



SCHOOL & COLLEGE LEGAL SERVICES
OF CALIFORNIA

SANTA CRUZ COUNTY OFFICE OF EDUCATION

**TITLE IX ESSENTIALS FOR
COORDINATORS, INVESTIGATIONS,
FACILITATORS, AND DECISION-
MAKERS**

December 7, 2022

Presented by:

Leah Smith
Associate General Counsel



SCHOOL & COLLEGE LEGAL SERVICES OF CALIFORNIA

Title IX Essentials for Coordinators, Investigations, Facilitators, and Decision-Makers

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Title IX Essentials for Coordinators, Investigations, Facilitators, and Decision-Makers

Santa Cruz COE
December 7, 2022

Presented by:
Leah M. Smith, Associate General Counsel
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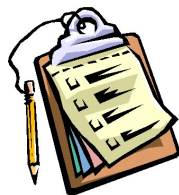


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Agenda

- Brief overview of Title IX
- Training requirements
- Title IX coordinator's role
- Conducting impartial investigations
- Legally compliant investigation reports
- Decision-making process
- Investigation Related Issues



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I. Brief Overview of Title IX



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What is Title IX?

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.”

20 U.S.C. § 1681 and 34 C.F.R. Part 106



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What Is Title IX?

- Title IX of the Education Amendments of 1972
- Established to combat discrimination against women in the educational system
- Two objectives:
 - Prevent use of federal resources to support discriminatory practices in education
 - Provide individuals with protection against those practices
- Title IX protects any “person” against sex discrimination – both male, female, non-binary

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What Is Title IX?

- Title IX applies to “recipients of Federal financial assistance.”
- Every recipient must ensure that a student is not denied or limited in the ability to participate in or benefit from a school program or activity on the basis of sex.



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Title IX Legal Framework


- Federal law
- Implementing regulations
 - TIX regulations (effective 8/14/20)
- Regulatory Guidance
 - 1997 Guidance on Sexual Harassment
 - 2001 Revised Sexual Harassment Guidance
 - 2015 Dear Colleague Letter, Dear Coordinator Letter & Resource Guide
 - 2017 Interim Guide: Q&A on Campus Sexual Violence

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Where Does Title IX Apply?

- Title IX protects students in connection with all academic, educational, extracurricular, athletic, and other programs of the district.
- Programs can take place in a district facility, on a school bus, at a program sponsored by the district at another location, or on a school-sponsored field trip.



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Where Does Title IX Not Apply?

- Sexual harassment that occurs off campus and does not occur in an **education program or activity** of the recipient will not be covered under Title IX.
- When the definition of sexual harassment under Title IX is not met. (Consider then whether the Uniform Complaint Procedures apply. BP/AR 1312.3)
- When might jurisdiction **not** exist?
 - When conduct occurs off campus via social media
 - When conduct occurs outside of the United States

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Educational Program or Activities

Includes locations, events, or circumstances over which the recipient exercised **substantial control** over **both** the respondent and the context in which the harassment occurs.

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Defined Terms

- **Complainant** means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.
- **Respondent** means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- **Recipient** means elementary and secondary schools, as well as postsecondary institutions, that receive Federal financial assistance.

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Sex-Based Discrimination

- Title IX prohibits sex-based discrimination
- Sex-based discrimination includes:
 - Sexual harassment
 - Sexual violence
 - Discrimination based on gender stereotypes
 - Gender-based discrimination
 - Sexual Orientation
 - Gender Identity

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Title IX Sexual Harassment - Definition

- (1) Unwelcome conduct on the basis of sex that a reasonable person would determine is so “**severe, pervasive and objectively offensive**” that it effectively denies a person equal access to the recipient’s education program or activity;
- (2) **Quid pro quo** harassment; or
- (3) Sexual assault, dating violence, domestic violence, or stalking as defined in the Clery Act/Violence Against Women Act (“VAWA”) (see next slide).

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Clery Act/VAWA Definitions

- (1) **Sexual assault** – 20 U.S.C. 1096(f)(6)(A)(v) – “The term “sexual assault” means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.”
- (2) **Dating violence** – 34 U.S.C. 12291(a)(10) – “The term “dating violence” means violence committed by a person—(A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) The length of the relationship. (ii) The type of relationship. (iii) The frequency of interaction between the persons involved in the relationship.”

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Clery Act/VAWA Definitions

- (3) **Domestic Violence** - 34 U.S.C. 12291(a)(8) – “The term “domestic violence” includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.”

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Clery Act/VAWA Definitions

(4) Stalking – 34 U.S.C. 12291(a)(30)

The term “stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to--

- (A) fear for his or her safety or the safety of others; or
- (B) suffer substantial emotional distress.

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General Response to Sexual Harassment

- Once a recipient has **actual knowledge** of sexual harassment in an education program or activity of the recipient, it must respond promptly in a manner that is **not deliberately indifferent**.
 - A response is deliberately indifferent only if its response to sexual harassment is **clearly unreasonable in light of the known circumstances**.
- The 2001 Guidance (now rescinded) stated that recipients must take action in response to sexual harassment that is reasonably calculated to stop harassment and prevent recurrence of harassment.
 - DOE has clarified that it will not unrealistically hold recipients responsible where the recipient took action that was not clearly unreasonable in light of the known circumstances, and a perpetrator of harassment reoffends.

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Actual Knowledge

“*Actual knowledge* means notice of sexual harassment or allegations of sexual harassment...Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent.”

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Receiving Actual Knowledge

K-12:

- *Any* elementary and secondary school employee (other than the Respondent).

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Pop Quiz!



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II. Why Are We Here?



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Title IX Training

- *Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must receive training on:*
 1. ☒ The definition of sexual harassment,
 2. ☒ The scope of the recipient’s education program or activity,
 3. ☒ How to conduct an investigation,
 4. ☒ How to conduct a grievance process including hearings, appeals, and informal resolution processes, as applicable, and
 5. ☒ How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias

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Title IX Training, Cont’d.

- *Decision-makers* must receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant.
- *Investigators* must receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence.

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A Word of Caution



- Some complainants file suit against their school for “failure to train” employees in how to investigate Title IX complaints
- School or district may be found liable even if there is no official written policy or custom of not training its employees
- If it rises to the level of “deliberate indifference,” courts will find against schools/districts

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III. Title IX Coordinator's Role



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Who is the Title IX Coordinator?

- Each school district must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the "Title IX Coordinator."
- Notice to many individuals must be given of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator pursuant to this paragraph.
- Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.

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Title IX Coordinator

- Plays an essential role in ensuring every person involved in the activities and programs of the educational institution is aware of their rights under Title IX
- Should have community-wide visibility and comprehensive knowledge and training
- Must be knowledgeable about other applicable federal and state laws, regulations, and policies that overlap with Title IX

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Title IX Coordinator

- The Title IX Coordinator has many responsibilities, including broadly:
 - Promoting gender equity in education
 - Overseeing the response to Title IX reports and complaints
 - Determining if jurisdiction exists under Title IX
 - Training students, staff, and faculty
 - Involvement in drafting and revising Title IX policies and regulations
 - Ensuring proper posting of notices
 - Identifying and addressing patterns of gender inequity revealed by reports and complaints



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Responding to Notice

- Title IX Coordinator is responsible to ***promptly contact*** the Complainant and discuss:
 - Availability of Supportive Measures,
 - Option to File Formal Complaint, and
 - Formal Complaint Process.
- Title IX Coordinator must determine whether Title IX jurisdiction exists.

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Supportive Measures

“*Supportive measures* means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment.”

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Supportive Measures


- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual restrictions on contact between the parties

- Changes in work or housing locations
- Leaves of absence
- Increased security and monitoring of certain areas of the campus
- Other similar measures

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IV. Conducting Impartial Investigations



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Title IX Grievance Procedures

- A formal complaint initiates the grievance process.
- Grievance procedures **MUST** include:
- Treat complainants and respondents equitably.
- Impose disciplinary sanctions only after following a grievance process that complies with the new regulations.
- An objective evaluation of all relevant evidence.
- No conflict of interest or bias by the Title IX Coordinator, investigator or decision-maker.
- Training for Title IX Coordinator, investigator or decision-maker on definition of sexual harassment, scope of the recipient's education program or activity, how to conduct an investigation and grievance process (including appeals), and how to serve impartially.

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Title IX Grievance Procedures, Cont'd.

- Grievance procedures **MUST** include:
 - Presumption of respondent's innocence until conclusion of grievance process.
 - Reasonably prompt time frames, to include limited extension of time frames for good cause.
 - Description of range of possible disciplinary sanctions and remedies.
 - Standard of evidence used.
 - Appeal rights.
 - Range of supportive services available.
 - Not use or require evidence that is legally privileged, unless privilege is waived.

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Formal Complaint

- A Formal Complaint is a document *filed by a complainant or signed by the Title IX Coordinator* alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment.
- A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail.
- At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.

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Mandatory Dismissal of Formal Complaint

- "If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then *the recipient must dismiss the formal complaint* with regard to that conduct for purposes of sexual harassment under title IX or this part."

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Mandatory Dismissal of Formal Complaint

If a complaint is dismissed because it does not constitute sexual harassment under Title IX, consider whether it requires an investigation under the Uniform Complaint Procedures or any other sexual harassment procedures the District has adopted.

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Permissive Dismissal of Formal Complaint

- “The recipient *may* dismiss the formal complaint or any allegations therein, if at any time during the investigation []: a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.”

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Written Notice of Allegations

- Title IX coordinator is responsible for providing the following information in a written notice to all of the parties:
 - Notice of recipient’s grievance process, including any informal resolution process; and
 - Notice of the allegations, including sufficient details known at the time and with sufficient time to prepare a response before an initial interview. This includes the identities of parties involved, if known, and the date and location of the alleged incident, if known.

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Informal Resolution

- “A recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed.
- However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication.”

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Emergency Removal

“Nothing in this part precludes a recipient from removing a respondent from the recipient’s education program or activity on an emergency basis, provided that the recipient [1] undertakes an individualized safety and risk analysis, [2] determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and [3] provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.”

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What is an Investigation?

- It is the process by which a school determines whether or not the conduct occurred based on the standard of evidence used
- The DOE used to take the position that an investigation included both the fact-finding and decision-making process (excluding appeals)
- Under the new Title IX regulations, the investigation is a separate process from the decision-making process; however, both are integral parts of the grievance process

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Investigation Process Requirements

- Burden of gathering evidence is on the recipient – not the complainant, respondent, or witnesses.
- Complainant and Respondent are provided equal opportunity to present evidence, including witnesses.
- No “gag-orders”; either party must be allowed to discuss the allegations and gather evidence.

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Investigation Process, Cont’d.

- Allow both parties to have advisor present throughout process.
- Provide notice of all proceedings to parties expected to attend.
- Both parties may review the evidence and have opportunity to meaningfully respond before final report (at least 10 days).
- Prepare and issue a final investigation report.

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Investigations Will Vary

- Investigations may include:
 - Conducting interviews
 - Complainant
 - Respondent
 - Other witnesses
 - Reviewing student and personnel files
 - Reviewing law enforcement documents, if applicable
 - Gathering and examining other relevant documents or evidence
 - Hiring an outside investigator

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Selecting the Investigator

- District employee -- manager or supervisor
- HR professional (in-house)
- HR consultant (3rd party), but only if licensed as attorney or PI
- Private investigator
- In-house counsel
- Outside counsel

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Selecting the Investigator

- Factors to consider when choosing an “outside” investigator:
 - Does the complaint present a high level of potential liability for the district?
 - Must the investigation be completed in a very short time frame and district employees cannot meet the timelines?
 - Will the investigation be so complicated or involved, that district employees cannot reasonably be reassigned to handle it?
 - Is the matter extremely sensitive or must it be handled with a heightened level of confidentiality?
 - Does the matter involve many of the individuals who would normally conduct the investigation?

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Investigator Qualifications

- An equitable investigation requires a trained investigator to:
 - Analyze and document available evidence
 - Develop reliable decisions
 - Objectively evaluate the credibility of parties and witnesses
 - Synthesize all available evidence
 - Take into account unique and complex circumstances of each case
- Investigator may not rely on sex stereotypes or generalizations in conducting investigation or reaching conclusions




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Investigation Fundamentals: First Steps

1. Review the applicable procedure
 - Enter the case into a complaint log
 - Map out the steps and timeline for the investigation based on the procedure/policy
 - Make sure required notices are sent, including copies of the applicable procedure/policy and other information required by the procedure/policy
2. Develop an investigative strategy
 - Outline scope and breadth of investigation
 - Determine who should be interviewed and what information should be reviewed




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Investigation Fundamentals: Next Steps

3. Determine who will be the investigator
 - District employees
 - Outside investigators
4. Conduct the investigation
 - Begin promptly
 - Determine who should be interviewed, and in what order
 - Begin interviews with core people and broaden as needed
 - Before interviewing, outline interview questions, including elements of a particular complaint
 - Before interviewing, review related documents/records




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Investigation Fundamentals, cont'd.

4. Conduct the investigation, cont'd
 - Prepare for interviews by identifying the following elements:
 - Person to be interviewed
 - Possible right to union representation
 - Possible admonishments, e.g. *Lybarger* warning
 - Location, date, and time of interview
 - Conduct interview in confidential setting
 - Make arrangements to record interviews, if possible
 - California law requires informed consent of witness (632 P.C.)
 - Once recorder is on, state date, time & place of interview, name of participants and have witness confirm on tape their knowledge of & consent of the recording



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Investigation Fundamentals, cont'd

- Should be looking for each element of the type of sexual harassment at issue
 - Hostile environment
 - Quid pro quo
 - Sexual assault, dating, domestic violence, or stalking
- Was each prong of the allegation met?
 - For example, hostile environment -
 - (1) Unwelcome conduct on the basis of sex that is
 - (2) Sufficiently severe, pervasive, and objectively offensive that it
 - (3) Effectively denies a person equal access to an education program or activity

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Standard of Evidence

- There are two permissible standards of evidence for Title IX investigations:
 - Preponderance of the Evidence (>50%)
 - Clear and Convincing (>75%)
- Recipients must apply the **same standard** to Title IX investigations involving students as those investigations involving employees.


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Written Notice of Allegations

- Title IX coordinator is responsible for providing the following information in a written notice to the parties:
 - Notice of recipient's grievance process, including any informal resolution process; and
 - Notice of the allegations, including sufficient details known at the time and with sufficient time to prepare a response before an initial interview. This includes the identities of parties involved, if known, and the date and location of the alleged incident, if known.

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Interviews

- Make appropriate disclosures (e.g., who you are, who you represent, why you are there)
- Ask for consent to record
- Explain that district is required to investigate allegations of [sexual harassment, sexual violence, sex discrimination] and take appropriate action
- State that no conclusions have been made and retaliation is prohibited
- Try to put interviewee at ease (use trauma-informed guidelines)
- Emphasize the expectation of best recollection and truthful answers
- Start with broad/overview questions

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Interviews

- Have interviewee describe the incident(s)/conduct in his/her own words
 - 5 W's – who, what, when, where, why
- Ask if interviewee has told interviewer everything they can remember
- After each answer, ask: "is there anything else?"
- Ask follow up questions, including questions to confirm chronology of events, to fill in any gaps in the 5 W's
- Don't offer information or provide answers
- Ask about knowledge of any relationships between complainant & respondent or possible motivations for complaint or conduct at issue

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Interviews

- Ask about and for copies of any relevant documents, texts, emails, photos, social media posts, etc.
- At the end of the interview:
 - Ask whether there is anyone else the interviewee thinks should be interviewed about the incident/conduct
 - Provide your contact information and advise the interviewee to contact you with any additional information
 - Give the interviewee a copy of the relevant procedure
 - Caution against retaliation
 - Remind the interviewee to maintain confidentiality
 - Advise interviewee you may need to follow-up with them as investigation proceeds

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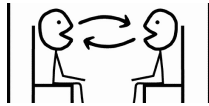
Interviews

- Be an active listener & critical thinker
 - “Does this make sense?”
 - “Do I understand exactly what happened?”
 - “Will someone else reading my report understand exactly what happened?”
- Clarify basis for witness’ knowledge of a “fact”
 - How do they know?
 - Saw it? Heard it? Was involved in it?
- Use your time line to identify discrepancies between witness’ own story & that of others - challenge facts
- Distinguish between “no” & “I cannot recall.”

