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INSTITUTE FOR HIGHER EDUCATION LAW & GOVERNANCE
100 LAW CENTER
HOUSTON, TEXAS 77204-6060
713.743.2075 713.743.2085 FAX
WWW.LAW.UH.EDU/LAWCENTER/PROGRAMS/IHELG**

MICHAEL A. OLIVAS
William B. Bates
Distinguished Chair in Law
Director, IHELG
molivas@uh.edu
713.743.2078

DEBORAH Y. JONES
Program Manager
dyjones@uh.edu

Outcome Notifications Under Title IX, The Clery Act, And FERPA:

A Compliance Blueprint

IHELG Monograph

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James T. Koebel
Assistant General Counsel for Compliance
University of North Carolina, Wilmington
(910) 962-7886 (Office)
jtkoebel@gmail.com

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OUTCOME NOTIFICATIONS UNDER TITLE IX, THE CLERY ACT, AND FERPA: A COMPLIANCE BLUEPRINT

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James T. Koebel⁺

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 uncertainty¹ 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 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 documents⁵ 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 investigation, 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

⁺ Assistant General Counsel, University of North Carolina Wilmington.

¹ See, e.g., Letter to Department of Education from Senator Lankford (4 March 2016) (stating that the Office for Civil Rights' Dear Colleague Letters have "create[d] uncertainty surrounding policies proscribing conduct and advancing [OCR] requirements..."); Federal Student Aid, U.S. Dep't of Educ. (16 July 2004), FSA LETTER TO GEORGETOWN UNIVERSITY (acknowledging "open issues of genuine confusion in the higher education community" with regard to dissemination of campus judicial proceeding outcomes), available at <https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/cleryact/georgetownuniversity/GUFPRD07162004.PDF> (hereinafter "FSA Letter to Georgetown University").

² 20 USC § 1232g.

³ Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 USC § 1092(f) and VAWA amendments Pub. L. 113-4, 127 Stat. 54, 89-92 (2013).

⁴ Title IX of the Education Amendments of 1972, 20 USC § 1681 *et seq.*

⁵ For a full list, see OCR Reading Room at <http://www2.ed.gov/about/offices/list/ocr/publications.html#TitleIX>.

⁶ See, e.g., Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (Apr. 24, 2014), n. 33 and accompanying text ("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."), (hereinafter "OCR Q&A") available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

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

⁸ See *infra* Part III.B.1.

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 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 via resolution agreements.¹² Applicable law—particularly FERPA—does grant institutions some decision-making authority as to how, and whether, it 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

⁹ See *infra* Part III.B.1.

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. 34 CFR § 106.4(a).

¹² See *infra* notes 14, 79, and 109 (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. This Article will treat all OCR guidance as valid to the same extent as the statutory and regulatory requirements of the Clery Act and FERPA, except when provisions may conflict or be superseded. In any event, non-compliance with OCR guidance may result in an institution negotiating a binding resolution agreement that contains identical or stricter provisions. Although the extent to which OCR guidance is 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.” Office of Management and Budget, Executive Office of the President, *Final Bulletin for Agency Good Guidance Practices*, 72 Fed. Reg. 3432, Section II(2)(h) (25 Jan. 2007). See also Letter to Senator Lankford from Assistant Secretary for Civil Rights Catherine Lhamon (17 Feb 2016) (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 the “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 to Department of Education from Senator Lankford (7 Jan. 2016) (questioning the authority on which OCR relies in issuing substantial guidance); Kent Talbert, *Behind the Scenes: A Closer Look at OCR’s Enforcement Authority*, 16 Engage 3 (October 2015) (questioning the extent and scope of OCR’s enforcement authority as exercised). See also OCR Q&A 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”); Office of Management and Budget, Executive Office of the President, *Final Bulletin for Agency Good Guidance Practices*, 72 Fed. Reg. 3432, 3434 (25 Jan. 2007).

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

¹⁴ See Office for Civil Rights, U.S. Dep’t of Educ. (30 Dec. 2014), OCR LETTER TO HARVARD LAW SCHOOL, pp. 10-12 (finding error where policy did not specifically provide for written notification of the outcome of a Title IX complaint), available at <http://www2.ed.gov/documents/press-releases/harvard-law-letter.pdf>.

They can shed light on an institution’s efforts to eliminate a discriminatory environment¹⁵ 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 secrecy¹⁸ or invading students’ privacy rights.

This Article analyzes and attempts to bring order to the interaction of Title IX and OCR’s guidance thereunder, the Clery Act and its recent Campus SaVE Act amendments, and FERPA when an institution provides a complainant, respondent,¹⁹ or a 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. Nor does it recommend policy approaches where there are institutional choices to be made. Part I briefly summarizes Title IX, the Clery Act, and FERPA and explains the offenses defined under each of those laws. Part II creates 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.

I. STATUTORY APPLICABILITY AND OFFENSE DEFINITIONS

A. Title IX

1. Overview of Legal Mandate

¹⁵ See, e.g., *Doe v. United States Department of Health and Human Services*, Civil Action No. 14-366 (D.D.C. Mar. 24, 2015) (noting that institutions themselves are proper defendants when there is an accusation of institutional discriminatory practices).

