DAVID H. ANGELI, OSB No. 020244
david@angelilaw.com
KRISTEN L. TRANETZKI, OSB. No. 115730
kristen@angelilaw.com
Angeli Ungar Law Group LLC
121 SW Morrison Street, Suite 400
Portland, OR 97204
Telephone: (503) 954-2232
Facsimile: (503) 227-0880

COURTNEY W. ANGELI, OSB No. 941765
courtney@baaslaw.com
ROBIN BOWERFIND, OSB No. 035949
robin@baaslaw.com
Buchanan Angeli Altschul & Sullivan LLP
321 SW 4th Avenue, Suite 600
Portland, OR 97204
Telephone: (503) 974-5015
Facsimile: (971) 230-0337

Attorneys for Plaintiff John Doe

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

JOHN DOE,

Plaintiff,

v.

THE REED INSTITUTE (aka, Reed College) and **JANE ROE**,

Defendants.

Case No.: 3:15-cv-00617-MO

OPPOSED MOTION TO SUBMIT PROPOSED ORDERS

LOCAL RULE 7-1 CERTIFICATION

Pursuant to LR 7-1(a), counsel for plaintiff John Doe ("Doe") certifies that they made a good faith effort through telephone conferences and email exchanges with counsel for defendant the Reed Institute ("Reed") to resolve the disputes presented in this motion and have been unable to do so. Counsel for defendant Jane Roe ("Roe") participated in these discussions but it is the understanding of plaintiff's counsel that she does not currently take a position on these issues.

MOTION

Plaintiff Doe moves this Court for entry of the attached two orders: (1) Order Governing FERPA Materials, and (2) Protective Order (attached as Exhibits 1 and 2, respectively to this motion). This motion is supported by the following memorandum of law.

MEMORANDUM OF LAW

I. INTRODUCTION

The parties held a discovery status conference before the Court on July 1, 2015, to request the Court's assistance in production of certain materials protected by the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g; 34 C.F.R. 99. The Court granted plaintiff's request for a judicial order governing the release of these materials pursuant to FERPA and instructed counsel for plaintiff to prepare an order consistent with the Court's statements. (ECF No. 28.) Counsel for plaintiff subsequently prepared a Motion Governing Release of FERPA Materials and a corresponding Protective Order. Pursuant to Local Rules, the parties conferred on the proposed orders, but were unable to resolve their disagreements as to three issues: (1) who should receive the FERPA notice; (2) what specific instructions should the FERPA notice contain; and (3) whether the Protective Order should include an "attorneys' eyes only" designation."

Doe maintains that only the non-party students whose own records will be released should receive notice pursuant to FERPA, and that the non-party students simply named in those records (e.g., witnesses to a disciplinary violation or students who serve on disciplinary panels) should not be notified. Doe further maintains that the language of the FERPA notice should be limited to that set forth in the relevant federal regulations and Reed should not take it upon itself to provide further advice or guidance to non-party students who are potential witnesses in this matter. Finally, the Protective Order should be single-tier and not include any provision for the unnecessary "attorneys' eyes only" designation. We can see no basis for designating any of the materials likely to be discoverable in this case as "attorneys' eyes only" and having such a designation needlessly risks litigation delays and unnecessarily encumbers and retards discovery. The proposed orders attached to this motion reflect Doe's position and should be entered by the Court.

II. ARGUMENT

A. The Order Governing the Release of FERPA Materials Should Be Entered as Proposed.

The parties have conferred and tried in good faith to reach agreement on the language of the Order Governing FERPA Materials ("FERPA Order"). While we believe that the parties are generally in agreement in light of the Court's ruling, there remain a couple issues in dispute.

