The Myth of Student Medical Privacy

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Student medical privacy is examined through the lens of a recent and troubling campus sexual assault case. Jane Doe, a university freshman who was sexually assaulted by several student athletes, sought on-campus counseling assistance and then sued her school under Title IX. To defend Jane Doe's lawsuit, the school attorney seized her psychotherapy notes and other records from the campus counseling center. HIPAA's Privacy Rule generally requires patient consent or a subpoena to access medical records. It excludes student medical records, leaving their regulation to FERPA, the student records statute. FERPA offers no greater privacy for Jane Doe's campus psychotherapy notes than her class attendance records. FERPA allows schools to unilaterally access and disclose student medical records in many circumstances, likely including the school's seizure of Jane Doe's records. In fact, FERPA seemingly permits schools to access campus medical records of both student accusers and accused students in sexual misconduct matters and disclose them to college disciplinary panels and the other party, not only to determine what happened but also to uncover credibility evidence about the parties. FERPA also authorizes non-consensual disclosure of student medical records in many other circumstances, for example if Jane Doe sought to enroll in a new school as a transfer or to pursue advanced studies.

Conflation of schools' education and health care provider roles is the underlying source of these problems. Although universities commonly offer health care to their students, regulation of student medical privacy is left to an education statute. Jane Doe's lawsuit illustrates this conflation of roles: Jane Doe's university was able to use an education statute to unilaterally seize student medical records created in its health care provider role to defend an education law claim. These problems can be addressed and resolved by teasing out these roles and amending FERPA accordingly to provide real student medical privacy. Jane Doe's campus health clinic records exist only because her school chose to assume a health care role, and there is no good reason to exclude them from the HIPAA Privacy Rule. On the other hand, schools deal with many student medical records that serve educational purposes, including doctors' notes excusing student absence, as well as records of physical therapy and other services provided to some students pursuant to special education law. It is neither feasible nor desirable to extend the HIPAA Privacy Rule to these more "educational" student medical records because educators need to access and use them to fulfill educational responsibilities. Access to these "educational" student medical records should continue to be governed by FERPA. However, recognizing the sensitive nature of these records, their disclosure outside the school should be limited by HIPAA's "minimum necessary" standard.

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Introduction

We understand and expect that our medical and counseling records and information are private. We are reminded regularly of this at medical appointments when we are given a copy of the provider's HIPAA Privacy Rule practices.[1] We may also know that the HIPAA Privacy Rule provides a right to access our medical records.[2]

Jane Doe, a freshman at the University of Oregon, learned that *student* medical records and information are not so private.[3] After her sexual assault by three student athletes, Jane Doe sought assistance from her University's campus counseling center. Jane Doe also sought legal assistance, and her

[1] HHS Notice of Privacy Practices for Protected Health Information, 45 C.F.R. § 164.520(a)(1) (2019).
[2] *Id.* at § 164.502(a)(2)(i) (2019); *id.* at § 164.524 (2019).
[3] The details of the Jane Doe case are explored in Part I, *infra*.

attorney notified the University of Doe's intent to sue under Title IX,[4] the federal education statute that prohibits gender discrimination (including sexual harassment and sexual misconduct) by schools. Jane Doe's lawsuit claimed the University was liable because it accepted one of the three student athletes as a transfer after his discipline at his prior school for sexually assaulting another student. To defend Jane Doe's threatened education litigation, the University's attorneys unilaterally seized Jane Doe's campus counseling records, including her therapy session notes, claiming the records were the University's property to access as it deemed appropriate. This Article uses the Jane Doe case and related proceedings as a lens for viewing student medical privacy.

Had Jane Doe's campus counseling records been protected by the HIPAA Privacy Rule, she would have enjoyed real medical privacy; consent or a court order would have been required to access her counseling records, and likely would not permit access to actual therapy notes. However, student medical records, such as Jane Doe's therapy notes and other counseling records, are governed by the Family Educational Rights and Privacy Act (FERPA),[5] the federal education records statute. HIPAA's Privacy Rule explicitly excludes student medical records,[6] contrary to the judgment of HIPAA's enforcing agency that there should be a uniform system of privacy and access for all medical records.[7]

Under FERPA, student medical privacy is more myth than reality. FERPA applies to student records generally and offers no enhanced protection for student medical records; Jane Doe's campus psychotherapy notes are treated no differently than her class attendance records. FERPA's single provision on student medical records denies students the right to directly access many of their own medical records.[8] Using this provision, the University seized and reviewed the medical records of another sexually assaulted student before she was allowed to access them herself.

FERPA permits schools to disclose student medical and other records both internally and externally, in a wide variety of circumstances, and according broad discretion to school decisions about whether and what records to disclose. For example, FERPA permits schools to internally disclose student medical and other records to persons, including the school's attorneys,[9] that the school deems to have "legitimate educational interests."[10] Thus, FERPA permitted the University's attorneys to review Jane Doe's medical records, despite their intimate content, despite no advance notice to Jane

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[4] 20 U.S.C. § 1681 (2012).

[5] *Id.* at § 1232g (2012 & Supp. I 2013).

[6] The HIPAA Privacy Rule's exclusion of student medical records is explored in Part II, *infra*.

[7] The HIPAA enforcing agency's views are explored in Part II, *infra*.

[8] *Id.* at § 1232g(a)(4)(B)(iv).

[9] Current law concerning access by school attorneys is reviewed at Section III.B.2, *infra*.

[10] *Id.* at § 1232g(b)(1)(A).

Doe, despite no court involvement or oversight, and despite the significant litigation advantage conferred on the University.

Jane Doe's case shows that leaving regulation of student medical records to FERPA, an education statute, in an era when schools commonly provide health care to students, means that privacy protection of student medical records varies widely, inappropriately, and arbitrarily. Had Jane Doe obtained counseling off campus, HIPAA's Privacy Rule would protect the privacy of the medical records by requiring consent or a subpoena. Had Jane Doe sued different defendants (perhaps, for example, the student athletes found responsible for sexually assaulting her, or the prior school that had determined one of the student athletes was responsible for sexual assault and allegedly failed to inform the University of this prior to his transfer), the University would act as health care provider. In this event, FERPA would govern Jane Doe's medical records, and likely would permit access by these non-school defendants only with Jane Doe's consent or by subpoena. It is when the school is both health care provider and litigation defendant, as in Jane Doe's case, that FERPA fails to recognize the impact of the school's dual roles and appears to authorize internal and some external disclosure without consent or subpoena.

Beyond the FERPA provisions raised in Jane Doe's case, FERPA also permits schools to disclose student medical records without consent, notice, or subpoena in a variety of other circumstances. If Jane Doe decided to transfer to another school, or eventually apply to graduate school, the University could share Jane Doe's campus counseling and other records with the potential new school.[11] To serve its legitimate educational interests in complying with relevant gender discrimination laws, FERPA might also permit the University to introduce Jane Doe's campus medical records in an internal University disciplinary hearing against the student athletes, thereby revealing them to the hearing panel, which often includes students, and requiring them to be shared with the accused student athletes. In fact, in the context of either internal discipline or litigation, FERPA would seem to permit schools to access campus medical records of other students. For example, the University might have seized campus medical records of the accused student athletes and disclosed them at an internal disciplinary hearing.[12] The University might even have seized campus medical records of friends of Jane Doe or the accused student athletes to identify evidence that might bear on party credibility.

Neither recent guidance from FERPA's enforcing agency, which is hortatory rather than mandatory, nor existing state laws and state law claims, solves this problem. FERPA's enforcing agency suggests that student medical records warrant enhanced privacy protection and hence should be treated

[11] See the discussion at Section III.B.3, *infra*.
[12] These issues are discussed *infra* at Section III.B.2.

differently by schools.[13] However, this guidance addresses only postsecondary schools, and conflicts with the agency's own prior pronouncements, FERPA's text and regulations, and court and administrative interpretations of FERPA[14]. Moreover, as sub-regulatory guidance, it may be revoked unilaterally by the agency and is not accorded deference by courts. State law protection of student medical records is neither consistent, comprehensive, nor robust. For example, the state health care privacy statute applicable in Jane Doe's case is modeled on the HIPAA Privacy Rule and explicitly excludes FERPA records.[15] Similarly, any available common law claims for unauthorized disclosure of "confidential" medical information tend to define "confidential" by reference to FERPA or to state health care statutes, which exclude FERPA records and thus often are not viable in the student medical records context.[16]

Part I of this Article reviews the Jane Doe case and related proceedings. Part II explains that the HIPAA Privacy Rule, the regulation that governs privacy of and patient access to medical records generally, explicitly excludes student medical records. Part III explores current privacy of student medical records under FERPA, identifying resulting problems both with Jane Doe's case and with other student medical privacy issues. Part IV reviews the sufficiency of existing alternative protections for privacy of student medical records, concluding that neither recent nonbinding FERPA guidance intended to respond to the Jane Doe case, nor state laws and legal claims, provide adequate privacy protection.

Part V of this Article proposes to amend FERPA to provide Jane Doe and other students with real medical privacy that also reduces exposure and uncertainty for her University and more generally allows schools to perform their educational responsibilities. As to student medical records created or maintained by school health clinics, Section V.A of the Article proposes to extend coverage of the HIPAA Privacy Rule. There is no good reason to exclude school health clinic records from the HIPAA Privacy Rule. Schools with campus health clinics choose to go beyond their educational role to embrace a health care function. Health care accessed from these campus providers should be private to the same extent as health care from outside providers. The HIPAA Privacy Rule would appropriately limit most internal and external disclosure of school health clinic student medical records to the "minimum necessary" to accomplish the permissible purpose.[17] Internal disclosure of student medical records across a firewall surrounding a school health clinic to other school employees would normally be forbidden, with exceptions including emergencies and internal access by persons such as IT

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[13] U.S. Dep't of Educ., Dear Colleague Letter: Protecting Student Medical Records (Aug. 24, 2016) [hereinafter DCL], https://studentprivacy.ed.gov/resources/dear-colleague-letter-school-officials-institutions-higher-education [https://perma.cc/J398-FU9P].

[14] *See infra* Section IV.A.

[15] *See infra* note 242 and accompanying text.

[16] *See infra* the discussion at Section IV.B.3.

[17] 45 C.F.R. § 164.502(b)(1) (2019).

staff and school attorneys supporting school clinic health care providers in their health care functions. Other disclosures to attorneys or courts in legal proceedings would generally require court involvement and supervision and protective orders.[18] Enhanced protection for psychotherapy notes such as Jane Doe's campus counseling notes would also apply, barring their nonconsensual disclosure to third parties.[19] School health clinic patients would have the right to access their own medical records (except for psychotherapy notes).[20] Section V.D of the Article proposes to repeal FERPA's archaic and inconsistent "treatment records" provision, which exempts all campus medical and counseling treatment records from college students' general right of access to their own records.

Schools also create and maintain "educational" student medical records such as school nurse records in K-12 schools, doctors' notes excusing a student's absence, and records of physical therapy and other health services provided to some students as part of their special education programs. Section V.B of the Article recognizes that Privacy Rule protection for internally sharing these records is inappropriate because these records are more educational in nature and need to be shared internally for educational purposes, and thus proposes that FERPA continue to govern internal disclosure. However, because student medical records are more private in nature than student records generally, Section V.C of the Article proposes that the Privacy Rule "minimum necessary" standard be added to FERPA to govern disclosure of "educational" student medical records outside of the school.

Section V.E of the Article explains that the proposed amendments to FERPA would protect student medical privacy in a way that is more consistent with general protection of medical privacy, offer real medical privacy to Jane Doe and other students, and be workable for schools. Section V.F explains that the proposal would enhance consistency with evidentiary privileges and their underlying public policy, and also would make state law claims equally available to student and nonstudent patients. Section V.G sets out the proposal's manageable new responsibilities for schools that choose to create student health clinics, and modest new requirements for schools that do not operate student health clinics. Section V.H explains under the proposal schools could continue to meet their community responsibilities as regards students who may pose a threat, and also minimize their liability for student-caused harm. These proposed changes would be informed by and improve upon Jane Doe's and her University's experience.

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[18] *Id.* at § 164.512(e).
[19] *Id.* at § 164.508(a)(2).
[20] *Id.* at § 164.502(a)(2)(I); *id.* at § 164.524(a)(1)(i).

I. The University's Seizure of Rape Victim Jane Doe's Campus Counseling Records to Defend Her Title IX Claim Illustrates the Myth of Student Medical Privacy and Resulting Problems

An 18-year-old University of Oregon freshman referred to by media and court documents as Jane Doe reported her off-campus rape by three basketball team members.[21] One of the three accused students had been accepted as a transfer student by Oregon after suspension from Providence College related to a different student's rape claim.[22] The local police investigated Jane Doe's claim, and the accused students were not criminally charged.[23] The University then investigated,[24] ultimately finding the players responsible for sexually assaulting Jane Doe and suspending them.[25]

Several months later, Jane Doe filed a civil lawsuit including Title IX and tort claims against the University and its basketball coach.[26] The lawsuit claimed the coach and University accepted one of the accused players as a transfer student knowing that he had been found responsible for sexual assault by his former school.[27] The lawsuit asserted that the University undertook no monitoring, counseling, notification, or other steps to avoid any

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[21] *See* Eugene Police Dep't, Incident/Investigation Report (Apr. 28, 2014), http://media.oregonlive.com/ducks_impact/other/14-04131.pdf [https://perma.cc/TVV3-KJL5] (indicating that Jane Doe initially contacted her father, who reported the assault to campus police).

[22] Tyler Kingkade, *Brandon Austin, Twice Accused of Sexual Assault, Is Recruited by a New College*, Huffington Post (July 28, 2014, 3:44 PM), http://www.huffingtonpost.com/2014/07/28/brandon-austin-northwest-florida_n_5627238.html [https://perma.cc/CNW2-TAJN] (noting his recruitment by Northwest Florida State College).

[23] *Id.*; Andrew Greif, *Oregon's Damyean Dotson is Suspended Following Forcible Rape Investigation That Won't Lead to Criminal Charges*, The Oregonian (May 5, 2014), http://www.oregonlive.com/ducks/index.ssf/2014/05/damyean_dotson_suspension_foll.html [https://perma.cc/V92Y-HUSF].

[24] Tyler Kingkade, *Oregon Basketball Coach Sued by Alleged Rape Victim for Ignoring Player's Sexual Assault Record*, Huffington Post (Jan. 8, 2015, 10:06 PM), http://www.huffingtonpost.com/2015/01/08/University-oregon-lawsuit-sexual-assault_n_6440000.html [https://perma.cc/PH4J-Y5R5].

[25] Kingkade, *supra* note 22; Greif, *supra* note 23. The complaint notes that the delay in the school investigation allowed the accused students to complete the academic year in good standing and not harm the University's Academic Progress Rate (APR). Complaint at 9, Doe v. Univ. of Or., No 6:15-cv-42 (D. Or. Jan. 8, 2015) [hereinafter *Complaint*]. Schools with low APRs face NCAA sanctions such as reduced athletic scholarships and bans on post-season play. *See* NCAA, Division I Academic Progress Rate (APR), http://www.ncaa.org/about/resources/research/division-i-academic-progress-rate-apr [https://perma.cc/835F-HAPN].

[26] Kingkade, *supra* note 24; *Complaint*, *supra* note 25. Jane Doe was represented by John Clune, a Colorado attorney who specializes in Title IX and representation of rape victims, and Jennifer Middleton, a Eugene Oregon attorney with a civil rights background. *See* Will Hobson, *Lawyers for Rape Accusers of Kobe Bryant, Jameis Winston Altered U.S. Campus Culture*, Wash. Post (July 9, 2015), https://www.washingtonpost.com/sports/seeking-justice-for-women-who-say-theyve-been-attacked-by-athletes/2015/07/09/6683224c-23f7-11e5-aae2-6c4f59b050aa_story.html [https://perma.cc/2NVY-XAAC].

[27] *Complaint*, *supra* note 25, at 5. A statement from the University's interim president at the time noted that "We have been as respectful and supportive as possible of the student, including immediately implementing support services and appropriately honoring her choice of process, once hearing of her experience." *See* Kingkade, *supra* note 24.

further sexual misconduct by the transfer student.[28] The University's answer[29] denied knowledge of the transfer student's history of sexual misconduct and also rejected any Title IX responsibility for assault that occurs off-campus.[30] The lawsuit also alleged that the University took special steps to protect student privacy, not for Jane Doe, but rather for the accused students, including offering them a private administrative conference rather than the normal disciplinary hearing by a panel of students and faculty.[31] The private administrative conference resulted in a finding that the students were responsible for sexually assaulting Jane Doe. Jane Doe's lawsuit sought both injunctive relief and money damages, including compensatory damages for her emotional distress.[32]

After her sexual assault, Jane Doe received counseling from the University's counseling center.[33] She may have chosen on-campus rather than private counseling for a variety of reasons. University staff may have suggested it as part of school responsibilities under Title IX and the Clery Act to provide free support services to campus sexual misconduct victims.[34] Jane Doe may have thought campus counselors would be especially sensitive to campus

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[28] *Complaint*, *supra* note 25, at 6.

[29] Defendant's Answer, Affirmative Defenses, & Counterclaim, Doe v. Univ. of Or., No. 6:15-cv-42 (D. Or. Feb. 9, 2015) [hereinafter *Answer*]. The University'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, and specifically claiming that her lawsuit and related actions were harmful to sexual assault victims. *Id.* at 24. The University claimed the lawsuit:

> threaten[ed] 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.

Id. at 25–26. This counterclaim was not included in the amended answer, but the same language is included in an unclean hands defense raised by the University. Defendants' Amended Answer and Affirmative Defenses at 24, Doe v. Univ. of Or., No. 6:15-cv-42 (D. Or. Feb. 26, 2015) [hereinafter *Amended Answer*].

[30] *Amended Answer*, *supra* note 29, at 2, 6–7.

[31] *Complaint*, *supra* note 25, 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 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. *Amended Answer, supra* note 29, at 12. The amended answer also asserts that Jane Doe was provided access to the full decision, albeit not a physical copy. *See id.* at 12.

[32] *Complaint*, *supra* note 25, at 17–18.

[33] *Id.* at 9.

[34] The University's president commented at the time of the investigation that "Federal laws that protect the privacy of all students preclude the University from commenting about students," and also noted that "a full range of services and support are offered to students." Andrew Greif, *Oregon's Damyean Dotson is suspended following forcible rape investigation that won't lead to criminal charges*, THE OREGONIAN (May 5, 2014), http://www.oregonlive.com/ducks/index.ssf/2014/05/damyean_dotson_suspension_foll.html [https://perma.cc/V92Y-HUSF].

rape and other issues affecting college students. The convenience of on-campus counseling may have been attractive to her. Or it may have been a financial decision; if Jane Doe had student health insurance through her University, on-campus counseling sessions were free, while she would have had a deductible and a co-pay of twenty dollars or more for each private counseling session.[35]

Jane Doe's lawsuit asserted that before the lawsuit was filed, and while counseling was ongoing, University attorneys seized her therapy notes and other counseling records from the University counseling center.[36] In mediation, Jane Doe's attorney had shared some of her counseling records with the University and explained that other counseling records were not shared because they involved family issues that predated the sexual assault.[37] After mediation failed, the University General Counsel's office requested Jane Doe's complete counseling center file and the center's director provided the file.[38] Jane Doe's lawsuit included a state law tort claim for invasion of privacy for accessing (and presumably reviewing) Jane Doe's counseling records. It asserted harm in the form of "stress, anxiety, and emotional distress as a result of UO's unauthorized intrusion."[39]

The details of Jane Doe's distress resulting from seizure of her therapy records are not specified in her complaint, but may be inferred from the circumstances and context of the seizure and from related research findings. The University's seizure of Jane Doe's records not only severely impaired her medical privacy, but also likely exacerbated her trauma. Her records were seized by the attorney for the University that Jane Doe claims facilitated her attack by accepting and failing to monitor a transfer student with a history of campus sexual misconduct. Jane Doe's records were seized while she was still in counseling and presumably trying to recover from her attack; if she continued therapy, presumably the University would have ongoing access to the records. The records were accessed despite her attorney's notice to the University that her counseling records included discussion of private family issues that arose prior to the attack. While Jane Doe's University asserted that it had not actually reviewed the records it seized, in a prior case the University had actually reviewed another student rape victim's campus counseling records even before the victim herself had access.[40] It is easy to infer from

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[35] *See Student Health Benefits Plan Student Guide*, UNIV. OF OR. (Aug. 10, 2019), https://health.uoregon.edu/sites/health1.uoregon.edu/files/2019-20_Student_Guide_Domestic.pdf [https://perma.cc/V4JS-ZCM9].

[36] *Complaint*, *supra* note 25, at 10, 16–17.

[37] Kerr, OAH Case No. 1504366 at 7–8 (Or. Bd. of Psychological Exam'rs 2016), https://obpe.alcsoftware.com/files/kerr.shelly%20k._1672.pdf [https://perma.cc/6GAB-TJ2L]. The complaint also asserts that these "records contain much detail about Plaintiffs personal life and family that are not related to any issues surrounding [the rape]." *Complaint*, *supra* note 25, at 10.