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Interviews: Assessing Credibility

- Investigators should take into account all relevant evidence in determining witnesses’ credibility



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Interviews: Assessing Credibility

- **Factors to consider:**
 - Changes in behavior of the complainant
 - Complainant telling another person about the discrimination
 - Other complaints against same respondent
 - Witnesses’ conduct during interviews, including body language, eye contact, tone, nervous behaviors, sweating
 - Consistent/inconsistent information
 - Corroboration by other witnesses, documents, or other evidence
 - How much detail did witness offer?
 - (See other factors in Sample Confidential Summary Investigation Report)
- **Factors that aren’t as relevant:** a delay in reporting, minor inconsistencies in story, that complainant and respondent once had a consensual relationship

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Interviewing the Complainant

- Must be provided sufficient written notice in advance of any interview to prepare for meaningful participation
- Ask complainant specifically:
 - Has anything like this ever happened before? Use 5 W's
 - The nature and past history of any relationship between complainant and respondent
 - Whether complainant has previously complained about the respondent, and if so, to whom
 - Whether anyone else knew of or joined in conduct
 - Whether complainant is aware of other incidents by respondent toward other individuals
 - Whether any documents exist to support the allegations

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Interviewing the Respondent

- Must be provided sufficient written notice (including the specific allegations) in advance of any interview to prepare for meaningful participation
- Verify that no determinations of wrongdoing have been made and that they will have a full opportunity to provide information
- Caution against retaliation
- The respondent (and complainant) should be allowed to have an advisor present

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Interviewing the Respondent, cont'd.

- Provide respondent a copy of applicable complaint procedures and explain district's obligation to investigate complaints
- Ascertain:
 - Whether respondent agrees with statements/allegations of complainant and other witnesses already interviewed
 - Whether any witnesses or other evidence exists that could corroborate respondent's version of events
 - The nature and past history of any relationship between complainant and respondent
 - Whether respondent knows if complainant has previously made complaints of a similar nature about respondent or others

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Interviewing Other Witnesses

- Advise witness to keep matter confidential
- Discuss prohibition against retaliation
- If witness is a minor, notify parent/guardian of need to interview minor
- Identify the relation of witnesses to the complainant and/or respondent
- Questions may include:
 - Ask them to describe event in own words
 - Does witness know of similar incidents/conduct
 - Identity of any other witnesses



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V. Legally Compliant Investigation Reports



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Investigation Report

- Report should:
 - Fairly summarize relevant evidence, and
 - Be provided to complainant and respondent (and their advisors) for comment at least 10 days before a final determination.

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Investigation Reports

- Follow your institution's grievance procedures, and any applicable policies
- It must contain the following elements:
 - Parties
 - Incident – when was it reported, to whom; when did it take place
 - Alleged Violations – code of conduct, district policy, etc.
 - Interviews with parties
 - Additional information provided by parties
 - Summary of relevant evidence (e.g., information provided by witnesses, review of documentation, review of video footage, etc.)
 - Credibility determination
 - Findings of fact
 - Conclusion – “I conclude it is/is not more likely than not that respondent...”

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Investigation Report Requirements (Per Cal. Law)

- **For Uniform Complaints, K-12 Decision** must include:
 - Findings of fact based on the evidence
 - Conclusions of law
 - Disposition of the complaint
 - Rationale for the disposition
 - Corrective actions, if any
 - Notice of appeal rights, if any
(5 CCR 4631)

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Findings of Fact and Conclusions

- Some evidence may not be in dispute
- Some evidence can be corroborated by the investigator
- Information from complainant or respondent may be corroborated by witnesses
- When information received from complainant and respondent differs on important points, make credibility determinations
- State what facts are determined to be true/untrue and what areas could not be determined (if any)

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Findings of Fact and Conclusions, cont'd.

- Based on the facts and analysis, reach a conclusion:
 - The complaint lacks merit
 - The evidence was not conclusive and cannot support a determination as to the merits of the complaint
 - The alleged conduct occurred, but did not meet the definition of sexual harassment under Title IX
 - The alleged conduct occurred and met the definition of sexual harassment under Title IX
- Prepare a report

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Interview Documentation

- Take and keep notes of interviews and the entire investigation (telephone conversations, meetings)
- Include date, time, and place of interview
- Include who attended the interview, and how long it lasted
- Note information provided by witnesses, and if it is consistent/inconsistent with information provided by other witnesses
- Note any documents/evidence provided during interview
- Note names of any potential witnesses provided by interviewee

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Preserve Evidence

- Take note of when, where, and from whom an item was taken
- Store all evidence in a secure location
- If any items are surrendered to law enforcement, take a picture of the item and note when, where, and to whom it was surrendered
- Photograph physical injuries and promptly arrange for appropriate first aid/medical attention
- Title IX regulations require institutions to keep records to send to OCR for compliance reviews
- Certain records must be sent to CDE/Chancellor's Office



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Balancing Act



- The most defensible investigations will balance the rights of complainant and respondent
- Essentially, parties must be treated equally, including:
 - Equal opportunity to present witnesses and other relevant evidence
 - Same meaningful access to information used during any disciplinary meetings/hearings
 - Opportunity to respond to the investigation report in writing in advance of any decision of responsibility

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VI. Decision Making



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Cross-Examination Requirement

After the recipient has sent the investigative report to the parties...and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

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Decision-Maker: Who?

- Title IX Coordinator or Investigator cannot be the decision-maker.
- Can be a single person or a panel of decision-makers.
- Cannot have a conflict of interest or bias that affects the outcome of the matter.
- Decision-maker on appeal must not have been previously involved.

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How to Serve Impartially

- Avoid intentional or unintentional injection of sex-based biases and stereotypes.
- Treat complainants and respondents equitably.
- Objectively evaluate all relevant evidence.
- Avoid credibility determinations based on a person's status as a complainant, respondent, or witness.
- Uphold the presumption of respondent's innocence until conclusion of the grievance process.
- Avoid prejudgment of the facts.

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Determining Relevancy

- Relevant:
 - Having significant and demonstrable bearing on the matter at hand
 - Affording evidence tending to prove or disprove the matter at issue or under discussion
- "Questions must be relevant. More specifically, the 2020 amendments state that questions about the complainant's prior sexual behavior are not relevant, subject to certain limitations. The preamble states that any school may exclude as not relevant questions that are duplicative or repetitive."

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Determining Relevancy

- “The 2020 amendments state that ‘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’ or 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.’”

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Reaching a Determination

After the parties have had an opportunity to review the investigative report and submit questions, “[t]he decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a **written determination** regarding responsibility.”

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Written Determination

- Must provide to parties simultaneously.
- The determination must contain:
 - Identification of the allegations potentially constituting sexual harassment;
 - A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, and methods used to gather other evidence;
 - Findings of fact supporting the determination;

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Written Determination, Cont'd.

- Conclusions regarding the application of the recipient's code of conduct to the facts;
- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and
- The recipient's procedures and permissible bases for the complainant and respondent to appeal.

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VII. Investigation-Related Issues



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CONFIDENTIAL

Confidentiality

- A complainant may no longer make a request for confidentiality in the course of an investigation
- Previously, requests for confidentiality were evaluated in light of the school's responsibility to provide a safe and nondiscriminatory environment for all students
- 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.

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Retaliation



- Schools need to be cognizant of the possibility of retaliation against complainants and witnesses
- Schools must have procedures in place to protect against retaliatory harassment
- Complainants and their parents/guardians, as appropriate, should be advised how to report subsequent problems
- Any retaliation experienced by a complainant constitutes a separate Title IX violation

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Hot Seat

Let's identify the issues and discuss how you would respond to this situation.

1. Complainant, Chris, tells Santa Cruz High School that he would like certain witnesses interviewed as part of the District's investigation into his sexual assault. The witnesses refuse to be interviewed. District has strong reason to believe they were pressured not to participate in the investigation.
2. The alleged assailant is a star on the SCHS football team. The District hires an attorney to work with the Decision Maker. The attorney is a former football player for the District and a regular donor to the football program.

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Title IX Investigation Procedures: Law Enforcement

- In cases involving potential criminal conduct, district personnel must determine whether law enforcement should be notified.
- District personnel should never discourage an alleged victim from reporting to law enforcement.
- Law enforcement involvement and/or separate investigation(s) does **not** relieve the district of its independent Title IX obligation to investigate the conduct.
- Conduct may constitute a violation of Title IX even if law enforcement does not have sufficient evidence of a criminal violation - different standards of evidence.

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A Word on FERPA



- The Family Educational Rights and Privacy Act (“FERPA”) prohibits educational institutions from disclosing information “maintained” in a student’s “education record”
- FERPA is implicated in two situations in the Title IX context
 - (1) victim’s right to information about the outcome of a complaint against another student
 - (2) due process rights of respondent individuals to obtain information about the identity of the complainant and the nature of the allegations.
- Consult legal counsel with specific facts/questions

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Another Word on FERPA

- FERPA permits a school to disclose to the complainant any information about the sanction imposed upon the perpetrator when the sanction directly relates to the complainant
 - Stay away order
 - Harasser is prohibited from attending school for a period of time
 - Perpetrator was transferred to another class or campus

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Additional Resources – K-12

- U.S. Department of Education, Office for Civil Rights: Title IX and Sex Discrimination, https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html
- U.S. Department of Education, Office for Civil Rights: Sexual Harassment Resources, <https://www2.ed.gov/about/offices/list/ocr/sexharassresources.html>
- White House Task Force to Protect Students from Sexual Assault, Considerations for School District Sexual Misconduct Policies, <https://www.justice.gov/ovw/file/900716/download>
- National Center on Safe Supportive Learning Environments, <https://safesupportivelearning.ed.gov/safe-place-to-learn-k12>

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Questions?



Information in this presentation, including but not limited to PowerPoint handouts and presenters' comments, is summary only and not legal advice. We advise you consult with legal counsel to determine how this information may apply to your specific facts and circumstances.

Leah M. Smith, Associate General Counsel
lsmith@scsca.org

School & College Legal Services of California
5350 Skylane Boulevard
Santa Rosa, CA 95403
(707) 524-2690
www.sclsca.org

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[INITIAL LETTER TO COMPLAINANT (K-12)]

**** AMEND BASED ON ALLEGATIONS AND COMPLAINT PROCEDURE****

[COMPLAINANT]

[ADDRESS]

[ADDRESS]

Via USPS Mail, First Class

Via Certified Mail

Via Email: [EMAIL ADDRESS]

[DATE]

Re: Formal Complaint (Received on [DATE])

Dear **[COMPLAINANT]**,

This letter is to confirm that the **[DISTRICT]** (“District”) has received the formal complaint against **[RESPONDENT]** (“Respondent”) that you submitted to **[NAME]** on **[DATE]**. The District will process this complaint as a Formal Complaint under the District’s grievance process pursuant to its Sexual Harassment Board Policy and Administrative Regulation **[INSERT BP/AR NUMBER]**. I have enclosed a copy of Board Policy and Administrative Regulation **[]** for your reference. Please contact me if you have any questions.

Formal Complaint

Based on your Formal Complaint, I have developed the following allegations, which will be investigated pursuant to the District’s policies and regulations. If you disagree with my understanding of your Formal Complaint, or with the allegations as I have written them, or if you wish to supplement your Formal Complaint, please let me know in writing as soon as possible.

In your complaint, you alleged that the Respondent discriminated against you **[OR YOUR CHILD]** on the basis of sex based on incidents that took place **[ON [DATE] OR DURING THE [] SEMESTER]**. In the allegations below, you **[OR YOUR CHILD]** are referred to as “Complainant.”

Allegation No. 1:

[INCLUDE SUFFICIENT DETAILS SUCH AS THE IDENTITIES OF THE PARTIES INVOLVED IN THE INCIDENT, IF KNOWN, THE CONDUCT ALLEGEDLY CONSTITUTING SEXUAL HARASSMENT, AND THE DATE AND LOCATION OF THE ALLEGED INCIDENT, IF KNOWN]

Allegation No. 2:

In your Complaint, you stated that your desired resolution of this matter is that:

- **[ADD DESIRED RESOLUTIONS]**

[INITIAL LETTER TO COMPLAINANT (K-12)]

**** AMEND BASED ON ALLEGATIONS AND COMPLAINT PROCEDURE****

Investigation of the Complaint under the Grievance Process

The District takes these allegations seriously and has a duty to conduct a fair, thorough, and legally compliant investigation, which will be conducted within the required timelines, but may be subject to a temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.

[INCLUDE IF APPLICABLE] The District has retained outside counsel, [NAME OF OUTSIDE COUNSEL], to conduct an independent investigation of this complaint. [OUTSIDE COUNSEL] or [DISTRICT EMPLOYEE] will be in touch with you to schedule a meeting.

The District will investigate the allegations in accordance with the grievance process set forth in Administrative Regulation [REDACTED]. An investigator will be assigned to conduct a fact-finding investigation and as part of the investigation they will meet with you to discuss these allegations and to ask you questions related to the allegations and other issues that may be raised in the course of the investigation. At this and any follow up meetings, you will be entitled to present evidence supporting the allegations, including any documentation you may have. You are also entitled to have an advisor of your choice, who may be, but is not required to be an attorney, and may inspect and review evidence obtained during the investigation. In addition, your advisor may attend any meeting with the District related to this investigation. The [INVESTIGATOR OR A DISTRICT EMPLOYEE] will contact you to arrange the meeting time.

Please be advised that knowingly making false statements or knowingly submitting false information during the grievance process may subject you to discipline. [INSERT RELEVANT PROVISION OF POLICY/REGULATION]

For each of the allegations, the District will investigate to determine whether it is more likely than not the alleged conduct occurred. [CONFIRM IF THE DISTRICT USES THE PREPONDERANCE OF EVIDENCE OR CLEAR AND CONVINCING EVIDENCE STANDARD]

The District will keep any investigation confidential to the extent possible, but it cannot guarantee absolute confidentiality. Release of some information on a "need-to-know basis" is necessary for a thorough investigation and to protect the rights of alleged victims, respondents, and the school community.

Information about the Grievance Process and Your Rights

The District is committed to providing an academic and work environment that respects the dignity of individuals and groups, and is free from unlawful sexual harassment and sex discrimination. (Board Policy [REDACTED] (Sexual Harassment), enclosed with this letter.)

[INITIAL LETTER TO COMPLAINANT (K-12)]

**** AMEND BASED ON ALLEGATIONS AND COMPLAINT PROCEDURE****

If an individual believes that he or she has been the victim of unlawful sexual harassment, sex discrimination, or retaliation, the District encourages the individual to file a complaint. An individual may file a formal complaint using the procedures outlined in Administrative Regulation [] (enclosed).

Here is some information about your rights under the grievance process:

- You will not be required to confront or work out problems directly with the Respondent.
- You may file a complaint with local law enforcement.
- You may file a complaint with the United States Department of Education, Office for Civil Rights, if the complaint is not based on employment.
- You may file a complaint with the United States Equal Employment Opportunity Commission or the California Department of Fair Employment and Housing if the complaint is based on employment.
- You may be entitled to the following supportive services during the grievance process: counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The District will maintain as confidential any supportive measures provided to you, to the extent that maintaining such confidentiality would not impair the ability of the District to provide the supportive measures.
- You will have an opportunity to present witnesses, including fact and expert witnesses, and any evidence supporting the allegation(s) and have that evidence considered as part of the District's investigation.
- The District will conduct an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and any credibility determinations may not be based on a person's status as a complainant, respondent, or witness.
- The District 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.
- Any individual designated by the District as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, may not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.
- You are entitled to the same periodic status updates that the District provides to the respondent.

