records directly related to the allegations in a formal complaint . . . because these records would directly relate to the parties in the complaint.”). *See generally* 34 C.F.R. § 99.31(a)(12) (2020) (FERPA regulations authorize disclosure to students not yet 18 or in college, but do not give them a right of access).

134. *See* 34 C.F.R. § 106.45(b)(6)(i) (2020):

If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.

135. *See id.*

testify at the hearing are also excluded.<sup>136</sup> The specific parameters of this kind of confidentiality cannot be ascertained by parties in advance.

This ban is limited to evidence offered to determine responsibility.<sup>137</sup> It thus does not appear to extend to evidence offered as to sanctions against respondents found to be responsible, nor to the impact of harassment on the complainant as relevant to determine appropriate remedies for the complainant if the respondent is found responsible. However, it would apply to the impact of harassment on the complainant to determine whether the misconduct caused denial of equal access to the educational program, a required part of hostile environment sexual harassment.<sup>138</sup> For example, a complainant's academic transcript showing a decline in grades coinciding with misconduct seems relevant to both academic remedies and denial of equal access to the educational program. Moreover, according to recent administrative guidance, refusal to answer even one relevant question on cross examination triggers the ban.<sup>139</sup> Thus a party or witness may testify and submit to cross examination generally, but refusing to answer one or more cross examination questions renders their entire testimony inadmissible.

### *1. Student privacy as to schools and redisclosure by schools.*

Schools must keep detailed records of formal complaints and responses for seven years, including the investigation report and a transcript of higher education hearings.<sup>140</sup> Like a trial transcript, Title IX hearing records would include admitted evidence, as well as evidence offered by a party that was ruled inadmissible, perhaps because irrelevant, or because the witness did not submit to full cross

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136. 34 C.F.R. § 106.45(b)(6)(i) (2020) (also providing “the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.”).

137. *See id.* (“If a party or witness does not submit to cross examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness *in reaching a determination regarding responsibility.*”) (emphasis added).

138. *See id.* at § 106.30(a)(2).

139. *See* Office for Civil Rights, Questions and Answers Regarding the Department's Final Title IX Rule at 6 (September 4, 2020), available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-part1-20210115.pdf>.

140. 34 C.F.R. § 106.45(b)(10)(i) (2020).

examination.<sup>141</sup> The investigation report would include relevant party and witness statements that were not ultimately admitted, perhaps because the declarant was unavailable to testify and submit to full cross examination.<sup>142</sup> Formal complaints resolved through the informal process would typically result in a written settlement agreement signed by the parties with a copy kept by the school.<sup>143</sup> Formal complaints resolved through higher education hearings, or by K-12 school meetings or hearings, require a detailed written decision.<sup>144</sup> Decisions must be shared simultaneously with the parties and must be kept by the school.<sup>145</sup> Decisions indicate whether remedies are appropriate but do not specify them, presumably to protect the privacy of the complainant.<sup>146</sup> Schools may create other records concerning remedies which could be shared with the complainant or accessed by the complainant under FERPA. These records are FERPA records and may be used and disclosed by the school consistent with FERPA and Title IX.<sup>147</sup>

*(a) School use of information to defend student Title IX and related litigation.*

Students may file Title IX complaints against schools with the DOE's Office for Civil Rights (OCR).<sup>148</sup> Students may also sue their schools for Title IX violations, and/or under related theories in contract and tort.<sup>149</sup> Generally the information collected by the school in its investigation, and the evidence offered at the hearing, is available to schools to defend these claims. As discussed above, the Title IX rape shield and privilege rules, and the ban on treatment records, are limited to the internal formal complaint process. In litigation, rules of evidence

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141. *See id.* at § 106.45(b)(6)(i) (requiring a recording or transcript of the entire hearing).

142. *Id.* at § 106.45(b)(5)(vii) (providing investigation report must include all relevant evidence).

143. *See* Preamble, 85 Fed. Reg. at 30,405 (referring to resolution agreements resulting from the informal process and indicating such agreements would be treated as contracts).

144. *See* 34 C.F.R. § 106.45(b)(7) (2020).

145. *Id.* at § 106.45(b)(7)(iii).

146. *Id.* at § 106.45(b)(7)(ii)(E).

147. *See* Preamble, 85 Fed. Reg. at 30,425; 34 C.F.R. § 106.45(b)(7)(iv) (2020).

148. 34 C.F.R. § 106.71 (2020).

149. *See, e.g.,* Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60 (1992); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998); Davis v. Monroe City Bd. of Educ., 526 U.S. 629 (1999).



govern rape shield and privilege.<sup>150</sup> As to party treatment records, no specific rule of evidence rule bans them, but recent non-binding DOE guidance suggests some limits on their non-consensual use by schools.<sup>151</sup> Moreover, the new rules' language on party treatment records refers to consent for the grievance process,<sup>152</sup> and so consent for the Title IX formal complaint process would not extend to Title IX or litigation against the school. While uncross-examined statements are barred from school Title IX hearings, the rules of evidence for litigation have no such ban.<sup>153</sup> More generally, student records created or maintained for a Title IX formal complaint, even if not admitted or admissible in the hearing, are governed outside of that context by FERPA, which allows schools to non-consensually disclose information to the court in the context of school-student litigation.<sup>154</sup>

*(b) School disclosure to third persons.*

The new rules govern use and access to the information from the investigation and hearing only within the context of the Title IX formal complaint process.<sup>155</sup> Outside of this process, records of student parties or witnesses would be FERPA records, governed by FERPA's privacy standards.<sup>156</sup>

As discussed above, schools must maintain extensive records about formal complaints including the evidence, the investigation report, and a transcript of the hearing.<sup>157</sup> These records would include not only admitted evidence, but also evidence offered by a party at a hearing that was ruled inadmissible, party and witness statements that were not admitted because the declarant did not submit to full cross examination,

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150. *See, e.g.* FED. R. EVID. 412 (rape shield for federal trials); FED. R. EVID. 501-02 (privileges in federal trials).

151. *See* U.S. Dep't of Educ., Dear Colleague Letter, Protecting Student Medical Records (Aug. 24, 2016), [https://studentprivacy.ed.gov/sites/default/files/resource\\_document/file/DCL\\_Medical%20Records\\_Final%20Signed\\_dated\\_9-2.pdf](https://studentprivacy.ed.gov/sites/default/files/resource_document/file/DCL_Medical%20Records_Final%20Signed_dated_9-2.pdf).

152. *See* 34 C.F.R. § 106.45(b)(5)(i) (2020).

153. *See generally* FED. R. EVID. 801-04 (setting forth several dozen exceptions to the ban on hearsay in federal trials).

154. *See* 34 C.F.R. § 99.31(a)(9)(iii) (2020).

155. *See* 34 C.F.R. §§ 106.30; 106.44; 106.45 (2020) (defining Title IX sexual misconduct and required school responses to it including the specified grievance/hearing process).

156. 20 U.S.C. § 1232g (2018).

