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CAMPUS MISCONDUCT PROCEEDING OUTCOME NOTIFICATIONS: A TITLE IX, CLERY ACT, AND FERPA COMPLIANCE BLUEPRINT

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Outcome notifications are the last of a multi-step campus misconduct resolution process, each of which has been the subject of large-scale discussion and some shared uncertainty[1] within higher education. This final step is a difficult one, which, depending on the offense at issue, may be regulated by some combination of the Family Educational Rights and Privacy Act,[2] the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act,[3] and Title IX of the

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1. *See, e.g.*, Letter from the Honorable James Lankford, Chairman, Subcomm. on Regulatory Affairs & Fed. Mgmt., U.S. Senate Comm. on Homeland Sec. & Gov't Affairs, to the Honorable John B. King, Jr., Acting Sec'y, U.S. Dep't of Educ. (Mar. 4, 2016), http://www.lankford.senate.gov/imo/media/doc/3.4.16%20Lankford%20letter%20to%20Dept.%20of%20Education.pdf (stating that the Office for Civil Rights' Dear Colleague letters have "create[d] uncertainty surrounding policies proscribing conduct and advancing [OCR] requirements . . ."); Letter from M. Geneva Coombs, Dir., Case Mgmt. Teams – Ne., U.S. Dep't of Educ., Fed. Student Aid, to John J. DeGioia, President, Georgetown Univ., (July 16, 2004) [hereinafter FSA Letter to Georgetown Univ.], https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/cleryact/georgetownuniversity/GUFPRD07162004.PDF (acknowledging "open issues of genuine confusion in the higher education community" with regard to dissemination of campus judicial proceeding outcomes).

2. Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2013) [hereinafter FERPA].

3. Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) (2012) [hereinafter Clery Act], *amended by* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89-92 (2013).

Education Amendments of 1972.[4] These statutes, along with implementing regulations and agency guidance, each contain a batch of defined terms, mandates, and prohibitions that are fraught with complications and cross-references. Together, they create a web of governance that an institution must untangle before determining the appropriate content and recipient of outcome notifications stemming from campus misconduct proceedings.

Although the Department of Education's Office for Civil Rights ("OCR") has issued numerous Title IX guidance documents[5] that, in part, address outcome notifications for offenses prohibited by that law, they are not comprehensive and must be read in conjunction with other relevant statutes and regulations.[6] OCR has mandated that victims of sexual violence and other harassing conduct receive notice of the outcome of any institutional proceeding, but such notice is permitted only to the extent FERPA allows it.[7] Moreover, OCR's outcome notification requirements overlap substantially with those contained in recent amendments to the Clery Act for certain offenses addressed by that law.[8] Title IX's prohibition on sexually harassing conduct, which includes sexual violence, and related investigation provisions coincide with the Clery Act's requirement that institutions include a policy statement in their annual security report ("ASR") regarding procedures to be followed upon reported instances of dating violence, domestic violence, sexual assault, and stalking.[9] That they are

4. Title IX, Education Amendments of 1972, 20 U.S.C. § 1681 (2012).

5. For a full list, see *OCR Reading Room*, OFF. FOR CIV. RTS., U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/publications.html#TitleIX (last modified Oct. 16, 2015).

6. *See, e.g.*, Questions and Answers on Title IX and Sexual Violence, OFF. FOR CIV. RTS., U.S. DEP'T OF EDUC., 37 n.33 and accompanying text (Apr. 29, 2014) [hereinafter OCR Q&A], https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf ("In addition to the Title IX requirements described above, the Clery Act requires, and FERPA permits, postsecondary institutions to inform the complainant of the institution's final determination and any disciplinary sanctions imposed on the perpetrator in sexual violence cases (as opposed to all harassment and misconduct covered by Title IX) not just those sanctions that directly relate to the complainant.").

7. *See infra* Parts III.B.1 and III.D.1.

8. *See infra* Part III.B.1.

9. *See infra* Part III.B.1.

similar, but not identical, creates an additional layer of complexity in achieving compliance with both Title IX and the Clery Act while remaining within FERPA's parameters. FERPA limits the information institutions may disclose in outcome notifications to the extent that they contain personally identifiable information of a student who has not granted consent.[10]

Institutions must have a clear outcome notification compliance plan in advance of any misconduct investigation. Without one, not only do they risk running afoul of the explicit statutory and regulatory mandates of the Clery Act and FERPA, but also OCR guidance.[11] OCR has demonstrated its intent to achieve enforcement of its guidance with individual institutions via resolution agreements that contain identical or stricter terms.[12] Applicable law—particularly FERPA—does

10. *See infra* Part I.C.1.

11. In addition to the risk of substantive violations, institutions provide assurance of compliance with Title IX in federal financial assistance applications and risk disapproval or revocation of approval upon noncompliance. *See* 34 C.F.R. § 106.4(a) (2016).

12. *See infra* notes 14, 79, 112 (citing OCR resolution agreements with Harvard University, Eastern Michigan University, and Virginia Military Institute, respectively). Achieving voluntary compliance with OCR guidance is the goal of this Article, despite the fact that such guidance, is, by definition, non-binding. Although the extent to which OCR guidance is treated as binding in practice is beyond the scope of this Article, it is worth noting that significant guidance documents should "not include mandatory language such as 'shall,' 'must,' 'required' or 'requirement,' unless the agency is using these words to describe a statutory or regulatory requirement, or the language is addressed to agency staff and will not foreclose agency consideration of positions advanced by affected private parties." Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3436 (Jan. 25, 2007) [*hereinafter* Final Bulletin]. *See also* Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., to the Honorable James Lankford, Chairman, Subcomm. on Regulatory Affairs & Fed. Mgmt., U.S. Senate Comm. on Homeland Sec. & Gov't Affairs (Feb. 17, 2016), http://www.chronicle.com/items/biz/pdf/DEPT.%20of%20EDUCATION%20RESPONSE%20TO%20LANKFORD%20LETTER%202-17-16.pdf (explaining that "OCR issues guidance documents . . . in order to further assist schools in understanding what policies and practices will lead OCR to initiate proceedings to terminate Federal financial assistance . . ." and that "[t]he Department [of Education] does not view such guidance to have the force and effect of law"). The increasing frequency of OCR resolution agreements and investigations has brought with it increasing scrutiny. *See, e.g.*, Letter from the Honorable James Lankford, Chairman, Subcomm. on Regulatory Affairs

grant institutions some decision-making authority as to how, and whether, they will issue outcome notifications for certain offenses,[13] so the exact procedures each institution adopts will differ.

While the bulk of agency guidance and discussion has focused on other aspects of a misconduct investigation, outcome notifications implicate important procedural and substantive rights belonging to both the complainant and respondent.[14] They can shed light on an institution's efforts to eliminate a discriminatory environment[15] as well as contribute to the due process afforded to an accused student.[16] Further, OCR has indicated that an institution's adherence to outcome notification requirements can be used to determine whether its grievance procedures as a whole are fair and equitable.[17] Finally, a well-informed compliance plan can aid an institution in avoiding accusations of cloaking its investigations in

& Fed. Mgmt., U.S. Senate Comm. on Homeland Sec. & Gov't Affairs, to the Honorable John B. King, Jr., Acting Sec'y, U.S. Dep't of Educ. (Jan. 7, 2016), http://www.lankford.senate.gov/imo/media/doc/Sen.%20Lankford%20letter%20to%20Dept.%20of%20Education%201.7.16.pdf (questioning the authority on which OCR relies in issuing substantial guidance); Kent D. Talbert, *Behind the Scenes: A Closer Look at OCR's Enforcement Authority*, 16 ENGAGE 1, 17 (Dec. 2015) (questioning the extent and scope of OCR's enforcement authority as exercised). *See also* OCR Q&A, *supra* note 6, at n.1 (stating that its significant guidance document "does not add requirements to applicable law, but provides information and example to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations").

13. *See infra* Parts III.A.2, III.B.2, and III.C.2.

14. *See* Letter from Joel J. Berner, Reg'l Dir., Office for Civil Rights, U.S. Dep't of Educ., to Martha C. Minow, Dean, Harvard Law School (Dec. 30, 2014), http://www2.ed.gov/documents/press-releases/harvard-law-letter.pdf (finding error where policy did not specifically provide for written notification of the outcome of a Title IX complaint).

15. *See, e.g.*, Doe v. U.S. Dep't of Health & Human Servs., 85 F. Supp. 3d 1 (D.D.C. 2015) (noting that institutions themselves are proper defendants when there is an accusation of institutional discriminatory practices).

16. *See, e.g.*, Doe v. Alger, 317 F.R.D. 37 (W.D. Va. 2016) (denying university's motion to dismiss where accused student alleged facts sufficient to show he had been denied due process, including that he did not receive prior notice of the appeal board's composition or meeting).

17. *See* Russlynn Ali, *Dear Colleague Letter*, OFF. FOR CIV. RTS., U.S. DEP'T OF EDUC. (Apr. 4, 2011) [hereinafter 2011 DCL], http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html.

secrecy[18] or invading students' privacy rights.

This Article analyzes and attempts to bring order to the interaction of Title IX and OCR's current guidance thereunder, the Clery Act and its recent Campus SaVE Act amendments, and FERPA when an institution provides a complainant, respondent,[19] or member of the general public notice of the outcome of a misconduct proceeding for any offense defined under those laws. This Article is limited in scope and does not address all confidentiality issues that may arise during a postsecondary misconduct investigation or hearing, such as the disclosure of investigative reports. Part I briefly summarizes Title IX, the Clery Act, and FERPA and explains the offenses defined under each of those laws. Part II creates original categories for those offenses based on which laws apply. Part III explains outcome notification requirements for each of the offense categories. Part IV concludes that, despite a confusing web of applicable statutes, regulations, and guidance, a clear blueprint for compliance with outcome notification requirements emerges upon a careful and integrated reading of each.