[INITIAL LETTER TO COMPLAINANT (K-12)]

**** AMEND BASED ON ALLEGATIONS AND COMPLAINT PROCEDURE****

- You will be given an equal opportunity as the respondent to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in the formal complaint, including the evidence upon which the District does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that you can meaningfully respond to the evidence prior to conclusion of the investigation.
- Prior to completion of the investigative report, the District must send to you, and your advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and you will have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.
- You are entitled to receive an investigative report in an electronic format or a hard copy that fairly summarizes relevant evidence at least 10 days prior to a hearing (if a hearing is required or otherwise provided) or other time of determination regarding responsibility, for your review and written response.
- Prior to reaching a determination regarding responsibility, you will be given the opportunity to submit written, relevant questions to the decision maker that you want asked of any party or witness. You are entitled to receive answers to your questions and the opportunity to submit additional, limited follow-up questions.
- The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. A determination regarding responsibility will only be made at the conclusion of the grievance process.
- If you are not satisfied with the results of the written determination regarding responsibility, you will have the right to appeal. The appeals process is described in Administrative Regulation [REDACTED].

At all times the District retains discretion to determine whether alleged harassment, discrimination, or retaliation warrants discipline. Please be aware that the District may require an investigation to continue even if you withdraw your complaint.

Informal Resolution Process [INCLUDE IF APPLICABLE]

At any time prior to reaching a determination regarding responsibility, the District may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the District:

- Provides the parties a written notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to

[INITIAL LETTER TO COMPLAINANT (K-12)]

**** AMEND BASED ON ALLEGATIONS AND COMPLAINT PROCEDURE****

withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

- Obtains the parties' voluntary, written consent to the informal resolution process; and
- Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

Prohibition against and Protection from Retaliation

Please be reminded that this matter is confidential; however, you may discuss the allegations under investigation with other individuals in order to gather and present relevant evidence. We appreciate, in advance, your understanding that it is critically important that those named in the complaint, and witnesses, feel free to candidly and confidentially speak during the investigation without fear of intimidation, harassment or retaliation. Just the same, the District prohibits retaliation against complainants or other participants in the investigation process.

In accordance with state and federal law, you are directed not to retaliate against the respondent or any individual involved in the investigation. Any retaliatory conduct will result in immediate disciplinary action. You also have the right to be free from retaliation. If you believe you have experienced mistreatment or retaliation as a result of your involvement in the investigation, please let me know right away.

Next Steps

The [INVESTIGATOR OR DISTRICT EMPLOYEE] will contact you to schedule a meeting.

Please do not hesitate to contact me if you have any questions. I can be reached directly at [PHONE NUMBER].

Sincerely,

[NAME]

[TITLE]

Enclosures: [AMEND AS NECESSARY]

Board Policy [] (Sexual Harassment)

Administrative Regulation [] (Sexual Harassment)

Board Policy [] (Nondiscrimination/Harassment)

Administrative Regulation [] (Nondiscrimination/Harassment)

[NOTICE OF ALLEGATIONS IN FORMAL COMPLAINT TO RESPONDENT (K-12)]

**** AMEND BASED ON ALLEGATIONS AND COMPLAINT PROCEDURE****

[RESPONDENT]

[ADDRESS]

[ADDRESS]

Via U.S. Mail, First Class

Via Certified Mail

Via Email: [EMAIL ADDRESS]

[DATE]

Re: Notice of Allegations in Formal Complaint

Dear **[RESPONDENT]**:

This letter is to inform you that the **[DISTRICT]** ("District") has received a formal complaint against you filed by **[INSERT NAME OF COMPLAINANT]** ("Complainant"). The Complainant alleged that you engaged in unlawful sex discrimination/sexual harassment in violation of District policies and regulations. In the allegations as described here, you are referred to as the "Respondent." Please review the allegations below. Please contact me if you have any questions.

The specific allegations are as follows:

Allegation No. 1:

[INCLUDE SUFFICIENT DETAILS SUCH AS THE IDENTITIES OF THE PARTIES INVOLVED IN THE INCIDENT, IF KNOWN, THE CONDUCT ALLEGEDLY CONSTITUTING SEXUAL HARASSMENT, AND THE DATE AND LOCATION OF THE ALLEGED INCIDENT, IF KNOWN]

Allegation No. 2:

Such behavior may constitute unlawful sex discrimination or sexual harassment, a violation of Board Policies and Administrative Regulations **[INSERT RELEVANT BP/AR – SEXUAL HARASSMENT, NONDISCRIMINATION, ETC.]** and Article **[]** of the collective bargaining agreement between **[UNION]** ("UNION") and the District **[IF APPLICABLE]**. If you are found to have engaged in misconduct, you may be subject to discipline on these or other grounds.

The District is confirming these allegations with the Complainant, and will notify you if the allegations change or are supplemented.

While no determination has been made, and the District does not presume that you have acted inappropriately, the District will investigate the allegations in accordance with the grievance process set forth in Administrative Regulation **[]**. I have enclosed a copy of Administrative Regulation **[]** for your reference.

[NOTICE OF ALLEGATIONS IN FORMAL COMPLAINT TO RESPONDENT (K-12)]

**** AMEND BASED ON ALLEGATIONS AND COMPLAINT PROCEDURE****

Investigation of the Complaint under the Grievance Process

The District takes these allegations seriously and has a duty to conduct a fair, thorough, and legally compliant investigation, which will be conducted within the required timelines, but may be subject to a temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.

[INCLUDE IF APPLICABLE] The District has retained outside counsel, [NAME OF OUTSIDE COUNSEL], to conduct an independent investigation of this complaint. [OUTSIDE COUNSEL] or [DISTRICT EMPLOYEE] will be in touch with you to schedule a meeting.

The District will investigate the allegations in accordance with the grievance process set forth in Administrative Regulation []. An investigator will be assigned to conduct a fact-finding investigation and as part of the investigation they will meet with you to discuss these allegations and to ask you questions related to the allegations and other issues that may be raised in the course of the investigation. At this and any follow up meetings, you will be entitled to present evidence refuting the allegations, including any documentation you may have. You are also entitled to have an advisor of your choice, who may be, but is not required to be an attorney, and may inspect and review evidence obtained during the investigation. In addition, your advisor may attend any meeting with the District related to this investigation. The [INVESTIGATOR OR A DISTRICT EMPLOYEE] will contact you to arrange the meeting time.

Please be advised that knowingly making false statements or knowingly submitting false information during the grievance process may subject you to discipline. [INSERT RELEVANT PROVISION OF POLICY/REGULATION]

For each of the allegations, the District will investigate to determine whether it is more likely than not the alleged conduct occurred. [CONFIRM IF THE DISTRICT USES THE PREPONDERANCE OF EVIDENCE OR CLEAR AND CONVINCING EVIDENCE STANDARD]

The District will keep any investigation confidential to the extent possible, but it cannot guarantee absolute confidentiality. Release of some information on a "need-to-know basis" is necessary for a thorough investigation and to protect the rights of alleged victims, respondents, and the school community.

Information about the Grievance Process and Your Rights

The District is committed to providing an academic and work environment that respects the dignity of individuals and groups, and is free from unlawful sexual harassment and sex discrimination. (Board Policy [] (Sexual Harassment), enclosed with this letter.)

[NOTICE OF ALLEGATIONS IN FORMAL COMPLAINT TO RESPONDENT (K-12)]

**** AMEND BASED ON ALLEGATIONS AND COMPLAINT PROCEDURE****

If an individual believes that he or she has been the victim of unlawful sexual harassment, sex discrimination, or retaliation, the District encourages the individual to file a complaint. An individual may file a formal complaint using the procedures outlined in Administrative Regulation [] (enclosed).

Here is some information about your rights under the grievance process:

- You will be provided written notice of the allegation(s) against you with sufficient details known at the time and with sufficient time to prepare a response before any initial interview.
- You may be entitled to the following supportive services during the grievance process: counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The District will maintain as confidential any supportive measures provided to you, to the extent that maintaining such confidentiality would not impair the ability of the District to provide the supportive measures.
- You will have an opportunity to present witnesses, including fact and expert witnesses, and any evidence refuting the allegation(s) against you and have that evidence considered as part of the District's investigation.
- The District will conduct an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and any credibility determinations may not be based on a person's status as a complainant, respondent, or witness.
- The District 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.
- You are entitled to a presumption that you are not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.
- Any individual designated by the District as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, may not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.
- You are entitled to the same periodic status updates that the District provides to the complainant.
- You will be given an equal opportunity as the complainant to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations

[NOTICE OF ALLEGATIONS IN FORMAL COMPLAINT TO RESPONDENT (K-12)]

**** AMEND BASED ON ALLEGATIONS AND COMPLAINT PROCEDURE****

raised in the formal complaint, including the evidence upon which the District does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that you can meaningfully respond to the evidence prior to conclusion of the investigation.

- Prior to completion of the investigative report, the District must send to you, and your advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and you will have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.
- You are entitled to receive an investigative report in an electronic format or a hard copy that fairly summarizes relevant evidence at least 10 days prior to a hearing (if a hearing is required or otherwise provided) or other time of determination regarding responsibility, for your review and written response.
- Prior to reaching a determination regarding responsibility, you will be given the opportunity to submit written, relevant questions to the decision maker that you want asked of any party or witness. You are entitled to receive answers to your questions and the opportunity to submit additional, limited follow-up questions.
- The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. A determination regarding responsibility will only be made at the conclusion of the grievance process.
- If you are not satisfied with the results of the written determination regarding responsibility, you will have the right to appeal. The appeals process is described in Administrative Regulation [REDACTED].

At all times the District retains discretion to determine whether alleged harassment, discrimination, or retaliation warrants discipline. Please be aware that the District may require an investigation to continue even if a complainant withdraws a complaint.

Informal Resolution Process [INCLUDE IF APPLICABLE]

At any time prior to reaching a determination regarding responsibility, the District may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the District:

- Provides the parties a written notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the

[NOTICE OF ALLEGATIONS IN FORMAL COMPLAINT TO RESPONDENT (K-12)]

**** AMEND BASED ON ALLEGATIONS AND COMPLAINT PROCEDURE****

informal resolution process, including the records that will be maintained or could be shared;

- Obtains the parties' voluntary, written consent to the informal resolution process; and
- Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

Prohibition against and Protection from Retaliation

Please be reminded that this matter is confidential; however, you may discuss the allegations under investigation with other individuals in order to gather and present relevant evidence. We appreciate, in advance, your understanding that it is critically important that those named in the complaint, and witnesses, feel free to candidly and confidentially speak during the investigation without fear of intimidation, harassment or retaliation. Just the same, the District prohibits retaliation against complainants or other participants in the investigation process.

In accordance with state and federal law, you are directed not to retaliate against the Complainant or any individual involved in the investigation. Any retaliatory conduct will result in immediate disciplinary action. You also have the right to be free from retaliation. If you believe you have experienced mistreatment or retaliation as a result of your involvement in the investigation, please let me know right away.

Next Steps

The [INVESTIGATOR OR DISTRICT EMPLOYEE] will contact you to schedule a meeting.

Pursuant to the [UNION]-District collective bargaining agreement, the District will notify [UNION] representative [UNION REPRESENTATIVE]) that you are the subject of a student complaint.

If you would like to be represented by your union in this matter, please contact your union representative directly.

Please do not hesitate to contact me if you have any questions. I can be reached directly at [PHONE NUMBER].

Sincerely,

[NAME]

[TITLE]

Enclosures: [AMEND AS NECESSARY]

[NOTICE OF ALLEGATIONS IN FORMAL COMPLAINT TO RESPONDENT (K-12)]

**** AMEND BASED ON ALLEGATIONS AND COMPLAINT PROCEDURE****

Board Policy [] (Sexual Harassment)

Administrative Regulation [] (Sexual Harassment)

Board Policy [] (Nondiscrimination/Harassment)

Administrative Regulation [] (Nondiscrimination/Harassment)

Cc: [GREIVANCE OFFICER], [UNION] Grievance Officer

[UNION PRESIDENT], [UNION] President

Investigation Tracking Document

Administrator to fill in information and initial each category upon completion.

1. Date Complaint Received:
2. Identify Applicable Policy/Procedure:
3. What type of investigation needs to take place?
4. Due date for completion:
5. Witnesses interviewed:
6. Factual findings:
7. Conclusions:
8. Action Taken:
9. Is follow-up necessary?
 - a. If so, what?
10. Is documentation in employee file? In student records?

Process completed: _____

Administrator Signature	Date
-------------------------	------

c: Investigation file

FROM: EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors

Effective Investigative Process

An employer should set up a mechanism for a prompt, thorough, and impartial investigation into alleged harassment. As soon as management learns about alleged harassment, it should determine whether a detailed fact-finding investigation is necessary. For example, if the alleged harasser does not deny the accusation, there would be no need to interview witnesses, and the employer could immediately determine appropriate corrective action.

If a fact-finding investigation is necessary, it should be launched immediately. The amount of time that it will take to complete the investigation will depend on the particular circumstances.⁶⁸ If, for example, multiple individuals were allegedly harassed, then it will take longer to interview the parties and witnesses.

It may be necessary to undertake intermediate measures before completing the investigation to ensure that further harassment does not occur. Examples of such measures are making scheduling changes so as to avoid contact between the parties; transferring the alleged harasser; or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation. The complainant should not be involuntarily transferred or otherwise burdened, since such measures could constitute unlawful retaliation.

The employer should ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts. The alleged harasser should not have supervisory authority over the individual who conducts the investigation and should not have any direct or indirect control over the investigation. Whoever conducts the investigation should be well-trained in the skills that are required for interviewing witnesses and evaluating credibility.

Questions to Ask Parties and Witnesses

When detailed fact-finding is necessary, the investigator should interview the complainant, the alleged harasser, and third parties who could reasonably be expected to have relevant information. Information relating to the personal lives of the parties outside the workplace would be relevant only in unusual circumstances. When interviewing the parties and witnesses, the investigator should refrain from offering his or her opinion.

The following are examples of questions that may be appropriate to ask the parties and potential witnesses. Any actual investigation must be tailored to the particular facts.

Questions to Ask the Complainant:

- Who, what, when, where, and how: *Who* committed the alleged harassment? *What* exactly occurred or was said? *When* did it occur and is it still ongoing? *Where* did it occur? *How often* did it occur? *How* did it affect you?

- How did you react? What response did you make when the incident(s) occurred or afterwards?
- How did the harassment affect you? Has your job been affected in any way?
- Are there any persons who have relevant information? Was anyone present when the alleged harassment occurred? Did you tell anyone about it? Did anyone see you immediately after episodes of alleged harassment?
- Did the person who harassed you harass anyone else? Do you know whether anyone complained about harassment by that person?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- How would you like to see the situation resolved?
- Do you know of any other relevant information?

Questions to Ask the Alleged Harasser:

- What is your response to the allegations?
- If the harasser claims that the allegations are false, ask why the complainant might lie.
- Are there any persons who have relevant information?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- Do you know of any other relevant information?

Questions to Ask Third Parties:

- What did you see or hear? When did this occur? Describe the alleged harasser's behavior toward the complainant and toward others in the workplace.
- What did the complainant tell you? When did s/he tell you this?
- Do you know of any other relevant information?
- Are there other persons who have relevant information?

Credibility Determinations

If there are conflicting versions of relevant events, the employer will have to weigh each party's credibility. Credibility assessments can be critical in determining whether the alleged harassment in fact occurred. Factors to consider include:

- **Inherent plausibility:** Is the testimony believable on its face? Does it make sense?
- **Demeanor:** Did the person seem to be telling the truth or lying?
- **Motive to falsify:** Did the person have a reason to lie?

- **Corroboration:** Is there **witness testimony** (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or **physical evidence** (such as written documentation) that corroborates the party's testimony?
- **Past record:** Did the alleged harasser have a history of similar behavior in the past?

None of the above factors are determinative as to credibility. For example, the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant's credibility, since harassment often occurs behind closed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that he or she did so again.

Reaching a Determination

Once all of the evidence is in, interviews are finalized, and credibility issues are resolved, management should make a determination as to whether harassment occurred. That determination could be made by the investigator, or by a management official who reviews the investigator's report. The parties should be informed of the determination.

