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Female Student Patient "Privacy" at Campus Health Clinics: Realities and Consequences

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FEMALE STUDENT PATIENT "PRIVACY" AT CAMPUS HEALTH CLINICS: REALITIES AND CONSEQUENCES

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INTRODUCTION

Since the early twenty-first century, the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule has protected patient privacy.[1] The HIPAA Privacy Rule singles out only the medical records of students for full exclusion.[2] The HIPAA Privacy Rule leaves regulation of student medical records to the Family Educational Rights and Privacy Act (FERPA), the 1970s federal student education records statute.[3] FERPA's protection of student medical privacy has been aptly characterized by one commentator as "cheesecloth" coverage.[4]

FERPA has a general consent requirement for disclosure of records that is modified by a long list of provisions allowing schools, in their discretion, to non-consensually disclose student medical and other information.[5] These provisions govern student information generally;[6] there are no different rules for student patient or other medical information.[7] This is FERPA's approach despite the modern reality that schools create and maintain extensive medical information about their students.[8] Most significantly, many K-12 schools, and most colleges, choose to take on a health care provider role and operate campus health clinics that offer mental and physical

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1. 45 C.F.R. §§ 160, 164; § 164.500–.534 (2019).
2. § 164.501. The HIPAA Privacy Rule's other exclusion is for employees, and it is limited to records maintained by the employer as an employer; for example, medical documentation surrounding absences or leaves. BUS. & LEGAL RES., EMPLOYER'S GUIDE TO HIPAA PRIVACY REQUIREMENTS ¶ 201 (David Slaughter ed., Supp. 2013). Employee records created when the employer provided treatment are covered by the Privacy Rule. *Id.*
3. *See generally* 20 U.S.C. § 1232g.
4. Katie Rose Guest Pryal, *Raped on Campus? Don't Trust Your College to Do the Right Thing*, CHRON. HIGHER EDUC. (Mar. 2, 2015), https://www.chronicle.com/article/Raped-on-Campus-Don-t-Trust/228093 [https://perma.cc/PT6V-X7V2].
5. *See* 20 U.S.C. § 1232g(b)(1).
6. *See* § 1232g.
7. *See id.*
8. *School Health Records: Privacy and Access*, PACER CTR., https://www.pacer.org/health/pdfs/HIAC-h18.pdf [https://perma.cc/AT5J-WF49] (last visited Nov. 2, 2020).

health care to all of their students.[9] Among other scenarios, FERPA allows schools to share student patient records from campus health clinics internally to persons with "legitimate *educational* interests,"[10] and also to externally share an entire student patient file with a new school in which the student enrolls or seeks to enroll.[11]

FERPA's "cheesecloth" protection of student patient privacy is unfair to all students, but it uniquely burdens female[12] student patients at campus health clinics.[13] Female students disproportionately use both K-12 and college campus health clinics.[14] Female students also disproportionately use campus health clinics for intimate and sensitive care.[15] For example, female students access counseling services at higher rates than men, and of course gynecological and prescription contraceptive care is almost exclusively provided to women.[16] Accessing health care at FERPA-regulated campus health clinics thus has special consequences for female students, including the potential to limit autonomy regarding reproductive decisions.[17] For example, while minor females have constitutional rights to make their own reproductive decisions[18]—including a right to bypass state laws requiring parental notice or consent if they convince a judge that they are mature enough to make their own decision to terminate a pregnancy[19]—one court has held

9. *See id.* Schools also create or maintain a variety of other student medical records, such as notes excusing K-12 student absence, counseling records, physical therapy records for some special education students, and documentation of college student disability surrounding requests for accommodations. *See generally id*. This Article's primary focus is the records of student patients at campus health clinics.
10. 20 U.S.C. § 1232g(b)(1)(A) (emphasis added).
11. § 1232g(b)(1)(B).
12. This article uses "female" as an umbrella term to include students who identify as female, both minor girls and adult women.
13. *See infra* Part VII; *see also* Pryal, *supra* note 4.
14. *See infra* Part IV.
15. *See infra* Part V.
16. Jeff Jackson, Gender Differences in Seeking Help (2011) (Master's thesis, Eastern Kentucky University) (on file with Encompass, Eastern Kentucky University).
17. *See* discussion *infra* Section VII.C.
18. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 10.3.3.5, at 912 (6th ed. 2019) ("The Supreme Court has held that a state may require parental notice and/or consent for an unmarried minor's abortion, but only if it creates an alternative procedure where a minor can obtain an abortion by going before a judge who can approve the abortion by finding that it would be in the minor's best interest or by concluding that the minor is mature enough to decide for herself.").
19. *Id.*

that once a school is aware a student is pregnant, the parents have a right to know under FERPA.[20]

Victims of the national epidemic of higher education campus sexual assault, who are disproportionately female, regularly seek care at campus health clinics.[21] In fact, both the Clery Act and Title IX require schools to make free counseling and other services available to victims of campus sexual misconduct.[22] But FERPA itself does not bar schools from accessing campus medical records and other records of victim students for use in Clery/Title IX investigations and hearings, in which event they must be shared with the accused student.[23] FERPA also allows schools to disclose campus medical records and other records to defend Title IX claims by students.[24] In

20. Port Wash. Teachers' Ass'n v. Bd. of Educ. of Port Wash. Union Free Sch. Dist., 361 F. Supp. 2d 69, 77–80 (E.D.N.Y. 2005) (rejecting claims that the parental right to know likely violated constitutional abortion rights of minors, state and federal health care laws, and therapist privilege).

21. *See, e.g.*, AM. COLL. HEALTH ASS'N (ACHA), NATIONAL COLLEGE HEALTH ASSESSMENT: SPRING 2019 REFERENCE GROUP DATA REPORT 8 (2019), https://www.acha.org/documents/ncha/NCHA-II_SPRING_2019_US_REFERENCE_GROUP_DATA_REPORT.pdf [https://perma.cc/99MT-DS6E] [hereinafter GROUP DATA REPORT] (showing gender disparity between college student self-reports of various types of unwanted sexual activity).

22. 20 U.S.C. § 1092(f)(8)(B)(vi); 34 C.F.R. § 106.44(a) (effective Aug. 14, 2020); *see* U.S. DEP'T OF EDUC., THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING 8–14 (2016 ed.), https://www2.ed.gov/admins/lead/safety/handbook.pdf [https://perma.cc/VC8J-6NGZ] [hereinafter CLERY HANDBOOK].

23. FERPA applies to *education* records only, defined in 34 C.F.R. § 99.3 (2019). It excludes *treatment* records—those "[m]ade or maintained by a . . . recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity [and m]ade, maintained, or used only in connection with treatment of the student." § 99.10(b)(4)(i)–(ii). Per 34 C.F.R. § 99.10(f), schools may but are not required to give students access to treatment records. However, 34 C.F.R § 99.3 indicates that these treatment records escape their exclusion from education records if they are disclosed to individuals other than those providing the treatment, e.g., a school attorney providing legal counsel in a lawsuit. Thus, upon such a disclosure, the records become subject to FERPA, and schools must provide access to the student upon request. *See* §§ 99.3, 99.10(a), (b), (f); *see* U.S. DEP'T OF HEALTH & HUM. SERVS. & U.S. DEP'T OF EDUC., JOINT GUIDANCE ON THE APPLICATION OF THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) AND THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996 (HIPAA) TO STUDENT HEALTH RECORDS 5 (2019), https://www2.ed.gov/policy/gen/guid/fpco/doc/ferpa-hippa-guidance.pdf [https://perma.cc/XTV3-SG76] [hereinafter JOINT GUIDANCE].

24. Section 99.31 of the FERPA regulations enumerates exceptions that allow non-consensual disclosure of education records. *See* JOINT GUIDANCE, *supra* note 23. The

fact, FERPA's treatment records provision allows schools to prevent a student victim from accessing her own medical records unless and until such records are disclosed to non-medical individuals, as one student victim recently found out.[25] New Title IX regulations add an important protection for student treatment records, providing that schools cannot access or use them in school hearings without voluntary written consent.[26] However, this new provision's scope is narrow; for example, it does not apply to Title IX litigation where the school is the defendant and FERPA continues to permit school defendants to seize campus medical records of student plaintiffs.[27] Moreover, the new regulations provide that the parties to school Title IX hearings will see all evidence gathered by the school, including student medical records consensually shared with the school.[28] The new regulations may thus contribute to the reluctance of victims of campus sexual assault to make a complaint and enable the campus sexual assault epidemic to continue.[29]

In addition to limiting decisional autonomy and failing to helpfully respond to the campus sexual assault epidemic,[30] current regulation of student patient records has other consequences for female students.[31] For example, invasion of privacy and similar tort claims turn on disclosure of "confidential" information usually defined by reference to external law such as the HIPAA Privacy Rule or FERPA.[32] Hence, disclosures permitted by FERPA are likely not

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first exception for non-consensual disclosure listed in subpart (a)(1)(i)(A) is to "other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests." § 99.31(a)(1)(i)(A). Title IX regulations require that schools "designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part . . . ." 34 C.F.R. § 106.8(a) (effective Aug. 14, 2020). Thus, under FERPA, the Title IX compliance designee may non-consensually access and/or disclose education records in keeping with the school's legitimate educational interests. NAT'L F. ON EDUC. STAT., FORUM GUIDE TO PROTECTING THE PRIVACY OF STUDENT INFORMATION 51–52 (Mar. 2004), https://nces.ed.gov/pubs2004/2004330.pdf [https://perma.cc/S98D-MCKE].

25. Charles Ornstein, *After Sexual Assault, Woman Says University Lawyers Accessed Her Counseling Records*, PROPUBLICA (Oct. 23, 2015, 5:00 AM), https://www.propublica.org/article/after-sexual-assault-woman-says-University-lawyers-counseling-records [https://perma.cc/YMN4-5RNY].
26. *See infra* note 427 and accompanying text.
27. *See infra* notes 432–35 and accompanying text.
28. *See infra* notes 404–09 and accompanying text.
29. *See infra* Sections VI.B, VII.D.
30. *See infra* Section VII.C and notes 341–49 and accompanying text.
31. *See infra* Sections VII.A, VII.B.
32. *See infra* Section VII.A.

actionable, such as recent school seizures of student patient records of rape victims who sue their schools under Title IX.[33]

FERPA needs to be amended to provide real medical privacy for all students, as proposed in a companion article.[34] In the meantime, students and their advisors and advocates need to be informed about the extent of privacy protection of student patient records so that they can make informed decisions, and work with schools and state legislatures to enhance student privacy through enactment of school policies and state statutes.[35]

Part I of this Article offers an overview of campus student health clinics and the law governing the privacy of their student patients.[36] Part II provides a short primer on the HIPAA Privacy Rule that governs patient privacy generally but excludes student patient and other student medical records.[37] Part III surveys the contours of student patient privacy under FERPA.[38] Parts IV, V, and VI offer information about the extent to which female students use campus health clinics,[39] the intimate and sensitive nature of the care female students commonly receive at campus health clinics,[40] and the campus sexual misconduct context within which female students often access care from campus health clinics,[41] respectively. Part VII identifies tort claim availability and decisional autonomy consequences of current realities.[42] Finally, Part VIII offers some solutions and workarounds, including heightened student patient information about the parameters of patient confidentiality, and advocacy for changes in school policies and statutes.[43]

33. *See infra* Section VII.A.
34. *See generally* Lynn M. Daggett, *The Myth of Student Medical Privacy*, 14 HARV. L. & POL'Y REV. 467 (2020).
35. *See infra* Sections VIII.C–.D.
36. *See infra* Part I.
37. *See infra* Part II.
38. *See infra* Part III.
39. *See infra* Part IV.
40. *See infra* Part V.
41. *See infra* Part VI.
42. *See infra* Part VII.
43. *See infra* Part VIII.

I. CAMPUS HEALTH CLINICS AND LEGAL REGULATION OF PATIENT PRIVACY

Schools are not required to operate or host campus health clinics.[44] Doing so is the result of a school's choice to take on a health care provider role.[45] However, it is now standard practice for colleges to fund and operate campus health clinics offering medical care and counseling services to students, and sometimes to other persons such as employees and student family members.[46] This Article uses the term "campus health clinic" to refer to on-campus clinics at K-12 schools and colleges that offer medical health care, mental health care, or both to their students.

In K-12 schools, campus health clinics are rapidly becoming more common.[47] More than 2,500 K-12 schools now have campus health clinics, more than doubling the total from twenty years ago.[48] Currently, K-12 campus health clinics are accessible by 6.3 million students,[49] and disproportionately serve low-income students and students of color.[50] K-12 campus health clinics tend to serve students in grades six and above, rather than prepubescent elementary school students,[51] and thus commonly offer reproductive and sexual health care.[52] While colleges themselves fund and operate their campus health clinics, K-12 clinics are funded and operated in a variety of ways.[53] For example, sometimes with Affordable Care Act or other federal funding, a campus health clinic may be located at a school but

44. *See Access to Health Care*, SCH. BASED HEALTH ALL., http://www.sbh4all.org/school-health-care/health-and-learning/access-to-health-care/ [https://perma.cc/Z75T-9JQ7] (last visited Nov. 2, 2020).

45. *See About School-Based Health Care*, SCH. BASED HEALTH ALL., https://www.sbh4all.org/school-health-care/aboutsbhcs/ [https://perma.cc/6FEP-T7YQ] (last visited Nov. 2, 2020).

46. 34 C.F.R. § 106.39 (2019) (reflecting that student health services are a common function of schools, forbidding schools from gender discrimination in the health services that are provided).

47. *National School-Based Health Care Census,* SCH. BASED HEALTH ALL., https://www.sbh4all.org/wp-content/uploads/2019/05/2016-17-Census-Report-Final.pdf [https://perma.cc/UF3K-6VXZ] (last visited Nov. 2, 2020).

48. *Id.*

49. *Id.*

50. *Id.* Eighty-nine percent of these clinics offer services to students in Title I schools. *Id.* Seventy percent of students in schools with these clinics are eligible for free or reduced-price lunch. *Id.*

51. *Id.*

52. *See id.*

53. *See infra* notes 54–57 and accompanying text.

operated independently of the school.[54] Other K-12 health clinics may be operated by hospitals or medical centers, local health departments, nonprofits, or school systems.[55] One commentator suggests most K-12 campus health clinics are operated by health care organizations rather than school systems.[56] However, that same commentator notes that almost half of K-12 campus health clinics have some school funding.[57] As discussed below, depending on the specifics of the arrangement with the school, some K-12 health clinics may be governed by the HIPAA Privacy Rule rather than FERPA.[58]

Student patient privacy in campus health clinics operated both by colleges and many K-12 schools is governed by FERPA, the federal education records statute, rather than the HIPAA Privacy Rule that governs patient privacy generally.[59] As discussed in more detail below, the HIPAA Privacy Rule is an administrative regulation of the Department of Health and Human Services (HHS).[60] The HIPAA Privacy Rule: (i) limits disclosure of "protected health information," (PHI); and (ii) gives patients a right of access to their own PHI.[61] The HIPAA Privacy Rule wholly excludes student records,[62] with no differentiation as to whether the school is acting in a health care or educational capacity.[63] The HIPAA Privacy Rule does this by defining PHI to expressly exclude both FERPA records and FERPA treatment records[64] (which, as discussed below, essentially are records of on-campus student clinic health care for adult and post-

54. *See School-Based Health Centers,* HEALTH RES. & SERV. ADMIN., https://www.hrsa.gov/our-stories/school-health-centers/index.html [https://perma.cc/G9V7-ZNVC] (last reviewed May 2017).
55. *Id.*
56. Victoria Keeton et al., *School-Based Health Centers in an Era of Health Care Reform: Building on History*, 42 CURRENT PROBS. PEDIATRIC ADOLESCENT HEALTH CARE 132, 133 (2012).
57. *Id.* at 150.
58. *See infra* notes 59–73 and accompanying text.
59. JOINT GUIDANCE, *supra* note 23, at 7.
60. *Id.* at 5.
61. 45 C.F.R. § 160.103 (2019) (defining PHI); § 160.103 (defining PHI as excluding FERPA records and FERPA treatment records for purposes of this subchapter); *see generally* §§ 160, 164; §§ 164.500–.534 (detailing HIPAA Privacy Rule).
62. § 160.103; *see* Lawrence Gostin et al., *The Nationalization of Health Information Privacy Protections*, 37 TORT & INS. L.J. 1113, 1113–15, 1138 (2002) (providing an overview of the HIPAA Privacy Rule).
63. 45 C.F.R. § 160.103(2)(i)–(ii).
64. *See infra* Section II.B.

secondary students to which students do not have a direct right of access).[65]

The HIPAA Privacy Rule's exclusion of student records is not the policy choice of the promulgating agency.[66] HHS announced a strong policy preference for a uniform standard of privacy protection for all health information but deemed it lacked authority in its administrative regulations to override Congress's statutory scheme in FERPA.[67] A recently reissued and updated Joint Guidance Letter from the HIPAA and FERPA enforcing agencies provides an overview of FERPA's regulation of student medical records.[68]

Exclusion of FERPA records from the HIPAA Privacy Rule means that FERPA governs disclosure of student patient records, with no additional limits created by HIPAA.[69] It is also FERPA rather than the HIPAA Privacy Rule that governs student patient access to campus health clinic records.[70]

Some K-12 campus health clinics are governed by the HIPAA Privacy Rule rather than FERPA.[71] FERPA governs records created or maintained by schools through their employees and others as well as persons "acting for" schools, and contractors performing services for schools.[72] Hence, those K-12 campus health clinics that are operated independently of a school would be governed by the HIPAA Privacy Rule.[73]

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65. 20 U.S.C. § 1232g(a)(4)(B)(iv); *see* 45 C.F.R. § 160.103.
66. *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,483 (Dec. 28, 2000).
67. *See id.* The agency noted:

> While we strongly believe every individual should have the same level of privacy protection for his/her individually identifiable health information, Congress did not provide us with authority to disturb the scheme it had devised for records maintained by educational institutions and agencies under FERPA. We do not believe Congress intended to amend or preempt FERPA when it enacted HIPAA.

Id. HHS also noted that schools not receiving federal funding would not be covered by FERPA and thus would be subject to HIPAA Privacy Regulations, citing a school nurse's records as an example. *Id.*

68. *See* JOINT GUIDANCE, *supra* note 23, at 3–5.
69. *See* 45 C.F.R. § 160.103 (2019).
70. JOINT GUIDANCE, *supra* note 23, at 9.
71. *See* 20 U.S.C. § 1232g(a)(4)(A)(ii).
72. *Id.*
73. *See supra* notes 59–72 and accompanying text.

II. A BRIEF OVERVIEW OF THE HIPAA PRIVACY RULE

The HIPAA Privacy Rule requires appointment of a HIPAA privacy officer[74] and designation of an office for receiving complaints,[75] dissemination of written privacy practices to patients,[76] and training of staff.[77]

A. Access

The HIPAA Privacy Rule provides a general right of patient access to her own records, and a right of access for the patient's personal representative, if any.[78] Parents are normally personal representatives of their minor children unless the minor has legally consented to their own treatment,[79] which state laws may permit for reproductive, substance abuse, or mental health care.[80] The right of access is modified for psychotherapy notes, for which therapists may instead choose to write a summary letter.[81]

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74. 45 C.F.R. § 164.530(a)(1)(i).
75. § 164.530(a)(1)(ii).
76. § 164.520(a)(1).
77. § 164.530(b).
78. § 164.502(a)(2)(i); § 164.524; § 164.502(g)(1).
79. *See infra* note 155–57 and accompanying text.
80. 45 C.F.R. § 164.502(g)(3). The parent would not be the personal representative with a right of access to medical information where state or other law permitted the minor to consent to treatment, as for example, some states permit older minors to consent to treatment for STDs, substance abuse, birth control, or mental health treatment. *See id.* For instance, in Washington, minors aged 13 and over can consent to their own outpatient treatment for mental health issues and substance abuse, WASH. REV. CODE § 71.34.530 (2020), for outpatient STD treatment at age 14 and over pursuant to § 70.24.110, and for birth control at any age pursuant to § 9.02.100(1). Similarly, the parent would not be the personal representative with a right of access to information related to court-authorized treatment, as sometimes occurs for example with pregnancy terminations. 45 C.F.R. § 164.502(g)(3)(i)(B); *e.g.*, ARIZ. REV. STAT. ANN. § 36-2152 (2020). Finally, if the parent agrees that their minor child will be treated confidentially, there is no right of access to information about that confidential treatment. 45 C.F.R. § 164.502(g)(3)(i)(C). Health care providers may also choose not to release PHI to parents with reasonable belief of abuse, neglect, or domestic violence, or if disclosure could create danger for the minor. § 164.502(g)(5).
81. 45 C.F.R. § 164.524(a)(1)(i), (c)(2)(iii). HIPAA defines psychotherapy notes as notes created by mental health professionals kept separate from other health records. § 164.501. The bases for this exclusion are twofold: i) the notes are created by the therapist for personal use; and ii) symmetry with the special limits on disclosure of these notes because of their sensitive nature. *See* U.S. DEP'T OF HEALTH & HUM. SERVS., HIPAA PRIVACY RULE AND SHARING INFORMATION RELATED TO MENTAL HEALTH 5 (Feb. 2014), https://www.hhs.gov/sites/default/files/hipaa-privacy-rule-and-sharing-info-related-to-mental-health.pdf [https://perma.cc/A9NE-32LN] [hereinafter

B. Disclosure

The HIPAA Privacy Rule permits disclosure of PHI with written consent,[82] which in most circumstances is from the parent as personal representative of minor patients.[83] Covered entities may disclose psychotherapy notes with written consent[84] and may not disclose them to third parties without patient consent.[85]

Recognizing the sensitive nature of medical information, the HIPAA Privacy Rule generally limits non-consensual disclosures to the "minimum necessary."[86] Non-consensual disclosure to other persons within the health care provider entity for treatment purposes is permitted.[87] For example, IT staff can access patient records as necessary to support the health care provider in provision of health care.[88] Health care provider attorneys can access patient records as necessary to support the health care provider in providing health care.[89] With consent (normally obtained at the time of treatment), disclosure to other treating health care professionals and insurance and government funding sources is also permitted.[90]

The HIPAA Privacy Rule establishes significant procedural limits on non-consensual disclosure and use of medical records in legal

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SHARING INFORMATION]. There is also no right of access under HIPAA to records created for legal proceedings. 45 C.F.R. § 164.524(a)(1)(ii).