157. *See* 34 C.F.R. § 106.45(b)(10) (2020).

and evidence banned by the rape shield.<sup>158</sup> Schools may non-consensually disclose these records as permitted by FERPA, which generally does not limit school discretion as to what or which records to disclose.<sup>159</sup> For example, schools may decide to disclose records internally to other school employees with legitimate educational interests,<sup>160</sup> such as the school attorney in the event of a student OCR complaint or Title IX lawsuit. FERPA specifically permits sharing disciplinary information internally.<sup>161</sup> To the extent school employees or other agents are involved in formal complaints as investigators, parties, witnesses, advisors, Title IX Coordinators, or decision-makers, they would presumably be able to access records to the extent of their legitimate educational interests in them.<sup>162</sup>

As to FERPA-authorized external disclosure, schools may, with prior notice, but not necessarily with consent, disclose any and all records to a new school in which the student plans to enroll or is enrolled.<sup>163</sup> Schools may also non-consensually disclose any and all records to parents of adult or college-enrolled students if the student is a financial dependent,<sup>164</sup> and to persons as necessary in emergencies.<sup>165</sup> With prior individual notice, schools may non-consensually disclose

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158. *See id.* at § 106.45(b)(6)(i) (requiring a recording or transcript of the entire hearing); Preamble, 85 Fed. Reg. at 30,352 (May 19, 2020) (“The Department disagrees that the evidence exchange provision in § 106.45(b)(5)(vi) negates the rape shield protections in § 106.45(b)(6)(i)B(ii). As noted by the Supreme Court, rape shield protections generally are designed to protect complainants from harassing, irrelevant inquiries into sexual behavior *at trial*.”).

159. *See generally* 20 U.S.C. § 1232g(b) (2018) (listing circumstances authorizing school non-consensual disclosure of education records).

160. *See* 34 C.F.R. § 99.31(a)(1) (2020).

161. *See* 20 U.S.C. § 1232g(h) (2018):

Nothing in this section shall prohibit an educational agency or institution from— (1) including appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community; or (2) disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student.

162. *See* 34 C.F.R. § 99.31(a)(1)(i)(A) (2020) (allowing schools to permit access by school employee and agents who have legitimate educational interests).

163. *See* 34 C.F.R. § 99.31(a)(2) (2020) (also authorizing general advance notice, such as in a student handbook).

164. 20 U.S.C. § 1232g(b)(1)(H) (2018).

165. 34 C.F.R. § 99.36(a) (2020).

records that are subpoenaed.<sup>166</sup> FERPA's ban on redisclosure would apply to these non-consensual disclosures to third parties.<sup>167</sup>

2. *Student privacy as to parents.*

(a) *Minor K-12 students.*

FERPA rights of minor students not enrolled in college are held by their parents.<sup>168</sup> As discussed above, the new rules allow parents to file complaints for their minor children,<sup>169</sup> and defend or otherwise participate on behalf of their minor children. Parents who do so have access to the records of the investigation,<sup>170</sup> as does the minor student.<sup>171</sup> As to parents this is not a significant change from the normal arrangement under FERPA, which permits parents to access the records of their minor children enrolled in K-12 schools.<sup>172</sup> As to minor students not in college, FERPA permits but does not grant a right of access,<sup>173</sup> but the new Title IX rules provide access rights to Title IX formal complaint information.

(b) *Minor college students.*

FERPA rights transfer from parents upon the earlier of becoming a legal adult at age 18 or enrolling in college,<sup>174</sup> and hence minor students in college hold their own FERPA rights. However, the new rules allow parents to file complaints or otherwise act for their minor children, even those who are enrolled in college.<sup>175</sup> Parents who do so have access to

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166. 20 U.S.C. § 1232g(b)(2)(B) (2018).

167. *See id.* at § 1232g(b)(4)(B).

168. *See* 20 U.S.C. § 1232g(d) (2018).

169. *See* 34 C.F.R. § 106.6(g) (2020).

170. *See* Preamble, 85 Fed. Reg. at 30,453.

171. *Id.* at 30,432 (“[P]arties who are students would have a right to inspect and review records directly related to the allegations in a formal complaint under FERPA . . . and its implementing regulations . . . because these records would directly relate to the parties in the complaint.”); *see also* 34 C.F.R. § 99.31(a)(12) (2020) (FERPA regulations authorize disclosure to students not yet 18 or in college, but do not give them a right of access).

172. 20 U.S.C. § 1232g(a)(1)(A) (2018).

173. *See* 34 C.F.R. § 99.31(a)(12) (2020).

174. *See* 20 U.S.C. § 1232g(d) (2018).

175. *See* 34 C.F.R. § 106.6(g) (2020).

the records of the investigation, as does the minor student.<sup>176</sup> It is not clear that the DOE has administrative authority to write regulations that require schools to non-consensually share records with parents of minor students in college. However, most minors in college are their parents' financial dependents, in which event FERPA permits non-consensual disclosure.<sup>177</sup> As discussed above, the new rules require collection and recording of extensive and intimate information, at a different level than the records normally available to parent of minor K-12 students under FERPA.<sup>178</sup> Hence, the primary impact is that some parents of minor college students will have a right to access extensive and intimate records. However, recent subregulatory Q & A guidance from the agency suggests an additional change, indicating that a new Title IX regulation concerning parent rights may require schools to inform parents of possible Title IX sexual misconduct that affects their minor child.<sup>179</sup>

(c) *Adult students.*

Students who are legal adults hold their own FERPA rights,<sup>180</sup> and the new rules do not provide a role for their parents in the formal complaint process. However, for adult students who are financial dependents of their parents, FERPA permits non-consensual disclosure to parents,<sup>181</sup> and in this context schools can permit parent access to the extensive and intimate records of a Title IX formal complaint.

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176. See Preamble, 85 Fed. Reg. at 30,453 (parent rights of access); 20 U.S.C. § 1232g(d) (2018) (minor students in college hold their own FERPA rights). See also *id.* at § 1232g(a)(1)(A)-(B) (minor students in college have the specific right to access their own records).

177. See 20 U.S.C. § 1232g(b)(1)(H) (2018).

178. See *supra* Part II.A.

179. Office for Civil Rights, Questions and Answers Regarding the Department's Final Title IX Rule at 6 (September 4, 2020), available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-part1-20210115.pdf>.

180. See 20 U.S.C. § 1232g(d) (2018).

181. See *id.* at § 1232g(b)(1)(H). See also Charles Ornstein, When Students Become Patients, Privacy Suffers, ProPublica (October 23, 2015), available at <https://www.propublica.org/article/when-students-become-patients-privacy-suffers> (describing college's release of mental health information for 21-year-old student to parents school knew to be estranged from their student).

3. *Student privacy as to the other party and party advisors, and redisclosure by parties and advisors.*

(a) *Shared information with parties and advisors.*

As discussed above, the parties and their advisors receive all the evidence the school has gathered in its investigation which is “directly related to the allegations” in the complaint.<sup>182</sup> At this stage, the investigator must share evidence made inadmissible in the hearing by the new rules’ rape shield.<sup>183</sup> The parties and their advisors also have a right of access to the investigation report the school then prepares, which is limited to relevant information, and hence would exclude evidence protected by the new Title IX rape shield.<sup>184</sup> Party access rights include parties who are minors, even young children.<sup>185</sup>

Comments on the proposed regulations<sup>186</sup> as well as pending litigation<sup>187</sup> assert that non-consensually sharing evidence with parties and advisors violates FERPA. The preamble reasons that evidence that is “directly related to the [Title IX] allegations” and therefore must be shared with the parties under the new rules, is also “directly related” under FERPA to both the complainant and respondent, and hence is the FERPA record of each party.<sup>188</sup> According to the agency, each party thus has a FERPA right of access. In fact, the preamble suggests the parties would have a FERPA right of access even without the new

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182. See 34 C.F.R. § 106.45(b)(5)(vi) (2020).

