

## Boston College Law Review

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Volume 60 | Issue 5

Article 4

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5-30-2019

# The Assault on Campus Assault: The Conflicts Between Local Law Enforcement, FERPA, and Title IX

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### Recommended Citation

Emma B. Bolla, *The Assault on Campus Assault: The Conflicts Between Local Law Enforcement, FERPA, and Title IX*, 60 B.C.L. Rev. 1379 (2019), <https://lawdigitalcommons.bc.edu/bclr/vol60/iss5/4>

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# THE ASSAULT ON CAMPUS ASSAULT: THE CONFLICTS BETWEEN LOCAL LAW ENFORCEMENT, FERPA, AND TITLE IX

**Abstract:** Controversies on college campuses nationwide have led to widespread calls to reform the investigative process of campus sexual assault cases. A total abandonment of the Title IX system would leave victims with few options for justice, but investigations by both universities and local law enforcement can lead to conflicts that are often not addressed in policy discussions about Title IX. This Note explores the Title IX and criminal systems for handling campus sexual assault. It then examines the conflicts created by federal law under the Family Educational Rights and Privacy Act (“FERPA”) and Title IX for the effective policing of campus sexual assaults. Both the Title IX system and traditional criminal proceedings have pros and cons. Local law enforcement access to campus proceedings may help bring effective criminal justice by increasing the amount of evidence in sexual assault trials. Yet FERPA and Title IX can stymie local law enforcement efforts by blocking access to student records without subpoena. This exacerbates problems relating to the high evidentiary standards in criminal cases. Even if law enforcement could access student records, the accused’s due process rights may be at even greater risk, undermining the integrity of the Title IX system. Ultimately, this Note argues that Congress must revise FERPA to require release of limited information where there is a finding of guilt, to strike a balance between the interests of the accused, the victim, and the public.

## INTRODUCTION

Many have heard the stories of Jameis Winston, a star quarterback at Florida State University accused of sexual assault; of Brandon Vandenburg and Cory Batey, two Vanderbilt football players convicted of gang raping a fellow student; of Duke University student Lewis McLeod who sued his university, claiming wrongful expulsion for sexual misconduct; and of the now infamous *Rolling Stone* article, accusing University of Virginia fraternity Phi Kappa Psi of gang rape.<sup>1</sup> These controversial stories have kept the debate sur-

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<sup>1</sup> Valerie Bauerlein, *Duke Settles Student Lawsuit Over Sexual-Misconduct Case*, WALL ST. J. (Feb. 27, 2018), <https://www.wsj.com/articles/duke-settles-student-lawsuit-over-sexual-misconduct-case-1519770735?mod=searchresults&page=1&pos=4;%> [<https://perma.cc/K8KZ-W2TB>] (examining the lawsuit against Duke University brought by a student expelled in a sexual misconduct case); Eliana Dockterman, *The Vanderbilt Rape Case Will Change the Way Victims Feel About the Courts*, TIME (Jan. 29, 2015), <http://time.com/3686617/the-vanderbilt-rape-case-will-change-the-way-victims-feel-about-the-courts/> [<https://perma.cc/L3TC-QUHB>] (discussing the conviction

rounding the investigation of campus sexual assault claims in the public eye.<sup>2</sup> These investigations are uniquely controversial because they pit university administrations against local law enforcement, all while under the watchful eye of the public.<sup>3</sup> These controversies have left many wondering who failed to properly bring justice in these cases: the police or the university?<sup>4</sup>

One in five college women and one in sixteen college men report sexual assault.<sup>5</sup> Unlike other crimes, both the investigation and proceedings of

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of former Vanderbilt football players for sexual assault); Eliza Gray, *Fraternity Plans to Sue Rolling Stone Over Campus-Rape Article*, TIME (Apr. 6, 2015), <http://time.com/3772657/rolling-stone-rape-phi-kappa-psi-lawsuit/> [<https://perma.cc/FG83-R4VW>] (discussing the now infamous exposé accusing a fraternity of gang rape); Juliet Macur, *Transcript of Winston Hearing Reveals Accuser's Words, and Florida State's Complicity*, N.Y. TIMES (Dec. 23, 2014), [https://www.nytimes.com/2014/12/24/sports/ncaaf-football/transcript-of-jameis-winston-hearing-reveals-accusers-words-and-florida-states-complicity.html?\\_r=0%20](https://www.nytimes.com/2014/12/24/sports/ncaaf-football/transcript-of-jameis-winston-hearing-reveals-accusers-words-and-florida-states-complicity.html?_r=0%20) [<https://perma.cc/FU29-XNZP>] (discussing the sexual assault accusations against former college football player, Jameis Winston).

<sup>2</sup> See Bauerlein, *supra* note 1 (discussing Duke University student's lawsuit against the university, alleging that the school failed to follow proper impartiality procedures); Dockterman, *supra* note 1 (arguing that the successful trial of former Vanderbilt football players who were convicted of aggravated rape and aggravated sexual assault should indicate that the courts are an effective method of justice for victims); Gray, *supra* note 1 (discussing Phi Kappa Psi's lawsuit against the *Rolling Stone* for a now infamous article published in *Rolling Stone*, which accused the fraternity of gang rape); Macur, *supra* note 1 (criticizing Florida State University's handling of the Jameis Winston case through the lens of the alleged victim's testimony).

<sup>3</sup> See Sheila Coronel et al., *Rolling Stone and UVA: The Columbia University Graduate School of Journalism Report*, ROLLING STONE (Apr. 5, 2015), <https://www.rollingstone.com/culture/features/a-rape-on-campus-what-went-wrong-20150405> [<https://perma.cc/PV6M-B38Q>] (analyzing the *Rolling Stone* story and discussing the national controversy surrounding it); Eliza Gray, *Why Victims of Rape in College Don't Report to the Police*, TIME (June 23, 2014), <http://time.com/2905637/campus-rape-assault-prosecution/> [<https://perma.cc/NMD8-8CSN>] [hereinafter *Why Victims Don't Report*] (discussing the tension between police and universities); Jon Krakauer, *How Much Should a University Have to Reveal About a Sexual Assault Case?*, N.Y. TIMES (Jan. 21, 2016), <https://www.nytimes.com/2016/01/20/magazine/how-much-should-a-university-have-to-reveal-about-a-sexual-assault-case> [<https://perma.cc/3Q67-AH23>] (discussing universities' ability to protect information regarding Title IX hearings by claiming FERPA protections over the records). Recently, various news and magazine outlets, from the *New York Times* to *Rolling Stone*, have become involved in the public debate about campus sexual assault, increasing the public controversy surrounding the university handling of sexual assault and Title IX cases. See, e.g., Coronel et al., *supra* (analyzing the now retracted *Rolling Stone* article "A Rape on Campus" which told a now debunked story of a UVA student's horrific experience being gang raped at a fraternity party); *Why Victims Don't Report, supra* (analyzing the disconnect between college sexual assaults and local law enforcement); Krakauer, *supra* (arguing that educational institutions use the Family Educational Rights and Privacy Act to hide the sexual assaults that occur on their campuses from the public).

<sup>4</sup> *Why Victims Don't Report, supra* note 3; see Robert Shibley, *Time to Call the Cops: Title IX Has Failed Campus Sexual Assault*, TIME (Dec. 1, 2014), <http://time.com/3612667/campus-sexual-assault-uva-rape-title-ix/> [<https://perma.cc/2EBY-2XUK>] (arguing that the Title IX system fails both victims and the accused in campus sexual assault cases).

<sup>5</sup> NAT'L SEXUAL VIOLENCE RES. CTR., STATISTICS ABOUT SEXUAL VIOLENCE (2015), [https://www.nsvrc.org/sites/default/files/publications\\_nsvrc\\_factsheet\\_media-packet\\_statistics-about-sexual-violence\\_0.pdf](https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf) [<https://perma.cc/SP8U-4G7F>] (providing statistics regarding sexual assault victimization).

the sexual assault are frequently handled without the involvement of local law enforcement.<sup>6</sup> Thus, the question of who should handle the investigation of a campus sexual assault is commonly and hotly debated.<sup>7</sup> In contrast, who handles the investigation of other crimes is generally uncontested.<sup>8</sup>

This Note examines the challenges presented to law enforcement in the context of campus sexual assault proceedings, including those related to gaining access to the contents of the campus proceedings.<sup>9</sup> Additionally, this Note addresses the impact that police access to campus sexual assault proceedings may have on the integrity of an alleged perpetrator's testimony in those proceedings.<sup>10</sup> Part I of this Note discusses the law related to campus sexual assault proceedings, local law enforcement's role in relation to those proceedings, and the Family Educational Rights and Privacy Act ("FERPA").<sup>11</sup> Part II highlights the potential legal arguments surrounding police access to the content of sexual assault proceedings.<sup>12</sup> Part III argues that in the interest of maintaining the integrity of Title IX proceedings and balancing the interests of the victim and the accused, local law enforcement should not have access to the campus proceeding records.<sup>13</sup> Instead, the law should be amended to create a mandate that the school report specific lim-

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<sup>6</sup> See Anna North, *How Colleges Can Help Sexual Assault Survivors—and the Accused*, VOX (Oct. 13, 2017), <https://www.vox.com/identities/2017/10/13/16360726/sexual-assault-college> [<https://perma.cc/973L-A6NQ>] (explaining that Title IX requires universities to investigate sexual assault); Shibley, *supra* note 4 (emphasizing that it is normal for colleges to run sexual assault investigations without local law enforcement).

<sup>7</sup> See, e.g., *Why Victims Don't Report*, *supra* note 3 (analyzing why victims do not report to local law enforcement); North, *supra* note 6 (debating the role colleges play in campus sexual assaults and its impact on both the accused and the alleged victims); Shibley, *supra* note 4 (arguing that Title IX has been ineffective in bringing justice in sexual assault cases and that instead, local law enforcement should be handling these cases).

<sup>8</sup> See Sean Dooley & Lauren Effron, *Shooting Outside of College Party Leaves 1 Student Dead, Another Facing Murder Charges, Many Questions About What Happened*, ABC NEWS (Sept. 8, 2017), <http://abcnews.go.com/US/shooting-college-party-leaves-student-dead-facing-murder/story?id=49685218> [<https://perma.cc/ZL2H-UQPR>] (discussing a campus shooting which was investigated and prosecuted by local law enforcement). For example, in 2015, one student killed another in a shooting at Northern Arizona University, for which the student faced murder charges. *Id.* The university did not investigate the crime; instead, local authorities investigated and prosecuted it without question. See *id.* (lacking a discussion regarding who should run the murder investigation). Contrastingly, in 2013, a fellow Duke University student accused Lewis McLeod of sexual misconduct. Bauerlein, *supra* note 1. Although the local authorities did investigate the crime, they did not charge McLeod. *Id.* Instead, the university investigated the crime under Title IX, finding that "it was more likely than not" that the woman did not consent. *Id.* McLeod sued the university, claiming that the university erred in how it handled the case. *Id.*

<sup>9</sup> See *infra* notes 1–236 and accompanying text.

<sup>10</sup> See *infra* notes 1–236 and accompanying text.

<sup>11</sup> See *infra* notes 15–107 and accompanying text.

<sup>12</sup> See *infra* notes 108–191 and accompanying text.

<sup>13</sup> See *infra* notes 192–236 and accompanying text.

ited information about certain crimes, instead of the current permissive standard of reporting under FERPA.<sup>14</sup>

## I. AN OVERVIEW OF CAMPUS SEXUAL ASSAULT PROCEEDINGS AND THE ROLE OF POLICE

The legal landscape surrounding sexual assault on university campuses is complicated specifically because it exists at the crossroads of state criminal law, federal privacy law, and federal nondiscrimination law.<sup>15</sup> Part I provides background on campus sexual assault proceedings and the intersection of those proceedings with local prosecution.<sup>16</sup> Section A discusses the laws that establish the campus sexual assault investigation procedures, mainly focusing on Title IX.<sup>17</sup> Section B discusses the current role of local law enforcement in campus sexual assault proceedings.<sup>18</sup> Section C introduces FERPA, which can impact Title IX and law enforcement investigations.<sup>19</sup> Section D further investigates how FERPA interacts with campus and local law enforcement investigations.<sup>20</sup>

### A. Title IX: The Role of Universities in Sexual Assault Proceedings

In 1972, Title IX became federal law, banning discrimination on the basis of sex in educational activities or programs that receive federal fund-

<sup>14</sup> See *infra* notes 192–236 and accompanying text.

<sup>15</sup> See North, *supra* note 6; Shibley, *supra* note 4; *Why Victims Don't Report*, *supra* note 3. This Note will use “campus sexual assault” to mean an alleged sexual assault over which the university has jurisdiction to investigate under Title IX, those between two university students. See OFFICE FOR CIVIL RIGHTS, DEP’T OF EDUC., Q&A ON CAMPUS SEXUAL MISCONDUCT 1 (2017), [https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf?utm\\_content=&utm\\_medium=email&utm\\_name=&utm\\_source=govdelivery&utm\\_term=](https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=) [https://perma.cc/79SV-Z5BS] [hereinafter Q&A] (providing information to universities on the handling of campus sexual assaults); see also *infra* notes 16–236 and accompanying text. Furthermore, use of the term “campus police” refers to the “law enforcement unit” of the university, which is a unit, officer, or department of a school, consisting of commissioned police officers or non-commissioned security that is designated by the school to enforce laws or refer any appropriate matter to authorities or maintain the security of the school. *FERPA General Guidance for Students*, DEP’T OF EDUC. (June 26, 2015), <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/students.html> [https://perma.cc/UXE5-2FFN] [hereinafter *Guidance for Students*] (providing students with guidance regarding their rights under FERPA). On the other hand, use of the term “local law enforcement” refers to authorities that are not designated by the school to enforce laws, but instead are outside policing authorities. See *Guidance for Students*, *supra*.

<sup>16</sup> See *infra* notes 16–107 and accompanying text.

<sup>17</sup> See *infra* notes 21–33 and accompanying text.

<sup>18</sup> See *infra* notes 34–45 and accompanying text.

<sup>19</sup> See *infra* notes 46–71 and accompanying text.

<sup>20</sup> See *infra* notes 72–107 and accompanying text.

ing, and applying to employees and students of the program.<sup>21</sup> Title IX applies to various forms of discrimination, including employment, pregnancy, marital or parental status, and testing or admission to educational programs and related activities, such as athletics.<sup>22</sup> Among its provisions, Title IX established The Office of Civil Rights of the Department of Education to investigate schools that do not comply with the statute and its related federal regulations.<sup>23</sup> Title IX has been widely used to combat issues of sexual harassment and assault at educational institutions between students and between student and teacher.<sup>24</sup> This includes gender-based harassment in addition to sexual assault, stalking, dating violence, and domestic violence.<sup>25</sup>

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<sup>21</sup> 20 U.S.C. § 1681(a)(1) (2012) (banning discrimination on the basis of sex in educational activities or programs that receive federal funding); *Overview of Title IX of the Education Amendments of 1972*, DEP'T OF JUSTICE (Aug. 7, 2015), <https://www.justice.gov/crt/overview-title-ix-education-amendments-1972-20-usc-1681-et-seq> [<https://perma.cc/7ZJK-U5V7>] [hereinafter *Overview of Title IX*] (providing a summary of the laws and regulations under Title IX). Congress passed Title IX through the Education Amendments of 1972. *Statement on Signing the Education Amendments of 1972*, THE AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/statement-signing-the-education-amendments-1972> [<https://perma.cc/PE92-BFBJ>] (providing a transcript of the statement made at the signing the law which introduced Title IX). The Education Amendments of 1972 is best known for Title IX, but it also modified the issuance of financial aid and the revitalization of research efforts. *Id.* Specifically, Title IX states that “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 education program or activity receiving federal financial assistance . . .” 20 U.S.C. § 1681(a)(1). The main goals of Title IX include the avoidance of using Federal funds to support programs that discriminate based on sex. *Overview of Title IX, supra*. The application of Title IX is almost universal to educational and training programs, as almost all programs in the country receive some sort of federal funding. RONNA GREFF SCHNEIDER, EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS AND DISCRIMINATION LEGISLATION § 4.3 (2016) (exploring the requirements of Title IX).