1. Notice Should Be Provided Only to the Student Whose Records Will Be Released.

The proposed FERPA Order states "[o]nly students whose own records are to be disclosed shall receive this notice, not student(s) who may be identified in another student's record." (Proposed Order ¶ 3.) The notice that Reed must provide pursuant to FERPA should not be provided to all students whose names appear in another student's education record. Such a result is not called for by the statute or its related regulations. 20 U.S.C. § 1232g(a)(4)

(defining "education records" as those records that are "directly related to a student"); 34 CFR 99.3 (same). FERPA requires notice to or consent from only the student whose own education record is being released. 34 CFR 99.31(a) (providing that a school "may disclose personally identifiable information *from an education record of a student*" in certain scenarios) (emphasis added). *See also Yu v. Vassar College*, 1:13-cv-04373-RA-MHD (S.D.N.Y. Mar. 6, 2014) (Order Concerning Confidential Information Produced in Discovery) and (Mar. 7, 2014) (Endorsed Order) (attached as Exhibit A(3) to ECF No. 26). In *Yu*, the Southern District of New York addressed this exact issue and concluded that the names of student witnesses identified in another student's record file should be provided without redaction and without any notice to those student witnesses.

Using Doe's own file as an example it is clear that the position that Reed takes is not supported by law or Reed's own written policies.[1] Doe's education record includes references to numerous students who served as witnesses or who participated in the disciplinary proceeding as part of the Sexual Misconduct Board and the Appeals Board, among other things. Pursuant to FERPA, Doe can give permission for the release of his entire record, including to other people or institutions. 20 U.S.C. § 1232g(b) (allowing for consent to release of student's education record). Reed can also release Doe's file to other educational institution to which Doe applies. *Id*. In either of these instances, Doe's entire record can be released with the names of these other students included (even absent some protective order, which would be in place here and would

[1] *See* Reed College Guidebook, "Disclosure of Student Information," http://www.reed.edu/academic/gbook/comm_pol/disclosure.html (accessed July 30, 2015) (explaining that FERPA provides certain rights, including "[t]he right to consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that FERPA authorizes disclosure without consent.")

govern the information).[2] *None* of those students would be given notice under FERPA about the release of Doe's file. It should not be any different when the records are released pursuant to judicial order.

Moreover, the position that Reed is advocating would create an enormous administrative burden for itself not envisioned by FERPA and would inevitably and unnecessarily slow down the production of important discovery materials. Likewise, it could create an incredible burden for the Court should it have to entertain requests for protective action from the hundreds or thousands of students that may be named as a witness in a disciplinary proceeding and identified as such in a disciplinary record, when the student whose record it actually is does not have any objection to its release.

2. The Notice Should Be Narrowly Crafted and Should Not Provide Additional Guidance to Potential Witnesses.

Similarly, the Order should contain an instruction preventing Reed from providing broader guidance to the non-party students who are potential witnesses. FERPA does not impose such an obligation, nor can one reasonably be read into the statute or the regulations. *See* 34 CFR 99.31(a)(9) (requiring school to make a "reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action"); 20 U.S.C. § 1232g(b)(2) (allowing release of information in compliance with a judicial order "upon condition that parents and the students are notified of all such orders or subpoenas in advance of compliance therewith by the educational institution or agency"). Notably, the requirement is only to *notify of the subpoena*, and does not require the

[2] Doe intends to maintain the confidentiality of student names pursuant to the Protective Order, just as he has used initials for the non-party students named in the First Amended Complaint. Whether or not these non-party students receive notification pursuant to FERPA or not is a different inquiry from whether the personally identifiable information is treated as confidential under a protective order.

school to take any other proactive steps. In fact, the statute and federal regulations even explicitly provide scenarios where such notification should not even occur, and thus require no further action from the school. *See* 20 U.S.C. § 1232g(b)(2)(B); 34 CFR 99.31(a)(9)(ii)(A)-(C). Allowing Reed to provide general advice or guidance outside that mandated by the statute and regulations risks influencing the non-party students' decisions or otherwise oversteps and impermissibly provides legal advice to potential witnesses.