183. Preamble, 85 Fed. Reg. at 30,352 (“The Department disagrees that the evidence exchange provision in § 106.45(b)(5)(vi) negates the rape shield protections in § 106.45(b)(6)(i)B(ii). As noted by the Supreme Court, rape shield protections generally are designed to protect complainants from harassing, irrelevant inquiries into sexual behavior *at trial.*”) (emphasis added).

184. See 34 C.F.R. § 106.45(b)(5)(vii) (2020) (investigative report to contain relevant evidence); *id.* at § 106.45(b)(6)(i) (information protected by rape shield is not relevant).

185. Preamble, 85 Fed. Reg. at 30,432 (“Even if these final regulations did not exist, parties who are students would have a right to inspect and review records directly related to the allegations in a formal complaint under FERPA, 20 U.S.C. 1232g(a)(1)(A)(B), and its implementing regulations, 34 CFR §99.10-99.12, because these records would directly relate to the parties in the complaint.”). See also 34 C.F.R. § 99.31(a)(12) (2020) (FERPA regulations authorize disclosure to students not yet 18 nor in college, but do not give them a right of access).

186. See, e.g., 85 Fed. Reg. at 30,424 (2020).

187. See, e.g., *New York v. Dep’t of Educ.*, 477 F.Supp.3d 279 (S.D.N.Y. 2020) (denying stay and preliminary injunction).

188. See 85 Fed. Reg. at 30,423 (2020).

rules.<sup>189</sup> The cogency of this reasoning and the consequences of this position are discussed in Part III. A new Title IX rule not limited to the formal complaint process states essentially that Title IX regulations take precedence over FERPA statutory requirements.<sup>190</sup> It is also discussed in Part III.

*(b) Rediscovery of shared information.*

Under the agency's reasoning that the evidence is the FERPA record of both parties, FERPA limits on redisclosure of records shared with third parties do not apply.<sup>191</sup> The parties are free to share "their" records with others.<sup>192</sup> It is not hard to imagine an unsuccessful student party disclosing records. A complainant might be tempted to widely share a confession to misconduct by respondent found not responsible. A respondent might be tempted to widely share a confession to fabrication of events by the complainant. Either confession might not be admitted at a hearing because the confessor did not submit to full cross examination. It is also not difficult to imagine a young and immature complainant or respondent talking freely about information shared in a hearing, investigation report, or meeting.

The new rules in fact explicitly prohibit gag orders on the allegations under investigation.<sup>193</sup> The preamble suggests that the ban on gag orders does not extend to discussions of evidence or the investigative report,<sup>194</sup> but does not clarify where allegations end and evidence begins. As discussed above, the preamble indicates that schools may, but need not, require non-disclosure agreements for parties and advisors.<sup>195</sup> The preamble's use of the terms

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189. *Id.* at 30,432:

Even if these final regulations did not exist, parties who are students would have a right to inspect and review records directly related to the allegations in a formal complaint under FERPA, 20 U.S.C. 1232g(a)(1)(A)-(B) (2018), and its implementing regulations, 34 CFR 99.10 through 9.12, because these records would directly relate to the parties in the complaint.

190. *See* 34 C.F.R. § 106.6(e) (2020).

191. *See* 20 U.S.C. § 1232g(b)(4)(B) (2018) (FERPA redisclosure limits for records shared with *third parties*).

192. *See* 20 U.S.C. § 1232g(b)(4)(B) (2018).

193. *See* 34 C.F.R. § 106.45(b)(5)(iii) (2020).

194. Preamble, 85 Fed. Reg. at 30,297, 30,432.

195. *See id.* at 30,297; *id.* at 30,432:

“require” and “non-disclosure agreement” are puzzling: a non-disclosure agreement generally covers a single case, but schools’ ability to require them suggests the possibility of a blanket school policy banning redisclosure. Moreover, the preamble’s reference to the possibility of non-disclosure agreements suggests the agency does not think these agreements violate due process or speech rights. It is unclear what a school could do in the event a party or advisor refused to sign an agreement, and it is also unclear how violations of signed non-disclosure agreements would be enforced. Notably, violations of required process are themselves actionable under Title IX, but failure to comply with a non-disclosure agreement does not involve a required process. The preamble also suggests disclosures or statements that are defamatory or invasive of privacy or retaliatory (such as witness tampering) are not permitted.<sup>196</sup>

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Recipients also may specify that the parties are not permitted to photograph the evidence or disseminate the evidence to the public. Recipients thus have discretion to determine what measures are reasonably appropriate to allow the parties to respond to and use the evidence at a hearing, while preventing the evidence from being used in an impermissible manner as long as such measures apply equally to both parties under § 106.45(b). Such measures may be used to address sensitive materials such as photographs with nudity.

*See also id.* at 30,304 (“Recipients may require parties and advisors to refrain from disseminating the evidence (for instance, by requiring parties and advisors to sign a non-disclosure agreement that permits review and use of the evidence only for purposes of the Title IX grievance process”); *see also* 34 C.F.R. § 106.45(b) (2020) (any requirement of non-disclosure agreements would need to apply to both parties). Where advisors or parties are school employees, FERPA would bar redisclosure. 20 U.S.C. § 1232g(b)(4)(B) (2018). *See also* 85 Fed. Reg. at 30,423:

The Department does not interpret Title IX as either requiring recipients to, or prohibiting recipients from, using a non-disclosure agreement, as long as such non-disclosure agreement does not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence under § 106.45(b)(5)(iii). Any non-disclosure agreement, however, must comply with all applicable laws.

196. *See* Preamble, 85 Fed. Reg at 30,296 (no right to discuss allegations in a manner that exposes the party to liability for defamation or related privacy torts, or in a manner that constitutes unlawful retaliation); *id.* at 30,281 (witness tampering).

### III. THE STUDENT PRIVACY PROTECTIONS OF THE NEW TITLE IX FORMAL COMPLAINT PROCESS ARE A FAILURE

#### A. The veneer of specific student privacy protections in the new rules obscures their broad student privacy failures

As discussed in Part II, the new formal complaint process requires schools to collect extensive and intimate information about student parties. The new rules give certain of this information a veneer of protection, creating a rape shield as well as banning school access to and use of party treatment records and privileged information. These new protections are quite narrow. In contrast to the federal rules of evidence rape shield it is based on, the Title IX rape shield protects only the complainant and does not protect other victims such as pattern witnesses.<sup>197</sup> Similarly, the new Title IX treatment records ban applies only to parties and not to witnesses (including past victims who may be pattern witnesses),<sup>198</sup> nor to party friends whose treatment records were sought in one recent Title IX case,<sup>199</sup> perhaps to uncover credibility or other evidence.