18. *See generally* Emma Pettit, *In Sexual-Misconduct Cases, Colleges Weigh Privacy Against Transparency*, THE CHRON. OF HIGHER EDUC., Sept. 2, 2016, http://www.chronicle.com/article/In-Sexual-Misconduct-Cases/237674 (describing the conflict "between transparency and privacy" as a "tug-of-war"); Jon Krakauer, *How Much Should a University Have to Reveal About a Sexual-Assault Case?*, N.Y. TIMES MAG., Jan. 21, 2016, https://www.nytimes.com/2016/01/20/magazine/how-much-should-a-university-have-to-reveal-about-a-sexual-assault-case.html?_r=0 (detailing author's efforts to obtain records regarding a high-profile university disciplinary action and claiming university's refusal to produce such records because of FERPA was improper).

19. The statutes, regulations, and agency guidance examined in this Article use a variety of terms to refer to parties to a campus misconduct proceeding. *See, e.g.*, 20 U.S.C. § 1092(f)(8)(B)(iv); 34 C.F.R. § 668.46(k)(2)(iii) (2016) ("accuser" and "accused"); 2011 DCL, *supra* note 17 ("victim," "complainant," and "alleged perpetrator"); 2001 GUIDANCE, *infra* note 26 ("harassing student"); and 20 U.S.C. § 1232g(b)(6)(A) ("alleged victim" and "alleged perpetrator"). Generally, this Article will use the terms "complainant" and "respondent" unless the terminology from a corresponding law offers greater clarity.

I. STATUTORY APPLICABILITY AND OFFENSE DEFINITIONS

A. *Title IX*

1. Overview of Legal Mandate

Title IX of the Education Amendments of 1972 ("Title IX") bars discrimination based on sex in education programs.[20] It applies to all institutions of higher education that receive federal funding, with limited exceptions,[21] and extends to all operations of the institution.[22] As evidenced by the content of guidance documents and resolution agreements with offending institutions in recent years, OCR has taken an expanded view of the scope of Title IX as it pertains to the investigation and prevention of prohibited misconduct.[23] Consequently, institutions must take steps to prevent, investigate, and correct sex discrimination, including the adoption and publication of grievance procedures for resolving allegations of misconduct.[24] Specific categories of misconduct that comprise sex discrimination are sexual harassment, sexual violence, and gender-based harassment, each of which must be addressed in

20. 20 U.S.C. § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."). *See also* 34 C.F.R. § 106.31(a).

21. *See, e.g.*, 34 C.F.R. §§ 106.12(a) (excepting institutions controlled by religious organizations with conflicting tenets); 106.13 (excepting military and merchant marine educational institutions); 106.14 (excepting certain tax exempt social fraternities and sororities); and 106.15(e) (excepting public undergraduate institutions that traditionally admit only students of one sex).

22. § 1681(a); § 106.11; § 1687(2)(A).

23. The 2011 *Dear Colleague Letter* added numerous requirements, including that an institution take "interim steps [to protect the complainant] before the outcome of the investigation" and that specified university personnel receive mandatory training. 2011 DCL, *supra* note 17, at 15. Institutions must designate a Title IX Coordinator to oversee the handling of individual complaints and the institutional grievance process. 34 C.F.R. § 106.8(a). Specifically, the Coordinator "is responsible for coordinating the grievance process and making certain that individual complaints are handled properly. This coordination responsibility may include informing all parties regarding the process, notifying all parties regarding grievance decisions and of the right and procedures for appeal, if any . . . ." OFF. FOR CIV. RTS., U.S. DEP'T OF EDUC., TITLE IX RESOURCE GUIDE 1, 5 (Apr. 2015) [hereinafter TITLE IX RESOURCE GUIDE].

24. § 106.8(b).

institutional policy. Further, institutions must clearly define in policy the litany of conduct that can constitute unlawful harassment prohibited by Title IX.[25]

2. Offense Definitions

Sexual harassment can take the form of *quid pro quo* harassment or "unwelcome conduct of a sexual nature" that "rises to a level that . . . denies or limits a student's ability to participate in or benefit from the school's program based on sex"[26] by students' peers, college employees, or third parties. In other words, the conduct creates a hostile environment. OCR has introduced numerous specific types of conduct of a sexual nature—verbal, nonverbal, and physical—that qualify as sexual harassment, including unwanted sexual advances or requests for sexual favors,[27] touching of a sexual nature,[28] targeting another with sexually-charged graffiti,[29] spreading sexual rumors,[30] retaliatory harassment,[31] bullying on the basis

25. 2011 DCL, *supra* note 17, at 7.

26. OFF. FOR CIV. RTS., U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 1, 5 (Jan. 2001) [hereinafter 2001 GUIDANCE]. *See also* Resolution Agreement, Univ. of Notre Dame & Office for Civil Rights, U.S. Dep't of Educ., 1, 6 (July 1, 2011), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/05072011-b.pdf (listing "sex based cyber-harassment" as a form of sexual harassment).

27. 2011 DCL, *supra* note 17.

28. Russlynn Ali, *Dear Colleague Letter: Harassment and Bullying*, OFF. FOR CIV. RTS., U.S. DEP'T OF EDUC. (Oct. 26, 2010) [hereinafter 2010 DCL], http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf. *Cf.* OCR Q&A, *supra* note 6, at 3-4 (explaining that Title IX "generally does not extend to legitimate nonsexual touching or other nonsexual conduct").

29. 2001 GUIDANCE, *supra* note 26, at 3.

30. 2010 DCL, *supra* note 28, at 6.

31. 2011 DCL, *supra* note 17, at 16. The 2011 *Dear Colleague Letter* states:

> Schools should be aware that complaints of sexual harassment or violence may be followed by retaliation by the alleged perpetrator or his or her associates. For instance, friends of the alleged perpetrator may subject the complainant to name-calling and taunting. As part of their Title IX obligations, schools must have policies and procedures in place to protect against retaliatory harassment.

Id. Retaliation is a broad category of misconduct and can include any type of

of sex,[32] gender-based harassment,[33] and virtually all forms of sexual violence.[34] OCR has been careful to note, however, that not all conduct perceived as offensive is prohibited[35] and that Title IX regulations do not extend to conduct protected by the First Amendment.[36]

sexual harassment or violence directed at a complainant or witnesses, by either the institution or alleged perpetrators or associates. *See* OCR Q&A, *supra* note 6, at 7, 42.

32. *See* 2010 DCL, *supra* note 28, at 1 ("[S]ome student misconduct that falls under a school's anti-bullying policy also may trigger responsibilities under [Title IX].").

33. 2011 DCL, *supra* note 17, at 3 n.9.

34. *Id.* at 1 ("[S]exual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX" and "[t]he requirements of Title IX pertaining to sexual harassment also cover sexual violence . . . .").

35. *See* Gerald A. Reynolds, *Dear Colleague Letter: First Amendment*, OFF. FOR CIV. RTS., U.S. DEP'T OF EDUC., (July 28, 2003) [hereinafter 2003 DCL], https://www2.ed.gov/about/offices/list/ocr/firstamend.html. The 2003 *Dear Colleague Letter* states:

> OCR has recognized that the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR. In order to establish a hostile environment, harassment must be sufficiently serious (*i.e.*, severe, persistent or pervasive) as to limit or deny a student's ability to participate in or benefit from an educational program.

Id.

36. *See id*. The 2003 *Dear Colleague Letter* states:

> OCR's regulations and policies do not require or prescribe speech, conduct or harassment codes that impair the exercise of rights protected under the First Amendment. . . . Some colleges and universities have interpreted OCR's prohibition of 'harassment' as encompassing all offensive speech regarding sex . . . . Harassment, however, to be prohibited by the statutes within OCR's jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive. Under OCR's standard, the conduct must also be considered sufficiently serious to deny or limit a student's ability to participate in or benefit from the educational program. Thus, OCR's standards require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim's position, considering all the circumstances, including the alleged victim's age.

Id.

Sexual violence, a form of sexual harassment, is defined as "physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol" or "due to an intellectual or other disability."[37] This definition further provides that "a number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, [] sexual coercion,"[38] and sexual abuse.[39]

Gender-based harassment will qualify as sex-based harassment "if students are harassed either for exhibiting what is perceived as a stereotypical characteristic for their sex, or for failing to conform to stereotypical notions of masculinity and femininity."[40] Such harassment may include unwelcome "acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping"[41] against any student, "regardless of the actual or perceived sexual orientation or gender identity of the harasser or target,"[42] "even

37. 2011 DCL, *supra* note 17, at 1-2.

38. *Id.* at 1.

39. OCR Q&A, *supra* note 6, at 1. *See also* WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, SAMPLE LANGUAGE AND DEFINITIONS OF PROHIBITED CONDUCT FOR A SCHOOL'S SEXUAL MISCONDUCT POLICY 1, 2 (Apr. 2014), https://www.justice.gov/ovw/page/file/910276/download (including within the definition of sexual harassment "rape, sexual assault, and sexual exploitation" and "depending on the facts, dating violence, domestic violence, and stalking").

40. 2010 DCL, *supra* note 28, at 7-8.

41. 2011 DCL, *supra* note 17, at 3 n.9.

42. 2010 DCL, *supra* note 28, at 8. The Title IX Resource Guide states:

A recipient should investigate and resolve allegations of sexual or gender-based harassment of lesbian, gay, bisexual, and transgender students using the same procedures and standards that it uses in all complaints involving sex-based harassment. The fact that an incident of sex-based harassment may be accompanied by anti-gay comments or be partly based on a student's actual or perceived sexual orientation does not relieve a recipient of its obligation under Title IX to investigate and remedy such an incident.

