

Investigator Training

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- You should have no expectation of confidentiality or that anything that we discuss today is privileged.
- Material discussed today is explicit

Investigation Best Practices



I DIDNT REALIZE I WAS
SUPPOSED TO KNOW HOW
TO DO EVERYTHING BY
MY SECOND RODEO

SEEMS LIKE A VERY LOW
AMOUNT OF RODEOS

The Investigation



- Must be prompt, thorough, impartial, and without bias
 - Treat all with respect and dignity
 - Make no assumptions
 - At a minimum should include interviews with the victim, the alleged harasser, and anyone else who can provide relevant information
 - DOCUMENT, DOCUMENT, DOCUMENT
-

The Investigation



- Coordinate investigation with law enforcement or others as necessary or appropriate
 - School has the legal obligation to conduct a prompt investigation
 - 34 C.F.R. § 106.45 includes “law enforcement activity” as a “good cause” to delay “reasonably prompt” timelines
 - Keep criminal, child abuse, and professional reporting obligations in mind
-

Understand the Claim



- Conduct a thorough interview of the complainant and identify specific allegations made
 - Identify specific provisions of law or parts of school policy alleged to have been violated
 - Conduct a thorough interview of the complainant and identify defenses
-

Create a Plan



- Written list of witnesses
- Written list of questions
- Written list of documents



"Things have gotten a lot easier since I moved everything from my to-do list to my it-is-what-it-is list."

Time for investigation?



- Review time line and plan accordingly
 - In addition to time taken to actually compile evidence, the parties must have at least ten days to review all evidence before a decision can be made by the decision maker
 - Time limit?
 - Regulations say the grievance process must have “reasonably prompt time frames for conclusion of the grievance process”
 - Investigation should take less time if facts are straightforward
-

Keep Parties Informed



- No specific requirements to update parties at every step (other than notice of interviews and submission of evidence at end of investigation)
 - However, keeping parties informed can make the process run more smoothly
-

Credibility determinations and decision-making



- Credibility determinations
 - Cannot be made based on status of complainant, respondent, or witness
 - Generally left to the D-M, especially when they impact responsibility determinations
 - Investigator should report facts regarding physical behavior and indicators of reliability and truthfulness during interviews
- Decision-making left to decision maker
 - Investigator should include facts that would bear towards responsibility or non-responsibility, but notes and report should not state any determination by the investigator



"Should I be concerned that all your references
pleaded the fifth?"

Interviews – Title IX



“Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate”

- 34 CFR 106.45(b)(5)(v)

Interviews – All Investigations



- Review any documents, videos, and other tangible evidence prior to interviews as appropriate
- Bring relevant documents to interview
- Outline and develop standard questions before the interview
 - Write out key questions and ask them the same way to every witness

Interviews – All Investigations



- Interviews should be somewhere private with limited interruptions
- Record? Take notes?
 - Taking notes during the interview—may slow down the interview but this is not necessarily a negative as it can help detect deception if party is nervous about your note taking
 - Should take place throughout interview, not just at incriminating or deceptive moments

Interviews – All Investigations



- Take your time!
- Introduce yourself and explain your role
- Explain purpose of interview and how information will be used
- Make clear they are not obligated to participate and the school can't retaliate against that decision
- Employ empathy while maintaining professionalism

Interviews – All Investigations



- Interview witnesses separately
- Tell the person he or she must tell the truth, even if it is difficult
- Don't promise confidentiality
 - But, limit the disclosure of information to people who really need to know
- Gather facts, not opinions or guesses
- Use "who, what, where, when, why, and how" questions

Interviews – All Investigations



- Investigate any bias the complainant or witnesses may have against the respondent
- Ask simple questions, not compound questions
- Let witnesses answer your questions in their own words
 - Do not suggest answers and do not help them with their answers
- Start with broad open-ended questions and get more specific as needed

Interviews – All Investigations



- Don't use leading questions
- Don't shy away from uncomfortable questions
- Question with empathy and understanding
 - It's not an interrogation

Interviews – All Investigations



- Have witnesses tell you what they know from personal knowledge and what they know from other sources
- Listen to “hearsay” but record it as hearsay
- Try to obtain information in chronological order to the extent possible
- Identify potential witnesses

Interviews – All Investigations



- Be comfortable with silence
- Consider obtaining legibly written (or typed) and signed statements
- Retaliation is prohibited
 - If they are threatened, harassed, etc., come to you
- Don't make promises about outcomes

Interviews – All Investigations



- Review your notes before the interview concludes; clarify anything you are unclear about
- Notes should be complete and detailed
 - Important for assessing credibility
 - Decision may turn on small details
- Where possible, include verbatim statements on critical issues – paraphrasing can later become problematic

Interviews – All Investigations



- Ask if there is anything the witness wants to tell you that you didn't ask
- Contact you if they think of anything else
- Gather any additional documents, videos, or other tangible evidence
- Conduct as many follow-up interviews as are needed

Doe v. Forest Hills Sch. Dist.