<sup>22</sup> SCHNEIDER, *supra* note 21, § 4.3.

<sup>23</sup> Lindsay J. Brice & Caroline S. Palmer, *Understanding Title IX Investigations: What They Are and What They Aren't*, 74 BENCH & B. MINN. 24, 26 (2017) (providing guidance on the requirements of Title IX for campus investigations). In terms of the evaluation of completion of Title IX investigations, currently, OCR will evaluate whether the school made a good faith effort to conduct an investigation that provided fair and impartial procedures to all parties in a timely manner. Q&A, *supra* note 15, at 3. In November 2018, the Department of Education issued proposed regulations. DEP'T OF EDUC., PROPOSED TITLE IX REGULATION FACT SHEET 1 (2018) [hereinafter PROPOSED REGULATION FACT SHEET]. If put into effect in their current form, they would instead hold a school in violation of Title IX in relation to campus sexual harassment proceedings only when the institution has demonstrated “deliberate indifference.” *Id.*

<sup>24</sup> SCHNEIDER, *supra* note 21, § 4.3. In *Davis v. Monroe County Bd. of Education*, the U.S. Supreme Court held that sexual harassment and assault may constitute discrimination on the basis of sex, and an institution may be held liable for the assault under Title IX where the school is deliberately indifferent to known acts of harassment. 526 U.S. 629, 653–54 (1999); Matthew R. Triplett, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487, 496 & n.47 (2012) (discussing the background of Title IX and the best approach to protect both victims and accused).

<sup>25</sup> James T. Koebel, *Campus Misconduct Proceeding Outcome Notifications: A Title IX, Clery Act, and FERPA Compliance Blueprint*, 37 PACE L. REV. 551, 556–57 (2017) (providing guidance for universities on tackling the overlapping laws of Title IX, the Clery Act, and FERPA).

Although Title IX applies to any type of training or educational program that receives some federal funding, the Act is particularly contentious for its impact on colleges and universities.<sup>26</sup>

When a school “knows or reasonably should know of” a complaint of alleged sexual harassment or assault, the administration has the responsibility to investigate what occurred and respond in an appropriate manner, whether or not the alleged victim files a complaint with the school.<sup>27</sup> Requiring schools to investigate alleged incidents of sexual assaults means that the matter is not left solely to local law enforcement and seeks to ensure that students are able to learn in a safe environment.<sup>28</sup>

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<sup>26</sup> See *Overview of Title IX*, *supra* note 21 (explaining what types of institutions Title IX applies to); see also SCHNEIDER, *supra* note 21, § 4.3 (explaining that Title IX has been used to combat sexual assault and harassment); Shibley, *supra* note 4 (arguing that Title IX has been bad for schools and sexual assault investigations).

<sup>27</sup> See Q&A, *supra* note 15, at 1 (explaining the school’s responsibility to investigate alleged cases of sexual misconduct). Each school must appoint at least one coordinator to handle issues related to compliance with Title IX. *Id.* at 2. As of September 2017, Department of Education Secretary Betsy DeVos announced the department would be rewriting the guidance issued to schools on how to handle sexual assault Title IX issues on campuses, formally withdrawing the “Dear Colleague Letter” issued by the Obama administration, which required a preponderance of the evidence standard for proving campus sexual assault. *Id.* at 1 & n.1; see Sophie Tatum, *Education Department Withdraws Obama-era Campus Sexual Assault Guidance*, CNN (Sept. 22, 2017), <http://www.cnn.com/2017/09/22/politics/betsy-devos-title-ix/index.html> [<https://perma.cc/85T6-6XLM>] (discussing the Trump Administration’s removal of the guidance provided by the Obama Administration). The administration made clear in that guidance that schools will still have the responsibility of investigating alleged incidents; however, schools may now use a preponderance of the evidence standard, or a higher, clear and convincing evidence standard, dependent upon which standard the school applies in other student misconduct investigations. *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 607 (D. Mass. 2016) (holding that lowering the standard of proof only for sexual misconduct cases is a deliberate effort to make only charges of sexual misconduct more difficult to defend against); Q&A, *supra* note 15, at 1, 5 & n.19; Tatum, *supra*. In November 2018, however, the Department of Education issued proposed regulations which would revise the school’s responsibility to investigate. PROPOSED REGULATIONS FACT SHEET, *supra* note 23. The school would only be required to investigate when the school has “actual knowledge,” which is triggered by a “formal complaint.” *Id.* The proposed rules are currently in the notice-and-comment period and are expected to be finalized or revised within a year. Simone C. Chu & Iris M. Lewis, *What Happens Next with Title IX: DeVos’s Proposed Rule Explained*, HARV. CRIMSON (Feb. 27, 2019), <https://www.thecrimson.com/article/2019/2/27/title-ix-explainer/> [<https://perma.cc/2UP6-R3HK>]. Schools are additionally subject to the Clery Act which requires higher education institutions to disclose statistics related to campus crime and campus security and criminal procedures. Jeanne Clery Act, 20 U.S.C. § 1092(f)(1)(F) (2012) (requiring universities and colleges to disclose certain campus safety statistics). The Violence Against Women Reauthorization Act passed in 2013 required schools to gather and disclose statistics related to incidents of domestic violence, sexual assault, and stalking, meaning that schools must now comply with both Title IX and the Clery Act. See § 1092(f)(1) (providing the procedures a university must follow to comply with the Clery Act); 34 C.F.R. § 668.46 (2017) (defining terms used within the Clery Act).

<sup>28</sup> See OFFICE FOR CIVIL RIGHTS, DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, at ii (2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<https://perma.cc/>

Schools must follow a variety of procedures in responding to an alleged incident in order to comply with Title IX, none of which include reporting to the local law enforcement.<sup>29</sup> Schools must also make findings of fact according to a prescribed standard and have the burden of proof to gather evidence.<sup>30</sup> A school's responsibility also includes determining each allegation individually, offering meaningful information to both of the parties, and allowing them the opportunity to present information.<sup>31</sup> In sexual harassment and assault cases, higher education institutions must provide defendants with the same opportunity as the alleged victim to have third parties present during proceedings, including an advisor of their choice.<sup>32</sup> It is again important to note that schools are at no point required or encouraged to report the incident to, or work with, local law enforcement.<sup>33</sup>

### *B. Police Involvement in Campus Sexual Assault Proceedings*

The Title IX investigation system allows victims to decide whether local law enforcement becomes involved in the matter and whether criminal charges are brought.<sup>34</sup> Thus, local law enforcement may bring criminal charges after campus proceedings have concluded or may never bring them at all.<sup>35</sup> A victim may choose not to report a sexual assault crime to the police for various reasons, and the Title IX system intends to protect that

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LY26-MP6A] (explaining the goals of Title IX investigations to ensure that students learn in a safe and comfortable environment).

<sup>29</sup> See Q&A, *supra* note 15, at 3 (listing procedures for a prompt and equitable investigation, which do not list reporting to police).

<sup>30</sup> *Id.* at 5. The investigation must be run by someone who is unbiased. *Id.* at 4.

<sup>31</sup> *Id.* at 5. The determination of the case must be done by an investigator trained to analyze evidence, determine the credibility of the parties, and synthesize all of the evidence in the case. *Id.* at 4. If implemented in their current form, the proposed regulations would further require that schools conduct a live hearing and have a neutral third party, in addition to the investigator to determine the case. PROPOSED REGULATIONS FACT SHEET, *supra* note 23; see Jeannie Suk Gersen, *Assessing Betsy DeVos's Proposed Rules on Title IX and Sexual Assault*, NEW YORKER (Feb. 1, 2019), <https://www.newyorker.com/news/our-columnists/assessing-betsy-devos-proposed-rules-on-title-ix-and-sexual-assault> [<https://perma.cc/8WG5-XQR6>].

<sup>32</sup> Q&A, *supra* note 15, at 5.

<sup>33</sup> See *id.* at 4–5 (explaining the procedures a school must follow, which do not include reporting to local law enforcement); Brice & Palmer, *supra* note 23, at 25 (explaining that the campus investigation process is completely separate from criminal investigations); Shibley, *supra* note 4 (explaining that federal guidance informs schools to allow students whether they want to report to police).

<sup>34</sup> See Shibley, *supra* note 4 (arguing that the federal government's interpretation of Title IX effectively fails, and although rooted in compassion, its costs are higher than its benefits).

<sup>35</sup> See *id.* (noting that because victims have the option to report or not report to the police in addition to the school, these crimes are often not subject to a professionally run investigation, including forensic investigation).



choice for the victim, making coordination between local law enforcement and campuses even more difficult.<sup>36</sup>

Various practical realities create additional hurdles for the coordination of local law enforcement and campuses.<sup>37</sup> Underreporting of sexual assault to local law enforcement has been a continuing dilemma in criminal prosecution for many years.<sup>38</sup> Furthermore, law enforcement is not always involved from the beginning of the investigation, leading to difficulties in collecting evidence later.<sup>39</sup> Underreporting of all sexual assault and harassment to law enforcement is high across all demographics and generally ranges from approximately five to twenty percent.<sup>40</sup> Female student victims between the ages of eighteen and twenty-four report to law enforcement only twenty percent of the time, whereas non-students of the same demographic report thirty-two percent of the time.<sup>41</sup> Furthermore, the standard of proof in criminal prosecutions is “beyond a reasonable doubt,” while the standard of

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<sup>36</sup> *Why Victims Don't Report*, *supra* note 3. Victims may not want to report to the police for fear of disbelief, months long ordeals during investigations and trials in which the victim must relive traumatic experiences, or fear of retaliation, among other reasons. *Id.*; see *Why Schools Handle Sexual Violence Reports*, KNOW YOUR IX, <https://www.knowyourix.org/issues/schools-handle-sexual-violence-reports/> [<https://perma.cc/XZE7-EKP6>] (exploring the reasons that Title IX entrusts universities to handle the investigation of campus sexual assault). Nevertheless, many argue that the Title IX campus investigation system may be failing both defendants and alleged victims, and that criminal prosecution may serve to be a more effective approach. See, e.g., Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 86 (2013) (arguing that the Title IX system fails student defendants); Shibley, *supra* note 4 (arguing that Title IX fails victims). Many of those who advocate for handling of these cases by the police believe that universities should refer these cases to the local law enforcement and not handle the cases at all. Sarah L. Swan, *Between Title IX and the Criminal Law: Bringing Tort Law to the Campus Sexual Assault Debate*, 64 U. KAN. L. REV. 963, 971 (2016) (exploring how tort law could play a role in the handling of campus sexual assault).

<sup>37</sup> See Brice & Palmer, *supra* note 23, at 25 (discussing the differing burdens of proof between a Title IX campus investigation and a criminal investigation); Michelle Lee, *The Truth About a Viral Graphic on Rape Statistics*, WASH. POST (Dec. 9, 2014), [https://www.washingtonpost.com/news/fact-checker/wp/2014/12/09/the-truth-about-a-viral-graphic-on-rape-statistics/?utm\\_term=.3e67a8f1951c](https://www.washingtonpost.com/news/fact-checker/wp/2014/12/09/the-truth-about-a-viral-graphic-on-rape-statistics/?utm_term=.3e67a8f1951c) [<https://perma.cc/343S-37JJ>] (exploring the real levels of underreporting of sexual assault to local law enforcement); North, *supra* note 6 (discussing how colleges help alleged victims by providing an alternative to reporting to police).

<sup>38</sup> See Lee, *supra* note 37 (analyzing the actual levels of underreporting to police, due to a variety of different statistics, presenting numbers ranging from ten percent of rapes reported to upwards of forty percent of rapes reported); North, *supra* note 6 (discussing noticeable differences in levels of reporting between college-aged women and non-college aged women).

<sup>39</sup> *Why Victims Don't Report*, *supra* note 3.

<sup>40</sup> Lee, *supra* note 37; North, *supra* note 6. Some reports have reflected levels of reporting to be as high as forty percent. Lee, *supra* note 37. Measuring the levels of crimes that go unreported is a difficult challenge. *Id.* Even at the forty percent reporting rate, reporting of sexual assault is comparatively low to other crimes. *Id.*

<sup>41</sup> DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RAPE AND SEXUAL VICTIMIZATION AMONG COLLEGE-AGED FEMALES, 1995–2013, at 1 (2014) [hereinafter RAPE AND VICTIMIZATION] (providing government-curated statistics regarding sexual victimization at the college-age).

proof in campus investigations may be one of the two lower evidentiary standards of “clear and convincing evidence” or “preponderance of the evidence.”<sup>42</sup> Criminal sexual conduct can often be difficult to prove, creating a “he-said-she-said” dichotomy, as often times there is little evidence aside from the words of the alleged victim and the accused.<sup>43</sup> A lack of evidence means that many times, a prosecutor may choose not to bring charges.<sup>44</sup> Thus, they leave victims with few options outside of Title IX.<sup>45</sup>

### C. *The Role of the Family and Educational Rights and Privacy Act*

FERPA creates privacy rights for student education records.<sup>46</sup> It requires all educational institutions, both public and private, that receive applicable funding from the federal government through the Department of Education to follow certain procedures in relation to the protection of those records.<sup>47</sup> In general, the procedures restrict third parties from gaining access to the records, while also ensuring that parents or students can access their records and have the right to challenge them.<sup>48</sup> When a student reaches the age of eighteen or enrolls in a postsecondary institution, the right to access and challenge the student’s education record is transferred from the parent to the student.<sup>49</sup> FERPA does not require that a school maintain cer-

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<sup>42</sup> Brice & Palmer, *supra* note 23, at 25–26; Q&A, *supra* note 15, at 5; see Lavinia M. Weizel, *The Process That Is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1636–42 (2012). The proposed regulations, following the guidance issued by the Department of Education in 2017, would allow a school to choose a preponderance of the evidence standard or a clear and convincing evidence standard. See PROPOSED REGULATION FACT SHEET, *supra* note 23; Q&A, *supra* note 15. If a school chooses a preponderance of the evidence standard for sexual assault investigations, however, it must also apply that same standard to other conduct investigations. See PROPOSED REGULATION FACT SHEET, *supra* note 23; Gersen, *supra* note 31.

<sup>43</sup> See Brooke W. Boucek, *Ridding the He-Said-She-Said Dichotomy: The Deep Entanglement of Sexual Violence on College Campuses*, 40 AM. J. TRIAL ADVOC. 103, 119 (2016) (discussing the he-said-she-said dichotomy in campus sexual assault cases); Brice & Palmer, *supra* note 23, at 26 (discussing complications presented in proving a sexual assault case “beyond a reasonable doubt” that often leaves prosecutors to choose not to charge a suspect).