In deeper and broader ways, the new system reduces student privacy. The new rules do not prohibit schools from disclosing evidence or other information gathered in investigations and hearings beyond the existing limits established by FERPA.<sup>200</sup> As discussed above, FERPA permits sharing a student party's records from a Title IX formal complaint investigation and hearing internally for legitimate educational reasons.<sup>201</sup> FERPA also permits external sharing in many ways, including with parents of adult student parties who are financial dependents, and with schools in which a student party enrolls or attempts to enroll.<sup>202</sup>

Moreover, student parties and their advisors access virtually all the evidence gathered in the investigation. Access includes intimate

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197. *See supra* Part II.B.1.

198. *See supra* Part II.B.3.

199. *See* Bowen v. Methodist Fremont Health, No. 19CV270, 2020 WL 1904832, at \*1–2, \*6 (D. Neb. Apr. 16, 2020).

200. *See supra* Part II.C.

201. *See supra* Part II.C.1.b.

202. *See supra* Part II.C.1.b.



admissible evidence that falls within the exceptions to the Title IX rape shield (such as the complainant's sexual activity with a third person that could explain bruising or other physical evidence), and complainant sexual history and sexual disposition evidence that the investigator believes to be inadmissible under the rape shield.<sup>203</sup> The new rules do not prohibit the parties or their advisors from redisclosing this evidence and in fact prohibit gag orders on the "allegations."<sup>204</sup> Party access rights extend to minor children such as complainants and respondents in elementary school<sup>205</sup> who may not use good judgment about sharing this information.

By requiring schools to disclose essentially all the extensive and intimate information gathered in the formal complaint process to both parties and their advisors, and then failing to ban their redisclosure of this information, the new Title IX rules attempt a sea change in legal protection of student disciplinary privacy. Existing language in both FERPA and Clery recognizes student disciplinary privacy and limits what can be disclosed to parties and advisors.<sup>206</sup>

To justify its new approach the agency cites the due process rights of respondents.<sup>207</sup> The agency also claims that the evidence and records are "directly related" to both parties, and hence are the FERPA records of both.<sup>208</sup> Finally, the agency argues that the requirements of its new Title IX rules override statutory FERPA requirements, promulgating a regulation to this effect.<sup>209</sup>

None of this reasoning supports mandatory disclosure of all information to parties and advisors with no ban on redisclosure. In fact, the new approach creates serious privacy risks for both complainants and respondents. It also conflicts with existing law including preexisting Clery and Title IX regulations requiring a fair and equitable process to resolve complaints.

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203. *See supra* Part II.B.1.

204. *See supra* Part II.C.3.

205. *See supra* Part II.C.2.a.

206. *See infra* Part III.B.1.

207. Preamble, 85 Fed. Reg. at 30,046-30,055 (discussing due process in the formal complaint context).

208. *See infra* Part III.B.3.

209. *See infra* Part III.B.4.

A wholly new approach is required. As a start, the information shared with parties and advisors should be limited to actual evidence used in the hearing with redisclosure banned, schools' ability to redisclose this information should be strictly limited, and the treatment records ban should be expanded.

**B. Required disclosure of all information to parties and advisors with no ban on redisclosure is unnecessary to Title IX and violates FERPA**

*1. Existing law requires student privacy in the school discipline context.*

FERPA authorizes schools to non-consensually disclose only narrowly delineated student discipline information to victims, permitting colleges to disclose the outcome (name, violation committed, and sanction) of crimes of violence and sex offenses.<sup>210</sup> For the sexual violence offenses it covers, Clery requires colleges to provide disciplinary outcome information to the parties, simultaneously and in writing, to include the result, sanctions, and rationale.<sup>211</sup> As discussed in

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210. See 20 U.S.C. § 1232g(b)(6)(A) (2018):

Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing, to an alleged victim of any crime of violence (as that term is defined in section 16 of title 18), or a nonforcible sex offense, the final results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime or offense with respect to such crime or offense.

See also *id.* at § 1232g(b)(6)(C):

For the purpose of this paragraph, the final results of any disciplinary proceeding -- (i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and (ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student.

See also *id.* at § 1232g(b)(6)(B) (authorizing public release of some disciplinary outcomes); *id.* § 1232g(b)(7) (authorizing release of sex offender information).

211. See 20 U.S.C. § 1092(f)(8)(B)(iv)(III) (2018) (“[B]oth the accuser and the accused shall be simultaneously informed, in writing, of -- (aa) the outcome of any institutional disciplinary proceeding that arises from an allegation of domestic violence, dating violence, sexual assault, or stalking.”); 34 C.F.R. § 668.46(k)(3)(iv) (2020):

*Result* means any initial, interim, and final decision by any official or entity authorized to resolve disciplinary matters within the institution. The result must include any sanctions imposed by the institution. Notwithstanding section 444 of the General Education Provisions Act (20 U.S.C. 1232g), commonly referred to as the Family Educational Rights and Privacy Act (FERPA), the result must also include the rationale for the result and the sanctions.

Part I, Clery regulations provide both parties with access to information that is actually used in meetings and hearings, with limitations.<sup>212</sup>

2. *At most, due process requires party access to the evidence admitted in public school hearings.*

The agency repeatedly notes the need for due process protections for accused students.<sup>213</sup> The new rules apply to both public and private schools although students and employees do not have due process or other constitutional rights as to private schools.<sup>214</sup> If a public school student is facing a due process property deprivation (which is certainly true if a K-12 student is facing suspension or expulsion,<sup>215</sup> but might not always be the case for public college students),<sup>216</sup> or a due process liberty deprivation (for which suspension or expulsion is not per se sufficient),<sup>217</sup> the process that is due is determined via a balancing test.<sup>218</sup>

In some circumstances due process in public schools and colleges requires access by the parties or their advisors to at least a summary<sup>219</sup>

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212. See 34 C.F.R. § 668.46(k)(3)(B)(iii) (2020).

213. See, e.g., Preamble, 85 Fed. Reg. at 30,046-30,055 (discussing due process in the formal complaint context).

214. See 34 C.F.R. § 106.30 (2020) (defining schools to which the regulations apply as including private schools); see also Preamble, 85 Fed. Reg. at 30,050-30,052 (discussing due process requirements for public schools and fundamental fairness requirements for private schools).

215. See *Goss v. Lopez*, 419 U.S. 565 (1975) (property deprivation in state law right to attend school for public K-12 students facing short suspensions of 10 days).

216. See *Doe v. Purdue Univ.*, 928 F.3d 652, 660 (7th Cir. 2019) (finding the plaintiff, a public college student accused of sexual misconduct who faced expulsion, had not sufficiently pleaded a due process property deprivation).

217. See *id.* at 661 (applying “‘stigma plus’ test, which requires him to show that the state inflicted reputational damage accompanied by an alteration in legal status that deprived him of a right he previously held”).

218. See *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). The process that is due in a given situation is determined by balancing:

(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the Government’s interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail.