82. 45 C.F.R. § 164.508(a)(2).

83. *See* Lori J. Strauss, *HIPAA Highlights Related to Minor Children: Office for Civil Rights Web Site Addresses Frequently Asked Questions*, J. HEALTH CARE COMPLIANCE, Mar.–Apr. 2016, at 49.

84. 45 C.F.R. § 164.508(a)(2). They may be disclosed when legally required, for example for mandatory reports of abuse, or by court order. § 164.512(a), (c), (e), (f).

85. *See* § 164.508(a)(2).

86. § 164.502(b)(1). This is defined as a "reasonableness standard . . . consistent with . . . best practices." Off. Civ. Rts., *How Are Covered Entities Expected to Determine What is the Minimum Necessary Information That Can Be Used, Disclosed, or Requested for a Particular Purpose?*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/hipaa/for-professionals/faq/207/how-are-covered-entities-to-determine-what-is-minimum-necessary/index.html [https://perma.cc/88RT-PQAJ] (Mar. 14, 2006). It does not apply to some disclosures such as consensual disclosures nor to disclosures for treatment purposes. 45 C.F.R. § 164.502(b)(2).

87. 45 C.F.R. § 164.506(c).

88. §§ 164.308(b), 164.506(a).

89. Off. Civil Rts., *May a Covered Entity That is a Plaintiff or Defendant in a Legal Proceeding Use or Disclose Protected Health Information for the Litigation?*, U.S. DEP'T HEALTH & HUM. SERVS. (Jan. 7, 2005), https://www.hhs.gov/hipaa/for-professionals/faq/705/may-a-covered-entity-in-a-legal-proceeding-use-protected-health-information/index.html [https://perma.cc/84RL-DUVT] [hereinafter *Covered Entity*]; *see generally* §§ 164.512(e), 164.506(a), (c).

90. *See* 45 C.F.R. §§ 164.502(a), 164.506, 164.508(a).

proceedings, both judicial and administrative.[91] Disclosures are limited to those ordered by a court or grand jury subpoena,[92] or by subpoena with either assurances of advance notice to the patient[93] or assurances that a qualified protective order has been sought.[94] Without satisfactory assurances, a health care entity may not disclose medical records without making its own reasonable efforts to notify the patient.[95] Moreover, once litigation is over, the records must be either returned or destroyed.[96] HIPAA does not preempt state laws that provide greater privacy protection,[97] such as state law establishing a privilege for medical records.[98] State privilege may thus preclude non-consensual disclosure in connection with legal proceedings.[99]

Limited disclosure to parents, other family members, or close personal friends who are involved in the health care of adult patients is authorized if the patient is given notice and an opportunity to object and does not object.[100] Disclosure to report suspected child abuse or neglect or domestic violence,[101] and disclosures to public health authorities[102] and health researchers is permitted.[103] Certain disclosures for law enforcement purposes to a law enforcement official in response to a warrant or court order, a civil or criminal subpoena, or an administrative demand is permitted as well.[104] Disclosure of medical records is also permitted in emergent circumstances.[105] Patients may request an accounting of disclosures of their PHI[106] and may request amendment of their records.[107]

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91. § 164.512(e); *see* Natalie Weiss, *To Release or Not to Release: An Analysis of the HIPAA Subpoena Exception*, 15 MICH. ST. U. J. MED. & L. 253, 257, 261–62 (2011); *see* Robert Miller & Tegan Schlatter, *Can This Health Information Be Disclosed? Navigating the Intricacies of HIPAA in Claims Litigation*, BRIEF, Spring 2011, at 32, 34–35.
92. 45 C.F.R. § 164.512(f).
93. § 164.512(e)(1)(ii)(A).
94. § 164.512(e)(1)(ii)(B).
95. § 164.512(e)(1)(vi).
96. § 164.512(e)(1)(v)(B).
97. § 160.203(b).
98. *E.g.*, Nw. Mem'l Hosp. v. Ashcroft, 362 F.3d 923, 925 (7th Cir. 2004).
99. *See, e.g.*, Turk v. Oiler, 732 F. Supp. 2d 758, 775–76 (N.D. Ohio 2010).
100. 45 C.F.R. § 164.510(b)(1)–(2).
101. § 164.512(c)(1).
102. § 164.512(b)(1)(i)–(ii).
103. § 164.512(i)(1).
104. § 164.512(f)(1)(ii).
105. § 164.512(j). Emergent disclosures are triggered by good faith belief that disclosure is necessary to address a "serious and imminent threat" to the patient or another

C. Enforcement

HIPAA has no private cause of action.[108] However, a determination that the HIPAA Privacy Rule has been violated, perhaps in response to an internal complaint or through normal business activities, requires documented sanctioning of the offending employee(s).[109] Complaints may also be made to the enforcing agency's Office of Civil Rights (OCR).[110] OCR can investigate complaints[111] and perform compliance reviews.[112] OCR may impose a penalty of at least $100 for each violation, not to exceed $25,000 in a single calendar year.[113] Knowing violations may result in larger fines or imprisonment,[114] with even larger potential fines and imprisonment for deliberate use of PHI "for commercial advantage, personal gain, or malicious harm."[115] Disclosure of patient information in violation of the HIPAA Privacy Rule may be actionable in tort, for example as invasion of privacy.[116]

III. STUDENT PATIENT PRIVACY UNDER FERPA

A. FERPA Overview

FERPA,[117] the federal student records statute, is 1974 Spending Clause legislation establishing conditions on the receipt of federal

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person, or to the public's health or safety. § 164.512(j)(1)(i)(A). Disclosures, which must be consistent with relevant law and professional ethics, can be made to persons (e.g., law enforcement or family members) reasonably believed to be able to address the threat. § 164.512(j)(1)(i)(B).

106. § 164.528(a)(1).
107. § 164.526(a)–(b).
108. *See* Univ. of Colo. Hosp. v. Denver Publ'g Co., 340 F. Supp. 2d 1142, 1145 (D. Colo. 2004) ("The statutory structure of HIPAA . . . precludes implication of a private right of action.").
109. 45 C.F.R. § 164.530(e).
110. § 160.306(a).
111. § 160.306(c).
112. § 160.308.
113. 42 U.S.C. § 1320d-5(a)(3)(A).
114. § 1320d-6.
115. *Id.*
116. *See generally* Morgan Leigh Tendam, Note, *The HIPAA-Pota-Mess: How HIPAA's Weak Enforcement Standards Have Led States to Create Confusing Medical Privacy Remedies*, 79 OHIO ST. L.J. 411, 427–35 (2018) (discussing cases and the subsequent issues created by using tort claims to address HIPAA violations).
117. 20 U.S.C. § 1232g. A companion article provides a fuller overview of FERPA and its role in student medical privacy. Daggett, *supra* note 34, at 483–507. This brief survey is adapted from that companion article.

education funds.[118] FERPA applies to both private and public schools, including preschool, K-12, and post-secondary, that receive any federal education funding such as federal student financial aid.[119] FERPA has two primary requirements:[120] (i) parents of minor students and adult students have the right to access their own education records;[121] and (ii) in general, but with many exceptions,[122] schools may not disclose education records or their contents to third parties without written consent from the parent/adult student.[123]

Complaints asserting FERPA violations may be made to the Department of Education (DOE), which may seek the school's voluntary compliance.[124] The results of this process may be unsatisfying to students.[125] For example, when a school district inadvertently posted a student's mental health records on its website for several weeks in connection with a school board executive session discussion about the student's special education placement, FERPA's enforcing agency took several years to determine that FERPA had been violated.[126] The agency closed the parent's complaint after the school indicated it would provide staff training on this issue.[127] There is no private cause of action under FERPA.[128] FERPA violations also are not actionable under Section 1983.[129]

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118. *See* 20 U.S.C. § 1221.
119. § 1232g(a)(3).
120. FERPA also requires that parents/adult students who believe their education records are inaccurate or invasive of privacy have the opportunity for an internal and informal hearing, 20 U.S.C. § 1232g(a)(2), and that schools provide parents/adult students with an annual notice of their FERPA rights. § 1232g(e). *See generally* Dixie Snow Huefner & Lynn M. Daggett, *FERPA Update: Balancing Access to and Privacy of Student Records*, 152 EDUC. L. REP. 469, 470 (2001).
121. 20 U.S.C. § 1232g(a)(1).
122. *See generally* § 1232g(b).
123. § 1232g(b)(1).
124. § 1232g(f).
125. *See infra* notes 126–27 and accompanying text.
126. Letter to Dr. Franklin, 118 LRP 33154 (FPCO May 7, 2018).
127. *Id.*
128. *See, e.g.*, Brown v. Tex. State Univ. Sys. Bd. of Regents, No. A-13-CA-483, 2013 WL 6532025, at *7–8, *20 (W.D. Tex. Dec. 12, 2013) (dismissing FERPA and HIPAA claims by student athlete whose scholarship was revoked and alleged the school disclosed "very personal, private, confidential, extremely delicate, medical information to . . . [a teammate].").
129. Gonzaga Univ. v. Doe, 536 U.S. 273, 276 (2002) (stating that FERPA does not create individual enforceable rights, and hence violations are not actionable under 42 U.S.C. § 1983). Prior to *Gonzaga*, courts held that disclosure of student medical information by public schools could be actionable under Section 1983. *See, e.g.*, Doe v. Knox Cnty. Bd. of Educ., 918 F. Supp. 181, 184 (E.D. Ky. 1996) (examining claim

B. FERPA Access Rights of Parents and Student Patients

Parents hold FERPA rights to access all FERPA records of their child until the student either becomes a legal adult or enters college.[130] This includes all medical records created or maintained by the school.[131] In fact, a federal court upheld a school policy providing for parent notification of a minor student's pregnancy, suggesting that under FERPA, parents had a right to this information,[132] and the school's *in loco parentis* status likely obligated them to inform the parents.[133] Schools may choose to share records with minor students but are not required to do so.[134] Thus, in school-operated K-12 campus health clinics governed by FERPA,[135] parents of minor K-12 students would have a FERPA right to access their child's campus health clinic records, but minor patients themselves would not have a right of access.[136]

At the college level and for adult K-12 students, FERPA rights are held by the student, including a general right of adult student access to their own records.[137] However, FERPA excludes a right of access to treatment records for adult and postsecondary students.[138] Treatment records are one of several categories of FERPA "non-records," such as certain records of a school's law enforcement

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surrounding school's alleged disclosure of student's hermaphroditic condition and related special education information to newspaper); T.F. v. Fox Chapel Area Sch. Dist., 62 IDELR 74 (W.D. Pa. 2013) (examining claims that disclosure of student's severe allergy disability at PTA meeting violates federal disability law).

130. Family Pol'y Compliance Off., *Family Educational Rights & Privacy Act (FERPA)*, U.S. DEP'T OF EDUC., https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html [https://perma.cc/V53H-38GZ] (Mar. 1, 2018).

131. *Id.*

132. Port Wash. Teachers' Ass'n v. Bd. of Educ. of the Port Wash. Union Free Sch. Dist., 361 F. Supp. 2d 69, 79 (E.D.N.Y. 2005).

133. *Id.* at 81. The court rejected claims that the policy likely violated constitutional abortion rights of minors, state and federal health care laws, and therapist privilege. *Id.* at 78–79.

134. 34 C.F.R. §§ 99.5(b), 99.31(a)(12) (2019).

135. *See supra* notes 130–34 and accompanying text.

136. FERPA's treatment records provision, 20 U.S.C. § 1232g(a)(4)(B)(iv), applies to records of adult students and college students. Hence, K-12 campus health clinic records of minor patients would not be excluded from FERPA as treatment records, and FERPA would provide a parent right of access. § 1232g(a)(1).

137. § 1232g(d).

138. § 1232g(a)(4)(B)(iv). Treatment records are those "made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in [that] capacity, or . . . made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment[.]" *Id.*

unit,[139] and "sole possession notes" created by an individual school employee,[140] such as a teacher or counselor as a confidential memory aid.[141] The HIPAA Privacy Rule expressly excludes FERPA treatment records[142] and thus, the HIPAA Privacy Rule patient right of access does not apply.[143]

FERPA's exclusion of treatment records allows them to be shared with other on-campus or off-campus persons treating the student without express student consent, facilitating coordination of care, which presumably enhances the overall health care provided to the student.[144] Any such sharing between health care providers does not alter their exclusion under FERPA.[145] However, FERPA's exclusion of treatment records also means the student herself has no right to access them.[146] FERPA instead provides for access to treatment records by a treating or non-treating medical professional of the student's choosing.[147] FERPA also allows schools to share treatment records internally or externally under FERPA disclosure rules.[148] Once a school shares treatment records under a FERPA disclosure provision, the treatment records become FERPA records and

139. § 1232g(a)(4)(B)(ii).
140. *See* Parents Against Abuse in Schs. v. Williamsport Area Sch. Dist., 594 A.2d 796, 802–03 (Pa. Commw. Ct. 1991) (holding sole possession notes under FERPA and state law do not include school psychologist's notes, kept at his home, of interviews with children abused by teacher which parents had agreed to on the condition they would be shared with the parents as a basis for further private therapy).
141. 20 U.S.C. § 1232g(a)(4)(B)(I).
142. *See supra* notes 64–65 and accompanying text.
143. 45 C.F.R. § 160.103 (2019).
144. *See* 20 U.S.C. § 1232g(a)(4)(B)(iv). HIPAA also allows off-campus health care providers to non-consensually disclose health information to school health care providers. T.F. v. Fox Chapel Area Sch. Dist., No. 12cv1666, 2013 WL 5936411, at *13 (W.D. Pa. Nov. 5, 2013) (citing Joint Guidance letter on FERPA and HIPAA), *aff'd,* 589 F. App'x 594 (3d Cir. 2014).
145. *See* 20 U.S.C. § 1232g(a)(4)(B)(iv); *see also* JOINT GUIDANCE, *supra* note 23, at 18.
146. *See* Parents Against Abuse in Schs. v. Williamsport Area Sch. Dist., 594 A.2d 796, 802–03 (Pa. Commw. Ct. 1991) (holding FERPA treatment records exception applies only to adult and postsecondary students and does not prevent parent access to notes of minor children interviews by school psychologist); *see also* Gundlach v. Reinstein, 924 F. Supp. 684, 690 (E.D. Pa. 1996) (holding law student plaintiff has no FERPA right to access his medical records as they are FERPA-excluded treatment records and rejecting FERPA claims related to the school attaching confidential letters from the plaintiff to its answer).
147. *See* 20 U.S.C. § 1232g(a)(4)(B)(iv); *see also JOINT* GUIDANCE, *supra* note 23, at 17–18.
148. *See* JOINT GUIDANCE, *supra* note 23, at 17–18.

consequently trigger a right of access for the student patient.[149] In one case, a campus rape victim suing her college learned that her college had accessed and reviewed her campus health clinic counseling records before she had a right to do so.[150] In that case, the victim commented, "I found out months later that every single meeting I had with a therapist, she took detailed notes on, and the University of Oregon had read these notes before I had even seen them."[151]

FERPA thus limits student patients' right to access their own medical records by denying minor K-12 students a right to access their own student patient records, and by denying adult and college student patients a direct right of access to their treatment records.[152] In contrast, the HIPAA Privacy Rule gives all other patients a right to access all records with the exception of psychotherapy notes, for which a summary may be substituted.[153]

Under the HIPAA Privacy Rule, there is a different approach to parent access for nonstudent patient records.[154] The HIPAA Privacy Rule right of parent access is dependent upon the parent's involvement in their child's health care and is limited to circumstances where the parent serves as the patient's personal representative.[155] Parents of minor patients are normally their personal representatives who also have access rights.[156] However, this is not the case where the minor can legally consent to their own health care.[157] Moreover, when parents or significant others are involved in the health care of an adult patient, information can be

149. *See id.* (stating that when an educational institution shares treatment records with a third-party, the records become subject to FERPA requirements controlling education records); *see* 34 C.F.R. § 99.10(a) (2019) (stating that an eligible student has a right of access to their records).

150. Ornstein, *supra* note 25 (reporting seizure of another victim's records in 2013 resulting in a legal claim settled for $30,000).

151. *Id.*

152. *See supra* notes 134–36, 146–47 and accompanying text.

153. 45 C.F.R. §§ 164.502(a)(2)(i), 164.524 (2019). HIPAA defines psychotherapy notes as notes created by mental health professionals kept separate from other health records. § 164.501. The bases for this exclusion are twofold: i) the notes are created by the therapist for personal use; and ii) symmetry with the special limits on disclosure of these notes because of their sensitive nature. § 164.501 (defining psychotherapy notes); § 164.524; *see* SHARING INFORMATION *supra* note 81. There is also no right of access under HIPAA to records created for legal proceedings. 45 C.F.R. § 164.524(a)(1)(ii).

154. *See infra* note 171 and accompanying text.

155. 45 C.F.R. § 164.502(g)(3)(ii)(C).

156. § 164.502(g)(3).

157. *Id.*

shared after the patient is given notice and an opportunity to agree or object, and fails to object.[158] In contrast, FERPA entitles parents to access full records of minor K-12 students, even concerning health matters that the minor student can legally consent to and get treatment on their own.[159] Parents also have access to matters where minors have a constitutional right to convince a court they are mature enough to make a decision without parent notice or consent.[160]

C. FERPA-Permitted Non-Consensual Disclosures by Schools

Many FERPA provisions permit schools to decide whether to non-consensually disclose student medical information.[161] These non-consensual disclosure provisions do not treat student medical information differently from other student information.[162] Generally, these provisions allow schools to unilaterally decide to share records.[163] Thus, advance notice to the student, nor an opportunity for the student to request zero or limited access, nor oversight by a court or other independent person, is required.[164] A summary of some of the relevant FERPA provisions, as well a brief contrast with HIPAA Privacy Rule provisions that apply to all patient records except for student patient records, follows.[165]

1. Disclosures to parents of adult and college students.

As discussed above, FERPA gives access rights to parents of minor K-12 students.[166] FERPA does not grant access rights to parents of

158. § 164.510(b).
159. *See* 20 U.S.C. § 1232g(a)(4)(B)(iv).
160. *See infra* notes 532–35 and accompanying text.
161. *See* 20 U.S.C. § 1232g(b)(1).
162. *See infra* note 200 and accompanying text. FERPA's enforcing agency recently issued nonbinding guidance suggesting schools treat college student medical information as more private in certain circumstances. FPCO, Dear Colleague Letter, Protecting Student Medical Records (Aug. 24, 2016), https://studentprivacy.ed.gov/resources/dear-colleague-letter-school-officials-institutions-higher-education [https://perma.cc/97TC-3K6G]. More recently, Executive Order 13,891, titled "Promoting the Rule of Law Through Improved Agency Guidance Documents," provides that guidance documents are "non-binding both in law and in practice," and orders federal agencies to review and consider whether to rescind their guidance documents. Exec. Order No. 13,891, 84 Fed. Reg. 55,235, 55,235 (Oct. 15, 2019).
163. *See supra* notes 10–11 and accompanying text.
164. 20 U.S.C. § 1232g(b)(2)(B); 34 C.F.R. §§ 99.31(a)(9), 99.31(a)(9)(ii) (2019) (noting that advance notice is "so that the parent or eligible student may seek protective action[.]").
165. *See infra* Sections II.C.1–.7, II.D.
166. *See supra* notes 130–36 and accompanying text.

adult and college students but does permit schools to choose to non-consensually disclose information about adult students to their parents in some circumstances.[167] If the adult student is a financial dependent, the school is permitted to disclose information without limitation.[168] Schools may thus choose to disclose medical information of financially dependent college students—such as pregnancy test results, use of birth control, or details of counseling sessions—to their parents.[169] FERPA also allows disclosure to parents of adult college students who are not yet twenty-one and have committed a disciplinary violation concerning alcohol or drugs.[170]

In contrast, under the HIPAA Privacy Rule parent access turns on the parent's involvement in health care and can be blocked by adult patients or by minor patients in circumstances in which they can consent to their own health care.[171] Moreover, disclosures are limited to the "minimum necessary" limitation of the HIPAA Privacy Rule.[172]

2. Internal school disclosures to persons with legitimate educational interests.

FERPA allows schools to share student medical records and other records internally with persons who have "legitimate educational interests" and act for the school such as employees and other agents, as well as persons who perform services for a school under a contract.[173] This exception is not limited to disclosure for medical reasons; it permits internal non-consensual disclosure of student patient records for educational reasons.[174] For example, a student was required to undergo counseling after allegedly behaving inappropriately in class.[175] After the student refused to sign a release, the school shared her counseling records with other school officials involved in the behavioral matter.[176] The court found disclosure to

167. *See infra* notes 168–70 and accompanying text.
168. 20 U.S.C. § 1232g(b)(1)(H).
169. 34 C.F.R. § 99.31(a)(8).
170. § 99.31(a)(15)(i).
171. 45 C.F.R. § 164.502(g)(3) (2019).
172. § 164.502(b).
173. 34 C.F.R. § 99.31(a)(1)(i).
174. *Id.; see also id.* § 99.31(a)(1)(ii) (requiring schools to monitor internal access under this provision).
175. *See* Chandler v. Forsyth Tech. Cmty. Coll., No. 15CV337, 2016 WL 4435227, at *1–2 (M.D.N.C. Aug. 19, 2016).
176. *See id.* at *4, *14.

be authorized by FERPA's "legitimate educational interests" provision.[177]

School attorneys (who may be in-house employees, officials, or independent contractors) may access records under this provision,[178] and often do so, for example, to represent the school in education matters such as special education disputes and expulsion hearings.[179] FERPA regulations impose a duty on schools to oversee internal access under this provision,[180] but provide that legitimate educational interests are to be determined by such agency or institution, and also note that the student's own educational interests are not the only legitimate ones.[181] Certainly, schools may determine that effective legal representation of the school district in disputes and other legal matters is part of that school's legitimate educational interests.[182]

A recent case, described in more detail at Part VI, involved school attorney access to student patient information to defend a student lawsuit against the university.[183] A student victim of sexual assault

177. *Id.* at *15 (quoting 34 C.F.R. § 99.31(a)(1)(i)).

