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NATIONAL CRIME VICTIM LAW INSTITUTE
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Violence Against Women *Bulletin*

May 2015

LEGAL PUBLICATIONS PROJECT OF THE NATIONAL CRIME VICTIM LAW INSTITUTE AT LEWIS & CLARK LAW SCHOOL*

Understanding the Intersection of Title IX and Victims' Rights: Protecting Victims from Subpoenas for School Disciplinary Records**

Campus sexual violence and harassment is startlingly common. Despite the myriad avenues available for seeking redress, victims often choose not to tell anyone of their victimization, and even fewer choose to formally report it to law enforcement or other investigative agencies. Although there are a number of reasons for this, key among them is a concern for maintaining privacy.[1] All too often this concern is well-founded, particularly when campus sexual violence and harassment proceedings, often called Title IX proceedings, are instituted.

Title IX proceedings are not subject to the same procedural rules as court proceedings,[2] yet documentation from these proceedings may contain personal information that a victim would not want to have shared publicly. What happens when this documentation is subpoenaed by the state, the defendant, or even the educational institution, in the course of a related criminal, civil, or administrative proceeding? In addition to any potential disclosure of information having concerning ramifications for victims' privacy,[3] the mere threat of disclosure may cause victims to choose not to seek any formal redress in the first instance, thereby directly affecting their right to access the courts.[4]

This *Bulletin* addresses the interplay of some of the key laws at issue in this situation. What is clear is that the current complex scheme often fails to adequately protect victims and their privacy rights. Accordingly, this *Bulletin* also provides practical pointers to aid practitioners and ensure meaningful rights for survivors.

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I. Brief Overview of Key Laws Implicated by Subpoenas for Documentation of School Disciplinary Proceedings

A. *Title IX*

Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulation, 34 C.F.R. Part 106, prohibit discrimination on the basis of sex in federally-funded education programs and activities.[5] Sex discrimination includes sexual harassment, which includes acts of sexual violence.[6]

Schools receiving federal assistance have certain basic obligations under Title

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IX. They must issue a policy against sex discrimination; they must designate at least one employee to coordinate investigations; they must adopt a grievance procedure; and they must publicize that grievance procedure.[7] Additionally, schools must adopt proactive measures to prevent sexual harassment and violence.[8]

Although grievance procedures vary, they generally include school investigations and hearings to determine if sexual harassment or violence occurred.[9] The determination is based on a preponderance of the evidence standard, which is a lesser burden of proof than the criminal justice standard of beyond a reasonable doubt.[10]

Throughout the investigation and at any hearings, the victim and the alleged perpetrator must be treated equally. They must have an equal opportunity to present witnesses and other evidence;[11] they must be afforded similar and timely access to any information that will be used at the hearing;[12] and they must each be given the opportunity to have a lawyer if the school allows lawyer participation.[13] Additionally, "[s]chools must maintain documentation of all proceedings, which may include written findings of facts, transcripts, or audio records."[14]

Throughout the investigation and at any hearings, the victim and the alleged perpetrator must be treated equally. . . . [This includes] the opportunity to have a lawyer if the school allows lawyer participation.

B. The Family Educational Rights and Privacy Act (FERPA)[15]

The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, was passed "'to protect [parents' and students'] rights to privacy by limiting the transferability of their records without their consent.'"[16] Although FERPA does not impose an outright ban on the release of certain information, it does prohibit the federal funding of educational institutions that maintain a policy or practice of releasing educational records to unauthorized persons.[17] Importantly, FERPA does not protect all documents from disclosure. To be covered by FERPA, the documents must be "education records." Education records are broadly defined 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."[18]

Even if documents meet the definition of "education records," and would therefore be entitled to some protection under FERPA, courts have held that they can nonetheless be disclosed if the students' identities are redacted or otherwise become untraceable.[19] However, if the victim's identity is still traceable even with redaction, disclosure of the records would be contrary to FERPA.[20]

Specifically exempted from the scope of "education records," and therefore not protected by FERPA's privacy protections, are "records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement."[21] Fortunately from a privacy perspective, courts have generally found that disciplinary records do not amount to law enforcement records and are therefore not automatically exempted from FERPA's privacy protections.[22]

However, the state of the law is not as clear regarding whether disciplinary records—particularly disciplinary records of Title IX proceedings[23]—fall within FERPA's definition of "education records," and are therefore entitled to FERPA's privacy protections. Many courts, noting the broad language of FERPA, find that

disciplinary records are education records, and that they are protected from disclosure under FERPA.[24] This broad definition is consistent with the Department of Education's interpretation of FERPA.[25] Other courts, however, have interpreted education records narrowly, finding that disciplinary records are not education records and therefore not protected under FERPA.[26] Notably, most of these narrow decisions predate the 1998 FERPA amendments that allow the release of disciplinary information in certain circumstances; amendments which evince Congress's intent that disciplinary records are education records.[27]

C. Victims' Rights

Under both federal and state law, victims have a number of explicit rights that may be implicated by a subpoena for the victims' records related to a Title IX proceeding.[28]