*Id.*

219. *Goss*, 419 U.S. at 581:

of the evidence relied on in a Title IX hearing. For example, a recent Seventh Circuit opinion by now-Justice Amy Coney Barrett found circumstances where respondent access to the evidence used in a school Title IX hearing asserting sexual violence may be a due process requirement, specifically writing that withholding the evidence on which the school relied in adjudicating his guilt was itself sufficient to render the process fundamentally unfair.<sup>220</sup> The school's policy at the time did not provide for student party access to the evidence or investigation report.<sup>221</sup> The student was suspended for a year and lost his ROTC scholarship, which was found to be a due process liberty deprivation; notably, the opinion suggests that Title IX public school formal hearings may not always involve due process liberty or property deprivations.<sup>222</sup> Ultimately, the court found qualified immunity for individual defendants on the due process claims because the law was not clearly settled.<sup>223</sup> The decision also notes that certain of the school's other procedures such as determining the accusing student was credible even though she did not appear at the hearing nor submit her own statement, and an admission by several panel members that they did not read the investigation report, raised colorable Title IX gender discrimination claims, but does not cite lack of access to evidence as a Title IX concern.<sup>224</sup> Extending this reasoning, access to evidence perhaps is not required in private school Title IX hearings.

While in some cases due process may require party (or advisor) access to evidence that is actually used in public school hearings, there is no suggestion that due process requires public schools to share information that would not be admissible in the hearing. The new rules themselves recognize this limit by not requiring schools to share

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Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, *if he denies them, an explanation of the evidence* the authorities have and an opportunity to present his side of the story. (emphasis added).

220. *See Doe v. Purdue Univ.*, 928 F.3d at 663 (citations omitted) (reversing trial court's dismissal of the student's Title IX and due process claims).

221. *Id.* at 657 (noting the student may have been given brief access to this information).

222. *Id.*

223. *Id.* at 665-66.

224. *Id.* at 669. The opinion cites *Goss*, in which the Supreme Court determined due process required public schools to provide students with a summary of the evidence, not the actual evidence. The opinion suggests the plaintiff student should not get less than the students in *Goss*.

privileged information or treatment records with the parties.<sup>225</sup> However, the new rules do require sharing intimate evidence that is inadmissible under the rape shield,<sup>226</sup> and even though the parties and their advisors are not required to keep this information confidential.<sup>227</sup>

The agency claims that investigators lack sufficient expertise to determine whether evidence is barred by the rape shield.<sup>228</sup> While investigators need not be attorneys, the new rules trust the investigator to identify evidence that is protected by privilege or not relevant,<sup>229</sup> and investigators presumably could also be trusted to identify evidence protected by the rape shield. If a check and balance on error by the investigator is desired, the new rules could have provided an option for parties to request in camera inspection of such records by the decision-maker, similar to the process available from courts when confidential information is subpoenaed.<sup>230</sup> Instead, the new rules require sharing all information gathered by the school about the complainant's sexual history, sexual character, and sexual reputation with the respondent party, the parties' advisors, and perhaps the parties' parents. Even a criminal prosecutor's constitutional duty to share information with the defendant is limited to exculpatory information, perhaps including victim sexual history/character/reputation that is admissible, but not inadmissible information such as evidence barred by the rape shield.<sup>231</sup>

3. *The agency's position that formal complaint information and evidence are the FERPA records of both student parties is unsupported and has far-reaching and unfortunate consequences.*

The agency asserts the information in a Title IX formal complaint process that is "directly related to the allegations" is also "directly

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225. See *supra* Parts II.B.2 and II.B.3.

226. See *supra* Part II.B.1.

227. See *supra* Part II.C.

228. Preamble, 85 Fed. Reg. at 30,352 (May 19, 2020).

229. See 34 C.F.R. § 106.45(b)(1)(x) (2020) (schools may "not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege").

230. See, e.g., FED. R. CIV. P. 45.

231. See, e.g., *Hoke v. Netherland*, 92 F.3d 1350, 1369 (4th Cir. 1996) (evidence protected by the rape shield cannot be material under *Brady v. Maryland*). This point was made by commenters. Preamble, 85 Fed. Reg. at 30,431.

related” to both student parties under FERPA, affording both a right of access.<sup>232</sup> The agency interprets information “directly related to the allegations” to go beyond records such as a witness statement that refers to a student party, to include for example, academic records.<sup>233</sup>

*(a) The agency’s interpretation is inconsistent with FERPA’s text, as well as court and administrative interpretations of FERPA.*

The preamble omits mention of authority that is inconsistent with the agency’s position. This body of inconsistent authority includes FERPA’s actual language about records of more than one party, prior agency interpretations of FERPA as to records with disciplinary information about more than one student, and court decisions about such records.

The preamble correctly notes that FERPA defines covered student records as those that are “directly related” to the student.<sup>234</sup> “Directly related” is not defined by FERPA’s text or regulations. However, FERPA explicitly addresses records with information about more than one student, providing that parents (as holders of FERPA rights for their minor K-12 children) may access only the specific information about their child:

If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be

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232. Preamble, 85 Fed. Reg. at 30,423–26.

233. *Id.* at 30,432:

If the academic record of a party is directly related to the allegations of sexual harassment, then the recipient may obtain, access, use, and disclose such evidence as part of the investigation under 106.45. For example, if a complainant alleges that the complainant frequently missed classes as a result of the sexual harassment, then the attendance records of the complainant for that class are directly related to these allegations. Accordingly, a recipient may obtain or a party may request the recipient to obtain such attendance records as part of an investigation under 106.45, if such records are directly related to the allegations in the formal complaint. Similarly, if a student-complainant alleges that an employee-respondent sexually harassed them on a field trip and the employee-respondent or that student-complainant did not attend the field trip, then the employee-respondent may provide the attendance records for the field trip, as these attendance records are directly related to the allegations of sexual harassment.

234. 20 U.S.C. § 1232g(a)(4)(A)(I) (2018); 34 C.F.R. § 99.3 (2020).

informed of the specific information contained in such part of such material.<sup>235</sup>

FERPA regulations as well as special education law regulations also address this issue.<sup>236</sup>

FERPA's text protects the privacy of the other students whose information is in these records by authorizing schools to orally inform the parents of the contents of the record rather than providing the normal in person review of the document.<sup>237</sup>

FERPA's enforcing office within the DOE has consistently interpreted this statutory language to mean that where records contain personally identifiable information about more than one student, schools must redact information about other students so that the requesting parents receive information only about their child.<sup>238</sup> For example, information about a student recorded in a teacher grade book would be disclosed after redaction of information about other students in the grade book. The office has used this same approach for evidence in hearings, rejecting a special education hearing officer's order to release unredacted disciplinary records where students had reported serious misconduct by the student party and the underlying reasoning that IDEA due process overrode FERPA and required release of unredacted records.<sup>239</sup>

For records where the information about each student cannot be separated out and still be comprehensible, access is still generally limited to the specific information about the requesting student; copies may not be provided, and information which is not about the requesting

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235. 20 U.S.C. § 1232g(a)(1)(A) (2018).

236. FERPA, 34 C.F.R. § 99.12(a) (2020) (stating that "if the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student"); Individuals with Disabilities Education Act, 34 C.F.R. § 300.615 (2020) (stating that if a "[special] education record includes information on more than one child, then the parents of those children have the right to inspect and review only the education records that contain information relating to their child, or to be informed of that specific information").