178. The enforcing agency's model notices of FERPA rights include attorneys as persons with legitimate educational interests. *See, e.g.*, *Model Notification of Rights Under FERPA for Postsecondary Institutions*, U.S. DEP'T OF EDUC., https://www2.ed.gov/policy/gen/guid/fpco/ferpa/ps-officials.html [https://perma.cc/9H4J-P5MF] (last modified Jan. 2, 2015); *see, e.g.*, Aufox v. Bd. of Educ. Twp. High School Dist. No.113, 588 N.E.2d 316, 319–20 (Ill. App. Ct. 1992) (relying on state law); Washoe Cnty. Sch. Dist., 113 LRP 24807 (Nev. State Educ. Agency May 31, 2013) (stating that in the context of special education dispute, no violation of FERPA or special education law where medical and other records released to school's attorney and psychiatrist, who were both "school officials" and independent contractors with legitimate educational interests connected to providing legal and psychiatric services respectively). Note however that state law may narrow permissible internal disclosures. *See* Herron Charter, 61 IDELR 240 (Ind. State Educ. Agency Mar. 1, 2013) (explaining that state law excludes third-party contractor as school official with legitimate educational interests, hence disclosure to school's attorney who is contractor is not authorized).

179. *See* Washoe Cnty. Sch. Dist., 113 LRP 24807 (Nev. State Educ. Agency May 31, 2013). In these school legal proceedings, only school staff with a legitimate educational interest may attend. *See* Letter from Melody Musgrove, Dir., Off. of Special Educ. Programs, to Judith A. Gran and Catherine Merino Reisman, Reisman Carolla Gran LLP (Nov. 30, 2012) (on file with U.S. Department of Education).

180. Schools "must use reasonable methods to ensure that school officials obtain access to only those education records in which they have legitimate educational interests." 34 C.F.R. § 99.31(a)(1)(ii) (2019).

181. § 99.31(a)(1). FERPA also clarifies that school officials can have legitimate educational interests in disciplinary information about a student. 20 U.S.C. § 1232g(h).

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

183. *See infra* Part VI.

by several student athletes (including one student athlete who had been accepted for transfer after being suspended related to the sexual assault of a student at his prior school), planned to sue her school for gender discrimination under Title IX.[184] To defend itself, the school seized, and allegedly reviewed, the student's patient records from her post-sexual assault counseling at the school's campus health clinic.[185] The school asserted that the student's campus counseling records were the University's property, and the University's legal team involved in defending the claim had the authority to non-consensually access campus counseling records because of the student's threatened claim against the University, presumably creating legitimate educational interests as a basis for the school attorney's access. [186]

In fact, FERPA's internal disclosure for legitimate educational reasons exception would appear to have allowed greater access to student medical records by the school in this case.[187] FERPA's internal access provision would seem to authorize the school to access the campus medical records not only of the victim, but also of the accused students and potential witnesses.[188] For example, FERPA would seem to authorize schools to access treatment records of witnesses, parties, or friends of parties to identify information that might bear on witness or party credibility as part of their legitimate educational interests in providing effective legal services to defend this education law litigation.[189]

In contrast, the analogous internal disclosure provision in the HIPAA Privacy Rule governing nonstudent patient records is limited to disclosure for health care reasons.[190] For example, disclosures to

184. *See infra* notes 318–25 and accompanying text.

185. *See infra* notes 326–31 and accompanying text.

186. *See infra* notes 332–33 and accompanying text.

187. *See supra* notes 173–82 and accompanying text.

188. *See supra* notes 180–82 and accompanying text; *see, e.g.*, Bowen v. Methodist Fremont Health, No. 19CV270, 2020 WL 1904832, at *1–2, *6 (D. Neb. Apr. 16, 2020) ("[The University supervisor] repeatedly demanded that [the University nurse] provide him with confidential student/patient health information regarding [the sexually assaulted] student and other Midland University students.").

189. *See*, *e.g.*, *Bowen*, 2020 WL 1904832, at *6 ("Defendants argue [the University supervisor] had a legitimate educational interest in the records he requested because, under Title IX, [the University] was obligated to take immediate corrective action once put on notice of sexual harassment or sexual violence toward students.").

190. *See generally* 45 C.F.R. §§ 164.512(e), 164.506 (2019) (requiring covered entities to limit disclosure to health care reasons except under certain circumstances, such as where notice is given or there are "satisfactory assurances" that the disclosures will be used for qualifying circumstances).

attorneys are limited to situations involving the patient's health care such as malpractice claims or disputes about payment for health care.[191] Similar to FERPA's treatment records provision, the HIPAA Privacy Rule permits patient upfront consent to external disclosure to others who provide health care to them.[192]

3. School-student litigation.

FERPA's litigation provision[193] is triggered when either the school or student initiates legal action against the other.[194] If the exception has been triggered, the school may disclose "relevant" records to the court.[195] FERPA's enforcing agency reasons that the records are the school's and that an implied waiver is created when students sue schools.[196] As with FERPA's internal disclosure exception, FERPA's

191. § 164.512(e)(1)(ii)(A)–(B), (iv)–(v); *see also Covered Entity*, *supra* note 89 ("Thus, for example, a covered entity that is a defendant in a malpractice action, or a plaintiff in a suit to obtain payment, may use or disclose protected health information for such litigation as part of its health care operations.").

192. 45 C.F.R. § 164.502(a)(1)(i)–(vi).

193. 34 C.F.R. § 99.31(a)(9)(iii) (2019). The exception for school-student litigation does not appear in the statute itself. It is included with the FERPA regulations concerning subpoenas. *Id.*

194. *See id.* Certainly, filing and serving a complaint would satisfy this requirement. *See* FED. R. CIV. P. 3. On the other hand, it seems likely a demand letter or notice of suit against a public school would be characterized as threatening, rather than initiating legal action. *See*, *e.g.*, Cara O'Neill, *How to Write a Formal Demand Letter*, NOLO, https://www.nolo.com/legal-encyclopedia/free-books/small-claims-book/chapter6-4.html [https://perma.cc/ES2W-SZ8K] (last visited Nov. 2, 2020). Moreover, the requirement that the school or student initiate legal action against the other means that only civil suits will qualify. *See* 34 C.F.R. § 99.31(a)(9)(iii).

195. *See*, *e.g.*, Doe v. N. Ky. Univ., No. 16-CV-28, 2016 WL 6237510, at *1–2, *4–5 (E.D. Ky. Oct. 24, 2016). Presumably acting as the custodian of the records, the school would initially determine what records it believed to be relevant to the case. *See id.* at *4–5. The student could contest relevancy with the court as appropriate under the circumstances. *See id.* at *2–4.

196. *See* Family Educational Rights and Privacy, 61 Fed. Reg. 59,292, 59,292–93 (Nov. 21, 1996). As originally promulgated, the exception required the school to provide advance notice to the student consistent with the approach for subpoenas, giving the student an opportunity to object. *Id*. at 59,292. In 2000, the requirement for following the FERPA subpoena advance notice requirement was removed from the regulation. Family Educational Rights and Privacy, 65 Fed. Reg. 41,852, 41,858 (July 6, 2000). The Department of Education noted that a school "should not be required to subpoena *its own records* or seek a judicial order . . . to defend itself" and concluded the advance notice requirement was "not necessary." *Id.* (emphasis added). The Department reasoned that filing the lawsuit put the student-defendant on notice, that the student-defendant should understand education records may be disclosed to the court, and other options such as petitioning the court to seal the records. *Id.* The

litigation exception is not limited to litigation about treatment provided to the student, such as a student malpractice claim or a school claim for student nonpayment for treatment.[197] Most school-student litigation is educational rather than medical in nature,[198] and the litigation exception permits non-consensual school access and disclosure of relevant medical records in the context of educational litigation and other types of lawsuits not directly related to campus health care.[199] Thus, for example, FERPA's enforcing agency has interpreted the litigation provision to allow a school to disclose special education medical records, without advance notice to the student/family, noting that "FERPA does not distinguish between different types of education records, such as . . . health or medical records."[200] And in the context of a sexual harassment lawsuit, a federal court concluded that FERPA's litigation provision limited student expectations of privacy, concluding that students could not reasonably expect privacy where FERPA permitted disclosure.[201]

FERPA's litigation provision does not require sealing or protective orders for disclosed student records.[202] Several courts have refused requests to seal FERPA records disclosed to the court under the litigation provision,[203] including one case denying a request to seal the records of high school athletes accused of rape who sued their school.[204] These courts noted the high standard for sealing records and the "strong presumption in favor of openness" in judicial

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exception for schools suing students now codified at 34 C.F.R. § 99.31(a)(9)(iii)(B) was added. Family Educational Rights and Privacy, 65 Fed. Reg. at 41,853, 41,858. The Department continued to posit an implied waiver theory, as well as claiming that when students sue schools they "understand[] that the [school] must be able to defend itself." *Id*. at 41,858. The Department declined to require advance notice by the school, stating such obligation would be "overly burdensome." *Id.*

197. *See* 34 C.F.R. § 99.31(a)(9)(iii) (allowing disclosure of records that are "relevant" to the legal action).

198. *See* Lelia B. Helms & James D. Jorgensen, *Patterns of Litigation and Higher Education: 2007 in Perspective*, 245 WEST'S EDUC. L. REP. 537, 546–47, 549 (2009) (finding claims related to financial issues were most prevalent in federal cases with student plaintiffs).

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

200. Letter to Anonymous, 111 LRP 64639 (FPCO Apr. 8, 2011).

201. Jennings v. Univ. of N.C., 340 F. Supp. 2d 679, 682 (M.D.N.C. 2004).

202. 34 C.F.R. § 99.31(a)(9)(iii) (2019); *see infra* notes 203–11 and accompanying text.

203. *See, e.g.*, Lee ex rel. Doe v. Sevier Cnty., No. 17-CV-41, 2017 WL 1048378, at *1 (E.D. Tenn. 2017); Osei v. Temple Univ., No. 10-2042, 2015 WL 12914144, at *1 (E.D. Pa. 2015); *Jennings*, 340 F. Supp. 2d at 682, 684 (finding FERPA is some evidence of a compelling interest to justify putting records under seal but is not conclusive, and suggesting disclosure of medical records may be different).

204. *Lee*, 2017 WL 1048378, at * 3.

proceedings, and hence have required showings that the records are of a kind normally protected (mentioning records protected by privilege and names of sexual assault victims as examples), and that disclosure would cause serious harm.[205] Courts may also interpret "relevant" records in school-student litigation broadly.[206] In one case in which a sexually assaulted student sued her college, the court refused to seal FERPA records.[207] The student claimed Title IX retaliation based on the school's statement that if she sued, under FERPA "the University will be permitted by law to rely on *all* records related to this incident in support of its defense."[208] In rejecting this claim, the court reasoned that the school's statement was an "accurate statement of the FERPA regulation," and thus would not be an adverse action as required for Title IX retaliation claims.[209]

As discussed above, the HIPAA Privacy Rule that applies to nonstudent patient records limits access by the health care entity's attorney to litigation over the patient's health care.[210] Also, it establishes significant procedural limits on non-consensual disclosure and use of medical records in legal proceedings, both judicial and administrative.[211]

4. Disclosure to other schools in which the student seeks to enroll or actually enrolls.

With advance notice, which can be satisfied with a blanket statement in the student handbook, schools may release any and all student records to another school in which the student seeks to enroll or actually enrolls.[212] In one case, a student challenged her former school's disclosure of her psychological reports and other FERPA

205. *E.g.*, *id.* at *2 (quoting Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1179 (6th Cir. 1983)).
206. *See supra* note 197 and accompanying text.
207. Doe v. N. Ky. Univ., No. 16-CV-28, 2016 WL 6237510, at *1–2 (E.D. Ky. 2016) (noting that the parties agreed to a protective order and to redact student names and other identifying data, also imposing sanctions for refusing to answer deposition questions on grounds of FERPA protection because FERPA does not create a privilege).
208. *Id.* at *4 (emphasis added).
209. *Id.* at *5. The statement was made in a civil settlement negotiations document, and thus also appeared to be inadmissible. *Id.*
210. *See* 45 C.F.R. §§ 164.512(e), 164.506 (2019); *see Covered Entity*, *supra* note 89.
211. 45 C.F.R. § 164.512(e); *see* Weiss, *supra* note 91, at 262; *see* Miller & Schlatter, *supra* note 91, at 33–37.
212. 34 C.F.R. § 99.31(a)(2) (2019).

records to her transfer school as a tortious invasion of privacy.[213] The school had parental consent to release academic records but not psychological records, and the school had agreed not to release psychological records, yet the entire file was inadvertently mailed to the new school where it was allegedly widely shared with staff and students.[214] The Court of Special Appeals of Maryland upheld a directed verdict for the school, concluding that since release of the records to the transfer school was permitted by FERPA, there was no actionable breach of reasonable privacy expectations.[215] Similarly, if a campus rape victim decided to transfer schools to get a fresh start, FERPA would permit her original school to send along all her student patient records to the new school, even over her objection.[216]

The HIPAA Privacy Rule that applies to all nonstudent patient records has no analogous provision.[217] If a student enrolled in a new school, the HIPAA Privacy Rule would permit the original school to share patient records with persons providing health care to the student at the new school, but the original school could not share student patient records with other persons at the new school.[218]

5. Disclosure in school-determined "emergencies."

FERPA gives schools discretion to internally and externally disclose records as necessary in an emergency.[219] A prior version of the FERPA regulation on emergencies specified that it be "strictly construed."[220] It has since been broadened to give schools more discretion[221] by replacing the strictly construed language with a

213. Klipa v. Bd. of Educ., 460 A.2d 601, 603 (Md. Ct. Spec. App. 1983).

214. *Id.*

215. *Id.* at 608. Actionable tortious invasion of privacy is limited to disclosures where the plaintiff reasonably expects privacy. *See generally* RESTATEMENT (SECOND) OF TORTS § 652A (AM. LAW INST. 1977). FERPA's provision dealing with enrollments in a new school likely means there is no reasonable expectation of privacy as to disclosures to the new school. 34 C.F.R. § 99.31(a)(1)(i)(A).

216. *See Klipa*, 460 A.2d at 608 (stating that the psychological and prior behavioral background of the transferring student is vital information required for planning an appropriate educational program and providing for the emotional needs of the student).

217. *See* 45 C.F.R. § 164.502(a) (2019).

218. *Id.*

219. *See generally* U.S. DEP'T OF EDUC., ADDRESSING EMERGENCIES ON CAMPUS (2011), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/emergency-guidance.pdf [https://perma.cc/NA3P-T7ZQ] (providing guidance on FERPA compliance).

220. 34 C.F.R. § 99.36(c) (2007).

221. The amendment came after analysis of the Virginia Tech school shooting revealed that school employees had not shared concerns about the mental health of the student

standard of an "articulable and significant threat" under the "totality of the circumstances," and further providing that FERPA's enforcing agency will defer to a school's judgment on this standard so long as it is supported by a rational basis.[222]

The change in approach is illustrated by a pair of decisions by FERPA's enforcing agency involving student medical information.[223] Under the original and narrower FERPA emergency provision, a student's chronic, non-urgent medical condition and related safety issues were found to be an insufficient basis for the school to non-consensually share records with the student's doctor.[224] But under FERPA's broadened emergency provision, no violation was found when a school's physical therapist contacted and disclosed information to a student's treating physician who had performed hand surgery, citing FERPA's "health and safety" exception.[225]

The HIPAA Privacy Rule that applies to nonstudent patient records also permits sharing in emergencies, defined more narrowly than the current FERPA definition, and limited to the "minimum [amount] necessary."[226]

6. Disclosures to police.

FERPA does not have a designated provision for non-consensually sharing information with police, but several exclusions and provisions, such as the emergency provision, permit non-consensual

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shooter, including details of his on-campus mental health treatment. *See* VA. TECH REV. PANEL, MASS SHOOTINGS AT VIRGINIA TECH 1 (2007) (noting confusion about FERPA and other information privacy laws and lack of compatibility between FERPA coverage of medical records and other laws governing health records); *id.* at 68 ("The lack of understanding of the laws is probably the most significant problem about information privacy."); *id.* at 69 (recommending amendment of FERPA to permit sharing of student medical records with outside treatment providers).

222. 34 C.F.R. § 99.36(c) (2019); *see generally* Letter to Anonymous, 109 LRP 59140 (FPCO Dec. 17, 2008) (offering an overview of the new FERPA approach on emergencies).

223. *See* Letter to Irvine (Ca.) Sch. Dist., 23 IDELR 1077 (FPCO Feb. 20, 1996); *see also* Letter to Anonymous, 111 LRP 19105 (FPCO Dec. 20, 2010).

224. Letter to Irvine, *supra* note 223.

225. Letter to Anonymous, *supra* note 223 (notably not using the term "emergency").

226. 45 C.F.R. § 164.502(b) (2019). Emergent disclosures are triggered by good faith belief that disclosure is necessary to address a "serious and imminent threat" to the patient or another person, or public health/safety. § 164.512(j). Disclosures must be consistent with any relevant law and with professional ethics, and to persons (perhaps such as law enforcement or family members) reasonably believed to be able to address the threat. *Id.*

sharing with police in some circumstances.[227] Moreover, FERPA excludes records of a school's law enforcement unit created at least in part for law enforcement purposes.[228] This exclusion allows schools discretion to disclose such records to the police or any other persons, such as a student's probation officer, without student consent.[229] Thus, for example, if campus police create records about a sexual assault—such as interviews with the victim, the accused, or witnesses—those records could be shared with the police or others without consent.[230]

The HIPAA Privacy Rule that applies to nonstudent patient records has a provision for non-consensual disclosure to law enforcement.[231] It permits certain disclosures for law enforcement purposes to a law enforcement official in response to a warrant or court order, a civil or criminal subpoena, or an administrative demand.[232] Disclosures to law enforcement may also be permitted under the Privacy Rule's emergency provision.[233]

7. Subpoenas and discovery of student records and related information under FERPA.

FERPA does not provide: (i) a legal privilege for student information; (ii) that records protected by existing legal privileges may not be disclosed; or (iii) protections for records from subpoena.[234] Student records and related information in fact are often subpoenaed, including FERPA "non-records" such as treatment

227. *See infra* notes 229–33 and accompanying text; *see also* 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, 221–22 (2013) (discussing FERPA disclosures and the police).

228. 34 C.F.R. § 99.8 (2019). Records created by a law enforcement unit which do not have a law enforcement purpose, such as campus parking violations, are outside this exclusion. *See* § 99.8(b)(2).

229. *See* Letter to Anonymous, 114 LRP 50799 (FPCO June 12, 2014).

230. *See* 20 U.S.C. § 1232g(a)(4)(B)(iv). Normally, a school law enforcement unit does not include health care providers, and so this provision would not usually permit sharing of student medical records, but presumably a school could include health care providers in its law enforcement unit and share medical records at its discretion. *See* U.S. DEP'T. OF EDUC., *supra* note 219, at 5–6.

231. 45 C.F.R. § 164.512(f)(1)(ii) (2019).

232. § 164.512(f).

233. § 164.512(j).

234. 20 U.S.C. § 1232g(b)(2)(B); 34 C.F.R. § 99.31(a)(9) (2019); *see, e.g.*, Garza v. Scott, 234 F.R.D. 617, 624 (W.D. Tex. 2005)

records.[235] Subpoenas may be for employee testimony concerning student information whether or not recorded, or the production of documents, or both.[236]

FERPA establishes procedural requirements for schools served with subpoenas of student records,[237] most significantly requiring schools to make "reasonable effort[s]" to provide advance notice to the parent/adult student before compliance.[238] Presumably, this requirement exists in order to provide the student an opportunity to ask a court to quash or modify the subpoena.[239] Schools may also oppose subpoenas but are not required to do so.[240] A case involving school disclosure of student medical records, in response to subpoena without providing the required advance notice, demonstrates the lack of recourse for aggrieved students for violation of FERPA's advance notice requirement.[241] The court dismissed FERPA claims and others brought by a student whose medical records were released by a school in response to a subpoena without the prior notice required by FERPA.[242] Moreover, in that case and others, courts have allowed release of subpoenaed student medical records.[243]

FERPA does not set out a substantive standard for courts or schools to use when asked to quash or modify a subpoena of student

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235. *See infra* notes 241–43, 258–62 and accompanying text. Schools may subpoena records of their own students, as Jane Doe's University has promised to do in its new policy. *See infra* Section VIII.D.

236. *See generally* 20 U.S.C. § 1232g(b) (discussing subpoenas and what material is available depending on the type of litigant and litigation).

237. *See, e.g.*, 34 C.F.R. § 99.10(e). While a request for student records (via subpoena, public records request, parent request for access, or otherwise) is pending, the requested records may not be destroyed. *Id.*

238. 20 U.S.C. § 1232g(b)(2)(B); 34 C.F.R. §§ 99.31(a)(9), 99.31(a)(9)(ii) (noting that advance notice is "so that the parent or eligible student may seek protective action"). In a class action case, the court found that individual advance notice was not feasible. Doe v. Ohio, No. 91–CV–0464, 2013 WL 2145594, at *9 (S.D. Ohio May 15, 2013).

239. 34 C.F.R. § 99.31(a)(9)(ii). When a third-party's records are subpoenaed which have been provided by a school pursuant to FERPA, the third-party bears the obligation of providing parental notice before complying. § 99.33(b)(2). These procedural requirements are modified for some law enforcement subpoenas. 20 U.S.C. § 1232g(b)(1)(J), (j).

240. *In re* Subpoena Issued to Smith, 921 N.E.2d 731, 734 (Ohio Ct. Comm. Pl. 2009).

241. *See* Dyess v. La. State Univ. Bd. of Supervisors, No. Civ.A. 05-392, 2005 WL 2060915, at *6 (E.D. La. Aug. 19, 2005).

242. *Id.* at *1, *8.