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A victim's right to privacy is a constitutionally protected interest under the federal Constitution[29] and, in many jurisdictions, by statute or state constitutional provision.[30] Many jurisdictions that do not have an explicit privacy right have a "catch-all" right providing that victims must be treated with fairness, dignity or respect,[31] which, when properly interpreted, requires that victims' privacy interests be respected.[32] Other victim rights may also be implicated by requests for documents. For instance, defense-initiated requests for victim information may implicate the victims' rights to protection and to be free from harassment and intimidation.[33] Additionally, some states recognize the right of victims to refuse discovery requests from defendants, with at least three states providing victims with an explicit constitutional right to refuse a defendant's pretrial discovery request.[34]

D. Privilege

FERPA exempts from its definition of education records (and therefore exempts from its protections and disclosure obligations) records that are "made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional 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 . . . ."[35]

FERPA defines these records rather narrowly; the records must be maintained *only* in connection with the provision of treatment and they cannot be made available to any other persons other than those providing treatment.

However, if the records sought do not fall within this somewhat narrow definition—thus putting them back into the realm of "education records"—they may still be protected under federal or state privilege laws. For instance, every state and the District of Columbia recognizes a patient-therapist privilege, a patient-psychologist, or a patient-psychiatrist privilege.[36] Additionally, many states protect communications between a victim and a social worker, a child abuse counselor or sexual assault counselor.[37] When privileged documents are contained within disciplinary records, they should be analyzed under a stricter standard.[38]

II. Subpoenas for Disciplinary Records: Best Practices to Protect Victims' Rights

As noted above, even if records from disciplinary hearings are covered by FERPA, these records may be disclosed in certain situations.[39] One exception to FERPA is that records may be disclosed if they are "furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena,

upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency," subject to some exceptions when notice is not required.[40] So what happens if a student's records from a Title IX proceeding get subpoenaed? How do these laws interact with each other and what are the best practices that a school should employ?

A. The School's Responsibilities

1. Giving notice to the victim.

The text of FERPA requires that the school "make[] a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance,"[41] but it does not specify how far in advance notification must be given.

> [D]ue process requires that notice be given [to the victim] immediately upon receipt of the subpoena.

Notice is given so that the student may seek protective action if the victim so desires.[42] Regardless of FERPA's provisions, for the victim to have sufficient time to retain an attorney (if he or she so desires) and move for protection, due process requires that notice be given immediately upon receipt of the subpoena.[43] Failure to do so risks the victim's ability to access justice and assert his or her rights to privacy, protection, dignity, fairness, and respect.

2. Assessing the subpoena.

i. Is it one of the limited circumstances in which pretrial discovery is permitted?

As an initial matter, it should be noted that there is no pretrial right for the production of documents under the Confrontation Clause, Compulsory Process Clause, Due Process Clause, or otherwise.[44] There are, however, limited circumstances in which pretrial discovery from victims is permitted nonetheless.[45]

ii. Is the subpoena facially valid?

Fundamentally, it must be determined if there is a valid subpoena. The school must assure itself prior to production as to the facial validity of the subpoena. If the subpoena is not valid, the school should not turn over the documents to the party requesting them. Rather, the school or the victim's counsel should argue that the subpoena is not valid and therefore compliance with the subpoena is not required.[46]

iii. Is it a valid subpoena that impermissibly treads on victims' rights?

Even if a subpoena is facially valid, it may nonetheless infringe upon the victims' rights described above, including the rights to privacy, fairness, and protection as well as state privilege laws and federal laws such as the Health Insurance Portability and Accountability Act (HIPPA).[47] Although a school is not under an obligation to move to quash the subpoena on behalf of the victim,[48] if the victim would prefer for the school to move on his or her behalf, it is best practice.[49] If the school does not intend to move, it should explain to the student or the student's parents that they have a legal right to move to quash the subpoena or for a protective order. It would also be best practice for a school to have a list of resources, including legal counsel, for the students or their parents in the event they should wish to move for protection.

If the student learns of the subpoena and wishes to move to quash or for a protective order, courts will generally use a balancing test to determine whether and to what extent records will be disclosed. This test has been articulated in slightly different ways, but in its basic forms it requires weighing the need for the requested

information against the intrusion on the student's rights, including the rights to dignity, privacy and protection.[50]

III. Courts Have Thus Far Failed to Adequately Consider the Important Victims' Rights at Stake in This Context

Although appellate courts have not yet specifically grappled with a victim's opposition to disclosure of documentation from a Title IX campus disciplinary proceeding,[51] in these instances the privacy stakes are high. Some courts have acknowledged the privacy interests,[52] however, the standard for producing documents has, to date, failed to adequately address the privacy and protection rights of victims, and has failed to consider victims' other statutory and constitutional rights. In some instances, victims' rights were not considered because at the time the opinions issued victims' rights legislation had not yet been passed.[53] However, in other instances, despite victims' rights legislation being on the books, courts have failed to adequately consider the victims' statutory and constitutional rights when ordering the disclosure of records.[54]

IV. Where We Go From Here

Sadly, the current state of the law is to allow education records—including disciplinary records—to be discovered without adequate consideration of the underlying privacy interests in those records. Although breaches of privacy are always concerning, privacy interests—and the harm from breaching those privacy interests—can be even more pronounced in sexual assault and harassment cases.