237. 20 U.S.C. § 1232g(a)(1)(A) (2018).

238. Letter to Attorney for School District (October 31, 2003), *in* 40 IDELR 99 (FPCO 2003).

239. *Id.*

student may not be disclosed.<sup>240</sup> For example, in a recent opinion concerning records about a fight involving three students, the enforcing office determined that FERPA did not permit the school to disclose to parents of two of the students that it had determined the third student had started the fight. The office contrasted this information with disclosure of a hypothetical witness statement about two students fighting, which both students would have a right to review.<sup>241</sup> FERPA's enforcing office has also found that a victim of sexual harassment was not entitled to a copy of the investigation report, but rather only to be informed of its contents.<sup>242</sup> In a bullying case, the office indicated that the victim's consent was required to release her records to the accused student as part of a school investigation.<sup>243</sup>

The preamble to the new Title IX rules identifies a prior FERPA office opinion involving a school surveillance video and witness statements as helpful in understanding student privacy in the formal complaint process.<sup>244</sup> In that opinion the office determined that redaction of the video was not possible and under state public records law the

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240. *See, e.g.*, Letter re Regional Multicultural Magnet Sch. Dist. (January 3, 2008), *in* 108 LRP 29577 (FPCO 2008) (finding that an incident report containing information about three students was a record that each student could inspect and review because the information about each student could not be separated out in a comprehensible way, but copies not available without consent of the others); Letter to Anonymous (February 13, 2003), *in* 113 LRP 14615 (FPCO 2013) (concluding IDEA hearing officer lacks authority to order release of disciplinary records concerning student party and another student without the latter's consent; school should redact information about the nonparty student, or if this is not feasible should orally inform the party student of the contents). FERPA does not generally provide parents/adult students with the right to a copy of their records; the right is to in person review. 34 C.F.R. § 99.10(d) (2020).

241. Letter to Anonymous (August 10, 2017), *in* 117 LRP 46542 (FPCO 2017). The office recently reiterated this approach. Letter to Anonymous (Feb. 18, 2020), *in* 120 LRP 18044 (SPPO 2020) (in discipline context, student can only be generally informed of information in records of other students that does not identify other students, and may access witness statement only when redaction is not feasible and witness identity is not disclosed).

242. Letter to Prescott (April 20, 2015), *in* 115 LRP 39435 (FPCO 2015).

243. Letter to Middletown Publ. Sch. (March 17, 2005), *in* 105 LRP 25686 (FPCO 2005): [b]efore initiating a complaint of bullying (the subject of your complaint against another student in the District) the District will obtain prior written consent of the accuser allowing for the disclosure of his or her child's education records in order that the accused may defend him/herself . . . the investigation of your FERPA complaint has made it clear to the District that in order to comply with § 99.12 of the regulations, the District should have the parent who files a complaint on any subject matter against any individual, student or other individual in the District, provide prior written consent in order to disclose his or her child's education records to the accused during the complaint process in order to conduct an investigation into the allegation.

244. Preamble, 85 Fed. Reg. at 30,438 (2020).



requesting student could view the video.<sup>245</sup> However, the office indicated that redaction of the witness statements removing information such as names of witnesses was feasible and should take place to the extent possible.<sup>246</sup>

Until recently, this approach was also used by Title IX's enforcing office within the DOE. That office determined that disciplinary records would be provided via inspection and review or oral summary, rather than via copies, and would be redacted for personally identifiable information of other students.<sup>247</sup>

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245. Letter to Wachter (December 17, 2017), in 118 LRP 16522 (FPCO 2017): FERPA's access provisions generally would not require the District to provide copies of the videotapes or the witness statements to parents of the disciplined student who requested copies of these records; any requirement for the District to provide or release copies of these records to parents would arise under the Pennsylvania Right-to-Know Law, rather than FERPA. That said, it would not violate FERPA for the District non-consensually to disclose to an eligible student or his or her parents copies of education records that the eligible student or his or her parents otherwise would have the right to inspect and review under FERPA. . . . in responding to a parent's request for his child's education records under the Pennsylvania Right-to-Know Law, when possible, we recommend that the District obtain written consent from other parents and eligible students whose information will be disclosed prior to the provision to parents or eligible students of copies of education records containing such information.

246. *Id.*

With regard to witness statements, the District similarly would need to determine whether it can segregate or redact any of the information that is in the witness statements that is about both the student making the request and other students without destroying its meaning. While it would seem unlikely that the District could redact, without destroying the meaning of the witness statements, observations conveyed about the hazing incident as a whole, other information in the witness statements may be able to be redacted without destroying the meaning of the witness statement. Thus, if it is possible for the District to redact the witness statements or disclose only a portion of the witness statements in a way that would fully depict the student's involvement in the hazing incident, then such redaction or segregation of information about other students would be required. As an example of information that could be redacted from the witness statements, it sounds to us as if the District could redact the identity of the student-witnesses who authored the witness statements without destroying the meaning of the statements because the names of the student authors are not about the student for whom the access request was made. Of course, if the redaction of the identity of a student witness is possible without destroying the meaning of a witness statement, then the District would need to secure the consent of the parents of the student-witness, or the eligible student's consent if the student-witness is an eligible student, before disclosing the identity of the student-witness, assuming no other FERPA exception to the requirement of consent applies.

247. U.S. DEP'T. OF EDUC., OFFICE FOR CIVIL RIGHTS, *Questions and Answers on Title IX and Sexual Violence* (April 29, 2014) (hereinafter "2014 Q&A") (OCR 2014) (citing FERPA), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; U.S. DEP'T. OF EDUC., OFFICE FOR CIVIL RIGHTS, *Q&A on Campus Sexual Misconduct* (Sept. 22, 2017) (hereinafter, "2017 Q&A") at Q10 and n. 28 (citing 34 C.F.R. § 99.12 in support of its position that FERPA

The agency's cited authority for its interpretation in the new Title IX rules is a hypothetical scenario set out in the preamble to 2008 FERPA regulations. It suggests that part of a student witness statement about misconduct by another student is directly related to the allegedly misbehaving student and is thus the FERPA record of that student:

[A] parent (or eligible student) has a right to inspect and review any witness statement that is directly related to the student, even if that statement contains information that is also directly related to another student, if the information cannot be segregated and redacted without destroying its meaning. For example, parents of both John and Michael would have a right to inspect and review the following information in a witness statement maintained by their school district because it is directly related to both students: "John grabbed Michael's backpack and hit him over the head with it." Further, in this example, before allowing Michael's parents to inspect and review the statement, the district must also redact any information about John (or any other student) that is not directly related to Michael, such as: "John also punched Steven in the stomach and took his gloves."<sup>248</sup>

Notably, this scenario is limited in scope. It concerns only a witness statement. It limits disclosure to the parts of the statement referring to the two students. It concerns alleged misconduct in the form of physical assault, rather than the intimate behavior routinely at issue in the Title IX formal complaint process. It records misconduct personally observed by a student. And perhaps most significantly, it in no way suggests that all records of the witness student and the victim student Michael are the FERPA records of accused student John which he is entitled to access and redisclose.