243. *See generally, e.g.*, Carpenter v. Mass. Inst. Tech., 19 Mass. L. Rptr. 342 (Super. Ct. 2005) (explaining that in a suit by parents of a student killed by a classmate against the University for failure to protect the slain student from stalking by the classmate-killer, the court ordered release of the victim's campus mental health records).

information.[244] Courts typically review the subpoenaed records in camera and weigh the need for the information contained in any relevant subpoenaed records against the intrusion on the student's privacy,[245] including subpoenas of records concerning students accused of sexual assault.[246] Court review of subpoenas involving student medical records has been inconsistent.[247] In one case claiming brain damage from lead paint, the defendants subpoenaed the FERPA records of the plaintiff's mother to support their expert's theory that the plaintiff's learning difficulties were at least partially familial.[248] This court found the mother's school medical records to be "sensitive" and not particularly relevant to the defense theory, and limited access to in-person inspection by the parties with a protective order.[249] A different court found that compliance with the FERPA subpoena process entitled the subpoenaing party to all FERPA records, including medical records with neither in camera review nor any balancing of privacy interests with the need for individual records.[250] This court refused a request for a protective order since the plaintiff had put his mental state at issue by suing, noting "FERPA is not a law which prohibits the disclosure of student records, but merely imposes a finding precondition for nondisclosure."[251]

Courts faced with discovery requests that include both school medical records and non-school medical records may treat them differently.[252] For example, in one case, the plaintiff student sued the police for injuries sustained in an on-campus incident.[253] The defendant sought broad access to the plaintiff's medical records as

244. *See* FED. R. CIV. P. 45(d)(3)(A)(iii) (discussing how a motion to quash civil subpoena may be made if the subpoena "requires disclosure of privileged or other protected matter").

245. *See, e.g.*, Rios v. Read, 73 F.R.D. 589, 599 (E.D.N.Y. 1977).

246. *Cf.* Krakauer v. State, 381 P.3d 524, 529, 535 (Mont. 2016) (discussing a case where a journalist's request for records under the state constitution's "right to know" provision concerning an internal appeal of a student-athlete found responsible for sexual assault was denied; the court remanded the case for the lower court to perform an in camera balancing test).

247. *See infra* notes 248–51 and accompanying text.

248. Bunch v. Artz, 71 Va. Cir. 358, 358–59 (2006).

249. *Id.* at 375.

250. Orefice v. Secondino, No. CV040486287S, 2006 WL 1102714, at *2 (Conn. Super. Ct. Apr. 7, 2006).

251. *Id.* at *1 (quoting E. Conn. State Univ. v. Freedom of Info. Comm'n, 17 Conn. L. Rptr. 588, at *3 (Super. Ct. 1996)).

252. *See infra* notes 253–56 and accompanying text.

253. Avina v. Bohlen, No. 13–C–1433, 2015 WL 1756774, at *1 (E.D. Wis. Apr. 16, 2015).

well as school medical and other records.[254] The court in that case limited access to the medical records.[255] The court did not limit access to the FERPA medical and other records and refused to review them in camera to determine their discoverability on an individualized basis.[256]

While the FERPA subpoena arrangement is certainly preferable to school seizure without a subpoena, court involvement, or advance notice, it is not without concerns as to sensitive student patient records.[257] A civil rights lawsuit by a student claiming quid pro quo sexual harassment by college employees and seeking damages for emotional distress is illustrative.[258] The individual employee-defendants subpoenaed the plaintiff-student's entire campus patient file after the student refused to sign a release.[259] The university-defendant directed the student health center to turn over the entire student patient file, which included gynecological information, before the subpoena date and without telling the student.[260] The defendants apparently did not argue FERPA authorized their actions.[261] The court ordered sanctions against the defendants, but the privacy damage was done.[262] Moreover, FERPA does not require schools to use the subpoena process for their own use of student patient records.[263]

In contrast, and as discussed above in Part II, the HIPAA Privacy Rule that applies to nonstudent patient records establishes significant procedural limits on non-consensual disclosure and use of medical

254. *Id.*
255. *Id.* at *4.
256. *Id.*
257. *See infra* notes 258–65 and accompanying text.
258. Mann v. Univ. of Cincinnati, 824 F. Supp. 1190, 1192 (S.D. Ohio 1993).
259. *Id.* at 1193–94.
260. *Id.* at 1194.
261. *See id.* The three opinions do not mention FERPA, but instead discuss constitutional privacy and physician privilege. Mann v. Univ. of Cincinnati, 152 F.R.D. 119, 127 (S.D. Ohio 1993) (affirming magistrate's order); Mann v. Univ. of Cincinnati, 824 F. Supp. 1190, 1205–06 (S.D. Ohio 1993) (finding that student campus patient records have constitutional privacy and are protected by physician privilege and ordering sanctions for disclosure); *see generally* Mann v. Univ. of Cincinnati, 114 F.3d 1188 (6th Cir. 1997) (unpublished table decision) (overruling pretrial decisions by magistrate and affirmed by the trial court that the student's records were protected by constitutional privacy and noting that there is no federal physician privilege, but unanimously affirming the sanctions against the defendants for bad faith conduct).
262. *Mann*, 152 F.R.D. at 120–21, 123–24, 126–27.
263. 20 U.S.C. § 1232g(b)(1)(A).

records in legal proceedings, both judicial and administrative.[264] Notably, disclosures to school attorneys or courts in legal proceedings which are not about the school's health care provider role would follow Privacy Rule process for legal proceedings, which gives patients an opportunity to object and to assert privilege, allowing for court involvement and supervision, as well as protective orders.[265]

D. The Myth of Student Patient Privacy Under FERPA

Student patient privacy, as currently governed by FERPA, is in no small part a myth.[266] FERPA permits schools to unilaterally access student patient records to defend lawsuits under education laws.[267] All student patient information about minor students and financially dependent adult students may be disclosed to parents.[268] Schools may send any and all student patient information to a new school in which a student seeks to enroll or enrolls.[269] Before complying with a subpoena of student patient information, schools merely need to notify the student.[270] Schools are not required to oppose subpoenas or seek protective orders.[271] Students lack meaningful legal recourse when schools fail to provide even the required advance notice.[272]

The current approach offers grossly inadequate protection of patient privacy for all students, both male and female.[273] While there

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264. 45 C.F.R. § 164.512(e) (2019); *see* Weiss, *supra* note 91, at 255, 257, 261–63; *see* Miller & Schlatter, *supra* note 91, at 33–35.

265. *See* 45 C.F.R. § 164.512(e).

> Where the covered entity is not a party to the proceeding, the covered entity may disclose protected health information for the litigation in response to a court order, subpoena, discovery request, or other lawful process, provided the applicable requirements of 45 C.F.R. § 164.512(e) (GPO) for disclosures for judicial and administrative proceedings are met.

Off. Civ. Rts., *May a Covered Entity Use or Disclose Protected Health Information For Litigation?*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Jan. 7, 2005), https://www.hhs.gov/hipaa/for-professionals/faq/704/may-a-covered-entity-use-protected-health-information-for-litigation/index.html [https://perma.cc/3RKA-MTG8].

266. *See infra* text accompanying notes 267–72.

267. *See supra* notes 193–201 and accompanying text.

268. *See supra* notes 159–60, 166–70 and accompanying text.

269. *See supra* notes 11, 212–16 and accompanying text.

270. *See supra* notes 237–43 and accompanying text.

271. *See supra* notes 202, 234, 240, 244 and accompanying text.

272. *See supra* notes 241–43 and accompanying text.

273. *See* Pryal, *supra* note 4.

is no evidence of discriminatory motive, the approach disproportionately affects female students.[274] This is because at campus health clinics female students: (i) are most of the patients; (ii) commonly receive intimate and sensitive health care; and (iii) often receive this health care as victims of sexual misconduct.[275]

IV. EXTENT OF CAMPUS HEALTH CLINIC CARE OF FEMALE STUDENTS

At the college level, one commentator notes the "well-established trend of females using health services more than males."[276] The data bears this out.[277] Campus health clinics report almost twice as many female campus health clinic patients as male patients.[278] Uploads of student medical records by colleges participating in the College Health Surveillance Network also show significant gender disparity: more than one and one-half times as many female student patients as male student patients.[279]

Similar gender disproportionality for patients may exist at K-12 campus health clinics.[280] One study of K-12 campus health clinics in a state that allows minors to access reproductive services without parent consent found that females were sixty-three percent of campus health clinic patients.[281]

Female students' disproportionate use of campus health clinic services may result from several factors, including females' overall more frequent use of health care and females' overall more frequent self-reporting of existing health conditions.[282] As discussed below,

274. *See supra* notes 12–33 and accompanying text.
275. *See supra* notes 12–33 and accompanying text.
276. James C. Turner & Adrienne Keller, *College Health Surveillance Network: Epidemiology and Health Care Utilization of College Students at US 4-Year Universities,* 63 J. AM. COLL. HEALTH 530, 532–35 (2015) (discussing a study conducted with twenty-three participating universities which generated data concluding female patients utilized care at the highest rate).
277. *Id.*
278. AM. COLL. HEALTH ASS'N, ACHA 2017 SEXUAL HEALTH SERVICES SURVEY 7 (2019), https://www.acha.org/documents/resources/survey_data/Pap_sti/ACHA_CY2017_Sexual_Health_Services_Survey_fullreport.pdf [https://perma.cc/G92J-ZRQZ] (reporting a median of sixty-four percent female visits as compared with thirty-three percent male visits).
279. *See* Turner & Keller, *supra* note 276, at 533 tbl.2.
280. *See* Samira Soleimanpour et al., *The Role of School Health Care Centers in Health Care Access and Client Outcomes*, 100 AM. J. PUB. HEALTH 1597, 1599 (2010).
281. *Id.*
282. *See infra* notes 288–89 and accompanying text.

the gender disparity also likely results in part from reproductive and gynecological care offered by campus health clinics, and female students' greater use of mental health services at campus health clinics.[283] Female students' extensive use of campus health clinic reproductive and mental health care services also means that especially sensitive and intimate patient information of female students is subject to FERPA's weaker regulation.[284]

V. SENSITIVE AND INTIMATE INFORMATION COLLECTED BY CAMPUS HEALTH CLINICS ABOUT THEIR FEMALE STUDENT PATIENTS

Campus health clinic services include significant counseling and therapy, as well as gynecological and reproductive care,[285] which involves uniquely intimate and sensitive information.[286] Female students disproportionately get health care of an especially intimate nature from schools.[287] Female students disproportionately get

283. *See infra* Part V.

284. Viola S. Lordi, *FERPA—The Buckley Amendment: Safeguarding the Rights and Privacy of Parents and Students from Pre-School to Graduate and Professional School*, N.J. LAW., Dec. 2013, at 52.

285. *See* 34 C.F.R. § 106.39 (2019) (reflecting that student gynecological and reproductive care is well established, Title IX regulations clarify that school-provided full coverage health services must include gynecological care).

286. Turner & Keller, *supra* note 276, at 534 tbl.3 (noting mental health care is the sixth most common reason for campus health clinic care but results in the highest number of visits per patient and thus is the fourth most common reason for a campus health clinic visit); *id.* (noting female reproductive care is the eleventh most common reason for care and the eighth most common reason for a visit, while male reproductive care accounts for only about one percent of campus health clinic visits); Allie Grasgreen, *Tracking Student Health*, INSIDE HIGHER ED (May 31, 2013), https://www.insidehighered.com/news/2013/05/31/data-track-student-health-visits-and-diagnoses [https://perma.cc/V6AH-YLCD] (showing birth control is second most common reason for visits to college campus health clinics and menstrual/gynecological care is tenth most common reason); *id.* (noting eighteen percent of visits are for mental health care); Keeton et al., *supra* note 56, at 141 (discussing how in K-12 campus health clinics, reproductive care is one of the most common reasons for visits; eighty-one percent offer pregnancy tests and seventy percent offer contraceptive counseling or care, but most are not permitted to dispense contraceptives, often due to school policy); *id.* at 142 (showing seventy-five percent of K-12 campus health clinics offer mental health care).

287. *See supra* notes 14–16 and accompanying text.

counseling and therapy from campus health clinics at the K-12[288] and college[289] levels.

Some forms of sexually intimate medical care[290] are virtually solely for female student patients.[291] Both male and female students may seek on campus treatment for STDs,[292] creating sexually intimate medical records that FERPA permits schools to non-consensually share; for example, with transfer schools and parents of both minor and financially dependent adult students.[293] However, only biologically female students seek on-campus pregnancy testing.[294] And since current medicine has developed prescription birth control methods such as birth control pills and IUDs only for women, aside from a rare vasectomy,[295] it is only female students who seek on-campus treatment to prevent pregnancy.[296] Finally, recommended annual gynecological exams and related treatment, such as pap smears, are virtually only for females.[297]

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288. *Cf.* Soleimanpour et al., *supra* note 280, at 1597 (observing that a group of K-12 campus health clinics was the most commonly reported provider of counseling for thirty-one percent of respondents, and sixty-three percent of patients were female).
289. Turner & Keller, *supra* note 276, at 533 tbl.2 (noting that female patients receiving counseling roughly double the amount of their male counterparts); GROUP DATA REPORT, *supra* note 21, at 39 (noting twenty-four percent of female college students self-report mental health care at campus health clinic as compared with seventeen percent of male students); *id.* at 59 (showing that eleven percent of female college students and six percent of male college students self-report having a psychiatric condition); *see* Grasgreen, *supra* note 286 (showing far more female than male college campus health clinic patients for anxiety, depression, adjustment reaction, and eating disorders).
290. Juno Obedin-Oliver & Harvey J. Makadon, *Transgender Men and Pregnancy*, 9 OBSTETRIC MED. 4, 5 (2016) (observing that some students identifying as male who were assigned the female gender at birth may seek gynecological or reproductive care).
291. *See infra* text accompanying notes 294–97.
292. *See infra* note 533 and accompanying text.
293. *See supra* notes 11, 159–60, 166–70, 212–16 and accompanying text.
294. *See supra* notes 290 and accompanying text.
295. *See* AM. COLL. HEALTH ASS'N, *supra* note 278, at 22–23.
296. GROUP DATA REPORT, *supra* note 21, at 27–28 (noting that collectively eighty-two percent of sexually active female students report use of a prescription birth control method); Soleimanpour et al., *supra* note 280, at 1598 (observing that more than half of all medical visits to these campus health clinics were for family planning purposes); *id.* at 1597 (noting that among studied group of K-12 campus health clinics, sixty-three percent of respondents reported the campus health clinic as their primary source of family planning).
297. *See generally Pap Smear*, MAYO CLINIC, https://www.mayoclinic.org/tests-procedures/pap-smear/about/pac-20394841 [https://perma.cc/CZ4Y-ZM7P] (last visited Nov. 2,

Campus health clinics thus maintain a disproportionate amount of intimate medical information about their many female student patients.[298] Campus health clinics also maintain an entire category of medical information that is almost exclusively limited to female students about pregnancy status and use of prescription birth control,[299] both of which imply that the female student is sexually active.[300] FERPA does not prohibit schools from non-consensually sharing this intimate medical information, even about adult students, with transfer schools or with parents, if the adult student is a financial dependent.[301]

VI. CAMPUS HEALTH CLINIC MEDICAL INFORMATION ABOUT FEMALE COLLEGE STUDENTS IN THE CONTEXT OF SEXUAL ASSAULT

Victims of sexual assault and harassment are disproportionately female,[302] and the rate of unwanted sexual activity experienced by female college students is shockingly high.[303] Student victims may seek on-campus counseling or other treatment such as gynecological care.[304] Victims may choose an on-campus provider for a variety of reasons.[305] School staff may suggest it as part of Title IX and Clery Act responsibilities to offer support services to campus sexual misconduct victims.[306] Student victims may perceive campus counselors as especially expert and sensitive about campus rape and

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2020) (indicating that a Pap smear is a procedure to test for cervical cancer in women).

298. *See supra* notes 278–79 and accompanying text.

299. AM. COLL. HEALTH ASS'N, *supra* note 278, at 23 (reporting more than 33,000 pregnancy tests at ninety-four reporting campus health clinics in 2017).

300. *See supra* notes 294–97 and accompanying text.

301. *See supra* notes 11, 168–69 and accompanying text.

302. GROUP DATA REPORT, *supra* note 21, at 8 (showing college student self-reports of various types of unwanted sexual activity and gender disparity).

303. DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND MISCONDUCT 15 (2020), https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20 appendices%201-7_(01-16-2020_FINAL).pdf [https://perma.cc/TC6V-9AAK].

304. *See, e.g.*, Tiffany M. Artime & Katherine R. Buchholz, *Treatment for Sexual Assault Survivors at University Counseling Centers*, 30 J. COLL. STUDENT PSYCHOTHERAPY 252, 256–57 (2016) (indicating most university counseling centers provide acute and ongoing services to sexual assault victims).

305. *See infra* notes 306–09 and accompanying text.

306. 34 C.F.R. § 106.44(a) (effective August 14, 2020); 20 U.S.C. § 1092(f)(8)(B)(vi); CLERY HANDBOOK, *supra* note 22, at 8-14.

other issues affecting college students.[307] The convenience of on-campus counseling may be attractive.[308] On-campus counseling may be financially attractive; for example, one college's student health insurance provides for free on-campus counseling sessions, as compared with co-pays of twenty dollars or more for each private counseling session.[309]

In the sexual misconduct context, females are the great bulk of victims getting care from campus health clinics, and commonly receive counseling or other forms of intimate and sensitive care.[310] Victims receive this care while processing mental and often physical trauma, and perhaps while deciding whether to pursue actions against the perpetrator and/or the school.[311] Student sexual misconduct victims who get care from a campus health clinic are receiving care from an entity that has legal obligations to prevent unwanted sexual activity.[312] Student victims who come to believe that their school has failed in these obligations may decide to file an internal or administrative complaint, or a lawsuit against the school under Title IX.[313] Schools also have obligations to allow victims initiate formal

307. Richard A. Wantz & Michael Firmin, *Perceptions of Professional Counselors: Survey of College Student Views*, 1 PRO. COUNS. 71, 74–76 (2011) (indicating the majority of students perceive that professional counselors are adept at helping with issues affecting college students).

308. *See* Matt Gragg et. al., *Counseling Services on the Redlands Campus*, UNIV. OF REDLANDS (June 22, 2020), https://www.redlands.edu/student-affairs/what-to-expect-this-fall/fall-2020-counseling-center-services-changes/ [https://perma.cc/N387-HUUB] (indicating many students chose to remain on the waiting list for on-campus counseling because of the convenience as opposed to off-campus options).

309. *See University Health Services*, UNIV. OF OR., https://health.uoregon.edu/uo-student-insurance [https://perma.cc/NZM4-CMW3] (last visited Nov. 2, 2020) (marketing student health insurance).

310. *See supra* notes 278–79, 302 and accompanying text.

311. *See generally* CONNIE J. KIRKLAND, N. VA. CMTY. COLL. (NOVA) OFF. OF STUDENT MENTAL HEALTH AND BEHAV., PROCESSING TRAUMA AFTER A SEXUAL ASSAULT 1 (2013), https://www.nvcc.edu/support/_files/Processing-Trauma-after-a-Sexual-Assault-2013.pdf [https://perma.cc/U8ML-NSN6] (asserting that besides murder, sexual assault causes the highest level of trauma of all crimes).

312. *Title IX and Sexual Violence in Schools*, ACLU, https://www.aclu.org/title-ix-and-sexual-violence-schools [https://perma.cc/V53D-LXCV] (last visited Nov. 2, 2020) (stating that, under Title IX, all schools receiving federal funding are required to protect students from sexual assault).

313. *See* 34 C.F.R. §§ 106.8, 106.9 (effective Aug. 14, 2020). Section VI.B of this paper analyzes the 2020 amendments to the Title IX regulations, which were released in their final form on May 6, 2020, and took effect on August 14, 2020. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,572–79 (May 19, 2020).

complaints against perpetrators, which the school must investigate, and which results at the college level in a formal disciplinary hearing.[314]

Both schools and accused perpetrators may seek access to records of campus health clinic patients in this context.[315] Schools may seek access to student patient records as part of investigations or school disciplinary hearings, or to defend victim claims and lawsuits against the school.[316] Schools may seek student patient records of victims, accused students, witnesses, or friends of the parties to attempt to discover information bearing on party credibility.[317]

A recent case illustrates the realities of female student patients who are sexual misconduct victims.[318] A college freshman referred to by media and court documents as "Jane Doe" reported her rape by three basketball team members.[319] One of the three accused students was

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Codified regulations are officially published annually in the *Code of Federal Regulations* (C.F.R.), which the government releases in print form before making it available online. *See About the Code of Federal Regulations*, GOVINFO, https://www.govinfo.gov/help/cfr [https://perma.cc/KTD7-ZHA8] (last visited Nov. 2, 2020). On its website, the Government provides a link to the *electronic Code of Federal Regulations* (e-C.F.R.), which is "a regularly updated, unofficial editorial compilation of C.F.R. material and Federal Register amendments." *Id.* At the time of writing, the 2020 Title IX regulations were in effect, but the codified version was not yet officially published in print or online form. *See id.* Due to the publication lag, all references to the new regulations were made pursuant to the e-C.F.R, *see* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (Title IX), 34 C.F.R. § 106 (effective Aug. 14, 2020), 34 e-C.F.R. § 106, https://www.ecfr.gov/cgi-bin/text-idx?SID=30cc33162fe9dc1fc06ee0739fb27ff8&mc=true&tpl=/ecfrbrowse/Title34/34cfr106_main_02.tpl [https://perma.cc/A6EC-237C], as well as to the lengthy Preamble that announced the new regulations, which was published in the Federal Register, *see generally* 85 Fed. Reg. 30,026, 30,026–30,572 [hereinafter Preamble].

314. *See* 34 C.F.R. § 668.46(b)(11)(ii)(C) (2019); *see also* 34 C.F.R. §§ 106.44, 106.45 (effective Aug. 14, 2020).

315. *See infra* notes 403–04 and accompanying text.

316. 34 C.F.R. §§ 106.44(b), 106.45(b)(3)(i) (effective Aug. 14, 2020); *see supra* notes 193–99 and accompanying text.

317. *See supra* notes 188–89 and accompanying text.

318. *See* Richard Read, *Student Who Sued UO, Claiming She Was Gang-Raped by Basketball Players, Settles Suit for $800,000,* OREGONIAN, http://www.oregonlive.com/education/index.ssf/2015/08/student_receives_800000_settle.html [https://perma.cc/A7XK-SDNC] (Jan. 9, 2019). A companion article provides a fuller overview of the Jane Doe case and student medical privacy. Daggett, *supra* note 34, at 474–80. This brief review is adapted from that companion article.