TITLE IX RESOURCE GUIDE, *supra* note 23, at 15. *Cf.* Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1160 (C.D. Cal. 2015) (finding that "sexual orientation discrimination is a form of sex or gender discrimination" and that "to allege discrimination on the basis of sexuality is to state a Title IX claim on the basis of sex or gender"). Unlike Title IX, a state's law may expressly prohibit harassment based on sexual orientation. *See, e.g.*, S.B. 08-200 (Colo. 2008) (prohibiting discrimination on the basis of sexual orientation in places

if those acts do not involve conduct of a sexual nature."[43]

B. *The Clery Act & Campus SaVE Act*

1. Overview of Legal Mandate

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("the Clery Act") requires colleges to report annually certain campus crime statistics and security policies in an Annual Security Report ("ASR") made available to current and prospective students and employees.[44] The Clery Act applies to all institutions participating in Title IV financial aid programs.[45] Institutions must compile and disclose statistics in the ASR for three general categories of offenses: (i) Criminal offenses; (ii) Hate crimes; and (iii) Arrests and referrals for institutional disciplinary action.[46] The ASR must also contain various campus security policy statements, including those pertaining to reporting campus crimes and the institution's response to such reports.[47]

Section 304 of Violence Against Women Reauthorization Act of 2013, known as the Campus Sexual Violence Elimination Act ("Campus SaVE Act"), amended and replaced several subsections of the Clery Act regarding domestic violence, dating violence, stalking, and sexual assault.[48] Institutions must now compile and disclose statistics for reported instances of dating violence, domestic violence, and stalking along with

of public accommodation).

43. 2011 DCL, *supra* note 17, at 3 n.9.

44. § 1092(f)(1).

45. *See id.*

46. *See* U.S. DEP'T OF EDUC., OFFICE OF POSTSECONDARY EDUC., THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING (2016) [hereinafter CAMPUS SAFETY HANDBOOK], http://www2.ed.gov/admins/lead/safety/handbook.pdf. Reportable statistics are limited to those offenses occurring on campus, in or on non-campus buildings or property owned or controlled by the institution, and on public property within or immediately adjacent to campus. *See also* 20 U.S.C. §§ 1092(f)(1)(F)(i)-(iii), 1092(f)(6)(A)(ii)-(iv).

47. § 1092(f)(1)(A).

48. Violence Against Women Reauthorization Act of 2013. Pub. L. No. 113-4 s.1-11264, 127 Stat. 54 (codified as amended in sections 18 and 42 of the United States Code), http://www.gpo.gov/fdsys/pkg/FR-2014-10-20/pdf/2014-24284.pdf.

previously mandated Clery Act offenses.[49] Institutions must also disclose in the ASR applicable policies and procedures to be followed in response to reported incidents of domestic violence, dating violence, sexual assault, and stalking.[50] Although similar offenses and institutional policies are addressed, the Campus SaVE Act did not affect the Title IX statute or regulations, OCR's Title IX guidance,[51] or institutions' responsibilities thereunder.

2. Offense Definitions

The Clery Act and its implementing regulations, as amended by the Campus SaVE Act, define dating violence, domestic violence, sexual assault, and stalking for purposes of Clery Act reporting and the required institutional policy statements.[52] Institutions must include these definitions in

49. § 1092(f)(1)(F)(iii).

50. § 1092(f)(8)(A). The required policy statements do not apply to other offenses. *Id*. The Campus Safety Handbook directs institutions to "list all of the steps involved and the anticipated timeline for each step, and describe the decision-making process, including who is responsible for making decisions." CAMPUS SAFETY HANDBOOK, *supra* note 46, at 8-15 – 16. The Clery Act, even as amended by Campus SaVE, provides that ED cannot require an institution to implement particular policies or procedures with regard to campus crimes. 20 U.S.C. § 1092(f)(2). *See also* CAMPUS SAFETY HANDBOOK, *supra* note 46, at 7-2 ("In general, the law does not prescribe policies and procedures for schools to follow; however, the law and the regulations set minimum requirements for specific information that must be addressed in your institution's annual security report."). *Id.* at 8-1 ("The regulations include some requirements for these programs but institutions have some discretion in the specifics of their statements and in how the policies and procedures are put into practice."). *But see id.* (emphasis added) ("[The Handbook] breaks down the statements' components and *indicates which aspects and procedures are required* and where you have flexibility.").

51. *See* Violence Against Women Act, 79 Fed. Reg. 35,418, 35,422 (proposed June 20, 2014) ("VAWA amended the Clery Act, but it did not affect in any way title IX of the Education Amendments of 1972 (title IX), its implementing regulations, or associated guidance issued by the Department's Office for Civil Rights (OCR)."). In a sense, Campus SaVE has codified OCR's expansion of sexual harassment to include sexual violence with regard to the required institutional response.

52. *See* § 1092(f)(7) (requiring usage of definitions of dating violence, domestic violence, and stalking found in 42 U.S.C. § 13925(a) (2012) for purposes of compiling crime statistics); 34 C.F.R. § 668.46(k) (referring to definitions of dating violence, domestic violence, sexual assault, and stalking provided in paragraph (a)). The definitions of domestic violence, dating violence, and stalking found in § 668.46(a) are virtually identical to those

their ASRs and also provide the definitions used in their local jurisdiction for purposes of institutional prevention programs.[53] In general, dating and domestic violence offenses consist of otherwise separate violent crimes, such as assault, that arise out of romantic, intimate, spousal, or familial relationships.[54] Stalking is defined generally as a targeted course of conduct that would place a reasonable person in fear for his or her own safety or the safety of others or cause the person to suffer substantial emotional distress.[55] Sexual assault is defined to include rape (including vaginal rape, sodomy, and sexual assault with an object), fondling, incest, and statutory rape.[56]

The Clery Act provides that definitions for other reportable offenses are as specified in the Federal Bureau of Investigation's Uniform Crime Reporting ("UCR") Program, incorporated in an appendix to the final Clery Act regulations.[57] The criminal offense category includes criminal homicide (murder, non-negligent manslaughter, and negligent manslaughter), robbery, aggravated assault, burglary, motor vehicle theft, arson, and the sex offenses of rape, statutory rape, fondling, and incest.[58] Reportable hate crimes include any offense in the criminal offense category determined to be a hate crime, in addition to any instances of larceny-theft, simple assault, intimidation, and destruction of property that are deemed hate crimes.[59] Reportable arrests and referrals for institutional disciplinary action include those regarding alcohol, drugs, and weapons possession.[60]

found in § 13925(a).

53. § 668.46(j)(1)(i)(A)-(B).

54. *See* § 668.46(a).

55. 42 U.S.C. § 13925(a)(30).

56. § 668.46(a) (incorporating definitions found in the Uniform Crime Reporting ("UCR") Program of the Federal Bureau of Investigation); *see also* 34 C.F.R pt. 668, Subpt. D, App. A. (2015) (Fondling, incest, and statutory rape comprise the category of "sex offenses" found in the UCR's National Incident-Based Reporting System User Manual).

57. § 1092(f)(7). *See* 34 C.F.R. pt. 668, Subpt. D, App. A.; § 668.46(c)(9)(i), (iii).

58. § 1092(f)(1)(F)(i); § 668.46(c)(1)(i).

59. § 1092(f)(1)(F)(ii); § 668.46(c)(1)(iii). Standing alone, those offenses are not otherwise reportable.

60. § 1092(f)(1)(F)(i); § 668.46(c)(1)(ii).

C. *FERPA*

1. Overview of Legal Mandate

The Family Educational Rights and Privacy Act ("FERPA") grants to students the right to inspect their education records[61] and limits an institution's ability to share those records without student consent.[62] This stance is riddled with exceptions that permit, but do not require,[63] disclosure of education records without consent for a number of reasons.[64] Some of these exceptions pertain to the release of records regarding institutional disciplinary proceedings[65] in response to allegations of a student's commission of a crime of violence or non-forcible sex offense.[66] An additional exception exists for the release of information to parents regarding a student's commission of certain disciplinary violations.[67]

61. 20 U.S.C. § 1232g(a)(1)(A); § 1232g(d); *see also* § 1232g(a)(4)(A) (defining "education records" generally as "records, files, documents, and other materials" maintained by the institution that "contain information directly related to a student"); 34 C.F.R. § 99.5(a)(1) (vesting inspection rights in the student upon reaching the age of 18); § 99.10(b) (stating that an institution must provide "access to records within a reasonable period of time," not to exceed 45 days, following a request).

62. § 1232g(b), (d).

63. § 99.31(d).

64. *See, e.g.*, § 1232g(b)(1)(A) (permitting release of records without consent to school official with legitimate interest); § 1232g(b)(1)(B) (permitting release of records without consent to school official of another institution to which the student seeks transfer admission); § 1232g(b)(6)(A) (permitting disclosure of final results of institutional disciplinary proceeding against an accused student to an alleged victim of any crime of violence or a nonforcible sex offense); § 99.3 (defining "disclosure" as "to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record").

65. § 99.3 (defining a "disciplinary action or proceeding" as "the investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students of the agency or institution").

66. *See* § 1232g(b)(6)(A)-(C).

67. § 99.31(a)(15)(i) (permitting the disclosure when the student is under 21 at the time of the disclosure).

2. Offense Definitions

FERPA regulation defines "crimes of violence" and "nonforcible sex offenses" for purposes of its exceptions to consent provisions.[68] The "crimes of violence" category consists of the following offenses: arson; assault offenses; burglary; criminal homicide (murder, non-negligent manslaughter, and negligent manslaughter); destruction of property; kidnapping/abduction; robbery; and forcible sex offenses.[69] "Assault offenses" include aggravated assault, simple assault, intimidation, and stalking.[70] "Forcible sex offenses" include forcible rape, forcible sodomy, sexual assault with an object, and forcible fondling.[71] The "non-forcible sex offenses" category consists of statutory rape and incest.[72] Like the Clery Act, FERPA defines each distinct offense in accordance with the UCR Program[73]; several definitions match those used in the Clery Act word for word.[74] FERPA's "disciplinary violations"

68. 34 C.F.R. pt. 99, App. A (2000).