In some circumstances, it may be difficult for management to reach a determination because of direct contradictions between the parties and a lack of documentary or eye-witness corroboration. In such cases, a credibility assessment may form the basis for a determination, based on factors such as those set forth above.

If no determination can be made because the evidence is inconclusive, the employer should still undertake further preventive measures, such as training and monitoring.



SCHOOL & COLLEGE LEGAL SERVICES OF CALIFORNIA

*A Joint Powers Authority
serving school and college
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state.*

INVESTIGATION NOTICE FORM

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Margaret M. Merchat
Patrick C. Wilson
Frank Zotter, Jr.

To:

From:

Date:

Re: Investigation of Possible Violation of District Policy

I am investigating a possible violation of _____ District policy. As part of the investigation, I will be interviewing you today. The purpose of this notice is to provide some important information about what the district expects from you during the investigation.

The district appreciates your participation in this process. We expect you to cooperate fully in the investigation by, for example, answering all questions completely and honestly, providing any documents that are relevant to the investigation, and making yourself available for follow-up interviews, if necessary. You will be excused from your usual work duties for interviews and any other activities necessary to the investigation.

Retaliation against anyone involved in the investigation is strictly prohibited. If you retaliate against anyone involved in this investigation, you will be subject to discipline. If you believe you have been mistreated or otherwise retaliated against because of your participation in this investigation, please tell me immediately.

We will maintain the confidentiality of the investigation to the extent possible, revealing information only on a need-to-know basis or as otherwise required by law.

I encourage you to contact me after our interview today if you remember additional information or if you would like to change or add to your statement for any other reason.

Your signature indicates that you have received and read this notice.

Signed: _____

Name: _____

Date: _____

CONFIDENTIAL SUMMARY INVESTIGATION REPORT

DATE:

TO:

CC:

FROM:

RE: Complaint of Sexual Harassment/Sex Discrimination – [COMPLAINANT
VS. RESPONDENT]

I. INTRODUCTION

This report summarizes the investigation and findings concerning allegations made by [COMPLAINANT] (“Complainant”) against [RESPONDENT] (“Respondent”) for the [SCHOOL DISTRICT OR COMMUNITY COLLEGE DISTRICT] (“District”). The Complainant alleged that Respondent engaged in unlawful sex discrimination/sexual harassment in violation of District policies and regulations.

The specific allegations are as follows:

Allegation No. 1:

Allegation No. 2:

II. FACTUAL BACKGROUND

Complainant is an [EMPLOYEE OR STUDENT] of the District. Respondent is an [EMPLOYEE OR STUDENT] of the District. The Complainant submitted a written formal complaint (“Complaint”) to the Title IX Coordinator on [DATE], which was received by the District on [DATE].

III. INVESTIGATION

The Complaint was accepted under its Grievance Process outlined in Administrative Regulation [OR Administrative Procedure] _____. In addition, this complaint was investigated under Title IX of the Education Amendments of 1972, which requires recipients of federal funds to protect people from discrimination based on sex in education programs or activities.

Under Title IX, sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

1. An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
2. 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; or
3. Sexual assault, dating violence, domestic violence or stalking.

California Education Code section 212.5 defines sexual harassment as the following:

"Prohibited sexual harassment includes, but is not limited to, unwelcome sexual advances, unwanted requests for sexual favors, or other unwanted verbal, visual, or physical conduct of a sexual nature made against another person of the same or opposite sex in the work or educational setting when:

1. Submission to the conduct is made explicitly or implicitly a term or condition of the individual's employment.
2. Submission to or rejection of such conduct by the individual is used as the basis for an employment decision affecting him/her.
3. The conduct has the purpose or effect of having a negative impact upon the individual's work or has the purpose or effect of creating an intimidating, hostile, or offensive work environment. The conduct is sufficiently severe, persistent, pervasive, or objectively offensive so as to create a hostile or abusive working environment or to limit the individual's ability to participate in or benefit from an education program or activity.
4. Submission to or rejection of the conduct by the other individual is used as the basis for any decision affecting him/her regarding benefits, services, honors, programs, or activities available at or through the district.

Other examples of actions that might constitute sexual harassment, whether committed by a supervisor, a co-worker, or a non-employee, in the work or educational setting, include, but are not limited to:

1. Unwelcome verbal conduct such as sexual flirtations or propositions; graphic comments about an individual's body; overly personal conversations or pressure for sexual activity; sexual jokes or stories; unwelcome sexual slurs, epithets, threats, innuendoes, derogatory comments, sexually degrading descriptions, or the spreading of sexual rumors.
2. Unwelcome visual conduct such as drawings, pictures, graffiti, or gestures; sexually explicit emails; displaying sexually suggestive objects.

3. Unwelcome physical conduct such as massaging, grabbing, fondling, stroking, or brushing the body; touching an individual's body or clothes in a sexual way; cornering, blocking, leaning over, or impeding normal movements.

Prohibited sexual harassment may also include any act of retaliation against an individual who reports a violation of the district's sexual harassment policy or who participates in the investigation of a sexual harassment complaint.”

The investigation was conducted by [NAME OF INVESTIGATOR], hired by the District to conduct a fair and impartial review of the facts related to this complaint.

Findings in this matter were based on a Preponderance of Evidence Standard [CONFIRM IF THE DISTRICT USES THE PREPONDERANCE OF EVIDENCE OR CLEAR AND CONVINCING EVIDENCE STANDARD]. The Preponderance of Evidence Standard is defined as reaching a finding that the alleged conduct more likely than not occurred as alleged.

In making findings of fact, this investigator applied the following standards:

- Where the investigation established by a preponderance of the evidence that the alleged conduct did not occur, the allegation is **UNFOUNDED**.
- Where there is insufficient evidence based on a preponderance of the evidence to determine whether the alleged conduct occurred, the allegation is **NOT SUSTAINED**.
- Where the investigation established by a preponderance of the evidence that the alleged conduct occurred, the allegation is **SUSTAINED**.

If an allegation was sustained, this investigator determined if the conduct was based on the Complainant's sex/gender or was of a sexual nature on which the Complainant alleged discrimination/harassment.

The findings are based on this investigator's best judgment as to whether or not a disputed event is more likely than not to have occurred, based on the available evidence. Consistent with District practice, the complaint was investigated promptly and thoroughly. In the course of the investigation, the Complainant and the Respondent were given an equal opportunity to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence. For each potential witness, this investigator made a case-by-case decision on whether or not to conduct interviews, depending upon whether this investigator believed the potential witness to have information directly relevant to the matter under investigation. This investigator instructed the Complainant, Respondent, and all witnesses regarding the confidential nature of the proceedings and the prohibitions on retaliation.

To the extent credibility determinations of witness statements were necessary in preparing my report and findings, this investigator examined the potential motives of the witnesses to fabricate or deny charges and examined circumstantial evidence such as timing or similar sustained charges. In addition, this investigator utilized principles for determining credibility as outlined in California Evidence Code Section 780, which provides:

Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his [or her] testimony at the hearing, including but not limited to any of the following:

- His [or her] demeanor while testifying and the manner in which he [or she] testifies.
- The character of his [or her] testimony.
- The extent of his [or her] capacity to perceive, to recollect, or to communicate any matter about which he [or she] testifies.
- The extent of his [or her] opportunity to perceive any matter about which he [or she] testifies.
- His [or her] character for honesty or veracity or their opposites.
- The existence or nonexistence of a bias, interest, or other motive.
- A statement previously made by him [or her] that is consistent with his [or her] testimony at the hearing.
- A statement made by him [or her] that is inconsistent with any part of his [or her] testimony at the hearing.
- The existence or nonexistence of any fact testified to by him [or her].
- His [or her] attitude toward the action in which he [or she] testifies or toward the giving of testimony.
- His [or her] admission of untruthfulness.

WITNESS INTERVIEWS

The investigation included interviews of the following:

1. _____ – **Complainant**
2. _____ – **Respondent**
3. _____ – **Witness**
4. _____ – **Witness**
5. _____ – **Witness**

The Complainant was asked to identify witnesses. She identified witnesses 1 and 2 as individuals who could have relevant information to provide in this investigation since they are both current students of the District.

The Respondent was asked to identify witnesses. The Respondent identified witnesses 3 and 4 as individuals who could have relevant information to provide in this investigation since they are or were employees of the District.

This investigator also determined that it was necessary to interview witnesses 5 and 6 because [PROVIDE REASONS].

DOCUMENTS

1. Complaint, dated [REDACTED]
2. Respondent's Response to Complaint
3. [INSERT EMAILS, TEXTS, VIDEO SURVEILLANCE, ETC.]
4. [INSERT RELEVANT BOARD POLICY/ADMINISTRATIVE REGULATION (OR PROCEDURE)]

This investigator asked both parties to provide me with any relevant documentation. The following documentation was provided by Complainant:

The following documentation was provided by Respondent:

WITNESS SUMMARIES

[COMPLAINANT], Complainant

Credibility Determination [SEE BELOW FOR EXAMPLE LANGUAGE]

Complainant was interviewed by this investigator on [DATE], at the District office. Complainant was a willing participant and understood the confidential nature of the investigation. Complainant presented himself/herself in an honest and straightforward manner. This investigator specifically evaluated whether there was evidence of bias or a motive to lie about Respondent. In particular, Respondent claimed that Complainant filed the complaint in retaliation for breaking up with him/her. This investigator determined that there was no evidence of bias or motive to lie about Respondent in regards to the specific allegations that were subject of this investigation.

Interview Summary

[INSERT RELEVANT DETAILS OF INTERVIEW]

IV. SUMMARY OF ALLEGATIONS, FINDINGS & CONCLUSIONS

ALLEGATION NO. 1:

FINDINGS

CONCLUSION

Based on the above findings, this investigator has determined that the investigation established by a preponderance of the evidence that the alleged conduct occurred; therefore, the allegation is sustained. Further, this investigator determined that the conduct was based on the Complainant's sex/gender or was of a sexual nature on which the Complainant alleged discrimination/harassment.

**[LETTER TO COMPLAINANT RE: DETERMINATION REGARDING RESPONSIBILITY
(K-12)]**

CONFIDENTIAL

[DATE]

Via USPS Mail, First Class

Via Certified Mail

Via Email: **[EMAIL ADDRESS]**

[COMPLAINANT]

[ADDRESS]

[ADDRESS]

Re: Determination Regarding Responsibility

Dear Mr./Ms. **[REDACTED]**:

I am writing you on behalf of the **[DISTRICT]** ("District") to provide you with the Determination Regarding Responsibility in regards to the investigation the District conducted after it received a formal complaint from you on **[DATE]**, alleging the following:

Allegation No. 1:

Allegation No. 2:

The following procedural steps were taken upon the District's receipt of the formal complaint:

- **[DATE THE INITIAL NOTIFICATIONS WERE SENT TO THE PARTIES, E.G., NOTICE OF ALLEGATIONS TO RESPONDENT AND NOTICE OF FORMAL COMPLAINT TO COMPLAINANT]**
- **[LIST OF NAMES AND DATES OF INTERVIEWS WITH PARTIES AND WITNESSES]**
- **[DATE OF ANY SITE VISITS]**
- **[METHODS USED TO GATHER EVIDENCE]**
- **[DATE PARTIES WERE PROVIDED OPPORTUNITY TO INSPECT AND REVIEW EVIDENCE PRIOR TO THE COMPLETION OF INVESTIGATIVE REPORT]**
- **[DATE PARTIES WERE PROVIDED INVESTIGATIVE REPORT PRIOR TO A DETERMINATION OF RESPONSIBILITY]**
- **[DATE PARTIES WERE PROVIDED OPPORTUNITY TO SUBMIT RELEVANT, WRITTEN QUESTIONS TO THE DECISION MAKER THAT THE PARTY WANTS ASKED OF ANY PARTY OR WITNESS]**
- **[DATE OF HEARING HELD, IF REQUIRED]**

The District conducted an impartial investigation under its grievance process pursuant to its Sexual Harassment Administrative Regulation, which is attached to this letter.

**[LETTER TO COMPLAINANT RE: DETERMINATION REGARDING RESPONSIBILITY
(K-12)]**

The investigation was conducted by [NAME OF INVESTIGATOR] who conducted an investigation into the allegations and applied a "preponderance of the evidence" standard in determining the veracity of the factual allegations. This standard is met if the allegation is more likely to be true than not. [IF THE DISTRICT APPLIED THE CLEAR AND CONVINCING STANDARD, PLEASE STATE SO INSTEAD]

SUMMARY OF ALLEGATIONS, FINDINGS, & CONCLUSIONS

Allegation No. 1

Finding No. 1

[THE DECISION MAKER MUST STATE THE FINDINGS RELEVANT TO THE INVESTIGATION AND ITS OUTCOME BASED ON THE INVESTIGATIVE REPORT AND INPUT FROM THE PARTIES. THE DECISION MAKER SHOULD ALSO INCLUDE THE POLICY(IES) THAT HAVE BEEN ALLEGED TO BE VIOLATED]

Conclusion of Law

[THE DECISION MAKER MUST DETERMINE IF THE ALLEGED CONDUCT OCCURRED BASED ON THE APPROPRIATE STANDARD OF EVIDENCE, AND IF SO, WHETHER THE CONDUCT VIOLATED DISTRICT POLICY OR CODE OF CONDUCT]

[REMEMBER TO USE THE NEW DEFINITION OF SEXUAL HARASSMENT UNDER TITLE IX]

DETERMINATION OF RESPONSIBILITY

[CHOOSE ONE]

The District did not substantiate the allegations you made against [RESPONDENT]; therefore, in light of this, the District will not proceed further at this time. However, this is a reminder that retaliation against you or any witness is unlawful and that the District will not tolerate retaliation of any kind.

OR

As Allegation No. __ was substantiated, the District will proceed with taking appropriate corrective action to address the findings. [IF CORRECTIVE ACTION IS BEING TAKEN, YOU CAN LIST THEM HERE SO LONG AS ANY CONFIDENTIALITY RULES ARE NOT VIOLATED]

**[LETTER TO COMPLAINANT RE: DETERMINATION REGARDING RESPONSIBILITY
(K-12)]**

REMEDIES [IF APPLICABLE]

The District is required to notify you of remedies offered to you to restore or preserve your equal access to the District's education programs or activities. As such, the District is offering the following individual remedies to address the findings: **[INSERT INDIVIDUAL REMEDIES]**

It is very important to note that this Determination Regarding Responsibility is confidential and that you are not authorized to release this to the public.

APPEAL RIGHTS

Please be advised that you have the right to appeal a determination regarding responsibility (see attached AR **[REDACTED]**). You also have the following additional appeal and other rights:

1. You have the right to appeal the District's decision to the California Department of Education ("CDE") by filing a written appeal within 15 calendar days of receiving the District's decision;
2. You may pursue available civil law remedies outside of the District's complaint procedures, including seeking assistance from mediation centers or public/private interest attorneys, 60 calendar days after the filing of an appeal with the CDE. (Education Code § 262.3);
3. The 60 days moratorium does not apply to complaints seeking injunctive relief in state courts or to discrimination complaints based on federal law. (Education Code § 262.3); and
4. Complaints alleging discrimination based on race, color, national origin, sex, gender, disability, or age may also be filed with the U.S. Department of Education, Office for Civil Rights at www.ed.gov/ocr within 180 days of the alleged discrimination.

In conclusion, I would like to thank you for your patience and understanding as this investigation was completed.

If I can be of further assistance, please contact me at your convenience.