¹⁶ See, e.g., *Doe v. Alger*, Civil Action No. 5:15-cv-00035 (W.D. Va. Mar. 31, 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), available at <https://kcjohnson.files.wordpress.com/2013/08/james-madison-mtd.pdf>.

¹⁷ Russlynn Ali, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter: Sexual Violence (4 Apr. 2011), p. 20, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html> (hereinafter “2011 DCL”).

¹⁸ See generally Jon Krakauer, *How Much Should a University Have to Reveal About a Sexual-Assault Case?*, NEW YORK TIMES MAGAZINE, Jan. 21, 2016 (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 USC § 1092(f)(8)(B)(iv) and 34 CFR § 668.46(k)(2)(iii) (“accuser” and “accused”); 2011 DCL (“victim,” “complainant,” and “alleged perpetrator”); 2001 DCL (“harassing student”); and 20 USC § 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.

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 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 the level of den[ying] or limit[ing] 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

²⁰ 20 USC § 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 CFR 106.31(a).

²¹ See, e.g., 34 CFR §§ 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 20 USC § 1681(a)(2012); 34 CFR § 106.11; 20 USC § 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 at p. 15. Institutions must designate a Title IX Coordinator to oversee the handling of individual complaints and the institutional grievance process. 34 CFR § 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” Office for Civil Rights, U.S. Dep’t of Educ., TITLE IX RESOURCE GUIDE (April 2015), p. 5, (hereinafter “Title IX Resource Guide”) available at <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf>.

²⁴ 34 CFR § 106.8(b).

²⁵ 2011 DCL at p. 7.

²⁶ Office for Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter: Revised Sexual Harassment Guidance (Jan. 2001), p. 5, (hereinafter “2001 DCL”) available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>. See also Office for Civil Rights, U.S. Dep’t of Educ. (1 July 2011), OCR LETTER TO UNIVERSITY OF NOTRE DAME, p. 6 (listing “sex based cyber-harassment” as a form of sexual harassment), available at <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/05072011-b.pdf>.

²⁷ 2011 DCL.

touching of a sexual nature,²⁸ targeting another with sexually-charged graffiti,²⁹ spreading sexual rumors,³⁰ retaliatory harassment,³¹ bullying on the basis 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 prohibited³⁵ and that Title IX regulations do not extend to conduct protected by the First Amendment.³⁶

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 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

²⁸ Russlynn Ali, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter: Harassment and Bullying (26 Oct. 2010), p. 6, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf> (hereinafter “2010 DCL”). Cf. OCR Q&A, A-6 (explaining that Title IX “generally does not extend to legitimate nonsexual touching or other nonsexual conduct”).

²⁹ 2001 DCL at p. 3.

³⁰ 2010 DCL at p. 6.

³¹ 2011 DCL at p. 16 (“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.”). Retaliation is a broad category of misconduct and can include any type of sexual harassment or violence directed at a complainant or witnesses, by either the institution or alleged perpetrators or associates. See OCR Q&A at B-4; K-1.

³² See 2010 DCL at p. 1 (“[S]ome student misconduct that falls under a school’s anti-bullying policy also may trigger responsibilities under [Title IX].”).

³³ 2011 DCL.

³⁴ 2011 DCL at p. 1 (“Sexual 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, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter: First Amendment (28 July 2003), available at <http://www2.ed.gov/about/offices/list/ocr/firstamend.html> (hereinafter “2003 DCL”) (“...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.”).

³⁶ See 2003 DCL (“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 rape.”).

³⁷ 2011 DCL at pp. 1-2.

³⁸ 2011 DCL.

³⁹ OCR Q&A at A-1. See also Task Force to Protect Students from Sexual Assault, SAMPLE LANGUAGE AND DEFINITIONS OF PROHIBITED CONDUCT FOR A SCHOOL’S SEXUAL MISCONDUCT POLICY (September 2014) (including within the definition of sexual harassment “rape, sexual assault, and sexual exploitation” and “depending on the facts, dating violence, domestic violence, and stalking”), available at <https://www.notalone.gov/assets/definitions-of-prohibited-conduct.pdf>.

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 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 Act of 2013, known as the 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

⁴⁰ 2010 DCL.

⁴¹ 2011 DCL.

⁴² 2010 DCL. *See also* Title IX Resource Guide at p. 15 (“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.”). *Cf. Videckis v. Pepperdine*, CV 15-00298 DDP (C.D. Cal. Dec 15, 2015) at 15 (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”). Although Title IX does not, a State’s law may expressly prohibit harassment based on sexual orientation. *See, e.g.*, Colorado Senate Bill 08-200 (prohibiting discrimination on the basis of sexual orientation in places of public accommodation).

⁴³ 2011 DCL.

⁴⁴ 20 USC § 1092(f)(1).

⁴⁵ *See* 20 USC § 1092(f)(1).

