

Investigator Training

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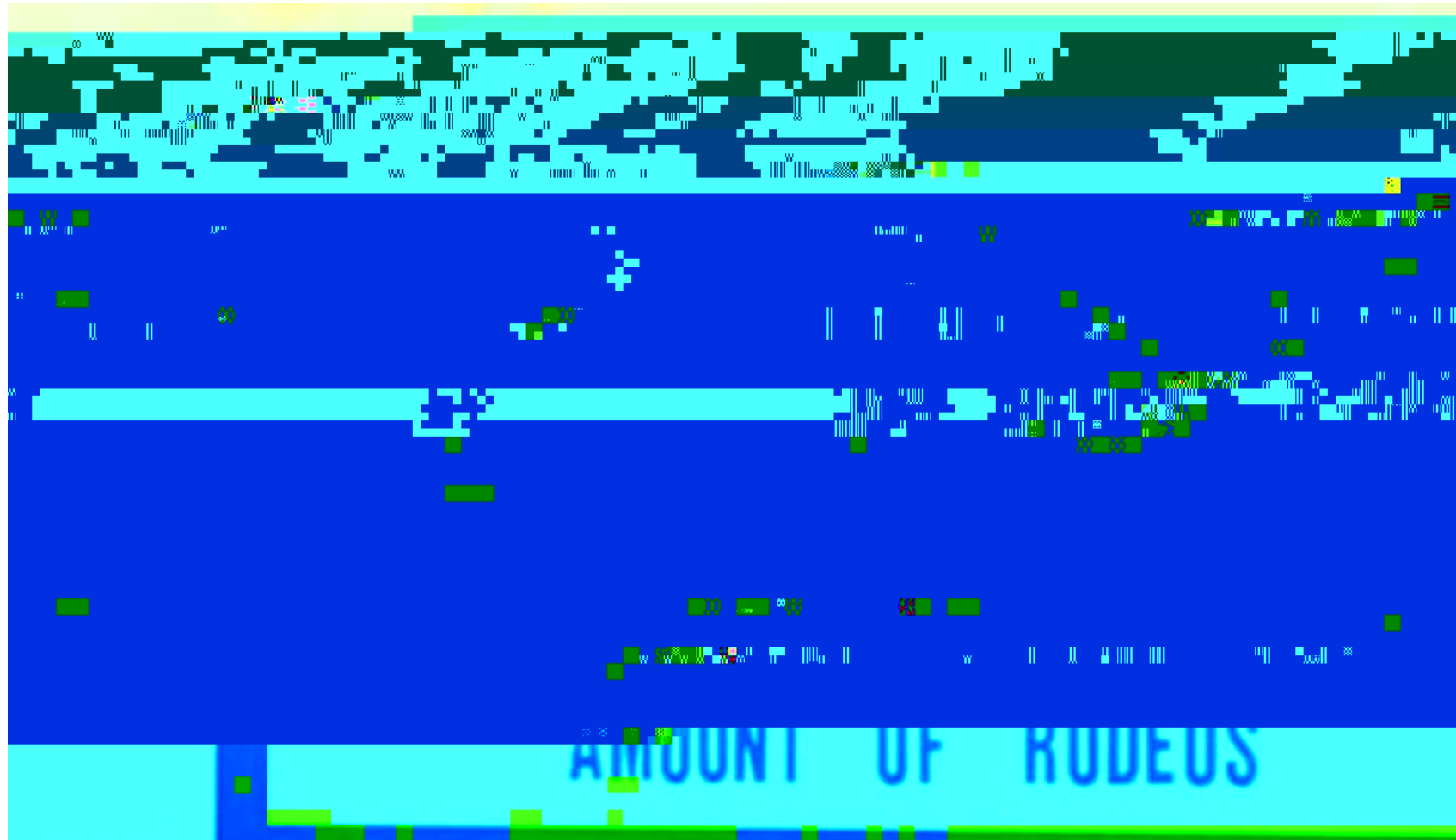
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Material discussed today is explicit

Investigation Best Practices



The Investigation



Coordinate investigation with law enforcement or others as necessary or appropriate

School has the legal obligation to conduct a prompt investigation

34 C.F.R. § 106.45 includes "law enforcement activity" as a "good cause" to delay "reasonably prompt" timelines

Keep criminal, child abuse, and professional reporting obligations in mind

Understand the Claim



Conduct a thorough interview of the complainant and identify specific allegations made

Identify specific provisions of law or parts of school policy alleged to have been violated

Conduct a thorough interview of the complainant and identify defenses

Time for investigation?