Sincerely,

**[ADMINISTRATOR]
[TITLE]**

Enclosures

Cc: **[REDACTED]**, Superintendent

**[LETTER TO RESPONDENT RE: DETERMINATION REGARDING RESPONSIBILITY
(K-12)]**

CONFIDENTIAL

[DATE]

Via USPS Mail, First Class

Via Certified Mail

Via Email: **[EMAIL ADDRESS]**

[RESPONDENT]

[ADDRESS]

[ADDRESS]

Re: Determination Regarding Responsibility

Dear Mr./Ms. **[REDACTED]**:

I am writing you on behalf of the **[DISTRICT]** ("District") to provide you with the Determination Regarding Responsibility in regards to the investigation the District conducted after it received a formal complaint against you from **[COMPLAINANT]** on **[DATE]**, alleging the following:

Allegation No. 1:

Allegation No. 2:

The following procedural steps were taken upon the District's receipt of the formal complaint:

- **[DATE THE INITIAL NOTIFICATIONS WERE SENT TO THE PARTIES, E.G., NOTICE OF ALLEGATIONS TO RESPONDENT AND NOTICE OF FORMAL COMPLAINT TO COMPLAINANT]**
- **[LIST OF NAMES AND DATES OF INTERVIEWS WITH PARTIES AND WITNESSES]**
- **[DATE OF ANY SITE VISITS]**
- **[METHODS USED TO GATHER EVIDENCE]**
- **[DATE PARTIES WERE PROVIDED OPPORTUNITY TO INSPECT AND REVIEW EVIDENCE PRIOR TO THE COMPLETION OF INVESTIGATIVE REPORT]**
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- **[DATE PARTIES WERE PROVIDED OPPORTUNITY TO SUBMIT RELEVANT, WRITTEN QUESTIONS TO THE DECISION MAKER THAT THE PARTY WANTS ASKED OF ANY PARTY OR WITNESS]**
- **[DATE OF HEARING HELD, IF REQUIRED]**

**[LETTER TO RESPONDENT RE: DETERMINATION REGARDING RESPONSIBILITY
(K-12)]**

The District conducted an impartial investigation under its grievance process pursuant to its Sexual Harassment Administrative Regulation, which is attached to this letter.

The investigation was conducted by [NAME OF INVESTIGATOR] who conducted an investigation into the allegations and applied a "preponderance of the evidence" standard in determining the veracity of the factual allegations. This standard is met if the allegation is more likely to be true than not. [IF THE DISTRICT APPLIED THE CLEAR AND CONVINCING STANDARD, PLEASE STATE SO INSTEAD]

SUMMARY OF ALLEGATIONS, FINDINGS, & CONCLUSIONS

Allegation No. 1

Finding No. 1

[THE DECISION MAKER MUST STATE THE FINDINGS RELEVANT TO THE INVESTIGATION AND ITS OUTCOME BASED ON THE INVESTIGATIVE REPORT AND INPUT FROM THE PARTIES. THE DECISION MAKER SHOULD ALSO INCLUDE THE POLICY(IES) THAT HAVE BEEN ALLEGED TO BE VIOLATED]

Conclusion of Law

[THE DECISION MAKER MUST DETERMINE IF THE ALLEGED CONDUCT OCCURRED BASED ON THE APPROPRIATE STANDARD OF EVIDENCE, AND IF SO, WHETHER THE CONDUCT VIOLATED DISTRICT POLICY OR CODE OF CONDUCT]

[REMEMBER TO USE THE NEW DEFINITION OF SEXUAL HARASSMENT UNDER TITLE IX]

DETERMINATION OF RESPONSIBILITY

[CHOOSE ONE]

The District did not substantiate the allegations made against you; therefore, in light of this, the District will not proceed further at this time. However, this is a reminder that retaliation against the Complainant or any witness is unlawful and that the District will not tolerate retaliation of any kind.

OR

As Allegation No. ___ was substantiated, the District will proceed with taking the following corrective action to address the findings: [SPECIFY CORRECTIVE ACTION BEING TAKEN]

**[LETTER TO RESPONDENT RE: DETERMINATION REGARDING RESPONSIBILITY
(K-12)]**

It is very important to note that this Determination Regarding Responsibility is confidential and that you are not authorized to release this to the public.

APPEAL RIGHTS

Please be advised that you have the right to appeal a determination regarding responsibility (see attached AR [REDACTED]).

In conclusion, I would like to thank you for your patience and understanding as this investigation was completed.

If I can be of further assistance, please contact me at your convenience.

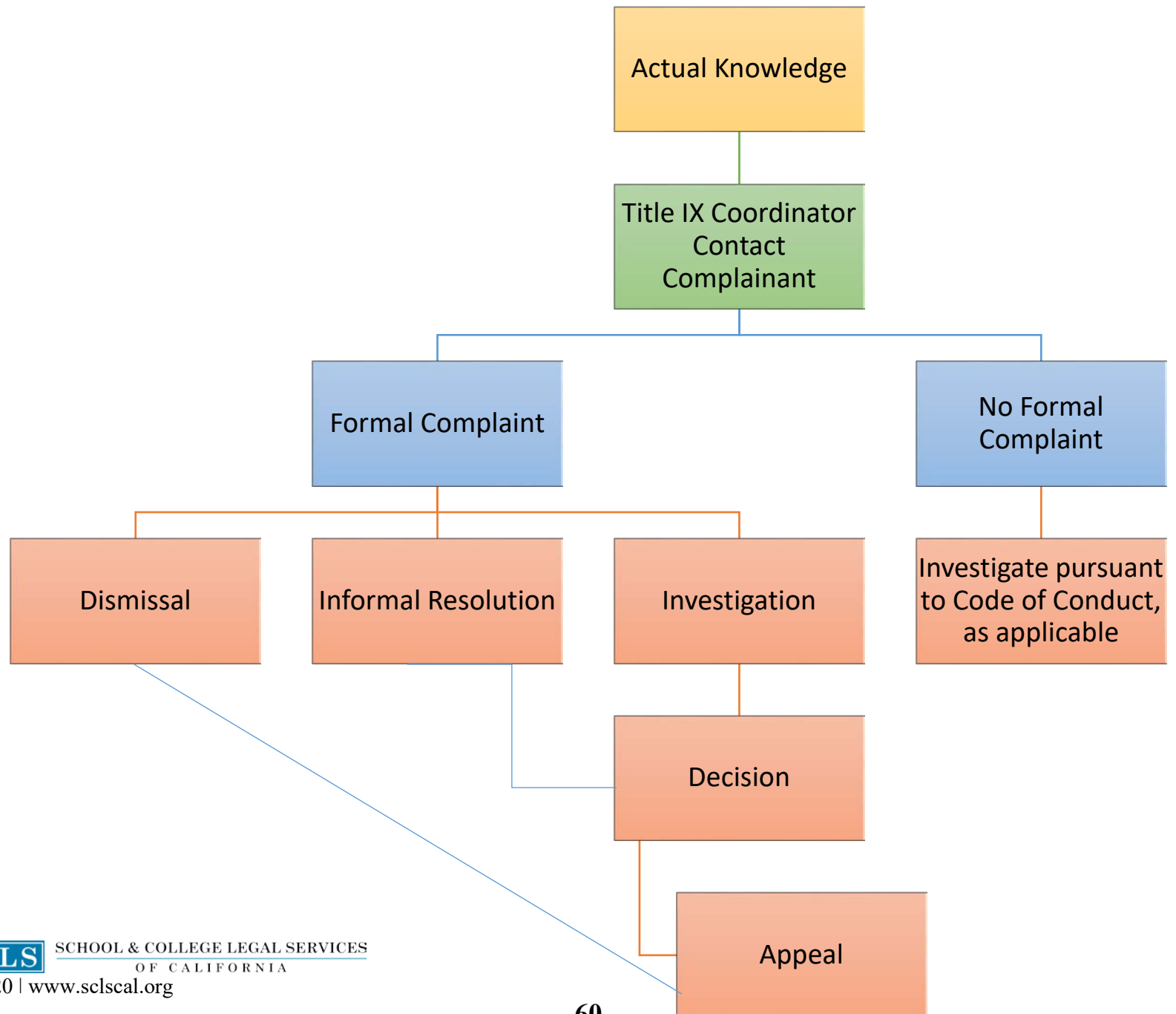
Sincerely,

[ADMINISTRATOR]
[TITLE]

Enclosures

Cc: [REDACTED], Superintendent

K-12 Title IX Flowchart



The Family Educational Rights and Privacy Act (FERPA): Legal Issues

May 24, 2021

Congressional Research Service
<https://crsreports.congress.gov>

R46799



R46799

May 24, 2021

Jared P. Cole

Legislative Attorney

The Family Educational Rights and Privacy Act (FERPA): Legal Issues

Schools generate and maintain numerous student records, including grades, standardized test scores, disciplinary accounts, contact information, mental health records, and more. The Family Educational Rights and Privacy Act (FERPA), which applies to educational agencies and institutions that receive certain types of financial assistance from the Department of Education (ED), regulates the handling of education records in several ways. The law sets forth two key requirements for covered entities. First, FERPA requires schools to allow parents to access and review their children's education records. Second, it prohibits schools from releasing students' education records, including personally identifiable information (PII), without the written consent of their parents, subject to several exceptions. FERPA defines "education records" as materials that (1) "contain information directly related to a student" and (2) "are maintained by an educational agency or institution or by a person acting for such agency or institution."

FERPA does not govern all materials that may contain information about a student. The statute exempts certain categories of information from its definition of "education records" altogether. For instance, FERPA's requirements do not apply to records independently generated by a school's law enforcement unit for law enforcement purposes.

The statute's prohibition against disclosing education records also does not apply to so-called "directory information," as long as schools follow specific procedures when doing so. And under ED regulations, schools may disclose "de-identified" records without consent.

FERPA also has various specific exceptions that permit disclosure of student records in different situations. In certain circumstances, disclosure of education records absent consent is permitted to appropriate "school officials," which can include online educational services, law enforcement units, and threat assessment teams. Schools can also disclose a student's records to appropriate parties in emergency situations if necessary to protect the health and safety of students. In addition, schools may disclose education records without consent for the purpose of certain studies, as well as for audits and evaluations. Disclosure is also sometimes permitted to a state law juvenile justice system in order for that system to serve the student effectively. In each of these situations, FERPA imposes requirements on the recipients of these student records, including how materials may be used and when those records may be re-disclosed.

Because FERPA does not create a private right of action to sue schools for noncompliance, enforcement of the statute is primarily conducted by ED's Student Privacy Policy Office, which can review and investigate violations. When noncompliance is not resolved through the administrative process, ED can withhold federal funds or terminate eligibility to receive federal funds.

In addition to complying with FERPA's requirements concerning disclosure of student records, schools that receive federal financial assistance must also abide by the requirements of Title IX of the Education Amendments of 1972. In May 2020, regulations were issued under Title IX that prescribe how schools must respond to allegations of sexual harassment at school. Those regulations require that during a grievance process in response to a formal complaint of harassment, schools must make certain information available to relevant parties. Although FERPA does not have an express "exception" for disclosures in Title IX sexual harassment proceedings, these requirements may nonetheless be reconcilable.

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Schools generate and maintain numerous records that concern their students, including grades, standardized test scores, disciplinary accounts, contact information, mental health records, and more. Concerns about protecting these materials from improper disclosure have increased with the rise of technology that is used to store and maintain school records.¹ And the major expansion of third-party software to enable school instruction at home during the Coronavirus Disease 2019 (COVID-19) pandemic has increased some observers' concern about the security of students' information.²

The Family Educational Rights and Privacy Act (FERPA), which applies to educational agencies and institutions³ that receive certain types of financial assistance from the Department of Education (ED),⁴ regulates the handling of student records in several ways.⁵ The statute has two key features. First, it requires schools to allow parents to access and review their children's education records.⁶ Second, it prohibits schools from releasing students' education records, including personally identifiable information (PII), without the written consent of their parents.⁷ As this report explains, however, this prohibition is not absolute. For instance, FERPA permits the limited disclosure of otherwise protected student records in certain situations, including to other school officials for legitimate education interests, or when disclosure is necessary to protect health and safety in case of an emergency.⁸ In addition, the statute authorizes disclosure of students' so-called "directory information," subject to several procedural requirements.⁹

¹ See, e.g., Betsy Morris, *Schools Wrestle With Privacy of Digital Data Collected on Students*, WALL ST. J. (July 10, 2019), <https://www.wsj.com/articles/one-parent-is-on-a-mission-to-protect-children-from-digital-mistakes-11562762000>.

² See, e.g., Shawn Hubler, *Keeping Online Testing Honest? Or an Orwellian Overreach?* N.Y. TIMES (May 10, 2020), <https://www.nytimes.com/2020/05/10/us/online-testing-cheating-universities-coronavirus.html>; Anushka Patil & Jonah Engel Bromwich, *How It Feels When Software Watches You Take Tests*, N.Y. TIMES (Sept. 29, 2020), <https://www.nytimes.com/2020/09/29/style/testing-schools-proctorio.html>.

³ Educational agencies and institutions includes local educational agencies (LEAs), elementary and secondary schools, and postsecondary educational institutions. See DEP'T OF EDUCATION, PRIVACY TECHNICAL ASSISTANCE CENTER, SCHOOL RESOURCE OFFICERS, SCHOOL LAW ENFORCEMENT UNITS, AND THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) 6 (2019) [hereinafter LAW ENFORCEMENT UNITS], <https://studentprivacy.ed.gov/resources/school-resource-officers-school-law-enforcement-units-and-ferpa>. For ease of reference, this report refers to the recipient educational agencies and institutions subject to FERPA simply as "schools."

⁴ 20 U.S.C. § 1232g(a)(1)(A). ED administers a number of programs that distribute financial assistance to schools and students, including the Elementary and Secondary Education Act, which authorizes aid for elementary and secondary schools (often through state and local educational agencies). See Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (as amended by Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015)). And ED also provides financial assistance to colleges and universities, including through grants and loans extended to students, as well as direct financial assistance to certain institutions of higher education, under the Higher Education Act. See Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (as amended). For more on the Elementary and Secondary Education Act, see CRS Report R45977, *The Elementary and Secondary Education Act (ESEA), as Amended by the Every Student Succeeds Act (ESSA): A Primer*, by Rebecca R. Skinner. For more on the Higher Education Act, see CRS Report R43351, *The Higher Education Act (HEA): A Primer*, by Alexandra Hegji.

⁵ 20 U.S.C. § 1232g. The Protection of Pupil Rights Amendment also has implications for student privacy. *Id.* § 1232h. Among other things, the law prohibits certain surveys of students absent consent, grants parents of students the right to inspect potential surveys, and requires schools to allow parents to opt out of certain activities, including physical examinations. *Id.* § 1232h(b), (c)(1)(A), and (c)(2).

⁶ 20 U.S.C. § 1232g(a)(1)(A). When a student reaches the age of 18 or attends a postsecondary institution, the rights of the parent transfer to the student. *Id.* § 1232g(d); 34 C.F.R. §§ 99.3, 99.5.

⁷ 20 U.S.C. § 1232g(b)(1). FERPA rights transfer to students once they reach the age of 18 or attend a postsecondary institution. *Id.* § 1232g(d); 34 C.F.R. §§ 99.3, 99.5.

⁸ *Id.* § 1232g(b)(1)(A)-(K).

⁹ 20 U.S.C. § 1232g(b)(1).

This report discusses FERPA's provisions and its application to certain areas, including the use of online software for at-home student learning.¹⁰ It also examines how the statute is enforced,¹¹ and discusses FERPA's interaction with other legal requirements that apply to schools, such as regulations under Title IX of the Education Amendments of 1972 (Title IX), which set standards for adjudicating allegations of sexual harassment at school.¹²

What Counts as an Education Record?