There are a number of things practitioners can do to bring increased awareness to this problem and begin to counteract it:

1. Discuss best practices schools should employ when they are served with a subpoena;

2. Encourage schools to give notice to students immediately upon receipt of the subpoena;

3. Encourage schools to move to quash assertively, incorporating arguments concerning students' full panoply of victims' rights;

4. When giving notice, encourage the school to tell students that they may move for a protective order;

5. Offer to provide a list of resources for the school, including sample motions to quash and motions for protective orders and a list of attorneys equipped to help students move for a protective order if they desire;

6. If students wish to move for protection, work with them or their attorneys in asserting that victims' rights need to be considered alongside the current law's balancing test; and

7. Contact NCVLI for assistance.

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For additional resources relating to the protection, enforcement, and advancement of crime victims' rights, please visit NCVLI's website at www.ncvli.org.

[1] The United States Department of Justice has recognized that rape is "seriously underreported," with findings suggesting that only 19.1% of women who were raped since their 18th birthday report the crime. Patricia Tjaden & Nancy Thoennes, *Extent, Nature, and Consequences of Rape Victimization: Findings from the National Violence Against Women Survey*. (NCJ publication No. 210346), Washington DC: U.S. Dep't of Justice, Office of Justice Programs, National Institute of Justice, *available at* http://www.ncjrs.gov/pdffiles1/nij/ 210346.pdf). One reason for the underreporting is that victims are often unwilling to have their personal details aired in a public forum. *See generally* Paul Marcus & Tara L. McMahon, *Limiting Disclosure of Rape Victims' Identities*, 64 S. Cal. L. Rev. 1019, 1050 (1991) ("One reason frequently mentioned by victims who do not report their rapes to the police is their

uncertainty about whether they will be able to maintain their privacy if they do report the rape. They want control over when and to whom they will reveal the details of their tragedy."); Anne W. Robinson, *Evidentiary Privileges and the Exclusionary Rule: Dual Justifications for an Absolute Rape Victim Counselor Privilege*, 31 New Eng. J. on Crim. & Civ. Confinement 331, 333 (2005) ("Subpoenaing records from every one of a victim's medical and counseling appointments constitutes a subtle form of intimidation. . . . Evidence has shown that a victim is less likely to pursue legal action once she realizes that her counseling records may be revealed in court.") (internal quotation omitted).

[2] Campus proceedings do not afford students the procedural protections found in the traditional court setting and formal rules of evidence do not apply. *See, e.g.,* Ethan M. Rosenzweig*, Please Don't Tell: The Question of Confidentiality in Student Disciplinary Records under FERPA and the Crime Awareness and Campus Security Act*, 51 Emory L.J. 447, 471-72 (2002) (collecting authorities). Without the protections of, for instance, Rape Shield laws or victim privacy laws, there may be information contained in Title IX proceedings that would not have been made public in criminal proceedings.

[3] Courts have found privacy concerns to be particularly pronounced in cases of sexual assault. As the Supreme Court commented "rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy." *Michigan v. Lucas*, 500 U.S. 145, 149-50 (1991) (stating that Michigan's rape shield statute represented a valid determination that rape victims deserved these protections). *See also, e.g., People v. Ramirez*, 55 Cal. App. 4th 47, 53 (Cal. Ct. App. 1997) ("There can be little dispute that the state's interest in protecting the privacy of sex offense victims is extremely strong and fully justified."); *Farish v. Commonwealth*, 346 S.E.2d 736, 738 (Va. Ct. App. 1986) (stating defendant's discovery requests for rape victim's psychiatric records were outweighed by the strong public policy in favor of supporting the privacy rights of the victim); *State v. Gonzalez*, 757 P.2d 925, 930 (Wash. 1988) (discussing the important privacy consideration when defendant seeks discovery in a rape case). *See generally* Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 Suffolk U L Rev 467, 473 (2005) (observing that for many victims, "privacy is like oxygen; it is a pervasive, consistent need at every step of recovery. Within the context of the legal system, if a victim is without privacy, all other remedies are moot").

[4] Courts recognize the fundamental nature of the right of all people to access the courts. *See, e.g.*, *Chappell v. Rich*, 340 F.3d 1279, 1282 (11th Cir. 2003) ("Access to the courts is clearly a constitutional right, grounded in the First Amendment, the Article IV Privileges and Immunities Clause, the Fifth Amendment, and/or the Fourteenth Amendment."); *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983) (noting that access to courts is a fundamental right). *See also, e.g.*, Robinson, *supra* note 1, at 333 ("Subpoenaing records from every one of a victim's medical and counseling appointments constitutes a subtle form of intimidation . . . . Evidence has shown that a victim is less likely to pursue legal action once she realizes that her counseling records may be revealed in court."). *See also, generally, Polyvictims: Victims' Rights Enforcement as a Tool to Mitigate "Secondary Victimization" in the Criminal Justice System,* NCVLI Victim Law Bulletin (Nat'l Crime Victim Law Inst, Portland, Or), March 2013, *available at* http://law.lclark.edu/live/files/13798-polyvictims-victims-rights-enforcement-as-a-tool.