69. FERPA refers to the definition of "crime of violence" in 18 U.S.C. § 16 (2012), which provides that:

> The term "crime of violence" means—
> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Id. *See also* § 1232g(b)(6)(A)-(B). *But see* Family Educational Rights and Privacy, 65 Fed. Reg. 41,852, 41,860 (July 6, 2000) [*hereinafter* Family Educational Rights and Privacy] ("[T]he statutory definition of 'crime of violence,' as defined in 16 U.S.C. § 18 [sic], is difficult to apply . . . . The [regulatory definition in Appendix A to Part 99] consists of an all-inclusive list of 'crimes of violence.'"). Several circuits have found the definition of "crime of violence" in 18 U.S.C. § 16(b) to be unconstitutionally vague. *See* Baptiste v. Att'y Gen., 841 F.3d 601 (3rd Cir. 2016); Golicov v. Lynch, 837 F.3d 1065 (10th Cir. 2016); Shuti v. Lynch, 828 F.3d 440 (6th Cir. 2016); United States v. Vivas-Ceja, 808 F.3d 719 (7th Cir. 2015); Dimaya v. Lynch, 803 F.3d 1110 (9th Cir. 2015), *cert. granted*, —— S. Ct. ——, No. 15-1498, 2016 WL 3232911, at *1 (Sept. 29, 2016).

70. 34 C.F.R. pt. 99, App. A.

71. *Id.* (stating that fondling includes indecent liberties and child molesting).

72. *Id.*

73. *See id.*

74. *Id.* Word for word matches are: arson; aggravated assault; simple

provision includes institutional violations of alcohol and drug use or possession policies.[75]

II. OFFENSE CATEGORIES

To determine which laws and/or guidance documents govern an outcome notification, an institution must look to the offense at issue. Because offenses, and thus their outcome notification requirements, may be governed by more than one body of law, they can be grouped into four different categories to assist in creating a compliance plan. The categories delineated below are original to this Article and are not found in law or agency guidance.

A first category of offenses applicable to outcome notification requirements includes those (i) for which an institution must report annual Clery statistics, (ii) that were not added by the Campus SaVE Act, and (iii) that do not constitute sex discrimination or sexual violence under Title IX. This category of offenses will be referred to as "Clery-Exclusive Crimes," and includes arson, aggravated assault, burglary, criminal homicide (manslaughter by negligence, murder, and nonnegligent manslaughter), robbery, motor vehicle theft, hate crimes (including destruction of property, intimidation, larceny-theft, and simple assault), and arrests and disciplinary referrals for alcohol and drug violations and weapons possession. Institutional disciplinary proceedings stemming from these offenses may result in serious penalties—as serious as any Title IX violation—but are not governed by the Campus SaVE Act or Title IX requirements, such as those regarding board composition, training, and outcome notifications.[76] Any of the aforementioned offenses that can also be classified as dating or domestic violence, or that are committed on the basis of sex or gender, would not qualify as a Clery-Exclusive Crime and would instead be governed by Campus SaVE and/or Title

assault; criminal homicide—manslaughter by negligence; criminal homicide—murder and non-negligent manslaughter; and destruction/damage/vandalism of property.

75. § 99.31(a)(15).

76. *See* Violence Against Women Reauthorization Act of 2013, *supra* note 3, at 91; § 1092(f)(8)(B)(iv).

IX procedural requirements, discussed *infra*.[77]

A second category of offenses is governed by the outcome notification provisions of both Campus SaVE and Title IX, and will be referred to as "Overlapping SaVE-Title IX Offenses" or "Overlapping Offenses." This category includes all dating violence, domestic violence, sexual assault, and stalking offenses, as they are defined in the Clery Act, that raise the specter of creating a hostile environment on campus. These offenses trigger statutory obligations under the Campus SaVE Act and require the institution to pursue investigation under Title IX.[78]

A third category is comprised of sexual assault and offenses added to the Clery Act by Campus SaVE (*i.e.*, domestic violence, dating violence, and stalking), where the institution determines that an investigation pursuant to Title IX is not warranted. This category of offenses will be referred to as "Campus SaVE-Exclusive Offenses." An institution may determine that a Title IX investigation is not warranted where, for example, the offense would otherwise be subject to institutional Title IX proceedings but, by virtue of the parties' status as employees, the parties are deemed to fall outside the scope of the institution's responsibilities under Title IX.[79]

77. *See generally* § 668.46(k); 2011 DCL, *supra* note 17.

78. *See supra* Parts I.A-B. An institution's obligations under Title IX apply regardless of where the alleged misconduct occurred. *See* 2011 DCL, *supra* note 17, at 4 ("If a student files a complaint with the school, regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures."). So do the Campus SaVE Act's response and procedural requirements following reported alleged incidents of sexual assault, dating violence, domestic violence, and stalking. *Compare* § 668.46(k)(1)(i) (detailing procedural requirements to be contained in institutional policy regarding disciplinary proceedings stemming from alleged dating violence, domestic violence, sexual assault, and stalking) *and* § 668.46(k)(3)(iii) (emphasis added) (defining a "proceeding" as "*all* activities related to non-criminal resolution of an institutional disciplinary complaint") *with* § 668.46(c)(1) (limiting statistical disclosure requirements to offenses occurring on or within an institution's Clery geography).

79. This Article does not address the existing uncertainty regarding the extent to which OCR's Title IX guidance on misconduct proceedings applies to faculty and staff, which stems largely from the 2011 Dear Colleague Letter's exclusive focus on student-on-student sexual violence. *But see* Letter from Catherine D. Criswell, Dir., Office of Civil Rights, U.S. Dep't. of Ed., to Gloria A. Hage, Esq., Gen. Counsel, E. Mich. Univ. (Nov. 22, 2010), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/15096002.html

Alternatively, if the facts surrounding such an offense present no possibility of sex discrimination or the creation of a hostile environment, Title IX's procedural requirements would not be implicated. For example, a stalking incident with no evidence of sexual harassment or other sexual conduct may lead an institution to determine that Title IX procedures are not warranted. This situation may be quite rare, as an institution may be inclined, as a cautionary measure, to commence an investigation of the facts before determining whether harassing conduct occurred that created a hostile environment, and such investigation would be undertaken pursuant to OCR's Title IX guidance.

A fourth category of offenses is governed by OCR's Title IX procedural guidance alone, and will be referred to as "Title IX-Exclusive Offenses." This category includes all harassing conduct that an institution must investigate and resolve under Title IX but that cannot be classified as sexual assault, dating violence, domestic violence, or stalking.[80] Specifically, these offenses are sexual and gender-based harassment, bullying, and certain forms of retaliatory harassment. These offenses may involve conduct that is reportable under Clery, (*e.g.*,

(agreeing to implement Title IX grievance procedures to address complaints of sex discrimination involving faculty and staff members and third parties). However, it is clear that the Clery Act, as amended by the Campus SaVE Act, requires institutions to detail the disciplinary options for any party involved in an alleged incident of sexual assault, domestic violence, dating violence, and stalking in their ASRs, and that requirements created by the Campus SaVE Act, including outcome notifications, apply to all parties under the jurisdiction of an institutional misconduct hearing panel. *See* § 668.46(k)(1)(i); Violence Against Women Act, *infra* note 83, at 62,772 ("If an institution has a disciplinary proceeding for faculty and staff, the institution would be required to describe it in accordance with § 668.46(k)(1)(i)."); CAMPUS SAFETY HANDBOOK, *supra* note 46, at 8-16 ("This requirement is not limited to students. If your institution has disciplinary procedures for faculty and staff . . . you are required to describe them here . . . . You must follow the procedures described in your statement regardless of where the alleged [offense] occurred . . . .").

80. This category includes conduct that satisfies all of the following three elements: (i) it resembles sexual harassment; (ii) the institution differentiates it from protected speech and academic discourse; and (iii) it may or may not rise to the level of creating a hostile environment on campus, but an investigation is required to make that determination. *See* 2001 GUIDANCE, *supra* note 26, at 5-6 (detailing factors to consider in "distinguish[ing] between conduct that constitutes sexual harassment and conduct that does not rise to that level").

aggravated assault), but would not include conduct that would implicate the Campus SaVE Act's procedural requirements (*i.e.*, conduct that would render the offense sexual assault, dating violence, domestic violence or stalking).[81]

III. OUTCOME NOTIFICATION REQUIREMENTS

Upon categorizing the inventory of Title IX, Clery Act, Campus SaVE Act, and FERPA offenses as explained above, an institution can formulate policy that details the required and permissible contents of outcome notifications for each category and better ensure the consistency of those notifications. See *Figure 1* for a shorthand reference of those requirements.

A. *Clery-Exclusive Crimes*

Although the Campus SaVE Act amended the Clery Act and created a number of specific outcome notification requirements resulting from disciplinary proceedings for alleged instances of sexual assault, dating violence, domestic violence, and stalking, this is not the case for Clery-Exclusive Crimes.[82] In fact, the Clery Act imposes *no* outcome notification requirements for institutional disciplinary proceedings resulting from allegations of any Clery-Exclusive Crime.[83] Instead, outcome notifications are governed by FERPA, institutional policy, and an institution's Title IV program participation agreement ("PPA"). To the extent a disciplinary proceeding concerning any Clery-Exclusive Crime involves students, FERPA permits an institution to provide outcome notifications to the parties, and, in some cases, non-

81. Title IX offenses involving conduct that would render the offense sexual assault, dating violence, domestic violence or stalking are classified in this Article as "Overlapping SaVE-Title IX Offenses."

82. *See* § 1092(f)(8)(B)(iv)(III) (applying only to institutional proceedings arising from an allegation of dating violence, domestic violence, sexual assault, or stalking).

83. Nor does the Clery Act prescribe the use of certain proceedings to resolve Clery-Exclusive Crimes. Institutions, must, however, describe each kind of disciplinary proceeding available in their ASRs. *See* Violence Against Women Act, 79 Fed. Reg. 62,752, 62,772 (Oct. 20, 2014); *supra* note 50 and accompanying text.

parties, without consent.[84] Because FERPA's provisions are merely permissive, an institution would be able choose to further restrict the release of outcome notifications stemming from Clery-Exclusive Crimes via policy[85] were it not for a mandatory disclosure requirement contained in an institution's PPA.[86] Likewise, where FERPA merely permits a disclosure, state law may require it.[87]

84. § 99.31(a)(13)-(14).