319. EUGENE POLICE DEP'T, INCIDENT/INVESTIGATION REPORT 14-04131 4 (Apr. 28, 2014), http://media.oregonlive.com/ducks_impact/other/14-04131.pdf [https://perma.cc/498E-Z75F]. The redacted copy of the police report indicates that Jane Doe initially contacted her father, who reported the assault to campus police. *Id.* at 4. In response

accepted as a transfer student by the college after being suspended from his original college based on a different student's rape claim.[320] Jane Doe filed a civil lawsuit including Title IX and tort claims, naming both the school and its basketball coach.[321] Jane Doe's lawsuit claimed the coach and school accepted one of the accused players as a transfer student knowing that he had been found responsible for sexual assault by his former school.[322] The lawsuit asserted that the school undertook no monitoring, counseling, notification, or other steps to avoid any further sexual misconduct by the transfer student.[323] The school's answer[324] denied knowledge of the transfer student's history of sexual misconduct.[325]

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to Jane Doe's rape allegations against the Oregon basketball players, the Eugene Police Department released its associated police report on Monday, May 5, 2014. *See* Andrew Greif, *Oregon's Damyean Dotson Is Suspended Following Forcible Rape Investigation That Won't Lead to Criminal Charges*, OREGONIAN (Jan. 10, 2019), https://www.oregonlive.com/ducks/2014/05/damyean_dotson_suspension_foll.html [https://perma.cc/PZ9R-PU94].

320. Tyler Kingkade, *Brandon Austin, Twice Accused of Sexual Assault, Is Recruited by a New College*, HUFF POST (July 28, 2014, 3:44 PM), https://www.huffpost.com/entry/brandon-austin-northwest-florida_n_5627238 [https://perma.cc/2QTM-RXGB] (noting his recruitment by Northwest Florida State College).

321. Complaint at 1, Doe v. Univ. of Or., No. 15-cv-00042 (D. Or. Jan. 8, 2015), https://www.courtlistener.com/recap/gov.uscourts.ord.120035.1.0.pdf [https://perma.cc/3SWG-PS36].

322. *Id.* at 5.

323. *Id*. at 6.

324. Defendants' Amended Answer and Affirmative Defenses at 6–7, 24, Doe v. Univ. of Or., No. 15-cv-00042 (D. Or. Feb. 26, 2015), https://www.courtlistener.com/recap/gov.uscourts.ord.120035.14.0.pdf [https://perma.cc/G4QG-QA6H]. The school's initial response included a counterclaim for attorney's fees asserting that at least some of the claims in Jane Doe's complaint were frivolous, specifically claiming that her lawsuit and related actions:

> [T]hreaten to harm not only Oregon and [its basketball coach] Altman but also all sexual assault survivors in Oregon's campus community. Here, the publication of false allegations about Oregon's handling of a report of an alleged sexual assault creates a very real risk that survivors will wrongly be discouraged from reporting sexual assaults and sexual harassment to Oregon, in direct contravention of the goals of both Title IX and Oregon.

Defendants' Answer, Affirmative Defenses, and Counterclaim at 25–26, *Doe*, No. 15-cv-00042 (D. Or. Feb. 26, 2015) (alteration in original), https://www.courtlistener.com/recap/gov.uscourts.ord.120035.7.0.pdf [https://perma.cc/S9B2-3J8Y]. This counterclaim was not included in the amended answer, but the same language is

After her rape, Jane Doe received counseling from her school's campus health clinic.[326] Jane Doe's complaint asserted that before the lawsuit was filed, and while counseling was ongoing, school attorneys seized Jane Doe's therapy notes and other counseling records from the campus health clinic.[327] In mediation, Jane Doe's attorney had shared some of her counseling records with the school and explained that other counseling records were not shared because they involved family issues which predated the sexual assault.[328] After mediation failed, the school's General Counsel's office requested Jane Doe's complete file from the campus counseling center, and the center's director provided the file.[329] As to this non-consensual disclosure of Jane Doe's medical records, the lawsuit included a state tort law invasion of privacy claim for accessing and presumably reviewing Jane Doe's counseling records.[330] It asserted harm in the form of "stress, anxiety, and emotional distress as a result of [the school's] unauthorized intrusion."[331]

The school's answer asserted Jane Doe's counseling records are the school's own records, and thus were not illegally accessed.[332] The school asserted FERPA permitted access and review by its attorney and asserted that Jane Doe's claim of damages for emotional distress waived any privilege for her counseling records.[333] Jane Doe's lawsuit was settled for $800,000 and a waiver of tuition and other expenses.[334]

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included in an unclean hands defense raised by the University. Defendants' Amended Answer and Affirmative Defenses at 6–7, *Doe*, No. 15-cv-00042.

325. Defendants' Amended Answer and Affirmative Defenses, *supra* note 324, at 2.

326. Complaint, *supra* note 321, at 9.

327. *Id.* at 9–10, 16–17.

328. *Id.* at 10. The Complaint also asserts that these "records contain much detail about Plaintiff's personal life and family that are not related to any issues surrounding [the rape]." *Id.*

329. *Id.*

330. *Id.* at 16–17.

331. *Id.* at 17.

332. Defendants' Amended Answer and Affirmative Defenses, *supra* note 324, at 14–15.

333. *Id*. The college claimed that it was "entitled to review" Jane Doe's medical records and took control of the records but had not yet reviewed them. *Id.*

334. Read, *supra* note 318. The University also agreed as part of the settlement to "pursue a policy change" requiring transfer applicants to both disclose disciplinary history and allow access to their discipline records. Settlement Agreement and Release at 1, Doe v. Univ of Or., No. 15-cv-00042 (D. Or. Aug. 3, 2015), http://media.oregonlive.com/education_impact/other/Doe%20v%20UO%20Settlement%20Agreement%20%28fully-executed%29%20080315_Redacted%5B1%5D.pdf [https://perma.cc/UK7K-TPCK]. The settlement agreement does not reference the college's seizure of Jane Doe's counseling records. Read, *supra* note 318. The University's president issued a

Jane Doe's college gained a significant litigation advantage through FERPA's weak protection of student medical privacy.[335] The college seized and allegedly reviewed all of Jane Doe's campus counseling records, which Jane Doe herself did not have the right to access, immediately after mediation failed.[336] The college did so without her consent, without advance notice to her, without court oversight and approval, and without a protective order.[337] If Jane Doe had chosen off-campus therapy, the HIPAA Privacy Rule would bar non-consensual disclosure of the records to a school or other defendant.[338] The college would have been able to subpoena and admit relevant therapy records.[339] The patient as well as the holder of the records such as the private therapist would then have an opportunity to negotiate access to relevant records or ask the court to quash or modify the subpoena after reviewing the records in camera.[340]

The college's seizure of Jane Doe's records likely exacerbated her trauma.[341] Her records were allegedly accessed by the attorney for the college that Jane Doe claims facilitated her attack by accepting and failing to monitor a transfer student with a history of campus sexual misconduct.[342] Jane Doe's records were allegedly accessed while she was still in counseling and presumably trying to recover

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statement concerning the settlement that he did not believe any University employee acted wrongfully. *Id.* It is unknown whether Jane Doe returned to the University or otherwise continued her education. *See id.*

335. *See* 45 C.F.R. § 99.31(a)(9)(iii) (2019).

336. *See supra* notes 326–30 and accompanying text.

337. *See supra* notes 329–30 and accompanying text. That Jane Doe's lawsuit sought damages for emotional harm does not negate this advantage. *See* Complaint, *supra* note 321, at 17. Patient-therapist communications are privileged and inadmissible in court. Jaffee v. Redmond, 518 U.S. 1, 15 (1996). A civil suit seeking damages for emotional harm waives the therapist privilege only as to relevant records for the claimed emotional harm. *See* M.S. v. City of Fontana, No. 16-2498-JGB (SPx), 2018 WL 6075323, at *3 (C.D. Cal. July 12, 2018).

338. *See* 45 C.F.R. § 164.508(a) (2019).

339. *See* § 164.512(e), (f)(1)(c).

340. *See generally* Finley v. Johnson Oil Co., 199 F.R.D. 301, 303–04 (S.D. Ill. 2001) (utilizing in camera review to determine if records fall within privilege while ruling on motion to quash subpoena, ultimately granting the motion).

341. *See* Ornstein, *supra* note 25; *see also* Charles Ornstein, *When Students Become Patients, Privacy Suffers*, PROPUBLICA (Oct. 23, 2015, 5:00 AM), https://www.propublica.org/article/when-students-become-patients-privacy-suffers/ [https://perma.cc/C7SF-KW6Y].

342. Complaint, *supra* note 321, at 10, 13–14.

from her attack.[343] They were accessed despite her attorney's notice to the college, during mediation, that her counseling records included discussion of private family issues that arose prior to the attack.[344] Jane Doe may have wondered how her college could seize records that in general are protected by a therapist-patient evidentiary privilege, and about the impact of the seizure on their admissibility at trial.[345]

It is easy to infer from these circumstances that the college's access of Jane Doe's counseling records was retraumatizing and interfered with her recovery.[346] Jane Doe had to try to continue her recovery knowing her college had access to her most intimate and private thoughts, and asserted it owned these records and thus might choose to redisclose them, perhaps in disciplinary proceedings against the accused students.[347] Social science research published by faculty at Jane Doe's college shortly before her attack, involving female college students who had experienced unwanted sexual activity, offers insight into the potential new trauma for a student such as Jane Doe.[348] The researchers found that institutional actions both before unwanted sexual activity (such as not taking proactive steps or tolerating an environment where unwanted sexual activity seems likely), and afterward (such as treating the experience as though it is not a big deal, making it difficult to report, covering it up, responding inadequately, or punishment of some sort for reporting), were associated with heightened anxiety, trauma-related sexual symptoms, sexual dysfunction, and dissociation.[349]

Jane Doe's lawsuit does not assert that she filed a formal complaint with her school.[350] It is known that the school offered the accused students a private administrative conference—which apparently Jane Doe was not invited to attend—rather than a disciplinary hearing.[351]

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343. *See id*. at 9–10.
344. *See supra* notes 327–29 and accompanying text.
345. *See supra* note 330 and accompanying text.
346. *See supra* note 331 and accompanying text.
347. *See supra* notes 332–33 and accompanying text.
348. *See* Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. TRAUMATIC STRESS 119, 119 (2013).
349. *See id.*
350. *See* Complaint, *supra* note 321, at 6–8.
351. *Id.* at 8. The University also allegedly offered terms including no expulsion, "no mention of sexual misconduct on their transcripts," and a promise that "no one would receive a physical copy of the final written outcome – including Plaintiff." *Id.* The University allegedly "explained to Plaintiff's counsel, omitting the words 'sexual misconduct' from their transcripts and the guaranteed lack of expulsion would then help the three men transfer to another school." *Id.*

The private administrative conference resulted in a finding that the students were responsible for assaulting Jane Doe.[352] The process for formal complaints and disciplinary hearings for sexual misconduct is governed by two federal statutes: The Clery Act and Title IX.[353] Extensive new Title IX regulations impose many requirements affecting student patient privacy, and student privacy generally.[354]

A. Clery Act

The Clery Act applies to colleges that receive federal student financial aid and is known for its requirement that colleges publicly report campus crimes.[355] In 2013, the Clery Act was amended by the Sexual Violence Elimination Act (SaVE) as part of reauthorization of the Violence Against Women Act (VAWA) to address four specific forms of sexual and other violence at colleges: (i) domestic violence; (ii) dating violence; (iii) sexual assault; and (iv) stalking.[356] Colleges must provide "[w]ritten notification of students and employees about existing counseling, health, mental health, victim advocacy, legal assistance, and other services available for victims both on-campus and in the community."[357] Persons who file complaints must be given written notice of these services and other rights and options.[358] Colleges must offer appropriate interim support and accommodations, including counseling services.[359] The Clery Act requires colleges to offer disciplinary proceedings (defined broadly to

352. Defendants' Amended Answer and Affirmative Defenses, *supra* note 324, at 11–12. The University's answer claimed that the administrative conference option for internal discipline was elected in part to accommodate Jane Doe's concerns about testifying in a hearing. *Id.*

353. Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act of 1990, 20 U.S.C. § 1092(f) (2018); Education Amendments Act of 1972 (Title IX), 20 U.S.C. §§1681–1688 (2018).

354. *See infra* Section VI.B.

355. *See The Tools You Need for Campus Security and Safety Analysis*, U.S. DEP'T OF EDUC., https://ope.ed.gov/campussafety/#/ [https://perma.cc/6J2R-QCJ2] (last visited Nov. 2, 2020).

356. 20 U.S.C. § 1092. Note that as defined in Clery, stalking and domestic violence need not be gender-based.

357. § 1092(f)(8)(B)(vi)*;* CLERY HANDBOOK, *supra* note 22, at 8-14.

358. *See* 20 U.S.C. § 1092(f)(8)(B)(vi); *see also* CLERY HANDBOOK, *supra* note 22, at 8-14 (stating a school's policy must provide specific information about available services and advising schools to connect with local organizations who provide such services). However, "[n]othing in this section shall be construed to require the reporting or disclosure of privileged information." § 1092(f)(10).

359. *See* 20 U.S.C. § 1092(f)(8)(B)(vi); *see also* CLERY HANDBOOK, *supra* note 22, at 8-14 (stating information about services to be shared with victims).

include factfinding, investigation, meetings, and hearings)[360] for these offenses that are "prompt, fair, and impartial."[361]

Some specific aspects of Clery Act "fair" proceedings are explicitly set out, including the right of both parties to access information that is actually used in meetings and hearings.[362] However, reporting or disclosure of "privileged information" is not required.[363] It is unclear if Jane Doe's campus counseling information was shared in the administrative meeting with the accused students;[364] if so, both parties would have a Clery right of access.[365] The result would be the same for any campus health clinic gynecological records for Jane Doe, and for any campus health clinic counseling or other records of the accused students, witnesses, or friends of the parties.[366] While there are no specific requirements about confidentiality of medical information, the enforcing agency's Handbook notes there is no ban on the advisor for a student party acting as a proxy with the student party's consent in order to access some evidence "in the interest of protecting the parties' privacy."[367]

B. Title IX and Its 2020 Regulations

Title IX prohibits gender discrimination in K-12 and higher education schools that receive federal education funds.[368] Regulations have long required schools to offer a grievance process for Title IX complaints that offers "prompt and equitable" resolution.[369] Sexual harassment, including but not limited to sexual assault, is a form of gender discrimination banned by Title IX and

360. *See* 34 C.F.R. § 668.46(k)(3)(iii) (2019).

361. *See* § 668.46(k)(2)(i); *see generally* CLERY HANDBOOK, *supra* note 22, at 8-18. The Clery Handbook specifically requires that the process be "transparent to the accuser and the accused," and provide them "timely and equal access" to "any information that will be used during informal and formal disciplinary meetings and hearings." *Id*.

362. 34 C.F.R. § 668.46(k)(3)(i)(B)(*3*).

363. 20 U.S.C. § 1092(f)(10).

364. *See supra* notes 330–32, 338–39, 351–52 and accompanying text.

365. *See supra* note 362 and accompanying text.

366. *Supra* notes 313–15 and accompanying text.

367. CLERY HANDBOOK, *supra* note 22, at 8-20.

368. Education Amendments Act of 1972 (Title IX), 20 U.S.C. §§1681–1688 (2018).

369. *Compare* former 34 C.F.R. § 106.8(b) (2019) ("A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part."), *with* 34 C.F.R. § 106.8(c) (effective August 14, 2020) ("A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30.").

has been the subject of much litigation and also extensive guidance from the U.S. Department of Education (DOE).[370] However, neither Title IX's statutory text nor regulations specifically addressed sexual harassment and misconduct until promulgation of regulations effective in August 2020.[371] The regulations are the subject of challenges on myriad grounds by both the ACLU and a coalition of state attorneys general.[372]

1. Overview of the 2020 regulations.

The regulations define sexual harassment and set out a detailed process schools must follow in responding to formal complaints of sexual harassment.[373]

a. Underlying basis and approach.

The new Title IX regulations focus on providing due process[374] and fundamental fairness for accused students ("respondents" in the regulations), including "equal" treatment of respondents and victims ("complainants" in the regulations).[375] Treatment of a complainant or respondent may be actionable.[376] Persons involved in investigation, hearings, and other meetings and proceedings must not be biased toward complainants or respondents.[377] Respondents must

370. *See, e.g.,* Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60 (1992); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998); Davis v. Monroe City. Bd. of Educ., 526 U.S. 629 (1999); *see also* Preamble, *supra* note 313, at 30,034–38 (reviewing 1997–2017 DOE guidance, including Dear Colleague Letters (DCLs) and Q&As on sexual harassment).

371. *See* JARED P. COLE & CHRISTINE J. BACK, CONG. RSCH. SERV., R45685, TITLE IX AND SEXUAL HARASSMENT: PRIVATE RIGHTS OF ACTION, ADMINISTRATIVE ENFORCEMENT, AND PROPOSED REGULATIONS 1 (2019).

372. Complaint for Declaratory and Injunctive Relief at 1–2, Know Your IX v. DeVos, No. 20-cv-01224 (D. Md. May 14, 2020), 2020 WL 2513668 (ACLU lawsuit); Pennsylvania v. DeVos, No. 20-cv-01468, 2020 WL 4673413, at *1 (D.D.C. Aug. 12, 2020) (lawsuit by state attorneys general).

373. 34 C.F.R. §§ 106.30, 106.44, 106.45 (effective August 14, 2020).

374. Preamble, *supra* note 313, at 30,030. The procedural requirements apply equally to private schools, against whom students do not have constitutional due process rights, and also go well beyond the procedural protections Congress provided in the Clery Act discussed in Section VI.A of this Article. *Id.* at 30,052.

375. *See id.* at 30,301.

376. 34 C.F.R. § 106.45(a) (effective August 14, 2020) ("A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.").

377. § 106.45(b)(1)(iii) ("[A]ny individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to

be presumed to be innocent.[378] Confidential and free supportive services must be offered to complainants.[379] No disciplinary or punitive consequences may be imposed on respondents prior to a determination of responsibility.[380] Schools can do interim emergency removals of respondents, but only when there is an "immediate threat to the physical health or safety of any student or other individual."[381]

b. Scope of sexual harassment.

The new Title IX regulations limit school liability for sexual harassment.[382] First, while the DOE previously enforced on a know or should have known basis,[383] the new regulations limit administrative enforcement to sexual harassment: (i) at the college level: (a) when someone at the college with authority to take corrective action had actual notice; and (b) was deliberately indifferent;[384] and (ii) at the K-12 level: to (a) knowledge by any school employee; and (b) deliberate indifference.[385] Second, hostile environment sexual harassment is limited to the acts of sexual violence covered by the Clery Act and conduct that is "[u]nwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity."[386]

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facilitate an informal resolution process, [must] not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent."). Training materials "used to train Title IX Coordinators . . . and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints." *Id.*

378. § 106.45(b)(1)(iv) (school grievance process must "[i]nclude a presumption that the respondent is not responsible" until a final decision is made at the end of the grievance process).

379. § 106.30(a) ("The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.").

380. § 106.45(b)(1)(vi).

381. § 106.44(c).

382. *See* Preamble, *supra* note 313, at 30,033–34.

383. *See id.* at 30,034–39 (reviewing DOE guidance, including Dear Colleague Letters (DCLs) and Q&As on sexual harassment providing for administrative enforcement on a know or should have known standard).

384. 34 C.F.R. at § 106.44(a) (effective August 14, 2020); § 106.30 (definition of actual knowledge).

385. § 106.44(a) (requiring schools to respond to sexual harassment when they have actual knowledge; § 106.30(a) (defining "actual knowledge").

386. § 106.30(a)(1)–(3) (defining sexual harassment).

Previously, conduct that limited the ability to benefit from an educational program was also prohibited.[387] The new regulations also exclude sexual harassment that occurs outside of the U.S.[388] as well as most sexual harassment that occurs off campus.[389] Formal Title IX complaints of harassment outside the coverage of the regulations must be dismissed, but this conduct is still subject to discipline under the school's conduct code.[390]

c. Formal complaints.

Normally a formal complaint will be filed by a complainant, who may choose at some point to withdraw it.[391] School Title IX Coordinators may also decide to file or pursue a formal complaint when the complainant does not, unless doing so is clearly unreasonable.[392] In this event, the complainant still has procedural rights—e.g., to access the evidence.[393] Whether or not complainants file formal complaints, they and respondents are not required to participate in the hearing and cannot be retaliated against for this decision.[394] Parents also have the right to file formal complaints on behalf of minor children.[395] The enforcing agency contemplates that

387. Preamble, *supra* note 313, at 30,034 (discussing the 1997 Guidance, highlighting differences between the respective "sexual harassment" definitions, and noting previous guidance that schools take action on the basis of constructive notice, rather than actual knowledge).

388. 34 C.F.R. § 106.8(d) (effective August 14, 2020).

389. *See* § 106.44(a) ("For the purposes of this section . . . 'education program or activity' includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.").

390. § 106.45(b)(3)(i).

391. § 106.45(b)(3)(ii).

392. § 106.30(a) (defining a "formal complaint" including complaints signed by Title IX Coordinator); Preamble, *supra* note 313, at 30,213 (stating the Title IX Coordinator may choose to open grievance process if the "Coordinator signs a formal complaint, after having considered the complainant's wishes and evaluated whether an investigation is not clearly unreasonable in light of the specific circumstances.").

393. 34 C.F.R. § 106.45(b)(5)(vi) (effective August 14, 2020) ("[B]oth parties [are provided] an equal opportunity to . . . review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint . . . .") (alteration in original).

394. § 106.71(a) (explicitly forbidding intimidating and interfering with another's Title IX protected rights because he or she "made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part.").

395. § 106.6(g).

if FERPA does not provide access rights to the parent (perhaps for example, in the event of a minor college student who has thereby become the holder of FERPA rights but is not a legal adult), the parent who has filed the formal complaint has the right to access the evidence and investigative report.[396] If a parent files the formal complaint, the minor child is still the complainant and has access to the evidence and investigative report.[397] Whoever files the complaint, once it is filed the parties must be given notice of the allegations with sufficient detail and advance notice to prepare for an initial interview.[398]

Schools may dismiss complaints against students or employees who are no longer enrolled or employed.[399] Formal complaints may not be made after the student is no longer enrolled at the school.[400] The parties must get written notice of any dismissal[401] and may appeal it.[402]

d. Investigation of formal complaints and party access to evidence.