B. The Protective Order Should Be Single-Tier and Not Include an "Attorneys' Eyes Only Designation."

The parties agree that a protective order is necessary in this case and generally agree on its terms. However, the parties disagree whether the protective order should be a single-tier or two-tier protective order (that is, with an "attorneys' eyes only" designation). We can see no basis for designating any of the materials likely to be discoverable in this case as "attorneys' eyes only" and thus do not think a two-tier protective order is necessary or even appropriate.

Though an "attorneys' eyes only" designation may be used for *any* confidential information pursuant to Rule 26(c), in practice, nearly all of the Ninth Circuit cases in which the "attorneys' eyes only" designation has been allowed have involved information of a proprietary or commercial nature (e.g., trade secrets, financial information, market research, patents, etc.). This makes sense, as the goal is to ensure competitors do not see each other's business information that could otherwise provide a competitive advantage or undermine the goals of the litigation itself. *See*, *e.g*., *Bryant v. Mattel, Inc.* No. CV 04 09049, C 04-09049 SGL RNBX, CV 04-09059, CV 05-2727, 2007 WL 5416684, at *4 (C.D. Ca. Feb. 6, 2007) (refusing to grant "attorneys' eyes only" designation to defendant's entire witness list because defendant had not "submitted a single declaration attesting to any company policy to treat employee identities as confidential business information" or that such information constituted a trade secret); *Wells*

Fargo Bank, N.A. v. Tinney, No. 11–CV–399–BR, 2011 WL 4950047, at *2 (D. Or. Oct. 18, 2011) (refusing to deny plaintiff's in-house counsel access to information marked "attorneys' eyes only" because "it is inappropriate to distinguish between in-house and retained counsel on the basis of a generalized risk of disclosure of confidential information to the client." (citing *U.S. Steel Corp. v. U.S.*, 730 F.2d 1465, 1468 (Fed.Cir.1984)); *Apple, Inc. v. Samsung Electronics Co., Ltd.*, No. 11–CV–01846–LHK2012, WL 10817203, at *4 (N.D. Ca. Jan, 30, 2012) (Agreed Upon Protective Order Regarding the Disclosure and Use of Discovery Materials) (ordering that "[a] Producing Party may designate Discovery Material as "HIGHLY CONFIDENTIAL—ATTORNEYS' EYES ONLY" if it contains or reflects sensitive business information that is trade secret, and/or commercially sensitive, *where substantial harm from disclosure cannot otherwise be avoided*." (emphasis added)).

Courts reserve the "attorneys' eyes only" designation for information that is highly confidential and cannot be protected by other less-restrictive measures. A party seeking such a designation must show that the disclosure of the material at hand to a non-attorney "would create a substantial risk of serious injury that could not be avoided by less restrictive means." *ASIS Internet Services v. Active Response Group*, No. C07 6211 THE, 2008 WL 2129417, *4 (N.D. Ca. May 20, 2008); *see also Defazio v. Hollister, Inc.*, No. CIV S-04-1358 DFL GGH, 2007 WL 2580633, at *1 (E.D. Ca. Sept. 5, 2007), (noting that "[d]esignations of "attorneys' eyes only" material shall be kept to the minimum absolutely necessary to protect very sensitive information.") The *Defazio* court cautioned against an "attorneys' eyes only" designation having the effect of leaving parties themselves in the dark about the litigation, particularly when they have something to contribute to the litigation strategy, stating: "the very real specter of over-designation of 'attorneys' eyes only' information exists, and plaintiffs should not be put in a

position where they are essentially kept in the dark about the important facts of the case." *Id.* at *2.