85. *See* Family Educational Rights and Privacy, *supra* note 69, at 41,860 ("The disclosure is permissive. Thus . . . institutions are . . . free to follow their own policies regarding disclosure of this information."). *See also id.* at 41,861, which states:

> [T]he release of an existing crime log . . . may be a satisfactory way to disseminate this information. . . . The release of a campus crime log, however, will not disclose some information that is permitted to be disclosed under FERPA. Specifically, a campus crime log does not contain the names of alleged perpetrators of crimes of violence or non-forcible sex offenses. . . . Final results that can be disclosed under FERPA, however, concern the name of the student, the disciplinary violation that the student committed, and the disciplinary sanction imposed on the student.

Id. Institutions may choose to disclose a student's disciplinary history upon that student's transfer to another institution. FERPA permits the entire education record of a potential transfer student to be shared with, and reviewed by, school officials of the transferee institution, which includes disciplinary records. *See* §§ 99.31(a)(2), 99.36(b)(1). Institutions would need to inform students of such disclosures in the annual security report FERPA rights notice or by direct contact. § 99.34. *See also* § 1232g(h) (permitting disciplinary record disclosure).

86. *See* § 1094(a)(26), which states:

> The institution will, upon written request, disclose to the alleged victim of any crime of violence (as that term is defined in section 16 of title 18), or a nonforcible sex offense, the report on the results of any disciplinary proceeding conducted by such institution against a student who is the alleged perpetrator of such crime or offense with respect to such crime or offense. If the alleged victim of such crime or offense is deceased as a result of such crime or offense, the next of kin of such victim shall be treated as the alleged victim for purposes of this paragraph.

Id.

87. *See also* Family Educational Rights and Privacy, *supra* note 69, at 41,860 (explaining that when "[s]tate open records laws [] require disclosure, FERPA does not prevent that disclosure").

1. Disclosure to Complainant

a. *Contents*

Where an outcome notification will be provided to an alleged victim of a Clery-Exclusive Crime that is also a "crime of violence" under FERPA, FERPA permits the notice to consist of the "final results" of the proceeding without consent from the alleged perpetrator.[88] The PPA requires disclosure to the alleged victim of any "crime of violence" upon written request.[89] All Clery-Exclusive Crimes qualify as FERPA "crimes of violence," except for motor vehicle theft and arrests or disciplinary referrals for weapons possession violations.[90]

FERPA defines the "final results" as a decision or determination made by a body authorized by the institution.[91] As such, both the initial finding of a hearing panel and any decision on appeal qualify as a final result. The information contained in the "final results" that will be disclosed may only include (i) the perpetrator's name (if a perpetrator was determined to exist), (ii) the violation committed, if any, and (iii) any sanction imposed upon the perpetrator.[92] FERPA defines a "sanction imposed" as a description of the disciplinary action taken by the institution, the date of its imposition, and its duration.[93] A "violation committed" consists of (i) the institutional rules or code sections that were violated and (ii) any essential findings supporting the conclusion that the

88. § 1232g(b)(6)(A); § 99.31(a)(13). FERPA also permits the release, without consent, of outcomes regarding certain offenses that are not Clery-reportable: kidnapping, destruction of property, intimidation, and non-hate crime simple assault. *See* 34 C.F.R. pt. 99, App. A (including such offenses within the definition of "crimes of violence").

89. *See* § 1094(a)(26). This provision requires disclosure of "the report on the results" of any such proceeding. In the event the alleged victim is deceased as a result of the offense at issue, an institution must release the report to the next of kin upon written request. *Id.* "Report on the results" is not defined. *Id.*

90. *See* discussion *supra* Parts I.C.2, II.

91. § 99.39.

92. *Id.*; § 1232g(b)(6)(C). *See also* Family Educational Rights and Privacy, *supra* note 69 at 41,861 ("An institution may disclose its letter of final determination provided that the institution redacts all personally identifiable information in the letter except those portions that contain the student's name, the violation committed, and the sanction imposed.").

93. § 99.39.

violation was committed.[94] FERPA does not permit an institution to disclose any personally identifiable information beyond the information that comprises the "final results," such as witness names, without prior consent from the appropriate student.[95]

Neither FERPA nor the PPA limits the disclosure of final results to a complainant to instances in which a violation was deemed to have occurred.[96] However, where no violation was found to have been committed, the final results will likely contain fewer, if any, pieces of personally identifiable information of another student.[97]

b. *Limits on Complainant's Redisclosure of Final Results*

Because the final results may contain education records of students other than the complainant, FERPA permits an institution to release such results to that individual only on the condition that she refrain from redisclosing personally identifiable information unless prior consent from the affected student has been obtained.[98] The institution must inform the complainant of this limitation.[99] However, where the result is a finding that the accused student violated an institutional rule or policy, FERPA's redisclosure limitation does not apply to the complainant.[100]

94. *Id.*

95. § 99.31(a)(14)(ii). *See also* Family Educational Rights and Privacy, *supra* note 69, at 41,861 ("[T]he institution must not disclose, without consent, any other portions of the letter of final determination that contain personally identifiable information that is directly related to the accused student or to any other student."); WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, INTERSECTION OF TITLE IX AND THE CLERY ACT (April 2014) [hereinafter INTERSECTION OF TITLE IX AND THE CLERY ACT], https://www.justice.gov/ovw/page/file/910306/download.

96. § 99.31(a)(13); § 1094(a)(26).

97. In other words, where there is no violation found, there may be no named alleged perpetrator or sanctions imposed.

98. § 99.33(a)(1), (e). Institutions may not permit students who redisclose FERPA-protected information from accessing or receiving additional protected information for at least five years. *See* § 1232g(b)(4)(B).

99. § 99.33(d).

100. § 99.33(c) (stating that the redisclosure limitation in § 99.33(a)(1) does not apply to disclosures made under certain FERPA provisions, including § 99.31(a)(14)). *See also* Letter from LeRoy S. Rooker, Dir., Family Policy Compliance Office, U.S. Dep't of Educ., to S. Daniel Carter (Mar. 10,

2. Disclosure to the Public

a. *Contents*

Where an outcome notification from a disciplinary proceeding for a Clery-Exclusive Crime will be provided to anyone other than the complainant, respondent, or an appropriate education official,[101] FERPA permits disclosure of personally identifiable information from the final results only if the result is a finding of a violation of institutional rule or policy.[102] The information permitted to be contained in the

2003), http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/carter.html. The letter states:

> When an institution determines that an accused student is an alleged perpetrator and has violated the institution rules, then there are no restrictions on disclosure or redisclosure of the final results of a disciplinary proceeding. In circumstances where an institution makes a determination that the accused student committed a violation, this clearly provides for much greater disclosure than is permitted by § 99.31(a)(13). In addition, the redisclosure restrictions of § 99.33 do not apply.

Id.

101. An institution may disclose student records, without prior consent, to school officials who have legitimate educational interests. *See* § 99.31(a)(1)(i)(A).

102. *See* § 1232g(b)(6)(B); § 99.31(a)(14)(i). *See also* Family Educational Rights and Privacy, *supra* note 69, at 41,860, which states:

> Sections 91.31(a)(13) and 99.31(a)(14) differ significantly. Victims may be informed of the final results of a disciplinary proceeding against an alleged perpetrator under § 99.31(a)(13), regardless of the outcome of that proceeding. In contrast, under § 99.31(a)(14), the institution may disclose to the public the final results of a disciplinary proceeding only if it has determined that: (1) The student is an alleged perpetrator of a crime of violence or non-forcible sex offense; and (2) The student has committed a violation of the institution's rules or policies with respect to the allegation.

Id. Whether to disclose the final results to a requester from the general public is an institutional decision. *See* Family Educational Rights and Privacy, 73 Fed. Reg. 74,806, 74,831 (Dec. 9, 2008) (emphasis added) ("FERPA is not an open records statute or part of an open records system. The only parties who *have a right* to obtain access to education records under FERPA are parents and eligible students."). For issues attendant to requests

final results is limited to that as discussed above, unless prior consent to disclose additional information is obtained.[103]

b. *Others' Redisclosure of Final Results*

Because an institution may only disclose the final results to a member of the general public when the result is a finding of a violation of institutional rule or policy against the respondent, FERPA's redisclosure limitation of personally identifiable information in those results does not apply.[104]

B. *Overlapping SaVE-Title IX Offenses*

Of the four offense categories defined in this Article, outcome notifications for Overlapping SaVE-Title IX Offenses are the most comprehensively regulated. Statutory and regulatory provisions of Campus SaVE and FERPA, in addition to OCR's guidance, govern their content and dissemination.[105] Despite this multilayered regime, Campus SaVE and Title IX[106] have substantial overlap with regard to outcome notifications stemming from these sexual violence offenses, and

for redacted records by members of the general public where the student's identity is known to the requestor, *see generally id.* at 74,832 (discussing application of definition of "personally identifiable information" in § 99.3 to targeted requests).

103. *See* Family Educational Rights and Privacy, *supra* note 69, at 41,861 ("An institution may disclose its letter of final determination provided that the institution redacts all personally identifiable information in the letter except those portions that contain the student's name, the violation committed, and the sanction imposed.").

104. § 99.33(c) (stating that the redisclosure limitation in § 99.33(a)(1) does not apply to disclosures made under certain FERPA provisions, including § 99.31(a)(14)). As such, institutions should carefully consider whether to disclose the final results of a disciplinary proceeding for a Clery-Exclusive Crime to the general public.

105. OCR included a summary of the intersection of Title IX, the Clery Act, and FERPA with regard to outcome notifications in its 2011 Dear Colleague Letter. *See* 2011 DCL, *supra* note 17, at 13-14. However, upon the amendment of the Clery Act by the Campus SaVE Act provisions of VAWA in 2013, many of its references became outdated.

106. Although Title IX's implementing regulations require an institution to publish and disseminate its grievance procedures for institutional resolution of harassment complaints, neither the content of those procedures nor outcome notification requirements are prescribed. *See* § 106.8(b). Instead, Title IX's outcome notification requirements have been put forward exclusively by OCR in guidance. *See* discussion *supra* Part III.D.