Schools must investigate formal complaints of sexual harassment and are responsible for gathering evidence.[403] Both parties and their advisors have ten days to respond and a right of access to all evidence the school gathers in its investigation that is: (i) "directly related to the allegations" in the complaint; (ii) whether or not it will be relied on in the hearing; and (iii) not limited to evidence that the investigator thinks is relevant.[404] The preamble to the regulations indicates that schools may require parties and advisors to sign non-disclosure agreements about the evidence,[405] and that the investigator

396. *See* Preamble, *supra* note 313, at 30,453–54 ("However, in circumstances in which FERPA would not accord a party the opportunity to inspect and review such evidence, these final regulations do so and provide a parent or guardian who has a legal right to act on behalf of a party with the same opportunity.").

397. *See id.* at 30,453 ("[I]f the parent . . . has a legal right to act on behalf of a student, then the parent . . . must be allowed to file the formal complaint . . . although the student would be the 'complainant' under the proposed regulation.").

398. 34 C.F.R. § 106.45(b)(2)(i)(B) (effective August 14, 2020).

399. § 106.45(b)(3)(ii).

400. § 106.30(a) (definition of formal complaint).

401. § 106.45(b)(3)(iii).

402. § 106.45(b)(8).

403. §§ 106.44(b), 106.45(b)(3)(i).

404. § 106.45(b)(5)(vi).

405. Preamble, *supra* note 313, at 30,304.

> Recipients may require parties and advisors to refrain from disseminating the evidence (for instance, by requiring parties and advisors to sign a non-disclosure agreement that permits review

may redact information, including FERPA-protected personally identifiable information[406] that is not directly related to the allegations, as well as barred information such as privileged information.[407] The preamble also indicates that information unlawfully obtained or unlawfully created need not be shared.[408] However, at this stage, the investigator cannot redact evidence because it is irrelevant under the regulations' rape shield.[409] Parties and advisors also have a right of access to the investigation report the school then prepares—which is limited to relevant information[410]—

> and use of the evidence only for purposes of the Title IX grievance process), thus providing recipients with discretion as to how to provide evidence to the parties that directly relates to the allegations raised in the formal complaint.

Id.

406. *Id.* at 30,429 ("Consistent with FERPA, these final regulations do not prohibit a recipient from redacting . . . information . . . not directly related to the allegations raised in a formal complaint. . . . [H]owever, [a recipient] should . . . not redact more information than is necessary . . . .").
407. *Id.* at 30,304.

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

Id.

408. *Id.* at 30,427 ("If a recipient knows that a recording is unlawfully created under State law, then the recipient should not share a copy of such unlawful recording. The Department is not requiring a recipient to disseminate any evidence that was illegally or unlawfully obtained.").
409. *See id.* at 30,352 ("The Department disagrees that the evidence exchange provision in [34 C.F.R.] § 106.45(b)(5)(vi) negates the rape shield protections in §106.45(b)(6)(i)–(ii). As noted by the Supreme Court, rape shield protections generally are designed to protect complainants from harassing, irrelevant inquiries into sexual behavior *at trial*.").
410. *See* 34 C.F.R. § 106.45(b)(5)(vii) (effective Aug. 14, 2020); Preamble, *supra* note 313, at 30,303. Hence, schools may redact nonrelevant information. *Id.* at 30,304 ("Similarly, a recipient may permit or require the investigator to redact from the investigative report information that is not relevant, which is contained in documents or evidence that is relevant, because 34 C.F.R. § 106.45(b)(5)(vii) requires the investigative report to summarize only 'relevant evidence.'"). However, parties may assert at the hearing that redacted or other evidence is in fact relevant. *Id.*

and thus excludes evidence protected by the rape shield, and another ten days to respond.[411] Schools must maintain records of investigations and hearings for seven years.[412]

e. Hearings.

Unless the parties agree to an informal resolution,[413] colleges must conduct a private live evidentiary hearing conducted by a different person than the investigator.[414] The parties may not be limited in presenting and gathering evidence.[415] The parties have the right to use an attorney or other advisor of their choosing, and the school must provide a free advisor to parties who have not chosen a private advisor, including parties who do not appear.[416] The burden of proof in hearings with student respondents cannot be less than that for faculty respondents.[417]

At the hearing there is a right to cross examine witnesses, including attempts to impeach credibility, performed by the advisors to the parties.[418] Statements of persons who do not submit to cross examination must be excluded.[419] This means that either party can

411. *See* 34 C.F.R. § 106.45(b)(5)(vii) (effective Aug. 14, 2020).
412. § 106.45(b)(10)(i).
413. *See* § 106.45(b)(9).
414. § 106.45(b)(6)(i) (live hearing requirement for postsecondary schools); § 106.45(b)(7) (adjudicator cannot be investigator).
415. § 106.45(b)(5)(iii) (recipients must not restrict parties' ability "to gather and present relevant evidence"); Preamble, *supra* note 313, at 30,432 (stating the regulations "do not allow a Title IX Coordinator to restrict a party's ability to provide evidence" and "[i]f a IX Coordinator restricts a party from providing evidence, then the Title IX Coordinator would be violating [the] . . . regulations.").
416. 34 C.F.R. § 106.45(b)(5)(iv) (effective Aug. 14, 2020) (party right to retain advisor of party's choosing); § 106.45(b)(6)(i) (school appointment of advisor when party has not retained an advisor).
417. § 106.45(b)(1)(vii).
418. *See* § 106.45(b)(6)(i).
419. *Id.*

> [I]f a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker cannot draw any inference about the determination regarding responsibility based solely on a party's or witness's absence from the hearing or refusal to answer cross-examination or other questions.

Preamble, *supra* note 313, at 30,322. It is unclear how far this ban on un-cross examined evidence goes. *See The New Title IX Rule: Excluding Reliance on a*

prevent their statements from being part of the evidence at the hearing by refusing to submit to cross examination, as can witnesses.[420] Some witnesses may be unavailable to testify at the hearing and their statements would also be excluded.[421] The adjudicator must issue a detailed written decision which the school must share with the parties.[422] K-12 schools can either provide hearings or less formal meetings.[423]

f. Retaliation.

The new regulations include a broad retaliation ban that is not limited to the school formal complaint process.[424] As to the formal complaint process, the regulation requires schools to keep the names of parties and witnesses confidential except as permitted by FERPA, as required by law, or as required for Title IX investigations and grievance hearings and other procedures.[425]

Party's 'Statements' When the Sexual Harassment at Issue Consists of Verbal Conduct, U.S. DEP'T OF EDUC.: OFF. CIV. RTS. (May 22, 2020), https://www2.ed.gov/about/offices/list/ocr/blog/20200522.html [https://perma.cc/8L58-BDTD]. The Preamble indicates that admission of police reports and medical reports require cross examination of the maker(s) at the hearing. Preamble, *supra* note 313, at 30,349. If an academic transcript is offered, for example, to show the impact of harassment on the complainant, the faculty whose grades are included in the transcript might be required to testify. *See id.*

420. *See* Aaron Bayer, et al., *Conducting a Live Hearing with Cross-Examination Under the New Title IX Rules*, NAT'L L. REV. (May 26, 2020), https://www.natlawreview.com/article/conducting-live-hearing-cross-examination-under-new-title-ix-rules [https://perma.cc/6DHJ-G9AZ].

421. *See* Nicole Bedera, et al., *A New Title IX Rule Essentially Allows Accused Sexual Assailants to Hide Evidence Against Them*, TIME (Aug. 14, 2020, 12:58 PM), https://time.com/5879262/devos-title-ix-rule/ [https://perma.cc/26XQ-R5GM].

422. 34 C.F.R. § 106.45(b)(7) (effective August 14, 2020).

423. § 106.45(b)(6)(ii).

424. *See* § 106.71.

425. § 106.71(a).

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

2. 2020 Title IX regulatory provisions concerning student medical privacy in the Title IX formal complaint process.

The new regulations include three new provisions related to student medical privacy when schools process sexual harassment complaints.[426]

a. Ban on non-consensual access and use of student treatment records.

In the Title IX formal complaint process, schools may not access or use student treatment records without voluntary written consent:

> *Investigation of a formal complaint*. When investigating a formal complaint and throughout the grievance process . . .
>
> > (i) . . . the recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under this section (if a party is not an "eligible student," . . . then the recipient must obtain the voluntary, written consent of a "parent" . . . .)".[427]

This provision was not in the proposed regulations.[428] It marks the first instance of enhanced statutory or regulatory privacy protection of student medical records as compared to student records generally.[429] Notably, the provision is not limited to records of on-

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Id.

426. § 106.45(b)(5)(i)–(iii).

427. § 106.45(b)(5)(i).

428. *Compare* Preamble, *supra* note 313, at 30,430, *with* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,478 (proposed Nov. 29, 2018).

429. See *supra* notes 161–62 and accompanying text; Preamble, *supra* note 313, at 30,303 ("[A] recipient will not access, consider, disclose, or otherwise use some of the most sensitive documents about a party without the party's . . . voluntary, written consent, regardless of whether the recipient already has possession of such treatment records, even if the records are relevant.").

campus party treatment generally, nor to treatment in school health clinics specifically, but appears to cover records of all treatment, by private off-campus providers, on-campus providers in school health clinics, and on-campus providers outside of a school health clinic (e.g., a K-12 school nurse or counselor).[430] The preamble also suggests schools must comply with state and federal laws concerning treatment records.[431]

Unfortunately, in other respects, the scope of the new provision is quite narrow.[432] It applies only to the formal complaint process where the school is the investigator and adjudicator.[433] It does not apply to litigation such as Jane Doe's where the school is the defendant.[434] It does not apply to other less formal activities under Title IX, such as when a school learns some information concerning possible sexual harassment and initiates an investigation without a formal complaint, or to the "individualized safety and risk analysis" that schools may employ to determine that a student presents an "immediate threat to the physical health or safety of any student or other individual" and justify emergency removal.[435] Also, the new provision is limited to the treatment records of the parties.[436] It does not forbid school non-consensual access to treatment records of pattern or other witnesses, or friends of the parties, for example to identify credibility evidence of the parties or witnesses, or to establish a pattern of sexual harassment by the respondent.[437] Even

430. 34 C.F.R. § 106.45(b)(5)(i) (effective August 14, 2020).

431. Preamble, *supra* note 313, at 30,434 ("Medical records may be subject to other Federal and State laws that govern recipients, and recipients should comply with those laws."). However, the regulations themselves state that "[t]o the extent of a conflict between State or local law and title IX as implemented by 34 C.F.R. §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law." 34 C.F.R. § 106.6(h) (effective August 14, 2020).

432. *See infra* notes 433–38 and accompanying text.

433. The provision applies "[w]hen investigating a formal complaint and throughout the grievance process . . .". 34 C.F.R. § 106.45(b)(5)(i) (effective August 14, 2020). *See also* Preamble, *supra* note 313, at 30,071 (alteration in original) ("[T]he grievance process in § 106.45 appl[ies] only to allegations of Title IX sexual harassment . . . .").

434. *See supra* notes 318–34 and accompanying text.

435. *See* 34 C.F.R. § 106.44(c) (effective August 14, 2020).

436. In pertinent part the new provision provides "the recipient cannot access, consider, disclose, or otherwise use a party's records." § 106.45(b)(5)(i). *See also* Preamble, *supra* note 313, at 30,304.

437. The new regulations require an opportunity to cross examine witnesses, including attacking credibility. 34 C.F.R. § 106.45(b)(6)(i) (effective August 14, 2020) ("At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other

within the context of a formal complaint and grievance procedure, the provision would not apply to Jane Doe's initial assault because it occurred off-campus in a private apartment.[438]

Where the new provision does apply, for example if Jane Doe had filed a formal complaint, her school could not access or use her student patient records without her consent.[439] Although Jane Doe's school had chosen to give Jane Doe her student patient records, in other cases, the student patient may have to decide whether to release treatment records the student patient has not seen and does not have a right under FERPA to see.[440] Further, when a party consents to release of on-campus or off-campus treatment records, they become evidence that normally will be shared with both parties.[441] Moreover, in the case of minor students not yet in college, it is the parent rather than the student who consents to share treatment records.[442] Hence, a minor student patient at a K-12 school health clinic where state law allows the minor to consent to that treatment does not control release of her patient records in a Title IX grievance process, and her parents may access them if the parent decides to share them.[443]

b. Privileged information.

The Title IX regulations go beyond pre-existing Clery Act language stating that no reporting or disclosure of privileged

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party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.").

438. § 106.44(a) ("For the purposes of this section . . . 'education program or activity' includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution."); Preamble, supra note 313, at 30,196 ("Title IX does not . . . regulate sex discrimination occurring *anywhere* but only . . . sex discrimination in education programs or activities."). The complaint asserts that there was a subsequent assault in a school-owned off-campus apartment. Complaint, *supra* note 321, at 4.

439. *See* 34 C.F.R. § 106.45(b)(5)(i) (effective August 14, 2020).

440. *See* 20 U.S.C. § 1232g(a)(4)(B)(iv); JOINT GUIDANCE, *supra* note 23, at 5.

441. Preamble, *supra* note 313, at 30,434. Shared records not already in the school's possession may also become FERPA records that the school may disclose as FERPA permits. *Id.* However, the new provision limits consent to the grievance process. 34 C.F.R. § 106.45(b)(5)(i). Finally, even consented to medical records will not be admissible if the makers of them do not submit to cross examination. *See supra* note 419.

442. *See* 34 C.F.R. § 106.6(g) (effective August 14, 2020).

443. *See* Preamble, *supra* note 313, at 30,434 ("If a party does not want the other party to receive any of the party's medical records, then the party (*or the party's parent*, if applicable) is not required to provide such medical records . . . .") (emphasis added).

information is required by colleges.[444] The new Title IX regulations apply to K-12 schools, as well as colleges that do not receive federal financial aid, and apply to sexual harassment which includes but is not limited to the four Clery Act offenses.[445] Perhaps most significantly, the Title IX regulations go beyond the Clery Act provision by affirmatively forbidding use of privileged information in Title IX grievance proceedings/meetings.[446] Also, while the Clery Act provision does not mention waiver of privilege, the Title IX regulations provide that a school grievance hearing or other process can include privileged information, if privilege is waived.[447]

Neither Clery nor Title IX provisions specify whether state or federal privilege governs.[448] Complaints would be made under federal statutes, and notably there is a federal therapist privilege but not a federal physician privilege.[449] The preamble notes the possibility of respondents asserting the Fifth Amendment privilege against self-incrimination, in which case the respondent's statements would be inadmissible and no inference from failure to testify could be drawn.[450] Also, privileges generally are limited to "confidential" communications.[451] School health clinic records are subject to

444. 34 C.F.R. § 106.45(b)(1)(x) (effective August 14, 2020).

445. § 106.30(a)(1)–(3), (b); Preamble, *supra* note 313, at 30,124–25 ("The third prong of the § 106.30 definition of sexual harassment includes 'sexual assault' as used in the Clery Act, 20 U.S.C. § 1092(f)(6)(A)(v) . . . .").

446. 34 C.F.R. § 106.45(b)(1)(x) (effective August 14, 2020).

447. *Id.* (stating that schools may "[n]ot require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.").

448. *See* 20 U.S.C. § 1092(f)(8)(B)(v), (f)(10); *see* 34 C.F.R. § 106.6(h) (effective August 14, 2020).

449. Preamble, *supra* note 313, at 30,277 (implying that doctor-patient privilege is protected).

450. *Id.* at 30,352 ("[W]e have revised [34 C.F.R.] § 106.45(b)(6)(i) to direct a decision-maker . . . not to draw any inference about the determination regarding responsibility based on the party's absence or refusal to be cross-examined (or refusal to answer other questions, such as those posed by the decision-maker). This modification provides protection to respondents exercising Fifth Amendment rights against self-incrimination (though it applies equally to protect complainants who choose not to appear or testify).").

451. *Id.* at 30,304 ("With regard to the sharing of confidential information, a recipient may . . . redact information that is not directly related to the allegations (or that is otherwise barred . . . , such as information protected by a legally recognized privilege . . .) contained within . . . other evidence that are directly related to the allegations . . . ."); CHRISTOPHER MUELLER & LAIRD KIRKPATICK, FEDERAL EVIDENCE § 5:18 (5th ed. 2012) (discussing limitation of attorney-client privilege to confidential

FERPA, not HIPAA, and thus have limited confidentiality, and FERPA does not itself create a privilege, so school health clinic records may be outside of therapist and physician privileges.[452]

Under this new provision, if Jane Doe filed a formal complaint with her school, and if her student patient records were protected by a therapist or other legal privilege, her school could not include them as evidence in the investigation report, and they would not be evidence in the hearing.[453]

c. Rape shield for complainant sexual history.

The new Title IX regulations create a rape shield[454] in grievance hearings and meetings for complainants, modeled on the criminal trials section of the federal evidence rule.[455] This provision renders most student treatment records or other evidence concerning the complainant's sexual history irrelevant, even if there is written and voluntary consent to sharing treatment records.[456] For example, even if a student complainant had shared details of sexual history in counseling and consented to school access, which were then shared with the respondent, the records likely would not be relevant and admissible in the grievance hearing or other process.[457] Notably, this

communications); *id.* § 5:40 (discussing same limitation for marital communications privilege); *id.* § 5:43 (discussing same limitation for therapist privilege).

452. *See supra* Section VII.B; *see* Doe v. N. Ky. Univ., No. 2:16-CV-28 (WOB-JGW), 2016 WL 6237510, at *1, *3–4 (E.D. Ky. Oct. 24, 2016) (imposing sanctions for refusing to answer deposition question on grounds of FERPA protection because FERPA does not create a privilege).

453. *See* 34 C.F.R. § 106.45(b)(1)(x) (effective August 14, 2020).

454. § 106.45(b)(6)(i) (regarding grievance hearings in higher education) ("Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent."); § 106.45(b)(6)(ii) (regarding grievance adjudication procedures in K-12 schools).

455. FED. R. EVID. 412. The federal rule also creates an exception for evidence which is constitutionally required, such as prior false allegations of sexual assault by the victim, or a motive to label consensual sexual contact with the defendant as rape for example to preserve the victim's marriage or other relationship. FED. R. EVID. 412(b).

456. *See* Preamble, *supra* note 313, at 30,054 (stating that questions and evidence about a complainant's sexual history are irrelevant unless one of the two limited exceptions under 34 C.F.R. § 106.45(b)(6) apply).

457. *See id.*

provision is limited to complainants.[458] It does not apply to respondents, and thus does not bar evidence of the respondent's sexual history and character, including sexual assault or harassment of other persons by the respondent.[459] Federal rules of evidence expressly make some sexual misconduct pattern behavior of defendants admissible in many sexual misconduct civil and criminal trials.[460] The rape shield is not included in the voluntary informal resolution process.[461]

In formal complaint hearings, and apparently whether or not there is a dispute or objection, the adjudicator must determine the relevance of each question and offer reasoning for determinations that any questions are not relevant.[462] For example, student treatment records may be determined not relevant because the student did not provide consent, because they are privileged, and/or because they are excluded by the rape shield.[463]

3. New 2020 regulation limiting applicability to Title IX.

A new regulation states essentially that Title IX regulations and statute take precedence over FERPA requirements.[464] The preamble limits this to situations where FERPA directly conflicts with Title

458. *Id.* at 30,103 ("Section 106.45(b)(6)(i)–(ii) protects complainants (but not respondents) from questions or evidence about the complainant's prior sexual behavior or sexual predisposition, mirroring rape shield protections applied in Federal courts.").

459. *See id.* at 30,352 ("[Q]uestions and evidence about a *respondent's* . . . prior sexual behavior are not subject to any special consideration but rather must be judged like any other question or evidence as relevant or irrelevant . . . .").

460. FED. R. EVID. 413 (admitting evidence of a defendant's prior sexual assault in criminal cases); FED. R. EVID. 414 (admitting evidence of a defendant's prior child molestation in criminal cases); FED. R. EVID. 415 (admitting evidence of a defendant's prior sexual assault or child molestation in civil cases).

461. *See* 34 C.F.R. § 106.45(b)(9) (effective Aug. 14, 2020).

462. § 106.45(b)(6)(i) ("Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.").

463. Preamble, *supra* note 313, at 30,294 ("[Section] 106.45 deems certain evidence . . . not relevant . . . to use in a grievance process: Information protected by a legally recognized privilege; evidence about a complainant's prior sexual history; any party's medical, psychological, and similar records unless the party has given voluntary, written consent . . . .") (footnotes omitted).

464. 34 C.F.R. § 106.6(e) (effective August 14, 2020) ("The obligation to comply with this part is not obviated or alleviated by the FERPA statute . . . or FERPA regulations . . . .").

IX.[465] As discussed above, the 2020 Title IX regulations provide the parties and their advisors with the right to access all of the evidence the school gathers, which in some cases may include student patient records or other medical information, that is "directly related to the allegations in a formal complaint"[466] as well as the investigative report,[467] which likely includes FERPA records.[468] The agency asserts in the preamble that this information is "directly related" to both parties and hence is a FERPA record of each party to which each party has a FERPA right of access.[469] In fact, the preamble suggests the parties would have a FERPA right of access even without the new regulations.[470]

Notably, if the evidence is each party's FERPA records, with a right of access under FERPA, then FERPA's limit on redisclosure of records[471] shared with third parties does not apply and the parties are free to share the evidence with others.[472] The regulations in fact explicitly prohibit gag orders on the "allegations under

465. Preamble, *supra* note 313, at 30,424 (referring to "rare and unusual circumstances" of conflict).

466. 34 C.F.R. § 106.45(b)(5)(vi) (effective August 14, 2020) (discussing evidence "directly related to the allegations"); Preamble, *supra* note 313, at 30,434 ("The Department also acknowledges that recipients have discretion to determine what constitutes evidence directly related to the allegations in a formal complaint. The purpose of the provision in § 106.45(b)(5)(vi) is to give parties an opportunity to inspect, review, and respond to evidence that may be used to support or challenge allegations made in a formal complaint prior to the investigator's completion of the investigative report. The recipient certainly cannot exclude any evidence that the investigator intends to use in the investigative report."); *cf.* 34 C.F.R. § 668.46(k)(3)(i)(B)(3) (2019) (Clery Act requirement to provide access to evidence used at the hearing).

467. 34 C.F.R. § 106.45(b)(5)(vii) (effective August 14, 2020) (access to full investigative report).

468. *See* § 106.45(b)(5)(vi)–(vii); *see also* Preamble, *supra* note 313, at 30,422 (addressing new revisions that allow recipients to provide hard or electronic copies of the evidence and investigative report to the other party, as it relates to potential FERPA noncompliance).

