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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

Portland

JOHN DOE, Plaintiff, v. **THE REED INSTITUTE** (aka, Reed College) and **JANE ROE**, Defendants.	**CV. 3:15-cv-00617-MO** DEFENDANT THE REED INSTITUTE'S RESPONSE TO OPPOSED MOTION TO SUBMIT PROPOSED ORDERS

There are two matters before the court on Plaintiff's Opposed Motion to Submit Proposed Orders (Dkt. No. 35), both of them following up on the status conference the parties requested to obtain the court's guidance on student record discovery. The two matters arise from Plaintiff's proposed form of order, and Plaintiff's opposition to the designation of a limited subset of records exchanged in discovery as "Attorney Eyes Only."

1. Plaintiff's Proposed Form of Order Exceeds the Scope of the Statements Made by the Court at the Status Conference

After the July 1, 2015 status conference, the parties were instructed to prepare an order consistent with the court's guidance about the manner in which student education records would be handled. (Dkt. No. 28). Plaintiff offered to prepare a draft, but the court should not sign it in its current form. The proposed order expands substantially on the court's guidance, "decides" issues that were not presented to the court, but also reflects an attempt to curtail the notice rights of student-victims and student-witnesses. Finally, the proposed order does not adequately address how any student might take protective action.

A. In any disciplinary file, records reflecting victims and witnesses are their own education records (as well as the student who is the subject of discipline) so that notice is required before any records are released.

The parties initially sought the court's guidance to address Reed's responsibilities under the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g and 34 C.F.R. Part 99 ("FERPA"), the statute that generally contemplates that students be provided notice and an opportunity to object to the release of protected education records in the context of litigation to which they are not a party.

The enjoyment of FERPA's protections of disciplinary files does not belong solely to students subject to disciplinary action. In 2002, the United States Department of Education sued for and won a permanent injunction against a university, in order to prevent the release of personally identifiable information in disciplinary files belonging to victims, witnesses, and students subject to disciplinary action. *U.S. v. Miami Univ.*, 294 F.3d 797 (6th Cir. 2002). In upholding the District Court's grant of permanent injunctive relief, the Sixth Circuit relied upon Congress' statement that "[o]ne explicit purpose of the FERPA is 'to protect [students'] rights to privacy by limiting the transferability of their records without their consent.'" *Id.* at 819 (citing Joint Statement, 120 Cong. Rec. 39858, 39862 (1974)). Therefore, the Sixth Circuit reasoned:

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> . . . the Universities' continued release of student disciplinary records clearly will injure the reputations of the students involved, including the perpetrator, the victim and any witnesses. In addition, the inherent privacy interest that Congress sought to protect will be greatly diminished. Once personally identifiable information has been made public, the harm cannot be undone.

Id. at 818. *See also K.L. v. Evesham Twp. Bd. of Educ*., 423 N.J. Super. 337, 363-64, 32 A.3d 1136, 1151 (App. Div. 2011) (School district's disciplinary referral form is simultaneously an education record of the subject and the victim).

Plaintiff's proposed order provides that notice will be given only to the student who is the subject of the disciplinary action, and Plaintiff asks the court to order that no notice be given to a student-victim or a student-witness whose records are part of a disciplinary file. That is contrary to the law. The statement or testimony of a student-victim is that student's own education record and, at the same time, it is the education record of the student who is subject to discipline. The same is true of a student-witness. Plaintiff's proposed order completely disregards the interests of student-victims and student-witnesses. FERPA regulations are explicit, and they extend beyond mere notice. In the case of a disciplinary proceeding involving a crime of violence or non-forcible sex offense, "the institution may not disclose the name of any other student [other than the alleged perpetrator], **including a victim or witness**, without the prior written consent of the other student." 34 C.F.R. § 99.31(a)(14) (emphasis added). These provisions are directly applicable to the kinds of offenses for which disciplinary records are sought here – records of alleged perpetrators of a crime of violence or a non-forcible sex offense, which the regulations identify as including "assault offenses" and "forcible sex offenses." Plaintiff's narrower view is apparent in his argument that no victim and no witness should receive notice. In Plaintiff's view, only the subject of the disciplinary proceeding receives notice, and that person alone gets to control whether an objection is made or not. There would be no need for 34 C.F.R. §

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99.31(a)(14) if FERPA could be read that way.

