

FERPA & Confidentiality

Question: How is FERPA to be applied where the Regulations direct that the parties be given all the particulars and evidence related to the investigation including information about the outcome which may include disciplinary action taken against the respondent. Minimally, the required disclosures involve providing the names of other student witnesses in addition to the names as the complainant and respondent and student statements collected. Typically, information considered to be a student record of one student is not permissibly shared (absent consent) with another student. An exception might be disclosure to a complainant of information necessary to carry out a remedy (i.e. advising complainant of a no contact order in place prohibiting responding from contacting the complainant, information regarding change in the respondent's schedule or bus). While the Regulations strive for transparency in this process, it unclear how to balance the competing interests of maintaining requested confidentiality and compliance with FERPA and providing equal rights to the respondent and compliance with directives for full disclosure related to investigations and the related reports/decisions .

Answer: In the Rule, the Department discusses at length the intersection between this Title IX Rule and FERPA. The Rule is interpreted to be consistent with FERPA, and both Title IX and FERPA are interpreted to be consistent with constitutional due process. The Department states on page 1443 that the "Department is precluded from administering, enforcing, and interpreting statutes, including Title IX and FERPA, in a manner that would require a recipient to deny the parties, including employee-respondents, their constitutional right to due process because the Department, as an agency of the Federal government, is subject to the U.S. Constitution. The Department's position is consistent with the principle articulated in the Department's 2001 Guidance that the 'rights established under Title IX must be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding.'" Please see the "Section 106.6(e) FERPA" subsection of the "Clarifying Amendments to Existing Regulations" section of the Rule, at pp. 1442-1508.

Question: The regulations make the release of a perpetrator's identity confidential unless FERPA exceptions apply. Based on the crimes of violence exception, that means that sexual assault, domestic violence, dating violence and stalking outcomes can be

released if there is a finding of violation, but there is no exception for sexual harassment. Does that mean that recipients cannot release a finding of sexual harassment through a reference check, because it would be retaliatory to release this confidential information? Assume no state law requires such release.

Answer: The Title IX Rule, § 106.71(a), states that a recipient must keep confidential the identity of any person who has reported sexual harassment, or who has been reported to be a perpetrator of sexual harassment. The purpose of this provision is to prevent the school from retaliating against anyone. This duty of confidentiality has three exceptions in § 106.71(a): if disclosure is permitted under FERPA, if disclosure is required by law, or if disclosure is necessary to carry out the purposes of Title IX and its regulations, including to conduct a grievance process.

A recipient's disclosure of the identity of a respondent cannot be made with a retaliatory purpose without violating § 106.71. If the disclosure is made by a recipient without falling into one of the three exceptions listed in § 106.71, OCR would view the disclosure as potentially retaliatory and examine the facts and circumstances to determine whether the disclosure either (i) satisfied one of the three exceptions (for example, the disclosure was necessary to carry out the purposes of Title IX), or (ii) was made for a non-retaliatory purpose.

Question: In the "Supportive measures" section, it is said that "Keep supportive measures confidential to the extent that confidentiality does not impair schools' ability to provide supportive measures" **Question:** I found this item quite confusing and hope if there is any example to help clarify its meaning.

Answer: In the Preamble to the Rule page 393 the Department explains:

If a complainant desires supportive measures, the recipient can, and should, keep the complainant's identity confidential (including from the respondent), unless disclosing the complainant's identity is necessary to provide supportive measures for the complainant (e.g., where a no-contact order is appropriate and the respondent would need to know the identity of the complainant in order to comply with the no-contact order, or campus security is informed about the no-contact order in order to help enforce its terms).

Question: Inquiry regarding confidentiality of supportive measures and due process:

Answer: Section 106.30 (defining “supportive measures”) states (emphasis added): “The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.” The Rule does not permit a recipient to breach this duty of confidentiality for a reason other than when keeping the supportive measure confidential would “impair the ability” of the recipient “to provide the supportive measure.” In the preamble to the Rule at pages 392-93, for instance, the Department explains:

A recipient’s ability to offer supportive measures to a complainant, or to consider whether to initiate a grievance process against a respondent, will be affected by whether the report disclosed the identity of the complainant or respondent. In order for a recipient to provide supportive measures to a complainant, it is not possible for the complainant to remain anonymous because at least one school official (e.g., the Title IX Coordinator) will need to know the complainant’s identity in order to offer and implement any supportive measures. Section 106.30 defining “supportive measures” directs the recipient to maintain as confidential any supportive measures provided to either a complainant or a respondent, to the extent that maintaining confidentiality does not impair the recipient’s ability to provide the supportive measures. A complainant (or third party) who desires to report sexual harassment without disclosing the complainant’s identity to anyone may do so, but the recipient will be unable to provide supportive measures in response to that report without knowing the complainant’s identity. If a complainant desires supportive measures, the recipient can, and should, keep the complainant’s identity confidential (including from the respondent), unless disclosing the complainant’s identity is necessary to provide supportive measures for the complainant (e.g., where a no-contact order is appropriate and the respondent would need to know the identity of the complainant in order to comply with the no-contact order, or campus security is informed about the no-contact order in order to help enforce its terms).

(emphasis added).