[5] 20 U.S.C. § 1681 *et seq.*

[6] *See* April 2011, Dear Colleague letter (2011 Dear Colleague Letter), at p. 1, *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html. *See also* Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 J.C. & U.L. 613, 634 (2009) (noting that sexual harassment includes both quid pro quo harassment (the exchange of a benefit or avoidance of a detriment for sexual favors between a superior and an inferior) and hostile environment harassment).

[7] 2011 Dear Colleague Letter at p. 6.

[8] The Campus SaVE Act, Sec. 304 of the Violence Against Women Reauthorization Act of 2013, requires that schools develop and distribute a statement of policy regarding the institution's programs to prevent domestic violence, dating violence, sexual assault, and stalking. The policy must address the school's education programs designed to promote the awareness of rape, acquaintance rape, domestic violence, dating violence, sexual assault and stalking, including "primary prevention and awareness programs for all incoming students and new employees . . . ." 20 U.S.C. § 1092(f)(8)(B)(i)(1).

[9] 2011 Dear Colleague Letter at p. 10.

[10] *Id.* at p. 11.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 12. Attorney participation in the Title IX proceeding is but one aspect of how an attorney may be helpful to a victim in the aftermath of a campus sexual assault. Even if schools do not allow attorney participation during proceedings, a victim should still consider hiring an attorney to ensure full protection of his or her rights.

[14] *Id.*

[15] By focusing on FERPA, this *Bulletin* does not mean to

imply other federal statutes are not at issue, nor to foreclose consideration of other options for relief, including the Federal Privacy Act, the Health Insurance Portability and Accountability Act (HIPPA), federal and state rape shield laws, and state educational privacy laws.

[16] *United States v. Miami Univ.*, 294 F.3d 797, 817 (2002) (quoting Joint Statement, Cong. Rec. 39858, 39862) (1974)).

[17] 20 U.S.C. § 1232g(b)(1).

[18] *Id.* at § 1232g(a)(4)(A). The Supreme Court has interpreted this second requirement that education records be "maintained" by the school as meaning that the records "are institutional records kept by a single central custodian, such as a registrar . . . ." *Owasso Independent Sch. Dist. No.I-011 v. Falvo*, 534 U.S. 426, 435 (2002).

[19] 20 U.S.C. § 1232g(b)(1) ("No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information . . .) of students without the written consent of their parents to any individual, agency, or organization [subject to certain exceptions]"); *Loch v. Bd. of Ed. Of Edwardsville Comm. School Dist. #7*, No. 3:06-cv-17-MJR, 2008 WL 79022, *2 (S.D. Ill. Jan. 7, 2008) (finding court did not err in providing educational records of similarly-situated students to the plaintiff when the board of education redacted the students' names); *An Unincorporated Operating Div. of Indiana Newspapers, Inc. v. Trustees of Indiana Univ.*, 787 N.E.2d 893, 909 (Ind. Ct. App. 2003) (finding that documents could be produced outside of FERPA's protections if documents "which might contain information that could identify any present or former students in violation of the confidentiality mandated by FERPA" could be redacted or otherwise separated); *Bd. of Trustees, Cut Bank Pub. Sch. v. Cut Bank Pioneer Press*, 160 P.3d 482, 487 (Mont. 2007) (finding that disciplinary records were not education records when personally identifying information has been redacted, and determining that state constitutional privacy interests did not warrant preventing disclosure).

[20] *See generally* Lynn M. Daggett & Dixie Snow Huefner, *Recognizing Schools' Legitimate Educational Interests: Rethinking FERPA's Approach to the Confidentiality of Student Discipline and Classroom Records*, 51 Am. U. L. Rev. 1, 7 (2001) ("The release of information without reference to a particular student's name may violate FERPA if the information is 'easily traceable' to a student."). For instance, it may be impossible to hold a student disciplinary hearing or a court proceeding without divulging identifiable information. *DTH Publ. Corp. v. The Univ. of North Car. at Chapel Hill*, 496 S.E.2d 8, 13 (N.C. Ct. App. 1998) (finding that the trial court did not err in allowing an undergraduate court to hold student disciplinary proceedings in closed session because "[i]t is impossible to hold a student disciplinary hearing without divulging student records as defined under FERPA or personally identifiable information contained therein"). Further, if the victim's identity is known, redaction may be insufficient to satisfy FERPA. *See Press-Citizen Co., Inc. v. Univ. of Iowa*, 817 N.W.2d 480, 492 (Iowa 2012) ("[C]onsistent with current [Department of Education] regulations, we conclude that educational records may be withheld in their entirety where the requester would otherwise know the identity of the referenced student or students even with redactions."). *See generally Osborn v. Bd. of Regents of the Univ. of Wisc. Syst.*, 647 N.W.2d 158, 169 (Wis. 2002) (allowing disclosure because the victim's identity was not easily traceable, but stating "only if the open records request seeks information that would make a student's identity traceable, may a custodian rely on FERPA to deny the request on the basis that it seeks personally identifiable information").

[21] 20 U.S.C. §1232g(a)(4)(B)(ii).