Review time line and plan accordingly

In addition to time taken to actually compile evidence, the parties must have at least ten days to review all evidence before a decision can be made by the decision maker

Time limit?

Regulations say the grievance process must have “reasonably prompt time frames for conclusion of the grievance process”
Investigation should take less time if facts are straightforward

Keep Parties Informed



No specific requirements to update parties at every step (other than notice of interviews and submission of evidence at end of investigation)

However, keeping parties informed can make the process run more smoothly

Credibility determinations and decision-making



Credibility determinations

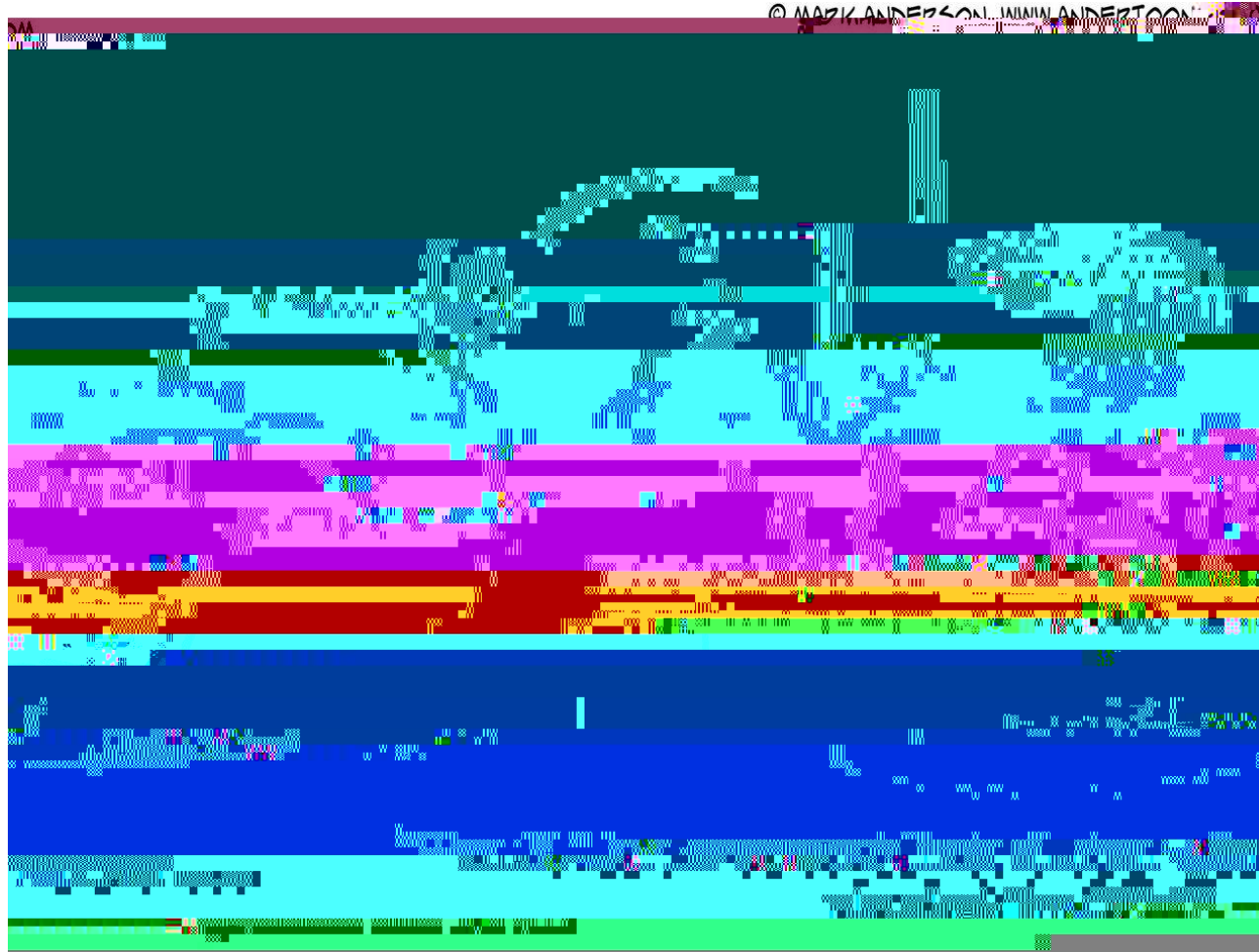
Cannot be made based on status of complainant, respondent, or witness