FERPA is largely permissive.[107] Indeed, OCR's guidance-issued requirements for outcome notifications present no conflict with Campus SaVE, and compliance with Campus SaVE's requirements will satisfy virtually all of those set forth in OCR guidance for Overlapping Offenses.[108]

1. Disclosures to Complainant and Respondent

a. *Contents*

Campus SaVE's outcome notification requirements are clearly delineated in statute and regulation.[109] An institution's policy must provide for simultaneous, written notification[110] to

107. *See* Violence Against Women Act, *supra* note 51, at 35,422, which states:

> While the Clery Act and title IX overlap in some areas relating to requirements for an institution's response to reported incidents of sexual violence, the two statutes and their implementing regulations and interpretations are separate and distinct. Nothing in these proposed regulations alters or changes an institution's obligations or duties under title IX as interpreted by OCR.

Id.

108. Although there is substantial overlap and virtually all of Title IX's requirements are met via compliance with the Campus SaVE Act, an institution should always perform an independent analysis to ensure compliance with each law's separate requirements.

109. § 1092(f)(8)(B)(iv)(III); § 668.46(k).

110. § 668.46(k)(2)(v). In 2014, the Department of Education indicated its intent to provide guidance on what constitutes "written simultaneous notification" in an updated Campus Safety Handbook. *See* Violence Against Women Act, *supra* note 83, at 62,775. In 2016, the Department issued a new edition of the Handbook and provided the following guidance:

> In explaining the rationale for the result and sanctions, the official or entity must explain how it weighted the evidence and information presented during the proceeding, and explain how the evidence and information support the result and sanctions. You must describe how the institution's standard of evidence was applied. It is not sufficient to say only that the evidence presented either met or did not meet the institution's standard of evidence. This means that there can be no substantive discussion of the findings or conclusion of the decision maker, or discussion of the sanctions imposed, with either the accuser or the accused prior to simultaneous notification to both of the result.

CAMPUS SAFETY HANDBOOK, *supra* note 46, at 8-22. *See also* § 668.46(b)(11)(vi) (requiring a statement in the ASR that the accuser and the

both the complainant[111] and respondent of the results of any proceeding arising out of an allegation of an Overlapping Offense.[112] Campus SaVE defines a "result" as any initial, interim, and final decision by an authorized hearing panel.[113]

accused will be informed of the institution's final determination and any sanction imposed against the accused with respect to the alleged sex offense). OCR guidance, like Campus SaVE, requires that both parties be provided written notice of the outcome of the complaint and any appeal. *See* 2011 DCL, *supra* note 17, at 13; OCR Q&A, *supra* note 6, at 24, 36. OCR guidance merely recommends simultaneous notice for Title IX proceedings. *Id.* OCR deems such "written notice to the complainant and alleged perpetrator of the outcome of the complaint" to be a critical element in achieving Title IX compliance. *See id.* at 12. Although not required by the Clery Act or OCR, OCR recommends an appeals process for Title IX offenses. *See* 2011 DCL, *supra* note 17, at 12; OCR Q&A, *supra* note 6, at 37. *But see* Letter from Timothy Blanchard, Dir., N.Y. Office, Office for Civil Rights, U.S. Dep't of Educ., to Christopher Eisgruber, President, Princeton Univ. (Nov. 5, 2014), http://www2.ed.gov/documents/press-releases/princeton-letter.pdf (finding university error when prevailing party was not provided an opportunity to appeal); OCR Q&A, *supra* note 6, at 38 (explaining that, if provided, "[t]he appeals process must be equal for both parties").

111. Although the PPA conditions its mandate that institutions provide the report of results on "crimes of violence" to alleged victims or next of kin "upon written request," Campus SaVE eliminates that condition for those crimes that this Article classifies as Overlapping Offenses. *See* CAMPUS SAFETY HANDBOOK, *supra* note 46, at 7-9; *see supra* text accompanying note 89.

112. Campus SaVE does not impose a timeline for the provision of such written notification; rather, it requires only that an institution's policy provide that the process "from the initial investigation to the final result" will be "prompt." § 668.46(k)(2)(i). Title IX, too, requires that investigations be prompt, but OCR has suggested a 60-day timeframe to complete "the entire investigation process." *See* 2011 DCL, *supra* note 17, at 12; OCR Q&A, *supra* note 6, at 31-32 (explaining the 60-day timeframe as "typical" and inclusive of the "entire investigation process" except the appeal stage). *But see* Letter from Debbie Osgood, Dir., Chicago Office, Office for Civil Rights, U.S. Dep't of Educ., to John Jenkins, President, Univ. of Notre Dame 1, 7 (June 30, 2011), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/05072011-a.pdf (including a sixty-day maximum for concluding proceedings). Still, a determination cannot be so delayed as to constitute inaction that itself results in a hostile environment. *See id.* at 2-3, 34 n.31. Further, an institution must incorporate timeframes for "all major stages" of its process, which includes outcome notifications. 2011 DCL, *supra* note 17, at 12. In fact, OCR has found error where institutional policy did not provide for reasonably prompt timeframes for certain "major stages" of the complaint process, including notification of the parties of the outcome. *See* Letter from Alice Wender, Reg'l Office Dir., Office for Civil Rights, U.S. Dep't of Educ. to Gen. J.H. Binford Peay III, Superintendent, Va. Military Inst. 1, 11 (May 9, 2014), http://www2.ed.gov/documents/press-releases/vmi-letter.doc.

113. § 668.46(k)(3)(iv).

The notification must also contain information on appeal procedures, if available under the institution's policy.[114] Additional simultaneous, written notification must be provided if there are any changes to a result before it becomes final,[115] as well as notice of when such result becomes final.[116] If the result is a finding of responsibility, the notice must include any sanctions imposed on the respondent by the institution.[117] Sanctions must be disclosed to both parties regardless of whether the sanctions relate to the complainant.[118] Finally, the notice must contain the hearing panel's rationale for the decision and any sanctions imposed.[119] Title IX does impose one disclosure requirement that Campus SaVE does not: The complainant must be informed of individual remedies provided to her and steps taken to eliminate the hostile environment.[120]

b. *Relationship to FERPA*

i. Release to Complainant

With regard to its release to a complainant for an Overlapping Offense, FERPA explicitly permits a Campus SaVE-mandated disclosure of results under its "crimes of

114. § 1092(f)(8)(B)(iv)(III)(bb); § 668.46(k)(2)(v)(B).

115. § 1092(f)(8)(B)(iv)(III)(cc); § 668.46(k)(2)(v)(C). Although there is no regulatory definition, preamble discussion in the Federal Register indicates that a "final result" means a decision that is no longer appealable or subject to modification. In other words, it means a decision other than an initial or interim decision, unless such initial or interim decision is not appealable or modifiable. *See* Violence Against Women Act, *supra* note 83, at 62,779.

116. § 1092(f)(8)(B)(iv)(III)(dd); § 668.46(k)(2)(v)(D).

117. § 668.46(k)(3)(iv). The sanctions imposed must be among those listed in the institution's Annual Security Report policy statement. *See* § 668.46(k)(1)(iii). OCR mandates the disclosure of sanctions imposed against the respondent that directly relate to the complainant, which aligns with Campus SaVE's regulatory requirement to disclose all sanctions regardless of whether they directly relate to the complainant. *Id.*

118. § 668.46(k)(3)(iv). *See also* OCR Q&A, *supra* note 6, at 37 ("[T]he Clery Act requires, and FERPA permits, postsecondary institutions to inform the complainant of the institution's final determination and any disciplinary sanctions imposed on the perpetrator in sexual violence cases (as opposed to all harassment and misconduct covered by Title IX) not just those sanctions that directly relate to the complainant.").

119. § 668.46(k)(3)(iv).

120. OCR Q&A, *supra* note 6, at 36-37.

violence or non-forcible sex offense" provision[121]—the same provision allowing release of outcomes for Clery-Exclusive Crimes—to the extent it contains personally identifiable information about a respondent who is also a student.[122] That provision permits the disclosure to an alleged victim of final results of a proceeding resulting from an alleged crime of violence or sexual offense, regardless of the responsibility determination.[123] FERPA's definition of "final results" encompasses all elements of the Campus SaVE-required disclosure to the complainant that contain personally identifiable information about the respondent.[124]

121. § 1232g(b)(6)(A); § 99.31(a)(13). Although the terms "dating violence" and "domestic violence" are not explicitly included within FERPA's definition of crimes of violence, the underlying violent offense between the individuals in the romantic, intimate, spousal, or familial relationship (*e.g.*, assault), would qualify as a crime of violence. Alternatively, the underlying offense may be a sexual offense. *See supra* note 54 and accompanying text. *See also* 2011 DCL, *supra* note 17, at 13-14. Normally, FERPA only requires an institution to provide a student with the opportunity to inspect and review his student records within a reasonable period of time, as opposed to delivering copies. § 99.10(a)-(b). Campus SaVE's requirement that an institution deliver the notice does not present a conflict with FERPA because FERPA allows institutions to give students rights in addition to those granted. *See* § 99.5(b).

122. FERPA only protects personally identifiable information about students contained in education records. *See supra* notes 61-62 and accompanying text. Some of the information required to be disclosed under Campus SaVE does not require consent because it is merely information contained in institutional policy, such as available appeal rights.

123. § 99.31(a)(13). *See supra* note 121 (regarding outcomes from dating and domestic violence).