<sup>44</sup> See Brice & Palmer, *supra* note 23, at 26. The prosecution may feel that the lack of evidence makes it too difficult to meet the standard of proof. See *id.*

<sup>45</sup> See *id.*

<sup>46</sup> *Family Educational Rights and Privacy Act (FERPA)*, DEP’T OF EDUC. (Jan. 1, 2018), <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html> [<https://perma.cc/HG8Q-TEEX>] [hereinafter *FERPA Guidance*] (providing guidance and explanation regarding the rights provided by FERPA).

<sup>47</sup> 20 U.S.C. § 1232g(a)(1)(A) (2012) (establishing FERPA); *FERPA Guidance*, *supra* note 46; see John E. Theuman, *Validity, Construction, and Application of Family Educational Rights and Privacy Act of 1974 (FERPA) (20 U.S.C.A. § 1232g)*, 112 A.L.R. FED. 1 (1993) [hereinafter *Validity, Construction, and Application*] (exploring the statutory construction and real-world application of FERPA).

<sup>48</sup> *Validity, Construction, and Application*, *supra* note 47.

<sup>49</sup> *FERPA Guidance*, *supra* note 46. Once the right to access the information passes from the parent to the student, there are certain exceptions in which the school may release, but is not re-

tain records about students, but rather that the school protects those records that the school does maintain.<sup>50</sup>

A student's education record includes any documentation, reports, recorded information, and similar materials that contain information that is directly related to the student, which may include disciplinary records.<sup>51</sup> Additionally, these records and materials must be maintained by "an educational agency or institution" or by an individual acting on behalf of that agency or institution.<sup>52</sup> Nevertheless, certain documents related to the educational institution are not considered part of a student's education records.<sup>53</sup> Campus police records, as long as they were created for the maintenance of security or the enforcement of the law, are not education records under FERPA.<sup>54</sup> Thus, students are not entitled to review campus police records, and the campus police may disclose these records to third parties without the permission of the parent or student.<sup>55</sup>

Although examination of FERPA is generally rare in the U.S. Supreme Court, which has interpreted education records using the plain meaning of the statute, Circuit courts and state courts analyze FERPA more frequently.<sup>56</sup> In the past, courts have held that education records do not include the

quired to release, the "education records" to the parent. *Parents Guide to the Family Educational Rights and Privacy Act*, DEP'T OF EDUC. (June 26, 2015), <https://www2.ed.gov/policy/gen/guid/fpco/brochures/parents.html> [<https://perma.cc/VF2F-C8H5>] [hereinafter *Guidance for Parents*] (providing guidance to parents regarding their rights under FERPA).

<sup>50</sup> *Guidance for Students*, *supra* note 15, at 1.

<sup>51</sup> 20 U.S.C. § 1232g(a)(4)(A).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* § 1232g(a)(4)(B). There are four exceptions, which allow disclosure of student records to third parties. *Id.* For example, FERPA does not consider records related to employees of institutions that are not also students at those institutions as education records. *Id.* Additionally, it does not include records of a student attending a postsecondary institution that are made by a physician, psychiatrist, or the like in connection with treatment of the student and are disclosed only to the treatment providers. *Id.* Lastly, FERPA does not protect records that are created by instructional, supervisory, or ancillary personnel only for their own use and are possessed only by those who created them. *Id.*; Sam Schmitt & David Aronofsky, *The Chicago Tribune v. the University of Illinois: The Latest Iteration of New Textualist Interpretation of FERPA by the Federal Courts*, 39 J.C. & U.L. 567, 571 (2013) (exploring the federal courts' methodology and interpretation of FERPA).

<sup>54</sup> 20 U.S.C. § 1232g(a)(4)(B)(ii). A "law enforcement unit," or campus police, of a school is a unit within a school composed of officers or security whose job is to enforce laws, refer any appropriate matter to the authorities, or maintain the school's security. *Guidance for Students*, *supra* note 15, at 6.

<sup>55</sup> *Guidance for Students*, *supra* note 15, at 6.

<sup>56</sup> See *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426, 433–44 (2002) (looking at the ordinary meaning of the word "maintain" in the definition of "education record" under FERPA); Schmitt & Aronofsky, *supra* note 53, at 574 (discussing the two instances in which the Supreme Court has addressed the interpretation of FERPA). In *Owasso*, the Court interpreted the definition of "education records" and the maintenance of those records under FERPA after the school district was sued for failing to protect students' grades because the school allowed students to peer grade papers and then read aloud the grades to the teacher. *Owasso*, 534 U.S. at 426; Schmitt & Aronof-

disciplinary records of students.<sup>57</sup> In contrast, in 2002, in *U.S. v. Miami University*, the Sixth Circuit held that the FERPA covers student disciplinary records within the meaning of education records.<sup>58</sup> The Sixth Circuit also found that disciplinary records that reference criminal offenses that may also have related local law enforcement records are still considered disciplinary records and are protected under FERPA.<sup>59</sup> Thus, records pertaining to disciplinary proceedings, including those relating to sexual assault under Title IX, are considered education records.<sup>60</sup> Campus sexual assault proceedings and their results under Title IX may be considered disciplinary records within FERPA's definitions.<sup>61</sup>

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sky, *supra* note 53, at 574. The Court held that the student grading of the papers did not constitute maintenance of "education records," because the students were not agents that could act on behalf of the school. *Owasso*, 534 U.S. at 434.

<sup>57</sup> See *Red & Black Publ'g Co. v. Bd. of Regents*, 427 S.E.2d 257, 261 (Ga. 1993) (holding that the definition of education records does not include disciplinary records); *State ex rel. The Miami Student v. Miami Univ.*, 680 N.E.2d 956, 959 (Ohio 1997) (holding that education records do not include disciplinary records).

<sup>58</sup> *United States v. Miami Univ.*, 294 F.3d 797, 813 (6th Cir. 2002). The Sixth Circuit explained that through study of the statute and its amendments, Congress clearly intended that the meaning of "education records" under FERPA includes student disciplinary records. *Id.* at 812. They provided that student disciplinary records are directly related to students and are maintained by the universities. *Id.*; Schmitt & Aronofsky, *supra* note 53, at 581 (quoting *Miami Univ.*, 294 F.3d at 812). *Miami University* conflicted with prior decisions of other federal courts, which held that FERPA did not cover the disclosure of disciplinary records. Compare *Miami Univ.*, 294 F.3d at 813 (holding that disciplinary records are protected by FERPA as educational records), with *Bauer v. Kincaid*, 759 F. Supp. 575, 590 (W.D. Mo. 1991) (holding that records related to criminal activity are not protected by FERPA). The Department of Education viewed rulings that "education records" did not include disciplinary records as an incorrect interpretation of the law. Dixie Snow Huefner & Lynn M. Daggett, *FERPA Update: Balancing Access to and Privacy of Student Records*, 152 WEST'S ED. LAW REP. 469, 473 (2001) (summarizing updates to FERPA and their impact on the previous law). The Sixth Circuit stated that this would be contrary to the stated goals of FERPA. See *Miami Univ.*, 294 F.3d at 812. It is important to note that Congress deliberately chose to use a broad definition of the term "education records," which originally included only a specified list of certain records. *Id.* A few months after the original passage of FERPA, Congress amended it to use the broad definition as opposed to the specific definition. Huefner & Daggett, *supra*, at 471. More cases have continued to follow in the footsteps of the *Miami University* definition. See, e.g., *State ex rel. ESPN, Inc. v. Ohio State Univ.*, 970 N.E.2d 939, 947 (Ohio 2012) (holding that disciplinary records are education records); Christopher C. Schwarz, Note, *Are Student-Athletes Alleged of Sex-Crimes Granted Educational Privacy Protections? FERPA's Misinterpretation by Academic Institutions*, 14 OHIO ST. J. CRIM. L. 809, 819 (2017) (arguing that universities wrongly use FERPA to protect student athletes accused of sexual assault). In *State ex rel. ESPN, Inc. v. Ohio State University*, the Ohio Supreme Court held that "education records" are not restricted to only those records that pertain to "academic performance, financial aid, or scholastic performance." 970 N.E.2d at 946-47.

<sup>59</sup> *Miami Univ.*, 294 F.3d at 815; Schmitt & Aronofsky, *supra* note 53, at 582.

<sup>60</sup> See *Miami Univ.*, 294 F.3d at 813 (holding that disciplinary records are "education records" under FERPA); Schmitt & Aronofsky, *supra* note 53, at 581 (explaining the Sixth Circuit's decision that "education records" include disciplinary records under FERPA).

<sup>61</sup> See *Miami Univ.*, 294 F.3d at 815 (holding that, under FERPA, a student's "education records" include the student's disciplinary record); Schmitt & Aronofsky, *supra* note 53, at 581 (ana-

FERPA provides further details regarding disciplinary records.<sup>62</sup> Under FERPA, a disciplinary action or proceeding means the investigation or sanctioning of a student by the university for a violation of the school's code of conduct.<sup>63</sup> In general, FERPA does not prohibit schools from including appropriate information relating to disciplinary action taken for behavior that created serious safety hazards for the institution's community, another student, or that student himself in the student's education record.<sup>64</sup>

To access a student's education record, FERPA provides that generally, a parent or student must submit a signed request in writing.<sup>65</sup> Exceptions, however, provide that schools may, but are not required to, release the education record of students to certain parties without the knowledge or request of the parent or student, including institution administrators with "a legitimate educational interest."<sup>66</sup>

It is important to note that FERPA clearly provides that it does not prohibit postsecondary institutions in any way from releasing the final results of a disciplinary proceeding to either the alleged victim or the alleged perpetrator of a violent crime or non-forcible sex offense.<sup>67</sup> The school may disclose to the public the final results of the proceedings, without consent, if certain requirements are met.<sup>68</sup> If an alleged perpetrator of a violent crime

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lyzing the textualist interpretation the courts use to interpret FERPA, including that used in *Miami Univ.* to determine that education records include disciplinary records).

<sup>62</sup> 20 U.S.C. § 1232g(h)(1)–(2); 34 C.F.R. § 99.3 (2017).

<sup>63</sup> 34 C.F.R. § 99.3.

<sup>64</sup> 20 U.S.C. § 1232g(h)(1)–(2).

<sup>65</sup> 34 C.F.R. § 99.31; *FERPA Guidance*, *supra* note 46.

<sup>66</sup> 34 C.F.R. § 99.31; *FERPA Guidance*, *supra* note 46; see Lynn M. Daggett, *Book 'Em?: Navigating Student Privacy, Disability, and Civil Rights and School Safety in the Context of School-Police Cooperation*, 45 URB. LAW. 203, 206 (2013) (exploring the prosecution of crimes by students as opposed to investigations by universities). For example, a legitimate educational interest may be a concern about a student's struggling performance. Huefner & Daggett, *supra* note 58, at 477–78. This would enable the teacher to view the student's standardized testing scores without getting the consent of the parent. *Id.* If a teacher was just curious about different students' IQs, that teacher would likely not have an interest that qualified as a "legitimate educational interest." *Id.* Officials with a "legitimate educational interest" can also include officials at a school to which the student is transferring, certain officials for auditing purposes, parties in connection with financial aid, organizations conducting a study for the school, accrediting organizations, appropriate officials during health or safety emergencies, compliance with a judicial order or subpoena, or state and local authorities within a juvenile justice system. *FERPA Guidance*, *supra* note 46.

<sup>67</sup> 20 U.S.C. § 1232g(b)(6)(A)–(B). A violent crime is defined to include arson, assault offenses, burglary, criminal homicide by manslaughter or murder, the destruction of vandalism of property, kidnapping, robbery, and forcible sex offenses. 34 C.F.R. § 99.39.

<sup>68</sup> 20 U.S.C. § 1232g(b)(6)(A); 34 C.F.R. § 99.39. The disclosure of violent crimes and non-forcible sexual offenses was included as part of an amendment to FERPA in 1998 which hoped to further address the rising criminal activity on college campuses. Tamu K. Walton, *Protecting Student Privacy: Reporting Campus Crimes as an Alternative to Disclosing Student Disciplinary Records*, 77 IND. L.J. 143, 157 (2002) (arguing that campus crimes should be reported to police).

or non-forcible sex offense is found guilty, the school may disclose the results.<sup>69</sup> The disclosure may only include the name of the student who perpetrated the act, the violation committed, and any sanction or punishment imposed.<sup>70</sup> The disclosure may not include the name of third parties, witnesses, or the victim without prior consent, and does not include the contents of the proceedings.<sup>71</sup>

#### *D. The Challenge for Police Created by the Family and Educational Rights and Privacy Act*

FERPA creates complications in the pursuit of both effective campus disciplinary proceedings and criminal proceedings by local law enforcement, because FERPA limits access to records.<sup>72</sup> During the campus proceedings, FERPA may restrict parties from accessing information regarding the opposing parties or witnesses without prior written consent of that party or witness.<sup>73</sup>

It has been argued that current Title IX proceedings guidelines conflict with the disclosure restrictions of the FERPA.<sup>74</sup> For example, current guidance provides that all parties and the relevant administrators must have equal access to any information that will be used during the proceeding in a timely manner.<sup>75</sup> Access to this type of information, however, can be highly restricted by FERPA.<sup>76</sup> FERPA creates exceptions to the disclosure re-

Yet, it does not require the school to disclose these crimes, but rather allows them to if the relevant state law requires disclosure. *Id.*

<sup>69</sup> 20 U.S.C. § 1232g(b)(6)(A); 34 C.F.R. § 99.39.

<sup>70</sup> 20 U.S.C. § 1232g(b)(6)(A); 34 C.F.R. § 99.39.

<sup>71</sup> 20 U.S.C. § 1232g(b)(6)(A); 34 C.F.R. § 99.39.

<sup>72</sup> See Triplett, *supra* note 24, at 508–09 (analyzing the conflicts between FERPA and Title IX guidance at the information gathering stage to find that where FERPA provides protection, the Title IX process could be restricted).

<sup>73</sup> See *id.* (noting the conflicts between federal guidance on Title IX investigations and FERPA both during and after the investigation).

<sup>74</sup> *Id.* Title IX guidelines are currently under review by the Department of Education, as headed by Betsy DeVos. Q&A, *supra* note 15, at 1 & n.1; Tatum, *supra* note 27; see *supra* note 27 and accompanying text (explaining the developments in how the Department of Education handles Title IX cases under the administration of President Trump). In 2017, the Department announced the withdrawal of the guidance on Title IX sexual assault proceedings issued during President Obama's administration. Tatum, *supra* note 27. In November 2018, the Department of Education issued proposed regulations which are currently open to comment. *Proposed Regulations Fact Sheet*, *supra* note 23; see Chu & Lewis, *supra* note 27.