Generally left to the D-M, especially when they impact responsibility determinations

Investigator should report facts regarding physical behavior and indicators of reliability and truthfulness during interviews

Decision-making left to decision maker

Investigator should include facts that would bear towards responsibility or non-responsibility, but notes and report should not state any determination by the investigator



Interviews – Title IX



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

Interviews – All Investigations



Review any documents, videos, and other tangible evidence prior to interviews as appropriate

Bring relevant documents to interview

Outline and develop standard questions before the interview

Write out key questions and ask them the same way to every witness

Interviews – All Investigations



Interviews should be somewhere private with limited interruptions

Record? Take notes?

Taking notes during the interview—may slow down the interview but this is not necessarily a negative as it can help detect deception if party is nervous about your note taking
Should take place throughout interview, not just at incriminating or deceptive moments

Interviews – All Investigations



Take your time!

Introduce yourself and explain your role

Explain purpose of interview and how information will be used

Make clear they are not obligated to participate and the school can't retaliate against that decision

Employ empathy while maintaining professionalism

Interviews - All Investigations





Interviews – All Investigations



Don't use leading questions

Don't shy away from uncomfortable questions

Question with empathy and understanding

It's not an interrogation

Interviews – All Investigations



Have witnesses tell you what they know from personal knowledge and what they know from other sources

Listen to “hearsay” but record it as hearsay

Try to obtain information in chronological order to the extent possible

Identify potential witnesses

Interviews – All Investigations



Be comfortable with silence

Consider obtaining legibly written (or typed) and signed statements

Retaliation is prohibited

If they are threatened, harassed, etc., come to you

Don't make promises about outcomes

Interviews - All Investigations



Interviews – All Investigations



Ask if there is anything the witness wants to tell you that you didn't ask

Doe v. Forest Hills Sch. Dist.

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



High school girl alleged boy sexually assaulted her at school

Security footage inconclusive

Principal called the cops; cops did not initially charge*

Victim alleged she was harassed by peers after report

Doe v. Forest Hills Sch. Dist.

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



Family sued under Title IX

School: not deliberately indifferent

Court: "Here, the school admitted that it was waiting for the police investigation to make its determination and did not suspend MM until after he pled guilty to state charges."

Doe v. Forest Hills Sch. Dist.

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



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



TI X - Parties' Rights During Investigation—Right to Present Witnesses



Parties must have the opportunity to present witnesses during investigation

Can be both fact and expert witnesses if they wish

The investigation must “[p]rovide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence”

34 CFR 106.45(b)(5)(ii)

TI X - Parties' Rights During Investigation—Discussion of Allegations



TI X - Parties' Rights During Investigation— Right to Advisor



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

34 CFR 106.45(b)(5)(iv)

TIX - Parties' Rights During Investigation—Protection from Retaliation



Prohibition against retaliation

Cannot hold a party's (or a witness's) refusal to participate in the process against them

"Right to remain silent"

Applies both to investigation and employment

34 CFR 106.71(a)

TI X - Parties' Rights During Investigation—Reviewing All Evidence



Review of all compiled evidence

TI X - Parties' Rights During Investigation—Reviewing All Evidence



Review of all compiled evidence

Can be submitted electronically

Parties must have at least ten days to submit a written response to evidence, which investigator must consider prior to drafting report

Burden of Proof



34 CFR 106.45(b)(5)

“When investigating a formal complaint and throughout the grievance process, a recipient must—

(i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties”

How much needs to be proved?



Preponderance of the evidence

More likely than not

Clear and convincing evidence

When the evidence "instantly tilts the scales in the affirmative when

Report Writing



Report Writing



Report should include:

Summary of facts

Include your reasoning for a controversial or contested fact determination

Discuss facts related to credibility of witnesses, witness reluctance, witness tampering or retaliation, etc.