124. *Compare* § 99.39 (defining "final results"), *with* § 668.46(k)(3)(iv) (defining a "result"). *See also* § 668.46(l) ("Compliance with paragraph (k) of this section does not constitute a violation of FERPA."). Guidance issued by the White House's Task Force to Protect Students from Sexual Assault does, in one instance, misstate FERPA-permissive disclosures, stating that "FERPA also permits the school to notify a complainant of sanctions imposed upon a student who was found to have engaged in sexual violence when the sanction directly relates to the complainant." INTERSECTION OF TITLE IX AND THE CLERY ACT, *supra* note 95, at 7. In fact, FERPA permits complainant notification of *any* sanctions imposed upon the respondent in cases of sexual violence. § 99.31(a)(13).

ii. Release to Respondent

Although FERPA affords the complainant the opportunity to receive notice of the final results from an Overlapping Offense containing information about the respondent (as required by Campus SaVE), no reciprocal provision exists for the respondent to receive personally identifiable information about his accuser in the form of an outcome notification. As such, an outcome notice to a respondent should not include information beyond that comprising the definition of Campus SaVE's "result," FERPA's "final results," and FERPA's "education records."[125] For example, a respondent may receive an outcome notice to learn the determination of the panel regarding his alleged conduct, any appeal rights he may have, the sanctions levied against him, and their rationale. The provision of this information to the respondent would comply with Campus SaVE. Notwithstanding Campus SaVE's requirement, the respondent retains the general right provided to students by FERPA to inspect that record, subject to any necessary redactions to maintain the privacy of other students' protected information.[126]

c. *Redisclosure Limits*

FERPA does not impose redisclosure limits on the notice a party is entitled to receive[127] and, in fact, explicitly removes disclosures that are required by Campus SaVE from its redisclosure limitations.[128] OCR guidance goes further and prohibits restrictions on the redisclosure of outcome notifications in any Overlapping Offense, such as by mandating the signature of a non-disclosure agreement.[129] As such, both

125. *See* § 1232g(a)(1)(a), which states:

> If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material.

Id.

126. *Id.*

127. § 99.33(c).

128. *Id.*

129. *See* 2011 DCL, *supra* note 17, at 14 ("[P]ostsecondary institutions

parties to an Overlapping Offense proceeding may redisclose the written outcome notice each is entitled to receive.[130]

2. Disclosures to General Public

a. Permissibility and Contents

Neither Campus SaVE nor Title IX requires an institution to provide notice of an Overlapping Offense outcome to a requester from the general public. However, FERPA permits such a disclosure of the final results, as defined by that law, without prior consent, and an institution may choose to do so.[131] In these instances, FERPA permits disclosure only if the result of the proceeding is a finding of a violation of institutional rule or policy.[132] The disclosure may, but need not, contain all information comprising the final results, including the panel's decision and any essential findings that

may not require a complainant to abide by a nondisclosure agreement, in writing or otherwise, that would prevent the redisclosure of this information."). *See also* FSA Letter to Georgetown Univ., *supra* note 1, at 2 (asserting that University's requirement that a sexual assault victim sign a non-disclosure agreement violated Clery Act's unconditional mandatory disclosure requirement, and requiring University to discontinue such practice in cases of "alleged sex offenses").

130. However, a non-disclosure agreement regarding the final results of a proceeding where outcome notifications are merely permissible under FERPA (in other words, not mandated by Clery or Title IX) has not been prohibited. *See id.* ("It does appear that the University could continue to require the execution of non-disclosure agreements in cases governed exclusively by FERPA to the extent that University policy may permit."). *But see* WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, CHECKLIST FOR CAMPUS SEXUAL MISCONDUCT POLICIES 1, 7 (April 2014) [hereinafter CHECKLIST FOR CAMPUS SEXUAL MISCONDUCT POLICIES] (emphasis added), https://www.justice.gov/ovw/page/file/910271/download (suggesting that non-disclosure agreements regarding redisclosure of "information *related* to the outcome of the proceeding" are prohibited).

131. § 1232g(b)(6)(B); § 99.31(a)(14)(i). *See also* 2011 DCL, *supra* note 17, at 14, which states:

> [A] postsecondary institution may disclose to anyone—not just the alleged victim—the final results of a disciplinary proceeding if it determines that the student is an alleged perpetrator of a crime of violence or a non-forcible sex offense, and, with respect to the allegation made, the student has committed a violation of the institution's rules or policies.

Id. (citing 34 C.F.R. § 99.31(a)(14)).

132. *Id*.

support it, the responsible student's name, the violation committed, and any sanction imposed on the student and its date of imposition and duration.[133]

b. *Redisclosure Limits*

FERPA's redisclosure limitation does not apply to outcome notifications provided to the general public regarding Overlapping Offenses.[134] As such, when an institution chooses to release all or part of the final results, the receiving individual may redisclose that information to whomever they choose, without prior consent from the affected student(s).

C. *Campus SaVE-Exclusive Offenses*

There are few differences between outcome notification requirements for Campus SaVE-Exclusive Offenses and Overlapping SaVE-Title IX Offenses. The Campus SaVE Act's requirements and FERPA's permissive provisions apply to this category to the same extent as they do for Overlapping Offenses. Still, an institution would be well served by a compliance plan that distinguishes these two offense categories, as FERPA's permissive provisions allow an institution to make policy choices that may hinge on whichever offense is at issue.

1. Disclosures to Complainant and Respondent

a. *Contents*

Although, in practice, outcome notification requirements for Campus SaVE-Exclusive Offenses are virtually identical to those for Overlapping Offenses, OCR's Title IX guidance does not apply. In effect, the only difference between a required outcome notification for a Campus SaVE-Exclusive Offense and an Overlapping Offense is that an institution, ostensibly, is not required to disclose to the complainant any individual remedies

133. § 99.39.

134. § 99.33(c) (excluding disclosures made under § 99.31(a)(14) from the prohibition on redisclosure). *See also* Family Educational Rights and Privacy, *supra* note 69, at 41,861 ("The redisclosure limitations in § 99.33 do not apply to disclosures made under § 99.31(a)(14) because information about the final results of a disciplinary proceeding concerning a crime of violence or a non-forcible sex offense may be disclosed to anyone, including the media.").

offered to her.[135] As discussed *supra* in Part III.B.1.a, the institution must provide simultaneous, written notification to both the complainant and respondent of the results of the proceeding and appeal procedures, if available.[136] The "results" are defined as any initial, interim, and final decision by a hearing panel, including the panel's rationale for the decision.[137] Additional simultaneous, written notification must be provided to both parties if there are any changes to a result before it becomes final, as well as notice of when such result becomes final.[138] If the result is a finding of responsibility, the notice to both parties must include any sanctions imposed on the respondent by the institution and the panel's rationale for their imposition.[139]

b. *Relationship to FERPA*

FERPA permits the release of these outcome notifications under its crimes of violence and sexual assault provision to the same extent as it does for Overlapping Offenses as discussed *supra* in Part III.B. Similarly, FERPA's redisclosure limitations do not apply.[140]

2. Disclosures to the General Public

The Campus SaVE Act does not require an institution to provide any outcome notification stemming from a Campus SaVE-Exclusive offense to the general public. However, just as with Overlapping Offenses discussed *supra* in Part III.B.2, FERPA permits the release of Campus SaVE-Exclusive outcome notifications to the general public when there is a finding of responsibility.[141] FERPA's redisclosure limitations do not apply to such disclosures to the general public.[142]

135. Additionally, OCR's recommended 60-day timeframe for the completion of the investigation process would not apply. Rather, the investigation must be "prompt" under Campus SaVE. *See supra* note 112.

136. § 1092(f)(8)(B)(iv)(III); § 668.46(k)(2)(v).

137. § 668.46(k)(3)(iv).

138. § 1092(f)(8)(B)(iv)(III); § 668.46(k)(2)(v)(C)-(D).

139. § 668.46(k)(3)(iv).

140. *See* discussion *supra* Part III.B.1.c.

141. *See supra* notes 131-133 and accompanying text.

142. § 99.33(c).

D. *Title IX-Exclusive Offenses*

Only OCR guidance explicitly addresses outcome notifications for Title IX-Exclusive Offenses. The Clery Act and its Campus SaVE amendments do not address outcome notifications for this category of offenses. Moreover, this category is unique in that FERPA contains no express provision for the disclosure of personally identifiable information contained in outcome notifications, which has led to uncertainty.

1. Disclosures to Complainant and Respondent

a. *Contents*

OCR's 2011 Dear Colleague Letter requires that both the complainant and respondent[143] be notified in writing about the outcome of both the complaint and any appeal.[144] As defined in the Letter, "outcome" refers to a guilt determination only (*i.e.*, whether harassment was found to have occurred).[145] OCR recommends, but does not require, that such notice be concurrent.[146]

OCR has issued no other notification requirements for respondents, except that those students should not be notified of the individual remedies offered or provided to the complainant.[147] OCR has, however, explained that a school must inform complainants as to (i) whether or not it found that the alleged conduct occurred, (ii) any individual remedies offered and/or provided to the complainant, (iii) any sanctions

143. Under FERPA, parents may also need to be informed if the student is under 18. *See* § 99.4.

144. *See* 2011 DCL, *supra* note 17, at 13 (stating that there is no requirement that the respondent be notified before the complainant); *see also* OCR Q&A, *supra* note 6, at 36-37.

145. 2011 DCL, *supra* note 17, at 13; *see also id.* at 9 n.24 ("Outcome does not refer to information about disciplinary sanctions unless otherwise noted.").

146. *See* OCR Q&A, *supra* note 6, at 36. *Cf.* CHECKLIST FOR CAMPUS SEXUAL MISCONDUCT POLICIES, *supra* note 130, at 1, 7 (listing "simultaneous written notice to both parties of the outcome of the complaint" as a "particularly important element" of a campus sexual misconduct policy).

147. *See* Catherine E. Lhamon, Assistant Sec'y for Civil Rights, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER 1, 20 (Oct. 21, 2014) [hereinafter 2014 DCL]; OCR Q&A, *supra* note 6, at 36-37.

imposed on the respondent that *directly relate* to the complainant, and (iv) other steps taken to eliminate any hostile environment and prevent recurrence.[148]

b. *Relationship to FERPA*

Unlike in instances of offenses governed by the Campus SaVE Act portions of the Clery Act (*i.e.*, dating violence, domestic violence, sexual assault, and stalking), FERPA does not contain a provision expressly permitting outcome notifications to alleged victims of Title IX-Exclusive Offenses. Because FERPA generally does not permit the disclosure of an education record without prior consent,[149] institutions have expressed uncertainty about the legality of particular OCR-mandated notifications.