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limits information disclosed to complainants about the outcome of a Title IX hearing; also noting that the Clery Act sets out specific disclosure requirement for outcomes of hearings under that statute.), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>. These documents were withdrawn by former Secretary of Education Betsy DeVos. See Letter from Candice Jackson, former Acting Assistant Sec'y for Civ. Rights, U.S. Dep't. Of Educ., to Title IX Coordinators (Sept. 22, 2017) (OCR 2017), ["Dear Colleague Letter"], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>.

248. 73 Fed. Reg. 74,806, 74,832-74833 (Dec. 9, 2008).

There appears to be no case law adopting the 2008 FERPA preamble's interpretation of "directly related,"<sup>249</sup> much less extending it to all records directly related to the allegations in a Title IX formal complaint. In fact, the case law reflects that students facing civil or criminal litigation or hearings for alleged misconduct subpoena the FERPA records of student accusers and witnesses. Courts inspect the records in camera, balancing the need for the records with the invasion of privacy involved to decide what if any records to disclose. For example, in one case a student in a special education hearing requested the records of another student who had sexually assaulted him as evidence that the assaulting student's presence affected the student party's progress. A federal court denied access, reasoning that the plaintiffs had not established their need for the records outweighed the privacy intrusion.<sup>250</sup>

Moreover, DOE has previously rejected the interpretation adopted in the new Title IX rules' preamble. The enforcing offices within the DOE for both Title IX and FERPA have limited disclosure of disciplinary outcomes to victims to those that refer to the victim, such as an order to stay away from the victim.<sup>251</sup> Disclosure of other information in the student's education record, including information about sanctions that do not directly relate to the harassed student, may result in a violation of FERPA.<sup>252</sup> For example, disclosure of sanctions

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249. Two lower courts compelled discovery of student statements about misconduct by school employees, reasoning in part that they are not FERPA records because the students made the statements as witnesses rather than as students, and as such, the statements did not "directly relate" to them as students. *Ellis v. Cleveland Munic. Sch. Dist.*, 309 F. Supp. 2d 1019, 1022 (N.D. Ohio 2004); *Wallace v. Cranbrook Educ. Cmty*, No. 05-73446, 2006 WL 2796135 (E.D. Mich. 2006). This reasoning seems to be based on thinking that a witness statement can only be directly related to one student (or other person). Under this reasoning that student witness statements about employee misconduct are not FERPA records, they have no privacy protection and can be accessed from public schools via public records requests.

250. *A.B. v. Clarke Cty. Sch. Dist.*, 372 F. App'x 61 (11th Cir. 2010).

251. Letter from Dale King, Director, Family Pol'y Council Off., U.S. Dept. Of Educ. to Loren W. Soukup, Assoc. Gen. Council, Sch. and Coll. Legal Services of Calif., [hereinafter "Letter to Soukup"] (Feb. 9, 2015), *in* 115 LRP 18668 (FPCO 2015).

252. *Id.* (referring to OCR's April 4, 2011 "Dear Colleague" letter on Title IX disclosures).

that do not directly affect the victim would violate FERPA rights of the accused student.<sup>253</sup>

*(b) The agency's interpretation of FERPA has far-reaching consequences for Title IX student parties, and for students generally.*

The agency's expansive interpretation of "directly related" FERPA records is not limited to the Title IX formal complaint context, and hence its consequences are potentially much broader. Under the new interpretation, in the hypothetical scenario from the 2008 preamble discussed immediately above, had the school pursued discipline against John for assaulting Michael, all of the information directly related to this allegation including education records of Michael and the witness student would be FERPA records of John, giving him the rights of access and redisclosure.

Similarly, many and varied non-disciplinary school records contain information about more than one student. Such records include student group projects, some school health records (for example a student diagnosed at a school health clinic as pregnant or with an STD who names a specific classmate as responsible), some school counseling records (for example a student talks with a school counselor about difficulty getting closure over the end of a relationship with another student), and some special education records (for example, records of small group speech and language therapy or records of small group social skills work for students on the autism spectrum). Under the agency's reasoning, these records would not be private as to the other students.

Moreover, if Title IX formal complaint records are the FERPA records of both parties, FERPA would not bar their redisclosure because

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253. *Id.*

The Department currently interprets FERPA as not conflicting with the Title IX requirement that the school notify the harassed student of the outcome of its investigation, i.e., whether or not harassment was found to have occurred, because this information directly relates to the victim. It has been the Department's position that there is a potential conflict between FERPA and Title IX regarding disclosure of sanctions, and that FERPA generally prevents a school from disclosing to a student who complained of harassment information about the sanction or discipline imposed upon a student who was found to have engaged in that harassment. [Footnote 3: Exceptions include the case of a sanction that directly relates to the person who was harassed (e.g., an order that the harasser stay away from the harassed student), or sanctions related to offenses for which there is a statutory exception to consent in FERPA, such as crimes of violence or certain sex offenses in postsecondary institutions.]

they are the party's own records.<sup>254</sup> They would not be private at all to the extent these other students decide to redisclose them, greatly weakening FERPA's protection of student privacy.

Some of these examples involve records with information about multiple students. Sexual misconduct can involve more than one complainant and/or respondent, and the new rules allow schools to consolidate formal complaints arising out a common incident.<sup>255</sup> While beyond the scope of this Article and not discussed in the new rules' preamble, the agency's interpretation would apparently require that all of the parties and their advisors would have access to evidence in a common hearing, and none of the parties would be barred from redisclosure. In contrast, in a case where multiple students complained of bullying by a school principal, FERPA's enforcing office determined that sharing the report with all their parents without consent violated FERPA.<sup>256</sup>

4. *Statutory language concerning the relationship between the FERPA and Title IX statutes does not confer agency authority to enact Title IX regulations that conflict with FERPA.*

On the relationship of General Education Provision Act ("GEPA") (which includes FERPA) to Title IX, GEPA states:

Nothing in this [GEPA] chapter shall be construed to affect the applicability of . . . Title IX of the Education Amendments of 1972 [ 20 U.S.C. 1681 et seq.], . . . or other statutes prohibiting discrimination, to any applicable program.<sup>257</sup>

The language refers to the GEPA and Title IX *statutes* and resolving unavoidable conflicts between them. Correspondingly, longstanding agency interpretation in the context of student discipline records has been that in the event of direct conflict *between these statutes*,<sup>258</sup> FERPA provisions must yield:

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254. See 20 U.S.C. § 1232g(b)(4)(B) (2018).

255. 34 C.F.R. § 106.45(b)(4) (2020).

256. Letter to Armstrong (November 14, 2016), in 117 LRP 5839 (FPCO 2016).

257. 20 U.S.C. § 1221(d) (2018).