Statement of Jurisdiction (control over respondent, control over context of allegations, reasons for no mandatory dismissal)

Burden of proof (preponderance of the evidence or clear and convincing)

Report Writing



Use their words as much as possible

Should describe any prior relationships between the parties

TIX - Must be sent to each party or the party's advisor
Can be either in a hard copy or electronically



What evidence to put in report?

Relevant Evidence

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence

Who, what, when, how of allegations in the complaint

Credibility Determinations



Motive or bias of witnesses and parties

Objective indications of truthfulness or deceit (e.g. witness looked down during entire interview, witness was sweating and would start and stop sentences frequently, sobbing, etc.)

Relevant evidence can be both inculpatory (showing responsibility) and exculpatory (showing non-responsibility)

Credibility Determinations



Credibility determinations

Cannot be made based on status of parties or witness

TIX –

Legal Standards for Sanctioning Student Conduct (Non-TIX)



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



Student teacher urged students to visit her MySpace Page
comments criticizing her supervisor

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

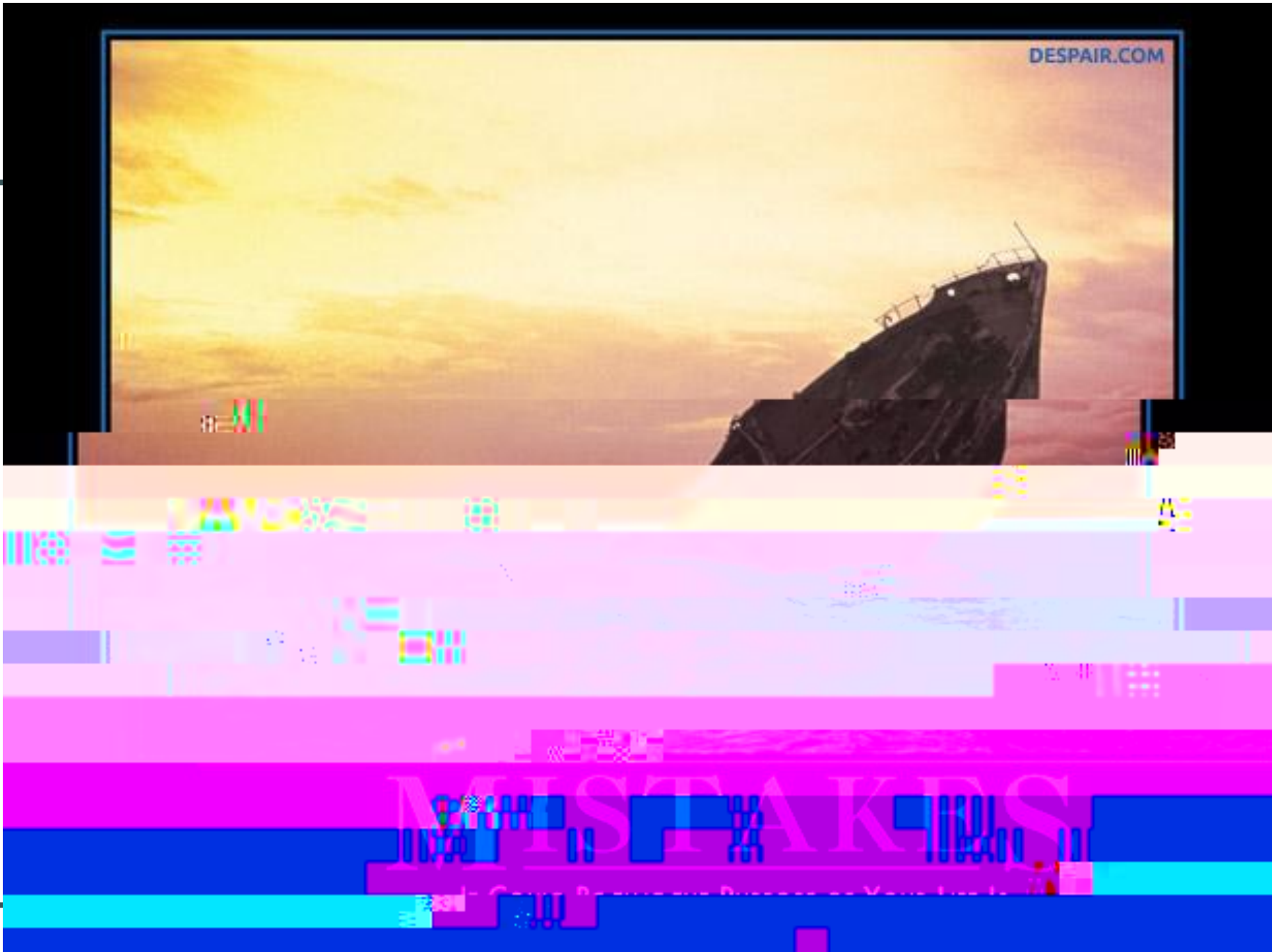


First tried to sue school, case dismissed

Then sued university claiming violation of First Amendment

Court: No protection because postings dealt only with purely personal matters, not issues of public concern

DESPAIR.COM



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



Plaintiff a freshman in creative writing

Had to keep a writing journal

described various teachers to whom he has felt sexually attracted in the past

About the professor

"She walks in and I say to myself "Drop, motherf*cker, drop."

"Kee-Rist, I'll never learn a thing. Tall, blond, stacked, skirt, heels, fingernails, smart, articulate, smile. I'm toast but I stay"

"Re-reading what I've previously written while drinking, its not as bad as I thought"

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



Sued, claiming First Amendment protection in journal

The Court:

“Plaintiff’s expressions of lust for [the professor] or descriptions of her physical appearance are not entitled to First Amendment protection.”

The writing “satisfied the legal definition of obscenity” and “sexual harassment”

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



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

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



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

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



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



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

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



Student in the Mortuary Science Program

Student posted about "Bernie"

getting to "play" with Bernie

"want[ing] to stab a certain someone in the throat with a trocar."

Student dismissed from the program

Sued on First Amendment grounds

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



MN Court of Appeals applied "Tinker"

Supreme Court of Minnesota:

Tinker not the standard for college

"A university may regulate student speech on Facebook that violates established professional conduct standards...with the qualification that any restrictions on a student's Facebook posts must be narrowly tailored and directly related to established professional conduct standards."