[38] Kerr, OAH Case No. 1504366 at 8.

[39] *Complaint*, *supra* note 25, at 17.

[40] *See Amended Answer*, *supra* note 29, at 14; Charles Ornstein, *After Sexual Assault, Woman Says University Lawyers Accessed Her Counseling Records,* PROPUBLICA (Oct. 23, 2015),

these circumstances that the University's access of Jane Doe's counseling records likely was retraumatizing and may have interfered with her recovery. Jane Doe had to try to continue her recovery knowing her University had access to her most intimate and private thoughts. The University asserted it owned these records[41] and thus might choose to redisclose them, perhaps in disciplinary proceedings against the accused students.

In fact, social science research published by faculty at Jane Doe's University shortly before her assault found school actions could increase harm to female students who experienced unwanted sexual activity.[42] The researchers found that institutional actions both before unwanted sexual activity (such as not taking proactive steps, or tolerating an environment conducive to unwanted sexual activity) and after (such as treating the experience as 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.[43]

The University's answer asserted that Jane Doe's counseling records are its records and thus were not illegally accessed.[44] Implicit in this position is the University's assertion of a right to non-consensually access all student medical and other FERPA records of its students. Specifically, the University asserted FERPA permitted access and review by its attorney, noted that access occurred only after a formal notice of intent to sue, and also asserted that Jane Doe's claim for damages for emotional distress waived any privilege for her counseling records.[45] The University claimed that it was "entitled to review" Jane Doe's medical records, though it had thus far only taken control of the records and not yet reviewed them.[46] Jane Doe's claim for tortious invasion of privacy was based on alleged actual review of her records. Whatever happened with Jane Doe's records, this was apparently not the first time the University had seized counseling records of a sexual assault victim, and it had not only seized but also reviewed them in a prior case.[47] In that prior case, the victim commented: "I blame them for how they re-

https://www.propublica.org/article/after-sexual-assault-woman-says-University-lawyers-counseling-records [https://perma.cc/ZT8B-H9SS] (reporting seizure of another victim's records in 2013 resulting in a legal claim settled for $30,000).

[41] *See id.*

[42] Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. TRAUMATIC STRESS 119–24 (2013). The research subjects were female college students at a "public northwestern university" who had experienced unwanted sexual activity. *Id.* at 120.

[43] *Id.*

[44] *Amended Answer*, *supra* note 29, at 14.

[45] *Id.*

[46] *Id.*

[47] Charles Ornstein, *After Sexual Assault, Woman Says University Lawyers Accessed Her Counseling Records,* PROPUBLICA (Oct. 23, 2015), https://www.propublica.org/article/after-sexual-assault-woman-says-University-lawyers-counseling-records [https://perma.cc/ZT8B-H9SS] (reporting seizure of another victim's records in 2013 resulting in a legal claim settled for $30,000).

sponded to it. 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."[48]

Jane Doe's lawsuit was settled for $800,000 and a waiver of tuition and other expenses.[49]

Jane Doe's private settlement agreement is a contract between her and the University. While the document is accessible under state public records law, it was not approved by a court and does not establish any precedent for future student medical privacy disputes. The settlement agreement does not specifically reference the University's seizure of Jane Doe's counseling records.[50] Jane Doe's case spawned numerous other legal proceedings, including lawsuits by and about the accused students.[51] These other claims illustrate the current law's lack of clarity and its inconsistency with general health care standards and attorney ethics, as well as the extent of potential liability and transaction costs for Jane Doe's University. Some of these other claims involved University counseling center staff who protested the University's seizure of Jane Doe's counseling records as an invasion of her medical privacy, consistent with their professional training concerning medical pri-

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[48] *Id.*; *see also* Camilla Mortensen, *Dragged Through the Mud: Sexual Assault Survivors Endure,* EUGENE WKLY. (May 28, 2015), https://www.eugeneweekly.com/2015/05/28/dragged-through-the-mud/ [https://perma.cc/GZN2-K9A5] (noting that this victim also received on-campus medical testing for STDs and pregnancy by a campus nurse practitioner, who arranged for on-campus counseling).

[49] Jane Doe and Univ. of Or., Settlement Agreement and Release (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/57BT-CJ86]. 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.

[50] *Id.* The University's president issued a statement concerning the settlement that he did not believe any University employee acted wrongfully. *See* Richard Read, *Student who sued UO, claiming she was gang-raped by basketball players, settles suit for $800,000*, OR. LIVE (Aug. 5, 2015), http://www.oregonlive.com/education/index.ssf/2015/08/student_receives_800000_settle.html [https://perma.cc/9SFJ-EXAS]. It is unknown whether Jane Doe returned to the University or otherwise continued her education.

[51] The transfer student found responsible for Jane Doe's sexual assault filed his own lawsuit against the University and student life officials. His lawsuit sought $7.5 million in damages, claiming the University's processing of Jane Doe's sexual assault allegations was a "kangaroo court" depriving him of a due process opportunity to prove the sexual contact was consensual, harming his ability to earn money playing professional basketball, and causing emotional distress. Complaint at 10–11, Brandon Austin v. Univ. of Or., No. 6:15-CV-2257 (Oct. 30, 2015), ECF No. 1-1.

The other two accused students also filed a lawsuit, seeking about $25 million collectively. The lawsuits of the three accused students were consolidated and dismissed with prejudice. Dylan Darling, *Lawsuit Against the UO Tossed*, REG. GUARD (June 29, 2017), https://www.registerguard.com/rg/news/local/35720982-75/judge-dismisses-former-uo-basketball-players-multimillion-dollar-lawsuits-against-university.html.csp [https://perma.cc/P8QF-K3N2]. The dismissal was upheld by the Ninth Circuit. Austin v. University of Oregon, 925 F.3d 1133 (9th Cir. 2019).

vacy.[52] Staff also claimed their jobs were threatened because they wrote a summary letter of Jane Doe's treatment, and also sought outside legal advice.[53] One therapist quit, claiming she was "sidelined" in retaliation for her protest, and another staff member's position was eliminated, allegedly also in retaliation for speaking out and filing an ethics complaint with state licensing authorities for therapists.[54] The University settled their lawsuits for $425,000.[55] The state licensing board for psychologists determined the director of the counseling center, who turned over Jane Doe's counseling records to the University's attorneys without protest, had violated professional ethics standards. She was reprimanded, and ordered to pay a $2,500 fine and take ethics coursework because she "did not take reasonable precautions to protect confidential information."[56]

Professional ethics complaints were also filed against the University's attorneys. The University therapist who claimed she was "sidelined" as a whistleblower filed an ethics complaint against the University's attorneys for seizing Jane Doe's counseling records.[57] The state bar found insufficient evidence that it was either "obviously illegal or fraudulent" to do so, or that the lawyers knew that to be the case as is required for an ethics violation.[58] The state bar indicated that the University had "raised colorable arguments why they believed it was legally permissible to take custody [of Jane Doe's counseling records]," and noted the University's claim it did not actually review the records, but did not take a position on whether the University acted illegally.[59] Thus, the University, which no agency or court determined had

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[52] Tyler Kingkade, *University of Oregon Violated Sexual Assault Victim's Medical Privacy, Employees Claim*, HUFFINGTON POST (Feb. 9, 2015, 4:14 PM), https://www.huffpost.com/entry/university-of-oregon-medical-privacy_n_6641920 [https://perma.cc/W5UW-QR7M].

[53] *Id.*

[54] Tyler Kingkade, *Therapist Quits University of Oregon, Claims School Punished Her for Whistleblowing*, HUFFINGTON POST (Nov. 2, 2015, 5:36 PM), http://www.huffingtonpost.com/entry/University-of-oregon-retaliation_us_5637a998e4b0c66bae5d324b [https://perma.cc/X4Y5-GP2U].

[55] Andrew Theen, *UO Settles Lawsuit with 2 Former Counseling Center Whistleblowers for $425,000*, OR. LIVE (July 18, 2016), https://www.oregonlive.com/education/2016/07/uo_settles_lawsuit_with_2_form.html [https://perma.cc/B7EA-6K8R].

[56] Kerr, OAH Case No. 1504366 at 17 (Or. Bd. of Psychological Exam'rs 2016), https://obpe.alcsoftware.com/files/kerr.shelly%20k._1672.pdf [https://perma.cc/6GAB-TJ2L].

[57] Richard Read, *Oregon State Bar Finds no Wrongdoing in how UO Lawyers Handled Student's Records*, OR. LIVE (June 19, 2015), http://www.oregonlive.com/education/index.ssf/2015/06/oregon_state_bar_finds_no_wron.html [https://perma.cc/MD4X-KRKN].

[58] Letter from Troy Wood, Assistant General Counsel, Or. State Bar, to Jennifer Morlok, Univ. of Or. (June 18, 2015), http://media.oregonlive.com/education_impact/other/OregonStateBarMorlok.pdf [https://perma.cc/C7JY-SDFP]. Compare this result with that of a Connecticut attorney who released a client's psychiatric records to defend the client's malpractice claim. This attorney's license to practice law was suspended for two years for violation of professional ethics rules. Office of Chief Disciplinary Counsel v. Jason Pearl, No. HHBCV186043301S (Conn. Super. Ct. 2018), *reported in* Stephanie Ward, *Attorney Sued for Malpractice is Suspended After Releasing Client's Psychiatric Records*, ABA J. Sept. 2018, http://www.abajournal.com.

[59] *Id.*

violated FERPA or other laws, found itself defending (and in some cases settling) multiple claims by students and University employees.

Jane Doe's case also resulted in policy changes at the University. The University enacted a new policy on "Confidentiality of Client/Patient Health Care and Survivors' Services Information."[60] The policy provides for litigation holds on such records. In the event of threatened or pending legal action, access is 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. In the event its records are subpoenaed by third parties, the University will resist subpoenas when there is a good faith basis to do so. The policy provides that even if the University is legally permitted to access these records without consent, it will not do so without a court order, consent or protective order. Additionally, students or other patients may ask the University to pay for independent counsel in the event of disagreement about access to records. Health care providers must provide clients with written information about confidentiality of their information.

II. The HIPAA Privacy Rule Excludes FERPA Records, Leaving Regulation of Student Medical Records to FERPA

The HIPAA statute itself regulates portability of health care insurance and other matters involving electronic medical records.[61] Congress directed the Department of Health and Human Services (HHS) to develop administrative regulations protecting privacy of medical records in the event Congress did not do so.[62] HHS's Privacy Rule both limits disclosure of "protected health information" (PHI), and gives patients a right of access to their own PHI.[63] PHI is defined broadly as individually identifiable information that is created or maintained by any health care provider that transmits health information electronically in billing transactions or otherwise.[64]

The Privacy Rule excludes the following from PHI: (1) records of employees held as an employer and not resulting from actual medical treatment by the employer[65] and (2) student records.[66] The exemption of employee

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[60] Univ. of Or., Confidentiality of Client/Patient Health Care and Survivors' Services Information, https://policies.uoregon.edu/III.05.02 [https://perma.cc/VS25-P8AH].

[61] Health Insurance Portability and Accountability Act (HIPAA) of 1996, Pub. L. No. 104–191, 110 Stat. 1936 (1996), 29 U.S.C. § 1181–1183. An overview of HIPAA and universities is provided by Pietrina Scaraglino, *Complying with HIPAA: A Guide for the University and Its Counsel*, 29 J. Coll. & Univ. L. 525 (2003).

[62] HIPAA, Pub. L. No. 104–191, 110 Stat. 1936, 2033 (1996).

[63] 45 C.F.R. § 160.103 (2019) (defining "Protected Health Information"). *See generally id.* at § 164.500–164.534 (HIPAA Privacy Rule details); *id.* at § 160.103 (defining PHI as excluding FERPA records and FERPA treatment records for purposes of subchapter which includes 45 C.F.R. § 164.500 (2019) *et seq*. HIPAA Privacy Rule).

[64] *Id.* at § 160.103.

[65] 45 C.F.R. § 160.103 (2019) (defining "Protected Health Information" § 2(iii)).

records distinguishes between employers' health care capacities (such as a hospital treating an employee patient) and employer capacities (such as employee supplied medical documentation for sick leave, FMLA leave, or workers' compensation claims).[67] In contrast, the student records exemption is wholesale, with no differentiation as to whether the school is acting in a health care or educational capacity.[68] It is also broad, excluding both FERPA records and FERPA "treatment records" (which essentially are records of on-campus student clinic health care for adult and postsecondary students to which students do not have a right to access)[69] from the Privacy Rule.[70]

HHS articulated several reasons for excluding student records, which notably do not include public policy justifications.[71] Instead, HHS noted primarily that by enacting FERPA, Congress had already established statutory level protection of education records and the information in them, statutory text which HHS lacked authority to override in regulations. HHS also noted

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[66] *Id.* at definition of "Protected Health Information" § 2(i)–(ii). For an overview of the HIPAA Privacy Rule, *see* Lawrence O. Gostin, James G. Hodge, Jr., and Lauren Marks, *The Nationalization of Health Information Privacy Protections*, 37 TORT & INS. L. J. 1113 (2002).

[67] 45 C.F.R. § 160.103 (2019) (defining "Protected Health Information" § 2(iii)).

[68] *Id.* (defining "Protected Health Information" § 2(i)–(ii)).

[69] 20 U.S.C. § 1232g(a)(4)(B)(iv) (2012 & Supp. I 2013). So long as access is limited to the staff of the health care component of the college (for example, so long as Jane Doe's counseling records were kept within the University counseling center), they are not FERPA records, and Jane Doe could not directly access them. She could however, arrange for her private medical provider to access these records. Once the school discloses treatment records outside of its health care component, the records become FERPA records and the parent or adult student has normal FERPA access rights.

The legislative history on FERPA treatment records suggests it is a narrow exclusion: "the Department . . . [should] interpret the term 'treatment' narrowly to limit the exemption for such records to those similar to those enumerated. . . . not . . . remedial educational records made or maintained by education professionals . . . ." S. REP. NO. 93-1409, at 6794 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 6793, 6794.

HIPAA does not explicitly exclude FERPA "sole possession notes," 20 U.S.C. § 1232g(a)(4)(B)(i) (2012 & Supp. I 2013), records created as a memory aid by certain school employees who might include faculty or health care providers, and are not accessed by or accessible to anyone else. Like FERPA treatment notes, sole possession notes become FERPA records once they are disclosed. Most FERPA sole possession notes, such as a faculty member's notes about a struggling student, are not health information governed by HIPAA. To the extent FERPA sole possession notes are created by health care providers at colleges, they also meet the definition of FERPA treatment notes and seemingly are thus excluded by HIPAA.

Sole possession notes created by, for example, a school nurse or counselor at a K-12 school, which have not been shared with any third person are arguably subject to the HIPAA Privacy Rule. However, once these sole possession notes are shared with the student, another school employee, or an outsider, they become FERPA records and are excluded from the HIPAA Privacy Rule. Since the HIPAA Privacy Rule limits disclosure and provides for patient access, and disclosure or student access negates sole possession notes status, and HIPAA excludes a right of patient access to psychotherapy notes, the impact of possible HIPAA protection seems largely theoretical.

[70] 45 C.F.R. § 160.103 (2019). Occasionally, courts have been confused as to what law governs student medical records. *See, e.g.,* L.S. v. Mount Olive Bd. of Educ., 765 F. Supp. 2d 648, 664 (D.N.J. 2011) (school violated statutes including HIPAA by sharing a student's psychiatric evaluation with classmates).

[71] *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,483 (Dec. 28, 2000).

that Congress established a specific scheme for FERPA treatment records by excluding them as education records unless and until they were disclosed to persons other than the treatment providers, including disclosure to the student/patient. In the event of disclosure, FERPA provides that the treatment records become FERPA education records.[72] In fact, HHS announced a strong policy preference for a uniform standard of privacy protection for all health information, but deemed that they lacked authority in administrative regulations to override Congress's statutory FERPA scheme:

> 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.[73]

A Joint Guidance Letter from the enforcing agencies for HIPAA and FERPA offers an overview of the regulation of student medical records by FERPA,[74] including the general principle that FERPA governs disclosure of student medical records, with no additional limits created by HIPAA.

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[72] *Id.* HHS noted that it considered making treatment records subject to the HIPAA Privacy Rule prior to disclosure, but determined requirements to comply with HIPAA at one stage and then FERPA would create an undue burden.

[73] *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.

[74] U.S. Dep't of Health and Human 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* (Dec. 2019) [hereinafter *Joint Guidance*], https://studentprivacy.ed.gov/sites/default/files/resource_document/file/2019%20HIPAA%20FERPA%20Joint%20Guidance%20508.pdf [https://perma.cc/5LYF-9SCM].

III. FERPA Provides Little Privacy for Student Medical Records, Treating Them No Differently than Other Education Records, and Authorizing Schools to Access and Non-consensually Disclose Student Medical Records Under a Wide Variety of Circumstances

A. FERPA protects student medical records no more than other education records, and allows school special control over student treatment records by defining them as non-records

1. FERPA overview

FERPA,[75] the federal statute governing student records, is a floor amendment to 1974 Spending Clause legislation establishing conditions on the receipt of federal education funds, passed without a statement of purpose or preface, public hearings, committee work or reports, or much floor debate.[76] FERPA applies to schools (both public and private, preschool, K-12 and postsecondary) that receive any federal education funding.[77] FERPA thus governs medical privacy not only for Jane Doe and other university students, but also for K-12 students.

FERPA has two primary requirements:[78] (1) parents of minor students and adult students have the right to access their child's and their own education records, respectively;[79] and (2) in general (but with many exceptions),[80] schools may not disclose education records or their contents to third parties without the written consent of the parent/adult student.[81]

Complaints asserting FERPA violations may be made to the Department of Education (DOE), which may seek the school's voluntary compli-

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[75] 20 U.S.C. § 1232g (2012 & Supp. I 2013).

[76] *See id.* at § 1221 (GEPA conditions on receipt of federal education funds which include FERPA). For an overview of FERPA's legislative history, see Lynn M. Daggett, *Bucking up Buckley I: Making the Federal Student Records Statute Work*, 46 Cath U. L. Rev. 617, 620–22 (1997).

[77] 20 U.S.C. § 1232g(a)(3) (2012).

[78] 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, *id.* at § 1232g(a)(2), and schools provide parents/adult students with an annual notice of their FERPA rights. *Id.* at § 1232g(e). *See generally* Dixie Snow Huefner and Lynn M. Daggett, *FERPA Update: Balancing Access to and Privacy of Student Records*, 152 W. Educ. L. Rep. 469, 470 (2001).

[79] 20 U.S.C. § 1232g(a)(1) (2012 & Supp. I 2013).

[80] *See id.* at § 1232g(b). For example, a court rejected a parent challenge to a school's sharing student records with the (non-attorney) consultant who was representing the district in a special education dispute about the student's program. The court held that sharing the records did not violate FERPA, relying in part on the "legitimate educational interest" exception, *id.* at § 1232g(b)(1)(A), which permits schools to internally share student records with employees and other agents who have a legitimate educational interest in them. Tyler L v. Poway Unified Sch. Dist., No. D037558, 2002 WL 423467, at *2 (Cal. Ct. App. Mar. 19, 2002).

[81] 20 U.S.C. § 1232g(b) (2012 & Supp. I 2013).

ance.[82] 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 agenda item about the student's special education placement, FERPA's enforcing agency determined that FERPA had been violated, and then closed the parent's complaint after the school indicated it would train staff on this issue.[83] There is no private cause of action under FERPA,[84] and FERPA violations are not actionable under Section 1983.[85]

Confidentiality protections for K-12 student special education records, which often include medical records (such as evaluations, counseling records, and records of physical and other therapy), are governed by the Individuals with Disabilities Education Act (IDEA). IDEA records provisions regarding access and confidentiality generally track and incorporate FERPA.[86] The IDEA also offers parents an opportunity to request destruction of special education records when no longer needed,[87] apparently recognizing these records' sensitive and potentially stigmatizing nature. Records violations of IDEA students are actionable under federal disability law.[88]

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[82] *Id.* at § 1232g(g).

[83] U.S. Dep't of Educ., Family Policy Compliance Office, Letter to Franklin, 118 LRP 33154 (FPCO 2018).

[84] *See, e.g.*, Brown v. Texas State Univ. Bd. of Regents, No. A-13-CA-483-SS, 2013 WL 6532025, at *8 (W.D. Tex. Dec. 12, 2013) (dismissing FERPA and HIPAA claims by student athlete whose scholarship was revoked alleging school disclosed "very personal, private, confidential, extremely delicate medical information" to teammate).

[85] Gonzaga Univ. v. Doe, 536 U.S. 273, 284 (2002) (FERPA statute does not create individual enforceable rights, and hence FERPA 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 Cty. Bd. of Educ., 918 F. Supp. 181, 184 (E.D. Ky. 1996) (claims surrounding school's alleged disclosure of student's hermaphroditic condition and related special education information to newspaper).