OCR has noted this "potential conflict between FERPA and Title IX regarding disclosure of sanctions,"[150] but has consistently maintained that sanctions directly related to the alleged victim constitute an exception to that conflict.[151] OCR's

148. *See* OCR Q&A, *supra* note 6, at 37, which states:

> Sanctions that directly relate to the complainant (but that may also relate to eliminating the hostile environment and preventing recurrence) include, but are not limited to, requiring that the perpetrator stay away from the complainant until both parties graduate, prohibiting the perpetrator from attending school for a period of time, or transferring the perpetrator to another residence hall, other classes, or another school. Additional steps the school has taken to eliminate the hostile environment may include counseling and academic support services for the complainant and other affected students. Additional steps the school has taken to prevent recurrence may include sexual violence training for faculty and staff, revisions to the school's policies on sexual violence, and campus climate surveys.

Id.

149. § 1232g(b), (d).

150. *See* 2001 GUIDANCE, *supra* note 26, at vii (recognizing that "FERPA may be relevant when the person found to have engaged in harassment is another student, because written information about the complaint, investigation, and outcome is part of the harassing student's education record").

151. *See, e.g.*, 2001 GUIDANCE, *supra* note 26, at 37; *Id.* at 37 n.102; *Id.* at vii. *See also* 2011 DCL, *supra* note 17, at 13 n.32 (quoting 20 U.S.C. § 1221(d)) ("In 1994, Congress amended the General Education Provisions

examples of directly related sanctions that must be disclosed include "an order that the harasser stay away from the harassed student, or that the harasser is prohibited from attending school for a period of time, or transferred to other classes or another residence hall."[152] In justifying its interpretation, OCR has noted Congress' expressed intent that "FERPA should not be construed to affect the applicability of [Title IX],"[153] which may occur when "it affects whether a hostile environment has been eliminated."[154]

In a technical assistance letter to counsel for a California school district, the Department of Education's Family Policy Compliance Office ("FPCO"), since renamed the Office of the Chief Privacy Officer,[155] which administers FERPA, took a position consistent with that taken by OCR; it explained that FERPA does not prevent the disclosure of information applicable to the complainant, including sanctions imposed on a respondent that directly relate to the complainant.[156] The

Act (GEPA), of which FERPA is a part, to state that nothing in GEPA 'shall be construed to affect the applicability of title VI of the Civil Rights Act of 1964, title IX of Education Amendments of 1972, title V of the Rehabilitation Act of 1973, the Age Discrimination Act, or other statutes prohibiting discrimination, to any applicable program.'").

152. 2011 DCL, *supra* note 17, at 13.

153. *Id.* at 13 n.32. *See also*, INTERSECTION OF TITLE IX AND THE CLERY ACT, *supra* note 95, at 6 n.1 (noting that "the Department of Education has not identified any specific situations where compliance with Title IX or the Clery Act will cause an institution to violate FERPA"). It is arguable that the Department of Education may also interpret FERPA as permitting (and perhaps requiring) the disclosure of a sanction arising from a separate or subsequent misconduct hearing that is related, in some way, to a previous Title IX misconduct hearing. For example, a perpetrator who violates a Title IX suspension order may be subject to a separate proceeding to determine responsibility of the violation. The victim may be notified of the outcome of the second proceeding if the sanction imposed on the perpetrator relates to eliminating a hostile environment or to the victim, such as the perpetrator's subsequent expulsion.

154. 2011 DCL, *supra* note 17, at 13 n.33.

155. *See* 82 Fed. Reg. 6,252 (Jan. 19, 2017).

156. Letter from Dale King, Dir., Fam. Policy Compliance Office, U.S. Dep't of Educ., to Loren W. Soukup, Assoc. Gen. Counsel, Sch. and College Legal Servs. of Cal. (Feb. 9, 2015) [hereinafter FPCO Letter], http://www2.ed.gov/policy/gen/guid/fpco/doc/letter-college-legal-services-california.pdf. The FPCO explained that FERPA "does permit this type of information to be disclosed," citing a provision in a proposed draft resolution agreement between OCR and the Del Norte County Unified School District

FPCO adopted OCR's position articulated in earlier guidance documents in reasoning that the release of such information to the complainant in accordance with Title IX presents no conflict with FERPA, despite the absence of an explicit, permissive FERPA provision.[157]

stating that:

> [T]he consequences imposed on any individual found to have engaged in discrimination that relate directly to the subject of the complaint, such as requiring the individual found to have engaged in discrimination to stay away from the complainant, prohibiting the individual from attending school for a period of time, or transferring the individual to other classes or another school [must be included in an outcome notice].

Id.

157. *Id*. The FPCO explained that:

> [T]he Department [of Education] has long viewed FERPA as permitting a school to disclose to the parent of a harassed student (or to the harassed student if 18 or older or in attendance at a post-secondary institution) information about the sanction imposed upon a student who was found to have engaged in harassment when that sanction directly relates to the harassed student. The 2001 OCR guidance explained that one example of this would be "an order that the harasser stay away from the harassed student." OCR's April 4, 2011, guidance, which FPCO worked with OCR in drafting, expounded on this in the context of discriminatory harassment and indicated that sanctions that would directly relate to the student include "an order that the harasser stay away from the harassed student, or that the harasser is prohibited from attending school for a period of time, or transferred to other classes or another residence hall."

Id. The 2001 OCR guidance document previously discussed this position, stating:

> The Department currently interprets FERPA as not conflicting with the Title IX requirement that the school notify the harassed student of the outcome of its investigation, i.e., whether or not harassment was found to have occurred, because this information directly relates to the victim. It has been the Department's position that there is a potential conflict between FERPA and Title IX regarding disclosure of sanctions, and that FERPA generally prevents a school from disclosing to a student who complained of harassment information about the sanction or discipline imposed upon a student who was found to have engaged in that harassment.

Thus, both OCR and the FPCO have taken the position that FERPA permits all mandated outcome disclosures for Title IX-Exclusive offenses; however, both of those offices have advised that the disclosure of sanctions that do not directly relate to the complainant constitutes a disclosure of a student record without consent in violation of FERPA.[158] Because no explicit exception exists, FERPA's redisclosure limitation would seemingly apply.[159] As such, institutions should be mindful of the intersection of outcome notifications and student records when delineating rights of complainants in policy.

2. Disclosures to General Public

Unlike offenses that qualify as a crime of violence or non-forcible sex offense, FERPA does not permit the disclosure of outcomes stemming from an allegation of a Title IX-Exclusive Offense to the general public without prior consent.[160]

2001 GUIDANCE; *supra* note 26 at vii. *See also id.* at n.3 ("Exceptions include the case of a sanction that directly relates to the person who was harassed (e.g., an order that the harasser stay away from the harassed student), or sanctions related to offenses for which there is a statutory exception to consent in FERPA, such as crimes of violence or certain sex offenses in postsecondary institutions.").

158. *See* FPCO Letter, *supra* note 156, at 2 ("The April 4, 2011, OCR guidance also warned that disclosure of other information in the student's education record, including information about sanctions that do not directly relate to the harassed student, may result in a violation of FERPA."). *See also* 2011 DCL, *supra* note 17, at 13; Family Educational Rights and Privacy, 73 Fed. Reg. at 74,833 ("[T]he sanction imposed on a student for misconduct is not generally considered directly related to another student, even the student who was injured or victimized by the disciplined student's conduct, except if a perpetrator has been ordered to stay away from a victim.").

159. *See* § 99.33(a)(1), (c). Title IX-Exclusive Offenses, as defined in this Article, are not among those explicitly excepted from FERPA's redisclosure limitation. *See* § 99.33(c).

160. *See* § 1232g(b)(6)(A); § 99.31(a)(13) (containing no exception from the prior consent requirement for Title IX-Exclusive offenses).

IV. CONCLUSION

Outcome notifications stemming from campus misconduct proceedings are governed by a complex set of laws and agency guidance. An adequate compliance plan will require an institution to consider each piece of the Title IX, Clery Act, and FERPA structure and make informed policy choices where available. The offense at issue will determine exactly which body of law or guidance controls the content of such notice as well as to whom the notice may be provided. Although difficult, compliance will enable an institution to preserve important rights owed to complainants, respondents, and the general public alike.

Figure 1

Campus Misconduct Proceeding Outcome Notification Requirements under Title IX, Clery Act/Campus SaVE, and FERPA

	Clery Exclusive Crime[161]	***Overlapping Offense***	***Campus SaVE-Exclusive Offense***	***Title IX-Exclusive Offense***
To Complainant: What must an institution disclose?	The "report on the results," upon written request.	Campus SaVE "result" and any later changes; appeal procedures; all sanctions; rationale; Complainant's remedies and actions to eliminate hostile environment.	Campus SaVE "result" and any later changes; appeal procedures; all sanctions; rationale.	Responsibility determination (incl. appeal); Complainant's remedies and actions to eliminate hostile environment; sanctions directly related to Complainant.

161. The Clery-Exclusive Crime must also qualify as a FERPA "crime of violence." *See* discussion *supra* Part III.A.1.a.

	Clery Exclusive Crime[161]	***Overlapping Offense***	***Campus SaVE-Exclusive Offense***	***Title IX-Exclusive Offense***
To Complainant: What <u>may</u> an institution disclose?	The FERPA "final results."	N/A	N/A	N/A
To Respondent: In addition to respondent's education records, what <u>must</u> an institution disclose?	Clery Act does not mandate specific disclosures.	Campus SaVE "result" and any later changes; appeal procedures; all sanctions; rationale.	Campus SaVE "result" and any later changes; appeal procedures; all sanctions; rationale.	Responsibility determination (incl. appeal).
To Public: What <u>must</u> an institution disclose?[162]	N/A	N/A	N/A	N/A
To Public: What <u>may</u> an institution disclose?	If a violation is found: FERPA "final results." If no violation: Nothing.	If a violation is found: FERPA "final results." If no violation: Nothing.	If a violation is found: FERPA "final results." If no violation: Nothing.	FERPA contains no provision permitting public disclosure of PII from education records.
May Complainant or public redisclose the outcome information?	Complainant: Only if a violation is found. Public: Yes.	Complainant: Yes. Public: Yes.	Complainant: Yes. Public: Yes.	Complainant: Probably no. Public: N/A

162. A state's open records law may require public disclosure.