⁴⁶ *See* U.S. Dep’t of Educ., Office of Postsecondary Educ., *The Handbook for Campus Safety and Security Reporting* (2011), <http://www2.ed.gov/admins/lead/safety/handbook.pdf> (hereinafter “Campus Safety Handbook”). Reportable statistics are limited to those offenses occurring on campus, in or on noncampus buildings or property owned or controlled by the institution, and on public property within or immediately adjacent to campus. *See also* 20 USC §§ 1092(f)(1)(F)(i)-(iii); 1092(f)(6)(A)(ii)-(iv).

⁴⁷ 20 USC § 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 various sections of 18 and 42 USC), available at <http://www.gpo.gov/fdsys/pkg/FR-2014-10-20/pdf/2014-24284.pdf>.

reported instances of dating violence, domestic violence, and stalking along with 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 an institution’s 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 their ASRs and also provide the definitions used in their local jurisdiction for purposes of institutional resolution preventative 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

⁴⁹ 20 USC § 1092(f)(1)(F)(iii).

⁵⁰ 20 USC § 1092(f)(8)(A). The required policy statements do not apply to other offenses. *Id.* 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 USC § 1092(f)(2).

⁵¹ *See* 79 Fed. Reg. 35,422 (20 June 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* 20 USC § 1092(f)(7) (requiring usage of definitions of dating violence, domestic violence, and stalking found in 42 USC § 13925(a) for purposes of compiling crime statistics); 34 CFR § 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 found in 42 USC § 13925(a).

⁵³ 34 CFR § 668.46(j)(1)(i)(A)-(B).

⁵⁴ *See* 34 CFR § 668.46(a).

⁵⁵ 42 USC § 13925(a)(30).

⁵⁶ 34 CFR § 668.46(a) (incorporating definitions found in the Uniform Crime Reporting [UCR] Program of the Federal Bureau of Investigation). Fondling, incest, and statutory rape comprise the category of “sex offenses” found in the UCR’s National Incident-Based Reporting System User Manual. 34 CFR Part 668, Subpt. D, App. A.

⁵⁷ 20 USC § 1092(f)(7). *See* 34 CFR Part 668, Subpt. D, App. A; 34 CFR § 668.46(c)(9)(i) and (iii).

⁵⁸ 20 USC § 1092(f)(1)(F)(i); 34 CFR § 668.46(c)(1)(i).

⁵⁹ 20 USC § 1092(f)(1)(F)(ii); 34 CFR § 668.46(c)(1)(iii). Standing alone, those offenses are not otherwise reportable.

referrals for institutional disciplinary action include those regarding alcohol, drugs, and weapons possession.⁶⁰

C. FERPA

1. Overview of Legal Mandate

The Family Educational Rights and Privacy Act (“FERPA”) grants to students the right to inspect their education records⁶¹ 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 proceedings⁶⁵ 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

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-

⁶⁰ 20 USC § 1092(f)(1)(F)(i); 34 CFR § 668.46(c)(1)(ii).

⁶¹ 20 USC §§ 1232g(a)(1)(A), 1232g(d), and 34 CFR § 99.5(a)(1) (vesting inspection rights in the student upon reaching the age of 18). *See* 20 USC § 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”). An institution must provide access to records within a reasonable period of time, not to exceed 45 days, following a request. 20 USC § 1232g(a)(1)(a) and 34 CFR § 99.10(b).

⁶² 20 USC §§ 1232g(b) and 1232g(d).

⁶³ 34 CFR § 99.31(d).

⁶⁴ *See, e.g.*, 20 USC §§ 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); and 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). “Disclosure” is defined to mean “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.” 34 CFR § 99.3.

⁶⁵ A “disciplinary action or proceeding” is defined 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.” 34 CFR § 99.3

⁶⁶ *See* 20 USC § 1232g(b)(6)(A)-(C).

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

⁶⁸ 34 CFR Part 99, App. A.

⁶⁹ FERPA refers to definition of “crime of violence” in 18 USC § 16. 20 USC § 1232g(b)(6)(A) and (B). *But see* 65 Fed. Reg. 41,860 (“[T]he statutory definition of ‘crime of violence,’ as defined in 16 USC § 18, is difficult to apply. . . . The [regulatory definition in Appendix A to Part 99] consists of an all-inclusive list of ‘crimes of violence.’”).

⁷⁰ 34 CFR Part 99, App. A.

⁷¹ 34 CFR Part 99, App. A. Fondling includes indecent liberties and child molesting. *Id.*

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 Program⁷³; several definitions match those used in the Clery Act word for word.⁷⁴ FERPA’s “disciplinary violations” provision includes institutional violations of alcohol and drug use or possession policies.⁷⁵

II. OFFENSE CATEGORIES

To determine which laws and/or guidance 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 were developed for 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 (“Clery-Exclusive Crimes”). This category of offenses 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 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 (“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 spectre 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

⁷² 34 CFR Part 99, App. A.

⁷³ See 65 Fed. Reg. 41,860.