When counsel conferred, Plaintiff stated he was relying on a minute order from a New York matter, *Yu v. Vassar College* (*See* Dkt. No. 35; Dkt. No 26, Exh. A(3)). But in *Yu v. Vassar College* the court did the opposite of what Plaintiff is proposing here. The court directed that while the identity of other named students (victims or witnesses) could be released (almost certainly because this is directory information, which under FERPA may be subject to release without prior consent, *see* 34 C.F.R. § 99.31(a)(11)), for other information (in this case the audio recording of the disciplinary hearing), the school was required to provide advance notice to "any affected party." Additionally, Plaintiff's theory is contrary to the logic of FERPA. In a disciplinary proceeding for a sexual assault, the information from a victim might be very detailed, personal and private and may provide considerable information about that student's experiences (see Declaration of Gary Granger). That record is that individual's own education record. There is no legitimate support for allowing a student who is charged the right to object to production of the disciplinary records while at the same time denying that right to object to a person whose information may be considerably more worthy of protection. In other words, a disciplined student might be a rapist, but Plaintiff would allow the rapist to have the sole right to object to the disclosure of the full disciplinary file, no matter how wrenching and painful the narrative of the victim might have been. That one-sided position flies in the face of Department of Education concerns about protecting victim confidentiality to the extent possible. See, for example, http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf (the 2011 Dear Colleague Letter, at 5). More recently, the Department of Education cautioned that "Given the sensitive nature of reports of sexual violence, a school should ensure that the information is maintained in a secure manner. A school should be aware that disregarding requests for confidentiality can have a chilling effect and discourage other students from reporting sexual violence. * * * To improve trust in the process for investigating sexual violence complaints, a

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school should notify students of the information that will be disclosed, to whom it will be disclosed, and why." (http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf, the April 2014 Questions and Answers on Title IX and Sexual Violence at 19).

Plaintiff complains that providing notice is overly burdensome and administratively cumbersome. That is not an excuse to circumvent legal requirements or to disregard the legitimate interests of non-party students involved in disciplinary proceedings as testifying victims or witnesses. Nor is it an answer to say that the court should try to avoid requests for protective action by keeping these individuals in the dark about what is happening to records of an event in which they were, and still may be, vitally interested. It is far too soon to know whether "thousands" of students will approach the court for protection, but if those students have a right or an interest in doing so, they should be permitted to do so.

B. Plaintiff should not further limit the rights of non-party students by denying them information about how to raise any concerns they might have.

Plaintiff also is asking the court to limit the type of notice that will be provided to the nonparty student or former student whose disciplinary records are being sought. By regulation, Reed must make a reasonable effort to provide notice so that the student may seek protective action. Plaintiff, without any factual basis or legal authority, accuses Reed of intending to use some form of notice that will "overstep" or "impermissibly" provide legal advice – even though in conference Reed suggested preparing a template notice for the court's review. In any event, Plaintiff again reads the regulation too narrowly. The obligation is not merely to “provide notice.” It is, instead, to provide notice so that the student “may seek protective action.” 34 C.F.R. § 99.31(a)(9)(ii). That language contemplates that a person receiving such notice should be allowed some minimum information – perhaps the address of the court or the kind of process the court would like to have followed to raise objections, or whether "protective action" should be sought by notifying Reed. These students and former students should be allowed an

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opportunity to raise concerns without having to hire counsel to help figure out how to protect their interests. There are many kinds of notices that are sent to nonparties in litigation that provide this kind of information – notices to putative class members, for example, explain how to make an objection. There isn't any reason to provide less courtesy to these nonparties. Reed returns to what it suggested – that it provide the court with a template notice form.

C. Plaintiff's additional provisions, which the court did not direct, should not be included in this order. These provisions circumvent discovery procedures in a way that was not presented to the court and that the court should not permit.

Plaintiff has taken further liberties with the court's directive and turned a jointly requested guidance into something more like an order compelling production. Those additional provisions are not appropriate for this order:

i. "Shall immediately produce." Even though Plaintiff has acknowledged that there will be administrative burdens in the treatment of nonparty records, the proposed order would require Reed to "immediately" produce records at the end of the fourteen day notice period. Certainly Reed intends to fulfill its responsibilities promptly, but the reality is that the processing of these documents will take time so that "immediately" will not be possible, particularly if there is some question whether a student intends to challenge the request. Defendant does not yet know how many documents are likely to be identified, processed and produced and the court did not impose such an aggressive time line. Moreover, Plaintiff ignores that a student could object to production without Reed becoming immediately aware (such as by writing a private letter to the court). There are better words to use, including "promptly."

ii. "For which no request for protective action was filed." The court did not identify for the parties what kind of protective action might be appropriate, or even how a student might seek to take advantage of that protective action. Plaintiff assumes that a student is going to file a motion for a protective order, but absent instructions that tell the student that is the

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way to respond to the notice, a student might simply call Reed's registrar and direct her not to produce anything. Plaintiff objects to providing instructions of any kind, but failing to do so means students can respond to a notice in many different ways, some of which may not come to the court's attention.

iii. ""All" documents that "discuss, describe, refer to, relate to, or reflect….." The parties approached the court for guidance about FERPA's application to disciplinary files. Instead of reflecting the narrow issue, Plaintiff has vastly expanded the description of documents and turned the court's FERPA guidance into something that reads like Plaintiff's dream or an order compelling production. By slipping in language the court did not use, on issues that were not presented to the court, Plaintiff extends the production of documents well beyond what the parties discussed at the status conference. The court should not sign an order containing this language because of the scope of what it encompasses. For example, Plaintiff's language would order the production of Reed's communications with its lawyers about disciplinary events (since such a document is something that "relates to" an investigation or the evaluation of a policy violation). It would require Reed to produce any confidential counseling or medical records of a victim or a respondent. It would also require Reed to produce reports made to confidential sources that Title IX requires a school to keep confidential, or files currently under investigation. Beyond that, plaintiff's choice of words would call for Reed to look beyond its disciplinary files (which is what the parties approached the court to discuss) and produce documents discussing such subjects as how to store disciplinary files, communications with faculty to identify ancillary academic issues related to a traumatic event or campus investigation – such as communications between faculty and a student whose course work has been interrupted because of trauma or discipline. It would require Reed to produce student transcripts that might show that a student dropped a course, or records reflecting adjustments in a student's dorm assignment. It probably also includes articles written by students for inclusion in the student newspaper. If Plaintiff