2015 U.S. Dist. LEXIS 175321 (W.D. Mich. 2015)



- High school girl alleged boy sexually assaulted her at school
 - Security footage inconclusive
 - Principal called the cops; cops did not initially charge*
 - Victim alleged she was harassed by peers after report
-

Doe v. Forest Hills Sch. Dist.

2015 U.S. Dist. LEXIS 175321 (W.D. Mich. 2015)



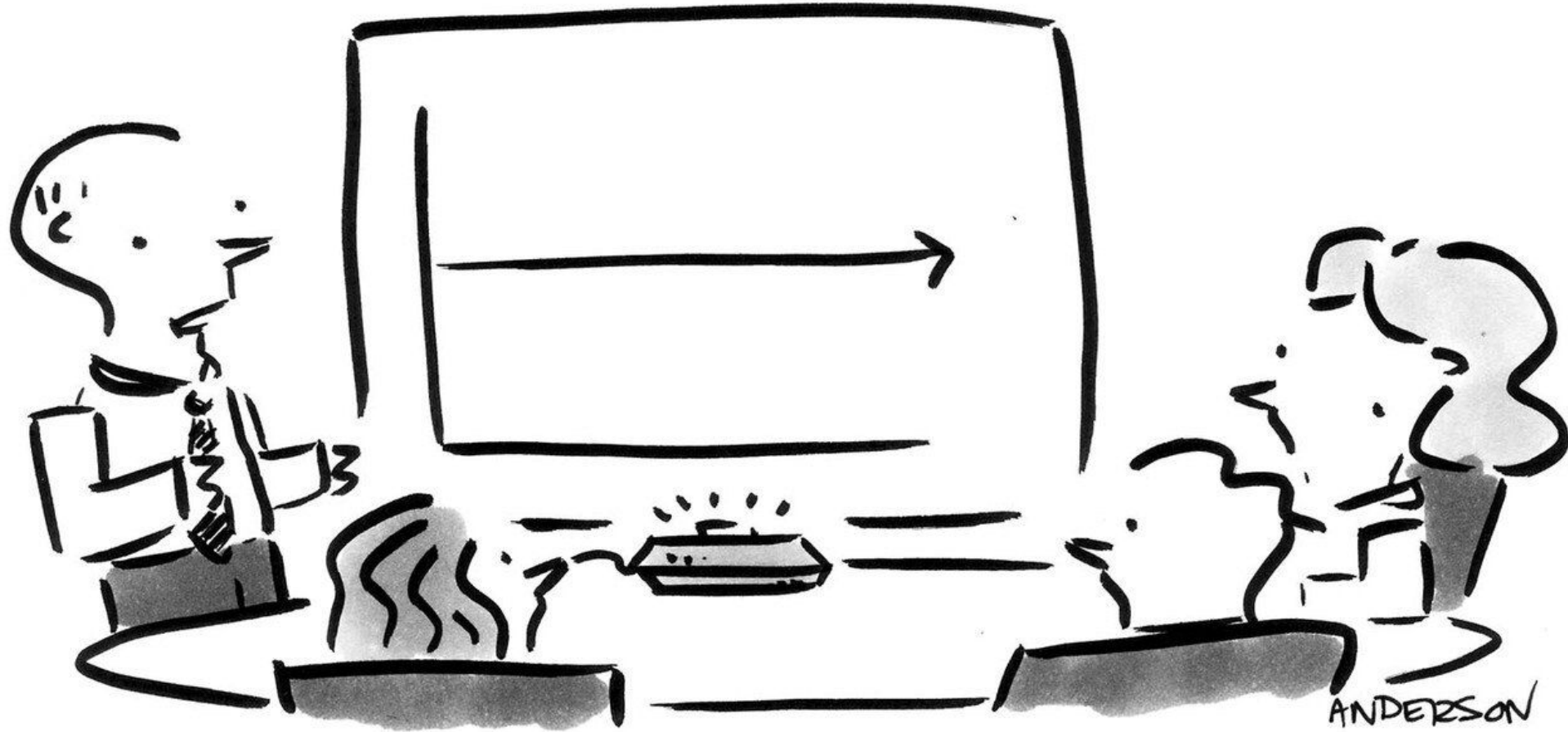
- Family sued under Title IX
 - School: not deliberately indifferent
 - Court: “Here, the school admitted that it was waiting for the police investigation to make its determination and did not suspend MM until after he pled guilty to state charges.”
-