<sup>75</sup> Q&A, *supra* note 15, at 4. The rules as proposed in 2018 would not only require equal access to this information but would require the compilation of an "investigative report" containing the evidence that would be given to the parties with at least ten days to respond. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,475 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

<sup>76</sup> See Triplett, *supra* note 24, at 508 (discussing the potential roadblocks to information access in a campus sexual assault proceeding created by the intersection of Title IX and FERPA).

quirements, including allowing school officials access to the records if the officials have a “legitimate educational interest.”<sup>77</sup> Nevertheless, this does not provide exceptions for those involved in the investigations.<sup>78</sup>

FERPA not only creates difficulties during campus sexual assault proceedings, but can create complications for local law enforcement seeking to prosecute the related crime.<sup>79</sup> FERPA does not provide an explicit exception that allows nonconsensual disclosure of education records, including disciplinary records to police, and does not give police an unrestricted right to access to student information.<sup>80</sup> Schools have struggled to properly interpret when police may access student information.<sup>81</sup> Some take the stance that police have unrestricted access, but others find that police have almost no access to student information, except in emergencies or with a subpoena.<sup>82</sup>

Certain exceptions included in FERPA, such as the limited, permissive standard for crimes of violence, may allow law enforcement to access the education records without consent of the student or parent.<sup>83</sup> As noted above, where a student is found guilty of a disciplinary violation related to the conduct of a violent crime or non-forcible sex offense, a school may issue basic public notice containing the perpetrator’s name, the final determination of the hearing, and any sanctions imposed.<sup>84</sup> The school could disclose this

<sup>77</sup> 34 C.F.R. § 99.31(a)(1). FERPA and the related regulations do not define what constitutes a legitimate educational interest. *Guidance for Students*, *supra* note 15, at 3. Instead, the educational institution itself must define it. *Id.* Teachers and other school officials could presumably have some legitimate educational interest in the disciplinary records of students whose conduct could pose safety risks or risks to the well-being of themselves or other students. Huefner & Daggett, *supra* note 58, at 478.

<sup>78</sup> See 34 C.F.R. § 99.31(a)(1) (allowing access to records for a “legitimate educational interest,” to an institution to which the student “intends to enroll,” to a state or federal educational program, in connection with financial aid, to local authorities in relation to the “juvenile justice system,” to an organization conducting studies related to testing development, to an organization performing “accrediting functions,” to parents of a defendant student, to comply with a subpoena, in connection with an emergency, as “directory information,” or to a victim of a crime of violence or non-forcible sex offense, to a parent regarding a violation of local, state or federal law, or concerns sex offenders that are required to register); Huefner & Daggett, *supra* note 58, at 477–78 (providing examples of appropriate and inappropriate educational interest).

<sup>79</sup> See Daggett, *supra* note 66, at 206 (discussing the difficulty schools face in determining when and whether they may or should disclose student records to local law enforcement).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> See 20 U.S.C. § 1232g(b)(1)–(6) (detailing some of the exceptions to FERPA that allow nonconsensual disclosure); Daggett, *supra* note 66, at 205–15 (reviewing the various exceptions to FERPA and analyzing how they may potentially be used to disclose records to local law enforcement).

<sup>84</sup> 20 U.S.C. § 1232g(b)(6)(A)–(B). FERPA clearly provides that it does not prohibit postsecondary institutions in any way from releasing these final results. *Id.* A violent crime is defined to include arson, assault offenses, burglary, criminal homicide by manslaughter or murder, the destruction or vandalism of property, kidnaping, robbery, and forcible sex offenses. 34 C.F.R. § 99.39. The

information to the police, however, this would not give the police access to the contents of the disciplinary hearing.<sup>85</sup> Additionally, the school is not required to disclose this information under FERPA.<sup>86</sup> Rather, FERPA provides a permissive standard here.<sup>87</sup>

Further complicating the issue, schools cannot disclose certain Title IX offenses without the consent of the student.<sup>88</sup> These offenses are those not covered under FERPA's definition of violent crimes or non-forcible sex offense.<sup>89</sup> Thus, if the conduct constitutes sexual assault, dating violence, stalking, or domestic violence, under FERPA, it may still be disclosed to the public by the school at limited levels without consent.<sup>90</sup>

Local law enforcement may access student education records without consent under an emergency situation in which a school finds an "articulable and significant threat" and the school documents that threat in the education records.<sup>91</sup> As mentioned earlier, campus police records created by a

disclosure may only occur if the disciplinary proceeding related to a violent crime or non-forcible sex offense, and if through that proceeding, the alleged perpetrator was found to have committed the alleged offense. 20 U.S.C. § 1232g(b)(6)(A); 34 C.F.R. § 99.39. The disclosure may not include the name of third parties, witnesses, or the victim without prior consent, and does not include the contents of the proceedings. 20 U.S.C. § 1232g(b)(6)(A); 34 C.F.R. § 99.39.

<sup>85</sup> See 20 U.S.C. § 1232g(b)(6)(A)–(B) (explaining the permissive disclosure standard). FERPA clearly provides that it does not prohibit postsecondary institutions in any way from releasing these final results. *Id.* A violent crime is defined to include arson, assault offenses, burglary, criminal homicide by manslaughter or murder, the destruction or vandalism of property, kidnapping, robbery, and forcible sex offenses. 34 C.F.R. § 99.39. The disclosure may only occur if the disciplinary proceeding related to a violent crime or non-forcible sex offense, and if through that proceeding, the alleged perpetrator was found to have committed the alleged offense. 20 U.S.C. § 1232g(b)(6)(A); 34 C.F.R. § 99.39. The disclosure may not include the name of third parties, witnesses, or the victim without prior consent, and does not include the contents of the proceedings. 20 U.S.C. § 1232g(b)(6)(A); 34 C.F.R. § 99.39.

<sup>86</sup> See 20 U.S.C. § 1232g(b)(6)(A) (providing that violent crimes and nonforcible sex offenses may be released by the school if certain requirements are met); 34 C.F.R. § 99.39 (defining terms relevant to the permissive disclosure standard for violent crimes and nonforcible sex offenses); Walton, *supra* note 68, at 157 (discussing the release of these records and the addition of this exception to FERPA by Congress).

<sup>87</sup> See 20 U.S.C. § 1232g(b)(6)(A) (stating that FERPA does not prevent schools from releasing this information).

<sup>88</sup> Koebel, *supra* note 25, at 586. The school may not disclose any personally identifiable information of anyone related to the crime and the proceedings that is not included in the results of the investigation. *Id.* at 571. Thus, the school could not disclose the name of witnesses or like information. *Id.*

<sup>89</sup> *Id.* at 570–71, 586. The "Title IX-exclusive" offenses are limited to that harassing conduct that an institution must investigate under Title IX, such as gender-based harassment or bullying. *Id.* at 586.

<sup>90</sup> See 34 C.F.R. § 99.39 (discussing what constitutes a crime of violence or non-forcible sex offense such that it could be subject to nonconsensual disclosure); Koebel, *supra* note 25, at 570, 586 (discussing which offenses are subject to Title IX, the Clery Act, and FERPA).

<sup>91</sup> Daggett, *supra* note 66, at 206–07. The Family Policy Compliance Office reviews the compliance of educational institutions with the Family Educational Rights and Privacy Act and defers to the educational institution in determining when an emergency situation has arisen. *Id.* at 207.



postsecondary institution's campus police are not protected by FERPA and may be accessed by local law enforcement, however, disciplinary proceedings are not considered campus police records.<sup>92</sup> If a student is a juvenile and the state law provides so, a school may disclose to local and state law enforcement student education records.<sup>93</sup> They may disclose only if it is necessary for the juvenile justice system to effectively serve the child.<sup>94</sup> This exception is not useful for law enforcement seeking to prosecute a sexual assault which was previously adjudicated through campus disciplinary proceedings under Title IX, because it pertains only to the juvenile justice system, which handles youth under the age of eighteen who are convicted of criminal offenses.<sup>95</sup> Additionally, individuals such as a student's classmates or professors could report personal knowledge of observed behavior or alleged conduct.<sup>96</sup>

Importantly, FERPA does provide that schools may disclose education records without consent in response to a judicial order or subpoena.<sup>97</sup> Gen-

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Thus, a school may declare an appropriate emergency from something such as a threat of violence to a medical emergency of the student. *See id.* (explaining that the exception is interpreted broadly and providing an example of a recent opinion).

<sup>92</sup> *See* 20 U.S.C. § 1232g(a)(4)(B)(ii) (explaining the disclosure of campus police records); Daggett, *supra* note 66, at 207–08 (providing an example stating that if records are created by campus police for law enforcement records *rather than* just campus discipline records). Campus police records, if they were created for the purposes of law enforcement, are not education records under FERPA. 20 U.S.C. § 1232g(a)(4)(B)(ii). A “law enforcement unit,” or campus police, of a school is a unit within a school composed of officers or security whose job is to enforce laws, refer any appropriate matter to the authorities, or maintain the school’s security. *Guidance for Students*, *supra* note 15, at 6. Students are thus not entitled to review campus police records, and the campus police may disclose these records to third parties without the permission of the parent or student. *Id.* Police may additionally have access to what FERPA terms as “directory information,” which includes basic information about a student such as their name and address. Daggett, *supra* note 66, at 209. Schools generally may disclose this type of information to the public without consent of the student or parent; however, the school must have given the student or parent the opportunity to object to the general disclosure of this type of information before disclosure. 20 U.S.C. § 1232g(a)(5)(B); 34 C.F.R. § 99.37(a).

<sup>93</sup> 20 U.S.C. § 1232g(b)(1)(E); 34 C.F.R. § 99.31(a)(5); Huefner & Daggett, *supra* note 58, at 480.

<sup>94</sup> 20 U.S.C. § 1232g(b)(1)(E); 34 C.F.R. § 99.31(a)(5); Huefner & Daggett, *supra* note 58, at 480.

<sup>95</sup> *See* 20 U.S.C. § 1232g(b)(1)(E) (providing for an exception to disclosure restrictions when related to the juvenile justice system); 34 C.F.R. § 99.31(a)(5) (providing exceptions to FERPA’s disclosure requirements); Huefner & Daggett, *supra* note 58, at 480 (explaining the juvenile justice system exception to FERPA). For example, a party could use this exception where the juvenile justice system needed to determine how to continue a certain student’s education while in a juvenile correctional facility. Huefner & Daggett, *supra* note 58, at 480.

<sup>96</sup> *See* 20 U.S.C. § 1232g (preventing certain disclosures but not preventing disclosure of personal knowledge to local law enforcement by individuals that have a relation to the university); Daggett, *supra* note 66, at 213. The FPCO, the agency tasked with enforcing FERPA, has established that the sharing of this type of personal knowledge is not a violation of FERPA. *Id.*

<sup>97</sup> 20 U.S.C. § 1232g(b)(1)(J)(ii); Daggett, *supra* note 66, at 210.

erally, FERPA requires that if a subpoena or public request is pending, the school may not destroy the education record.<sup>98</sup> Additionally, depending on the type of subpoena, FERPA may require the school to follow other procedures with respect to the education record.<sup>99</sup> The school must make reasonable attempts to provide notice to the student or parent of the student whose records have been subpoenaed before the school complies with the subpoena.<sup>100</sup> If a federal grand jury issues the subpoena that requires no notification, however, the school may comply without notification to the student or parent.<sup>101</sup> In general, when a school receives a subpoena for education records, the school has the ability to ask the court to modify or quash the subpoena per the Federal Rules of Civil Procedure.<sup>102</sup> Federal courts use a balancing test in determining a motion to quash or modify a subpoena for student education records, weighing the need for the record against the need to protect student privacy.<sup>103</sup>

A main issue confronting law enforcement is that without a subpoena, FERPA prevents any disclosure of disciplinary records beyond the final results of the disciplinary proceeding.<sup>104</sup> Though many states have open records laws, a review of them generally shows that these laws have exemptions if federal law or other statutes require that the information remain confidential.<sup>105</sup> Thus, providing access to information protected by FERPA would

<sup>98</sup> Daggett, *supra* note 66, at 210–11.

<sup>99</sup> *Id.* The exact procedural requirements vary depending on which of the three recognized types of subpoenas are used, “general subpoenas,” “confidential law enforcement subpoenas,” and terrorism-related subpoenas. *Id.*

<sup>100</sup> *Id.* at 211.

<sup>101</sup> 20 U.S.C. § 1232g(b)(1)(J)(i); Daggett, *supra* note 66, at 211. In comparison, if federal law enforcement or agencies issue a subpoena in investigation of terrorism-related activities, the Patriot Act and amendments to FERPA have made it easier for those law enforcement authorities to acquire student “education records” if the court issues the subpoena. 34 C.F.R. § 99.31(a)(9); see Daggett, *supra* note 66, at 211 (explaining the terrorism exception); Lynn M. Daggett, *FERPA in the Twenty-First Century: Failure to Effectively Regulate Privacy for All Students*, 58 CATH. U. L. REV. 59, 79–80 (2008) (providing detailed background on the terrorism exception).

<sup>102</sup> FED. R. CIV. P. 45(d)(3)(A)(iii) (allowing a motion to quash a subpoena if it contains privileged information); Daggett, *supra* note 66, at 212.

<sup>103</sup> Daggett, *supra* note 66, at 212; Daggett, *supra* note 101, at 93. FERPA does not itself provide any guidance to the courts in how to handle a motion of this type. Daggett, *supra* note 101, at 93. The first case to use the balancing method was *Rios v. Read*, occurring in 1977, shortly after FERPA’s enactment. 73 F.R.D. 589, 590–97 (E.D.N.Y. 1977); Daggett, *supra* note 101, at 93. The courts have generally continued to follow this method, as motions to modify or quash subpoenas for student “education records” have become increasingly more common. Daggett, *supra* note 101, at 93.

<sup>104</sup> See Daggett, *supra* note 66, at 206–14 (discussing the different exceptions to FERPA which may enable police to access student “education records”); Walton, *supra* note 68, at 158 (discussing the obstacles created for local law enforcement by the restrictions of FERPA and FERPA’s permissive disclosure standard).

<sup>105</sup> See Walton, *supra* note 68, at 158 (discussing the interaction of FERPA and state open records laws). An open records law is a public disclosure law that allows the public to access cer-

not be required under the exemption and disclosure would violate FERPA.<sup>106</sup> Increasing calls for local law enforcement to address the campus sexual assault problem often fail to properly consider some of the challenges that police may have in addressing these crimes due to current privacy laws.<sup>107</sup>

## II. POLICE ACCESS TO TITLE IX CAMPUS PROCEEDINGS

Those increasingly demanding that local law enforcement handle campus sexual assault must confront the legal realities potentially preventing police from effectively prosecuting these crimes, including the issue of access to student records.<sup>108</sup> A large determinative factor in local law enforcement's ability to access the contents of campus sexual assault proceedings for their own purposes hinges on whether the definition of the term "education record" under FERPA includes disciplinary records.<sup>109</sup> But, competing viewpoints of what the term encompasses create further complications.<sup>110</sup>

Part II evaluates the competing legal arguments related to police access of these records.<sup>111</sup> Section A reviews the competing analyses of the term "education records" within the meaning of FERPA to discuss whether the term encompasses disciplinary records.<sup>112</sup> Section B explores whether police can access campus sexual assault proceeding records and the related

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tain types of documents. *Proof Supporting Disclosure Under State Freedom of Information Acts*, 132 AM. JUR. 3D *Proof of Facts* § 1, Westlaw (database updated 2019).

<sup>106</sup> Walton, *supra* note 68, at 158.