February 2019 PTAC Guidance



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

Education Records



An education record is defined by FERPA to include, with limited exceptions, any records that directly relate to a student and are maintained by an educational agency or institution

Can either be in print or computer media

Maintain is not defined in the act or its implementing regulations, so the best practice is to define maintain in district policy

Legitimate Educational Interest



Not explicitly defined by statute or regulation

Each institution told to define the term and include their definition in policy

US Department of Education

Direct Control



“Direct control requires the school district disclosing the records to ensure that outside parties that prov aT

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



School proposed designating EFOs (SROs) "school officials" with a "legitimate educational interest"

FPCO: Expressed serious skepticism the school would exercise requisite control over SRO to meet exception

What is the "legitimate educational interest?"

SROs could not re-disclose unless the disclosure meets another exception to consent

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



Case of the missing shoe in band class

School disclosed information from a student's education records to a school resource officer

SRO then re-disclosed the information to the student's parents and the county's prosecuting attorney

Parent complained to FPCO

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



School: SRO was a "school official" or "law enforcement unit"

Insufficient control over SRO to establish as a "school official"

Even if the SRO had qualified as a school official or law enforcement unit, he would not have been entitled to re-disclose the education records he had received from the school



34 C.F.R. § 99.36



Letter tr

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Letter to Hastings

119 LRP 1745 (FPCO 2018)



Student with a disability has violent meltdown

Throws chair and destroys property

Assaults several staff members

IEP included multiple strategies and supports to assist student regain emotional control

These were implemented with fidelity yet unsuccessful

Mother, who worked at district, came to the room but also failed to calm the Student

Letter to Hastings

119 LRP 1745 (FPCO 2018)



Incident resulted in injuries to student and multiple employees, including a para that was pregnant

Injured individuals brought to hospital for treatment

Pursuant to hospital policy, hospital employees contacted local law enforcement to report the assault

Local law enforcement responds and begins collecting information from district employees; para provides copy of the school incident report she wrote

Letter to Hastings

119 LRP 1745 (FPCO 2018)



Student is criminally charged after local law enforcement refer case to county attorney

Parents: District violated FERPA by disclosing an education record to the police

District: Disclosure fell within emergency exception because the para "reasonably concluded that there was 'an articulable and significant threat to the health or safety of a student or other individuals'"

Letter to Hastings

119 LRP 1745 (FPCO 2018)



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