[22] *See, e.g., Miami Univ.*, 294 F.3d at 815 (stating disciplinary records were not law enforcement records because "[e]ven though some of the disciplinary proceedings may have addressed criminal offenses that also constitute violations of the Universities' rules or policies, the records from those proceedings are still protected 'education records' within the meaning of FERPA"); *DeFeo v. McAboy*, 260 F.Supp.2d 790, 794 (E.D. Mo. 2003) ("Disciplinary records are within the general definition of protected 'education records' in [FERPA]"); *DTH Publ. Corp.*, 496 S.E.2d at 13 (stating that given the breadth of FERPA's definition of "education records," disciplinary records are protected under FERPA). *But see Bauer v. Kincaid*, 759 F.Supp 575, 594 (W.D. Mo. 1991) (finding FERPA does not prohibit disclosure of campus criminal investigation and incident reports because they amount to law enforcement records).

[23] Facially FERPA carves out some specific guidelines regarding disciplinary hearings. For instance, it affirmatively allows the victim or the perpetrator access to the final results of any disciplinary proceedings conducted by the institution with respect to that crime. 20 U.S.C. § 1232g(b)(6)(A), (B). *See also* 2011 Dear Colleague Letter at 13 ("FERPA permits a school to disclose to the harassed student information about the sanction imposed upon a student who was found to have engaged in harassment when the sanction directly relates to the harassed student. . . . Disclosure of other information in the student's 'education record,' including information about sanctions that do not relate to the harassed student, may result in a violation of FERPA."). Importantly, the 2011 Dear Colleague Letter makes clear that when FERPA and Title IX conflict, Title IX must prevail. 2011 Dear Colleague Letter at p.13 n. 32 ("FERPA continues to apply in the context of Title IX enforcement, but if there is a direct conflict between the requirements of FERPA and the requirements of Title

IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions."). Title IX's purpose is to eliminate sex-based discrimination in schools. If the courts' interpretation of FERPA becomes so contrary to victims' privacy rights that it impacts their willingness to report, the two laws may conflict.

[24] *See, e.g., Miami Univ.*, 294 F.3d at 812 ("Under a plain language interpretation of the FERPA, student disciplinary records are educational records because they directly relate to a student and are kept by that student's university."); *see also, generally,* authorities cited in note 22, *supra*.

[25] Family Educational Rights and Privacy, 60 Fed. Reg. 3464-01 (Jan. 17, 1995) ("Based on the broad definition of 'education records,' which includes those records, files, documents, and other materials that contain information directly related to a student, except those that are specifically excluded by statute, all disciplinary records, including those related to non-academic or criminal misconduct by students, are 'education records' subject to FERPA.").

[26] *The Red & Black Publ. Co., Inc. v. The Bd. of Regents*, 427 S.E.2d 257, 261 (Ga. 1993) (stating that disciplinary records from a school internal "Organization Court" were not protected under FERPA because, *inter alia*, "the records are not of the type [FERPA] intended to protect, i.e., those relating to individual student academic performance, financial aid, or scholastic probation"); *State ex rel. The Miami Student v. Miami Univ.*, 680 N.E.2d 956, 959 (Ohio 1997) (finding that disciplinary records "do not contain educationally related information, such as grades or other academic data, and are unrelated to academic performance, financial aid, or scholastic performance" and therefore are not "education records" as defined in FERPA).

[27] *See Miami Univ.*, 294 F.3d at 812-13 ("These two exemptions [for disclosure of disciplinary records] clearly evolve from a base Congressional assumption that student disciplinary records are 'education records' and thereby protected from disclosure. . . . If Congress believed that student disciplinary records were not education records under the FERPA, then these sections would be superfluous.").

[28] Although facially many victims' rights may look like they attach only to criminal proceedings, they can apply to other proceedings as well. *See, e.g., State v. Lee*, 245 P.3d 919, 920 (Ariz. Ct. App. 2011) (applying the victim's right to refuse a deposition to a civil proceeding, holding that "victims retain their constitutional right to refuse to be deposed by the defense in a civil proceeding where the subject matter of the proposed deposition is the criminal offense committed against those victims").

[29] *See, e.g., Roe v. Wade*, 410 U.S. 113, 152 (1973) ("[T]he Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (noting that "[v]arious guarantees [in the Bill of Rights] create zones of privacy").

[30] *See Refusing Discovery Requests of Privileged Materials Pretrial in Criminal Cases,* NCVLI Violence Against Women Bulletin (Nat'l Crime Victim Law Inst., Portland, Or), June 2011, at 3 n.30, *available at* https://law.lclark.edu/live/files/11779-refusing-discovery-requests-of-privileged (hereinafter, *Refusing Discovery Requests*). Other victims' rights may also be implicated by requests for documents. For instance, defense-initiated requests for victim information may implicate the victim's right to protection and to be free from harassment and intimidation. *Id.* at 3. Additionally, some states recognize the right of victims to refuse discovery requests from defendants. At least three states provide victims with an explicit constitutional right to refuse a defendant's pretrial discovery request. See Ariz. Const. art. II, § 2.1(A)(5) ("[A] victim of crime has a right . . . to refuse an interview, deposition, or other discovery request by the defendant . . . ."); Cal. Const. art. I, § 28(b)(5) ("[A] victim shall be entitled to . . . refuse an interview, deposition or discovery request by the defendant . . . ."); Or. Const. art. I, § 42(1)(c) (granting victims the right "to refuse an interview, deposition or other discovery request by the criminal defendant . . . ."). In addition, Idaho's constitution provides victims with the right "[t]o refuse an interview, ex parte contact, or other request by the defendant, or any other person acting on behalf of the defendant, unless such request is authorized by law." Idaho Const. art. I, § 22(8). *See also Protecting Victims' Privacy: Moving to Quash Pretrial Subpoenas Duces Tecum for Non-Privileged Information in Criminal Cases*, NCVLI Violence Against Women Bulletin (Nat'l Crime Victim Law Inst., Portland, Or), Sept. 2014, available at http://law.lclark.edu/live/files/18060-quashing-pretrial-subpeonasbulletinpdf (hereinafter, *Moving to Quash*).