[86] *See* IDEA Part B Regulations covering children beginning at age 3, 34 C.F.R. § 300.610–627 (2019). IDEA protections as to parent access go beyond FERPA in some ways. *See, e.g.,* 34 C.F.R. § 300.612 (2019) (requiring parent notice of IDEA rights as to records); *id.* at § 300.613 (requiring access without unnecessary delay and before any IEP team meeting, and authorizing access by parent representative); *id.* at § 300.616 (on request parents must be given list of types of records maintained). However, as to disclosure, the IDEA largely refers back to FERPA. *Id.* at § 300.622(a). Staff training and a designated responsible person are required. *Id.* at § 300.623. Parent consent is required before sharing information with non-local private schools, *id.* at § 300.622(b)(3), and with transition service providers, *id.* at § 300.622(b)(2). FERPA is also incorporated into IDEA Part C, which provides services to children ages birth to three. U.S. Dep't of Educ., Office of Special Educ. Programs, Dear Colleague Letter: Applicability of FERPA/HIPAA to IDEA Part C (May 8, 2013), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/12-025676r-tx-flinn-ferpa5-8-13.pdf [https://perma.cc/S5VC-FJQZ].

[87] 34 C.F.R. § 300.624 (2019).

[88] *See, e.g.,* T.F. v. Fox Chapel Area Sch. Dist., No. 12-cv-1666, 62 IDELR 74, 2013 WL 5936411, at *10 (W.D. Pa. Nov. 5, 2013) (examining claims that disclosure of student's severe allergy disability at PTA meeting violates federal disability law).

2. FERPA "records," and exclusion of treatment and certain other "non-records"

FERPA broadly defines the student education records it regulates. FERPA defines covered records as "those records, files, documents and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution."[89] FERPA does not carve out medical records, nor any other subcategory of student records, for greater restriction on disclosure to third parties.[90] In fact, FERPA does not prohibit schools from including student mental health records in the same file as more traditional education records.[91]

FERPA excludes several categories of "non-records" that may include student medical records, such as certain records of a school's law enforcement unit[92] and "sole possession notes" created by an individual school employee, such as a teacher or counselor, as a confidential[93] memory aid.[94] FERPA also excludes as "non-records" the "treatment records" of students aged eighteen or older or who are enrolled in postsecondary education.[95] FERPA's exclusion of treatment records has one salutary consequence: treatment records may be shared with other (on- or off-campus) persons treating the student. For example, a student with a chronic health condition, such as diabetes or depression, might be treated on campus during the semester and at home during school breaks. Treatment records may be shared between these on- and off-campus health care providers without express student consent, which presumably enhances the overall health care provided to the student.[96] This sharing between health care providers does not alter their

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[89] 20 U.S.C. § 1232*g*(a)(4)(A) (2012 & Supp. I 2013).

[90] *Cf.* United States v. Miami Univ., 294 F.3d 797, 812 (6th Cir. 2002) (in the context of holding that discipline records are FERPA education records, noting "Congress made no content-based judgments with regard to its 'education records' definition.").

[91] U.S. Dep't of Educ., Family Policy Compliance Office, Letter to Anonymous, 107 LRP 47711 (FPCO 2007) (not reaching parent's claim that student mental health records were disclosed to another parent in the absence of specifics in the complaint).

[92] 20 U.S.C. § 1232*g*(a)(4)(B)(ii) (2012 & Supp. I 2013).

[93] *See* Parents Against Abuse in Schs. v. Williamsport Area Sch. Dist., 594 A.2d 796, 802–03 (Pa. Commw. Ct. 1991) (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).

[94] 20 U.S.C. § 1232*g*(a)(4)(B)(I) (2012 & Supp. I 2013).

[95] *Id.* at § 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 [such] capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment." *Id.*

[96] 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. 12-cv-1666, 62 IDELR 74, 2013 WL 5936411, at *13 (W.D. Pa. Nov. 5, 2013) (citing Joint Guidance letter on FERPA and HIPAA).

exclusion under FERPA.[97] Less sensibly, FERPA's exclusion of treatment records means the student herself has no right to access them.[98] FERPA instead provides for access to treatment records by a (treating or non-treating) medical professional of the student's choosing.[99] FERPA also allows schools to share treatment records internally or externally under general FERPA disclosure rules.[100] Once a school shares treatment records they become FERPA records, with a right of student access. For example, FERPA would permit Jane Doe's University to send her campus counseling records to a school she transferred to without her consent, and without allowing her to see them first.[101]

FERPA's treatment records exclusion is limited to adult and postsecondary students. Treatment records of minor students not yet attending college are not excluded, and thus FERPA provides a right of access by parents.[102] This right of access includes all medical records created or maintained by the school. For example, a federal court upheld a school policy providing for parent notification of minor student pregnancy.[103]

More generally, FERPA's exclusions do not enhance privacy protections for treatment and other "non-records." Instead they increase schools' ability to non-consensually disclose to third parties, and/or limit student access to their own records. An example in the first category is FERPA's exclusion of law enforcement records, which allows campus security to share some records with police without student consent. For example, any records created by University police about Jane Doe's sexual assault would have been produced at least in part for law enforcement purposes, and could have been shared with law enforcement authorities without her consent.[104] In the sec-

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[97] *See* 20 U.S.C. § 1232g(a)(4)(B)(iv) (2012 & Supp. I 2013); *Joint Guidance*, *supra* note 74, at 18 (question 20).

[98] *See Parents against Abuse in Sch.*, 594 A.2d at 802–03 (holding that 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); *Gundlach v. Reinstein*, 924 F. Supp. 684, 690 (E.D. Pa. 1996) (finding that law student plaintiff has no FERPA right to access his medical records as they are FERPA-excluded treatment records; also rejecting FERPA claims related to the school attaching confidential letters from the plaintiff to its answer).

[99] *See* 20 U.S.C. § 1232g(a)(4)(B)(iv) (2012 & Supp. I 2013); *Joint Guidance*, *supra* note 74, at 18 (question 20).

[100] *See* 20 U.S.C. § 1232g(a)(4)(B)(iv) (2012 & Supp. I 2013).

[101] *See id.*

[102] *Cf. Joint Guidance*, *supra* note 74, at 14–15.

[103] Port Washington Teachers' Ass'n v. Bd. of Educ. of Port Washington Union Free Sch. Dist., 361 F. Supp. 2d 69 (E.D.N.Y. 2005). The court rejected claims that the policy likely violated constitutional abortion rights of minors, state and federal health care laws, or therapist privilege. The court suggested that under FERPA the parents likely had a right to the information, and the school's *in loco parentis* status likely obligated them to inform the parents. *Id.* at *80.

[104] Relatedly, the FERPA–enforcing agency has opined that disclosure of personally observed behavior and statements does not violate FERPA. *See, e.g.,* Dep't. of Educ., FERPA General Guidance for Students, https://www2.ed.gov/policy/gen/guid/fpco/ferpa/for-eligible-students.pdf [https://perma.cc/KF9T-AY7E] (last updated June 26, 2015); *see also* Doe v. Northern Ky. Univ., No. No. 2:16-CV-28, 2016 WL 6237510 at *4 (E.D. Ky. 2016). This interpretation seems inconsistent with language in FERPA regulations that oral disclosure of

ond category, FERPA exclusions for law enforcement records, sole possession notes, and treatment notes work to limit parent/adult student access to their own records, thereby providing more control over the records for the school employees who create them.[105] Since law enforcement unit and sole possession notes are not FERPA records, there is no FERPA right to access them. Somewhat similarly, students do not have a right of access to FERPA-excluded treatment notes, but there is a right of access by the college student's medical professional.

B. FERPA's non-consensual disclosure provisions authorize discretionary school disclosure of student medical records in many circumstances

In addition to reducing privacy by excluding some student medical records, FERPA allows non-consensual disclosure of student medical and other records both within the school (for example, to others within the school with a legitimate educational interest) and to persons outside of the school (for example, disclosure when the school has determined there is an emergency or disclosure to another school in which the student seeks to enroll).

FERPA's non-consensual disclosure provisions are thus triggered by specific circumstances or specific audiences, rather than by medical or other specific content. Moreover, FERPA's non-consensual disclosure provisions leave not only whether to disclose, but also the scope of the disclosure, to the school's judgment and discretion. There is no HIPAA Privacy Rule "minimum necessary" or similar limitation on most FERPA disclosures.[106] Finally, when FERPA authorizes a school to release records, generally no advance notice to the adult student/parent is required, and the records may be released even if the adult student/parent objects. The FERPA non-consensual

information in records is a FERPA violation. 34 C.F.R. § 99.3 (2019). Under the agency interpretation, arguably FERPA would allow University employees to disclose (within or outside of the University) information about Jane Doe based on personal knowledge.

FERPA also excludes records of alumni, 34 C.F.R. § 99.3 (2019) (definition of "Education Records" at section (b)(5)), and thus they may also be disclosed by the school in its discretion. FERPA also excludes records of applicants who do not matriculate, with some limitations. *See generally* 20 U.S.C. § 1232g(a)(6) (2012 & Supp. I 2013).

[105] Teachers and counselors may find it preferable to create sole possession notes by keeping them inaccessible and unaccessed, which may indirectly work to enhance the privacy of this information.

[106] 34 C.F.R. § 99.31(a) (2019) (listing permitted disclosures). FERPA's limits on disclosures include the litigation exception which is limited to "relevant" records, *id.* at § 99.31(a)(9)(iii), and the internal disclosure exception which is limited to records in which the school official has a "legitimate educational interest," as determined by the school, *id.* at § 99.31(a)(1)(i)(a). A prior restriction in FERPA's emergency exception dictating it be strictly construed has been eliminated. *See infra* Section III.B.4. Other FERPA exceptions such as disclosures to other schools in which the student may enroll, 20 U.S.C. § 1232g(b)(1)(B) (2012 & Supp. I 2013), law enforcement unit disclosures, 34 C.F.R. § 99.8 (2019), and disclosures to parents of dependent students, 20 U.S.C. § 1232g(b)(1)(H) (2012 & Supp. I 2013) have no limits on the scope of disclosures.

disclosure provisions thus afford schools great discretion as to appropriate protection for student privacy.[107]

Several FERPA non-consensual disclosure provisions permit schools to share student medical records. Six such provisions are described below, including the two provisions—school-student litigation, and internal disclosures to persons with legitimate educational interests—the University raised in the Jane Doe case.

1. School-student litigation

FERPA's litigation provision[108] is triggered when either the school or student "initiates legal action" against the other.[109] If the exception has been triggered, the school may disclose "relevant" records to the court.[110] FERPA's enforcing agency reasons that a school "should not be required to subpoena its own records or seek a judicial order in order to defend itself in a lawsuit initiated by a parent or student" and that an implied waiver is created when students sue schools.[111] The enforcing agency has interpreted the litigation provision to allow a school to disclose special education records information, without advance notice, noting that "FERPA does not distinguish

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[107] FERPA does not give rights of access to student records other than to parents/adult students. *See generally* 20 U.S.C. § 1232g(a)–(b) (2012 & Supp. I 2013). More recently, other law gives the military a limited right of access for recruiting purposes. Secondary schools must release to requesting military recruiters lists of names, addresses and telephone numbers of students who have not filed objections. *Id.* at § 7908; 10 U.S.C. § 503(c) (2012 & Supp. IV 2017).

[108] 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.

[109] *Id.* Certainly, filing and serving a complaint would satisfy this requirement. 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. Moreover, the requirement that the school or student initiate legal action against the other means that only civil suits will qualify.

[110] 61 FR 59292-01 (Nov. 21, 1996); *see also* Doe v. Northern Ky. Univ., No. 2:16-CV-28, 2016 WL 6237510 at *4–5 (E.D. Ky. 2016). Presumably as the custodian of the records the school would initially determine what records it believed to be relevant to the case. The student could contest relevancy with the court as appropriate.

[111] *See* 65 FR 41852-01, at 41858 (July 6, 2000). 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. 61 FR 59292-01 (Nov. 21, 1996). In 2000, the requirement for following the FERPA subpoena advance notice requirement was removed from the regulation. 65 FR 41852-01, at 41858 (July 6, 2000). The Department 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, and the student defendant should understand that education records may be disclosed to the court, and has options such as petitioning the court to seal the records. *See id.*

The exception for schools suing students now codified at 34 C.F.R. 99.31(a)(9)(iii)(B) (2019) was added. *Id.* 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.* The Department declined to require advance notice by the school as "overly burdensome." *Id.*

between different types of education records, such as . . . health or medical records."[112] In the context of a sexual harassment case, one federal court concluded that FERPA's litigation provision limited student expectations of privacy.[113]

FERPA's litigation provision does not require protective orders for disclosed student records, nor does it require putting them under seal. Student records disclosed to courts are not normally put under seal. Several courts have refused requests to seal FERPA records disclosed to the court under the litigation provision,[114] including one case denying a request to seal the records of high school athletes accused of rape who had sued their school.[115] These courts have noted the high standard for sealing records, and the "strong presumption of openness" in judicial proceedings, and hence have required showings that the records are of a kind normally protected (mentioning as examples records protected by privilege and names of sexual assault victims) and that disclosure would cause serious harm.[116]

When another sexually assaulted student sued her college, the court refused to seal FERPA records.[117] The student claimed Title IX retaliation based on the school's statement that if she sued, under FERPA the University would be permitted by law to rely on *all* records related to this incident in support of its defense.[118] 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.[119]

In Jane Doe's case, FERPA's litigation provision would not authorize disclosure at the time Jane Doe's records were seized when there was only a threatened lawsuit and there was no court to disclose to.[120] However, once

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[112] U.S. Dep't of Educ., Family Policy Compliance Office, Letter to Anonymous, 111 LRP 64639 at 2 (FPCO 2011).

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

[114] *See, e.g.*, Doe #1 by & through Lee v. Sevier Cty., Tenn., 2017 WL 1048378, at *4 (E.D. Tenn. 2017); Osei v. Temple University, 2015 WL 12914144 (E.D. Pa. 2015); Jennings v. Univ. N. Carolina, 340 F. Supp. 2d 679 (M.D. N.C. 2004) (sexual harassment case in which school defendant asked court to seal affidavits and depositions of plaintiff and others as well as plaintiff's transcript; finding FERPA is some evidence of a compelling interest to justify putting records under seal but is not conclusive); *id.* at 684 (suggesting disclosure of medical records may be different).

[115] *Sevier Cty., Tenn.*, 2017 WL 1048378 at *3.

[116] *Sevier Cty., Tenn.*, 2017 WL 1048378 at *2.

[117] Doe v. Northern Ky. Univ., 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).

[118] *Id.* at 4 (emphasis added).

[119] *Id.* at 5. The statement was made in a civil settlement negotiations document, and thus also seemed to be inadmissible. *See id.*

[120] The school might have cited hearing decisions finding a special education hearing triggered the provision because it was a prerequisite to litigation. *See, e.g.*, Albuquerque Publ. Sch., 109 LRP 73897 (N.M. SEA 2009) (reasoning in part that the hearing officer could not make a fair decision without the records). The school could have argued that the notice of suit is also a prerequisite to litigation, but that seems a stretch.

Jane Doe filed her complaint, the FERPA litigation provision would permit disclosure to the court of "relevant" FERPA records. Seeking damages for emotional distress made some of Jane Doe's campus counseling records relevant. The school could access her campus counseling and other records without advance notice to Jane Doe. At least initially, the University would unilaterally determine what records were relevant. Jane Doe could then ask the court to deem some or all records not relevant. In Jane Doe's case, the court might find her campus medical records would be relevant to her claim for damages for emotional distress—both the extent of her distress and whether it was caused by the sexual assault or preexisting issues—or relevant to her credibility. FERPA likely would not require sealing her records nor a protective order.

2. Internal disclosures to persons with legitimate educational interests

FERPA allows schools to share student medical and other records internally with persons with a "legitimate educational interest."[121] For example, a student was required to undergo counseling after allegedly behaving inappropriately in class. After the student refused to sign a release, the school shared his counseling records with other school officials involved in the behavioral matter. The court found disclosure to be authorized by FERPA's legitimate educational interest provision.[122] This internal disclosure provision allows schools to decide to share records unilaterally. Neither advance notice to the student, nor an opportunity for the student to request no or limited access, nor oversight by a court or other independent person, is required.

Internal sharing is allowed with "school officials," specifically including teachers.[123] Actual employee status is not required, and thus internal sharing can be with unpaid agents, such as volunteers, paid or unpaid nonemployee officials such as school board members,[124] and independent contractors, such as physical therapists working with special education students. Regulations flesh out who can access records under this provision, including consultants and persons performing outsourced services under some circumstances.[125]

It is clear that a school's attorney (who might be an in-house employee, an official, and/or an independent contractor) may access records under this

[121] 20 U.S.C. § 1232g(b)(1)(A) (2012 & Supp. I 2013).

[122] Chandler v. Forsyth Tech. Comm'y Coll., 2016 WL 4435227 at *15 (M.D. N.C. 2016).

[123] 20 U.S.C. § 1232g(b)(1)(A) (2012 & Supp. I 2013).

[124] School board members and analogous university officials may seek access to student records under this provision, but not always with success. When a university regent requested complete access under FERPA's legitimate educational interest provision to all admissions records, the university chancellor redacted FERPA information from the records. The regent sought a writ of mandamus compelling production of unredacted records, and the Texas Supreme Court upheld the chancellor's authority to redact the records. Hall v. McRaven, 508 S.W.3d 232 (Tex. 2017).

[125] 34 C.F.R. § 99.31(a)(1)(i)(B) (2019).

provision.[126] In fact, school attorneys often access records under this provision, for example, to represent the school in student matters such as special education disputes and expulsion hearings.[127] FERPA regulations impose a duty on schools to oversee internal access under this provision,[128] but provide that legitimate educational interests are to be "determined by such agency or institution," and also note that the student's educational interests are not the only legitimate ones.[129] 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.

In Jane Doe's case, the University asserted that her counseling records were the University's property, and her threatened claim against the University gave the University's attorney and other persons involved in defending the claim authority to non-consensually access campus counseling records. Notably, the University accessed Jane Doe's entire counseling center file although Jane Doe's attorney had reported that some of Jane Doe's counseling related to family issues independent of her attack.[130] More generally, prior to their assaults, student sexual assault victims may have had campus counseling to deal with other issues. They may have also received pre- or post-assault campus gynecological care.

If Jane Doe or another sexual assault victim got counseling off-campus, or the defendant is the assaulter rather than the University, a subpoena and advance notice to the student would be required by HIPAA Privacy Rule and FERPA respectively.[131] In the first of these scenarios, the school is the defendant, and in the second scenario the school is the health care provider. In both scenarios the student would seem to have a cogent argument for a

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[126] The enforcing agency's model notices of FERPA rights include attorneys as persons with legitimate educational interests. *See, e.g.*, U.S. DEP'T OF EDUC., MODEL NOTIFICATION OF RIGHTS UNDER FERPA FOR POSTSECONDARY INSTITUTIONS, https://www2.ed.gov/policy/gen/guid/fpco/ferpa/ps-officials.html [https://perma.cc/Y6CZ-BTF2]. *Cf.* Aufox v. Bd. of Educ. of Twp. High Sch. Dist. No. 113, 588 N.E.2d 316, 319 (Ill. App. Ct. 1992) (holding under state student records law that school attorney may access student records to defend the school in a special education hearing); Washoe Cty. Sch. Dist., 113 LRP 24807 (SEA Nev. 2013) (in 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 (SEA Ind. 2013) (state law excludes third party contractors as school officials with legitimate educational interests; hence disclosure to school's attorney who is contractor is not authorized).

[127] In these school legal proceedings, only school staff with a legitimate educational interest may attend. *See* U.S. Dep't. of Educ., Office of Special Educ. & Rehab. Serv., Opinion Letter (Nov. 30, 2012), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/12-015702r-pa-gran-dph-11-30-12.pdf [https://perma.cc/F2EY-8PVU].

[128] 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).

[129] FERPA also clarifies that school officials can have legitimate educational interests in disciplinary information about a student. 20 U.S.C. § 1232g(h) (2012 & Supp. I 2013).

[130] *Complaint*, *supra* note 25, at 10.

[131] *See* 45 C.F.R. § 164.512(e) (2019) (HIPAA); 34 C.F.R. § 99.31(a)(9) (2019) (FERPA).

court that some counseling records are not relevant to the lawsuit about sexual assault, and the subpoena should be quashed as to those records. However, in cases such as Jane Doe's when the school is both health care provider and defendant, FERPA appears to permit these records to be unilaterally seized by the school without court involvement or oversight.