<sup>107</sup> Daggett, *supra* note 66, at 206 (exploring the complexities of local law enforcement investigation as an alternative to or an addition to Title IX and the challenges that local law enforcement may face); Ada Meloy, Letters to the Editor, *Why Are Campus Sexual Assaults Not Handled by Law Enforcement?*, WASH. POST (July 4, 2014), [https://www.washingtonpost.com/opinions/why-are-campus-sexual-assaults-not-handled-by-law-enforcement/2014/07/04/f58385ec-0222-11e4-8bb2-6b921949ecfa\\_story.html?utm\\_term=.fc952ce2e979](https://www.washingtonpost.com/opinions/why-are-campus-sexual-assaults-not-handled-by-law-enforcement/2014/07/04/f58385ec-0222-11e4-8bb2-6b921949ecfa_story.html?utm_term=.fc952ce2e979) [<https://perma.cc/6WW3-8PNA>] (arguing that local law enforcement should handle campus sexual assaults, not universities, and confronting some of the investigative challenges that local law enforcement may face); Shibley, *supra* note 4 (calling for reform to the handling of campus sexual assault cases and discussing the complex challenges that local law enforcement may face in becoming more involved in the investigation of these cases); Daggett, *supra* note 66, at 206 (explaining challenges FERPA creates for police); Triplett, *supra* note 24, at 494 (noting the challenges that FERPA creates for due process).

<sup>108</sup> Daggett, *supra* note 66, at 206 (explaining challenges FERPA creates for police); Triplett, *supra* note 24, at 494 (noting the challenges that FERPA creates for due process).

<sup>109</sup> See 20 U.S.C. § 1232g(a)(4)(A)–(B) (2012) (defining education records, such that FERPA only protects those records which fall within this definition); Daggett, *supra* note 66, at 206–14 (detailing the various exceptions to FERPA that allow disclosure of education records).

<sup>110</sup> *Compare* United States v. Miami Univ., 294 F.3d 797, 813 (6th Cir. 2002) (holding that "education records" includes disciplinary records), *with* State *ex rel.* The Miami Student v. Miami Univ. ("*Miami Student*"), 680 N.E.2d 956, 959 (Ohio 1997) (interpreting the term "education records" under FERPA such that it does not include student disciplinary records).

<sup>111</sup> See *infra* notes 108–191 and accompanying text.

<sup>112</sup> See *infra* notes 115–152 and accompanying text.

policy arguments supporting their access to these records.<sup>113</sup> Section C explores the arguments criticizing police access to the records of campus sexual assault proceedings.<sup>114</sup>

### A. The Key Term: “Education Records”

Different types of records that may be related to students or universities are categorized differently under the FERPA privacy protections.<sup>115</sup> The term education records includes those records that are directly associated with the student and are controlled by an education institution or an agent of that institution.<sup>116</sup> The regulations of FERPA provide further guidance about the exceptions to the nondisclosure requirements.<sup>117</sup> Neither the courts nor the legislature, however, have clearly established whether education records under FERPA include disciplinary records, including those records from Title IX campus sexual assault proceedings.<sup>118</sup>

The records of Title IX campus sexual assault proceedings may be considered disciplinary records.<sup>119</sup> FERPA permits schools to include relevant information related to disciplinary action for high-risk conduct that threatened the safety of that student or other students in an education record.<sup>120</sup> Under FERPA, a disciplinary action or proceeding “means the investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students of the agency or institution.”<sup>121</sup> Title IX proceedings, because they require investigation and sanctioning by the uni-

<sup>113</sup> See *infra* notes 153–169 and accompanying text.

<sup>114</sup> See *infra* notes 170–191 and accompanying text.

<sup>115</sup> See 20 U.S.C. § 1232g(a)(4)(B) (providing categories of records that are excluded from a student’s education record under FERPA and do not exclude student disciplinary records).

<sup>116</sup> *Id.* § 1232g(a)(4)(A); 34 C.F.R. § 99.3 (2017).

<sup>117</sup> See, e.g., 34 C.F.R. §§ 99.30–99.39 (providing further definitions related to education records and their release, including exceptions to their nondisclosure under FERPA).

<sup>118</sup> See 20 U.S.C. § 1232g(a)(4)(A)–(B) (providing a two-prong positive definition of “education records” that does not clearly specify disciplinary records); 34 C.F.R. § 99.3 (providing categories of records that are excluded from a student’s education record under FERPA and do not exclude student disciplinary records). Compare *Miami Univ.*, 294 F.3d at 813 (finding that “education records” include disciplinary records), with *Miami Student*, 680 N.E.2d at 959 (interpreting the term “education records” under FERPA such that it does not include student disciplinary records).

<sup>119</sup> See 20 U.S.C. § 1232g(a)–(h) (discussing the term education records, campus police records, also known also “law enforcement unit records,” and disciplinary records); 34 C.F.R. § 99.3 (defining the term disciplinary proceeding).

<sup>120</sup> 20 U.S.C. § 1232g(h)(1)–(2) (noting that a school may include information relating to a student’s disciplinary action or proceeding in the student’s education record if it posed a significant safety risk); 34 C.F.R. § 99.3 (defining the meaning of the term “disciplinary action or proceeding” under FERPA).

<sup>121</sup> 34 C.F.R. § 99.3.

versity for a violation, fit within the definition of disciplinary proceedings under FERPA.<sup>122</sup> Thus, it is not clear whether the records of campus sexual assault proceedings are included in a student's education record under FERPA.<sup>123</sup> If it is included as part of the student's education record, then access to the record is restricted by FERPA's privacy provisions.<sup>124</sup>

FERPA expands beyond the positive definition of education records and includes a negative definition, but it still does not clearly address disciplinary records of students.<sup>125</sup> The positive definition of the term requires that the records are directly associated with the student and are controlled by an education institution or agent of that institution.<sup>126</sup> The negative definition states that education records may not include those records which one person possesses and uses as a personal memory aid; those of the campus police of the educational institution; records of employees; psychological and medical records of a student eighteen or older; records created after a student has graduated; or the grades of peer-graded papers.<sup>127</sup> Thus, the statute and the regulations do not clearly exclude or include the disciplinary records of students.<sup>128</sup>

There are diverging positions regarding whether student disciplinary records constitute education records or campus police records.<sup>129</sup> It is explicitly stated in the statute that campus police records are not considered education records and thus do not qualify for protection under FERPA.<sup>130</sup> Therefore, a party could potentially access these records, particularly if the

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<sup>122</sup> See *id.* (defining what constitutes a disciplinary action or proceeding under FERPA such that it includes campus sexual assault proceedings under Title IX when analyzed by the plain text of the statutory language).

<sup>123</sup> See 20 U.S.C. § 1232g(a)(4)–(5) (defining education records without explicitly addressing whether they include disciplinary records).

<sup>124</sup> See 20 U.S.C. § 1232g(a) (explaining a school's responsibilities in relation to the privacy of and access to student education records under FERPA); *FERPA Guidance*, *supra* note 46 (explaining the requirements of privacy of student education records under FERPA).

<sup>125</sup> See 20 U.S.C. § 1232g(a)(4)(A)–(B) (defining education records with a positive and negative definition that does not discuss disciplinary records).

<sup>126</sup> 20 U.S.C. § 1232g(a)(4)(A).

<sup>127</sup> *Id.* An example of those records which one possesses and uses as a personal memory aid would be a teacher's grade book, which the teacher used to note grades received throughout the period, before calculating and submitting the final grade to the school. See *id.* (providing a list of records which are explicitly not education records).

<sup>128</sup> See *id.* § 1232g(a)(4)(A)–(B) (providing a two-prong positive definition of "education records" that does not clearly specify disciplinary records); 34 C.F.R. § 99.3 (providing categories of records that are excluded from a student's education record under FERPA and do not exclude student disciplinary records).

<sup>129</sup> Compare *Miami Univ.*, 294 F.3d at 813 (holding that "education records" include disciplinary records), with *Miami Student*, 680 N.E.2d at 959 (interpreting the term "education records" under FERPA such that it does not include student disciplinary records).

<sup>130</sup> 20 U.S.C. § 1232g(a)(4)(B); *Bauer v. Kincaid*, 759 F. Supp. 575, 591 (W.D. Mo. 1991) (holding that campus police records are not education records under FERPA).

state has an open records law.<sup>131</sup> On the other hand, some argue that when these records are shared with the institution, they become education records and are then part of FERPA-protected records.<sup>132</sup> In 1991, in *Bauer v. Kincaid*, however, the Supreme Court found that FERPA did not protect campus police records despite the fact that they had been released to the university.<sup>133</sup> The court relied on the statute and its related regulations to establish that campus police records are not considered education records because interpreting the statute otherwise would create absurd results and make Congress's explicit exceptions superfluous.<sup>134</sup> Thus, if courts classify student disciplinary records as campus police records, as opposed to education records, FERPA will not prevent disclosure of these records, even if they are shared with the university.<sup>135</sup>

Some state courts have found that student disciplinary records do not constitute education records.<sup>136</sup> In 1997, in *State ex rel. The Miami Student v. Miami Univ.*, the Ohio Supreme Court found that FERPA does not protect student disciplinary records.<sup>137</sup> More specifically, the court found that educa-

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<sup>131</sup> Schwarz, *supra* note 58, at 814.

<sup>132</sup> *Id.* at 814–15. University officials, in attempts to avoid disclosure of records, argue that when an exempt entity passes records to a non-exempt entity, such as from the campus police to university officials, they become part of the student's education record. *Id.*

<sup>133</sup> *Bauer*, 759 F. Supp. at 575, 591. In *Bauer*, plaintiff was a student at Southern Missouri State University who worked on the school newspaper and brought an action against the school when it refused to release information related to criminal activity at the school's campus. *Id.* at 576, 580; Schwarz, *supra* note 58, at 820 (quoting *Bauer*, 759 F. Supp. at 587). The court held that, in this case, the school incorrectly used FERPA to avoid disclosure of the criminal records in the face of the state's open records law. *Bauer*, 759 F. Supp. at 591; Schwarz, *supra* note 58, at 820.

<sup>134</sup> *Bauer*, 759 F. Supp. at 590; Schwarz, *supra* note 58, at 821 (quoting *Bauer*, 759 F. Supp. at 591). Furthermore, statutory analysis suggests that campus police records do not become part of a student's education record even if provided to the education institution. Schwarz, *supra* note 58, at 815. In the regulation and statute, there are multiple categories of documents and information excluded from "education records," and only three of these exclusions provide no one outside of those listed in the exclusion may view the records. 20 U.S.C. § 1232g(a)(4)(A)–(B); 34 C.F.R. § 99.3; Schwarz, *supra* note 58, at 815. Thus, those exclusions indicate that if they are shared with those outside of the persons listed in that exclusion, they may be considered "education records." Schwarz, *supra* note 58, at 815. The campus police records exclusion does not hinge on the persons using or keeping the records, but instead provides for a blanket exclusion of campus police records. See 20 U.S.C. § 1232g(a)(4)(B); 34 C.F.R. § 99.3; Schwarz, *supra* note 58, at 814–15.

<sup>135</sup> See 20 U.S.C. § 1232g(a)(4)(B) (excluding campus police records from protection under FERPA) *Bauer*, 759 F. Supp. at 590 (holding that campus police records, even if shared with the university, are not protected by FERPA); Schwarz, *supra* note 58, at 821 (quoting *Bauer*, 759 F. Supp. at 591) (analyzing the *Bauer* decision).

<sup>136</sup> *Miami Univ.*, 294 F.3d at 803 (discussing Ohio Supreme Court case that found that education records do not include disciplinary records); *Miami Student*, 680 N.E.2d at 959; see *Kirwan v. The Diamondback*, 721 A.2d 196, 206 (Md. 1998) (holding that parking tickets were not part of a student's education record). In 1998, in *Kirwan*, the Maryland Court of Appeals found that the parking tickets of a student are not part of a student's education record. 721 A.2d at 206.

<sup>137</sup> *Miami Student*, 680 N.E.2d at 959.

tion records do not include disciplinary records, because they do not contain academic data and do not relate to financial aid or other school performance.<sup>138</sup> Importantly, however, the Sixth Circuit preempted this decision when federal officials brought a case against the universities after the universities followed the ruling of the Ohio Supreme Court.<sup>139</sup> Additionally, in 1993, in *Red & Black Pub. Co., Inc. v. Board of Regents*, the Georgia Supreme Court interpreted the meaning of education records in such a manner that it would not include disciplinary records, because disciplinary proceedings are not related to academic performance of individuals, academic suspension, or financial aid.<sup>140</sup> Furthermore, the court analogized the disciplinary records to the exemption for campus police records, noting that although they do not specifically fit the definition of campus police records, they are similar and should be treated in a similar manner.<sup>141</sup> Unlike the Ohio Supreme Court's decision, the Georgia Supreme Court's decision has not been directly or indirectly overruled by its federal circuit court, the Eleventh Circuit.<sup>142</sup>

On the other hand, some federal courts have established that disciplinary records are considered education records, in contrast to state courts.<sup>143</sup> In 2000, in *United States v. Miami University*, the Sixth Circuit held that disciplinary records are education records under FERPA.<sup>144</sup> The court found that Miami University and Ohio State University violated FERPA by releas-

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<sup>138</sup> *Id.* at 958. The case arose when a Miami University student working on the school newspaper requested the records of school disciplinary proceedings, which the school refused to provide. *Id.* at 957. The student brought an action against the school. *Id.* In finding that student disciplinary records are not "education records," the Ohio Supreme Court granted a writ of mandamus which compelled the university to disclose the disciplinary records. *Id.* at 962.

<sup>139</sup> *Miami Univ.*, 294 F.3d at 813; Schwarz, *supra* note 58, at 817–18. The case arose when the universities contacted the Department of Education to state that they would be releasing disciplinary records to those who ask for them as per the decision of the Ohio Supreme Court. *Miami Univ.*, 294 F.3d at 804; Schwarz, *supra* note 58, at 818. Federal officials then started a case against the universities for violating FERPA. *Miami Univ.*, 294 F.3d at 804; Schwarz, *supra* note 58, at 818.

<sup>140</sup> *Red & Black Publ'g Co. v. Bd. of Regents*, 427 S.E.2d 257, 261 (Ga. 1993). The court noted that the disciplinary records were not of the type that the legislature intended FERPA to protect. *Id.*

<sup>141</sup> *Red & Black*, 427 S.E.2d at 261.

<sup>142</sup> Compare *id.* (holding that disciplinary records were not considered "education records"), with *Miami Student*, 680 N.E.2d at 959 (holding that disciplinary records did not fit within the term "education records"). Although both cases follow similar logic, the Court of Appeals for the Sixth Circuit directly overruled *Miami Student* in 2002 by holding that education records include disciplinary records. See *Miami Univ.*, 294 F.3d at 813 (overturning the Ohio Supreme Court's decision). The Court of Appeals for the Eleventh Circuit has not commented on or indirectly overruled *Red & Black*. See 427 S.E.2d at 261 (holding that within FERPA education records do not include disciplinary records).

<sup>143</sup> See *Miami Univ.*, 294 F.3d at 813 (holding that disciplinary records fall within the meaning of education records under FERPA).