⁷⁴ Word-for-word matches are: Arson; Aggravated assault; Simple assault; Criminal homicide—manslaughter by negligence; Criminal homicide—murder and nonnegligent manslaughter; and Destruction/damage/vandalism of property.

⁷⁵ 34 CFR § 99.31(a)(15).

⁷⁶ See 127 Stat at 91; 20 USC § 1092(f)(8)(B)(iv).

⁷⁷ See generally 34 CFR § 668.46(k) and 2011 DCL.

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 p. 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 34 CFR § 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 34 CFR § 668.46(k)(3)(iii) (defining a “proceeding” as “all activities related to non-

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 (“Campus SaVE-Exclusive Offenses”). For example, where the parties are covered by institutional proceedings for such an offense but, by virtue of their status, the institution deems them to fall outside of the scope of its responsibilities under Title IX.⁷⁹ Alternatively, if the facts surrounding such as offense present no possibility of sex discrimination or the creation of a hostile environment, Title IX’s procedural requirements would not be implicated.⁸⁰ This situation should be quite rare, as only an investigation of the facts would reveal 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 (“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.⁸¹ 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.*, aggravated assault), but would not include conduct that would implicate Campus SaVE Act procedural requirements (*i.e.*, conduct that would render the offense sexual assault, dating violence, domestic violence or stalking).⁸²

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.

criminal resolution of an institutional disciplinary complaint”) (emphasis added) *with* 34 CFR § 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* Office for Civil Rights, U.S. Dep’t of Educ. (22 Nov. 2010), OCR LETTER TO EASTERN MICHIGAN UNIVERSITY (agreeing to implement Title IX grievance procedures to address complaints of sex discrimination involving faculty and staff members and third parties), available at <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/15096002.html>. 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* 34 CFR § 668.46(k)(1)(i); 79 Fed. Reg. 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).”).

⁸⁰ For example, stalking with no sexual component.

⁸¹ 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 DCL at pp. 5-6 (detailing factors to consider in “distinguish[ing] between conduct that constitutes sexual harassment and conduct that does not rise to that level”).

⁸² 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.”

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.⁸³ In fact, the Clery Act imposes *no* outcome notification requirements for institutional disciplinary proceedings resulting from allegations of any Clery-Exclusive Crime.⁸⁴ Instead, outcome notifications are governed by FERPA and institutional policy. 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-parties, without consent.⁸⁵ Because FERPA's provisions are merely permissive, an institution may choose to further restrict the release of outcome notifications stemming from Clery-Exclusive Crimes via policy.⁸⁶ Likewise, where FERPA merely permits a disclosure, a State may lawfully require it.⁸⁷

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 All Clery-Exclusive Crimes qualify as FERPA "crimes of violence" except for motor vehicle theft and arrests or disciplinary referrals for weapons possession violations.⁸⁹

FERPA defines the "final results" as a decision or determination made by a body authorized by the institution.⁹⁰ As such, both the initial finding of a hearing panel and any decision

⁸³ 20 USC § 1092(f)(8)(B)(iv)(III) applies only to institutional proceedings arising from an allegation of dating violence, domestic violence, sexual assault, or stalking.

⁸⁴ 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* 79 Fed. Reg. 62,772.

⁸⁵ 34 CFR §§ 99.31(a)(13)-(14).

⁸⁶ *See* 65 Fed. Reg. 41,860 ("The disclosure is permissive. Thus . . . institutions are . . . free to follow their own policies regarding disclosure of this information."). *See also* 65 Fed. Reg. 41,861 ("[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."). 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. 34 CFR §§ 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. 34 CFR § 99.31(a)(2). *See also* 20 USC § 1232g(h) (permitting disciplinary record disclosure).

⁸⁷ *See* 65 Fed. Reg. 41,860 (explaining that when "... State open records laws [] require disclosure, FERPA does not prevent that disclosure").

⁸⁸ 20 U.S.C § 1232g(b)(6)(A) and 34 CFR § 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 CFR Part 99, App. A (including such offenses within the definition of "crimes of violence").

⁸⁹ *See supra* discussion in Parts I.C.2 and II.

⁹⁰ 34 CFR § 99.39.

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.⁹¹ FERPA defines a “sanction imposed” as a description of the disciplinary action taken by the institution, the date of its imposition, and its duration.⁹² 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 violation was committed.⁹³ 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.⁹⁴

FERPA does not limit the disclosure of final results to a complainant to instances in which a violation was deemed to have occurred.⁹⁵ 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.⁹⁶

b. Limits on Complainant’s Rediscovery 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.⁹⁷ The institution must inform the complainant of this limitation.⁹⁸ 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.⁹⁹

2. Disclosure to the Public

⁹¹ 34 CFR § 99.39 and 20 USC § 1232g(b)(6)(C). *See also* 65 Fed. Reg. 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.”).

⁹² 34 CFR § 99.39.

⁹³ 34 CFR § 99.39.