FERPA defines "education records" as materials that (1) "contain information directly related to a student" and (2) "are maintained by an educational agency or institution or by a person acting for such agency or institution."¹³ Certain records are expressly exempted from coverage under this definition, including employment records,¹⁴ as well as records created by educational personnel that are in the sole possession of the creator (e.g., notes taken by a teacher regarding a conversation with a student) that are not accessible to anyone except a substitute.¹⁵

One of the notable categories of materials excluded from FERPA's definition of "education records" is materials created and maintained by a school's law enforcement unit for law enforcement purposes.¹⁶ Importantly, this category only applies to records that are (1) "created by a law enforcement unit," (2) "created for a law enforcement purpose," and (3) "maintained by" the law enforcement unit.¹⁷ The category does not include records maintained by a component of the school other than law enforcement. FERPA regulations clarify that the category does not

¹⁰ Because FERPA penalizes schools that have a policy or practice of violating its provisions, 20 U.S.C. § 1232g(b)(1), some disagreement exists with regard to how the statute should interact with state open records laws. Mathilda McGee-Tubb, *Deciphering the Supremacy of Federal Funding Conditions: Why State Open Records Laws Must Yield to FERPA*, 53 B.C. L. REV. 1045, 1049 (2012). See *United States v. Miami Univ.*, 294 F.3d 797, 812 (6th Cir. 2002) (affirming a district court decision that granted an injunction brought by the United States against a university from releasing records in violation of FERPA). This report only examines the ways in which FERPA directly regulates the disclosure of student records. It does not consider the degree to which FERPA, in addition to imposing record-shielding requirements on covered entities as a condition to receiving federal funds, may also have a preemptive effect on inconsistent state or local measures. See generally *Caledonian-Record Pub. Co. v. Vermont State Colleges*, 175 Vt. 438, 441, 833 A.2d 1273, 1275–76 (2003) (collecting cases reaching different conclusions on FERPA's preemptive effect and observing that "state and federal courts are sharply divided on this issue.... Some have questioned whether the federal law, merely by withholding funds from educational institutions that release education records to anyone other than certain enumerated persons, affirmatively prohibits disclosure of student records.") (internal citations omitted).

¹¹ See *infra* "FERPA Enforcement."

¹² See *infra* "How Does FERPA Interact With Other Legal Requirements?"

¹³ 22 U.S.C. § 1232g(a)(4)(A).

¹⁴ *Id.* § 1232g(a)(4)(B)(iii); 34 C.F.R. § 99.3. In addition, medical treatment records for students 18 years of age or older or in college are not considered education records. But to meet this definition, treatment records must be made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

20 U.S.C. § 1232g(a)(4)(B)(iv) (emphasis added).

¹⁵ 20 U.S.C. § 1232g(a)(4)(B)(i). See DEP'T OF EDUCATION, WHAT RECORDS ARE EXEMPTED FROM FERPA? (accessed May 11, 2021), <https://studentprivacy.ed.gov/faq/what-records-are-exempted-ferpa>.

¹⁶ 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8 (a)(1).

¹⁷ 34 C.F.R. § 99.8 (b)(1). See *Bauer v. Kincaid*, 759 F. Supp. 575, 590 (W.D. Mo. 1991).

include records, even if created and maintained by the law enforcement unit, that are used exclusively for non-law enforcement purposes, such as a disciplinary proceeding.¹⁸ But, if a school's law enforcement unit independently generates an investigative report on a student for law enforcement purposes and maintains those records itself, FERPA does not prohibit the local law enforcement unit from disclosing that information.¹⁹ Because of this distinction, ED advises that local law enforcement units maintain law enforcement records separately from education records.²⁰

In addition to these exclusions, FERPA and its implementing regulations include a number of other categories of materials that do not qualify as "education records."²¹ Table 1 lists materials exempted from the definition of "education records."

Table 1. Materials Exempted by FERPA or its Implementing Regulations from the Definition of "Education Records"

Instructional Records in Sole Possession of the Maker	"records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute" (20 U.S.C. § 1232g(a)(4)(B)(i))
Law Enforcement Records	"records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement" (20 U.S.C. § 1232g(a)(4)(B)(ii))
Employee Records	"in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose" (20 U.S.C. § 1232g(a)(4)(B)(iii))

¹⁸ 34 C.F.R. § 99.8 (b)(2).

¹⁹ LAW ENFORCEMENT UNITS, *supra* note 3, at 15.

²⁰ *Id.*

²¹ FERPA regulations contain two such exceptions that are not explicitly mentioned in the statute. The first is for records of a former student not directly related to the individual's attendance as a student. 34 C.F.R. § 99.3. ED states that this provision simply clarifies that such materials do not qualify as "education records" under FERPA. Final Regulations, Family Educational Rights and Privacy, 73 Fed. Reg. 74806-01, 74811 (Dec. 9, 2008). The second is for student grades from peer-graded papers before recording by the teacher. 34 C.F.R. § 99.3. This regulatory exception reflects the Supreme Court's decision in *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 428 (2002). See also Final Regulations, Family Educational Rights and Privacy, 73 Fed. Reg. 74806-01, 74811 (Dec. 9, 2008).

Health Records of Adult Students

“records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student’s choice” (20 U.S.C. § 1232g(a)(4)(B)(iv))

Former Students

“Records created or received by an educational agency or institution after an individual is no longer a student in attendance and that are not directly related to the individual’s attendance as a student” (34 C.F.R. § 99.3)

Peer Review Grading

“Grades on peer-graded papers before they are collected and recorded by a teacher” (34 C.F.R. § 99.3)

Source: CRS.

A practical example of what counts as an education record under FERPA derives from the Supreme Court’s 2002 decision in *Owasso Independent School District v. Falvo*.²² There, the Court considered whether the process of peer grading in classrooms violated FERPA requirements.²³ The plaintiffs argued that the practice of students grading one another’s papers and calling out those grades to the teacher for recording violated FERPA by disclosing students’ “education records” without parental consent.²⁴ The Court disagreed, ruling that the grades of students’ papers, at least before being entered into the teacher’s gradebook, are not “education records” because they are not “maintained” within the meaning of the term’s definition.²⁵ The term “maintain,” the Court noted, suggested that education records subject to FERPA would be “kept in a filing cabinet in a records room at the school or on a permanent secure database.”²⁶

²² *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 428 (2002).

²³ *Id.* at 428. As explained *infra*, the Court explicitly did not resolve whether FERPA contains a private right of action to bring suit to enforce its provisions in federal court. *Id.* at 430-31. The Court later held that FERPA did not create a private right of action. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 276 (2002).

²⁴ *Owasso Indep. Sch. Dist.*, 534 U.S. at 432.

²⁵ *Id.* at 432-33. The Court declined to decide whether FERPA protects grades once they are given to a teacher. *See id.* at 436 (“For these reasons, even assuming a teacher’s grade book is an education record, the Court of Appeals erred, for in all events the grades on students’ papers would not be covered under FERPA at least until the teacher has collected them and recorded them in his or her grade book. We limit our holding to this narrow point, and do not decide the broader question whether the grades on individual student assignments, once they are turned in to teachers, are protected by the Act.”). It appears that ED and a few lower courts have concluded that FERPA protects grades entered into a gradebook. *See* DEP’T OF EDUCATION, WHAT IS AN EDUCATION RECORD?, <https://studentprivacy.ed.gov/faq/what-education-record/> (“These records include but are not limited to grades, transcripts, class lists, student course schedules, health records (at the K-12 level), student financial information (at the postsecondary level), and student discipline files.”); *Greenfield v. Newman Univ., Inc.*, No. 218CV02655DDCTJJ, 2020 WL 2766172, at *2 (D. Kan. May 28, 2020) (“FERPA is intended to protect records” such as “transcripts, test scores, grade information or information related to student academic performance.”); *Ragusa v. Malverne Union Free Sch. Dist.*, 549 F. Supp. 2d 288, 293 (E.D.N.Y. 2008) (“[D]ocuments relating to students’ grades, evaluations, and academic performance are undoubtedly ‘education records’ within the meaning of FERPA.”).

²⁶ *Owasso Indep. Sch. Dist.*, 534 U.S. at 432-33.

When students grade one another's papers, the Court explained, they do not "maintain" records in the manner that the school registrar does.²⁷

Accessing Education Records

FERPA requires schools that receive financial assistance from ED to allow parents to access and review the education records of their children.²⁸ Under the statute, schools must establish procedures that facilitate this process, and those procedures must ensure that parents can access their children's records within 45 days of a request.²⁹ Parents must also have the option to challenge the content of those records in order to ensure their accuracy, including through a hearing if requested.³⁰ According to FERPA regulations, schools must annually give parents notice of their rights under the law.³¹

Although the rights under FERPA transfer from parents to students when they turn 18 or enter postsecondary education,³² those students' right of access to records is limited in several ways. For instance, FERPA does not require colleges to make parents' financial records available to students.³³

Disclosing Education Records

FERPA prohibits federal funds from going to schools that have a policy permitting disclosure of students' education records, including PII, without written parental consent.³⁴ As noted above, the definition of "education records" under FERPA is broad, perhaps indicating at first glance that schools might be prohibited from ever releasing a broad range of student information. But the statute contains numerous qualifications. As explained below, so-called "directory information" may be disclosed as long as parents are given prior notice of what materials are designated as directory information and an opportunity to opt out. Further, education records may be released to specific entities for various purposes outlined in the statute and FERPA regulations. Schools must, however, keep a record of which individuals or entities (other than a student's parents) requested

²⁷ *Id.*

²⁸ 20 U.S.C. § 1232g(a)(1)(A). FERPA applies to schools that receive federal financial assistance under an applicable program of ED.

²⁹ *Id.* § 1232g(a)(1)(A).

³⁰ *Id.* § 1232g(a)(2); 34 C.F.R. §§ 99.20-99.21

³¹ 34 C.F.R. § 99.7(a). If a school has a policy of disclosing records under the school official exception, the notice must also include the criteria used to determine who qualifies as a school official and "what constitutes a legitimate educational interest." *Id.* § 99.7(a)(3)(iii). See *infra* "School Officials Exception."

³² 20 U.S.C. § 1232g(d); 34 C.F.R. §§ 99.3, 99.5.

³³ 20 U.S.C. § 1232g(a)(1)(C). The statute provides that the right of access does not extend to letters of recommendation in some situations. The statute has different provisions for letters of recommendation from before January 1, 1975, and after. Compare *id.* § 1232g(a)(1)(C)(ii), with *id.* § 1232g(a)(1)(C)(iii) (explaining that the right of access does not apply to certain confidential recommendations if a student has signed a waiver pursuant to 20 U.S.C. § 1232g(a)(1)(D)).

³⁴ *Id.* § 1232g(b). FERPA prohibits disclosing "education records" absent consent or a relevant exception. *Id.* § 1232g(b)(1). But the regulations implementing FERPA permit disclosing records without consent if all PII is removed "provided that the educational agency or institution or other party has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information." 34 C.F.R. § 99.31(b)(1).

or obtained access to a student's records, including the legitimate interest such entities had in the information.³⁵

For many FERPA exceptions,³⁶ the regulations also impose requirements on recipients of student records regarding the use and re-disclosure of that information.³⁷ When schools disclose PII from an education record pursuant to an applicable exception, they must do so on the condition that the recipient will not re-disclose the information absent consent.³⁸ And when recipients receive student information, they may only use the information for the purposes for which it was disclosed.³⁹ That said, the regulations provide that schools may disclose PII to a recipient with the understanding that the recipient may make further disclosures on behalf of the school if a relevant exception applies.⁴⁰

Directory Information and De-identified Data

Although the prohibition on releasing “education records” broadly encompasses information directly related to a student and maintained by a school,⁴¹ FERPA nonetheless provides that basic student data—so-called “directory information”—may be released without affirmative consent as long as certain requirements are met.⁴² Directory information includes material that “would not generally be considered harmful or an invasion of privacy if disclosed.”⁴³ Schools must give prior public notice of the types of records designated as directory information and an opportunity for parents in writing to refuse to allow specific records to be so designated.⁴⁴

Under FERPA and its implementing regulations, directory information includes a student's identification number,⁴⁵ as well as a student's

name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; enrollment status (e.g., undergraduate or graduate, full-time or part-time); dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors and awards received; and the most recent educational agency or institution attended.⁴⁶

³⁵ 20 U.S.C. § 1232g(b)(4)(A). This provision appears to exempt disclosures to school officials from this requirement. *Id.* § 1232g(b)(4)(A); 34 C.F.R. § 99.32(d)(2).

³⁶ The regulations provide that the use and re-disclosure requirements do “not apply to disclosures under §§ 99.31(a)(8), (9), (11), (12), (14), (15), and (16), and to information that postsecondary institutions are required to disclose under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. 1092(f) (Clery Act), to the accuser and accused regarding the outcome of any campus disciplinary proceeding brought alleging a sexual offense.” 34 C.F.R. § 99.33(c).

³⁷ 34 C.F.R. § 99.33.

³⁸ *Id.* § 99.33(a)(1).

³⁹ *Id.* § 99.33(a)(2).

⁴⁰ *Id.* § 99.33(b).

⁴¹ 20 U.S.C. § 1232g(a)(4)(A).

⁴² *Id.* § 1232g(b)(1) and (a)(5)(a).

⁴³ 34 C.F.R. § 99.3.

⁴⁴ 20 U.S.C. § 1232g(a)(5)(a); 34 C.F.R. § 99.37(a)(1)-(3).

⁴⁵ A student's identification number counts as directory information as long as “the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, such as a personal identification number (PIN), password, or other factor known or possessed only by the authorized user.” 34 C.F.R. § 99.3.

⁴⁶ *Id.* § 99.3; 20 U.S.C. § 1232g(a)(5)(A).

The carve-out of directory information from FERPA’s disclosure prohibition allows schools to include certain student information in various publications, such as playbills for theatre productions, programs at athletics competitions, student directories, yearbooks, graduation programs, and honor rolls.⁴⁷ Directory information also can be distributed to companies that provide class photos, yearbooks, and class rings.⁴⁸

FERPA’s regulations also provide that schools, as well as parties authorized to receive education records under a relevant exception (e.g., the exception for audits and evaluations),⁴⁹ may disclose “de-identified” records absent consent.⁵⁰ For this exception to apply, the entity must remove all PII and make “a reasonable determination that a student’s identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.”⁵¹

School Officials Exception

Schools may disclose education records to appropriate “school officials” without parental consent.⁵² School officials include other teachers in the institution if the school has determined they have “legitimate educational interests.”⁵³ According to FERPA regulations, outside parties, such as contractors, volunteers, or consultants to whom a school has “outsourced institutional services or functions,” may also qualify as school officials if (1) the school determines they have a legitimate educational interest; (2) they conduct “an institutional service or function for which” the school would otherwise use employees; (3) they are “under the direct control” of the school regarding the maintenance and use of the records; and (4) they are subject to FERPA’s use and re-disclosure requirements.⁵⁴

Finally, schools must “use reasonable methods” to ensure school officials only access those records in which they have legitimate educational interests.⁵⁵ According to guidance from ED, a school official will typically have a legitimate educational interest “if he or she needs to review an education record in order to fulfill his or her professional responsibilities.”⁵⁶

Online Educational Services

While not explicitly set forth in statute or regulations, ED guidance documents interpret the school official exception to permit disclosure of education records to third-party providers of online educational software.⁵⁷ Schools often use online tools to facilitate instruction provided by

⁴⁷ DEP’T OF EDUCATION, STUDENT PRIVACY POLICY OFFICE, THE A-B-C’S OF STUDENT DIRECTORY INFORMATION (Aug. 3, 2016), <https://studentprivacy.ed.gov/training/b-cs-student-directory-information>.

⁴⁸ *Id.*

⁴⁹ 20 U.S.C. § 1232g(b)(1)(C), (b)(3), (b)(5); 34 C.F.R. §§ 99.31(a)(3), 99.35.

⁵⁰ 34 C.F.R. § 99.31(b)(1).

⁵¹ *Id.*

⁵² 20 U.S.C. § 1232g(b)(1)(A); 34 C.F.R. § 99.31. *Doe v. Woodford Cty. Bd. of Educ.*, 213 F.3d 921, 927 (6th Cir. 2000) (“For these reasons, we find there was no violation of John Doe’s rights under the Act. Any disclosure is protected by the [school official and health and safety] exceptions under the Act.”).

⁵³ 20 U.S.C. § 1232g(b)(1)(A); 34 C.F.R. § 99.31(a)(1)(i)(A).

⁵⁴ 34 C.F.R. § 99.31(a)(1)(i).

⁵⁵ *Id.* § 99.33(a)(ii).

⁵⁶ See LAW ENFORCEMENT UNITS, *supra* note 3, at 11.