Doe v. Forest Hills Sch. Dist.

2015 U.S. Dist. LEXIS 175321 (W.D. Mich. 2015)



- Court: Principal “failed to interview Doe's friends, and waited months for someone else to make a conclusion as to whether the assault happened. Based on the record, a jury could find that the investigation in its scope and the delay to ultimate conclusion was clearly unreasonable and represented deliberate indifference by the school and administrators.”
-



"After closer investigation, it's become clear that we need to enter more than one value."

TIX - Parties' Rights During Investigation—Right to Present Witnesses



- Parties must have the opportunity to present witnesses during investigation
 - Can be both fact and expert witnesses if they wish
- The investigation must “[p]rovide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence”
34 CFR 106.45(b)(5)(ii)

TIX - Parties' Rights During Investigation—Discussion of Allegations



- “Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence”
 - 34 CFR 106.45(b)(5)(iii)
- Parties must be able to discuss allegations with anyone
 - Limited to the allegations themselves
 - Can place limits on discussion of the evidence outside of the Tix process
 - Regulations allow for school to require NDAs if no formal complaint is filed

TIX - Parties' Rights During Investigation— Right to Advisor



- “Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties”
 - 34 CFR 106.45(b)(5)(iv)

TIX - Parties' Rights During Investigation—Protection from Retaliation



- Prohibition against retaliation
 - Cannot hold a party's (or a witness's) refusal to participate in the process against them
 - "Right to remain silent"
 - Applies both to investigation and employment
- 34 CFR 106.71(a)

TIX - Parties' Rights During Investigation—Reviewing All Evidence



- Review of all compiled evidence
 - Once the investigator has compiled the evidence, ALL of the evidence, including that which he doesn't plan to use, must be disclosed to both parties
 - Parties must then have the chance to meaningfully respond to the evidence before the investigator drafts final report
 - 34 CFR 106.45(b)(5)(vi)

TIX - Parties' Rights During Investigation—Reviewing All Evidence



- Review of all compiled evidence
 - Can be submitted electronically
 - Parties must have at least ten days to submit a written response to evidence, which investigator must consider prior to drafting report

Burden of Proof



- 34 CFR 106.45(b)(5)
- “When investigating a formal complaint and throughout the grievance process, a recipient must—
 - (i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties”

How much needs to be proved?



- Preponderance of the evidence
 - More likely than not
- Clear and convincing evidence
 - When the evidence "instantly tilts the scales in the affirmative when weighed against the evidence in opposition and if it causes the fact finder to have an abiding conviction that the evidence is true," it is considered clear and convincing. *Trickey v. Kaman Indus. Techs. Corp.*, 705 F.3d 788, 799 (8th Cir. 2013).
 - In other words, something highly and substantially more probable to be true than not
- 34 CFR 106.45(1)(vii)

Report Writing



- TIX -Report must “fairly summarize the relevant evidence”
 - 34 CFR 106.45(b)(5)(vii)
- Good standard for all investigations



“Instead of writing my own book report, I’ve curated the results of previous reports, calculated the consensus opinion, and presented the average score with a cute graphic. I figured it’d save us both some time.”