If the school conducts a grievance process in response to a formal complaint, § 106.45 does not exempt the recipient from its obligation to keep supportive measures confidential. That expectation is buttressed by the Department’s discussion of revision to the recordkeeping provision, § 106.45(b)(10), at page 1406 of the preamble to the Rule:

In response to commenters' concerns that this provision giving the parties access to records might contradict the requirement to keep supportive measures confidential, the Department has revised § 106.45(b)(10)(i) to remove the language making records available to parties. Because the parties to a formal complaint receive written notice of the allegations, the evidence directly related to the allegations, the investigative report, and the written determination (as well as having the right to inspect and review the recording or transcript of a live hearing), the Department is persuaded that the parties' ability to access records relevant to their own case is sufficiently ensured without the risk that making records available to parties under proposed § 106.45(b)(10) would have resulted in disclosure to one party of the supportive measures (or remedies) provided to the other party.

While § 106.45 directs the recipient to objectively evaluate "all relevant evidence – including both inculpatory and exculpatory evidence" (§ 106.45(b)(1)(ii)) and to provide the parties a copy of the "evidence" that is "directly related to the allegations raised in a formal complaint" for review and response (§ 106.45(b)(5)(vi)), any supportive measures provided to the complainant are not "evidence" that is "directly related to the allegations" and the duty to keep supportive measures confidential applies throughout the grievance process.

In your example, the "timeline" that a respondent might wish to establish may consist of establishing when the school received notice of the alleged sexual harassment (e.g., when the incident was reported), combined with the fact that the Rule requires schools "promptly" to offer all complainants supportive measures which, under the Rule, may include academic coursework adjustments, without piercing the confidentiality of supportive measures by disclosing the recipient's records regarding supportive measures requested by or provided to this complainant.

See also the "Section 106.6(e) FERPA" subsection of the "Clarifying Amendments to Existing Regulations" section of the preamble to the Rule (pages 1442-1508) for discussion of FERPA and the Rule's requirement to disclose evidence "directly related to the allegations" to both parties during a grievance process.

As an additional note, the Rule does not grant respondents a general "right to due process," but does give complainants and respondents the specific procedural rights enumerated throughout § 106.45, which rights are rooted in concepts of due process and fundamental fairness for the benefit of complainants, respondents, witnesses, and recipients. See, e.g., Rule at pp. 82-83, FN 203:

E.g., Association of Title IX Administrators (ATIXA), ATIXA Position Statement: Why Colleges Are in the Business of Addressing Sexual Violence 3-4 (Feb. 17, 2017) (acknowledging that due process has been denied in some recipients' Title IX proceedings but insisting that "Title IX isn't the reason why due process is being compromised. . . . Due process is at risk because of the small pockets of administrative corruption . . . and because of the inadequate level of training currently afforded to administrators. College administrators need to know more about sufficient due process protections and how to provide these protections in practice.") (emphasis added). The Department agrees that recipients need to know more about sufficient due process protections and what such protections need to look like in practice, and this belief underlies the Department's approach to the § 106.45 grievance process which prescribes specific procedural features instead of simply directing recipients to provide due process protections, or be fair, for complainants and respondents. Edward N. Stoner II & John Wesley Lowery, Navigating Past the "Spirit Of Insubordination": A Twenty-First Century Model Student Conduct Code With a Model Hearing Script, 31 Journal of Coll. & Univ. L. 1, 10-11 (2004) (noting that the trend among colleges and universities has been to put into place written student disciplinary codes but, whether an institution is public or private, a "better practice" is to describe in the written disciplinary code exactly what process will be followed rather than making broad statements about "due process" or "fundamental fairness"). The Department agrees that it is more instructive and effective for the Department to describe what procedures a process must follow, rather than leaving recipients to translate broad concepts like "due process" and "fundamental fairness" into Title IX sexual harassment grievance processes, and unlike the NPRM the final regulations do not reference "due process" but rather prescribe specific procedural features that a grievance process must contain and apply.

Question: I have a question regarding when the Title IX Coordinator signs the Formal Complaint: For example, assume the Title IX Coordinator signs the Formal Complaint to begin the grievance process because there are 2 (or 3) complaints of alleged sexual harassment, and the perpetrator is the same individual in all of 3 of these complaints. Assume that none of these three complainants wishes to take advantage of the Informal Resolution Process or file a Formal Complaint and go through the grievance process. When the Title IX Coordinator signs the Formal Complaint to begin the process, is the Title IX Coordinator allowed to share the names of the three Complainants with the

Respondent? Or, do we have to get permission from the three Complainants? What is the proper procedure in this matter?

Answer: Thank you for your question regarding OCR's new Title IX Regulations. All references and citations are to the official version of the Regulations published in the Federal Register available is [here](#). A link to the unofficial version of the final Regulations is available [here](#).

When a formal complaint is signed by a Title IX Coordinator rather than filed by a complainant, the written notice of allegations in 34 C.F.R. § 106.45(b)(2) requires the recipient to send both parties details about the allegations, including the identity of the parties if known, and thus, if the complainant's identity is known it must be disclosed in the written notice of allegations. However, if the complainant's identity is unknown (for example, where a third party has reported that a complainant was victimized by sexual harassment but does not reveal the complainant's identity, or a complainant has reported anonymously), then the grievance process may proceed if the Title IX Coordinator determines it is necessary to sign a formal complaint, even though the written notice of allegations does not include the complainant's identity.