258. See Preamble, 85 Fed. Reg. at 30,426 (emphasis added).

If there is a direct conflict between the requirements of FERPA and the requirements of Title [IX], such that enforcement of FERPA would interfere with the primary purpose of Title [IX] to eliminate . . . discrimination in schools, the requirements of Title [IX] override any conflicting FERPA provisions.<sup>259</sup>

In an apparent attempt to deal with the FERPA problems the new Title IX rules create, the new rules include the following provision stating that Title IX administrative regulations override conflicting FERPA statutory text and regulations:<sup>260</sup>

(e) Effect of Section 444 of General Education Provisions Act (GEPA)/Family Educational Rights and Privacy Act (FERPA). The obligation to comply with this part is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99.<sup>261</sup>

DOE's apparent position is that it has authority to enact regulations that are not necessary to enforce Title IX and which conflict with the FERPA statute, such as the requirements to disclose to the parties and their advisors all information from the investigation and hearing, even evidence inadmissible under the rape shield, with no limitation on redisclosure of this information. Of course, agencies lack authority to write regulations that conflict with statutes, and the special GEPA statutory language does not alter this. At minimum, the agency should promulgate regulations that minimize conflict with FERPA. As a start, the agency's Title IX goals can be served without requiring party and advisor access to inadmissible evidence, and with a ban on redisclosure of evidence by parties and advisors. Hence, the Title IX formal complaint process should limit party access to actual admitted evidence

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259. Letter to Soukup, *supra* note 251. ("The Department also has repeatedly noted in OCR guidance that . . . this amendment to GEPA reflects congressional intent that, if there is a conflict between the laws, FERPA should not be construed to affect the applicability of these civil rights laws, such as Title VI. . . ."). The quoted language is about Title VI, another federal discrimination statute covered by the GEPA/FERPA language. *See also* Letter to Anonymous, 117 LRP 46530 (FPCO 2017); Preamble, 85 Fed. Reg. at 30,424 (referring to "rare and unusual circumstances" of conflict).

260. Notably, this new regulation provision applies to Title IX generally, and is not limited to the new regulatory formal complaint process for sexual harassment and misconduct. In the future, the agency may assert authority to create other administrative Title IX requirements that conflict with FERPA.

261. 34 C.F.R. § 106.6(e) (2020).

and ban redisclosure of information about other students accessed in this way. Under this approach non-disclosure agreements would not be needed, avoiding arguments that such agreements improperly waive FERPA rights,<sup>262</sup> as well as the difficult scenario that may result if a party or advisor refuses to sign such an agreement.

**C. Given the nature of Title IX formal complaint information, schools' ability to redisclose it must be strictly limited**

As discussed in Part II.A, schools collect extensive and intimate information about student parties (and in some cases student witnesses). The new rules provide specifics about access to information for those involved in the formal complaint process, and they require schools to maintain extensive records for seven years. However, the new rules fail to recognize that the intimate nature of this information requires strict limits on school redisclosure. As discussed in Part II.C, the new rules leave school redisclosure to FERPA, which permits schools in their discretion to non-consensually disclose any and all records not only to other school staff whom the school deems have a legitimate educational interest, but also to parents of adult financial dependent students, and to new schools in which the student enrolls or plans to enroll. It is hard to understand why schools should be permitted to share records such as party interviews of either the complainant or the respondent about a sexual assault with for example, a new school of a student party.

FERPA permits public disclosure of some disciplinary outcomes,<sup>263</sup> and sex offender information.<sup>264</sup> Apart from this, these records require real privacy protection,<sup>265</sup> including recognition of their unique confidentiality and limits on school authority to disclose them. If not a full bar on school redisclosure, their non-consensual disclosure should

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262. FERPA provides for waiver of access only for letters of recommendation. 20 U.S.C. § 1232g(a)(1)(D) (2018).

263. 20 U.S.C. § 1232g(b)(6)(B) (2018).

264. *Id.* at § 1232g(b)(7).

265. Title IX formal complaint information is not the only kind of student records that is intimate and deserving of much more privacy than FERPA affords. Student medical records are another such category. See Lynn M. Daggett, *The Myth of Student Medical Privacy*, 14 HARV. L. & POL'Y REV. 467–530 (2020) (arguing that student health clinic records should be covered by the HIPAA Privacy Rule and only the minimum necessary of other more educational student health records such as IEPs and school nurse records should be released externally).

be limited to the minimum necessary, or left to the subpoena process, or both.

#### **D. The party treatment records exclusion should be expanded**

The party treatment records exclusion discussed in Part II.B.3 enhances privacy protection of some student medical records as compared to student records generally. Its breadth is welcome: it covers records of all treatment, by private off-campus providers, on-campus providers in school health clinics, and on-campus providers outside of a school health clinic such as a K-12 school nurse or counselor. The new provision also appropriately limits the scope of party consent to sharing treatment records to the Title IX grievance process. For example, consent to share records in a Title IX college hearing would not extend to litigation between student parties such as a tort claim for damages by the complainant, or a claim for defamation by the respondent.

In other respects, the treatment records provision must be broadened. First, the ban on non-consensual access to and use of treatment records should extend beyond the Title IX formal complaint process to other Title IX activities including litigation against the school. In the Title IX formal complaint process the school's role is investigator and adjudicator. In litigation by the complainant or respondent the school's role is defendant. If, for example, a student victim decides to sue the school rather than pursue a formal complaint, the school should not be able to non-consensually access or use treatment records. The ban should also apply to other activities under Title IX, such as when a school learns some information concerning possible sexual harassment and initiates an investigation without a formal complaint.

Second, the new provision is limited to the treatment records of the parties. It should be extended to forbid school non-consensual access to treatment records of other persons involved in a formal complaint, such as pattern witnesses, or friends of the parties to identify credibility evidence of the parties or witnesses.<sup>266</sup>

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266. The new rules require an opportunity to cross examine witnesses including attacking credibility. 34 C.F.R. § 106.45(b)(6)(i) (2020) (“At the live hearing, the decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.”).



Third, to the extent a student's treatment records come from on-campus health care, FERPA's treatment records provision<sup>267</sup> provides that the student does not have a right of access. As posited in a companion article,<sup>268</sup> this archaic provision should be repealed. In the specific context of the the Title IX formal complaint process, students must be able to view their own records to make informed consent decisions about whether to share them.

#### IV. CONCLUSION

Using the school discipline process to deal with sexual misconduct has been regarded as an attractive option to civil litigation or criminal prosecution because the school process is internal and more private. In fact, the new Title IX formal complaint process offers students (both complainants and respondents) quite limited privacy and must be revised. In the meantime, student parties (and student witnesses) should educate themselves about the actual parameters of their privacy in the new formal complaint process. After doing so, students can make informed decisions about whether to file a formal complaint, whether to participate in a hearing, and whether to consent to release of treatment records. Student parties and witnesses should consider conditioning participation in the formal complaint process on signed non-disclosure agreements from all parties and their advisors.

To protect student privacy and to comply with FERPA, schools should consider enacting policies providing that parties and advisors in Title IX formal complaints may not redisclose information about other students obtained through the formal complaint process. Alternatively, schools should require parties and advisors to sign non-disclosure agreements about student information shared during the investigation and hearing. Schools should create a discipline process and initiate discipline of students and school employees who violate a non-disclosure agreement. Schools should also treat records from the formal complaint process as uniquely confidential and accordingly should not non-consensually release them outside of the formal complaint process absent emergency or other extraordinary circumstances.

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267. 20 U.S.C. § 1232g(a)(4)(B)(iv) (2018).

268. See Daggett, *supra* note 265, at 521-522.