469. Preamble, *supra* note 313, at 30,423–26.

470. *Id.* at 30,432 ("Even if these final regulations did not exist, parties who are students would have a right to inspect and review records directly related to the allegations in a formal complaint under FERPA, 20 U.S.C. 1232g(a)(1)(A)–(B), and its implementing regulations, 34 CFR 99.10 through 99.12, because these records would directly relate to the parties in the complaint.").

471. 20 U.S.C. § 1232g(b)(4)(B).

472. *See* Preamble, *supra* note 313, at 30,422 (acknowledging "the inapplicability of the general limitations in FERPA [34 C.F.R. § 99.33(c)] on the redisclosure of personally identifiable information contained in education records that the Clery Act and its implementing regulations require to be disclosed").

investigation."[473] The preamble interprets this ban to be limited to situations where a formal complaint has been filed and an investigation has begun, and suggests that non-disclosure agreements and confidentiality orders can be appropriate outside of this context.[474] Moreover, the ban on gag orders does not extend to discussions of evidence or the investigative report,[475] and according to the agency does not permit disclosures or statements that are defamatory, invasive of privacy, or retaliatory (such as witness tampering).[476] The preamble indicates schools may, but do not have to, require non-disclosure agreements.[477] It also suggests some disclosures may be actionable retaliation.[478]

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473. 34 C.F.R. § 106.45(b)(5)(iii) (effective August 14, 2020).
474. Preamble, *supra* note 313, at 30,297, 30,432 ("Recipients also may specify that the parties are not permitted to photograph the evidence or disseminate the evidence to the public. Recipients thus have discretion to determine what measures are reasonably appropriate to allow the parties to respond to and use the evidence at a hearing, while preventing the evidence from being used in an impermissible manner as long as such measures apply equally to both parties under § 106.45(b). Such measures may be used to address sensitive materials such as photographs with nudity.").
475. *Id.* at 30,295–96 ("The Department further notes that § 106.45(b)(5)(iii) is not unlimited in scope; by its terms, this provision stops a recipient from restricting parties' ability to discuss 'the allegations under investigation.' This provision does not, therefore, apply to discussion of information that does not consist of 'the allegations under investigation' (for example, evidence related to the allegations that has been collected and exchanged between the parties and their advisors during the investigation under §106.45(b)(5)(vi), or the investigative report summarizing relevant evidence sent to the parties and their advisors under § 106.45(b)(5)(vii)).").
476. *Id.* at 30,281, 30,296 (clarifying there is no right to discuss "allegations in a manner that exposes the party to liability for defamation or related privacy torts, or in a manner that constitutes unlawful retaliation").
477. *See id.* at 30,304 ("Recipients may require parties and advisors to refrain from disseminating the evidence (for instance, by requiring parties and advisors to sign a non-disclosure agreement that permits review and use of the evidence only for purposes of the Title IX grievance process) . . . ."). Any requirement of non-disclosure agreements would need to apply to both parties. 34 C.F.R. § 106.45(b) (effective August 14, 2020) ("Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in §106.30, must apply equally to both parties."). Where advisors or parties are school employees, FERPA would bar redisclosure. Preamble, *supra* note 313, at 30,422–23 ("The Department does not interpret Title IX as either requiring recipients to, or prohibiting recipients from, using a non-disclosure agreement, as long as such non-disclosure agreement does not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence under § 106.45(b)(5)(iii). Any non-disclosure agreement, however, must comply with all applicable laws.").
478. Preamble, *supra* note 313, at 30,438.

4. Overall impact of the new regulations on student patient privacy.

The 2020 Title IX regulations include incremental but nonetheless significant new protections of student patient privacy within the formal complaint process, creating a rape shield for complainant patient records and other information concerning sexual history, prohibiting the use of privileged information, and most significantly, requiring a party's voluntary written consent in order for a school to access the party's treatment records for investigations and hearings.[479] The narrow scope of the treatment records ban is troubling.[480] It is limited to treatment records of only the parties and only within the specific context of Title IX formal complaint investigations, grievance hearings, and meetings, and does not extend to litigation such as Jane Doe's lawsuit against her school.[481]

The 2020 regulations also create indirect incentives for schools to minimize student patient privacy.[482] The burden of proof in many schools will be clear and convincing evidence, and schools likely will seek all possible evidence to meet this high standard.[483] Schools have the responsibility of gathering the evidence and protecting due process rights of respondents, and can be liable under Title IX for

479. *See supra* Section VI.B.2.

480. *See* 34 C.F.R. § 106.44(a) (effective August 14, 2020) (impliedly stating that Title IX regulations only apply to sexual harassment, and the subsequent formal grievance processes that follow, that occur "in an education program or activity of the recipient against a person in the United States."); *see also* Susan D. Friedfel & Crystal L. Tyler, *Department of Education Amended Title IX Regulations*, JACKSON LEWIS (June 11, 2020), https://www.jacksonlewis.com/publication/department-education-amended-title-ix-regulations [https://perma.cc/RCP7-LPS8] (stating pursuant to new revisions, if an occurrence does not meet the statutory definition for "sexual harassment," does not take place within an "education program or activity," or does not take place in the United States, then the institution must dismiss the Title IX complaint).

481. *See generally* 34 C.F.R. § 106.45(b)(5)(i) (effective August 14, 2020) (providing protections limiting the recipient's use of the evidence absent the party's voluntary waiver of the protections).

482. *See id.*; *see also* Preamble, *supra* note 313, at 30,290 ("The final category of discretionary dismissals addresses situations where specific circumstances prevent a recipient from meeting the recipient's burden to collect evidence sufficient to reach a determination regarding responsibility . . . .").

483. *See* 34 C.F.R. § 106.45(b)(5)(i) (effective August 14, 2020) ("[T]he burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest[s] on the recipient and not on the parties . . . ."); Lily Mae Lazarus, *A Look Inside the New Title IX*, SANTA BARBARA INDEP. (July 20, 2020, 4:00 PM), https://www.independent.com/2020/07/20/a-look-inside-the-new-title-ix/ [https://perma.cc/M6VW-NKZV]. While the university is responsible for gathering evidence and meeting its burden of proof, the heightened standard of clear and convincing evidence, which many schools must or will choose to adopt, will ultimately be felt by complainants and potentially cause victims to experience additional trauma. *Id.*

bias toward complainants or respondents, as well as for their treatment of complainants and respondents, which encourages zealous collection of evidence as well.[484] The narrowed definition of actionable sexual harassment also means that schools must/may dismiss some complaints.[485] It will sometimes not be initially clear to schools whether alleged conduct is actionable, for example, whether it was sufficiently severe, pervasive, and objectively offensive to deprive the complainant of equal access to the school's educational program.[486] In these cases, schools may initially proceed with a formal complaint, collect the evidence, and then later dismiss it.[487]

Finally, in other respects—most notably, the ban on some gag orders,[488] and party access to all evidence and the investigation report with no limits on redisclosure unless the school decides to require a non-disclosure agreement[489]—the new regulations lessen student patient and other privacy protections for students who are most in need of it.[490] And when the Title IX Coordinator files the formal complaint, student complainants lose decisional autonomy and associated privacy, since the respondent still has access to the evidence.[491] These losses of privacy and decisional autonomy, combined with the newly narrowed standard for sexual harassment and school liability for it, may deter students and their advocates

484. *See* 34 C.F.R. § 106.45(b)(1)(i)–(iii), (b)(5) (effective August 14, 2020).

485. *See* Tyler Kingkade, *Betsy DeVos' New Title IX Rules Will Shake Up How K-12 Schools Handle Sexual Harassment*, NBC NEWS (May 6, 2020, 8:50 PM), https://www.nbcnews.com/news/education/betsy-devos-new-title-ix-rules-will-shake-how-k-n1201616 [https://perma.cc/J8PJ-N8DW] (discussing the geographical and definitional limitations for the new approach of the regulations to actionable sexual harassment); *see supra* Section VI.B.1.b.

486. 34 C.F.R. § 106.30(a)(2) (effective August 14, 2020); *see* Kingkade, *supra* note 485.

487. *See* Friedfel & Tyler, *supra* note 480 (stating institutions may dismiss complaints when prevented or unable to gather sufficient evidence to determine responsibility); see also note 482 *supra* and accompanying text.

488. *See supra* note 473 and accompanying text.

489. *See* Preamble, *supra* note 313, at 30,422–23 (discussing potential redisclosure issues involving shared access to evidence, stating that the regulations are not interpreted "as either requiring recipients to, or prohibiting recipients from, using a non-disclosure agreement[.]").

490. *See* Tara Murtha, *The Trump/DeVos Title IX Rules Go in Effect Today*, WOMEN'S L. PROJECT (Aug. 14, 2020), https://www.womenslawproject.org/2020/08/14/the-trump-devos-title-ix-rules-go-in-effect-today/ [https://perma.cc/SZ5U-CH8U].

491. *See* Preamble, *supra* note 313, at 30,305 (stating belief that full access will allow the parties to make corrections, prepare responses, and provide context prior to a final determination).

from filing Title IX complaints.[492] Moreover, it may be difficult for schools to explain to student parties in Title IX disputes why they do not have privacy vis-à-vis the other party, while students in disputes about other misconduct such as fighting maintain privacy rights.[493]

VII. CONSEQUENCES OF THE REALITY OF FEMALE STUDENT PATIENT PRIVACY

The reality is that female students disproportionately get health care governed by FERPA from campus health clinics, very often for intimate and sensitive matters, and not uncommonly as victims of sexual misconduct.[494] This reality has several consequences that disproportionately fall on female student patients.[495] Female student patients have lessened availability of tort privacy claims when their patient information is disclosed by schools, lessened availability of tort claims to address related trauma from such disclosures, narrowed evidentiary privileges protecting their patient information, and added burdens on decisional autonomy concerning reproductive and other health care vis-à-vis their parents.[496] Knowledge of the limited privacy protection offered by FERPA and consequences may deter female students from seeking needed care at a campus health clinic.[497]

A. Lessened Availability of Tort Claims for Disclosure of Patient Information and Related Trauma

Female student patients at campus health clinics likely have reduced availability of tort claims for disclosure of their patient information than do patients generally.[498] Tort claims under a variety of state common law theories such as tortious invasion of privacy,[499]

492. Olivia Tran, *How New Title IX Policies May Deter Reports of Sexual Misconduct, Cause Legal Battles*, DAILY BRUIN (June 10, 2020, 6:51 PM), https://dailybruin.com/2020/06/10/how-new-title-ix-policies-may-deter-reports-of-sexual-misconduct-cause-legal-battles [https://perma.cc/RHN7-SZUG].

493. *See supra* notes 403–12 and accompanying text; JOINT GUIDANCE, *supra* note 23, at 3–4 (stating pursuant to FERPA, institutions may not disclose an eligible student's education records or personally identifiable information therein without the student's written consent).

494. *See supra* Part IV; *see also supra* notes 302–03 and accompanying text.

495. *See infra* Sections VII.A–.D.

496. *See infra* Sections VII.A–C.

497. *See infra* Section VII.D.

498. *See infra* notes 499–516 and accompanying text.

499. Klipa v. Bd. of Educ., 460 A.2d 601, 608 (Md. Ct. Spec. App. 1983) (holding that the legal disclosure of student's psychological records was not actionable because there was no invasion of reasonable privacy expectations).

intentional or negligent infliction of emotional distress,[500] or unauthorized disclosure of confidential information may be available in some instances.[501] For example, one court found potential liability when a physician disclosed a former patient's identity to a daughter she had given up for adoption.[502] Courts have looked to external health care laws including the HIPAA Privacy Rule[503] and state health care laws[504] to define what medical information is "confidential" in the context of these claims.[505] Hence, school disclosure of student medical records that violate FERPA or other external law may be actionable.[506] For example, in one case seemingly resulting from very poor judgment by a school and its employees, teachers asked school officials for an actual student psychological evaluation for use in connection with an assignment to prepare a psychological evaluation of the protagonist in the novel *The*

500. In a pre-FERPA case, a court found school disclosure of confidential student information could be "outrageous" conduct actionable as intentional or negligent infliction of emotional distress. Blair v. Union Free Sch. Dist., 324 N.Y.S.2d 222, 228 (Dist. Ct. Suffolk Cnty. 1971) (noting the special and confidential, albeit nonfiduciary relationship between school and student). The opinion does not provide details, other than the claim that the family gave confidential information to the school and police which was leaked to the general public. *Id.*

501. COLLEEN SANSON, CAUSE OF ACTION AGAINST PHYSICIAN OR OTHER HEALTH CARE PRACTITIONER FOR WRONGFUL DISCLOSURE OF CONFIDENTIAL PATIENT INFORMATION § 1 (36 Causes of Action Ser. 2d No. 299, 2008); Alan Vickery, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426, 1426–34 (1982); *see generally* Judy Zelin, Annotation, *Physician's Tort Liability for Unauthorized Disclosure of Confidential Information About Patients*, 48 A.L.R. 4th 668 §§ 1–2[a] (1986).

502. Humphers v. First Interstate Bank, 696 P.2d 527, 527–28, 536 (Or. 1985); *see also* Pence v. Aspen Educ. Grp., No. 05-6199-HO, 2006 WL 3345192, at *3 (D. Or. Nov. 16, 2006) (denying summary judgment in case of disclosure of material in alleged counseling session with unlicensed counselor at private facility to police).

503. *See, e.g.*, *Pence*, 2006 WL 3345192, at *3 (disclosure of counseling information by group home to police; claims are available for disclosure of statutorily protected information; court must determine whether group home is covered by HIPAA and whether HIPAA protects the information); *see also* Bigelow v. Sherlock, No. Civ. A. 04-2785, 2005 WL 283359, at *1 (E.D. La. Feb. 4, 2005) (looking to HIPAA to determine if disclosed information is confidential). *But see* Franklin Collection Serv. v. Kyle, 955 So.2d 284, 291–93 (Miss. 2007) (parameters of confidentiality under federal HIPAA statute are not relevant to determining what is confidential in state law claims).

504. *See, e.g.*, Givens v. Mullikin, 75 S.W.3d 383, 397, 405, 410 (Tenn. 2002); *see* SANSON, *supra* note 501, § 6.

505. *See, e.g.*, *Pence*, 2006 WL 3345192, at *3.

506. *See infra* notes 507–09 and accompanying text.

Catcher in the Rye.[507] The teachers were provided with a poorly redacted copy of the plaintiff student's actual psychiatric evaluation, which they shared with students.[508] A federal court held this disclosure to be a violation of constitutional privacy as well as negligence per se for violation of the Individuals with Disabilities Education Act, FERPA, and HIPAA.[509] Commentators also suggest that actionable tort claims for disclosure would be limited to information commonly understood to be confidential in the context of the relationship.[510]

Correspondingly, school access to and disclosure of student medical information as permitted by FERPA's cheesecloth protection of student patient records[511] may not be actionable in tort.[512] Female campus health clinic patients such as Jane Doe may have difficulty proving their schools tortiously disclosed "confidential" patient records if the disclosure was permitted by FERPA (for example to the school attorney, to a transfer school, or to parents if Jane Doe were a financial dependent).[513] Similarly, if Jane Doe brought a claim for infliction of emotional distress, she likely could prove the required severe emotional distress, but would have difficulty proving that the school's disclosure of her campus counseling records, to the extent authorized by FERPA, was "extreme and outrageous" (as required for the claim of intentional infliction of emotional

507. L.S. v. Mt. Olive Bd. of Educ., 765 F. Supp. 2d 648, 662, 666 (D.N.J. 2011).

508. *Id.*

509. *Id.* at 662, 667.

510. SANSON, *supra* note 501, § 4 (discussing relevance of a HIPAA violation to prove information disclosed was "confidential"); *see, e.g.*, Vickery, *supra* note 501, at 1461 ("[D]etermination of whether a duty of confidence exists turns on whether there is a definite pattern of confidentiality with respect to relationships of that kind, not on the particular facts of the particular case. If no such pattern exists, the plaintiff will have to rely on a legal theory other than breach of confidence, or go remediless."); *see also id.* (explaining the types of relationships and communication that would prompt a duty of confidentiality if proposed rule was enacted). This is not to say that Jane Doe did not have a reasonable expectation of privacy in her records vis-à-vis the University. Complaint, *supra* note 321, at 10. Therapy patients generally expect privacy in their therapy records, and there is no evidence that Jane Doe was informed at the outset of therapy that FERPA and its laxer confidentiality protections governed. Complaint, *supra* note 321, at 10; *see* Vickery, *supra* note 501, at 1426.

511. Alternatively, however, courts may look to reasonable expectations of patient confidentiality to define "confidential" records. *See* SANSON, *supra* note 501, § 10 (discussing instances where patient confidentiality is presumed due to relationship between physician and party claiming breach of duty).

512. *See infra* notes 513–16 and accompanying text.

513. *See supra* notes 11, 159–60, 166–70, 193–201, 212–16 and accompanying text.

distress)[514] or negligent (as required for a negligent infliction of emotional distress claim).[515] Hence, the intrusion on the privacy of a student such as Jane Doe and her resulting emotional distress may go unredressed.[516]

B. Narrowed Evidentiary Privileges

New Title IX regulations establishing a rape shield and banning disclosure of privileged information provide some protection for female students in Title IX formal complaint school proceedings.[517] Outside of this context, however, female student patients at campus health clinics likely have narrower privilege protection as compared with nonstudent female patients.[518] For example, the Supreme Court has created a federal therapist privilege that makes covered "confidential" communications inadmissible,[519] recognizing the important mental health and other societal interests served by psychotherapy[520] and the need for confidentiality for therapy to be effective.[521] Many states have physician privileges.[522] Similar to the limitation of invasion of privacy tort claims to information in which the plaintiff reasonably expects privacy, as discussed above,[523] these privileges are limited to "confidential" communications.[524] For example, in Jane Doe's case, the applicable state therapist privilege

514. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOTIONAL HARM § 46 cmt.d (AM. LAW INST. 2012).
515. S*ee id.* § 47.
516. *See supra* notes 511–15 and accompanying text.
517. *See supra* Section VI.B.2.c.
518. *See infra* notes 519–27 and accompanying text.
519. Jaffee v. Redmond, 518 U.S. 1, 15 (1996).
520. *Id.* at 11.
521. *Id.* at 10 ("Effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears.").
522. *See* Yedishtra Naidoo & J. Richard Ciccone, *The Reporting of Child Abuse Argued as an Exception to Physician–Patient Privilege in Criminal Proceedings*, 44 J. AM. ACAD. PSYCHIATRY L. 270, 271 (2016), http://jaapl.org/content/jaapl/44/2/270.full.pdf [https://perma.cc/5V8J-WDRK]. In federal court, there is no doctor-patient privilege to protect communications for physical health treatment, but many states recognize such a privilege for trials in their courts. *See* MUELLER & KIRKPATICK *supra* note 451, § 5:42 (discussing federal courts' reluctance to recognize physician-patient privilege).
523. *See supra* notes 511–15 and accompanying text.
524. *See*, *e.g.*, *Jaffee*, 518 U.S. at 12, 15 (creating therapist privilege for confidential communications between therapists and patients).

protected "confidential" information, a term left undefined.[525] While not referencing HIPAA specifically, Oregon's highest court held that the parameters of "confidential" medical information in disclosure claims must be determined by an external legal source.[526] For student patient information, the contours of "confidential" may be delineated by FERPA, and hence student patient records may not be covered by applicable therapist or physician privileges.[527]

Similarly, when a medical condition is put at issue in litigation—e.g., seeking damages for physical injury or mental distress—there is an implied waiver of privilege.[528] Generally, the waiver's scope is not a blanket one, but rather is limited to medical information relevant to or discoverable in the lawsuit, which would be sorted out by the court in the event of a dispute.[529] However, and as discussed above, FERPA's school-student litigation exception has been interpreted to allow schools to unilaterally and broadly access and disclose student medical and other information the school has deemed relevant.[530] Thus, Jane Doe and other female student patients at campus health clinics who end up in litigation with their schools—whether the litigation is related to the campus health care or is educational such as Jane Doe's Title IX lawsuit—do not have the same opportunities as other patients to limit the scope of the waiver, or to have a court review records before disclosure to the opposing party, as do other patients.[531]

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525. Defendants' Amended Answer and Affirmative Defenses, *supra* note 324, at 14–15. The patient has:

> [A] privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purposes of diagnosis or treatment of the patient's mental or emotional condition among the patient, the patient's psychotherapist or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

Or. Rev. Stat. Ann. § 40.230(2) (West 2020).

526. Humphers v. First Interstate Bank, 696 P.2d 527, 534–35 (Or. 1985).
527. *See supra* Part III.
528. *See, e.g.*, State *ex rel.* Dean v. Cunningham, 182 S.W.3d 561, 567 (Mo. 2006).
529. *See, e.g.*, *id.*
530. *See supra* Section III.C.3.
531. *See supra* notes 206–11 and accompanying text; *see supra* Section II.C.

C. Likely Burdens on Decisional Autonomy

In general, parental consent is required for the medical care of minors.[532] However, state laws may allow older minors to consent on their own to certain outpatient treatment in areas such as substance abuse, mental health care, and sexual/reproductive health care, without informing parents.[533] Similarly, minors have some constitutional rights surrounding reproductive decisions.[534] For example, minors wishing to terminate a pregnancy without parental notice or consent must have the option of convincing a judge they are mature enough to make this decision without parental consent or knowledge.[535] Minors also have the right to access contraceptives.[536]

Current regulation of student patient privacy at campus health clinics does not explicitly limit female decisional autonomy in these areas, but that seems to be the likely result.[537] Minor female students seeking help at a campus health clinic for addiction, mental health issues, or sexual/reproduction issues—such as pregnancy tests, pregnancy counseling, or birth control which they can themselves consent to under state law[538]—have no guarantee that the school will not share information with parents, or internally within the school, a new transfer school, or otherwise.[539] Even adult students seeking these kinds of care at campus health clinics may have their information disclosed to their parents if the adult student is a

532. *See generally* RESTATEMENT OF THE LAW - CHILDREN AND THE LAW § 2.30 (AM. L. INST., TENTATIVE DRAFT NO. 1, 2018).

533. For example, in Washington, minors aged thirteen and over can consent to their own outpatient treatment for mental health issues, WASH. REV. CODE § 71.34.530 (2019), for outpatient STD treatment at age fourteen and over, WASH. REV. CODE § 70.24.110 (2020), and for birth control at any age, § 9.02.100(1). A summary of each state's approach can be found at *An Overview of Consent to Reproductive Health Services by Young People*, GUTTMACHER INST. (Aug. 1, 2020), https://www.guttmacher.org/state-policy/explore/overview-minors-consent-law# [https://perma.cc/4C2M-EFD5].