[31] *Moving to Quash*, *supra* note 30, at p. 1.

[32] *See United States v. Bradley*, Crim. No. 09-40068-GPM, 2011 WL 1102837, at *2 (S.D. Ill. Mar. 23, 2011) (quashing subpoena requesting educational, juvenile court, and mental health records pertaining to the victim, stating that defendant's "request for such irrelevant materials is a blatant violation of the victim's right to be treated with respect for his dignity and privacy").

[33] *See Protecting Victims' Privacy Rights: The Use of Pseudonyms in Criminal Cases*, NCVLI Victim Law Bulletin (Nat'l Crime Victim Law Inst., Portand, Or), Oct. 2013, at 2, *available at* https://law.lclark.edu/live/files/15549-protecting-victims-privacy-rights---the-use-of.

[34] *See* Ariz. Const. art. II, § 2.1(A)(5) ("[A] victim of crime has a right . . . to refuse an interview, deposition, or other discovery request by the defendant . . . ."); Cal. Const. art. I, § 28(b)(5) ("[A] victim shall be entitled to . . .

refuse an interview, deposition or discovery request by the defendant . . . ."); Or. Const. art. I, § 42(1)(c) (granting victims the right "to refuse an interview, deposition or other discovery request by the criminal defendant . . . ."). In addition, Idaho's constitution provides victims with the right "[t]o refuse an interview, ex parte contact, or other request by the defendant, or any other person acting on behalf of the defendant, unless such request is authorized by law." Idaho Const. art. I, § 22(8). *See also Moving to Quash*, *supra*, note 30, at 2.

[35] 20 U.S.C.A. § 1232g(a)(B)(iv).

[36] *Refusing Discovery Requests*, *supra* note 30, at p. 2.

[37] *Id.*

[38] For more information on the subpoenaing of privileged documents, see *id.*

[39] *Rios v. Read*, 73 F.R.D. 589, 598 (E.D.N.Y. 1977) (stating that FERPA "says nothing about the existence of a school-student privilege analogous to a doctor-patient or attorney-client privilege"); *In re Subpoena Issued to Smith*, 921 N.E.2d 731, 733 (Ohio Ct. C.P. 2009) ("FERPA itself does not create any qualified immunity from discovery. It creates only a right to confidentiality of student records. . . . The records remain subject to subpoenas, state or federal in both civil and criminal cases. If a student, notified of a pending subpoena, desires to prevent disclosure, he or she must seek a protective order or an order modifying or quashing the subpoena").

[40] 20 U.S.C. § 1232g(b)(2)(B).

[41] 34 C.F.R. § 99.31(a)(9)(ii); *see also* 20 U.S.C. § 1232g(b)(2)(B). FERPA has an exception to its notice requirement when a parent is a party to a court proceeding involving child abuse and neglect or dependency matters, and the order is issued in the context of that proceeding. *Id.* Additionally, educational institutions may disclose records without notice in the context of federal grand jury subpoenas and law enforcement subpoenas if the court so orders upon a showing of good cause. *Id.* at §§ 1232g(b)(J)(i), (ii).

[42] Letter from LeRoy S. Rooker, Director, FPCO, to colleagues (Apr. 12, 2002), at 3, *available at* https://www2.ed.gov/policy/gen/guid/fpco/pdf/htterrorism.pdf ("[E]ducational agencies or institutions may disclose information pursuant to any other court order or lawfully issued subpoena only if the school makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action.").

[43] Due process requires that "parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Fuentes v. Shevin* 407 U.S. 67, 80 (1972) (internal citations omitted). To meet the requirements of due process, such notice must be meaningful. *Mullane v. Central Hanover Bank Tr. Co*. 339 U.S. 306, 314 (1950) (finding that to satisfy due process, notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

[44] For a detailed discussion of defendants' rights in the context of subpoenas, see *Moving to Quash*, *supra* note 30, at 1.