- Report should include:
 - The names of the parties
 - The parties' representatives, if any
 - Allegations investigated
 - Individuals interviewed and dates of interviews
 - List of exhibits/evidence considered
 - Attach copies

- Report should include:
 - Summary of facts
 - Include your reasoning for a controversial or contested fact determination
 - Discuss facts related to credibility of witnesses, witness reluctance, witness tampering or retaliation, etc.
 - Statement of Jurisdiction (control over respondent, control over context of allegations, reasons for no mandatory dismissal)
 - Burden of proof (preponderance of the evidence or clear and convincing)

Report Writing



- Use their words as much as possible
- Should describe any prior relationships between the parties
 - TIX - Must be sent to each party or the party's advisor
- Can be either in a hard copy or electronically

- What evidence to put in report?
- Relevant Evidence
 - Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence
- Who, what, when, how of allegations in the complaint

Credibility Determinations



- Motive or bias of witnesses and parties
- Objective indications of truthfulness or deceit (e.g. witness looked down during entire interview, witness was sweating and would start and stop sentences frequently, sobbing, etc.)
- Relevant evidence can be both inculpatory (showing responsibility) and exculpatory (showing non-responsibility)

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Legal Standards for Sanctioning Student Conduct (Non-TIX)



Stacey the Drunken Pirate



Snyder v. Millersville Univ. (D. Ct. Penn. 2008)



- Student teacher urged students to visit her MySpace Page
 - comments criticizing her supervisor
 - photograph of her wearing a pirate hat and drinking from a plastic cup with the caption "drunken pirate"
 - School refused to let her complete student teaching; couldn't graduate without student-teaching practicum
-

Snyder v. Millersville Univ.

(D. Ct. Penn. 2008)



- First tried to sue school, case dismissed
 - Then sued university claiming violation of First Amendment
 - Court: No protection because postings dealt only with purely personal matters, not issues of public concern
-



MISTAKES

IT COULD BE THAT THE PURPOSE OF YOUR LIFE IS
ONLY TO SERVE AS A WARNING TO OTHERS.

Corlett v. Oakland Univ., (Mich. 2013)



- Plaintiff a freshman in creative writing
 - Had to keep a writing journal
 - described various teachers to whom he has felt sexually attracted in the past
 - About the professor
 - “She walks in and I say to myself “Drop, motherf*cker, drop.”
 - “Kee-Rist, I’ll never learn a thing. Tall, blond, stacked, skirt, heels, fingernails, smart, articulate, smile. I’m toast but I stay”
 - “Re-reading what I’ve previously written while drinking, its not as bad as I thought”
-

Corlett v. Oakland Univ., (Mich. 2013)



- On November 1, professor collected journals and read them for the first time
 - On November 2, Dean of students called student into his office; told him not to go back to English class for the remainder of the week.
 - Following week when student walked into class, professor called campus police who escorted him from the classroom
-

Corlett v. Oakland Univ., (Mich. 2013)



- Sued, claiming First Amendment protection in journal
 - The Court:
 - "Plaintiff's expressions of lust for [the professor] or descriptions of her physical appearance are not entitled to First Amendment protection."
 - The writing "satisfied the legal definition of obscenity" and "sexual harassment"
-

Corlett v. Oakland Univ., (Mich. 2013)



- “Perhaps some would view Defendants' punishment as disproportionate to Plaintiff's conduct. Perhaps, however, Defendants believed the sanctions were necessary to emphasize to Plaintiff that, although arguably acceptable in a karaoke bar, certain behaviors when directed at female professors, fellow students, or future co-workers are not tolerable in a civilized society.”
-

Key v. Robertson (E.D. Va. 2009)



- Law student at Regent Univ. posted image of Pat Robertson giving the middle finger
-

Key v. Robertson (E.D. Va. 2009)



NEWS

Regent student suspended for posting Robertson picture files suit

Nov. 28, 2007

A Regent University law student who was expelled for posting an unflattering photo of school founder Pat Robertson on the Internet filed a lawsuit against the university and Robertson on Thursday.



Key v. Robertson (E.D. Va. 2009)



- Student ordered to remove and apologize
 - Sued, claiming First Amendment Protection
 - Court: No First Amendment rights against private university
-

Tatro v. Univ. of Minn. (MN 2009)



- Student in the Mortuary Science Program
 - Student posted about “Bernie”
 - getting to “play” with Bernie
 - “want[ing] to stab a certain someone in the throat with a trocar.”
 - Student dismissed from the program
 - Sued on First Amendment grounds
-

Tatro v. Univ. of Minn. (MN 2009)