Jane Doe's case illustrates this problem at an acute level, but only hints at its potential magnitude. FERPA's internal access provision would seem to authorize Jane Doe's University to unilaterally seize not only the campus medical records of Jane Doe, but also of the accused students and potential witnesses. For example, Jane Doe's University might seize treatment records of witnesses, parties, or friends of parties to identify information that might bear on witness or party credibility as part of its legitimate educational interests in providing legal services as well as in compliance with Title IX obligations. Moreover, Jane Doe's University might seize student medical records for nonlitigation matters such as Title IX or other internal student discipline hearings and investigations conducted as part of its educational mission.[132] If colleges access student medical records for use in Title IX hearings, they must be disclosed to both parties.[133] Proposed Title IX regulations would make FERPA inapplicable in Title IX compliance matters generally.[134] The proposed regulations specifically would extend the requirement of full access by both parties to everything in a college's Title IX investigation file, and even require access by party-aligned advisors and by the accused student in the event a formal complaint was filed by the school Title IX coordinator rather than by the student.[135] Moreover, because under the proposal FERPA is inapplicable, there would be no FERPA ban on redisclosure.[136] Schools might also seize student medical records to defend other matters such as student personal injury claims, constitutional and statutory civil rights claims against schools, and employee injury or discipline matters involving students.

3. 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 a school in which the student seeks to enroll[137] or actually enrolls.[138] Thus if

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[132] FERPA also includes related language permitting the internal disclosure to persons with legitimate educational interests in the behavior of a student of disciplinary information and related "appropriate information" about students whose conduct "posed a significant risk" to safety. 20 U.S.C. § 1232g(h) (2012 & Supp. I 2013). Discipline includes investigation not leading to actual sanctions. 34 C.F.R. § 99.3 (2019).

[133] 34 C.F.R. § 668.46(k)(3)(B)(3) (2019).

[134] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. 106).

[135] *Id.*

[136] 20 U.S.C. § 1232g(b)(4)(B) (2012 & Supp. I 2013).

[137] The student must actually be seeking enrollment. Thus, in the context of a special education dispute, and against the parents' expressed wishes, a school district sent a student's

Jane Doe decided to try to transfer to another school after her attack, or at some later point applied to graduate school, the University could choose to disclose any or all of her records, including her campus counseling and other medical records, to that school.[139]

A case involving disclosure of medical records of a K-12 student to his transfer school shows what could have happened had Jane Doe attempted to transfer and even objected to release of her counseling records to her transfer school. In that case, the K-12 student challenged his former school's disclosure of his psychological reports and other FERPA records to his transfer school as a tortious invasion of privacy.[140] The school had parental consent to release academic records, but not psychological records, and the school had agreed not to release psychological records. However, the entire file was inadvertently mailed to the new school. A state appeals court 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.[141]

4. Disclosure in school-determined "emergencies"

FERPA also gives schools discretion to internally and externally disclose records as necessary in an emergency.[142] A prior version of the FERPA regulation on emergencies required that it be "strictly construed."[143] It has since been broadened to give schools more discretion[144] by replacing the "strictly construed" language with a standard of an "articulable and significant threat" under the "totality of the circumstances" and further providing

records including a neuropsychological evaluation and a psychiatric update to several possible placements. W.A. v. Hendrick Hudson Centr. Sch. Dist., No.14-CV-8093 (KMK), 2016 U.S. Dist. LEXIS 44369 (S.D.N.Y. 2016) (noting these records were "excruciatingly private and intimate in nature," a federal district court denied the school's motion to dismiss due process claims, finding in the context of the student's age and disability a triable due process interest in privacy of medical information, and noting the lack of a private cause of action under both HIPAA and FERPA).

[138] 34 C.F.R. § 99.31(a)(2) (2019).

[139] A similar result would obtain if Jane Doe graduated and entered graduate school.

[140] *See* Klipa v. Bd. of Educ. of Anne Arundel Cty., 460 A.2d 601 (Md. Ct. Spec. App. 1983).

[141] *Id.* at 608. Actionable tortious invasion of privacy is limited to disclosures where the plaintiff reasonably expects privacy. *See* RESTATEMENT (SECOND) OF TORTS § 652A (AM. LAW INST. 1977). FERPA's enrollment in a new school provision likely means there is no reasonable expectation of privacy as to disclosures to the new school.

[142] *See* U.S. Dep't of Educ., Family Policy Compliance Office, Opinion Letter on Addressing Emergencies on Campus (June 2011), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/emergency-guidance.pdf [https://perma.cc/NMA3-7V39].

[143] 34 C.F.R. § 99.36(c) (2007).

[144] 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 shooter, including details of his on-campus mental health treatment. *See* VA. TECH. REVIEW PANEL, MASS SHOOTINGS AT VA. TECH. (2007), https://scholar.lib.vt.edu/prevail/docs/VTReviewPanelReport.pdf [https://perma.cc/2XM9-R5PT].

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.[145]

The change in approach is illustrated by a pair of decisions by FERPA's enforcing agency. Under the original and narrower FERPA emergency provision, a student's chronic and 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.[146] But under FERPA's broadened emergency provision, no violation was found when a school physical therapist contacted and disclosed information to a student's treating physician who had performed hand surgery, citing FERPA's "'health and safety'[147] exception."[148]

In the Jane Doe case, the University might determine that Jane Doe's alleged rape by a student previously found responsible at his prior school for sexual assault constituted an emergency, and expect FERPA's enforcing agency to defer to that determination. The University could then disclose FERPA records, with no particular ban on disclosure of medical records both within and outside of the school.

5. Disclosures to police

While FERPA does not have a designated provision for non-consensually sharing information with police, several exclusions and provisions such as the emergency provision permit non-consensual sharing with police in some circumstances.[149] As discussed above, FERPA excludes records created by a school's law enforcement unit that were created at least in part for law enforcement purposes.[150] This exclusion gives schools discretion to disclose such records to the police or other persons such as a student's probation officer[151] without student consent and whether or not disclosure falls under one of FERPA's provisions.[152] In the Jane Doe case, campus police were notified of allegations of criminal sexual assault. It is unclear what if anything campus police did, but any records created by campus police about the

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[145] 34 C.F.R. § 99.36(c) (2019); *see generally* U.S. Dep't of Educ., Family Policy Compliance Office, Letter to Anonymous, 53 IDELR 235 (FPCO 2008) (offering an overview of the new FERPA approach on emergencies).

[146] U.S. Dep't of Educ., Family Policy Compliance Office, Letter to Irvine (CA) Sch. Dist., 23 IDELR 1077 (FPCO 1996).

[147] U.S. Dep't of Educ., Family Policy Compliance Office, Letter to Anonymous, 111 LRP 19105 (FPCO 2010) (noting deference to school determinations of emergency when supported by a rational basis, and not mentioning any emergent or urgent circumstances nor detailing any rational basis for the school's determination of emergency).

[148] *Id.*

[149] For an overview of FERPA disclosures and the police, *see* Lynn M. Daggett, *Book 'em?: Navigating Student Privacy, Disability, and Civil Rights and School Safety In the Context of School-Police Cooperation*, 45 URBAN LAWYER 205, 217–24 (2013).

[150] 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.

[151] U.S. Dep't of Educ., Family Policy Compliance Office, Letter to Anonymous, 114 LRP 50799 (FPCO 2014).

[152] *Id.*

assault (such as interviews with the victim, accused, or witnesses) could be shared with the police or others without consent.[153]

6. Disclosure to parents of adult students

FERPA permits sharing with parents of financially dependent students.[154] In mediation, Jane Doe's attorney told her University that Jane Doe's counseling included family issues predating her rape. Even if Jane Doe had not disclosed her rape to her parents, FERPA would permit her University to share her psychotherapy notes with them if they supported her financially.

C. FERPA permits subpoenas and discovery of student records and related information, offering some protection for third party subpoenas, but little protection in school-student litigation

FERPA includes procedural requirements for schools served with subpoenas of student records,[155] most significantly requiring schools to make "reasonable efforts" to provide advance notice to the parent/adult student before compliance.[156] Presumably this requirement exists in order to provide the student an opportunity to ask a court to quash or modify the subpoena,[157] though one court has held that students lack standing to object to subpoenas of their records.[158] Schools may also oppose subpoenas but are not required to do so.[159] A case involving disclosure of a former student's education records from medical school in response to a subpoena without providing the required advance notice demonstrates the lack of recourse for violation of

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[153] 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 in its discretion.

[154] 20 U.S.C. § 1232g(b)(1)(I) (2012 & Supp. I 2013).

[155] 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. 34 C.F.R. § 99.10(e) (2019).

[156] 20 U.S.C. § 1232g(b)(2)(B) (2012 & Supp. I 2013); 34 C.F.R. § 99.31(a)(9) (2019) (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, 61 IDELR 67 (S.D. Oh. 2013).

[157] When a third party's records which have been provided by a school pursuant to FERPA are subpoenaed, it is the third party that has the obligation of providing parent notice before complying. 34 C.F.R. § 99.33(b)(2) (2019). These procedural requirements are modified for some law enforcement subpoenas. 20 U.S.C. at § 1232g(b)(1)(J) (2012 & Supp. I 2013); *id.* at § 1232g(j).

[158] Whittaker v. Morgan St. Univ., 842 F. Supp. 2d 845, 846 (D. Md. 2012). In that case, a former professor sued the university and sought transcripts for students who had complained about him. The court held that prior notice to the students was all that was required, finding no explicit right to object in FERPA itself and deeming that regulations, 34 C.F.R. § 99.31(a)(9)(ii) (2011), did not give courts jurisdiction to hear student challenges.

[159] In re Subpoena Issued to Smith, 921 N.E.2d 731, 734 (Oh. Ct. Com. Pl., Hamilton Cty. 2009).

FERPA's advance notice requirement.[160] In other cases, courts have allowed release of subpoenaed student medical records.[161]

FERPA does not set out a substantive standard for courts or schools to use to decide whether to comply with a subpoena of student information. Hence, schools that choose to fully comply with subpoenas likely face no adverse legal consequences. Courts asked to quash[162] or modify FERPA subpoenas typically inspect the subpoenaed records in camera and apply a balancing test, weighing the need for the information contained in subpoenaed records against the intrusion on the student's privacy.[163] This approach has been used for subpoenas of records concerning students accused of sexual assault.[164] When FERPA records are shared with a third party by subpoena (or otherwise), the third party must keep the shared records confidential to the extent required by FERPA.[165]

Court review of subpoenas of student medical records has been inconsistent. In a case claiming brain damage from lead paint, defendants subpoenaed the FERPA records of the plaintiff's mother to support its expert's theory that the plaintiff's learning difficulties were at least partially familial.[166] The court found the mother's school medical records to be "sensitive" and not particularly relevant to the defense theory, and excluded medical records from the documents to be produced.[167] That court limited access to in-person inspection by the parties, and issued an order prohibiting redisclosure after notice to the plaintiff's mother with an opportunity[168] to object. A different court found that compliance with the FERPA subpoena process entitled the subpoenaing party to all FERPA records including medical records, neither reviewing the records in camera nor balancing privacy interests with the need for individual records.[169] This court refused a request for a protective order since the plaintiff had put his mental state at issue by suing,

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[160] *See* Dyess v. La. State Univ. Bd. of Supervisors, No. Civ.A. 05-392, 2005 WL 2060915 (E.D. La. Aug. 19, 2005) (dismissing FERPA and other claims by plaintiff whose educational records were released by a school in response to subpoena without prior notice as required by FERPA).

[161] *See, e.g.*, Carpenter v. Mass. Inst. Tech., 19 Mass. L. Rptr. 342 (Super. Ct. 2005) (in case brought against university by parents for failure to protect child who committed suicide after being stalked by fellow student, university was ordered to release student's campus mental health records).

[162] *See, e.g.*, FED. R. CIV. P. 45(d)(3)(A)(iii) (motion to quash civil subpoena may be made if the subpoena "requires disclosure of privileged or other protected matters").

[163] *See e.g.*, Rios v. Read, 73 F.R.D. 589, 598–99 (E.D.N.Y. 1977).

[164] *See, e.g.*, Krakauer v. State, 381 P.3d 524, 537 (Mont. 2016) (author request for records under state constitution "right to know" provision concerning internal appeal of student athlete found responsible for sexual assault; remanded to perform in camera balancing test).

[165] 34 C.F.R. §99.33 (2019).

[166] *See* Bunch v. Artz, 71 Va. Cir. 358 (Va. Cir. Ct. 2006).

[167] *Id.* at 375.

[168] *Id.* at 375–76.

[169] Orefice v. Secondino, No. CV040486287S, 2006 WL 1102714, at *1 (Conn. Super. Ct. 2006).

noting "FERPA is not a law which prohibits the disclosure of medical records, but merely imposes a finding precondition for nondisclosure."[170]

In several cases, courts faced with discovery requests for both school and non-school medical records have treated them differently. In a medical malpractice case, defendants sought discovery of the education records of the disabled plaintiff's siblings in order to try to establish genetic or familial causation of plaintiff's disabilities.[171] A state appellate court ordered disclosure of some special education records, including records made by school health care professionals, after in camera review and with a protective order, but found the outside medical records to be protected from discovery by privilege.[172] In another case, a student sued the police for injuries sustained in an on-campus incident. The defendant sought broad access to the plaintiff's medical records, as well as school medical and other records.[173] That court limited access to the medical records, but did not limit access to the FERPA health and other records, refusing to review them in camera and determining their discoverability on an individualized basis.[174]

This differential treatment extends to records obtained without a subpoena in criminal cases. In one case, after prosecutors were able to access the defendant's prison medical records and his FERPA records without a warrant or subpoena, the defendant's motion to suppress was granted as to the medical records, but denied as to the FERPA records.[175] The court recognized the defendant had reasonable privacy expectations in outside medical records under both HIPAA and the Fourth Amendment, but concluded that "[e]ducation records generally do not contain the same degree of private, sensitive, and highly personal information that medical and mental health records do," even when they are obtained without a warrant.[176]

In criminal cases, courts have examined FERPA subpoenas by both defendants and prosecutors. Criminal defendants accused of sexual misconduct against minors have subpoenaed their accusers' student records, seeking evidence of lying or other information which they might use to impeach their accuser, or exculpatory information. Courts performing in camera reviews of the accuser's records generally do not discover impeaching or exculpatory information in the records.[177] In a case in which prosecutors subpoenaed the

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[170] *Id.* (citing Student Bar Ass'n v. Byrd, 239 S.E.2d 415, 419 (N.C. 1977)).

[171] Catrone v. Miles, 160 P.3d 1204, 1208 (Ariz. Ct. App. 2007).

[172] *Id.* at 1210–16 (contrasting these records with medical records protected by privilege).

[173] Avina v. Bohlen, No. 13-C-1433, 2015 WL 1756774, at *1 (E.D. Wis. Apr. 16, 2015).

[174] *Id.* at *5.

[175] United States v. McCluskey, No. CR 10-2734 JCH, 2012 WL 13080237, at *1 (D.N.M. July 26, 2012), *opinion amended and superseded*, 893 F. Supp. 2d 1117 (D.N.M. 2012), *order clarified*, No. CR 10-2734 JCH, 2013 WL 12333650 (D.N.M. Feb. 13, 2013).

[176] *Id.* at *5.

[177] *See, e.g.*, People v. Bachofer, 192 P.3d 454, 459–62 (Colo. App. 2008) (appeal by 31-year-old defendant convicted of false imprisonment of his 15-year-old girlfriend during police standoff which he claimed was consensual; trial court reviewed subpoenaed school records of girlfriend in camera and quashed subpoena; trial court erred in performing the balancing test when it looked for exculpatory material only about the standoff and not exculpatory material

school records of a defendant who claimed ADD, the court refused to quash the subpoena.[178]

Student plaintiffs in civil suits seeking damages for injuries at school or at a school-sponsored activity from a third party presumably put their physical and perhaps mental condition in issue. In this context, courts have been willing to enforce subpoenas of the plaintiff's relevant school records including student medical records.[179]

Subpoenas of other student victims' records have had mixed results. In two cases in which student plaintiffs claimed school employees sexually assaulted them and other students, courts enforced subpoenas of other (alleged) victims' records,[180] but more often courts have refused to enforce subpoenas of other (potential pattern witness) students' records by a student plaintiff claiming injury by a school employee.[181] Students claiming injuries inflicted by another student have had some success in obtaining the defendant student's records.[182] Where a student sues a third party for compensa-

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concerning the girlfriend/witness's credibility, but appeals court's own in camera review found no noncumulative exculpatory material and thus error was harmless); People v. Wittrein, 198 P.3d 1237, 1240–41 (Colo. App. 2008), *rev'd on other grounds*, 221 P.3d 1076 (Colo. 2009) (prosecution for sexual assault of an 8-year-old; no abuse of discretion for trial court to refuse to conduct in camera review of alleged victim's school records subpoenaed by defendant where defendant did not articulate a specific basis for needing access to those records); May v. Dir., TDCJ-CID, No. 6:06-CV-326, 2007 WL 708580, at *24–25 (E.D. Tex. Mar. 5, 2007) (gymnastics coach convicted of child rape was properly denied access to victim's school records in an attempt to show a history of misconduct and prior instances of untruthfulness after in camera review reveals nothing usable for impeachment). *But cf.* Zaal v. State, 602 A.2d 1247, 1264 (Md. App. 1992) (subpoena of victim's psychological evaluations and other education records by grandfather prosecuted for sexual abuse of 12-year-old granddaughter enrolled in special education; in camera review should include records with impeachment value such as instances of lying or bias against the defendant, and in camera review with counsel present would be appropriate; noting that FERPA confidentiality was less than that for child abuse investigation records).

[178] United States v. Hunter, 13 F. Supp. 2d 586, 594 (D. Vt. 1998).

[179] *See, e.g.*, Gaumond v. Trinity Repertory Co., 909 A.2d 512, 516–19 (R.I. 2006) (special education student claim of injury on field trip to defendant theater; report prepared by school nurse which was redacted at student's request pursuant to IDEA records provisions would be made available to defendant; rejecting existence of "school-disabled student privilege"); Catrone v. Miles, 160 P.3d 1204, 1204 (Ariz. Ct. App. 2007) (medical malpractice defendants claimed plaintiff's condition was genetic and not the result of negligence, and sought sibling's special education records in support of this theory; court properly ordered partial production of such records after in camera review and balancing); *Orefice v. Secondino*, No. CV040486287S, 2006 WL 1102714, at *1 (Conn. Super. Ct. 2006) (claim for damages for emotional distress puts mental state in issue).

[180] *See* Anonymous v. High Sch. For Envt'l Studies, 820 N.Y.S. 2d 573, 579 (N.Y. App. Div. 2006); Baker v. Mitchell-Waters, 826 N.E.2d 894, 899 (Ohio Ct. App. 2005); *cf.* T.M. *ex rel.* D.M. v. Elwyn, Inc., 950 A.2d 1050, 1063 (Pa. Super. Ct. 2008) (rejecting argument that FERPA barred plaintiff's discovery of records concerning sexual abuse of other students by this counselor).

[181] *See, e.g.*, E.W. v. Moody, C06-5253 FDB, 2007 WL 445962, at *1 (W.D. Wash. Feb. 7, 2007) (student's request for names of teacher's other students is protected by FERPA).

[182] *See, e.g.*, DeFeo v. McAboy, 260 F. Supp. 2d 790, 795 (E.D. Mo. 2003) (ordering disclosure of discipline and law enforcement FERPA non-records of allegedly negligent student who drove into plaintiff student); *cf.* Rose v. Kenyon Coll., 211 F. Supp. 2d 931, 940 (S.D. Ohio 2002) (in college student's civil suit alleging rape by fellow student, student defendant sought discovery of student plaintiff's education records; codefendant college moves for

tory damages for mental injury, courts have found an implied waiver of therapist privilege and allowed access to the student's mental health records.[183] Students may also seek damages for personal injury not involving their school. Courts may allow discovery of FERPA records including special education records as relevant to claims for lost earning capacity.[184]

Had Jane Doe sued her assaulters in tort, they would have been able to subpoena relevant therapy records. In this event it is likely that a court, on request by either Jane Doe or the University, would determine which records to make available to these defendants. Jane Doe's lawsuit sought damages for emotional harm, thus placing her mental state in issue, and waiving her therapist privilege for relevant records. Jane Doe would have an opportunity to ask a court to review subpoenaed medical records in camera and determine what records to disclose. This FERPA subpoena arrangement is certainly preferable to the University's seizure of Jane Doe's records without either a subpoena or court involvement nor advance notice to her, but is not without concerns as to sensitive student medical and similar records. As described above, not all courts agree that students may object to subpoenas of their records, and neither do all courts agree to do an in camera review balancing need and the student's privacy interests. Some courts which do perform in camera review and balancing seem to give short shrift to student privacy. Some courts refuse to issue protective orders, and other courts routinely refuse to put subpoenaed student records under seal.

A civil rights lawsuit by a student claiming sexual harassment by university employees illustrates these concerns. Individual defendants subpoenaed the plaintiff student's campus gynecological and other student medical records. The university co-defendant directed the student health center to turn over the records before the subpoena date, and without telling the student. The court ordered sanctions against the defendants, but the privacy damage was done.[185]

protective order; parties encouraged to negotiate a resolution of this issue); Order Denying Renewed Motion for Protective Order, Israel v. Kenyon Coll., No. 2:00-cv-1378 (S.D. Ohio Aug. 27, 2003) (in the same case, magistrate grants motion to compel discovery of the records).