Moreover, nothing in FERPA requires the "attorneys' eyes only" designation. *See, e.g.*, *Dempsey v. Bucknell Univ.*, 4:11-cv-1679-MWB (M.D. Pa. June 29, 2012) (Order) (attached as Exhibit A(1) to ECF No. 26) (allowing distribution of FERPA information to parties). Likewise, a court in this circuit rejected a party's attempt to argue that information otherwise covered by a privacy-related statute (Children's Online Privacy Protection Act ("COPPA")) should be designated as "attorneys' eyes only." In *ASIS Internet Services v. Active Response Group*, No. C07 6211 THE, 2008 WL 2129417 (N.D. Ca. May 20, 2008), plaintiffs were Internet Service Providers ("IAPs") who sought to prevent the disclosure of thousands of email addresses, claiming that some of the email addresses (belonging to children) were covered under COPPA and therefore could not be disclosed. The court rejected that argument, holding that it was unlikely that IAPs were covered by COPPA, but, even if they were, the statute contains an exception to the parental consent requirement "to respond to judicial process." *Id.* at *2. (This is analogous to the disclosure exception contained in FERPA, wherein information may be disclosed "in compliance with a judicial order" 20 U.S.C. §1232g(b)). Further, the court refused to allow an "attorneys' eyes only" designation for the email addresses because plaintiffs provided no evidence to show that the disclosure of the email addresses "to another Party or non-party would create a substantial risk of serious injury that could not be avoided by less restrictive means." *Id.* at *4. Specifically, the court found that "[p]laintiffs have not explained why requiring those third parties to sign the agreement to be bound by the protective order is insufficient protection." *Id.*

Although Reed's proposed two-tier protective order does not include any definition of or limitation as to what should be protected by an "attorneys' eyes only" designation, counsel for Reed has suggested during the conferral process that the "attorneys' eyes only" designation is appropriate for "sensitive" items such as any rape kits or reports of stalking that may be included in the education records of non-party students. We do not believe that these potentially sensitive items require treatment any different from the other sensitive materials that will necessarily be included in the education records and otherwise securely protected by the standard single-tier protective order. It is exactly this type of sensitive information that the protective order as drafted is meant to include in its ambit.

Moreover, we have legitimate concerns that permitting an "attorneys' eyes only" designation and indicating it may be used for "sensitive topics" like rape kits or allegations of stalking will open the flood gates to a wide assortment of materials deemed too "sensitive" for Doe to see, resulting in "over-designation of 'attorneys' eyes only' [with Doe] put in a position where [he is] essentially kept in the dark about the important facts of the case." *Defazio*, 2007 WL 2580633, at *2. This is especially important when a central allegation of this case is that Reed violated Title IX in how it approached, investigated, adjudicated and resolved cases involving sexual assault and intimate partner violence. Rape kits, descriptions of rape, descriptions of sexual assault, descriptions of stalking or fears of stalking and other similar items or information may be sensitive materials, but what specific information they contain and Reed's response to them are extremely important to Doe's case – and they will all be sufficiently guarded under the protective order as drafted.

Use of a "attorneys' eye only" designation in the protective order for "sensitive materials" can only result in designations that are unjustified or that unnecessarily encumber or

retard the case development process and impose unnecessary burdens on Doe and his ability to participate meaningfully in his case. There is no need to wait for Doe to have to challenge these designations on an individual basis before the Court (and deal with the intervening substantial unfairness, unnecessary economic burdens, and disruptions to or delays of the litigation) when it is clear that there is no category of materials that requires the "attorney eyes' only" designation.

III. CONCLUSION

For the reasons set forth in this motion, the Court should enter the proposed Order Governing FERPA Materials and the proposed Protective Order, attached to this motion.

DATED this 31st day of July, 2015.

ANGELI UNGAR LAW GROUP LLC

By: s/ *David Angeli*
David H. Angeli, OSB #020244
Kristen L. Tranetzki, OSB #115730
Telephone: (503) 954-2232

BUCHANAN ANGELI ALTSCHUL & SULLIVAN LLP

Courtney W. Angeli, OSB #941765
Robin Bowerfind, OSB #035949
Telephone: (503) 974-5015

Attorneys for Plaintiff John Doe