⁹⁴ 34 CFR § 99.31(a)(14)(ii). *See also* 65 Fed. Reg. 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.”); Task Force to Protect Students from Sexual Assault, CLARIFICATION CHART ON THE INTERSECTION OF TITLE IX AND THE CLERY ACT (April 2014), available at <https://www.notalone.gov/assets/ferpa-clerychart.pdf> (last visited May 14, 2016) (hereinafter “CHART ON THE INTERSECTION OF TITLE IX AND THE CLERY ACT”).

⁹⁵ 34 CFR § 99.31(a)(13).

⁹⁶ In other words, where there is no violation found, there may be no named alleged perpetrator or sanctions imposed.

⁹⁷ 34 CFR § 99.33(a)(1). Institutions may not permit students who redisclose FERPA-protected information from accessing or receiving additional protected information for at least five years. 34 CFR § 99.33(e).

⁹⁸ 34 CFR § 99.33(d).

⁹⁹ 34 CFR § 99.33(c) (stating that the redisclosure limitation in 99.31(a)(1) does not apply to disclosures made under certain FERPA provisions, including 99.31(a)(14)). *See also* Family Policy Compliance Office, U.S. Dep’t of Educ., (10 March 2003), *Letter to Mr. S. Daniel Carter* (“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.”), available at <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/carter.html>.

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 appropriate education official,¹⁰⁰ 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.¹⁰¹ The information permitted to be contained in the final results is limited to that as discussed above, unless prior consent to disclose additional information is obtained.¹⁰²

b. Others' Rediscovery 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 re-disclosure limitation of personally identifiable information in those results does not apply.¹⁰³

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.¹⁰⁴ Despite this multilayered regime, Campus SaVE and Title IX¹⁰⁵ have substantial overlap with regard to outcome notifications stemming from these sexual violence

¹⁰⁰ An institution may disclose student records, without prior consent, to school officials who have legitimate educational interests. 34 CFR § 99.31(a)(1)(i)(a).

¹⁰¹ 20 USC § 1232g(b)(6)(B) and 34 CFR § 99.31(a)(14)(i). *See also* 65 Fed. Reg. 41,860 ("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."). Whether to disclose the final results to a requester from the general public is an institutional decision. *See* 73 Fed. Reg. 74,831 ("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.") (emphasis added). For issues attendant to requests for redacted records by members of the general public where the student's identity is known to the requestor, *see generally* 73 Fed. Reg. 74,832 (discussing application of definition of "personally identifiable information" in 34 CFR § 99.3 to targeted requests).

¹⁰² *See* 65 Fed. Reg. 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.").

¹⁰³ 34 CFR § 99.33(c) (stating that the redisclosure limitation in 99.31(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.

¹⁰⁴ 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. 2011 DCL at pp. 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.

¹⁰⁵ 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. Instead, Title IX's outcome notification requirements have been put forward exclusively by OCR in guidance.

offenses and FERPA is largely permissive.¹⁰⁶ 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.¹⁰⁷

1. Disclosures to Complainant and Respondent

a. Contents

Campus SaVE’s outcome notification requirements are clearly delineated in statute and regulation.¹⁰⁸ An institution’s policy must provide for simultaneous, written notification¹⁰⁹ to both the complainant and respondent of the results of any proceeding arising out of an allegation of an Overlapping Offense.¹¹⁰ Campus SaVE defines a “result” as any initial, interim, and final decision

¹⁰⁶ See 79 Fed. Reg. 35,418 and 35,422 (20 June 2014) (“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.”).

¹⁰⁷ 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.

¹⁰⁸ 20 USC § 1092(f)(8)(B)(iv)(III) and 34 CFR § 668.46(k).

¹⁰⁹ 34 CFR § 668.46(k)(2). The Department of Education has indicated its intention to provide guidance on what constitutes “written simultaneous notification” in an updated *Handbook for Campus Safety and Security Reporting*. See 79 Fed. Reg. 62,775. See also 34 CFR § 668.46(b)(11)(vi)(B) (requiring a statement in the ASR that the accuser and the 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 at p. 13; OCR Q&A at F-1; H-3. OCR guidance merely recommends simultaneous notice for Title IX proceedings. See OCR Q&A at H-3. 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 OCR Q&A at C-5. Although not required by the Clery Act or OCR, OCR recommends an appeals process for Title IX offenses. See 2011 DCL at p. 12; OCR Q&A at I-1. *But see* Office for Civil Rights, U.S. Dep’t of Educ. (2014 Nov. 5), OCR LETTER TO PRINCETON UNIVERSITY (finding university error when prevailing party was not provided an opportunity to appeal), available at <http://www2.ed.gov/documents/press-releases/princeton-letter.pdf>. If provided, “[t]he appeals process must be equal for both parties.” OCR Q&A at I-2.