⁵⁷ DEP’T OF EDUCATION, STUDENT PRIVACY POLICY OFFICE, FERPA & VIRTUAL LEARNING DURING COVID-19 (Mar. 2020) [hereinafter FERPA & VIRTUAL LEARNING],

third parties. These tools can include programs that students or their parents access through the internet to participate in a school activity. The use of such tools has expanded with the increase in at-home learning due to the COVID-19 pandemic.⁵⁸

Schools may disclose education records to third-party providers under the school official exception as long as the requirements discussed above are met.⁵⁹ ED has noted that the “direct control” requirement above can be met through a contract signed by the school and online software provider; in some cases, the “Terms of Service” may satisfy this obligation as well.⁶⁰ As mentioned above, providers that receive education records under the school official exception may only use those records for the specific purpose for which they were disclosed.⁶¹ In other words, providers may only use those education records to perform the outsourced function assigned by the school. This requirement generally precludes providers from selling such information to another party or reusing it for another purpose.⁶²

Under FERPA’s regulations, however, providers may disclose without consent records that are properly “de-identified,” or stripped of all PII.⁶³ According to guidance from ED, this includes metadata that the provider collects through its software.⁶⁴ For instance, providers might collect information about how long it takes students to perform a discrete task.⁶⁵ As long as such information is stripped of PII, providers may disclose that information without consent.⁶⁶

Law Enforcement

If a school has outsourced the duties of providing safety and security to law enforcement unit (LEU) officials, such as school resource officers, it may consider them to be “school officials” when certain requirements are met.⁶⁷ As noted above, records created and maintained by an LEU

https://studentprivacy.ed.gov/sites/default/files/resource_document/file/FERPAandVirtualLearning.pdf.

⁵⁸ Lisa Ward, *Data Privacy in the Age of Online Learning*, WALL ST. J. (Dec. 8, 2020), <https://www.wsj.com/articles/data-privacy-in-the-age-of-online-learning-11607457738>.

⁵⁹ See FERPA & VIRTUAL LEARNING, *supra* note 57. Of course, particular states may have their own privacy laws that restrict when information may be disclosed. See, e.g., Conn. Gen. Stat. Ann. §§ 10-234aa—10-234dd. See Connecticut Executive Order 2020-71 (authorizing the Commissioner of Education to waive student data privacy requirements “in order to provide quality online educational opportunities” during the COVID-19 pandemic), *available at* <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-71.pdf>.

⁶⁰ DEP’T OF EDUCATION, PRIVACY TECHNICAL ASSISTANCE CENTER, PROTECTING STUDENT PRIVACY WHILE USING ONLINE EDUCATIONAL SERVICES: REQUIREMENTS AND BEST PRACTICES at 4 (Feb. 2014) [hereinafter PROTECTING STUDENT PRIVACY], <https://tech.ed.gov/wp-content/uploads/2014/09/Student-Privacy-and-Online-Educational-Services-February-2014.pdf>.

⁶¹ 34 C.F.R. § 99.31(a)(1)(i).

⁶² PROTECTING STUDENT PRIVACY, *supra* note 60, at 5.

⁶³ 34 C.F.R. § 99.31(b)(1). The regulations provide that such de-identified information may be disclosed “provided that the educational agency or institution or other party has made a reasonable determination that a student’s identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.” *Id.*

⁶⁴ PROTECTING STUDENT PRIVACY, *supra* note 60, at 2-3.

⁶⁵ *Id.* at 5.

⁶⁶ *Id.* at 5.

⁶⁷ See LAW ENFORCEMENT UNITS, *supra* note 3, at 11. According to ED, an LEU official who is a school or school district employee “generally would be considered a school official to whom the school or district may disclose, without consent, education records (or PII contained in those records), if the law enforcement unit official meets the criteria specified in the school or district’s annual notification of FERPA rights to parents and eligible students for being a ‘school official’ with a ‘legitimate educational interest’ in the education records.” *Id.* See 34 C.F.R. § 99.7(a)(3)(iii).

for law enforcement purposes are not education records under FERPA.⁶⁸ This means that if a school's LEU *independently* generates records on a student for law enforcement purposes, it will not violate FERPA if it discloses that information without consent. However, a school may not disclose a student's education records to its LEU without consent unless one of FERPA's exceptions is met.⁶⁹

When schools outsource the function of providing safety and security on campus to LEU officials, they may sometimes disclose education records without consent to those LEU officials under the school official exception.⁷⁰ In order to do so, the school resource officer or LEU official must meet the four requirements laid out in FERPA's regulations mentioned above.⁷¹ That means (1) the school must determine that they have a legitimate educational interest in the records; and the LEU official must (2) perform an institutional service or function for the school; (3) maintain the records under the direct control of the school; and (4) follow FERPA's use and re-disclosure requirements.⁷²

LEU officials to whom a school has outsourced the function of providing safety and security on campus can satisfy requirement (2) because ensuring school safety constitutes an "institutional service or function."⁷³ And as mentioned above, a school can satisfy the "legitimate educational interest," requirement (1), if an LEU official needs to review the information to fulfill his job responsibilities.⁷⁴ For instance, a school might disclose to its LEU the disciplinary record of a student who is barred from campus.⁷⁵

Often, a school will enter a memorandum of understanding with its LEU that establishes data protection and use requirements in order to satisfy requirement (3).⁷⁶ Application of requirement (4), FERPA's use and re-disclosure requirements, means that LEUs may only use education records for the purpose for which the disclosure was made, such as ensuring school safety.⁷⁷ In addition, LEUs may not re-disclose covered education records to outside parties, such as a police department, unless one of FERPA's exceptions is satisfied.⁷⁸

Threat Assessment Teams

Schools may also use the school official exception to disclose education records to threat assessment teams. According to guidance documents issued by ED, a threat assessment team may "review incidents of threatening behavior by students (current and former), parents, school employees, or other individuals," and based on their expertise provide guidance to a school on how to respond to a potential threat.⁷⁹ It appears that such teams can assist schools to determine

⁶⁸ 20 U.S.C. § 1232g(a)(4)(B)(ii).

⁶⁹ *Id.* § 1232g(b)(1).

⁷⁰ See LAW ENFORCEMENT UNITS, *supra* note 3, at 11.

⁷¹ See *supra* note 54.

⁷² 34 C.F.R. § 99.31(a)(1)(i).

⁷³ LAW ENFORCEMENT UNITS, *supra* note 3, at 12.

⁷⁴ *Id.* at 11.

⁷⁵ *Id.* at 15.

⁷⁶ *Id.* at 12.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

whether student records should be disclosed under the health or safety emergency exception.⁸⁰ The members of a threat assessment team can include individuals not employed by a school, such as medical and mental health professionals, as well as law enforcement officers.⁸¹

Members of threat assessment teams are subject to the limitations that apply to all school officials. Consequently, the members may only use education records for the purposes for which they were disclosed, and they may not re-disclose the records absent a FERPA exception.⁸² ED guidance documents specifically give an example: if a representative from a police department serves on a threat assessment team, he or she may not disclose PII from education records accessed as a member of the team to their police department (absent an applicable FERPA exception).⁸³

Health and Safety Emergency Exception

FERPA also provides that student records may be released in emergency situations if necessary to protect the health and safety of students.⁸⁴ The statute's regulations spell out in detail how this exception operates.⁸⁵ Schools "may take the totality of the circumstances" in determining if an emergency exists.⁸⁶ If a school determines that there is an "articulable and significant threat" to the health or safety of a student or other person, it may disclose an education record to any person whose knowledge of that information is necessary to protect health and safety.⁸⁷ As long as a school has a rational basis for this decision, ED will not "substitute its judgment" for that of the school.⁸⁸

According to ED, examples of a significant and articulable emergency include an impending natural disaster, terrorist attacks, campus threats, or the outbreak of an epidemic disease.⁸⁹ For instance, during the COVID-19 pandemic, ED issued guidance explaining that the health and safety emergency exception will sometimes authorize disclosure without consent of PII from education records to appropriate public health officials to protect public safety.⁹⁰ State and local law enforcement officials, public health officials, medical personnel, and parents might need to

⁸⁰ *Id.* See *supra* "Health and Safety Emergency Exception."

⁸¹ LAW ENFORCEMENT UNITS, *supra* note 3, at 13.

⁸² 34 C.F.R. § 99.33.

⁸³ LAW ENFORCEMENT UNITS, *supra* note 3, at 14.

⁸⁴ 20 U.S.C. § 1232g(b)(1)(I). *Doe v. Woodford Cty. Bd. of Educ.*, 213 F.3d 921, 927 (6th Cir. 2000) ("For these reasons, we find there was no violation of John Doe's rights under the Act. Any disclosure is protected by the [school official and health and safety] exceptions under the Act.").

⁸⁵ 34 C.F.R. §§ 99.31(a)(10), 99.36.

⁸⁶ *Id.* § 99.36(c).

⁸⁷ *Id.*

⁸⁸ *Id.* See DEP'T OF EDUCATION, ADDRESSING EMERGENCIES ON CAMPUS 4 (June 2011) [hereinafter EMERGENCY GUIDANCE] ("This is a flexible standard under which the Department defers to school administrators so that they may bring appropriate resources to bear on the situation, provided that there is a rational basis for the educational agency's or institution's decisions about the nature of the emergency and the appropriate parties to whom the information should be disclosed."), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/emergency-guidance.pdf.

⁸⁹ See LAW ENFORCEMENT UNITS, *supra* note 3, at 17; EMERGENCY GUIDANCE, *supra* note 88, at 3.

⁹⁰ DEP'T OF EDUCATION, STUDENT PRIVACY POLICY OFFICE, FERPA & CORONAVIRUS DISEASE 2019 (COVID-19), FREQUENTLY ASKED QUESTIONS (FAQs) (Mar. 2020), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/FERPA%20and%20Coronavirus%20Frequently%20Asked%20Questions_0.pdf. See also CRS Report R46542, *Digital Contact Tracing and Data Protection Law*, by Jonathan M. Gaffney, Eric N. Holmes, and Chris D. Linebaugh.

receive records to protect the health and safety of students and others.⁹¹ Any time that a school discloses a student's PII from education records under the emergency exception, it must record the threat and the parties to whom records were disclosed.⁹²

According to guidance from ED, FERPA does not prohibit a school official from disclosing information obtained not through a record but from personal knowledge or observation.⁹³ For instance, if a teacher overhears a student make a threat, FERPA does not prohibit that information from being disclosed.⁹⁴ Consequently, the teacher could disclose what he or she overheard to appropriate authorities.⁹⁵

Studies and Audits Exceptions

FERPA also allows disclosing education records for the purpose of certain studies,⁹⁶ as well as for audits and evaluations.⁹⁷ The studies exception allows schools to disclose records to organizations conducting studies in order to (1) develop, administer, or validate predictive tests; (2) administer student aid programs; or (3) improve instruction.⁹⁸ For instance, a school might disclose education records to an organization that compares student outcomes across different school districts.⁹⁹ Disclosures under the studies exception are permitted only if the study does not authorize the personal identification of students or parents other than to members of the organization with legitimate interests in the information.¹⁰⁰ In addition, when no longer needed for the study, the information must be destroyed.¹⁰¹ Finally, in order to disclose education records to an organization under the studies exception, schools must enter into written agreements with the organization that specify the scope of the study and limit the use of PII in various ways.¹⁰²

The audit and evaluation exception permits schools to release education records without consent to authorized representatives of state and local educational authorities.¹⁰³ Information under the

⁹¹ EMERGENCY GUIDANCE, *supra* note 88, at 3.

⁹² 34 C.F.R. § 99.32(a)(5).

⁹³ EMERGENCY GUIDANCE, *supra* note 88, at 4.

⁹⁴ *Id.* According to ED, “this general rule does not apply where a school official personally learns of information about a student through his or her official role in making a determination about the student and the determination is maintained in an education record.” *Id.*

⁹⁵ *Id.*

⁹⁶ 20 U.S.C. § 1232g(b)(1)(F); 34 C.F.R. § 99.31(a)(6).

⁹⁷ 20 U.S.C. § 1232g(b)(1)(C), (b)(3), (b)(5); 34 C.F.R. §§ 99.31(a)(3), 99.35.

⁹⁸ 20 U.S.C. § 1232g(b)(1)(F); 34 C.F.R. § 99.31(a)(6)(i).

⁹⁹ DEP’T OF EDUCATION, PRIVACY TECHNICAL ASSISTANCE CENTER, GUIDANCE FOR REASONABLE METHODS AND WRITTEN AGREEMENTS 1-2 (June 2015), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/Guidance_for_Reasonable_Methods%20final_0.pdf.

¹⁰⁰ 34 C.F.R. § 99.31(a)(6)(iii)(A).

¹⁰¹ *Id.* § 99.31(a)(6)(iii)(B).

¹⁰² *Id.* § 99.31(a)(6)(iii)(C). In particular, the regulations provide that schools enter into a written agreement that “(1) Specifies the purpose, scope, and duration of the study or studies and the information to be disclosed; (2) Requires the organization to use personally identifiable information from education records only to meet the purpose or purposes of the study as stated in the written agreement; (3) Requires the organization to conduct the study in a manner that does not permit personal identification of parents and students, as defined in this part, by anyone other than representatives of the organization with legitimate interests; and (4) Requires the organization to destroy all personally identifiable information when the information is no longer needed for the purposes for which the study was conducted and specifies the time period in which the information must be destroyed.”

¹⁰³ 20 U.S.C. § 1232g(b)(1)(C), (b)(3), (b)(5); 34 C.F.R. §§ 99.31(a)(3), 99.35. Disclosure under this exception may

exception must be used to audit or evaluate a federal or state-supported education program or to enforce or ensure compliance with federal legal requirements connected to those programs.¹⁰⁴ As with the studies exception, schools must enter into written agreements with recipients of the information that specify how the information will be used and when it will be destroyed.¹⁰⁵ Further, written agreements must establish policies and procedures that protect information from further disclosure.¹⁰⁶

State Law Juvenile Justice System Exception

FERPA also authorizes disclosing education records to a state or local juvenile justice system without consent in certain situations.¹⁰⁷ If a state has adopted a statute after November 19, 1974, that specifically allows disclosure of student education records to state and local officials, then disclosure without consent is allowed if the disclosure concerns the juvenile justice system's "ability to effectively serve, prior to adjudication, the student whose records are released."¹⁰⁸ Officials to whom this information is disclosed must certify in writing that they will not re-disclose the information except as provided under state law or with consent.¹⁰⁹ Guidance from ED, in coordination with the Department of Justice (DOJ), indicates that disclosure under this exception is limited to a local or state juvenile justice system agency.¹¹⁰ For instance, in situations where the above conditions are met, if a student is arrested for a crime for the first time, a police department's juvenile division can receive education records from a school about the student in order to serve the student effectively prior to adjudication.¹¹¹

The juvenile justice system exception appears to authorize some disclosures of education records by a school district to a local juvenile justice agency, although the outer bounds of when a disclosure concerns the juvenile justice system's ability to serve a student effectively are uncertain. Because the statute imposes this requirement for "the student whose records are released," disclosure under this exception may require a specific finding of need for a particular student. This reading of the statute seems consistent with ED and DOJ guidance describing how the exception operates.¹¹²

Victims of Crimes at Postsecondary Institutions

Postsecondary institutions may disclose certain disciplinary records of an alleged perpetrator of a crime of violence or a nonforcible sex offense.¹¹³ First, institutions may disclose *to the alleged*

also be made to the Comptroller General of the United States, the Attorney General, and the Secretary of Education. 20 U.S.C. § 1232g(b)(1)(C); 34 C.F.R. § 99.31(a)(3).

¹⁰⁴ 20 U.S.C. § 1232g(b)(3), (b)(5); 34 C.F.R. § 99.35.

¹⁰⁵ 34 C.F.R. § 99.35(a)(3).

¹⁰⁶ *Id.* § 99.35(a)(3)(v).

¹⁰⁷ 20 U.S.C. § 1232g(b)(1)(E).