<sup>144</sup> *Id.* (finding that disciplinary records meet the two elements of the definition of "education records").

ing disciplinary records of students that contained identifiable information about those students, without the consent of the students.<sup>145</sup> This case arose out of *State ex rel. The Miami Student v. Miami Univ.*<sup>146</sup> The Sixth Circuit noted that the federal court was not bound by the Ohio Supreme Court decision for the meaning of education records under FERPA because FERPA is federal law.<sup>147</sup>

Furthermore, state courts have begun to align their decisions with the Sixth Circuit's view of the term.<sup>148</sup> In 2012, in *State ex rel. ESPN, Inc. v. Ohio State University*, the Ohio Supreme Court found that records relating to investigations of a violation of a National Collegiate Athletic Association ("NCAA") regulation by students constituted education records.<sup>149</sup> In light of the Sixth Circuit's decision, the Ohio Supreme Court held that these documents constitute education records because the statute does not limit the term to include only those records related to "academic performance, financial aid, or scholastic performance."<sup>150</sup> The Eleventh Circuit, however, has not addressed, either explicitly or implicitly, *Red & Black*.<sup>151</sup> Thus, interpretation of the term education records indicates a potential circuit split regarding what type of information FERPA protects.<sup>152</sup>

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<sup>145</sup> *Id.* at 824 (explaining that the violation occurred because disciplinary records are considered "education records" and are thus protected by FERPA's nondisclosure provisions).

<sup>146</sup> *Id.* at 803 (overturning the Ohio Supreme Court case out of which it arose by finding that FERPA protects disciplinary records); Schwarz, *supra* note 58, at 818. The case arose when the universities contacted the U.S. Department of Education to state that they would be releasing disciplinary records to those who ask for them as per the decision of the Ohio Supreme Court. *Miami Univ.*, 294 F.3d at 804; Schwarz, *supra* note 58, at 818. Federal officials then started a case against the universities for violating FERPA. *Miami Univ.*, 294 F.3d at 804; Schwarz, *supra* note 58, at 818.

<sup>147</sup> Schwarz, *supra* note 58, at 818. Furthermore, in 1991, in *Norwood v. Slammons*, a federal district court in Arkansas found that investigations by a school itself, not the campus police of the school, are protected by FERPA such that the school is not required to release the information just because the public demands release of the information. See 788 F. Supp. 1020, 1027 (W.D. Ark. 1991) (implying that university-investigated sex crime records would be covered by FERPA); Schwarz, *supra* note 58, at 822–23.

<sup>148</sup> See *State ex rel. ESPN, Inc. v. Ohio State Univ.* ("Ohio State"), 970 N.E.2d 939, 947 (Ohio 2012) (aligning with the Sixth Circuit by holding that education records included disciplinary records relating to an NCAA regulation violation).

<sup>149</sup> *Id.* at 947 (holding that disciplinary records are education records in contrast to their prior opinion); Schwarz, *supra* note 58, at 819.

<sup>150</sup> *Ohio State*, 970 N.E.2d at 947; Schwarz, *supra* note 58, at 819.

<sup>151</sup> See *Red & Black*, 427 S.E.2d at 261 (holding that within FERPA education records do not include disciplinary records).

<sup>152</sup> See *Miami Univ.*, 294 F.3d at 813 (holding that disciplinary records are "education records" under FERPA); *Red & Black*, 427 S.E.2d at 261 (finding that "education records" do not include disciplinary records); *Ohio State*, 970 N.E.2d at 947 (finding that disciplinary records are "education records" under FERPA after the Sixth Circuit's decision); see also Schwarz, *supra* note 58, at 817–22 (discussing the results of the various cases at both state and federal levels).



### B. Justifications for Police Access to Disciplinary Records

Proponents for releasing campus sexual assault proceedings to local law enforcement argue release of these records is justified for multiple reasons.<sup>153</sup> The first of these justifications follows the idea articulated by the Ohio Supreme Court and the Georgia Supreme Court that education records do not include disciplinary records.<sup>154</sup> Congress originally enacted FERPA with two goals: allowing parents access to their children's records with regards to education, and protecting unauthorized individuals from accessing those records.<sup>155</sup> Thus, student disciplinary records would not be covered by FERPA, because they are not related to academic performance or financial aid.<sup>156</sup>

Proponents also allege that local law enforcement may be able to access information related to campus sexual assault proceedings under state laws or through campus police.<sup>157</sup> Most states have state freedom of information laws which would require disclosure of these records at the request of the public.<sup>158</sup> Furthermore, if campus police records contain reports or investigations related to a Title IX proceeding, local law enforcement would be able to access these records, as FERPA does not protect campus police records.<sup>159</sup>

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<sup>153</sup> See Schwarz, *supra* note 58, at 828 (explaining that amendments to FERPA, which generally promote disclosure could benefit students in various ways, including benefitting the investigations of criminal conduct, such as sexual assault charges); see also *Red & Black*, 427 S.E.2d at 261 (finding that "education records" must refer to those records that are directly related to academic standing, grades, or financial aid because of Congress' intent in passing FERPA); *Miami Student*, 680 N.E.2d at 959 (referring to the analysis used by the Georgia Supreme Court in *Red & Black*).

<sup>154</sup> See *Red & Black*, 427 S.E.2d at 261 (concluding that "education records" must refer to those records that are directly related to academic standing, grades, or financial aid because of Congress' intent in passing FERPA); *Miami Student*, 680 N.E.2d at 959 (referring to the analysis used by the Georgia Supreme Court in *Red & Black*).

<sup>155</sup> *Guidance for Parents*, *supra* note 49; see *Red & Black*, 427 S.E.2d at 261 (analyzing the meaning of "education records" under FERPA by examining Congress' intent in passing FERPA); Huefner & Daggett, *supra* note 58, at 469 (discussing the goals of Congress in passing FERPA).

<sup>156</sup> See *Guidance for Parents*, *supra* note 49 (explaining the goal of FERPA is to protect student information under "education records," including disciplinary records); see also *Red & Black*, 427 S.E.2d at 261 (finding that "education records" must refer to those records that are directly related to academic standing, grades, or financial aid because of Congress' intent in passing FERPA); *Miami Student*, 680 N.E.2d at 959 (referring to the analysis used by the Georgia Supreme Court in *Red & Black*).

<sup>157</sup> See Daggett, *supra* note 66, at 208 (discussing access to campus police records); Huefner & Daggett, *supra* note 59, at 490 (discussing access to state open records laws); Schwarz, *supra* note 58, at 822-23 (discussing how the Arkansas Freedom of Information Act could have allowed disclosure of records protected by FERPA).

<sup>158</sup> See Walton, *supra* note 68, at 158 (explaining how state freedom of information laws interact with FERPA); Schwarz, *supra* note 58, at 822 (stating that state freedom of information laws may compel the release of Title IX-related investigative documents by a university).

<sup>159</sup> See 20 U.S.C. § 1232g(a)(4)(B)(ii) (excluding campus police records from FERPA protection); Daggett, *supra* note 66, at 208 (discussing the meaning of the campus police exclusion).

Even if the campus sexual assault proceedings are considered part of the education record, proponents argue they should be released to local law enforcement under the emergency exception to FERPA.<sup>160</sup> Where the academic institution documents an expressible and significant threat, law enforcement may access these education records without consent in an emergency situation.<sup>161</sup> Generally, the FERPA office of compliance defers to the educational institution in determining when there is an emergency situation, which can range from a threat of violence to a medical emergency.<sup>162</sup> This exception, however, is restricted to the period of the emergency and should not include a blanket disclosure of the personal information.<sup>163</sup> Proponents allege that it seems likely that an investigation taking place within a reasonable amount of the time after the sexual assault would constitute an emergency for which education records could be released.<sup>164</sup> Thus, local law enforcement could access relevant parts of the student's education record when criminally investigating the alleged sexual assault.<sup>165</sup>

From a policy standpoint, the emergency exception promotes the position that local law enforcement should be able to access these records when there is a serious health or safety need.<sup>166</sup> Relatedly, proponents argue that social policy encourages access by local law enforcement to disciplinary records, particularly where the disciplined action constitutes a serious crime

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<sup>160</sup> See 34 C.F.R. § 99.36 (explaining the emergency exception for the release of student "education records" to police); Schwarz, *supra* note 58, at 824 (arguing that where the sexual assault has recently occurred, local law enforcement may be able to access a student's education record in regards to an ongoing criminal investigation).

<sup>161</sup> 34 C.F.R. § 99.36(c) (providing the emergency exception); Daggett, *supra* note 66, at 206–07 (explaining the instances in which the emergency exception may be used to justify the release of student education records). Even in an emergency, a school may not release the entirety of the student's record; instead, only relevant portions of the education record may be released to assist in the health or safety emergency. Daggett, *supra* note 66, at 206–07.

<sup>162</sup> Daggett, *supra* note 66, at 207.

<sup>163</sup> Schwarz, *supra* note 58, at 816. In response to an inquiry by the University of New Mexico, the Department of Education stressed that the intent of the emergency exception is use in "imminent" situations, in which there is an "immediate need" for the information. *Id.*

<sup>164</sup> See *id.* at 824 (analogizing the before and after of the Virginia Tech tragedy to the criminal investigation of a sexual assault to examine when the emergency exception of FERPA may be applicable to allow the disclosure of student education records).

<sup>165</sup> See Huefner & Daggett, *supra* note 58, at 482 (discussing the emergency exception to FERPA); see also MICHAEL L. MEDARIS ET AL., U.S. DEP'T OF JUSTICE, SHARING INFORMATION: A GUIDE TO THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT AND PARTICIPATION IN JUVENILE JUSTICE PROGRAMS 7 (1997), <http://files.eric.ed.gov/fulltext/ED410664.pdf> [<https://perma.cc/8FVP-H8XF>] (explaining that disturbances on-campus that are criminal fall within the health or safety exception).

<sup>166</sup> See MEDARIS ET AL., *supra* note 165, at 7 (providing guidance on the emergency exception and noting that it is "a commonsense acknowledgement" that these situations arise); Schwarz, *supra* note 58, at 816 (discussing the Department of Education's response to an inquiry regarding when an emergency is sufficient for the disclosure of records).

for public safety concerns.<sup>167</sup> The state may seek to prosecute crimes like this and allowing access to this type of information makes prosecution easier.<sup>168</sup> It may also serve to increase public safety, as older students may be warier of their actions if they know that the discipline for their actions may easily be criminal.<sup>169</sup>

### C. Criticisms of Police Access to Disciplinary Records

In contrast, there are multiple criticisms of the disclosure of student disciplinary records to police.<sup>170</sup> Critics argue that federal court precedent defining the term education records is correct, finding that campus sexual assault proceeding records are disciplinary records within the meaning of the term under FERPA.<sup>171</sup> Thus, critics argue that the contents of campus sexual assault proceedings are protected by FERPA aside from the limited release of the result of the proceeding.<sup>172</sup> Under this interpretation, police face many more challenges in accessing the contents of sexual assault proceedings.<sup>173</sup>

Although the emergency exception could apply to the contents of Title IX campus sexual assault proceedings, critics argue that the emergency exception should be interpreted narrowly.<sup>174</sup> The release of the information is

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<sup>167</sup> See Walton, *supra* note 68, at 160 (discussing the calls for disclosure in the interest of safety that sparked the Clery Act).

<sup>168</sup> See Brice & Palmer, *supra* note 23, at 26 (analyzing the differences between Title IX and police investigations and addressing some of the difficulties in prosecuting sexual assaults); *Why Victims Don't Report*, *supra* note 3 (discussing the role of police in the investigation of sexual assaults on college campuses and the difficulty police face in collecting evidence in sexual assault cases).

<sup>169</sup> Cf. Walton, *supra* note 68, at 159 (discussing the public safety benefits served by the permissive standard).

<sup>170</sup> See Huefner & Daggett, *supra* note 58, at 472 (arguing that education records include disciplinary records and are thus protected by FERPA's privacy provisions); see also *Miami Univ.*, 294 F.3d at 813 (holding that education records include disciplinary records, and thus, disciplinary records are protected by FERPA).

<sup>171</sup> See Schwarz, *supra* note 58, at 818 (agreeing with the Sixth Circuit's decision in *Miami*, which found that disciplinary records are part of a student's education record under FERPA); see also *Miami Univ.*, 294 F.3d at 813 (holding that education records include disciplinary records, and thus, disciplinary records are protected by FERPA).

<sup>172</sup> See Huefner & Daggett, *supra* note 58, at 472 (arguing that education records include disciplinary records are thus protected by FERPA's privacy provisions); see also 20 U.S.C. § 1232g(b)(6)(A) (defining the limited release of disciplinary records in certain situations); *Miami Univ.*, 294 F.3d at 813 (holding that "education records" are disciplinary records).

<sup>173</sup> See 20 U.S.C. § 1232g(a)-(b) (defining education records and the nondisclosure exclusions); *Miami Univ.*, 294 F.3d at 813 (including disciplinary proceedings within the definition of education records, meaning that they are subject to the protections and their exceptions).

<sup>174</sup> MEDARIS ET AL., *supra* note 165, at 7 ("Educators determine what constitutes an 'emergency,' but FERPA requires that they construe the term strictly"); see 34 C.F.R. § 99.36 (explaining the emergency exception); Schwarz, *supra* note 58, at 816-17 (arguing that the emergency exception should be interpreted narrowly).

restricted only to the “limited period of the emergency” when there is “imminent danger” and “immediate need” for the information in the education record.<sup>175</sup> But, an additional criminal investigation after the campus investigation ends may not be considered within the period of the emergency or considered imminent danger, especially if the criminal investigation takes place months later.<sup>176</sup> Thus, local law enforcement could likely access the campus sexual assault proceeding record only by subpoena.<sup>177</sup>

Critics argue that FERPA limits access to student education records, including disciplinary records in order to protect the privacy of students and prevent abuse of these records.<sup>178</sup> The permissive disclosure rule allows the final results of the institution’s judicial procedures for a violent act to be shared only if there is a finding of guilt.<sup>179</sup> The rule alerts the public and ensures public safety, while simultaneously protecting the privacy of students.<sup>180</sup> Additionally, the protection of student disciplinary records under FERPA serves other social policy purposes, such as maintaining the integrity of the Title IX investigation system.<sup>181</sup> Maintenance of the Title IX system could be crucially important to provide accountability and action for

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<sup>175</sup> Schwarz, *supra* note 58, at 816.

<sup>176</sup> *See id.* at 816, 824 (hypothesizing that the emergency exception would be sufficient for a sexual assault investigation in the recent aftermath of the crime, but also noting the limited temporal period in which the exception could be used). Access in the immediate aftermath of the crime may not be helpful because the school would not yet have completed their investigation. *But see id.* (discussing access to student education records for a criminal investigation of a sexual assault under the emergency exception).

<sup>177</sup> *See* Daggett, *supra* note 66, at 211–12 (discussing the access to student education records by subpoena); Daggett, *supra* note 101, at 93–94 (discussing the increasing use of subpoenas by various parties to access student education records); *see also* 20 U.S.C. § 1232g(b)(1)(j) (explaining the subpoena procedures for accessing education records); 34 C.F.R. § 99.31 (explaining subpoena procedures).

<sup>178</sup> *See* Walton, *supra* note 68, at 158–60 (quoting 144 CONG. REC. H2984, H2984) (discussing the importance of weighing the benefit of student privacy against the benefit of public safety and knowledge).

<sup>179</sup> *Id.* at 157, 159 (quoting 144 CONG. REC. H2984, H2984).

<sup>180</sup> *Id.* Furthermore, the required disclosure of campus crime rates under the Clery Act, also known as the Campus Safety Act, serves the interest of public awareness of crimes on or near campus. Jeanne Clery Act, 20 U.S.C. § 1092(f) (2012); Walton, *supra* note 68, at 160.