[45] The Supreme Court case *United States v. Nixon* set forth the standard for pretrial production of potential evidence: (1) the documents must be evidentiary and relevant; (2) they must not otherwise be procurable reasonably in advance of trial by exercise of due diligence; (3) the party must not be able to properly prepare for trial without such production and inspection in advance of trial and the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) the application must be made in good faith and not be intended as a general "fishing expedition." 418 U.S. 683, 699-700 (1974). *Nixon* sets a high hurdle for parties seeking to discover victim information. For instance, merely asserting that there may be information in the records that could lead to impeachment should not be sufficient, because such documents do not become evidentiary until the witness has testified at trial. *Id.* at 701 ("Generally, the need for evidence to impeach witnesses is insufficient to require its production in advance of trial."). *See also United States v. Cuthbertson*, 630 F.2d 139, 144 (3d Cir. 1980) ("[B]ecause [impeachment] statements ripen into evidentiary material for purposes of impeachment only if and when the witness testifies at trial, impeachment statements, although subject to subpoena under rule 17(c), generally are not subject to production and inspection by the moving party prior to trial."); *State v. Block*, No. 9908006808, 2000 WL 303351, *3 (Del. Super. Ct. Feb. 18, 2000) ("Clearly, insofar as the requested materials are sought to impeach or otherwise attack the credibility of the complainant, such right of inspection does not arise until the time of trial.") (internal citations omitted). The admissibility requirement also eliminates the production of hearsay records. *See United States v. Cherry*, 876 F. Supp. 547, 552 (S.D.N.Y. 1995) (finding that documents compiled by local police department concerning defendant's alleged offenses could not be subpoenaed under the rule providing for subpoena for books, papers, documents, or other objects, because they were inadmissible hearsay and thus could not be introduced as evidence at trial). It also eliminates the production of records that would be protected under rape shield laws. *See Excluding Evidence of Specific Sexual Acts Between the Victim and Defendant Under Rape Shield*, NCVLI Violence Against Women Bulletin (Nat'l Crime Victim Law Inst., Portland, Or), Sept. 2010, at 2-3, *available at* https://law.lclark.edu/live/files/11816-excluding-evidence-of-specific-sexual-acts-between. The subpoena must also be specific. In order to establish sufficient specificity, requests must rest on reli-

able assertions, not on mere speculation that the evidence exists. *See United States v. Jackson*, 155 F.R.D. 664, 667 (D. Kan. 1994) ("This requirement ensures that the subpoenas are used only to secure for trial certain documents or sharply defined groups of documents. It also serves to prevent the subpoena from being converted into a license for . . . a fishing expedition to see what may turn up.") (internal citations omitted). *See also, generally, Moving to Quash*, *supra* note 30 at 2-3; *Refusing Discovery Requests*, *supra* note 30 at 2-3.

[46] For instance, in *United States v. Hunter*, a Vermont court conducted the *Nixon* analysis and determined that records the state subpoenaed were not yet relevant to the case, although they may become relevant at a later date, thus failing to meet the first prong of the *Nixon* test. 13 F. Supp. 2d 586, 594 (D. Vt. 1998). Because the government did not meet the *Nixon* factors, the court refused to order the documents be deposited with the United States Attorney's Office, instead ordering the records be deposited with the court and placed under seal until such time as the records became relevant. *Id. See also United States v. Bradley*, Crim. No. 09-40068-GPM, 2011 WL 1102837, *2 (S.D. Ill. Mar. 23, 2011) (quashing subpoena to non-parties seeking schooling, juvenile court, and mental health records pertaining to the victim because appellant did not meet the *Nixon* standards, and noting that failure to give notice to the victim was a "blatant violation of the victim's right to be treated with respect for his dignity and privacy"); *State v. Bruno*, 673 A.2d 1117, 1124-29 (Conn. 1996) (finding the trial court did not improperly deny defendant access to two witnesses' school records because defendant failed to show how access to these records would relate to the witnesses' capacity to accurately perceive, recall and relate events).

[47] Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 18, 26, 29, and 42 U.S.C.).

[48] *See In re Subpoena Issued to Smith*, 921 N.E.2d at 734 ("The school has no obligation under FERPA to oppose an order or seek to quash a subpoena."). *See also DeFeo*, 260 F.Supp.2d at 795 ("[T]he condition of notice having been accomplished, all of the submitted documents are outside the protection of FERPA").

[49] Even if the school is moving on behalf of the victim, best practice would nonetheless be for the victim to retain an attorney because the interests of the victim and the school may not always align or continue to align during the course of any necessary appellate practice.

[50] *See, e.g., Bradley*, 2011 WL 1102837, at *2 (quashing subpoena requesting educational, juvenile court, and mental health records pertaining to the victim, stating that defendant's "request for such irrelevant materials is a blatant violation of the victim's right to be treated with respect for his dignity and privacy"); *Rios*, 73 F.R.D at 599 (stating that, under FERPA, "before approval is given, the party seeking disclosure is required to demonstrate a genuine need for the information that outweighs the privacy interest of the students," and ultimately finding that the need was shown because without full access to the records plaintiffs would not be able to determine whether the school had violated Title VI standards); *People v. Bachofer*, 192 P.3d 454, 460 (Colo. Ct. App. 2008) (determining that a court may order the release of confidential school records to a party in a criminal case upon a proper showing of need, and finding that the court was justified in conducting an in camera review of the records); *Zaal v. State*, 602 A.2d 1247, 1256 (Md. 1992) (stating that "a trial judge, in the exercise of discretion, must conduct a balancing test in which the privacy interest of the student is weighed against the genuine need of the party requesting the information for its disclosure," and determining that controlled access by counsel to the records was appropriate). *But see DeFeo*, 260 F. Supp. 2d at 795 (ordering disclosure of discipline records without employing a balancing test, stating the records were no longer covered by FERPA once the school met its statutory duty of notifying the student involved).