¹⁰⁸ *Id.* § 1232g(b)(1)(E)(ii); 34 C.F.R. § 99.38. The statute has a similar provision for state laws passed before that date. 20 U.S.C. § 1232g(b)(1)(E)(i).

¹⁰⁹ 20 U.S.C. § 1232g(b)(1)(E)(ii).

¹¹⁰ *See* DEP'T OF EDUC., SHARING INFORMATION: A GUIDE TO THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT AND PARTICIPATION IN JUVENILE JUSTICE PROGRAMS 8 (1997).

¹¹¹ *Id.* at 8.

¹¹² *Id.* at 8-9.

¹¹³ 20 U.S.C. § 1232g(b)(6). Regulations implementing FERPA provide definitions and examples of these terms. 34 C.F.R. § Appendix A to Part 99.

victim of such a crime the final results of disciplinary proceedings that are conducted against the alleged perpetrator of the crime.¹¹⁴ Second, if an institution determines through a disciplinary proceeding that a student violated its rules or policies with respect to a crime of violence or nonforcible sex offense, then it may disclose the final results of that proceeding to anyone.¹¹⁵ The final results are limited to the name of the student, the violation committed, and any sanction the institution imposes.¹¹⁶ The names of other students, however, such as other victims or witnesses, may only be disclosed with their consent.¹¹⁷

Importantly, while FERPA *authorizes* postsecondary institutions to disclose the results of disciplinary proceedings to the alleged victim of a crime of violence or a nonforcible sex offense, a statutory provision outside of FERPA, contained in the Higher Education Act (HEA), *requires* institutions of higher education to do so in certain circumstances.¹¹⁸ As a condition of receiving funds under Title IV of the HEA, institutions of higher education must enter a Program Participation Agreement that requires them to, upon written request, disclose to the alleged victim of a crime of violence or a nonforcible sex offense the report on the results of a disciplinary proceeding against the student who is the alleged perpetrator of that offense.¹¹⁹

FERPA Enforcement

As explained above, FERPA prohibits federal funding of schools that have a policy of denying parents the right to review the education records of their children, as well as schools that have a policy or practice of disclosing student education records to unauthorized entities.¹²⁰ The enforcement of FERPA's provisions is statutorily entrusted with the Secretary of Education, who is responsible for designating an office and review board for investigating and reviewing complaints of violations.¹²¹ The Student Privacy Policy Office in ED reviews and investigates complaints and violations of FERPA.¹²² Following an investigation, it will provide any complainant as well as the school written notice of its findings.¹²³ In cases where ED finds that a school has not complied with FERPA and that failure was based on a school's policy or practice, the notice to the school will include the specific steps needed to comply with FERPA, and provide a reasonable time to comply.¹²⁴ If the school does not comply within the time given, the Secretary can enforce FERPA in a variety of ways, including by withholding further payments under any educational program, issuing a complaint to compel compliance through a cease and desist order,

¹¹⁴ 20 U.S.C. § 1232g(b)(6)(A).

¹¹⁵ *Id.* § 1232g(b)(6)(B).

¹¹⁶ *Id.* § 1232g(b)(6)(C).

¹¹⁷ *Id.* § 1232g(b)(6)(C)(ii).

¹¹⁸ *Id.* § 1094(a)(26).

¹¹⁹ *Id.* § 1094(a)(26).

¹²⁰ 20 U.S.C. § 1232g(a)(1); (b)(1).

¹²¹ *Id.* § 1232g(f); (g).

¹²² FERPA regulations refer to the Office of the Chief Privacy Officer. 34 C.F.R. § 99.60. The ED website indicates that the Student Privacy Policy Office is led by the Chief Privacy Officer. DEP'T OF EDUCATION, STUDENT PRIVACY POLICY OFFICE, <https://www2.ed.gov/about/offices/list/oepd/sppo/index.html>.

¹²³ 34 C.F.R. § 99.66(b).

¹²⁴ *Id.* § 99.66(c).

or terminating eligibility to receive funding under any educational program.¹²⁵ Another option is for the DOJ to bring a lawsuit on behalf of the United States against a noncompliant school.¹²⁶

Aside from the possibility of a lawsuit brought by the DOJ, the administrative scheme implemented by ED is the primary enforcement mechanism for FERPA. Whereas some other federal requirements for schools, such as Title IX of the Education Amendments of 1972,¹²⁷ are enforceable through a private right of action brought in federal court directly against a school for violations, FERPA does not create such a private right of action for students or parents. Courts have recognized that the statute itself does not explicitly establish a private right of action to sue for violations.¹²⁸ And in the 2002 case of *Gonzaga University v. Doe*, the Supreme Court ruled that FERPA also does not create any personal rights enforceable under 42 U.S.C. § 1983 (which provides a remedy for violations of federally conferred rights against state officials).¹²⁹ According to the Court, because Congress did not clearly and unambiguously establish an enforceable right in the statute, FERPA could not be enforced via a suit under § 1983.¹³⁰

How Does FERPA Interact With Other Legal Requirements?

Military Recruiters

While FERPA generally prohibits schools from disclosing student education records without consent unless an exception applies, two other statutes *require* schools to disclose certain student information to military recruiters. The Elementary and Secondary Education Act (ESEA) imposes certain requirements on local educational agencies that receive federal funds under its provisions.¹³¹ Those schools must disclose the name, address, and telephone listing of secondary school students upon request to a military recruiter.¹³² Parents may opt out of this disclosure for their children, and schools must notify parents of this option.¹³³ Another statute generally directed at the Department of Defense imposes similar requirements,¹³⁴ but defines covered schools somewhat differently.¹³⁵

¹²⁵ *Id.* § 99.67(a). *See* 34 C.F.R. § 99.60(c) (designating the Office of Administrative Law Judges as the Review Board authorized to enforce the Act).

¹²⁶ *See e.g.*, *United States v. Miami Univ.*, 294 F.3d 797, 812 (6th Cir. 2002) (affirming a district court decision that granted an injunction brought by the United States against a university from releasing records in violation of FERPA).

¹²⁷ 20 U.S.C. § 1681. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 717 (1979).

¹²⁸ *Girardier v. Webster Coll.*, 563 F.2d 1267, 1276 (8th Cir. 1977); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 276 (2002) (noting that the lower court “acknowledged that ‘FERPA itself does not give rise to a private cause of action’”).

¹²⁹ *Gonzaga Univ. v. Doe*, 536 U.S. 273, 276 (2002).

¹³⁰ *Id.* at 290.

¹³¹ Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27, codified as amended at 20 U.S.C. § 6301 *et seq.* The Every Student Succeeds Act reauthorized the ESEA. *See* Pub. L. No. 114-95, 129 Stat. 1802 (2015).

¹³² 20 U.S.C. § 7908(a)(1).

¹³³ *Id.* § 7908(a)(2). When a student turns 18, the consent required of parents transfers to the student. *Id.* § 7908(a)(5).

¹³⁴ 10 U.S.C. § 503(c)(1).

¹³⁵ *Id.* § 503(c)(6). The DOD-specific statute also applies to local educational agencies that receive assistance under the ESEA, but defines local educational agencies as (1) local educational agencies within the meaning of the term under the ESEA and (2) private secondary schools. *Id.* § 503(c)(6). By contrast, the ESEA defines local educational agencies as primarily “public” entities. 20 U.S.C. § 7801(30)(A).

Title IX of the Education Amendments of 1972

In addition to complying with FERPA's requirements concerning disclosure of student records, schools that receive federal financial assistance must also abide by the requirements of Title IX of the Education Amendments of 1972.¹³⁶ That statute generally prohibits schools from discriminating on the basis of sex.¹³⁷ In May 2020, ED issued regulations under Title IX that prescribe how schools must respond to allegations of sexual harassment at school.¹³⁸ Those regulations require that, during a grievance process in response to a formal complaint of harassment, schools must provide both parties the opportunity to review any evidence obtained through an investigation related to the allegations.¹³⁹ They also require schools to allow parties to have an advisor present during any proceeding of the grievance process.¹⁴⁰ Schools must create an investigative report that is sent to each party and their advisor,¹⁴¹ and issue written determinations of responsibility that include various findings that are disclosed to the parties.¹⁴²

Schools that receive federal financial assistance generally must comply both with FERPA and these Title IX requirements. Although FERPA does not have an express "exception" for disclosures in Title IX sexual harassment proceedings, these requirements may nonetheless be reconcilable. According to ED, the requirements of FERPA and the Title IX regulations do not contradict each other.¹⁴³ But in cases in which a direct conflict arises, ED asserts, Title IX's requirements override FERPA.¹⁴⁴ For support, ED points to the larger General Education Provisions Act (GEPA)—of which FERPA is a part—which provides that nothing in its

¹³⁶ 20 U.S.C. § 1681.

¹³⁷ *Id.* § 1681. While ED's Student Privacy Office enforces FERPA, Title IX's requirements for educational programs receiving federal financial assistance from ED are enforced by the Office for Civil Rights. See DEP'T OF EDUCATION, ABOUT OCR (last accessed Feb. 24, 2021), <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html>.

¹³⁸ Nondiscrimination On the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020) (codified at 34 C.F.R. Part 106) [hereinafter Nondiscrimination]. These provisions are similar to those included in regulations implementing the Clery Act. 34 C.F.R. § 668.46(k). The Clery Act provisions apply to institutions of higher education who participate in Title IV of the Higher Education Act's student financial assistance programs. CRS In Focus IF11277, *The Clery Act: Requirements and Legal Issues*, by Jared P. Cole. The procedural requirements for disciplinary actions cover cases of alleged dating violence, domestic violence, sexual assault, and stalking. 34 C.F.R. § 668.46(k). The Clery Act regulations also provide that compliance with those requirements does not violate FERPA. *Id.* § 668.46(l).

¹³⁹ 34 C.F.R. § 106.45(b)(5)(vi).

¹⁴⁰ *Id.* § 106.45(b)(5)(iv).

¹⁴¹ *Id.* § 106.45(b)(5)(vii).

¹⁴² *Id.* § 106.45(b)(7). The Biden Administration issued an executive order directing ED to review these regulations for consistency with Title IX and the Administration's position that the statute's bar against sex discrimination includes sexual orientation and gender identity. Exec. Order 14021, 86 Fed. Reg. 13,803 (Mar. 11, 2021). ED's Office of Civil Rights (OCR) has since announced that it is conducting a review of existing regulations, including amendments to the regulations made in 2020, in light of the executive order. OCR also indicated that after a period of review and hearing from the public, it anticipates issuing a notice of proposed rulemaking to amend the Title IX regulations. Suzanne B. Goldberg, Acting Assistant Secretary for Civil Rights, Letter to Students, Educators, and other Stakeholders re Executive Order 14021 (Apr. 6, 2021), <https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/20210406-titleix-eo-14021.pdf>.

¹⁴³ Nondiscrimination, *supra* note 138, at 30426, 30428 ("The Department disagrees that § 106.45(b)(5)(v) [of Title IX implementing regulations] inherently or directly conflicts with FERPA. A recipient should interpret Title IX and FERPA in a manner to avoid any conflicts.").

¹⁴⁴ *Id.* at 30426 ("To the extent that there may be unusual circumstances, where a true conflict between Title IX and FERPA may exist (such as a student's formal complaint against an employee), the Department includes a provision in § 106.6(e) to expressly state that the obligation to comply with these final regulations under Title IX is not obviated or alleviated by the FERPA statute or regulations.").

provisions “shall be construed to affect the applicability of” Title IX.¹⁴⁵ And the Title IX regulations themselves provide that a recipient’s obligation to comply with Title IX’s requirements “is not obviated or alleviated by the FERPA.”¹⁴⁶

Further, ED asserts that these Title IX regulations help protect a party’s right to procedural due process under the Constitution.¹⁴⁷ In certain student disciplinary cases involving public schools, the Constitution requires that parties be given adequate notice of the charges against them and a meaningful opportunity to respond.¹⁴⁸ ED is precluded from enforcing Title IX or FERPA in a manner that deprives students of their constitutional rights.¹⁴⁹ According to this line of reasoning, FERPA cannot prohibit a school from disclosing to an accused student the evidence collected against him or her in a disciplinary proceeding because that would violate due process.¹⁵⁰

In addition, ED points to the FERPA requirement that parents (or eligible students) have access to their own education records.¹⁵¹ FERPA’s definition of education records includes records that “contain information directly related to a student.”¹⁵² ED notes that the evidence and investigative report disclosed pursuant to Title IX regulations directly relates to the allegations in a complaint, and therefore “directly relate” to the students at issue.¹⁵³

Moreover, as a practical matter, even if compliance with certain Title IX requirements might appear to conflict with FERPA’s provisions in a particular situation, schools that comply with Title IX regulations by disclosing evidence to parties in a disciplinary proceeding are unlikely to face legal repercussions. As noted above, FERPA does not create a private right of action, meaning that ED conducts most enforcement of the statute.¹⁵⁴ But here, ED has explicitly acknowledged that, as it administers both FERPA and Title IX, it will “not interpret compliance with its regulations under Title IX to violate requirements in its regulations under FERPA.”¹⁵⁵

Conclusion

Although FERPA’s prohibition on disclosing student records without consent is framed broadly, the various exceptions to that mandate have provided schools flexibility to respond to situations in which certain information merits release. As discussed above, schools may disclose materials in order to ensure school safety, to participate in certain studies aimed at improving education outcomes, and to adapt to changes in how education is generally offered, including through developments in technology.

¹⁴⁵ 20 U.S.C. § 1221(d).

¹⁴⁶ 34 C.F.R. § 106.6(e).

¹⁴⁷ Nondiscrimination, *supra* note 138, at 30421.

¹⁴⁸ See *Doe v. Purdue Univ.*, 928 F.3d 652, 656 (7th Cir. 2019) (Barrett, J.); *Doe v. Miami Univ.*, 882 F.3d 579, 603 (6th Cir. 2018).

¹⁴⁹ Nondiscrimination, *supra* note 138, at 30422.

¹⁵⁰ While due process requirements generally apply to public entities, such as a state school, ED has applied its reasoning to recipient private schools as well. *Id.* at 30421-22.

¹⁵¹ *Id.* at 30433. See 20 U.S.C. § 1232g(a)(1).

¹⁵² 20 U.S.C. § 1232g(a)(4)(B).

¹⁵³ Nondiscrimination, *supra* note 138, at 30433.

¹⁵⁴ See *supra* “FERPA Enforcement.”

¹⁵⁵ Nondiscrimination, *supra* note 138, at 30433.

Some have expressed larger concerns with the handling of student records.¹⁵⁶ The maintenance and use of student records by third parties authorized to receive them for a particular purpose, for instance, can generate controversy.¹⁵⁷ If lawmakers believe these concerns are warranted, they can address them through legislation that amends FERPA to define schools' and other parties' obligations more specifically. Further, because the statute lacks a private right of action for students or parents to bring suit in response to FERPA violations, Congress could consider adding such a right to the statute. Finally, Congress could also amend the law to clarify the relationship between FERPA and a school's obligations under Title IX.

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¹⁵⁶ See, e.g., Kathleen McGrory & Natalie Weber, *Feds Investigating Pasco Schools Giving Student Data to Sheriff*, TAMPA BAY TIMES (Apr. 19, 2021) (observing that ED “has opened an investigation into whether the Pasco school district broke federal law by sharing private student information with the Pasco Sheriff’s office”), <https://www.tampabay.com/investigations/2021/04/19/feds-investigating-pasco-schools-giving-student-data-to-sheriff/>.

¹⁵⁷ See, e.g., Lisa Ward, *Data Privacy in the Age of Online Learning*, WALL ST. J. (Dec. 8, 2020) (“Schools are relying heavily on technology—from videoconferencing programs to digital-teaching tools and temperature-taking apps—to educate children safely in the age of Covid. But this rapid deployment of new technology means schools are collecting a lot more personal data on students. And that is raising some troubling questions about who has access to the data, how it is being used and whether it is being kept safe.”), <https://www.wsj.com/articles/data-privacy-in-the-age-of-online-learning-11607457738>.

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