[183] *See, e.g.*, N.D. *ex rel.* Dorman v. Golden, 2014 WL 1764714, No. 2:13-cv-540–MEF–TFM (M.D. Ala. May 1, 2014) (student suing off–duty reserve officer for off–campus incident claiming mental injury moved to quash defendant's subpoena of all of student's FERPA records; court quashed motion as to all of student's FERPA records but found implied waiver as to student's school mental health records).

[184] Milligan v. Bifulco, 62 N.Y.S.3d 663, 664 (N.Y. App. Div. 2017) (permitting discovery of special education records but denying discovery of pre-accident mental health records after claims for cognitive impairment were withdrawn).

[185] Mann v. Univ. of Cincinnati, 152 F.R.D. 119 (S.D. Oh. 1993). The opinion does not mention FERPA, but relies on a constitutional privacy theory.

D. Public records laws that govern public schools may further limit student medical privacy

Jane Doe attended a public university regulated not only by FERPA but also state public records law exempting "[s]tudent records required by state or federal law to be exempt from disclosure."[186] More generally, public records laws exempt various categories of records from a public right of access, typically including some sort of exemption for student records, which may or may not align with the scope of FERPA records.[187] Jane Doe's University might have faced a public records request for Jane Doe's campus treatment records. Media and individual citizens may request student records under public records laws, including demands for records surrounding campus sexual misconduct.[188] It is not entirely clear that FERPA would require Jane Doe's University to deny such a request.

Schools facing public records requests for student records are not required to provide advance notice to parents/adult students. Schools receiving public records requests for documents the school believes to be protected by FERPA could seek advice from relevant state agencies or the attorney general's office, or ask a court for a declaratory ruling, or merely deny the public records request, citing FERPA, and defend the denial as necessary. When schools receive public records requests for student records that are not exempt under state statute, there is some incentive to produce the records. Schools that refuse such requests on the grounds that the records are protected by FERPA risk defending and losing a claim under the state public records statute, with resulting responsibility for the claimant's attorney's fees and costs, as well as statutory penalties.[189] These risks are greater than those which loom under FERPA if the school hands over the records in violation of the law.[190]

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[186] OR. REV. STAT. § 192.398(4) (West, Westlaw current through laws enacted in the 2018 Reg. Sess. and 2018 Spec. Sess. of the 79th Legis. Assemb.).

[187] For an overview and discussion of FERPA and state public records laws, see Susan P. Stuart, *A Local Distinction: State Education Privacy Laws for Public Schoolchildren*, 108 W. VA. L. REV. 361, 387–94 (2005). For a critical examination of a narrowly construed state public records act exception for "personal information" in "files maintained for students," see Tevon Edwards, *I Would Like to Request Your Academic Records: FERPA Protections and the Washington Public Records Act*, 93 WASH. L. REV. 1057 (2018). The federal FOIA exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (2012 & Supp. III 2016).

[188] *See* Press-Citizen Co. v. Univ. of Iowa, 817 N.W.2d 480 (Iowa 2012) (denying media request for student records with student names redacted concerning campus sexual assault of student athlete by football players named in press accounts, reasoning such disclosures would involve personally identifiable information in violation of state public records law that is interpreted to incorporate FERPA).

[189] *See, e.g.*, Lindeman v. Kelso Sch. Dist. No. 458p, 172 P.3d 329, 330 (Wash. 2007) (state public records statute exemption of "[p]ersonal information in any files maintained for students in public schools" did not include a fight between two students on a school bus recorded by video surveillance); *id.* at 332 (ordering the school to pay the parents' attorney's fees, costs and penalties under the public records statute).

[190] *See supra* notes 82-85 and accompanying text regarding the unavailability of either a private cause of action or a Section 1983 claim for FERPA violations. Hence, violations of

The intersection of FERPA and state public records laws is unclear and unsettled. When the state public records law has a FERPA exception, schools likely are not required to release student FERPA records.[191] When the records are protected by FERPA but not by the state public records law, FERPA arguably preempts (albeit to an unclear extent) inconsistent state public records laws[192] and so schools may refuse requests for student records protected by FERPA.[193] However, when the requested records are both not protected by FERPA because (a) they are FERPA "non-records" such as Jane Doe's treatment records; (b) FERPA is interpreted to exclude them;[194] or (c) FERPA permits their non-consensual disclosure, such as public disclosure of certain student discipline outcomes;[195] and are not exempt from

FERPA generally do not expose schools to litigation. In contrast, a violation of the state public records statute in Jane Doe's case can be challenged in court, and exposes a defendant school to damages as well as reimbursement of the successful plaintiff's attorney's fees. *See generally* OR. REV. STAT. § 192.431 (West, Westlaw current through 2018 Reg. Sess. and 2018 Spec. Sess. of the 79th Legislative Assemb.).

[191] *See* Press-Citizen Co. v. Univ. of Iowa, 817 N.W.2d 480, 490 (Iowa 2012).

[192] *See id.* at 486–87 (collecting authority on FERPA preemption of state public records laws and noting courts are "sharply divided"). FERPA's only guidance to schools in the event of a conflicting state law is a regulatory requirement that they report the potential conflict to the FPCO. *See* 34 C.F.R. § 99.61 (2019).

[193] *See, e.g.*, United States v. Miami Univ., 294 F.3d 797, 810–11 (6th Cir. 2002) (holding that FERPA protects the request for student disciplinary records, and state public records statute explicitly excludes records protected by federal law).

[194] For example, the Supreme Court held that peer graded assignments not turned in to teachers were not FERPA records. Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 534 U.S. 426 (2002). FERPA is arguably not violated by the disclosure of personally observed information. Daniel S. v. Board of Educ. of York Cmty. High Sch., 152 F. Supp. 2d 949, 954 (N.D. Ill. 2001) (teacher's ejection of student from class was known by many including the other students in that class; hence, disclosure of this information to others does not violate FERPA). Some courts narrowly interpret the records which are covered by FERPA. *See, e.g.*, *In re* Rome City Sch. Dist. Disciplinary Hearing v. Grifasi, 806 N.Y.S.2d 381, 383 (N.Y. Sup. Ct. 2005) (school district-created videotape of two students fighting was analogous to law enforcement records which are excluded from FERPA; it "was recorded to maintain the physical security and safety of the school building and . . . does not pertain to the educational performance of the students captured on this tape" and was thus not a FERPA record); Wallace v. Cranbrook Educ. Cmty., 2006 WL 2796135, *4–*5, *17 (E.D. Mich. 2006) (unredacted student complaints of sexual misconduct by school employee are outside of FERPA since they were made by students in their capacity as witnesses and are primarily related to employees rather than students); Risica *ex rel.* Risica v. Dumas, 466 F.Supp.2d 434, 441 (D. Conn. 2006) ("hit list" on outside of student's book was not a FERPA record because the book was open for public inspection and student had no expectation of privacy in it).

[195] 20 U.S.C. §1232g(b)(6) (2012 & Supp. I 2013).

disclosure under the relevant state public records law,[196] disclosure might be required.[197]

One recent decision attempts to narrow scenarios in which student records must be disclosed under the relevant state public records law.[198] The court in this case noted that FERPA permits rather than requires public disclosure of the outcome of discipline in some sexual misconduct and other cases. The court held that FERPA occupies the entire field of student privacy, and thus the discretion accorded to schools under FERPA implicitly preempts state public records laws.[199] This court refused to order disclosure of names and sanctions in discipline records of students disciplined for sexual misconduct.

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[196] Exemptions in state public records laws are themselves open to varying interpretations. For example, a "pupil records" exception in public records law was interpreted to be limited to "institutional records maintained in the normal course of business by a single, central custodian of the school" and thus did not protect a school document prepared in connection with an investigation of misconduct including sexual harassment of students by a former school superintendent: "True, it identifies students by name and details acts taken by them and against them, some of which violated school policy and subjected them to discipline. However, the report was not directly related to the private educational interests of the students. Its purpose was to investigate complaints of malfeasance . . ." BRV, Inc. v. Superior Court, 49 Cal. Rptr. 3d 519, 524–27 (Cal. Ct. App. 2006) (ordering production of report with names redacted).

By contrast, a state public records statute exemption of "[p]ersonal information in any files maintained for students in public schools" was held not to include a fight between two students on a school bus recorded by video surveillance. Lindeman v. Kelso Sch. Dist. No. 458, 162 Wash. 2d 196, 199 (2007) (interpreting WASH. REV. CODE § 42.17.310(1)(a), recodified as § 42.56.210 (West, Westlaw current with all legislation from the 2019 Reg. Sess. of the Wash. Leg.)). The court interpreted the public records exemption to include only "the protection of material in a . . . student's permanent file, such as a student's grades, standardized test results, assessments, psychological or physical evaluations, class schedule, address, telephone number, social security number, and other similar records." *Id.* at 202; *see also id.* at 204 (ordering the school to pay the parents' attorney's fees, costs and penalties under the public records statute). Inexplicably, the opinion mentions FERPA only to suggest that allowing one of the student's parents to view the videotape was inconsistent with it being a FERPA record. *See id.* at 203.

[197] For an overview of the issues from a journalism perspective, *see* STUDENT PRESS L. CEN., FERPA AND ACCESS TO PUBLIC RECORDS (2005), https://splc.org/2005/05/ferpa-and-access-to-public-records/ [https://perma.cc/K7EM-GMF9]. In one Oregon case, media sought records of notices of claims by students and others made to a public university hospital. The state appeals court reversed the trial court's order of disclosure, finding that FERPA protected this information if it was directly related to a student. Or. Health & Sci. Univ. v. Oregonian Publ. Co., 373 P.3d 1233, 1245–46 (Or. Ct. App. 2016) (finding that state law exception for "information the disclosure of which is prohibited by federal law" renders FERPA records exempt from disclosure, remanding for finding on whether tort claim notice is a FERPA record as information "'directly related to a student['s]' activities or educational status."). On further appeal, the state supreme court held that in the "absence of adequately developed arguments, we decline to consider whether the tort claim notices filed by students are 'education records' under FERPA and prohibited from disclosure. We therefore leave undisturbed the Court of Appeals' disposition of that issue." Or. Health & Sci. Univ. v. Oregonian Publ. Co., 403 P.2d 732, 744–45 (Or. 2017).

[198] DTH Media Corp. v. Folt, 816 S.E.2d 518 (N.C. Ct. App. 2018).

[199] *Id.* at 521–23. Strangely, the judge in this case is the nephew of the defendant university's former athletic director. *See* Gabriel Greschler, *Court orders University of North Carolina to Hand Over Sexual Assault Records to Tar Heel*, STUDENT PRESS L. CENT. (Apr. 19, 2018), www.splc.org/blog/splc/2017/05/daily-tar-heel-hits-stumbling-block-in-records-lawsuit-against-unc/ [https://perma.cc/LQ5K-TCD2].

IV. Neither Nonbinding Guidance on FERPA and Student Medical Records nor State or Other Law Adequately Protects Student Medical Privacy

A. Recent nonbinding guidance on FERPA and student medical records insufficiently protects student medical privacy

After the University's seizure of Jane Doe's counseling records,[200] FERPA's enforcing agency issued a Dear Colleague Letter (DCL) titled "Protecting Student Medical Records."[201] The DCL is well-intentioned. It marks the first time the agency has recognized that student medical records warrant enhanced privacy protection and recommended that FERPA treat them differently. Unfortunately, the DCL's protection of student medical privacy is narrowly circumscribed at best and may well be illusory.

The DCL suggests that schools treat postsecondary student medical records consistently with some HIPAA Privacy Rule concepts. Substantively, the DCL addresses certain disclosures of postsecondary students' medical records under three of FERPA's exceptions: school-student litigation, internal disclosures to persons with legitimate educational interests, and emergencies. As a "best practice," the DCL also "urges" schools to inform students about privacy protections conferred by law or school policy at the time of treatment.[202]

As to school-student litigation, the DCL approves litigation holds of student medical records in the form of orders to school employees to preserve student medical records in their possession.[203] The DCL suggests that, for student medical records, the FERPA litigation exception "should be read in light of the special sensitivity of those types of records and the importance of students being able to obtain timely on-campus medical treatment"[204] and that the HIPAA Privacy Rule's approach for disclosure of medical records in legal proceedings "strikes the right balance."[205] The DCL does not identify which specific aspects of the HIPAA Privacy Rule's legal proceedings provision accomplish this.[206] The DCL suggests that disclosure of student medical records under the FERPA litigation exception should occur without consent or subpoena only in claims about the campus medical services, such as a

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[200] *See, e.g.*, Kristian Foden-Vencil, *College Rape Case Shows a Key Limit to Medical Privacy Law*, NPR (Mar. 9, 2015), www.npr.org/sections/health-shots/2015/03/09/391876192/college-rape-case-shows-a-key-limit-to-medical-privacy-law [https://perma.cc/G5TB-UQHV]; Katie Rose Guest Pryal, *Raped on Campus? Don't Trust Your College to Do the Right Thing*, Chronicle of Higher Educ. (Mar. 2, 2015), https://www.chronicle.com/article/Raped-on-Campus-Don-t-Trust/228093 [https://perma.cc/K9WX-5YB3].

[201] *See* DCL, *supra* note 13.

[202] *Id.* at 1.

[203] *Id.* at 5.

[204] *Id.*

[205] *Id.*

[206] 45 C.F.R. § 164.512(e) (2019) (setting out the circumstances triggering permissible disclosure, the process for disclosure, special limits on disclosure of psychotherapy notes, and limiting disclosures to the "minimum necessary" information).

payment dispute or a malpractice claim about the campus medical services.[207] The DCL also exhorts schools to limit disclosures of medical records in litigation to "only those records that are, in fact, relevant and necessary to the litigation."[208]

For internal sharing with persons having legitimate educational interests, the DCL reiterates that schools have "significant discretion" to determine who is a school official and what may be a legitimate educational interest.[209] The DCL notes that a school's attorney is normally a school official under this exception but, citing the HIPAA Privacy Rule's approach, suggests that the attorney has a legitimate educational interest in student medical records only in malpractice and similar disputes about the campus medical services provided, or payment for them, and disclosures to a school attorney should be limited to the minimum necessary and in a litigation context.[210] The DCL indicates that otherwise the school's attorney should get a court order or consent, suggesting that "FERPA should be applied similarly to those portions of the HIPAA Privacy Rule" pertaining to litigation.[211] Aside from attorney access in a litigation context, DCL guidance on the legitimate educational interest exception does not recommend limitation of disclosures to the "minimum necessary" as HIPAA requires, nor the "relevant and necessary" language the DCL itself proposes for the litigation exception.[212]

As to emergencies, the DCL largely reiterates the concepts in the existing FERPA regulation and notes their applicability to student medical records. The DCL reminds schools that it "generally defers to school officials" and that it is for the school to determine if there is an "articulable and significant threat" triggering the emergency exception.[213] The DCL lists persons who may receive student medical records information in an emergency, including "[l]aw enforcement officials, public health officials, . . . *attorneys representing the institution*, and parents."[214] The DCL also reminds schools that disclosure in emergencies is limited to necessary information and records, which normally will not include actual medical records or counselor notes.[215] The DCL suggests that a counselor's summary statement will normally be adequate in an emergency scenario.[216]

If applied, albeit retroactively, to the Jane Doe case, the DCL recommends no access by the University attorney's to Jane Doe's records absent her

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[207] DCL, *supra* note 13, at 6.
[208] *Id.*
[209] *Id.* at 4. The DCL also restates its encouragement of campus threat assessment teams and indicates that in some circumstances, counselors may share student medical records with threat assessment teams.
[210] *Id.*
[211] *Id.*
[212] *Id.* at 5.
[213] *Id.* at 6.
[214] *Id.* (emphasis added).
[215] *Id.*
[216] *Id.*

consent or a subpoena whether before or after Jane Doe filed her lawsuit. Jane Doe's lawsuit raised Title IX and tort claims, and thus was not a dispute about her campus medical treatment or payment for it, which are the only types of cases the DCL suggests are appropriate for non-consensual disclosure to school attorneys under the litigation and legitimate educational interest exceptions. Moreover, the University had made no declaration of emergency nor assembled a campus threat assessment team. To comply with litigation hold requests or to avoid spoliation of evidence claims, the University could have ordered staff at the campus counseling center to preserve Jane Doe's records. However, the University attorney's taking custody of Jane Doe's treatment records rather than ordering its counseling center employees to hold and preserve them, without articulating why custody was necessary to preserve the evidence, was inconsistent with the DCL guidance.

There is some initial comfort from understanding that the DCL would not recommend that the University's attorneys unilaterally access Jane Doe's campus health records. Unfortunately, that comfort dissipates with deeper reflection. The DCL's status as nonbinding sub-regulatory guidance greatly limits its effectiveness.[217] The DCL provides notice to schools of what the enforcing agency recommends and thus might be the standard to which the enforcing agency may hold schools if complaints are filed. However, the agency's only recourse is to find a FERPA violation; the agency lacks power to award damages against offending schools and students have no judicial recourse for FERPA violations.[218] Thus, while hopefully schools will choose to comply with the DCL, there are no direct consequences for noncompliance.

It is also unclear what weight, if any, the DCL would have in court. While there is authority for judicial deference to agency regulations when a law's text is unclear,[219] and when a regulation itself is unclear,[220] such deference is not accorded to sub-regulatory guidance.[221] Moreover, the DCL may be ephemeral. Agency regulations cannot normally be revoked without a notice and comment process.[222] However, sub-regulatory guidance, such as Dear Colleague Letters, may be withdrawn by the agency without notice or

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[217] While comments were invited on a draft DCL, and it was published to all postsecondary schools, the APA notice and comment process was not followed. The product is a guidance letter not an amendment to regulations. One also wonders if amending the FERPA regulations to be consistent with the DCL would be in excess of the agency's authority.

[218] *See* 20 U.S.C. § 1232g(f) (2012 & Supp. I 2013); 34 C.F.R. § 99.67 (2019); *see supra* notes 82-85 and accompanying text for an overview of absence of available court claims for FERPA violations.

[219] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984) (deference to regulation containing a reasonable interpretation of an ambiguous statute).

[220] Auer v. Robbins, 519 U.S. 452, 457 (1997) (deference to agency interpretation of its regulations). A divided Supreme Court recently upheld *Auer*, with substantial limits. *See* Kisor v. Wilkie, 139 S. Ct. 2400 (2019).

[221] Christensen v. Harris Cty., 529 U.S. 576, 587 (2000) (no deference to agency sub-regulatory guidance).

[222] 5 U.S.C. § 553 (2012) (providing no exemption from notice and comment process for revocation of regulations).

comment. For example, current Secretary of Education Betsy DeVos recently withdrew DCLs issued by her department's Office for Civil Rights on both transgender student access to school bathrooms, as well as Title IX and campus sexual violence,[223] announcing that "the era of rule by letter is over."[224]

The DCL's purported scope is also quite narrow. It is addressed to "School Officials at Institutions of Higher Education,"[225] not to K-12 school officials. Student medical privacy is also a concern at the K-12 level. FERPA's exclusion for treatment records applies not only to postsecondary education, but also to adult students still in high school[226] such as eighteen-year-old high school seniors and special education students aged twenty-one and under who have not yet graduated. Additionally, some K-12 schools offer both adult and minor students health care at school health clinics. More commonly, K-12 schools offer school nursing services, such as insulin injections for diabetic students and first aid to students with minor injuries. The DCL does not address the school health clinic or other medical records of these K-12 school students. The DCL also offers no guidance about student medical records generally, nor about disclosure of student medical records to persons other than school attorneys. For example, the DCL does not address whether FERPA's legitimate educational interest exception would permit disclosure of Jane Doe's medical records in the University's administrative conference or hearing process to discipline the attackers, to the University's dean of students office for the purpose of identifying support services for Jane Doe, or to the University's Title IX coordinator.

The DCL's language is hortatory rather than mandatory, repeatedly stating what schools should do, rather than what they must do.[227] Perhaps this is so because the DCL's articulated basis for its substance is merely the creation of a recommended policy-based gloss on its interpretation of FERPA in limited scenarios regarding student medical records. Specifically, the DCL refers to students' expectation of privacy in their medical records,

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[223] U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter (September 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf [https://perma.cc/M9CA-4S6L]; U.S. Dep't of Educ., Office for Civil Rights, Q&A on Campus Sexual Misconduct (September 2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf [https://perma.cc/QE3E-TJVD].

[224] Betsy DeVos, Prepared Remarks on Title IX Enforcement (Sept. 7 2017), https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement [https://perma.cc/8XPP-C7QK]. The DCL was issued during the Obama presidency under a different Secretary of Education. In fact, as of October 2019, Executive Order 13891 "Promoting the Rule of Law Through Improved Agency Guidance Documents" provides that guidance documents are "nonbinding both in law and in practice," and orders federal agencies to review and consider whether to rescind their guidance documents. Exec. Order 13,891, 84 Fed. Reg. 55,235 (Oct. 15, 2019).

[225] DCL, *supra* note 13, at 1.

[226] 20 U.S.C. § 1232g(a)(4)(B)(iv) (2012 & Supp. I 2013).