¹¹⁰ 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.” 34 CFR § 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 at p. 12; OCR Q&A at F-8. *But see* Office for Civil Rights, U.S. Dep’t of Educ. (1 July 2011), OCR LETTER TO UNIVERSITY OF NOTRE DAME, p. 8 (including a sixty-day maximum for concluding proceedings). OCR’s full explanation of the 60-day timeframe is as follows:

As noted in the DCL, the 60-calendar day timeframe for investigations is based on OCR’s experience in typical cases. The 60-calendar day timeframe refers to the entire investigation process, which includes conducting the fact-finding investigation, holding a hearing or engaging in another decision-making process to determine whether the alleged sexual violence occurred and created a hostile environment, and determining what actions the school will take to eliminate the hostile environment and prevent its recurrence, including imposing sanctions against the perpetrator and providing remedies for the complainant and school community, as appropriate. Although this timeframe does not include appeals, a school should be aware that an unduly long appeals process may impact whether the school’s response was prompt and equitable as required by Title IX.

by an authorized hearing panel.¹¹¹ The notification must also contain information on appeal procedures, if available under the institution's policy.¹¹² Additional simultaneous, written notification must be provided if there are any changes to a result before it becomes final,¹¹³ as well as notice of when such result becomes final.¹¹⁴ If the result is a finding of responsibility, the notice must include any sanctions imposed on the respondent by the institution.¹¹⁵ Sanctions must be disclosed to both parties regardless of whether the sanctions relate to the complainant.¹¹⁶ Finally, the notice must contain the hearing panel's rationale for the decision and any sanctions imposed.¹¹⁷ 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.¹¹⁸

b. Relationship to FERPA

i. Release to Complainant

OCR does not require a school to complete investigations within 60 days; rather OCR evaluates on a case-by-case basis whether the resolution of sexual violence complaints is prompt and equitable. Whether OCR considers an investigation to be prompt as required by Title IX will vary depending on the complexity of the investigation and the severity and extent of the alleged conduct. OCR recognizes that the investigation process may take longer if there is a parallel criminal investigation or if it occurs partially during school breaks. A school may need to stop an investigation during school breaks or between school years, although a school should make every effort to try to conduct an investigation during these breaks unless so doing would sacrifice witness availability or otherwise compromise the process.

Because timeframes for investigations vary and a school may need to depart from the timeframes designated in its grievance procedures, both parties should be given periodic status updates throughout the process. OCR Q&A at F-8.

Still, a determination cannot be so delayed as to constitute inaction that itself results in a hostile environment. *See* OCR Q&A at A-5 and n. 31. Further, an institution must incorporate timeframes for "all major stages" of its process, which includes outcome notifications. 2011 DCL at p. 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* Office for Civil Rights, U.S. Dep't of Educ. (9 May 2014), OCR LETTER TO VIRGINIA MILITARY INSTITUTE, p. 11, available at <http://www2.ed.gov/documents/press-releases/vmi-letter.doc>.

¹¹¹ 34 CFR § 668.46(k)(3)(iv).

¹¹² 20 USC § 1092(f)(8)(B)(iv)(III)(bb) and 34 CFR § 668.46(k)(2)(v)(B).

¹¹³ 20 USC § 1092(f)(8)(B)(iv)(III)(cc); 34 CFR § 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, a decision other than an initial or interim decision, unless such initial or interim decision is not appealable or modifiable. *See* 79 Fed. Reg. 62,779.

¹¹⁴ 20 USC § 1092(f)(8)(B)(iv)(III)(dd); 34 CFR § 668.46(k)(2)(v)(D).

¹¹⁵ 34 CFR § 668.46(k)(3)(iv). The sanctions imposed must be among those listed in the institution's Annual Security Report policy statement. *See* 34 CFR § 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.

¹¹⁶ 34 CFR § 668.46(k)(iv). *See also* OCR Q&A at H-3 ("[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.").

¹¹⁷ 34 CFR § 668.46(k)(iv).

¹¹⁸ OCR Q&A at H-3.

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 violence or non-forcible sex offense” provision¹¹⁹—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.¹²⁰ 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 guilt determination.¹²¹ 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.¹²²

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 disclosure 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.”¹²³ 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.¹²⁴

c. Redisclosure Limits

¹¹⁹ 20 USC § 1232g(b)(6)(A) and 34 CFR § 99.31(a)(13). *See also* 2011 DCL at pp. 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. 34 CFR §§ 99.10(a); 99.10(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. 34 CFR § 99.5(b).

¹²⁰ FERPA only protects personally identifiable information about students contained in education records. *See supra* notes 61-62. Some of the information required to be disclosed under Campus SaVE does not require consent because it is information contained in institutional policy, such as available appeal rights.

¹²¹ 34 CFR § 99.31(a)(13).

¹²² *Compare* 34 CFR § 99.39 (defining “final results”), *with* 34 CFR § 668.46(k)(3)(iv) (defining a “result”). *See also* 34 CFR § 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.” CHART ON THE INTERSECTION OF TITLE IX AND THE CLERY ACT, *supra* n. 94. In fact, FERPA permits complainant notification of *any* sanctions imposed upon the respondent in cases of sexual violence. 34 CFR § 99.31(a)(13).

¹²³ *See* 20 USC § 1232g(a)(1)(a) (“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.”).