<sup>181</sup> *See Why Schools Handle Sexual Violence Reports*, *supra* note 36 (discussing the benefits of the Title IX system for survivors of sexual assault); North, *supra* note 6 (arguing that Title IX investigations can help the accused and victims better than local law enforcement investigations). Knowing that statements made in the campus proceedings may be released to local law enforcement could promote defendants to lie or remain silent during campus proceedings. *Cf.* Emily Yoffe, *The Uncomfortable Truth About Campus Rape Policy*, THE ATLANTIC (Sept. 6, 2017), <https://www.theatlantic.com/education/archive/2017/09/the-uncomfortable-truth-about-campus-rape-policy/538974/> [<https://perma.cc/W4LR-68LZ>] (arguing that a defendant’s due process rights are impaired, because the defendant may be threatened with expulsion if he or she refuses to answer questions, but if the defendant does answer, that campus record may be used against them in a criminal trial).

college-aged victims due to the high levels of underreporting to police and the low levels of criminal prosecution of reported cases.<sup>182</sup>

Recently, there have been growing concerns surrounding the due process rights of the accused.<sup>183</sup> Critics argue that the Title IX system may fail to function properly if the accused knows that what they say in campus proceedings may be used against them in criminal proceedings.<sup>184</sup> Accused students have brought lawsuits against universities alleging wrongful punishment and violation of their due process rights.<sup>185</sup> The outcomes of the administrative hearings may be more widespread than expulsion from or punishment at school, because of the damage to the student's reputation it could potentially cause.<sup>186</sup> Critics argue that this means that the students

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<sup>182</sup> See North, *supra* note 6 (arguing that Title IX provides a needed form of justice to victims); see also RAPE AND VICTIMIZATION, *supra* note 41, at 1 (providing statistics that indicate higher levels of underreporting among college-aged women than other women). Female student victims between the ages of eighteen to twenty-four report to law enforcement only twenty percent of the time compared to non-student women who report thirty-two percent of the time. RAPE AND VICTIMIZATION, *supra* note 41, at 1; North, *supra* note 6. The burden of proof in criminal prosecutions is "beyond a reasonable doubt," while the burden of proof in campus investigations may be one of the two lower standards of "clear and convincing evidence" or "preponderance of the evidence." Brice & Palmer, *supra* note 23, at 26. Criminal sexual conduct can often be difficult to prove, creating a he-said, she-said dichotomy, as often there is little evidence aside from the words of the alleged victim and the accused. *Id.* This means that often, prosecution will choose not to charge an alleged perpetrator, because they believe they will not meet the evidentiary standard. *Id.*

<sup>183</sup> See Henrick, *supra* note 36, at 50–51 (expressing concerns that current guidance does not ensure an equitable process for the accused); Triplett, *supra* note 24, at 508 (noting that the Dear Colleague Letter has raised concerns about the due process rights of the accused). Defendants may fail to show up, and their due process rights may be hindered, as the university can still find them guilty. See Casey McGowan, Comment, *The Threat of Expulsion as Unacceptable Coercion: Title IX, Due Process, and Coerced Confessions*, 66 EMORY L.J. 1175, 1188 (2017) (arguing that alleged perpetrators' due process rights are impacted in campus sexual assault proceedings). If the proceeding takes place *in absentia* because the accused did not appear in fear of local law enforcement accessing the proceedings, the accused will face the consequences of the proceeding's determinations without being heard or risk expulsion. See *id.* at 1188–89.

<sup>184</sup> Cf. McGowan, *supra* note 183, at 1205 (arguing that the threat of expulsion from academic institutions coerces alleged perpetrators into confessing to sexual assaults in Title IX proceedings).

<sup>185</sup> Samantha Iannucci, "Due" the Process: *The Sufficiency of Due Process Protections Afforded by University Procedures in Handling Sexual Assault Allegations*, 95 OR. L. REV. 609, 623 (2017) (discussing the levels of due process protections provided to the accused in campus sexual assault proceedings); Bauerlein, *supra* note 1. Brandon Austin, an alleged perpetrator in a sexual assault case at the University of Oregon brought a lawsuit alleging that because of the widespread consequences of the hearings, such as losing future income he would have earned if he remained an athlete for a Division I school, the school's investigation violated his due process rights. Iannucci, *supra*, at 623–24.

<sup>186</sup> See Henrick, *supra* note 36, at 90 (arguing that although the campus investigative process cannot carry jail time, it still hurts the accused's due process rights, because of the monetary loss of a degree and the "stigmatizing" effect of a finding of guilt related to sexual misconduct); see, e.g., Iannucci, *supra* note 185, at 623–24 (examining Austin's case in which he argued that the impacts from a finding of guilt against him in a campus sexual assault proceeding went beyond his enrollment in school).

should be provided with due process protections beyond those which Title IX ensures.<sup>187</sup> Many question if a higher evidentiary standard should be employed instead of a “preponderance of the evidence standard,” which requires only that “it is more likely than not that sexual harassment or violence occurred.”<sup>188</sup> Additionally, many argue that a right to counsel, an opportunity to take depositions, the use of subpoenas, a right to cross-examine witnesses, and similar due process protections should be employed in the Title IX process.<sup>189</sup>

Consequently, amid the increasing calls for police involvement in campus sexual assaults and for universities to do more, social policy and the legal reality remains unclear as to how local law enforcement and universities should interact in addressing the problem of campus sexual assault.<sup>190</sup> Varying interpretations of FERPA and its regulations blur the lines of FERPA’s protections of campus sexual assault proceedings and provide only a gray area of guidance to address these issues.<sup>191</sup>

### III. FERPA SHOULD LIMIT POLICE ACCESS TO “EDUCATION RECORDS”

Part III argues that under current law, local law enforcement have little access to the contents of campus sexual assault proceedings without subpoena and that the current permissive standard regarding the release of records should be made mandatory.<sup>192</sup> Section A asserts that under federal interpretation and plain meaning of the statute, education records include disciplinary

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<sup>187</sup> See Henrick, *supra* note 36, at 54 (arguing for an abandonment of the Title IX system due to due process concerns for the accused); Iannucci, *supra* note 185, at 624 (calling for an increase in due process protections for alleged perpetrators under the Title IX system).

<sup>188</sup> See Diane Heckman, *The Assembly Line of Title IX Mishandling Cases Concerning Sexual Violence on College Campuses*, 336 WEST’S ED. L. REP. 619, 647 (2016) (discussing cases determining whether there should be a higher evidentiary standard in campus sexual assault proceedings); Dear Colleague Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., at 11 (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/Y737-S9TH>] (explaining old guidance that said that a preponderance of the evidence standard should be used).

<sup>189</sup> See, e.g., Iannucci, *supra* note 185, at 624.

<sup>190</sup> See *Miami Univ.*, 294 F.3d at 813 (holding that disciplinary records are “education records” under FERPA); *Red & Black*, 427 S.E.2d at 261 (holding that “education records” do not include disciplinary records); *Ohio State*, 970 N.E.2d at 947 (holding that disciplinary records are “education records” under FERPA after the Sixth Circuit’s decision); Schwarz, *supra* note 58, at 817–22 (discussing the results of the various cases at both the state and federal levels).

<sup>191</sup> See, e.g., *Guidance for Students*, *supra* note 15, at 3–4 (explaining the various exemptions to FERPA that allow disclosure of student education records); see also *Miami Univ.*, 294 F.3d at 813 (holding that disciplinary records are “education records” under FERPA); *Red & Black*, 427 S.E.2d at 261 (holding that “education records” do not include disciplinary records); *Ohio State*, 970 N.E.2d at 947 (holding that disciplinary records are “education records” under FERPA after the Sixth Circuit’s decision); Schwarz, *supra* note 58, at 817–22 (discussing the results of the various cases at both the state and federal levels).

<sup>192</sup> See *infra* notes 192–236 and accompanying text.

records and campus sexual assault proceedings.<sup>193</sup> Section B addresses the concerns for the accused student and the victim that must be balanced when approaching the issue of police access to local law enforcement records.<sup>194</sup> Section C suggests potential ways to resolve these issues.<sup>195</sup>

### A. Disciplinary Records Are “Education Records”

Under federal interpretation and the plain meaning of the statute, FERPA strongly protects campus sexual assault proceedings as education records.<sup>196</sup> Thus, police cannot access the records without a subpoena, unless one of the exceptions applies, because the records of Title IX campus sexual assault proceedings are disciplinary records, and thus education records as defined under FERPA.<sup>197</sup>

In 2000, in *United States v. Miami University*, the Sixth Circuit correctly determined that disciplinary records are protected under FERPA as education records. If and when the Eleventh Circuit is faced with the question, it should seriously consider adoption of the Sixth Circuit’s analysis.<sup>198</sup> The Sixth Circuit’s interpretation of the term education records under a plain language interpretation was correct. Although the term itself does not inherently include disciplinary records, disciplinary records are certainly covered by the definition “records, files, documents, or other materials which contain information directly related to a student; and are maintained by an educational agency or institution or by a person acting for such insti-

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<sup>193</sup> See *infra* notes 196–205 and accompanying text.

<sup>194</sup> See *infra* notes 206–220 and accompanying text.

<sup>195</sup> See *infra* notes 221–236 and accompanying text.

<sup>196</sup> See *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426, 433 (2002) (using a plain meaning interpretation to analyze FERPA); *United States v. Miami Univ.*, 294 F.3d 797, 813 (6th Cir. 2002) (finding that disciplinary records are “education records”); Schmitt & Aronofsky, *supra* note 53, at 573–74 (discussing the Court’s textualist approach to analyzing FERPA).

<sup>197</sup> See *Miami Univ.*, 294 F.3d at 813 (holding that disciplinary records are “education records”); 20 U.S.C. § 1232g(a)(4)(A) (2012); 34 C.F.R. § 99.3 (2017). A disciplinary proceeding or action is defined as an “investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students of the agency or institution.” 34 C.F.R. § 99.3. Title IX investigations involve investigation by the academic institutions and sanctioning of the student if the alleged perpetrator is found guilty. See 20 U.S.C. § 1232g(b)(6)(A)–(B); 34 C.F.R. § 99.3. Thus, FERPA classifies campus sexual assault proceedings as disciplinary records. See 20 U.S.C. § 1232g(b)(6)(A)–(B); 34 C.F.R. § 99.3.

<sup>198</sup> Compare *Miami Univ.*, 294 F.3d at 813 (holding that education records include disciplinary records under the plain meaning of FERPA), and *State ex rel. ESPN, Inc. v. Ohio State Univ.* (“*Ohio State*”), 970 N.E.2d 939, 947 (Ohio 2012) (finding that education records do not include disciplinary records), with *Red & Black Publ’g Co. v. Bd. of Regents*, 427 S.E.2d 257, 261 (Ga. 1993) (holding that education records do not include disciplinary records because this interpretation would go against Congressional intent).

tution.”<sup>199</sup> The statute never states that education records must be related to “academic performance. . . , academic suspension, or financial aid,” but is instead broadly worded to include records of the institution that fall outside of those categories.<sup>200</sup> Thus, a plain reading of the statute supports that disciplinary records are education records.<sup>201</sup> When interpreting FERPA, the Supreme Court has used an ordinary meaning interpretive method, and the Georgia Supreme Court erred in going beyond that textual determination to Congress’ intent.<sup>202</sup>

Even if one considers congressional intent, the Georgia Supreme Court was incorrect in determining that Congress wanted to exclude disciplinary records from FERPA’s protection.<sup>203</sup> By providing two exemptions, the public permissive disclosure standard and the disclosure of certain information to the victim, Congress implied that this information, which would be part of a disciplinary record, would otherwise be protected under FERPA.<sup>204</sup> Thus, in the potential circuit split, the Sixth Circuit has correctly analyzed disciplinary records to be within the definition of education records and thus under the strong protection of FERPA.<sup>205</sup>

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<sup>199</sup> 20 U.S.C. § 1232g(a)(4)(A)–(B) (2012); *Miami Univ.*, 294 F.3d at 812.

<sup>200</sup> 20 U.S.C. § 1232g(a)(4)(A)–(B); *Miami Univ.*, 294 F.3d at 812; see Walton, *supra* note 68, at 155 (discussing the meaning of “education records”).

<sup>201</sup> See 20 U.S.C. § 1232g(a)(4)(A)–(B) (defining the terms “disciplinary proceedings” and “education records”); *Miami Univ.*, 294 F.3d at 812 (interpreting the definition of “education records” to include the records of disciplinary proceedings).

<sup>202</sup> See *Owasso*, 534 U.S. at 433 (analyzing the definition of education records using a plain-meaning approach); *Red & Black*, 427 S.E.2d at 261 (looking at the policy and congressional intent behind the definition of “education records”); Schmitt & Aronofsky, *supra* note 53, at 573–74, 581 & n.87 (looking at the various interpretations of “education records” by the courts). In *Owasso*, the Supreme Court interpreted the definition of “education records” and the maintenance of those records under FERPA after the school district was sued for allowing students to peer grade papers and then read aloud the grades to the teacher. 534 U.S. at 428. The court found that the student grading of the papers did not constitute maintenance of “education records,” because the students were not agents that could act on behalf of the school. *Id.* at 434.

<sup>203</sup> See Walton, *supra* note 68, at 155 (analyzing the interpretation of the term “education records”); see also 20 U.S.C. § 1232g(b)(6)(A)–(B) (exempting two situations in which disciplinary records can be released); *Miami Univ.*, 294 F.3d at 812 (holding that education records include disciplinary records because of the ordinary meaning of the statutory language and because of congressional intent).

<sup>204</sup> Compare *Miami Univ.*, 294 F.3d at 812–13 (finding that Congress’s inclusion of exemptions of certain kinds of disciplinary records shows Congress’s intent to include disciplinary records within the definition of education records), with *Red & Black*, 427 S.E.2d at 261 (finding that Congress did not intend to include disciplinary records within the definition of education records, and thus within the protection of FERPA).

<sup>205</sup> See 20 U.S.C. § 1232g(a)(4)(A)–(B) (defining “education records”); *Miami Univ.*, 294 F.3d at 813 (holding that education records include disciplinary records).



*B. Balancing Local Law Enforcement Access: Concerns for Defendant's Due Process Rights and Concerns for the Victim's Rights*

Aside from the concerns for local law enforcement itself, such as the difficulties of gathering evidence, the interests of the victim, the public, and the defendant must be balanced in addressing local law enforcement access to these records.<sup>206</sup> It can be difficult for police to gather evidence related to sexual assault as time passes, and lacking access to the statements and evidence could hinder a police investigation.<sup>207</sup> On the other hand, police access to the contents of the proceedings may affect the manner in which defendants presents themselves during the proceeding, if the defendant even appears at the proceeding.<sup>208</sup> A defendant's refusal to speak or appear at the proceeding can impact the integrity of the Title IX system, which provides an important outlet for justice for student victims.<sup>209</sup>

Police access to the contents of the proceedings could further exacerbate the already existing concerns about the due process rights of the accused.<sup>210</sup> If an alleged perpetrator knows that statements made in the campus proceedings will be accessed by police, he or she may refuse to testify at the proceeding, refuse to build the record, or refuse to appear.<sup>211</sup> This would impact the integ-

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<sup>206</sup> See Daggett, *supra* note 66, at 206 (discussing difficulties local law enforcement may have in accessing campus sexual assault records); McGowan, *supra* note 183, at 1188 (discussing the risks for an accused student who does not appear at the Title IX proceeding for fear of building the record for a criminal investigation); *Why Victims Don't Report*, *supra* note 3 (discussing the difficulties presented to prosecutors in sexual assault cases).