[227] *See, e.g.*, DCL, *supra* note 13, at 2 ("FERPA's school official exception to consent *should* be construed to offer protections that are similar to those provided to medical records in the context of litigation between a covered health care provider, such as a hospital, and a patient under [HIPAA]" (emphasis added)).

the value of campus medical services, and the necessity of student trust for these services to be effective.[228] As discussed above, this lessens expectations for judicial deference, and makes it difficult to reconcile the DCL with inconsistent existing law.

Even in the very limited student medical records scenarios the DCL does address, it leaves issues unanswered. For example, in the event of a malpractice or similar lawsuit about campus medical services that the DCL suggests would permit non-consensual disclosure of student medical records to the school's attorney under the legitimate educational interest exception, the DCL does not offer clear guidance on what records attorneys may access and leaves such decisions to the school's judgment.[229]

Finally, and perhaps most importantly, the DCL is at odds with FERPA's text, as well as prior agency and court interpretations. FERPA's text and regulations nowhere indicate that student medical records will be treated differently under the litigation, legitimate educational interest, or other exceptions. Some courts have upheld disclosure of student medical records under FERPA without suggesting they should be treated differently than other student records,[230] and the enforcing agency has also taken this approach in prior guidance[231] and responses to complaints.[232]

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[228] *Id.* at 1–2.

[229] *See id.* at 4.

[230] *See, e.g.*, Carpenter v. Mass. Inst. Tech., 19 Mass. L. Rptr. 342 (Super. Ct. 2005) (in case brought against university by parents for failure to protect child who committed suicide after being stalked by fellow student, university was ordered to release student's campus mental health records).

[231] *See, e.g., Joint Guidance*, *supra* note 74, at 18 (question 19) ("For example, in order for a physician at a university-operated health clinic treating an eligible student to disclose the student's treatment records to the student's parents, the physician would need to either obtain the eligible student's prior written consent or satisfy one of the exceptions to FERPA's general consent requirement. Under one such exception, the physician could non-consensually disclose the records to the parents if the eligible student qualified as the parents' dependent, under section 152 of the Internal Revenue Code of 1986, for Federal income tax purposes. See 20 U.S.C. § 1232g(b)(1)(H); 34 CFR § 99.31(a)(8)."); id. at 18–19 (question 20) ("For example, if a university is served with a court order requiring the disclosure of the mental health records of a student maintained as treatment records at the campus clinic, FERPA would permit the university to disclose the records to comply with the court order in accordance with the provisions of 20 U.S.C. §§ 1232g(b)(2), and (j) and 34 CFR § 99.31(a)(9). Although FERPA would generally require the university to make a reasonable effort to notify the eligible student in advance of compliance with such a court order so that the eligible student may seek protective action, the university may also wish to take additional measures to protect the privacy of student mental health records, such as obtaining a protective order or filing the records under seal. The university also should determine if the disclosure would comply with all other applicable laws, including any applicable State laws protecting the confidentiality of the mental health records. Thereafter, these mental health records that the university disclosed for non-treatment purposes would no longer be excluded from the definition of 'education records' and, instead, become subject to all other FERPA requirements as 'education records' under FERPA.").

[232] *See, e.g.*, U.S. Dep't of Educ., Family Policy Compliance Office, Letter to Anonymous, 111 LRP 64639 at *2 (FPCO 2011); *cf.* Letter to Franklin, *supra* note 83 (after issuing the Dear Colleague Letter on student medical records, summarily closing a complaint concerning the posting of a student's mental health records on the school website for several weeks against school that promised staff training to avoid future errors without any discussion of the sensitive medical nature of the posted records).

B. Neither state law claims nor constitutional privacy consistently or adequately protect student medical records

1. State health care confidentiality statutes

Some states statutorily protect medical privacy and such protections may include student medical records.[233] For example, Washington[234] and Montana[235] have adopted the Uniform Health Care Information Act, which contains no exclusion for FERPA/student medical records and would thus greatly limit disclosures of student medical records.[236] Non-consensual disclosure is permitted to persons "who require[s] health-care information . . . to provide . . . legal . . . services to the health care provider,"[237] and thus would not permit, for example, non-consensual disclosure of Jane Doe's counseling records to university attorneys. 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.[238] If the required advance notice is not provided, the health care provider may not release the records.[239] Mental health treatment records are subject to even more robust protection, requiring a court order for disclosure in many cases.[240] In contrast, the Oregon statute on "Protected Health Information"[241] that governed Jane Doe's counseling records closely tracks the HIPAA Privacy Rule by excluding FERPA education records and treatment records as protected health information, and so did not offer Jane Doe any additional privacy protection.[242]

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[233] Some states also have mini-FERPA laws, most of which track FERPA and thus do not enhance protection of student medical records. For an overview of state mini-FERPA laws, *see* Stuart, *supra* note 187, at 377–87.

[234] WASH. REV. CODE ANN. § 70.02.005–.905 (West, Westlaw current with all legislation from the 2019 Reg. Sess. of the Wash. Leg.).

[235] MONT. CODE ANN. §§ 50-16-501–533 (West, Westlaw current through the 2019 Sess.).

[236] Written authorization is generally required prior to disclosure and the exceptions do not include one for litigation. WASH REV. CODE ANN. §§ 70.02.020, .030 (West, Westlaw current with all legislation from the 2019 Reg. Sess. of the Wash. Leg.). Patients may sue civilly for violations and if successful are eligible for damages and attorney's fees. *Id.* at § 70.02.170. Obtaining records under false pretenses is a misdemeanor. *Id.* at § 70.02.330. A separate Washington statute requires health care providers to provide a written description of services at the outset of treatment. *Id.* at § 7.70.060. Counselors and psychologists are explicitly required to disclose the boundaries of confidentiality at the outset of treatment. *Id.* at § 18.19.060 (counselors); *id.* at § 18.83.115 (psychologists).

[237] WASH REV. CODE ANN. § 70.02.050(1)(b) (West, Westlaw current with all legislation from the 2019 Reg. Sess. of the Wash. Leg.).

[238] *Id.* at § 70.02.060.

[239] *Id.* at § 70.020.060(2).

[240] *Id.* at § 70.02.230 (also providing violations are subject to damages of not less than $1000 and attorney's fees).

[241] OR. REV. STAT. § 192.553 (West, Westlaw current through laws enacted in the 2018 Regular Session and 2018 Special Session of the 79th Leg. Assembly).

[242] *Id.* at §§ 192.556(11)(a), (b). Subsequent to Jane Doe's case, Oregon enacted a statute providing for confidentiality of college student campus treatment records. *Id.* at § 192.551.

2. Professional ethics standards

Oregon has also codified professional ethics standards for some health care professionals, including American Psychological Association (APA) Ethical Standards for psychologists which concern undefined "confidential" information.[243] The director of the University's counseling center was disciplined for violation of these ethical standards.[244] These APA standards impose a nebulous duty to take "reasonable precautions" to protect "confidential" information and not to disclose it except as "mandated by law, or where permitted by law for a valid purpose."[245] In light of this lack of clarity, it is not surprising that the licensing board hearing was a battle of expert opinions on whether the University counseling center director met her ethical obligations. This lack of clarity also likely contributed to the state licensing agency's inability to decide whether the University's attorneys could legally access Jane Doe's medical records.[246] The state licensing board noted that the legality of the University's position was "far from clear."[247] The board concluded only that the director breached her ethical obligations by not advocating for patient privacy in the context of University attorneys simultaneously defending the University from Jane Doe's lawsuit and also advising counseling staff on release of Jane Doe's records.[248]

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[243] Or. Admin. R. 858-010-0075 (2019). The APA ethical standard for confidentiality provides in pertinent part:

> 4.01 Maintaining Confidentiality. Psychologists have a primary obligation and take *reasonable precautions to protect confidential* information . . . recognizing that the extent and limits of confidentiality may be regulated by law or established by institutional rules or professional or scientific relationship . . . .
>
> 4.05 Disclosures . . . (b) Psychologists disclose confidential information without the consent of the individual *only as mandated by law, or where permitted by law for a valid purpose* such as to (1) provide needed professional services; (2) obtain appropriate professional consultations; (3) protect the client/patient, psychologist, or others from harm; or (4) obtain payment for services from a client/patient, in which instance disclosure is limited to the minimum that is necessary to achieve the purpose . . . .

ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT §§ 4.01, 4.05 (AM. PSYCHOLOGICAL ASS'N (2017)) (emphasis added).

[244] Kerr, OAH Case No. 1504366 (Or. Bd. of Psychological Exam'rs July 22, 2016), https://obpe.alcsoftware.com/files/kerr.shelly%20k._1672.pdf [https://perma.cc/3ZAD-EPZP].

[245] ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT §§ 4.01, 4.05 (AM. PSYCHOLOGICAL ASS'N (2017)).

[246] *See* Kerr, OAH Case No. 1504366 at 16–17. One expert concluded the director's reliance on the University's General Counsel's advice and representations satisfied her ethical obligations. *Id.* Another expert concluded that the counseling center director had an ethical obligation to assert Jane Doe's privacy rights, and object to the General Counsel's request for the records, and should have sought Jane Doe's consent, a court order, or gotten independent legal advice. *Id.* The director argued that the records were FERPA records in which the University had a legitimate educational interest; the board did not decide whether this was so. *Id.* at 18–19.

[247] *Id.* at 16.

[248] *Id.* at 16, n.4. The Board concluded that "regardless of whether the law permitted the General Counsel's office to take custody of Student's [counseling center] file, Licensee had an

3. Tort claims

Claims under a variety of state common law theories such as tortious invasion of privacy,[249] intentional or negligent infliction of emotional distress,[250] or unauthorized disclosure of confidential information[251] may be available for some disclosures of medical information. For example, an Oregon case found potential liability when a physician disclosed a former patient's identity to a daughter she had given up for adoption.[252] In general the defendant in these claims is the health care provider who has disclosed medical information and, potentially, the employer vicariously.[253] However, in some cases third parties, including attorneys, who have induced a health care provider to disclose medical information may be sued.[254] Some courts deciding these claims have found that disclosure of plaintiffs' medical information

independent, primary ethical obligation . . . to protect Student's confidential information. Because Licensee did not consult with Student to confirm consent, did not demand an order compelling disclosure, and/or obtain outside advice as to her legal and ethical obligations under the circumstances, Licensee did not take reasonable precautions to protect confidential information." *Id.* at 17.

[249] Klipa v. Bd. of Educ. of Anne Arundel Cty., 460 A.2d 601, 608 (Md. Ct. Spec. App. 1983) (legal disclosure of student's psychological records to transfer school over objection of parents is not actionable because no invasion of reasonable privacy expectations).

[250] In a pre-FERPA case, a court found school disclosure of confidential student information could be actionable "outrageous" conduct actionable as intentional or negligent infliction of emotional distress. Blair v. Union Free Sch. Dist. No. 6, 324 N.Y.S.2d 222, 228 (Dist. Ct., Suffolk Cty. 1971) (noting the special and confidential, albeit non-fiduciary, 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.

[251] *See generally* Judy Zelin, Annotation, *Physician's Tort Liability for Unauthorized Disclosure of Confidential Information about Patients*, 48 A.L.R. 4th 668 (1986); Colleen K. Sanson, *Cause of Action Against Physician or Other Health Care Practitioner for Wrongful Disclosure of Confidential Patient Information*, 36 CAUSES OF ACTION 2D 299 (2008 & Supp. 2019); Alan Vickery, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426 (1982).

[252] Humphers v. First Interstate Bank, 696 P.2d 527, 533 (Or. 1985); *see also* Pence v. Aspen Educ. Grp., Civ. 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 non-licensed counselor at private facility to police).

[253] *See, e.g.*, Bagent v. Blessing Care Corp., 862 N.E.2d 985, 994 (Ill. 2007) (finding no vicarious liability for hospital where employee disclosed medical information in a social setting).

[254] Ohio has recognized an independent tort for disclosure of medical information against both health care providers and third parties who induce disclosure. Biddle v. Warren Gen. Hosp., 715 N.E.2d 518, 522, 528 (Ohio 1999). In that case, a hospital's law firm accessed medical information of the hospital's patients in order to identify patients who might be eligible for Social Security disability benefits to cover their bills. The state supreme court rejected arguments that the law firm was an agent of the hospital rather than a third party, *id.* at 526, and that the attorney-client privilege created a legally sufficient "closed loop" for the disclosures, *id.* at 524, and allowed the claim to proceed. Tennessee recognized possible vicarious liability for the insurer of a car accident defendant for its attorney's abuse of process when the insurer's attorney induced health care providers to disclose confidential medical information during the discovery process. Givens v. Mullikin *ex rel.* Estate of McElwaney, 75 S.W.3d 383, 397, 405, 410 (Tenn. 2002). Notably, the court looked to state health care statutes to define "confidential" medical information in the context of the implied contract between health care provider and patient. *Id.* at 407. The court also determined that the health care provider's good faith compliance with defective subpoenas did not breach the contractual relationship, *id.* at

to opposing attorneys is not actionable when a plaintiff-patient like Jane Doe has put medical condition at issue in the lawsuit,[255] even if the patient's attorney has instructed the physician not to disclose.[256] Other courts have found that informal disclosures to opposing attorneys, for example via ex parte conversations, are actionable because they circumvent the protections discovery provides to plaintiffs, such as involvement of their attorneys and court supervision.[257] These courts reason that if medical condition is at issue in litigation, the scope of the waiver is not a blanket one. Rather, waiver is limited to medical information that is relevant to or discoverable in the lawsuit, which would be sorted out by the court in the event of a dispute.[258]

Courts have looked to health care laws including the HIPAA Privacy Rule[259] and state health care statutes[260] to define what medical information is "confidential" in the context of these claims. For example, Oregon's psychotherapist privilege protects "confidential" information, a term left undefined.[261] While not referencing HIPAA specifically, Oregon's highest court held that the parameters of "confidential" medical information in disclosure

408, but private conversations between the health care provider and defendant's attorneys could be actionable, *id.* at 409.

[255] *See, e.g.*, Glenn v. Kerlin, 248 So.2d 834 (La. Ct. App. 1971) (physician disclosure to defense attorneys); Brandt v. Med. Def. Assocs., 856 S.W.2d 667 (Mo. 1993) (physician disclosure in malpractice action); *cf.* Mikel v. Abrams, 541 F. Supp. 591 (W.D. Mo. 1982) (physician disclosure to patient's spouse in family law dispute). *But see* Heller v. Norcal Mut. Ins. Co., 21 Cal. Rptr. 2d 135 (Cal. Ct. App. 1993) (disclosures to defense attorneys in malpractice case are actionable); Alexander v. Knight, 177 A.2d 142 (Pa. Super. 1962) (disclosures to defense attorneys in car accident case are actionable). Some courts have found that ex parte conferences between physicians and opposing counsel are not precluded by HIPAA. *See, e.g.*, Harris v. Whittington, 2007 WL 164031 (D. Kan. 2007); Holmes v. Nightingale, 158 P.3d 1039 (Okla. 2007); *cf.* Santaniello *ex rel.* Quadrini v. Sweet, No. 3:04-CV-806 (RNC), 2007 WL 214605 (D. Conn. Jan. 25, 2007) (HIPAA does not preclude ex parte conferences between physicians and opposing counsel if a HIPAA protective order has been issued).

[256] *See* Fedell v. Wierzbieniec, 485 N.Y.S.2d 460, 463–64 (N.Y. Sup. Ct. 1985).

[257] *See, e.g.*, Alsip v. Johnson City Med. Ctr., 197 S.W.3d 722, 727–30 (Tenn. 2006) (barring ex parte conversations between physicians and opposing counsel for these reasons, which were found to amount to public policy).

[258] *See, e.g.*, *id.* at 726; State *ex rel.* Dean v. Cunningham, 182 S.W.3d 561, 567 (Mo. 2006).

[259] *See, e.g.*, Pence v. Aspen Educ. Grp., No. 05-6199-HO, 2006 WL 3345192 (D. Or. Nov. 16, 2006) (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); Bigelow v. Sherlock, No. 04-2785, 2005 WL 283359 (E.D. La. Feb. 4, 2005) (look to HIPAA to determine if disclosed information is confidential). *But see* Franklin Coll. Serv. v. Kyle, 955 So. 2d 284 (Miss. 2007) (parameters of confidentiality under federal HIPAA statute are not relevant to determining what is confidential in state law claims).

[260] *See, e.g.*, Givens v. Mullikin, 75 S.W.3d 383, 405 (Tenn. 2002). Cases on state statutes are collected in Sanson, *supra* note 251.

[261] 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. § 40.230(2) (West, Westlaw current through laws enacted in the 2018 Regular Sess. and 2018 Spec. Sess. of the 79th Leg. Assembly).

claims must be determined by an external legal source.[262] Commentators also suggest that actionable claims for disclosure would be limited to information commonly understood to be confidential in the context of the relationship.[263]

Some courts have found state common law claims are available for school disclosure of student medical records. In one troubling case, teachers allegedly asked school officials to share an actual student psychological evaluation to use in connection with a student assignment to prepare a psychological evaluation of the protagonist in the novel The Catcher in the Rye.[264] The teachers were provided with a poorly redacted copy of the plaintiff student's psychiatric evaluation, which they shared with students.[265] A federal court held these allegations presented a triable issue of a violation of constitutional privacy[266] as well as triable evidence of negligence for violation of the IDEA, FERPA, and HIPAA.[267]

This patchwork of existing state law claims does not adequately protect student medical records and it appears that Oregon law then in effect did not clearly protect the privacy of Jane Doe's records. State statutes protecting health care information may expressly exclude FERPA records as in Oregon. Claims under state common law for unauthorized disclosure of "confidential" medical information will often use HIPAA (which excludes FERPA records) or state statutes (which in Oregon excluded FERPA records) as did an Oregon court to define the boundaries of "confidential" information. By analogy, courts presented with claims of unauthorized disclosure of student medical records likely would look to FERPA to set the parameters of confidentiality for those records. As discussed above, FERPA itself establishes a plethora of limits on and exceptions to confidentiality of student medical records.[268]

Even if unauthorized disclosure of student medical records is generally actionable in litigation in which a plaintiff student's medical condition is at issue, it is uncertain whether ex parte disclosures to defense attorneys are

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[262] Humphers v. First Interstate Bank. 696 P.2d 527 (Or. 1985).

[263] *See, e.g.,* Vickery, *supra* note 251, at 1461 ("determination 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."); *id.* ("The proposed rule would . . . cover a school's disclosure of a student's record or evaluations. These are all situations in which we clearly expect confidentiality, and liability should attach. The proposed rule would not cover a school's disclosure of information not customarily considered confidential, such as attendance."); Sanson, *supra* note 251 (discussing relevance of a HIPAA violation to prove information disclosed was "confidential").

This is not to say that Jane Doe did not have a reasonable expectation of privacy in her records vis-a-vis the University. 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.

[264] L.S. v. Mt. Olive Bd. of Educ., 765 F. Supp. 2d 648, 652-653 (D.N.J. 2011).

[265] *Id.* at 653.

[266] *Id.* at 658-660.

[267] *Id.* at 665-666.

[268] Alternatively, courts may look to reasonable expectations of patient confidentiality to define "confidential" records. A reasonable student seeking on-campus medical treatment may be presumed to understand FERPA's limits on confidentiality of her medical records.

actionable. This unsettled issue means schools and other defendants arguably may access student medical information with willing health care providers (or, in Jane Doe's case, campus health care providers ordered by their employer to disclose). Such access would be outside of formal discovery, and thus without the involvement of the plaintiff's attorney or the oversight of the court, both as to whether any disclosure is permissible and if so, what specific records are relevant or discoverable.

4. Constitutional claims

Constitutional due process privacy claims, available only against public schools, also do not offer comprehensive protection. Some years ago, the Supreme Court decided *Whalen v. Roe*,[269] a constitutional informational privacy challenge to a state law requiring the disclosure of medical information to the government.[270] Without expressly finding a constitutional right of informational privacy,[271] the Court determined the statute was a valid exercise of state police power, noting that providing medical information to health care staff, insurers, and public health agencies was an essential part of modern medical practice.[272] More recently, the Court heard a constitutional privacy challenge to federally required drug use disclosures, as well as disclosures in the course of background checks involving, in part, schools attended by federal employees and contractors.[273] The Court unanimously upheld the federal disclosure requirements, again expressly refusing to find a constitutional right of informational privacy.[274] In the words of a prominent constitutional scholar, "there is thus far little support for . . . a right [of informational privacy] from the Supreme Court."[275] Moreover, the Court's suggestion that any due process privacy interest is not violated by disclosures that are part of "modern medical practice" arguably incorporates existing FERPA standards for student medical records. Accordingly, some lower courts have determined that disclosure of student medical or other records is not actionable as a deprivation of constitutional privacy. For example, in one case a school allegedly disclosed that a student was in a psychiatric hospital to teachers and students. The court found no constitutional privacy or other violations, noting that the disclosure did not violate FERPA.[276] However,

[269] 429 U.S. 589 (1977).
[270] *Id.*
[271] *Id.* at 605–06.
[272] *Id.* at 602.
[273] NASA v. Nelson, 131 S. Ct. 746 (2011).
[274] *Id.* at 751.
[275] Erwin Chemerinsky, Constitutional Law: Principles and Policies § 10.6 (5th ed. 2015).
[276] Norris v. Bd. of Educ. of Greenwood Cmty. Sch. Corp., 797 F. Supp. 1452, 1465–66 (S.D. Ind. 1992) (finding no legitimate privacy interest in confidentiality of education records vis a vis school personnel, nor in information "learned during the ordinary course of instruction").

some other lower courts have found public school disclosures of student medical information to be constitutionally actionable.[277]

V. Real and Workable Protection of Student Medical Privacy Can Be Achieved By Amending FERPA

While HIPAA Privacy Rule coverage for all student medical records is not appropriate, three amendments to FERPA would result in real and workable protection of student medical privacy. First, student medical records from school health clinics, such as Jane Doe's campus counseling records, should be subject to the HIPAA Privacy Rule. Second, external disclosures of other student medical records should be limited to the "minimum necessary." Third, FERPA's treatment records provision should be repealed.