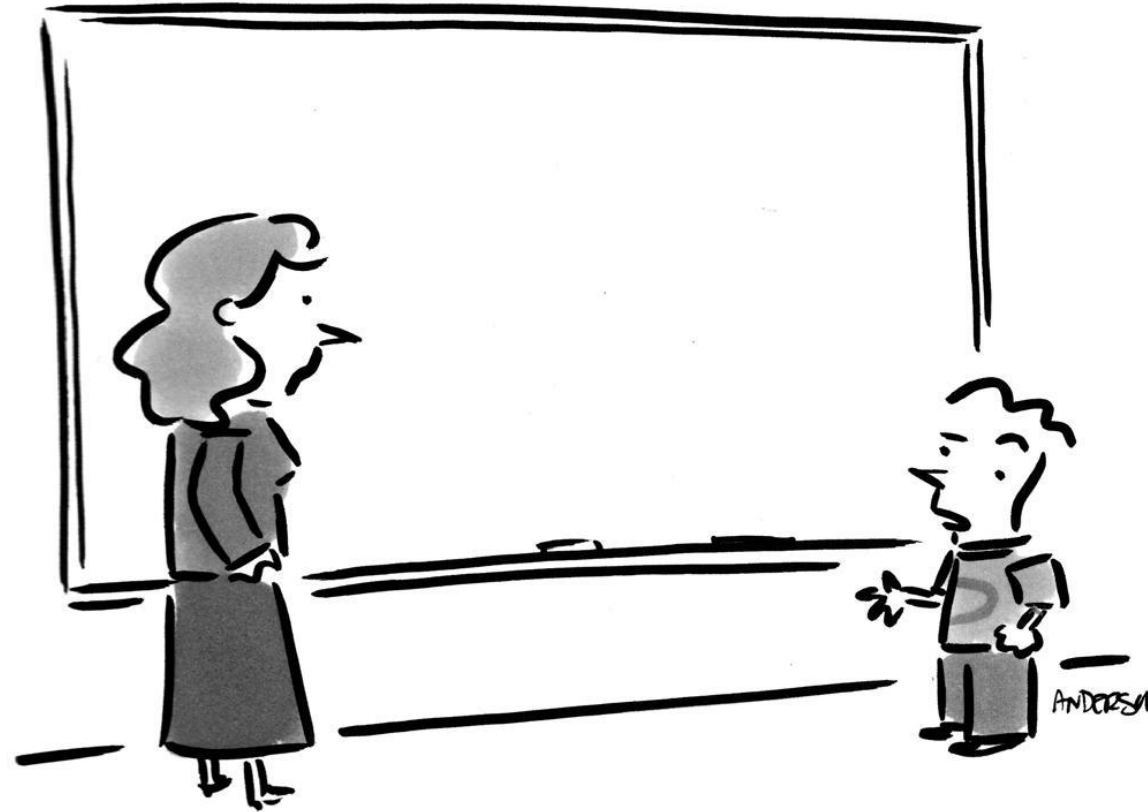


- MN Court of Appeals applied "Tinker"
 - Supreme Court of Minnesota:
 - Tinker not the standard for college
 - "A university may regulate student speech on Facebook that violates established professional conduct standards...with the qualification that any restrictions on a student's Facebook posts must be narrowly tailored and directly related to established professional conduct standards."
-

Confidentiality and Disclosure



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"Before I write my name on the board, I'll need to know how you're planning to use that data."

Confidentiality & FERPA



- FERPA requires educational institutions to maintain the confidentiality of personally identifiable information in a student's education records
 - Generally requires consent prior to disclosure, unless an exception applies to permit disclosure
 - School official exception
 - Emergency exception
 - Law Enforcement Unit Exemption
-

February 2019 PTAC Guidance



- U.S. Dep't of Education's Privacy Technical Assistance Center issued Q&A Guidance to address questions about the application of FERPA to the disclosure of PII to school security units, SROs, and law enforcement agencies
 - Focuses on the relationship between law enforcement education institutions, including higher ed
-

Education Records



- An education record is defined by FERPA to include, with limited exceptions, any records that directly relate to a student and are maintained by an educational agency or institution
 - Can either be in print or computer media
 - Maintain is not defined in the act or its implementing regulations, so the best practice is to define maintain in district policy
-

Education Records



- Many forms of information do not meet the definition of education record, may be disclosed
 - Information gained through personal observation, personal knowledge, hearsay, or social media is not an education record protected by FERPA
 - Opinions extrapolated from personal knowledge, such as the opinion that a student is dangerous, is not protected
-

The School Official Exception



- May disclose PII from an education record of a student without consent if the disclosure is to a 3rd party that:
 - Performs a function that the school would otherwise use its own employees to complete
 - Is included in the district's FERPA notice
 - Is under the direct control of the school district with regard to use and maintenance of education records
 - Uses education records only for authorized purpose and does not re-disclose without authorization
-

Legitimate Educational Interest



- Not explicitly defined by statute or regulation
 - Each institution told to define the term and include their definition in policy
 - US Department of Education
 - A school official “has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility.”
-

Direct Control



“Direct control requires the school district disclosing the records to ensure that outside parties that provide institutional services or functions as ‘school officials’ . . . do not maintain, use, or redisclose education records except as directed by the agency or institution that disclosed the information.”