<sup>207</sup> See *Why Victims Don't Report*, *supra* note 3 (discussing local law enforcement response to complaints that sexual assault cases are not prosecuted or convicted frequently enough and expressing concerns about the ability to gather substantial evidence for these types of crimes).

<sup>208</sup> See Yoffe, *supra* note 181 (discussing the due process rights of perpetrators in campus sexual assault proceedings and examining a case in which a defendant did not appear).

<sup>209</sup> See *Why Victims Don't Report*, *supra* note 3 (arguing that victims find much-needed justice in campus sexual assault proceedings); Yoffe, *supra* note 181 (criticizing the realities of campus sexual assault proceeding for both the victim and the accused).

<sup>210</sup> See Janet Napolitano, "Only Yes Means Yes": *An Essay on University Policy Regarding Sexual Violence and Sexual Assault*, 33 YALE L. & POL'Y REV. 387, 399–400 (2015) (noting the various arguments concerning an accused student's due process rights, such as a right against self-incrimination, victim-friendly procedural requirements, and the burden of proof); *cf.* McGowan, *supra* note 183, at 1188–89 (arguing that defendants' confessions are often coerced in campus sexual assault proceedings); Jeremy Bauer-Wolf, *Court Finds Due Process Denied in Sexual Assault Case*, INSIDE HIGHER ED (Sept. 26, 2017), <https://www.insidehighered.com/news/2017/09/26/us-appeals-court-finds-student-accused-sexual-assault-was-denied-due-process> [<https://perma.cc/8EN9-NTVL>] (discussing lawsuit in which the court found that the accused's due process rights were violated when the university did not allow him to cross-examine the alleged victim); Yoffe, *supra* note 181 (arguing that a defendant's due process rights are impaired, because the defendant may be threatened with expulsion if he or she refuses to answer questions, but if the defendant does answer, that campus record may be used against them in a criminal trial).

<sup>211</sup> See Napolitano, *supra* note 210, at 399 ("Should there be any recognition of an accused student's rights against self-incrimination?"); McGowan, *supra* note 183, at 1188–89 (arguing that defendants confessions are often coerced in campus sexual assault proceedings); Yoffe, *supra* note

urity of the proceedings, the due process rights of the defendant, and could potentially harm victims.<sup>212</sup> Accused students would have to weigh the risks of building the record of the proceeding and appearing at the proceeding with the risks of that record being used by local law enforcement.<sup>213</sup> If the proceeding takes place *in absentia* because the accused did not appear after weighing these risks, the accused will face the consequences of the proceeding's determination without being heard or risk expulsion.<sup>214</sup> Furthermore, local law enforcement use of the record may hinder the accused's due process rights because the proceeding took place without the same rules of evidence and a lower evidentiary standard than in a criminal trial.<sup>215</sup>

Further hindrance of the accused's due process rights could also hurt victims because refusal of the accused to testify or build the record impacts the integrity of the proceeding itself.<sup>216</sup> If Title IX proceedings are considered ineffective or are removed, college-aged victims lose an important form of relief.<sup>217</sup> In addition to providing justice, the Title IX system provides victims with interim forms of assistance the criminal justice system cannot provide, such as accommodations to changes in schedules and living

181 (arguing that a defendant's due process rights are impaired, because the defendant may be threatened with expulsion if he or she refuses to answer questions, but if the defendant does answer, that campus record may be used against them in a criminal trial).

<sup>212</sup> See Napolitano, *supra* note 210, at 400 (discussing the due process risks of Title IX proceedings); *Why Victims Don't Report*, *supra* note 3 (arguing the benefits of Title IX proceedings for victims); North, *supra* note 6 (arguing that Title IX proceedings are the most effective method of handling campus sexual assaults for both parties); Yoffe, *supra* note 181 (arguing that campus sexual assault proceedings hinder the due process rights of the defendant and are thus ineffective).

<sup>213</sup> See McGowan, *supra* note 183, at 1188–89, 1205 (discussing the risks an accused student faces by not testifying at a campus sexual assault proceeding); Yoffe, *supra* note 181 (“If the accused declines to answer questions, he can be expelled. But whatever he says in an administrative hearing can be turned over to law-enforcement authorities and used against him in a criminal proceeding”).

<sup>214</sup> See McGowan, *supra* note 183, at 1188–89; Yoffe, *supra* note 181 (“If the accused declines to answer questions, he can be expelled. Yet, whatever he says in an administrative hearing can be turned over to law-enforcement authorities and used against him in a criminal proceeding”).

<sup>215</sup> See Henrick, *supra* note 36, at 85 (arguing that Title IX proceedings violate the accused's due process rights because of a lack of evidentiary rules); Iannucci, *supra* note 185, at 625 (discussing the impacts of different evidentiary rules and evidentiary standards on the due process rights of the accused in campus sexual assault proceedings); McGowan, *supra* note 183, at 1188–89; Yoffe, *supra* note 181 (noting that colleges are losing lawsuits based on due process grounds).

<sup>216</sup> See *Why Victims Don't Report*, *supra* note 3 (arguing that victims find much-needed justice in campus sexual assault proceedings); Yoffe, *supra* note 181 (criticizing the realities of campus sexual assault proceedings for both the victim and the accused).

<sup>217</sup> Napolitano, *supra* note 210, at 401; *Why Victims Don't Report*, *supra* note 3; *Why Schools Handle Sexual Violence Reports*, *supra* note 36. Aside from an inclination not to report to local law enforcement for fear of distrust by police and prosecutors, retaliation by the attacker, and low conviction rates, victims find relief in accommodations that universities can provide, which the criminal system cannot, such as accommodation for classes, transfers of residences, and needed mental health support. *Why Schools Handle Sexual Violence Reports*, *supra* note 36.

arrangements.<sup>218</sup> The Title IX system also allows victims to avoid some of the fears that local law enforcement will not believe the victim or will not be able to pursue justice for the victim.<sup>219</sup> Ultimately, the lack of access by police to the contents of campus sexual assault proceedings creates important balancing concerns regarding the defendant's due process rights and the victim's access to justice.<sup>220</sup>

### C. How Can These Issues Be Resolved?

Congress should revise FERPA to clarify whether local law enforcement may access the contents of campus sexual assault proceedings.<sup>221</sup> Congress should revise FERPA to make the gray area of local law enforcement access to Title IX records clearer by explicitly restricting local law enforcement access to these records.<sup>222</sup> Additionally, Congress should amend the permissive disclosure standard to make it mandatory.<sup>223</sup>

Congress should revise FERPA to clearly establish that local law enforcement may not access the contents of these records without subpoena or in absence of a situation that fits within one of the exceptions.<sup>224</sup> This would protect the rights of the accused and thus maintain the integrity of the Title IX proceeding for victims.<sup>225</sup> Even access by subpoena should be restricted

<sup>218</sup> Q&A, *supra* note 15, at 2; *Why Schools Handle Sexual Violence Reports*, *supra* note 36.

<sup>219</sup> See *Why Victims Don't Report*, *supra* note 3 (discussing the fear that local law enforcement will not believe a sexual assault victim, because of the low rates of conviction); see also Ken Armstrong & T. Christian Miller, Opinion, *When Sexual Assault Victims Are Charged with Lying*, N.Y. TIMES (Nov. 24, 2017), <https://www.nytimes.com/2017/11/24/opinion/sunday/sexual-assault-victims-lying.html> [https://perma.cc/8V4L-JE55] (discussing a victim's fear of being accused of falsifying a rape stories and identifying instances in which women victims were prosecuted for lying, when in fact, their stories were ultimately found to be true).

<sup>220</sup> See Daggett, *supra* note 66, at 206 (discussing difficulties local law enforcement may have in accessing campus sexual assault records); *Why Victims Don't Report*, *supra* note 3 (discussing the difficulties presented to prosecutors in sexual assault cases); Yoffe, *supra* note 181 (criticizing the realities of campus sexual assault proceedings for both the victim and the accused).

<sup>221</sup> See Napolitano, *supra* note 210, at 401 (calling for Congress to clarify and revise procedures under Title IX); cf. Shibley, *supra* note 4 (calling for the removal of Title IX).

<sup>222</sup> See 20 U.S.C. § 1232g(a)(4)(A)–(B) (defining education records and when they may be accessed without permission of a third party); cf. Walton, *supra* note 68, at 158–60, 165 (arguing the benefits of protection for student disciplinary records under FERPA). By clarifying that disciplinary records are “education records,” Congress would clarify the manner in which police could access this information. See 20 U.S.C. § 1232g(a)(4) (defining education records but not explicitly including disciplinary records).

<sup>223</sup> See 20 U.S.C. § 1232g(b)(6)(A) (establishing a permissive standard of reporting for violent crimes and nonforcible sex offenses); 34 C.F.R. § 99.39 (detailing the permissive standard).

<sup>224</sup> See 20 U.S.C. § 1232g(a)(4)(A)–(B) (defining education records and when they may be accessed without permission of a third party); cf. Walton, *supra* note 68, at 158–60, 165 (arguing the benefits of protection for student disciplinary records under FERPA).

<sup>225</sup> See 20 U.S.C. § 1232g(a)(4)(A)–(B) (2012) (defining education records and when they may be accessed without permission of a third party); cf. Walton, *supra* note 68, at 158–60, 165 (arguing the benefits of protection for student disciplinary records under FERPA). By clarifying

because this access can still hinder the due process rights of the parties and the integrity of the proceedings.<sup>226</sup> Local law enforcement access to the records discourages accused students from testifying, building the record, and even attending the proceedings, further exacerbating existing concerns about the accused's due process rights.<sup>227</sup> Furthermore, Title IX proceedings are an important tool to provide young victims with relief, comfort, and justice, and thus, the integrity of the proceeding continues to be important to supporting victims.<sup>228</sup> Restricting access to the contents of the campus proceedings seeks to balance these conflicting but vitally important concerns.<sup>229</sup>

Congress should also revise FERPA's permissive standard with respect to the limited release of information about violent offenses and nonforcible sex offenses to a mandatory reporting standard.<sup>230</sup> The current standard permits universities to release limited information regarding the offense if the accused is found guilty.<sup>231</sup> Congress should revise this standard to require, rather than just permit, universities to release the limited information if the campus investigation finds the alleged perpetrator guilty.<sup>232</sup> This revision

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that disciplinary records are "education records," Congress would clarify the manner in which police could access this information. *See* 20 U.S.C. § 1232g(a)(4) (defining education records but not explicitly including disciplinary records).

<sup>226</sup> *See* 20 U.S.C. § 1232g(b)(1)(J); *cf.* Walton, *supra* note 68, at 165 (arguing that student disciplinary records should be protected); Yoffe, *supra* note 181 (noting the tension between the risk of expulsion for refusal to testify and the potential release of records to local law enforcement if the accused does testify).

<sup>227</sup> *See* McGowan, *supra* note 183, at 1188–89 (arguing that defendants' confessions are often coerced in campus sexual assault proceedings); *see also* Bauer-Wolf, *supra* note 210 (discussing lawsuit in which the court found that the accused's due process rights were violated when the university did not allow him to cross-examine the alleged victim); *cf.* Yoffe, *supra* note 181 (arguing that a defendant's due process rights are impaired, because the defendant may be threatened with expulsion if he or she refuses to answer questions, but if the defendant does answer, that campus record may be used against them in a criminal trial).

<sup>228</sup> *Why Victims Don't Report*, *supra* note 3 (discussing the various reasons why victims of sexual assault do not report to the police); North, *supra* note 6 (explaining how Title IX and universities can benefit student victims); *Why Schools Handle Sexual Violence Reports*, *supra* note 36 (explaining the benefits and important outlets of relief provided by the Title IX campus system).

<sup>229</sup> *See* Daggett, *supra* note 66, at 206 (discussing difficulties local law enforcement may have in accessing campus sexual assault records); *Why Victims Don't Report*, *supra* note 3 (discussing the difficulties presented to prosecutors in sexual assault cases); Yoffe, *supra* note 181 (criticizing the realities of campus sexual assault proceedings for both the victim and the accused).

<sup>230</sup> *See* Walton, *supra* note 68, at 165 (discussing the need for accused student's privacy despite the public interest in the awareness of crimes committed on campus); *see also* 20 U.S.C. § 1232g(b)(6)(A) (establishing a permissive standard of reporting for violent crimes and nonforcible sex offenses); 34 C.F.R. § 99.39 (detailing the permissive standard).

<sup>231</sup> 20 U.S.C. § 1232g(b)(6)(A); 34 C.F.R. § 99.39.

<sup>232</sup> *See* 20 U.S.C. § 1232g(b)(6)(A); 34 C.F.R. § 99.39. The disclosure of violent crimes and nonforcible sexual offenses was included as part of an amendment to FERPA in 1998 which hoped to further address the rising criminal activity on college campuses. Walton, *supra* note 68,

would support concerns about public safety and transparency of universities.<sup>233</sup> The limited release of this information is balanced by the restriction of local law enforcement's access to the records.<sup>234</sup> This additionally helps prevent universities from covering up scandals that occur at the university and allows journalists and others to provide the public with the information, while still maintaining the integrity of the proceedings.<sup>235</sup> Ultimately, requiring a restricted mandatory disclosure of guilty findings in campus sexual assault proceedings, while restricting local law enforcement access to the full contents of these proceedings is a moderate change, which strikes a balance between the concerns of the victim, the defendant, and the public.<sup>236</sup>

### CONCLUSION

Title IX proceedings are inherently entangled with FERPA which protects the privacy of students and their education records. This is further confused by the restriction of local law enforcement access to campus sexual assault proceeding records. FERPA complicates the calls for local law enforcement to get more involved, because FERPA restricts police access to student and assault proceeding information. As stories of campus sexual assaults sweep the news and grab headlines, change in the current campus sexual assault system is needed. Calls on both sides of the spectrum, however, argue extreme solutions. Instead, a moderate revision of FERPA that restricts local law enforcement access to Title IX records and creates a mandatory reporting requirement for violent or nonforcible sex offenses provides the best and most effective balance of the rights of the accused, the victim's concerns, and the concerns of the public.

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at 157. It does not require, however, the school to disclose these crimes, but rather allows them to if the relevant state law requires disclosure. *Id.* at 158.

<sup>233</sup> See 20 U.S.C. § 1232g(b)(6)(A); 34 C.F.R. § 99.39; *cf.* Walton, *supra* note 68, at 157–58.

<sup>234</sup> See 20 U.S.C. § 1232g(b)(6)(A); 34 C.F.R. § 99.39; Schwarz, *supra* note 58, at 829 (arguing that public safety concerns call for a revision of disclosure requirements).

<sup>235</sup> See Schwarz, *supra* note 58, at 810 (expressing concern about universities' ability to hide scandals from the public); North, *supra* note 6 (explaining the benefits and important outlets of relief provided by the Title IX campus system); *Why Schools Handle Sexual Violence Reports*, *supra* note 36 (discussing the benefits of university handling of investigations).

<sup>236</sup> See 20 U.S.C. § 1232g(a)(4)(A)–(B) (defining education records and when they may be accessed without permission of a third party); *cf.* Walton, *supra* note 68, at 158–60, 165 (arguing the benefits of protection for student disciplinary records under FERPA). By clarifying that disciplinary records are “education records,” Congress would clarify the manner in which police could access this information. See 20 U.S.C. § 1232g(a)(4) (defining education records but not explicitly including disciplinary records).