A. FERPA should be amended to provide that the HIPAA Privacy Rule governs disclosure of "school health clinic" student medical records[278]

Some schools choose to become health care providers, offering general student health care services in school-based health clinics. As a consequence

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[277] In one case a school shared a poorly redacted version of a student's psychiatric evaluation with other students, and the court found a constitutional privacy violation. *See* L.S. v. Mt. Olive Bd. of Educ., 765 F. Supp. 2d 648, 660-662 (D.N.J. 2011). In the context of a special education dispute, and against the parents' expressed wishes, a school district sent a student's records including a neuropsychological evaluation and a psychiatric update to several possible placements. *See* W.A. v. Hendrick Hudson Centr. Sch. Dist., No. 14-CV-8093 (KMK), 2016 WL 1274587 (S.D.N.Y. Mar. 31, 2016). Noting these records were "excruciatingly private and intimate in nature," a federal district court denied the school's motion to dismiss due process claims, finding in the context of the student's age and disability a triable due process interest in privacy of medical information. *Id.* at *5–6. In another case, a swim coach allegedly required a student athlete to take a pregnancy test administered by teammates, and discussed the results with assistant coaches and many other persons. Gruenke v. Seip, 225 F.3d 290, 302–03, 306 (3d Cir. 2000). Noting that medical information was involved, the federal appeals court found this could violate the student's right to constitutional privacy. *Id.* at 302–03. The same federal appeals court rejected a constitutional privacy claim against a school that allegedly disclosed a student's negative drug test results, concluding that disclosure of a negative result was not the proximate cause of injury to the student. Hedges v. Musco, 204 F.3d 109, 121–22 (3d Cir. 2000). A federal trial court ordered sanctions against public university employee defendants that subpoenaed a student plaintiff's student medical records to defend Title IX and other civil rights claims stemming from alleged sexual harassment by the employees. The attorney for the university co-defendant directed the student health center to produce the student's gynecological and other medical records to the defendants before the subpoena date without advance notice to the student. *See* Mann v. Univ. of Cincinnati, 152 F.R.D. 119 (S.D. Ohio. 1993), *aff'd*, 114 F.3d 1188 (6th Cir. 1997).

[278] Under this proposal, the HIPAA Privacy Rule would govern student medical records whether or not a school is HIPAA "covered entity" so long as school is subject to FERPA. *See* 45 C.F.R. § 160.102 (2019) (defining a covered entity as one that provides health care and engages in electronic transactions such as billing Medicaid or private insurance). Some K-12 private schools that do not receive federal education funds are not governed by FERPA and thus would be outside the proposal. However, K-12 private schools not receiving federal education funding that are HIPAA covered entities and maintain PHI are already subject to the HIPAA Privacy Rule.

of this choice, student medical records created or maintained by school health clinics should be subject to the HIPAA Privacy Rule.[279] The Privacy Rule is an existing system that protects medical privacy generally and would work well to protect the privacy of school health clinic records. School-based health care providers are already familiar with the Privacy Rule. As discussed earlier at Part II, its exclusion of school health clinic records is not a reasoned policy judgment, but instead resulted from the lack of authority of the promulgating health agency to write administrative regulations that would override FERPA's statutory text. This amendment would harmonize privacy requirements from on-campus and off-campus providers.

While detailed review of the HIPAA Privacy Rule is beyond the scope of this Article, the relevant provisions begin with requirements for schools that choose to operate school-based health clinics to appoint a HIPAA privacy officer[280] and an office for receiving complaints,[281] disseminate written privacy practices to student patients,[282] and train staff.[283]

1. Access

The Privacy Rule provides a general right of patient access to records,[284] as well as a right of access for the patient's personal representative if any exists. Parents are normally personal representatives of their minor children and so would have access to their children's school health clinic records.[285] Student patients at school health clinics would have a right of access to their own medical records.[286] The right of access is modified for psychotherapy notes, for which therapists may instead choose to write a summary letter.[287]

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[279] This approach is not the same as HIPAA's hybrid entity approach, which is not workable for fulfillment of school educational responsibilities. *See Joint Guidance*, *supra* note 74, at 11 (question 7).

[280] 45 C.F.R. § 164.530(a)(1)(i) (2019).

[281] *Id.* at § 164.530(a)(1)(ii).

[282] *Id.* at § 164.520(a)(1).

[283] *Id.* at § 164.530(b).

[284] *Id.* at § 164.502(a)(2)(I); *id.* at § 164.524.

[285] *Id.* at § 164.502(g)(3). The parent would not be the personal representative with a right of access to medical information related to instances where state or other law permitted the minor to consent to treatment. *Id.* at § 164.502(g)(3)(1)(B) (referencing this possibility both where state law permits minors to consent to their own health care and where a court has provided the necessary consent for treatment of a minor). 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, if disclosure could create danger for the minor. *Id.* at § 164.502(g)(3)(ii)(c). For an overview, see Lori Strauss, *HIPAA Privacy Rule Highlights Related to Minor Children: Office for Civil Rights Web Site Addresses Frequently Asked Questions*, J. Health Care Compliance, Mar.–Apr. 2016, at 49.

[286] *Id.* at § 164.502(a)(2)(I); *id.* at § 164.524.

[287] HIPAA defines psychotherapy notes as notes created by mental health professionals kept separate from other health records. The bases for this exclusion are twofold: a) the notes are created by the therapist for personal use, and b) symmetry with the special limits on disclosure of these notes because of their especially sensitive nature. *Id.* at § 164.501 (defining psychotherapy notes); § 164.524. For more details, see U.S. Dep't of Health and Hum. Servs.,

Thus, Jane Doe would have a right to access her own campus medical records, except for actual therapy notes for which a summary could be substituted.

2. Disclosure

The Privacy Rule provides for disclosure with written consent,[288] which can be by the parent as the personal representative of minor patients in most circumstances.[289] Generally, psychotherapy notes may be disclosed only with written consent.[290] Psychotherapy notes, such as Jane Doe's campus counseling notes, could not be disclosed to third parties without patient consent.[291]

Recognizing the sensitivity of medical information, the Privacy Rule generally limits non-consensual disclosures to the "minimum necessary."[292] Schools operating health clinics would need to set up a firewall between their school health clinics and the rest of the school. Internal disclosure to other persons within the school health clinic for treatment purposes is permitted. 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.[293]

Internal disclosure of student medical records to school employees outside of the school health clinic would normally require consent. However, internal "minimum necessary" disclosure in Privacy Rule-defined emergencies would be permitted.[294] Internal "minimum necessary" disclosure also would be authorized to persons supporting school health clinic staff in their health care functions. For example, IT staff could access student patient records as necessary to support the student health clinic in its provision of health care. School attorneys could access student patient records as necessary to support the school health clinic in litigation concerning health care.[295]

Office for Civil Rights, HIPAA Privacy Rule and Sharing Information Related to Mental Health, (Feb. 2014), https://www.hhs.gov/sites/default/files/hipaa-privacy-rule-and-sharing-info-related-to-mental-health.pdf [https://perma.cc/BT8Y-LBXZ]. There is also no right of access under HIPAA to records created for legal proceedings. 45 C.F.R. § 164.524(a)(1)(ii) (2019).

[288] *Id.* at § 164.508(a)(2).

[289] For an overview, see Lori Strauss, *HIPAA Privacy Rule Highlights Related to Minor Children: Office for Civil Rights Web Site Addresses Frequently Asked Questions*, J. Health Care Compliance, Mar.–Apr. 2016, at 49.

[290] 45 C.F.R. § 164.508(a)(2) (2019). They may be disclosed when legally required, for example mandatory reports of abuse, or by court order.

[291] *Id.* at § 164.508(a)(2).

[292] *Id.* at § 164.502(b)(1). This is defined as a "reasonableness standard" "consistent with . . . best practices." It does not apply to some disclosures such as consensual disclosures or disclosures for treatment purposes. *Id.* at 164.502(b)(2).

[293] *Id.* at § 164.502(a).

[294] *See Joint Guidance*, *supra* note 74, at 6–7, 19 (question 21); 45 C.F.R. § 164.512(j) (2019); *id.* at § 164.502(a).

[295] *See generally id.* at § 164.512(e); *id.* at § 164.506; Office for Civil Rights, Dep't of Health & Human Servs., May a Covered Entity That is a Plaintiff or Defendant in a Legal Proceeding Use or Disclose Protected Health Information for the Litigation? (2005), https://www.hhs.gov/hipaa/for-professionals/faq/705/

For example, the school health clinic might face a claim for malpractice, breach of contract, unauthorized disclosure, or have a payment dispute with a student patient. In other disputes such as education claims (for example, special education/disability law claims, or civil rights claims such as Jane Doe's Title IX and tort claims surrounding her rape), school attorneys could access school health clinic records only with consent, or as permitted in the Privacy Rule provisions for legal proceedings.

The Privacy Rule limits non-consensual disclosure and use of medical records in legal proceedings, both judicial and administrative.[296] Disclosures may be ordered by a court or grand jury subpoena,[297] or by subpoena with either assurances of advance notice to the patient[298] or assurances that a qualified protective order has been sought.[299] Absent satisfactory assurances, a health care provider may not disclose without its own reasonable efforts to notify the patient.[300] Moreover, once litigation is over, the records must be returned or destroyed.[301] The Privacy Rule does not preempt state law that provides greater privacy protection,[302] such as state law establishing a privilege for medical records. State privilege might thus preclude non-consensual disclosure in connection with legal proceedings.[303] Consequently, disclosures to school attorneys or courts in legal proceedings that are not about the school's health care provider role (such as Jane Doe's Title IX suit and other claims about the education provided by her school) would follow Privacy Rule process for legal proceedings which give patients an opportunity to object and to assert privilege as well as court involvement and supervision and protective orders.[304]

External disclosures are permitted in some other circumstances. "De-identified" information may be disclosed where "there is no reasonable basis to believe that the information can be used to identify an individual."[305] Limited disclosure to parents or other family and close friends of adult or legally emancipated patients is authorized after the patient is given notice and an

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may-a-covered-entity-in-a-legal-proceeding-use-protected-health-information/index.html [https://perma.cc/R4FR-9E5A].

[296] 45 C.F.R. § 164.512(e) (2019). For overviews, see Natalie F. Weiss, *To Release or Not to Release: An Analysis of the HIPAA Subpoena Exception*, 15 MICH. ST. U. J. MED. & L. 253, 278 (2011); Robert B. Miller and Tegan Schlatter, *Can This Health Information Be Disclosed? Navigating the Intricacies of HIPAA in Claims Litigation*, THE BRIEF, Spring 2011, at 32, 34.

[297] 45 C.F.R. § 164.512(f) (2019).

[298] *Id.* at § 164.512(e).

[299] *Id.*

[300] *Id.*

[301] *Id.*

[302] *Id.* at § 164.512(f).

[303] *See, e.g.,* Turk v. Oiler, 732 F. Supp. 2d 758, 759–78 (N.D. Ohio 2010).

[304] *See* 45 C.F.R. § 164.512(e) (2019) (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) for disclosures for judicial and administrative proceedings are met); *see generally* OFFICE FOR CIVIL RIGHTS, DEP'T OF HEALTH & HUMAN SERVS., *supra* note 295.

[305] 45 C.F.R. § 164.514 (2019).

opportunity to agree or object and fails to object.[306] Disclosure is permitted to report suspected child abuse, neglect, or domestic violence[307] to public health authorities,[308] as well as to health researchers.[309] Disclosures are also permissible for law enforcement purposes in response to a warrant or court order, civil or criminal subpoena, or administrative demand.[310] Disclosure is also permitted in emergency circumstances.[311] Patients may request an accounting of disclosures of their PHI,[312] and may request amendment of their records.[313]

3. Enforcement

Like FERPA, HIPAA has no private cause of action.[314] Unlike FERPA, HIPAA offers complaint processes with fairly robust remedies. A determination that the Privacy Rule has been violated, perhaps in response to an internal complaint, or discovered without a complaint, requires documented sanctioning of the offending employee or employees.[315] Complaints may also be made to HHS's Office for Civil Rights (OCR).[316] OCR can investigate complaints[317] and perform compliance reviews.[318] OCR shall assess a penalty of at least $100 for each violation, not to exceed $25,000 in a calendar year.[319] Knowing violations may result in larger fines or even imprisonment,[320] with even larger potential fines and imprisonment for deliberate use of PHI for "commercial advantage, personal gain, or malicious harm."[321] Thus, Jane Doe's University would need to consider sanctioning its attorneys and might face fines.

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[306] *Id.* at § 164.510(b).
[307] *Id.* at § 164.512(c).
[308] *Id.* at § 164.512(b).
[309] *Id.* at § 164.512(i).
[310] *Id.* at § 164.512(f).
[311] *Id.* at § 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 person, or to the public's health or safety. Disclosures must be consistent with any relevant law and with professional ethics to persons (perhaps such as law enforcement or family members) reasonably believed to be able to address the threat.
[312] *Id.* at § 164.528(a)(1).
[313] *Id.* at § 164.526.
[314] Cases on this point are collected in Univ. of Colo. Hosp. v. Denver Publ'g Co., 340 F. Supp. 2d 1142 (D. Colo. 2004).
[315] 45 C.F.R. § 164.530(e) (2019).
[316] *Id.* at § 160.306.
[317] *Id.*
[318] *Id.* at § 160.308.
[319] 42 U.S.C. § 1320d-5(a)(1)(A) (2012).
[320] *Id.* at § 1320d(6).
[321] *Id.*

B. FERPA should continue to govern internal disclosure of other ("educational") student medical records

While schools' primary educational responsibility is to provide instruction, K-12 schools also have the educational responsibility to act in loco parentis while they have custody of students.[322] Schools' in loco parentis role and other public policy underlie the affirmative tort duty of K-12 schools to take reasonable steps to prevent harm to students, and to provide aid to students who have been injured.[323] Schools have different and greater needs to share student medical information in their educational role than is the case when schools select to take on a health care provider role.

In their educational role, schools create or maintain student medical records. College disability offices receive medical information from students wishing to document a disability and receive accommodations, such as note-taking assistance in class or extra time on exams.[324] Staff in K-12 school offices collect and maintain doctors' notes excusing student absence. School nurses in K-12 schools offer basic health services in loco parentis such as first aid and medicine administration. Many special education students' Individualized Education Plans (IEPs) require school nurses to provide school health services, such as injecting insulin for diabetic students and suctioning tracheotomy tubes for medically fragile students, or health care services such as physical therapy.[325]

Schools need to internally share these student "educational" medical records for educational purposes. Often, these records are sent by outsiders to school officials who are not health care professionals. Information about a student's past medical treatment may be sent to a school principal or teacher, an absence excuse written by a parent or doctor disclosing a student's recent illness may be delivered to a school administrator office, and disability information may be sent to a disability office. School employees use these student medical records in connection with the student's education. A college disability office may need to share some medical information about a student with university administrators and/or faculty to determine if a requested accommodation is a legally required "reasonable" one. Disability information

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[322] *See* RESTATEMENT (SECOND) OF TORTS § 314A illus. 7 (AM. LAW. INST. 1965); *id.* at § 320; Eisel v. Bd. of Educ., 597 A.2d 447, 451–52 (Md. Ct. App. 1991).

[323] *See generally* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 40 (AM. LAW. INST. 2012); RESTATEMENT (SECOND) OF TORTS § 314A (AM. LAW. INST. 1965); Allen Korpela, Annotation, *Tort Liability of Public Schools and Institutions of Higher Learning for Injuries Resulting from Lack or Insufficiency of Supervision*, 38 A.L.R.3D 830 (1971).

[324] *See* U.S. Dep't of Educ., Family Policy Compliance Office, Letter to Univ. of N. Ala., 104 LRP 58746 (FPCO 2004) (medical and clinical record of students requesting accommodations for disabilities that are maintained by university disability office are FERPA records, are not excluded FERPA treatment records, and are not governed by HIPAA; also noting that schools could provide for access to such records by faculty from whom accommodations have been requested under the legitimate educational interest exception).

[325] *See, e.g.*, Cedar Rapids Comm'y Sch. Dist. v. Garret F. *ex rel* Charlene F., 526 U.S. 66 (1999) (finding that the school was responsible under the IDEA for providing extensive nursing assistance to a medically fragile student breathing through a tracheotomy tube).

may also be shared with school faculty or other employees to determine whether the circumstances surrounding an academically dismissed student's disability meet the school's standard for readmission.[326] School nurses may need to share some student medical information, for example informing teachers that one of their students may have seizures and what to do in the event of a seizure. In K-12 schools, physical therapy and similar services for special education students are provided when a team of persons including school employees such as teachers, special education administrators, and school principals determines that such services are a necessary part of a student's IEP.[327] Schools have specific obligations under special education law to provide "related services"[328] such as physical therapy when necessary for the student to benefit from (special) education, with the school team deciding the details of these services. Disputes about services are subject to resolution under special education law.[329]

Internal disclosure of these "educational" student medical records should continue to be governed by FERPA and its legitimate educational interest provision. School office staff should continue to review doctor's notes about student absences to keep records of excused and unexcused absences. School nurses should continue to inform teachers about student medical conditions such as seizure disorders which teachers might have to deal with in class. Teams of school officials should continue to access "educational" student medical information such as evaluations needed to write IEPs for special education students. College disability offices should continue to share "educational" student medical information with faculty and school officials as needed to determine what accommodations for a student are reasonable and therefore legally required. Faculty should continue to review "educational" medical information of an academically dismissed student as needed to determine if the student meets the school's readmission standard. Moreover, in a situation meeting the FERPA standard for an emergency, schools should share student "educational" medical information internally as needed to resolve the emergency.

School attorneys representing the school in educational matters (as opposed to health care disputes) should continue to access "educational" student medical information as needed for legal representation. For example, school attorneys defending parent special education claims need to review the "educational" medical records of the student. In a student expulsion hearing in which the school attorney puts on the case for the administration, or advises the board of education that decides the hearing, the attorney needs to review the student's "educational" medical records.

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[326] *See generally* Lynn M. Daggett, *Doing the Right Thing: Disability Discrimination and Readmission of Academically Dismissed Law Students*, 32 J. COLL. & UNIV. L. 505 (2006).

[327] IDEA provisions regarding IEPs may be found at 20 U.S.C.A. § 1414(d) (2012 & Supp. I 2013).

[328] Details regarding related services under the IDEA may be found at 34 C.F.R. § 300.34 (2019).

[329] *See* 20 U.S.C. § 1415 (2012 & Supp. I 2013).

C. External disclosure of "educational" student medical records should be governed by FERPA, amended to limit disclosures to the "minimum necessary"

Borrowing from the HIPAA Privacy Rule, FERPA should be amended to provide that external disclosures of student medical records are limited to the "minimum necessary" to achieve the purpose of the disclosure.[330] For example, in general it should be unnecessary, and therefore unauthorized, for a school to send "educational" student medical records to a transfer school. However, in limited situations such as a special education student's transfer, sending some "educational" medical records of the student may be necessary.

With this additional "minimum necessary" limitation, external disclosures of "educational" student medical records should be governed by FERPA. Parents of minor students would continue to have a right of access. However, disclosure to parents of a financially dependent postsecondary student of "educational" medical records would be limited to the "minimum necessary." In FERPA emergencies, "minimum necessary" disclosures to outsiders, such as police or parents, would be permitted, considering the emergent context. The "minimum necessary" limitation would govern disclosures in response to subpoenas and establish a standard for courts to apply to disputes about subpoenaed student medical information.

D. FERPA's treatment records provision should be repealed

Section V.A of this Article proposes that the Privacy Rule access and disclosure provisions would also apply to student health clinic medical records. Doing so would render unnecessary the portion of the FERPA treatment records provision providing for non-consensual access by other (on- or off-campus) health care providers who are treating the student.