¹²⁴ *Id.*

FERPA does not impose redisclosure limits on the notice a party is entitled to receive¹²⁵ and, in fact, explicitly removes disclosures that are required by Campus SaVE from its redisclosure limitations.¹²⁶ 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.¹²⁷ As such, both parties to an Overlapping Offense proceeding may redisclose the written outcome notice each is entitled to receive.¹²⁸

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.¹²⁹ In these instances, FERPA permits disclosure only if the result of the proceeding is a finding of a violation of institutional rule or policy.¹³⁰ The disclosure may, but need not, contain all information comprising the final results, including the panel's decision and any essential findings that support it, the responsible student's name, the violation committed, and any sanction imposed on the student and its date of imposition and duration.¹³¹

b. Redisclosure Limits

FERPA's redisclosure limitation does not apply to outcome notifications provided to the general public regarding Overlapping Offenses.¹³² 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

¹²⁵ 34 CFR § 99.33(c).

¹²⁶ 34 CFR § 99.33(c).

¹²⁷ See 2011 DCL at p. 14 (“[P]ostsecondary institutions 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 University, (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”).

¹²⁸ 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 FSA Letter to Georgetown University (“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, Task Force to Protect Students from Sexual Assault, CHECKLIST FOR CAMPUS SEXUAL MISCONDUCT POLICIES (April 2014) p. 7, <https://www.notalone.gov/assets/checklist-for-campus-sexual-misconduct-policies.pdf> (last visited May 14, 2016) (suggesting that non-disclosure agreements regarding re-disclosure of “information related to the outcome of the proceeding” are prohibited) (emphasis added).

¹²⁹ 20 USC § 1232g(b)(6)(B) and 34 CFR § 99.31(a)(14)(i). See also 2011 DCL at p. 14 (“[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.”) (citing 34 CFR § 99.31(a)(14)).

¹³⁰ *Id.*

¹³¹ 34 CFR § 99.39.

¹³² 34 CFR § 99.33(c).

There are few differences between outcome notification requirements for Campus SaVE-Exclusive Offenses and Overlapping 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 the offense 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 is not required to disclose to the complainant any individual remedies offered to her.¹³³ 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.¹³⁴ The “results” are defined as any initial, interim, and final decision by a hearing panel, including the panel’s rationale for the decision.¹³⁵ 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.¹³⁶ 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.¹³⁷

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.¹³⁸

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.¹³⁹ FERPA’s redisclosure limitations do not apply to such disclosures to the general public.¹⁴⁰

¹³³ 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 110.

¹³⁴ 34 CFR § 668.46(k)(2); 20 USC § 1092(f)(8)(B)(iv)(III)(bb) and 34 CFR § 668.46(k)(2)(v)(B).

¹³⁵ 34 CFR § 668.46(k)(3)(iv).

¹³⁶ 20 USC § 1092(f)(8)(B)(iv)(III)(cc); 34 CFR § 668.46(k)(2)(v)(C); 20 USC § 1092(f)(8)(B)(iv)(III)(dd); 34 CFR § 668.46(k)(2)(v)(D).

¹³⁷ 34 CFR § 668.46(k)(3)(iv).

¹³⁸ *See supra* Part III.B.1.c.

¹³⁹ *See supra* notes 129-131 and accompanying text.

¹⁴⁰ 34 CFR § 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 respondent¹⁴¹ be notified in writing about the outcome of both the complaint and any appeal.¹⁴² As defined in the Letter, "outcome" refers to a guilt determination only (*i.e.*, whether harassment was found to have occurred).¹⁴³ OCR recommends, but does not require, that such notice be concurrent.¹⁴⁴

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.¹⁴⁵ 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 imposed on the respondent that *directly relate* to the complainant, and (iv) other steps taken to eliminate any hostile environment and prevent recurrence.¹⁴⁶

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

¹⁴¹ Under FERPA, parents may also need to be informed, if the student is under 18.

¹⁴² See 2011 DCL at p. 13. There is no requirement that the respondent be notified before the complainant. *Id.* See also OCR Q&A at H-3.

¹⁴³ 2011 DCL at p. 13. See also *id.* at n. 24 ("Outcome does not refer to information about disciplinary sanctions unless otherwise noted.").

¹⁴⁴ See OCR Q&A at H-3. Cf. Task Force to Protect Students from Sexual Assault, CHECKLIST FOR CAMPUS SEXUAL MISCONDUCT POLICIES (April 2014) p. 7, <https://www.notalone.gov/assets/checklist-for-campus-sexual-misconduct-policies.pdf> (last visited May 14, 2016) (listing "simultaneous written notice to both parties of the outcome of the complaint" as a "particularly important element" of a campus sexual misconduct policy).

¹⁴⁵ See 2014 DCL; OCR Q&A at H-3.

¹⁴⁶ See OCR Q&A at H-3.