[51] Although not explicitly about access to Title IX proceedings, the court's decision in *DTH Pub. Corp. v. Univ. of North Carolina at Chapel Hill*, 496 S.E.2d 8 (N.C. Ct. App. 1998) is instructive in that it involves access to disciplinary proceedings. However, the majority of FERPA cases arise in two contexts. In one, a criminal defendant attempts to impeach the victim or another witness. *See, e.g., Bachofer*, 192 P.3d at 459-62; *Zaal*, 602 A.2d at 1261-62; *In re C.F.*, Nos. H12CP08012016A, H12CP08012017A, 2009 WL 455922, *10-11 (Ct. Super. Ct. Jan. 26, 2009) (stating that school records of student who was a potential victim of a child who was at the center of a neglect proceeding could be subpoenaed because they were relevant to the parents' case and potentially useful for impeachment purposes). In another, the victim is the plaintiff in a civil suit and the victim has arguably put his or her mental or physical condition at issue. *See, e.g., Catrone v. Miles*, 160 P.3d 1204, 1212-16 (Ariz. Ct. App. 2007) (determining that special education records of the plaintiff's sibling could be subpoenaed in a medical malpractice lawsuit in which defendants sought to prove the plaintiff's impairments were genetic and not the result of negligent medical practices); *Gaumond v. Trinity Rep. Co.*, 909 A.2d 512, 518-19 (R.I. 2006) (affirming, in suit brought by disabled student against a repertory company for injury obtained during school field trip, superior court's order denying student's motion to quash subpoena and ordering production of injury report school employees prepared soon after the incident).

[52] *Rios v. Read*, 73 F.R.D. at 598 ("[T]he Congressional policy expressed in this provision places a significantly heavier burden on a party seeking access to student records to justify disclosure than exists with respect to discovery of other kinds of information, such as business records.

The remarks of Senator Buckley . . . emphasize strongly that students have substantial privacy and confidentiality interests in their school records. . . . These privacy violations are no less objectionable simply because release of the records is obtained pursuant to judicial approval unless, before approval is given, the party seeking disclosure is required to demonstrate a genuine need for the information that outweighs the privacy interest of the students.").

[53] For example, in *Zaal*, although the court noted that education records are confidential under FERPA and that victims have a privacy interest in these records, the court went on to employ a lenient test for subpoenaing documents, even allowing defense counsel access to the records rather than having the court conduct an initial in camera review. 602 A.2d at 1261-62 (finding, in a case in which defendant was accused of sexually abusing his granddaughter, education records could be subpoenaed on the ground that they were necessary to effectively cross-examine her concerning her motivation, bias, and veracity). The court stated that it may wish to order defense counsel to directly view the subpoenas without a prior in camera review, noting that if the court were to review in camera, "the court's review is not to determine whether, and, if so, what is 'directly admissible;' rather, it is to exclude from the parties' review material that could not, in anyone's imagination, properly be used in defense or lead to the discovery of usable evidence. Only when the records are not even arguably relevant and usable should the court deny the defendant total access to the records." *Id.* at 1264. Importantly, this case was decided before the enactment of Article 47 of the Maryland Declaration of Rights, which granted constitutional rights to victims of crime, including the rights to be treated "with dignity, respect, and sensitivity during all phases of the criminal justice process." Md. Const., Decl. of Rights, Art. 47(a) (ratified November 1994). Failure to adequately consider these rights today when presented with a subpoena for disciplinary records would amount to a violation of Maryland's Constitution.

[54] In *Bachofer*, the court discussed the need to protect the privacy rights of students and concluded that "a court may order the release of confidential school records to a party in a criminal case upon a proper showing of need." 192 P.3d at 460-61. The test for disclosure was articulated as: (1) the student or parents must be notified and given an opportunity to respond; (2) if no consent is given, the court must balance the student's and parents' confidentiality interests against the party's need for the requested information, including by conducting an in camera hearing; (3) the court must disclose materially favorable information to defendant; (4) in determining whether or what to disclose, the court must look to (a) the nature of the information sought; (b) the relationship between this information and the issue in dispute; and (c) the harm that may result from disclosure; and (5) the court's ruling is subject to review for abuse of discretion. The showing of need was met when defendant sought access to the child victim's records for purpose of acquiring impeachment evidence, even though defendant's requests were not specific. *Id.* at 461. Despite Colorado passing victims' rights legislation granting victims "[t]he right to be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process," the court failed to affirmatively consider these rights in reaching its decision. Colo. Stat. 24-4.1-302.5(1)(a) (effective to May 13, 2007). Although the statute has been amended, this provision remains the same today. The court's failure to consider victims' rights was error and if the issue is presented again in Colorado this issue should be further challenged.

Research for this publication was supported in part by Grant No. 2014-XV-BX-K013, awarded by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, and conclusions expressed are those of the author(s) and do not necessarily represent the official position or policies of the U.S. Department of Justice.

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