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intends to seek those records, those requests need to go through the customary discovery process so that disputes, if any, can be presented to the Court with proper briefing. This order is supposed to be about the disciplinary files, which are identifiable and discrete. The parties did not discuss nor did the court have an opportunity to consider whether ancillary documents that merely "relate to" or "reflect" disciplinary matters of non-party students should be produced, and the court did not express that Plaintiff would be able to use this proposed order to circumvent customary discovery procedures and avoid conferring about objections. Instead, Plaintiff assured the court he was seeking only those narrow nonparty files that would be relevant to his Title IX claims. Instead, he has presented a proposed order that would require Reed to investigate whether a faculty member allowed a student in 2008 to substitute a take-home exam or research paper because he or she was emotionally distressed by a disciplinary event.

2. A two-tiered protective order is appropriate in this case

Court-supplied templates contemplate that there may be cases in which a two-tiered protective order (permitting an attorney-eyes only designation) is appropriate. In spite of that, Plaintiff is asking the court prospectively to forbid the use of an attorney-eyes only designation under any circumstances in this case, in advance of seeing any of the materials that are at issue. Reed believes that the nature of the discovery is such that preserving the option of this designation is prudent. Plaintiff's approach is not sensible in this case, particularly for investigation and disciplinary files of nonparty students.

Plaintiff's own authorities prove the point. While the attorney-eyes only designation is common in business cases to protect proprietary information, Plaintiff agrees that such a designation is not restricted to business cases. Trial courts within the Ninth Circuit have entered a two-tiered order in a variety of cases for a variety of reasons. *See Milke v. Ryan*, 711 F.3d 998, 1019 (9th Cir. 2013) (personnel records of detective in matter seeking post-conviction relief); *Marbet v. City of Portland*, No. CV 02-1448-HA, 2003 WL 23540258, at *8 (D. Or., 2003)

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(internal affairs records); *Cox v. Aero Automatic Sprinkler Co*., No. 5:14-CV-02723-EJD, 2015 WL 3658031, at *5 (N.D. Cal. June 12, 2015) (contact information of putative class members designated "highly confidential" and for attorney eyes only); *Walker v. Cnty. of Contra Costa*, No. C03-3723 TEH(JL), 2004 WL 2782870, at *1 (N.D. Cal. Dec. 3, 2004) (documents reflecting an employer's internal investigation into employment complaints); *Moreno v. Baca*, 2007 WL 549734, at *1 (C.D. Cal., 2007) (internal criminal investigation bureau records). Other trial courts have invoked the attorney-eyes only designation in Title IX cases where appropriate including *Simpson v. Univ. of Colorado*, 220 F.R.D. 354, 361 (D. Colo. 2004) (plaintiff's diary entries); *Herrera v. Santa Fe Pub. Sch*., No. CIV 11-0422 JB/KBM, 2013 WL 4782160, at *21 (D.N.M., 2013) (student's journal). The designation is not appropriate for all discovery materials, but it might be appropriate for some.

Plaintiff, instead, asks the court to assume that there will never be anything in any of the investigation and discipline files worthy of this kind of protection. That is a great leap to make before all files have even been gathered or evaluated. Even without that, the files are known to contain sensitive information including recollections of severe trauma, medical and emotional concerns, discussions of childhood sexual abuse, suicide or self-harm. It is not unlikely that some of the victims or witnesses will be former classmates of or personally known to Plaintiff (See Granger Decl). Their interests are as worthy of protection as a corporate financial statement might be.

When counsel conferred, Reed repeatedly told Plaintiff that it was not Reed's intention to designate a large number of materials as attorney-eyes only, but explained that there *might* be materials for which the designation is appropriate. In cases like this there is a place for an attorney-eyes only designation. There are safeguards to limit any negative effect it will have on any party's ability to develop his, her or its case, and Plaintiff will have a right to ask for the designation to be changed if appropriate.

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3. Reed's Proposal

Reed asks the court to provide further guidance on the issues referenced in this response and expresses its willingness to prepare a revised version of the two orders incorporating that guidance. If the parties still disagree the parties can return to the court.

DATED this 3rd day of August, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of August, 2015, I served the foregoing DEFENDANT THE REED INSTITUTE'S RESPONSE TO OPPOSED MOTION TO SUBMIT PROPOSED ORDERS on the following parties at the following addresses:

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by the following indicated method or methods on the date set forth below:

☑ Electronic filing using the court's ECF System

☐ Facsimile

☐ First-class mail, postage prepaid

☐ Hand-delivery

☐ Electronic Mail

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