"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.*

prior consent,¹⁴⁷ 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,”¹⁴⁸ but has consistently maintained that sanctions directly related to the alleged victim constitute an exception to that conflict.¹⁴⁹ OCR’s 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.”¹⁵⁰ In justifying its interpretation, OCR has noted Congress’ expressed intent that “FERPA should not be construed to affect the applicability of [Title IX],”¹⁵¹ which may occur when “it affects whether a hostile environment has been eliminated.”¹⁵²

In a technical assistance letter to counsel for a California school district, the Department of Education’s Family Policy Compliance Office (“FPCO”), 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.¹⁵³ The FPCO adopted OCR’s position articulated in earlier Dear Colleague Letters 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.¹⁵⁴

¹⁴⁷ 20 USC §§ 1232g(b) and 1232g(d).

¹⁴⁸ See 2001 DCL at p. 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”).

¹⁴⁹ See, e.g., 2001 DCL; *Id.* at n. 102; *Id.* at p. vii; 2011 DCL at n. 32 (“In 1994, Congress amended the General Education Provisions 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.’”) (citing 20 USC § 1221(d)).

¹⁵⁰ 2011 DCL at p. 13.

¹⁵¹ 2011 DCL at n. 32. See also, CHART ON THE INTERSECTION OF TITLE IX AND THE CLERY ACT at 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.

¹⁵² 2011 DCL at n. 33.

¹⁵³ Family Policy Compliance Office, U.S. Dep’t of Educ., (9 Feb. 2015), *Letter to School and College Legal Services of California re: concern with the language from OCR’s April 4, 2011, Dear Colleague Letter (DCL) on sexual violence regarding what information may be disclosed in the notice of the outcome of a discriminatory harassment complaint, and whether the language in the DCL is consistent with the requirements of FERPA* (hereinafter “2015 FPCO Letter”) available at <http://www2.ed.gov/policy/gen/guid/fpc/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 requiring that “the 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” be included in an outcome notice. *Id.*

¹⁵⁴ 2015 FPCO Letter. The FPCO explained that:

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.¹⁵⁵ Because no explicit exception exists, FERPA's redisclosure limitation would seemingly apply.¹⁵⁶ 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,¹⁵⁷ 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.

... the 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." . . . The Department originally noted this position in the January 2001 OCR guidance, which stated:

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. [Footnote 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.]

¹⁵⁵ See 2015 FPCO Letter at p. 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 at p. 13; 73 Fed. Reg. 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.").

¹⁵⁶ See 34 CFR § 99.33(a)(1). Title IX-Exclusive Offenses, as defined in this Article, are not among those explicitly excepted from FERPA's redisclosure limitation. 34 CFR § 99.33(c).

¹⁵⁷ 20 USC § 1232g(b)(6)(A) and 34 CFR § 99.31(a)(13).

Figure 1

Campus Misconduct Proceeding Outcome Notification Requirements under Title IX, Clery Act/Campus SaVE Act, and FERPA				
	<i>Clery-Exclusive Crime</i> ¹⁵⁸	<i>Overlapping Offense</i>	<i>Campus SaVE-Exclusive Offense</i>	<i>Title IX-Exclusive Offense</i>
<i>To Complainant: What <u>must</u> an institution disclose?</i>	N/A	Campus SaVE “result” and any changes before finalized; appeal procedures; all sanctions imposed; panel’s rationale; remedies provided to Complainant and steps taken to eliminate hostile environment.	Campus SaVE “result” and any changes before finalized; appeal procedures; all sanctions imposed; panel’s rationale.	Guilt determination stemming from complaint and any appeal; remedies provided to Complainant and steps taken to eliminate hostile environment; sanctions that directly relate to Complainant.
<i>To Complainant: What <u>may</u> an institution choose to disclose?</i>	FERPA “final results”	N/A	N/A	N/A
<i>To Respondent: In addition to respondent’s education records, what <u>must</u> an institution disclose?</i>	Clery Act does not mandate specific disclosures.	Campus SaVE “result” and any changes before finalized; appeal procedures; all sanctions imposed; panel’s rationale.	Campus SaVE “result” and any changes before finalized; appeal procedures; all sanctions imposed; panel’s rationale.	Guilt determination stemming from complaint and any appeal.
<i>To Public: What <u>must</u> an institution disclose?</i> ¹⁵⁹	N/A	N/A	N/A	N/A
<i>To Public: What <u>may</u> an institution choose to disclose?</i>	If result is a finding of a violation: FERPA “final results.” If result is a finding of no violation: Nothing.	If result is a finding of a violation: FERPA “final results.” If result is a finding of no violation: Nothing.	If result is a finding of a violation: FERPA “final results.” If result is a finding of no violation: Nothing.	FERPA contains no applicable provision permitting public disclosure of personally identifiable information from education records.
<i>Can Complainant or public redisclose the outcome information?</i>	Complainant: No, if no finding of responsibility. Public: Yes.	Complainant: Yes. Public: Yes.	Complainant: Yes. Public: Yes.	Complainant: Probably no. Public: N/A

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 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.

¹⁵⁸ The Clery-Exclusive Crime must also qualify as a FERPA “crime of violence.” See *supra* Part III.A.1.a.

¹⁵⁹ A State’s open records law may require public disclosure.