What then remains is FERPA's exclusion of treatment records from the general right of student access, which should be repealed. Predating the enactment of the Privacy Rule and its general patient right of access to medical records, FERPA disallows a student patient access to treatment records unless and until the school chooses to disclose internally or externally to persons outside of the campus treatment setting.[331] Instead, FERPA provides for access by a health care professional identified by the student. There is no reason to deny postsecondary and adult students access to medical records they would have a Privacy Rule right to access from off-campus providers. FERPA's denial of access is inappropriate, paternalistic, and perhaps classist. Postsecondary and adult students seeking treatment from school health clinics are mature enough to access the records of their treatment without the guidance of a private health care professional. Many students are unable to

[330] 45 C.F.R. § 164.502(b)(1) (2019).
[331] Schools may choose to share FERPA treatment records with the student patient.

afford the health care professionals FERPA requires to gain access to their own medical records.

FERPA's treatment records provision also draws arbitrary lines. Its limitation to postsecondary and adult students denies these students direct access unless they find (and presumably pay) a health care professional to access these records, while parents of minor K-12 students can directly access their children's school health clinic records without involving a health care professional intermediary. As a corollary, the treatment records provision requires high schools to offer different levels of privacy protection for school health clinic records for minor students and adult students. Moreover, the treatment records provision's denial of direct access disappears once treatment records are internally or externally disclosed to third parties outside of the treatment providers, rendering the treatment records FERPA records to which the postsecondary or adult student has a right of access. Thus, for example, Jane Doe's University's counseling center's disclosure of her medical records to the University's attorneys changed their status from treatment records to FERPA records, giving Jane Doe a right of access. It is unclear what purpose is served by this dichotomy and why it would be appropriate for Jane Doe or another postsecondary student to review her own medical records after, but not before, disclosure to a third party. Similarly, the treatment records provision permits school officials or other schools in which the student seeks to enroll to access student medical records before the student herself. As discussed in Part I, in a case involving another sexually assaulted student at Jane Doe's University, the FERPA treatment records provision created the harsh and unfair outcome of the student being able to review her own medical records only after the University's attorneys had done so.

Elimination of the FERPA treatment records provision would also be a step toward protecting student medical records from state public records laws requests, as discussed at Section III.D. Specifically, repeal of this provision would remove the argument that, since FERPA does not cover treatment records, they should be available for public access.[332]

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[332] This Article does not propose repealing or amending FERPA's provision for sole possession notes. *See* 20 U.S.C. § 1232g(a)(4)(B)(i) (2012 & Supp. I 2013); 45 C.F.R. § 160.103 (2019). Under the Article's proposal, when sole possession notes are created by providers in student health clinics, such as the notes Jane Doe's counselor created in her sessions with Jane Doe, access and disclosure would be governed by HIPAA Privacy Rule. When sole possession notes are created by school-based health care providers outside of school health clinics, such as a school physical therapist's notes of sessions with a student with a disability receiving PT under an IEP, they would be "educational" student medical records with disclosure governed by FERPA, modified to limit external disclosure to the "minimum necessary." Sole possession notes created by other school officials other than health care providers, such as a professor's notes of a meeting with a student in academic difficulty, would be governed by FERPA unamended by the Article's proposal.

E. HIPAA Privacy Rule coverage of student health clinic records but not "educational" student medical records appropriately balances student medical privacy with school performance of educational responsibilities

As discussed above, there is no real reason for the HIPAA Privacy Rule to exempt student health clinic records. As to internal disclosures of "educational" medical records, a HIPAA Privacy Rule-type firewall for "educational" student medical records between school health care providers and other school employees would be unworkable, and would preclude the development of IEPs required by special education law. However, student "educational" medical records do not normally need to be shared outside of the school in order for the school to fulfill its educational responsibilities. For example, many student "educational" medical records such as doctors' absence notes and school nursing logs need not be shared with new schools in which the student enrolls or seeks to enroll. Importing HIPAA's "minimum necessary" disclosure limit into FERPA for external disclosures of "educational" student medical records would provide a meaningful level of privacy protection.

Many postsecondary (and some K-12) schools choose to operate a student health clinic and assume a health care role, thereby creating and maintaining student "patient" medical records, such as Jane Doe's campus counseling records. At schools that have made this choice, students receive on-site care from school health clinics that is available to all students. Students choose this school-based health care as an alternative to private health care that is covered by the HIPAA Privacy Rule. Student on-campus health care supports their health and thus indirectly their educational success. However, students receive treatment from a school health clinic largely separate from their education, provided by persons whose profession and sole responsibility is to provide health care. There is normally no need for others within the school to know about it in order to fulfill educational responsibilities. For example, in Jane Doe's case neither her professors nor University student life staff needed to know the contents of her therapy to provide her with instruction or with support under Title IX.

As with the HIPAA Privacy Rule provision for employee medical records,[333] recognizing and separating roles is essential. The Privacy Rule recognizes that employers create and maintain employee medical records as employers (such as an employee's medical documentation in support of Americans with Disabilities Act (ADA) disability accommodations) that are excluded from the Privacy Rule. However, when employers actually provide health care to employees, the Privacy Rule governs.

Conflation of the educational and health care roles of schools is part of what makes Jane Doe's case so troubling. Jane Doe's medical records were created as a result of her choice to be a student patient. She sought help at

[333] *See* 45 C.F.R. § 164.501 (2019).

her campus counseling center made available by her University in the health care provider role it chose to assume. Jane Doe then sued her University under Title IX, an education statute, specifically claiming a hostile learning environment on the basis of gender. Her University used its dual role as both a health care provider and an education claim defendant in order to seize, and allegedly access, her student patient records to defend itself in an education law case.

Inappropriate conflation of these roles is also part of current student medical privacy law. Although Jane Doe's campus counseling created medical records of the sort that the HIPAA Privacy Rule would protect if the counseling occurred off-campus, it does not apply. Instead, the education records statute FERPA governs. FERPA fails to differentiate records created and maintained in a school's educator and voluntarily chosen health care roles, treating both school health clinic and other "educational" student medical records no differently than education records generally. FERPA allows disclosure of these very private records under many circumstances.

Jane Doe's University used this conflation to gain a significant litigation advantage. Immediately after mediation failed, the University was able to seize and allegedly review all of Jane Doe's campus counseling records, without her consent, without advance notice, without court oversight and approval, and without a protective order.[334] If Jane Doe had chosen off-campus therapy, the HIPAA Privacy Rule would have barred non-consensual disclosure of the records to a school or other defendant. The University would have been able to subpoena and admit relevant therapy records. The patient (and the holder of the records, such as the private therapist) would then have an opportunity to negotiate access to relevant records, or to ask the court to quash or modify the subpoena after reviewing the records in camera. As discussed earlier in Part I, the University's actions were likely traumatizing for Jane Doe, and also resulted in multiple legal proceedings for the University. The proposal would prevent non-consensual seizure and review of Jane Doe's campus counseling records, thereby avoiding both her trauma and the associated legal exposure of the University.

As the DCL recognizes, student medical records deserve greater privacy protection than student records generally. Whether connected to a school's educational responsibilities or to a school's chosen health care role, student medical records are uniquely private. School educational and health care roles are not completely distinct. For example, K-12 school nurses primarily perform services for educational reasons, such as providing health services to

[334] That Jane Doe's lawsuit sought damages for emotional harm does not negate this advantage. Patient-therapist communications are privileged and inadmissible in court. A civil suit seeking damages for emotional harm waives the therapist privilege only as to relevant records for the claimed emotional harm. *See* Jaffee v. Redmond, 518 U.S. 1, 17 n.14 (1996) (noting privilege may be waived); CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, FED. EVIDENCE § 5:43 (4th ed. and Supp. 2018) ("Where the client makes claims or defenses that put in issue those aspects of his mental or emotional condition that connect closely with psychotherapy that he obtained, he waives the protection of the privilege for communications that bear directly on such claims or defenses").

special education students pursuant to their special education programs, or providing basic health services as part of in loco parentis responsibilities, but also may offer some health care to all students, such as vision screenings. School health clinics primarily offer health care to all students, but also occasionally may perform services that are more educational such as providing counseling as a reasonable accommodation to a student with a disability. Drawing a line between "school health clinic" student medical records created or maintained by school health clinics (including K-12 school health clinics that offer physical health care, college campus health clinics and counseling centers) and "educational" student medical records appears to be the best available way to balance needed enhancement of student medical privacy with schools' need to fulfill their educational responsibilities. Recognizing schools' need to internally disclose student medical information connected to the school's educational responsibilities, HIPAA Privacy Rule regulation of these "educational" student medical records would be inappropriate.

F. The proposal furthers important public policy goals, may make state law claims available to students for medical privacy violations, and brings student medical privacy in line with medical privacy generally

The proposal is consistent with the public policy underpinnings of the therapist-patient and physician privileges that render certain medical evidence inadmissible in court. For example, the Supreme Court has created a federal psychotherapist privilege that makes covered "confidential" communications inadmissible,[335] recognizing the important mental health and other societal interests served by psychotherapy[336] and the need for confidentiality for therapy to be effective.[337] Similarly, the proposal to enhance privacy of student health clinic records creates confidentiality in psychotherapy and other on-campus medical care that is necessary for effective treatment, thus enhancing student health. Moreover, the proposal creates new confidentiality in student medical records that supports their status as privileged.[338]

As to any psychotherapist or physician privilege, the patient is the holder and thus determines whether to waive it.[339] Thus, the patient has primary control over release of the information in litigation and an ownership-like interest in the information. For example, a patient who decides to

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[335] *Id.*

[336] *Id.* at 11. 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 generally* CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, FED. EVIDENCE § 5:42 (4th ed. and Supp. 2018).

[337] *Jaffee*, 518 U.S. 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.").

[338] Such records would now be "confidential" and thus within the privilege.

[339] *See Jaffee*, 518 U.S. at 15 n.14.

sue her psychotherapist for malpractice has by that action impliedly waived the privilege as to records relevant to that claim. Similarly, a patient's decision to file a civil suit seeking damages for emotional harm waives the psychotherapist privilege as to relevant records for the claimed emotional harm. Consistent with these principles, the proposal would replace FERPA's school discretion to release student health clinic records in a wide variety of circumstances with enhanced student patient control of medical records. For example, unless the lawsuit concerned campus health care, non-consensual disclosure of Jane Doe's campus counseling records to a school or other defendant would not be authorized. Schools or other defendants could subpoena student patient records during pretrial discovery. The student patient would then have an opportunity to negotiate access to relevant records, or to ask the court to quash or modify the subpoena. If the school or other defendant subpoenaed all of a student plaintiff's medical records, the plaintiff could ask the court to review the records in camera and determine which would be disclosed to the defendant considering the "minimum necessary" standard that the proposal would apply to both student health clinic and student "educational" medical records.

The proposal thus creates privacy for Jane Doe equivalent to that for private therapy. The defendant University would have been able to subpoena and admit relevant therapy records, with the court if requested by the plaintiff determining which records to make available to the school defendant.[340] The proposal would negate the University's claim in its answer that Jane Doe's student health clinic medical records were "the University's records." In accordance with the principle of student patient control over their records, the proposal would also replace FERPA's lack of entitlement for adult students to access medical records with the Privacy Rule's general right of access, modified for psychotherapy notes.

Under the proposal, student patients would lack a statutory cause of action to challenge violations of their medical privacy, as HIPAA provides no private cause of action.[341] However, the proposal would offer student and nonstudent patients equivalent ability to sue under state health care confi-

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[340] *Cf.* C.R. *ex rel.* Joe R. v. Novi Comm'y Sch. Dist., No. 14-CV-14531, 2016 WL126250, at *3 (E.D. Mich. Jan. 12, 2016) (student sexually abused by classmate sued school in tort and Title IX; student subpoenaed psychiatric records of accused student from four private facilities; facilities refused to release records without court order as required by HIPAA; court ordered production with a protective order); Gaines-Hanna v. Farmington Publ. Sch., No. 04-CV-74910-DT, 2006 WL 932074, at *10 (E.D. Mich. Apr. 7, 2016) (in claim against school district putting mental condition at issue, plaintiff's private medical records sought by defendant school district were protected by HIPAA, which requires protective order; court ordered psychiatric exam "limited to the effects of the events of the events underlying" the lawsuit and disclosure of private medical and psychiatric records).

There is no guarantee that private medical records would be reached by a subpoena. *Cf. In re:* Student with a Disability, 40 IDELR 119, 7–9 (N.M. SEA Oct. 31, 2003) (special education hearing officer refuses to order parent to disclose student's records of private medical treatment to school, noting that once such a disclosure occurs, the records are FERPA records which may be shared in accordance with that law).

[341] *See* Univ. of Colo. Hosp. v. Denver Publ'g Co., 340 F. Supp. 2d 1142, 1145 (D. Colo. 2004) (holding that "the statutory text displays no intent to create a private right of action. . .").

dentiality or other law for medical privacy violations. As discussed in Section IV.B, these laws often reference external law (and so, currently likely reference FERPA) to define "confidential" records. The proposal establishes specific confidentiality provisions for student medical records. Violations of student medical privacy thus may become actionable in common law claims including invasion of privacy, such as Jane Doe claimed in her lawsuit, since students would now have reasonable expectations of privacy in their medical records.

The proposal is also consistent with the approach to medical privacy under other federal laws. The Protection of Pupil Rights Act (PPRA) recognizes a greater privacy expectation in student medical information by imposing special limits on schools' ability to require its disclosure.[342] The ADA protects the privacy of covered employee medical information.[343] As discussed earlier, the proposed approach is also consistent with the Privacy Rule's own exception for employee medical records which distinguishes the employer as health care provider from the employer as employer.[344]

G. Schools' new responsibilities under the proposal are modest

The proposal creates burdens that are considerably smaller than those under Jane Doe's University's new policy discussed in Part I. That new University policy requires subpoenas in all instances, school opposition to subpoenas, and on request payment for a lawyer for the student to challenge subpoenas. The proposal would add some new responsibilities for schools that choose to operate school health clinics. These schools would need to designate a HIPAA coordinator and complaint office, provide HIPAA training to clinic staff, and create and disseminate HIPAA notices of privacy practices to their student patients. These schools would provide students with access to their own school health clinic records and limit their internal and external disclosure. Schools that violate these new requirements will need to sanction offending employees and may face fines. Unauthorized disclosures may become actionable under state health care confidentiality statutes and common law claims such as invasion of privacy. These modest new responsibilities are justified by the need to protect student medical privacy in a way that is reasonably consistent with the privacy protections of other medical records. Schools that do not wish to assume these responsibilities can choose not to operate student health clinics.

New responsibilities for K-12 schools under the proposal are extremely modest, because most K-12 schools do not operate student health clinics,

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[342] 20 U.S.C. § 1232h(b) (2012 & Supp. I 2013) (limits on required disclosures by students of "mental or psychological problems" and information from privileged relationships such as with physicians); *id.* at § 1232h(c) (limits on certain student physical examinations).

[343] 42 U.S.C. § 12112(d)(3)(B) (2012) (requiring certain employee medical information to be "collected and maintained on separate forms and in separate medical files and . . . treated as a confidential medical record").

[344] 45 C.F.R. § 164.501 (2019).

and thus create and maintain only "educational" student medical records. HIPAA coordinators, complaints, training, and notice of privacy practices would not be required. Standards for internal disclosure under FERPA would be unchanged. The only new obligation would be to comply with the proposed "minimum necessary" limit on external disclosures of their "educational" student medical records. Additionally, unauthorized disclosures by schools may become actionable under state health care confidentiality statutes and common law claims, such as invasion of privacy.

Many schools are already familiar with the Privacy Rule and its "minimum necessary" limit on disclosures. Some private schools do not receive federal education funds and are not covered by FERPA, and thus already operate under the HIPAA Privacy Rule.[345] Some schools are already governed by HIPAA provisions other than the Privacy Rule.[346] If the campus health center offers health care services to nonstudents such as school employees or dependents of students, it is already governed by the HIPAA Privacy Rule as to those nonstudent patients.[347] School-based health care providers may be governed by state health care laws and/or professional ethical standards similar to the HIPAA Privacy Rule. The educational training of health care professionals at school health clinics likely focused on HIPAA rather than FERPA.

H. The proposal neither undermines student safety nor expands school liability for student misconduct

As discussed in Section V.B, K-12 schools owe a duty to reasonably supervise their minor students. This duty requires schools to take reasonable steps to prevent students from foreseeable harms, including foreseeable intentional harms inflicted by classmates, such as physical bullying and school shootings. For K-12 schools, the proposal would limit internal sharing only for records maintained by school health clinics. K-12 school health clinics typically provide physical health treatment rather than counseling and so are unlikely places for students to share thoughts or plans to harm others. School counselors and other school staff who are not part of school health clinics are more likely to hear this information, and their ability to share it internally would not change under the proposal. Moreover, under FERPA's legitimate educational interest exception, K-12 schools could continue to internally disclose, discuss, and collect information about a student of concern, including "educational" student medical records, such as work with a school counselor.

Under the proposal, a K-12 school that operates a school health clinic would need to comply with the Privacy Rule to access student medical records from its school health clinic, and also to share this information outside the school. As discussed in Section V.A, the Privacy Rule allows

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[345] *See Joint Guidance*, *supra* note 74, at 3, 8 (question 1).
[346] *See id.* at 7.
[347] *See id.* at 9 (question 3).

non-consensual sharing in emergencies and generally permits non-consensual disclosure to parents of minors. Moreover, for both minor and adult patients, the Privacy Rule permits non-consensual sharing of "information that is directly relevant to the involvement of a family member in the patient's health care or payment for care if, when given the opportunity, the patient does not object to the disclosure."[348] Tort law also requires therapists to take reasonable steps to prevent harm from dangerous patients and the Privacy Rule authorizes disclosure when required by law.[349] The Privacy Rule also authorizes disclosure to law enforcement officials in some circumstances. Collectively, these permitted disclosures allow those K-12 schools with school health clinics to both reasonably supervise their students and deal with any specific student safety threats.

The proposal involves somewhat more change for school health clinic medical records of postsecondary students such as Jane Doe and the students found responsible for her sexual assault, and students who harm others such as the Virginia Tech student shooter. To the extent these or other postsecondary students disclosed thoughts or plans concerning harm to self or others to a campus counselor, the Privacy Rule would govern. As discussed immediately above, those standards permit sharing in an emergency, as well as sharing with family involved in the student's medical care or payment for it, as well as with law enforcement in some circumstances, and as required by law such as the tort duty of therapists to take steps to prevent patients who pose a specific and credible threat from following through. Thus, college campus therapists who become concerned about student patients who pose threats of harm to themselves or others could non-consensually disclose under the Privacy Rule emergency exception, and in some circumstances also to family members, law enforcement, and threatened victims. Since such disclosures are part of campus counselor tort duties, the Privacy Rule would permit campus therapists to consult with their college attorneys about how to fulfill these duties and comply with Privacy Rule standards.

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[348] *See* 45 C.F.R. § 164.510(b) (2019).

[349] *See* Tarasoff v. Regents of Univ. of Cal., 17 Cal.3d 425, 431 (1976). In Oregon, the duty is statutory. OR. REV. STAT. ANN. §179.505 (West, Westlaw current through laws enacted in the 2018 Regular Sess. and 2018 Spec. Sess. of the 79th Legis. Assembly (2018)). Steps taken by a therapist pursuant to a Tarasoff-type duty to warn may not be exceptions to evidentiary privileges; *see generally* U.S. v. Chase, 340 F.3d 978 (9th Cir. 2003) (declining to recognize a dangerous patient exception to Oregon or federal testimonial privilege). FERPA itself does not impose such a duty. *See* Jain v. Iowa, 617 N.W.2d 293, 298 (Iowa 2000) (rejecting claim by parents of student who committed suicide that university had a duty to inform them of son's prior suicide attempt and rejecting that there was a special relationship between school and student triggering a special duty). In *Jain* the student had apparently not undergone campus counseling. Another case, ultimately settled, made a similar claim as to a student who committed suicide and had received on campus counseling. *See* Shin v. Mass. Inst. Tech., No. 020403, 2005 WL 1869101, at *12 (Mass. Super. Ct. June 27, 2005).

Conclusion

Jane Doe's case offers a window to view student medical privacy. While the view is not pretty, it is an opportunity to learn from and improve upon the experience of the case's parties. FERPA should be amended to bring school health clinic student medical records under the HIPAA Privacy Rule, resulting in privacy standards that are reasonably consistent with protection of medical records generally. Amending FERPA in this manner would have made it clear that the University could not unilaterally access Jane Doe's student health clinic records and likely would have avoided further trauma to Jane Doe. Moreover, professional ethics proceedings involving University counselors and attorneys, as well as successfully settled litigation brought by University counselors, would be averted. The proposed amendments would thus benefit not only Jane Doe, but also her University. FERPA's treatment records language should also be repealed to allow Jane Doe and other adult and postsecondary students access their own medical records.

Moving beyond Jane Doe's case, and reflecting schools' need for access to some student medical records, "educational" student medical records should continue to be governed by FERPA. This approach would continue to allow schools to meet educational obligations under disability laws, as well as provide reasonable supervision of their minor students. However, recognizing the more sensitive nature of student medical records as compared with other education records, and the infrequency of schools' needs to nonconsensually share them outside of the school, FERPA should be amended by importing a concept from the HIPAA Privacy Rule to limit external disclosures to the "minimum necessary."