534. *See infra* notes 535–36 and accompanying text.

535. *See generally* CHEMERINSKY, *supra* note 18, at 912 ("The Supreme Court has held that a state may require parental notice and/or consent for an unmarried minor's abortion, but only if it creates an alternative procedure where a minor can obtain an abortion by going before a judge who can approve the abortion by finding that it would be in the minor's best interest or by concluding that the minor is mature enough to decide for herself.").

536. Carey v. Population Serv. Int'l, 431 U.S. 678, 694 (1977); *see* CHEMERINSKY, *supra* note 18, § 10.3.2, at 884–85.

537. *See supra* notes 12–20 and accompanying text.

538. *See supra* note 533 and accompanying text.

539. *See supra* Sections III.B, III.C.1–.2, .4.

financial dependent of the parents, or within the school for "legitimate educational reasons," or with a transfer school.[540] It is easy to imagine scenarios where a parent or other's reaction to this knowledge will impact decisions.[541] For example, parental knowledge that a minor or adult child is pregnant may result in the continuation of an unwanted pregnancy.[542]

D. Potential Deterrent Effect on Seeking Health Care

A recent survey of campus health clinics reports widespread student patient concerns about confidentiality surrounding sexual health services.[543] For example, roughly two-thirds of reporting campus health clinics agreed or strongly agreed that students "regularly voiced concerns" about their parents finding out about STD testing or treatment.[544] A national student self-report survey noted more than sixty percent of college campus health clinic student patients are on their parent's health insurance.[545]

It is unclear whether student patients at campus health clinics are aware of the many specific limitations on the privacy of their patient information as to their parents, their schools, and others.[546] Campus health clinic providers are governed by professional ethics standards that require transparency with patients about limits on confidentiality.[547] It would seem that even some knowledge of the privacy limits would give pause to prospective female student patients at campus health clinics.[548] Female patients seeking mental health care, or gynecological and reproductive care, and the mostly female patients seeking care as victims of sexual misconduct, would seem to have special cause for concern.[549] If these or other students who have some knowledge of privacy limitations choose not to seek campus health care, and for financial, convenience, or other reasons

540. *See supra* notes 167–68 and accompanying text; *see supra* Sections III.C.1–.2, .4.
541. *See* Theodore Joyce et al., *Changes in Abortions and Births and the Texas Parental Notification Law*, 354 NEW ENG. J. MED. 1031, 1036–37 (2006).
542. *Id.*
543. *See* AM. COLL. HEALTH ASS'N, *supra* note 278, at 5.
544. *Id.* at 19.
545. GROUP DATA REPORT, *supra* note 21, at 58 (noting no significant gender disparity on this issue regarding question sixty-two).
546. *See supra* Sections III.C and VI.B.1.d.
547. *See, e.g.*, *Ethical Principles of Psychologists and Code of Conduct*, AM. PSYCH. ASS'N § 4.02 (Jan. 1, 2017), https://www.apa.org/ethics/code/ [https://perma.cc/ZKF3-YERG].
548. *See supra* Parts III and VI.
549. *See supra* Part V.

do not get alternate off-campus care, important health care needs go unmet.[550]

VIII. POSSIBLE SOLUTIONS AND WORKAROUNDS

A. Amend FERPA

A companion article proposes to amend FERPA to make student patient records at campus health clinics subject to the HIPAA Privacy Rule in all circumstances.[551] That Article also suggests importing the HIPAA Privacy Rule's "minimum necessary" standard into FERPA to govern external disclosure of other student medical records such as school nurse records, special education records, and disability documentation.[552] Finally, the companion article advocates elimination of FERPA's treatment records exclusion so that adult and college students have the right to access their own medical records.[553]

B. Advocate for Interpretation of FERPA and Amendment of Title IX Concerning Party Access to Evidence

The potential collective impact of the new regulations and preamble—(i) stating that the FERPA statute is subordinate to Title IX regulations;[554] (ii) providing that parties have a right to access all evidence even including sexual history evidence protected by the new rape shield;[555] (iii) interpreting FERPA that evidence gathered by a school in response to a Title IX formal complaint is the FERPA record of both parties; and (iv) the corresponding lack of limitation on redisclosure of accessed evidence by the parties—is to broadly limit privacy of student parties and student witnesses who are involved in a Title IX formal complaint.[556] In fact, the law should provide that Title IX formal complaints shall be processed consistent with FERPA, including the parties' access to the evidence, and banning redisclosure of the evidence by the parties and their advisors.[557] Consistent with the Clery Act and fairness,[558] Title IX

550. *See supra* Section VII.D.
551. *See* Daggett, *supra* note 34, at 248–52.
552. *See id.* at 255.
553. *See id.* at 219–20.
554. 34 C.F.R. §106.6(e) (effective Aug. 14, 2020).
555. § 106.45(b)(3)(ii).
556. *See supra* notes 488–90 and accompanying text.
557. *See supra* notes 554–56 and accompanying text; *see generally* 20 U.S.C. § 1232g.
558. 34 C.F.R. § 668.46(k)(3)(i)(B)(3) (2019).

regulations should limit party access to actual evidence at Title IX hearings.

C. Enact State Laws that Protect Student Patient Privacy

Some state health care statutes track the HIPAA Privacy Rule by excluding FERPA education records and treatment records as PHI.[559] For example, the Oregon statute for "Protected Health Information"[560] in effect for Jane Doe's case took this approach.[561]

State laws may go further than FERPA to protect student medical privacy.[562] For example, Washington has adopted the Uniform Health Care Information Act, which contains no exclusion for FERPA/student medical records,[563] and would thus greatly limit disclosures of student medical records.[564] Non-consensual disclosure is permitted to a person "who requires health care information . . . to provide . . . legal . . . services to . . . the health care provider,"[565] and thus would not permit non-consensual disclosure to university attorneys unless the matter concerned the student's health care, such as a malpractice claim or a payment dispute.[566] Health care information can be subpoenaed or requested in discovery, but the health care provider and patient must be given advance notice and the opportunity to seek a protective order.[567] If the required advance notice is not provided, the health care provider may not release the

559. *See infra* notes 560–561 and accompanying text.

560. OR. REV. STAT. ANN. § 192.553 (West 2011).

561. § 192.556(11)(a)–(b). Subsequent to Jane Doe's case, Oregon amended its statute to extend confidentiality to college student campus treatment records. § 192.551(1) (West, Westlaw through 2020 Legisl. Sess.).

562. *See, e.g.*, *infra* notes 563–64 and accompanying text. Some states also have mini-FERPA laws, most of which track FERPA and thus do not enhance protection of student medical records. *See* Susan P. Stuart, *A Local Distinction: State Education Privacy Laws for Public Schoolchildren*, 108 W. VA. L. REV. 361, 377–87 (2005). For an overview of state mini-FERPA laws, *see generally id.*

563. WASH. REV. CODE ANN. §§ 70.02.005–.905 (West 2020).

564. *See id.* Written authorization is generally required prior to disclosure and the exceptions do not include one for litigation. §§ 70.02.020, .030. Patients may sue civilly for violations, and if successful, are eligible for damages and attorney's fees. § 70.02.170. Obtaining records under false pretenses is a misdemeanor. § 70.02.330. A separate Washington statute requires health care providers to give a written description of services at the outset of treatment. § 7.70.060. Counselors and psychologists are explicitly required to disclose the boundaries of confidentiality at the outset of treatment. § 18.19.060 (counselors); § 18.83.115 (psychologists).

565. § 70.02.050(1)(b).

566. § 70.02.050.

567. § 70.02.060(1).

records.[568] Mental health treatment records are subject to even more robust protection, in many cases requiring a court order for disclosure.[569]

D. Enact School Policies that Protect Student Patient Privacy

Schools can go beyond FERPA and other legal requirements to protect the privacy of student patients.[570] A school policy could not alter FERPA access rights held by adult and college students and parents of minor K-12 students.[571] However, schools could enact policies that limit non-consensual disclosures beyond FERPA's provisions.[572] For example, schools can enact policies that provide that the school will treat disclosure of student patient information in its campus health clinic consistent with the HIPAA Privacy Rule and will limit external disclosures of other student medical information to the "minimum necessary."[573] Schools can enact policies providing that the school will not non-consensually share student patient or other medical information with schools in which a student patient enrolls or seeks to enroll.[574] Schools can enact policies limiting non-consensual disclosure of student patient information to parents to circumstances where the HIPAA Privacy Rule would allow sharing with parents and not permit disclosure merely because the student is a financial dependent.[575] Schools can enact policies giving student patients the right to access their own treatment records.[576]

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568. § 70.020.060(2).
569. § 70.02.230 (also providing violations are subject to damages of not less than $1,000 and attorney's fees).
570. *See infra* notes 571–76 and accompanying text.
571. 20 U.S.C. § 1232g(a)(1)(A). FERPA does not appear to permit a waiver of rights, except for access to letters of recommendation. § 1232g(a)(1)(C)(iii)–(D).
572. Alternatively, on a case-by-case basis, students could ask their schools to sign an agreement not to disclose medical records without consent.
573. *See* 45 C.F.R. § 164.502(b)(1) (2019) (applying HIPAA Privacy Rule "minimum necessary" standard for most disclosures); *see also* § 164.520(a)(1) (requiring dissemination of privacy practices to patients). FERPA's enforcing agency has issued nonbinding guidance suggesting some disclosures of student medical records be limited by the HIPAA "minimum necessary" standard. Letter from Kathleen M. Styles, Chief Priv. Officer, U.S. Dep't of Educ., to Sch. Offs. at Insts. of Higher Educ. (Aug. 24, 2016) (on file with U.S. Department of Education), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/DCL_Medical%20Records_Final%20Signed_dated_9-2.pdf [https://perma.cc/SQ9C-9J6J].
574. *See* Letter from Kathleen M. Styles, *supra* note 573, at 4.
575. *See supra* notes 166–72 and accompanying text; *see also* Health Info. Priv. Div., *Individuals' Right under HIPAA to Access Their Health Information 45 CFR §*

At the K-12 level, schools with federally funded campus health clinics can arrange and clarify that these clinics are not agents of or otherwise acting for the school.[577] In this event, the clinic is outside of FERPA coverage and is instead covered by the HIPAA Privacy Rule.[578]

Similar to the HIPAA Privacy Practices document that patients receive from medical providers, schools can prepare a Student Patient Privacy Practices document.[579] The substance of Student Patient Privacy Practices and HIPAA Privacy Practices will not be identical, but such a document would serve to inform student patients about the extent of their privacy, so that they can make informed decisions about on-campus treatment.[580]

Jane Doe's school provides an example of policies enacted to protect student patient privacy.[581] The new policy on "Confidentiality of Client/Patient Health Care and Survivors' Services Information" provides for litigation holds of such records by the campus health center rather than the school attorney.[582] In the event of threatened or pending legal action, the policy provides for access to such records by subpoena when possible, or with advance notice and an opportunity for the student or other client to object when a subpoena is not possible.[583] If its records are subpoenaed by third parties, the policy requires the school to resist subpoenas when

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164.524, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html [https://perma.cc/CH8Y-353A] (last reviewed Jan. 31, 2020).

576. *See supra* notes 152–53 and accompanying text; *see also* Health Info. Priv. Div., *supra* note 575.

577. *See supra* notes 53–54 and accompanying text.

578. *See id.*

579. Off. Civ. Rts., *Model Notices of Privacy Practices*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/model-notices-privacy-practices/index.html [https://perma.cc/25WR-E3BW] (last reviewed Apr. 8, 2013) (providing models of standard notices of private practices (NPP) forms); *see, e.g.*, *Patient Rights*, PURDUE UNIV., https://www.purdue.edu/legalcounsel/HIPAA/Patient%20Rights.html [https://perma.cc/W5ML-J8VD] (last visited Nov. 2, 2020) (providing extensive information on patient privacy rights and protections of Purdue University students and other patients as a HIPAA hybrid entity).

580. *See Patient Rights*, *supra* note 579. This would also be consistent with relevant professional ethics standards. *See, e.g.,* AM. PSYCH. ASS'N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT 7 § 4.02 (2017), https://www.apa.org/ethics/code/ethics-code-2017.pdf [https://perma.cc/3HQW-X6J6].

581. *See infra* notes 582–87 and accompanying text.

582. *Policy III.05.02: Confidentiality of Client/Patient Health Care and Survivors' Services Information*, UNIV. OF OR. POL'Y LIBR., http://policies.uoregon.edu/III.05.02 [https://perma.cc/S9EW-2BEK] (last visited Nov. 2, 2020).

583. *Id.*

there is a good faith basis to do so.[584] Even if FERPA permits the school to access these records without consent, the policy forbids doing so without a court order, consent, or a protective order.[585] The policy provides for the school to pay for independent counsel in the event of disagreement about access to records.[586] Finally, the policy provides that school health care providers must provide clients with written information about the confidentiality of their information.[587]

E. Facilitate Informed Decision Making by Student Patients

At the very least, campus health clinics can take one of the steps set out in Jane Doe's school's new policy,[588] and consistent with professional ethics standards,[589] by making written policies available to student patients at the outset of an initial counseling session or medical treatment so student patients can inform themselves about the boundaries of campus health clinic confidentiality.[590] Student patients who are not satisfied with the boundaries of confidentiality for on-campus treatment can then choose an off-campus provider.[591]

In the case of a student victim of campus sexual misconduct for which a school is required to offer free "appropriate" interim supportive services such as counseling under Title IX and the Clery Act,[592] students and their advocates may consider requesting truly (HIPAA Privacy Rule-level) "confidential" counseling.[593] If the school is not ready to offer truly confidential counseling at campus health clinics, students and their advocates may consider requesting that the school pay for private counseling.

F. Facilitate Informed Decision Making by Student Victims About Title IX Formal Complaints

Student victims of campus sexual misconduct need to understand the privacy consequences and limitations of filing a Title IX formal

584. *Id.*
585. *Id.*
586. *Id.*
587. *Id.*
588. *See supra* notes 582–87 and accompanying text.
589. *See supra* note 547 and accompanying text.
590. *See supra* notes 580, 587 and accompanying text.
591. *See* CLERY HANDBOOK, *supra* note 22, at 8-14.
592. *See* 20 U.S.C. § 1092(f)(8)(B)(vi); *see* CLERY HANDBOOK, *supra* note 22, at 8-14; *see also* 34 C.F.R. § 106.44(a) (effective August 14, 2020).
593. *See supra* notes 84–86 and accompanying text.

complaint.[594] The school is responsible for investigating and gathering evidence, although the parties can gather their own evidence and request that the school gather additional evidence.[595] The parties have the right not to cooperate, for example, with interviews.[596] The school cannot gather party treatment records without voluntary written consent.[597]

Parties and their advisors have access to all of the evidence the school gathers that is "directly related to the allegations."[598] There is no right of access to evidence that is privileged,[599] but there is no ban on access to evidence that is protected by the rape shield.[600] If a party shares treatment records with the school investigator, it becomes evidence shared with both parties and advisors.[601]

The parties cannot be prohibited from discussing the allegations.[602] However, schools may but do not have to require parties and/or advisors to sign non-disclosure agreements about the evidence.[603] Without a non-disclosure agreement, the parties may share the evidence with others.[604] Student victims pursuing Title IX formal complaints might consider insisting on a broad non-disclosure agreement that: (i) forbids disclosure to any third-party of any of the evidence, the investigative report, and the contents of the hearing; (ii) forbids disclosure to any person for any purpose other than the Title IX formal complaint process (thus forbidding disclosure in connection with related litigation); and (iii) establishes set penalties (such as additional disciplinary consequences, and perhaps damages) for violation.[605] Even with a strong non-disclosure agreement,

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594. *See supra* notes 382–90 and accompanying text; *see also supra* Section VI.B.1.d.
595. *See* 34 C.F.R. § 106.45(b)(5)(i)–(vi) (effective Aug. 14, 2020).
596. *See* § 106.71(a) (stating that a party cannot be discriminated against for choosing not to participate in any manner in an investigation, such as an interview).
597. *See* § 106.45(b)(5)(i).
598. § 106.45(b)(5)(vi).
599. *See* § 106.45(b)(1)(x).
600. *See* § 106.45(b)(6)(i).
601. *See* Preamble, *supra* note 313, at 30,427 ("If a complainant or respondent provides sensitive records such as medical records as part of an investigation, then the parties must have an equal opportunity to inspect and review information that constitutes evidence directly related to the allegations raised in a formal complaint.").
602. *See* 34 C.F.R. § 106.45(b)(5)(iii) (effective August 14, 2020).
603. *See* Preamble, *supra* note 313, at 30,298 ("Additionally, these final regulations do not prohibit a recipient from using a non-disclosure agreement that complies with these final regulations and other applicable laws.").
604. *See supra* notes 471–78 and accompanying text.
605. *See* Richard Stim, *Sample Confidentiality Agreement (NDA)*, NOLO, https://www.nolo.com/legal-encyclopedia/sample-confidentiality-agreement-nda-33343.html [https://perma.cc/BNH3-87PE] (last visited Nov. 2, 2020).

however, there is reason for concern.[606] For example, there is no bright-line between protected discussion of the allegations and forbidden discussion of the evidence.[607] Moreover, parties may have good reason to discuss facts and evidence with certain other persons such as therapists and attorneys who are not the Title IX advisors.[608] The parties and their advisors also have access to the investigative report, which will not include evidence protected by the rape shield.[609] Schools can consolidate formal complaints arising out a common incident with multiple complainants and/or respondents.[610] In this event, it appears that all of the parties and their advisors would have access to evidence and investigative reports.[611]

Unless both parties agree to an alternative informal resolution process, complaints filed with colleges will be resolved in a private hearing, normally attended by the parties and their advisors.[612] The burden of persuasion will likely require proof of the sexual misconduct by clear and convincing evidence.[613] The adjudicator need not be an attorney, but will be deciding whether evidence is admissible, including specific determinations of relevance, privilege, rape shield coverage, and whether evidence is an excluded party treatment record.[614] Witnesses must testify live and submit to cross examination, including impeachment by the advisor for the opposing party.[615] Statements by persons who do not appear, or who will not submit to cross examination, must be excluded.[616] Thus, for example, a student respondent might decide not to testify. In this event, the respondent's statements made outside of the hearing, even including a confession, are excluded.[617] Similarly, if an eyewitness decides not to testify, their interviews or other statements taken outside of the hearing are excluded.[618]

Student victims can decide not to file a formal complaint, to withdraw a formal complaint, and/or to not participate in the

606. *See supra* notes 471–76 and accompanying text.
607. *See supra* notes 471–76 and accompanying text.
608. *See supra* notes 326–27 and accompanying text.
609. *See supra* notes 410–11 and accompanying text.
610. 34 C.F.R. § 106.45(b)(4) (effective August 14, 2020).
611. *See id*.
612. *See supra* notes 413–14 and accompanying text.
613. *See supra* note 483 and accompanying text.
614. *See supra* notes 454–70 and accompanying text.
615. *See supra* note 418 and accompanying text.
616. *See supra* notes 419–21 and accompanying text.
617. *See supra* notes 419–21 and accompanying text.
618. *See supra* notes 419–21 and accompanying text.

hearing.[619] However, these options do not guarantee privacy to the student victim.[620] Title IX Coordinators can file formal complaints and can continue to pursue withdrawn formal complaints.[621] Hearings can proceed without a party, in which case an advisor will be appointed for the party.[622]

Student victims who are minors—even if enrolled in college—need to understand that their parents likely have the legal right to file formal complaints on their behalf.[623] In this situation, both parent and minor student likely have the right to see all of the evidence.[624] Correspondingly, minor-student respondents have the right to see all of the evidence even if their parents act for them.[625] In these cases, even if minors sign non-disclosure agreements, one wonders about compliance by young and immature parties.[626]

CONCLUSION

FERPA's regulation of student patient records at campus health clinics falls far short of the meaningful protection that the HIPAA Privacy Rule provides to all other patients.[627] This approach harms all student patients, but especially female student patients who comprise one and one-half to two times more than male campus health clinic patients.[628] Female campus health clinic patients also disproportionately access mental health and sexual/reproductive/gynecological care at campus health clinics, creating intimate and sensitive records that need robust privacy protection rather than FERPA's "cheesecloth" approach.[629] Moreover, female student patients all too often seek these sorts of care at campus health clinics as victims of sexual misconduct, where FERPA permits disclosures to, for example, school attorneys defending Title IX lawsuits, which may retraumatize victims.[630] The current approach also likely results in other inequities for female student patients, such as lessened availability of tort claims to redress medical privacy violations,

619. *See supra* notes 391–94 and accompanying text.
620. *See supra* notes 489–93 and accompanying text.
621. *See supra* note 392 and accompanying text.
622. *See supra* note 416 and accompanying text.
623. *See supra* notes 395–98 and accompanying text.
624. *See supra* notes 395–98 and accompanying text.
625. *See supra* notes 395–98 and accompanying text.
626. *See supra* notes 603–11 and accompanying text.
627. *See supra* Sections III.B–.C.
628. *See supra* notes 278–79 and accompanying text.
629. *See supra* Part V.
630. *See supra* Section VI.B.

reduced privilege protection for their student patient records, and in some cases, obstacles to decisional autonomy surrounding reproductive decisions.[631] New Title IX regulations add some significant but specific and narrow protections in the context of Title IX formal complaints to schools,[632] but more generally, significantly lessen student patient privacy and student privacy generally.[633]

While current federal protection of female student patient privacy at campus health clinics is wholly inadequate, there are paths to improvement.[634] FERPA and other federal laws can be amended.[635] States can enact laws that enhance student patient privacy.[636] Schools can promulgate policies limiting disclosure of student patient information.[637] One improvement that is immediately available to female student patients and their advocates is to become better informed about the extent of their medical privacy at campus health clinics and other health care providers, and make health care decisions accordingly.[638]

631. *See supra* Sections VII.A–.C.
632. *See supra* Section VI.B.2.
633. *See supra* Sections VI.B.3–.4.
634. *See supra* Part VIII.
635. *See supra* Sections VIII.A–.B.
636. *See supra* Section VIII.C.
637. *See supra* Section VIII.D.
638. *See supra* Section VIII.E.