Letter to Montgomery County Public Schools (FPCO 2/15/06)



- School proposed designating EFOs (SROs) "school officials" with a "legitimate educational interest"
 - FPCO: Expressed serious skepticism the school would exercise requisite control over SRO to meet exception
 - What is the "legitimate educational interest?"
 - SROs could not re-disclose unless the disclosure meets another exception to consent
-

Letter to Dr. Jene Watkins, Indian Creek Local School District (FPCO 2008)



- Case of the missing shoe in band class
 - School disclosed information from a student's education records to a school resource officer
 - SRO then re-disclosed the information to the student's parents and the county's prosecuting attorney
 - Parent complained to FPCO
-

Letter to Dr. Jene Watkins, Indian Creek Local School District (FPCO 2008)



- School: SRO was a "school official" or "law enforcement unit"
 - Insufficient control over SRO to establish as a "school official"
 - Even if the SRO had qualified as a school official or law enforcement unit, he would not have been entitled to re-disclose the education records he had received from the school
-

The Emergency Exception



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IF THIS IS A MEDICAL
EMERGENCY, PLEASE
HANG UP AND DIAL 911.
OTHERWISE, STAY ON
THE LINE, PONDER THE
KIND OF PERSON WHO
WOULD CALL HERE FIRST
IN AN EMERGENCY,
AND WE'LL BE WITH YOU
IN A MOMENT.

ANDERSON

34 C.F.R. § 99.36



- FERPA allows disclosure of personally identifiable information from education records without prior consent “to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.”
 - ED has stated that lawmakers intended for this exception to ensure school administrators may “bring appropriate resources to bear on the situation.”
-

Letter to Anonymous

18 FAB 50 (FPCO 2015)



- FPCO explained how the emergency exception would apply in practical contexts
 - States that the exception applies when “the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals” based upon the totality of pertinent circumstances
 - Disclosure may be made to anyone whose “knowledge of the information is necessary to protect” the student or others
-

No Second Guessing

34 C.F.R. § 99.36



- “If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.”
-

Letter to Hastings

119 LRP 1745 (FPCO 2018)



- Student with a disability has violent meltdown
 - Throws chair and destroys property
 - Assaults several staff members
 - IEP included multiple strategies and supports to assist student regain emotional control
 - These were implemented with fidelity yet unsuccessful
 - Mother, who worked at district, came to the room but also failed to calm the Student
-

Letter to Hastings

119 LRP 1745 (FPCO 2018)



- Incident resulted in injuries to student and multiple employees, including a para that was pregnant
 - Injured individuals brought to hospital for treatment
 - Pursuant to hospital policy, hospital employees contacted local law enforcement to report the assault
 - Local law enforcement responds and begins collecting information from district employees; para provides copy of the school incident report she wrote
-

Letter to Hastings

119 LRP 1745 (FPCO 2018)



- Student is criminally charged after local law enforcement refer case to county attorney
 - Parents: District violated FERPA by disclosing an education record to the police
 - District: Disclosure fell within emergency exception because the para "reasonably concluded that there was 'an articulable and significant threat to the health or safety of a student or other individuals'"
-

Letter to Hastings

119 LRP 1745 (FPCO 2018)



- FPCO: "District's response indicates that based on facts surrounding ... the incident, specifically that implementing the strategies incorporated into the Student's IEP did not serve to deescalate the abusive behavior, [para] believed the Student presented a health and safety emergency."
-

Letter to Hastings

119 LRP 1745 (FPCO 2018)



- FPCO: “It appears further that school officials believed as long as they were responsible for the education and care of the Student there was the possibility of an on-going health and safety emergency.”
 - “Based on the information provided ... we believe that the disclosure was consistent with FERPA’s health and safety emergency exception”
-

Questions?

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