

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

JOHN DOE

v.

C.A. No.: 2016-17-S

BROWN UNIVERSITY IN PROVIDENCE
IN THE STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS

**DEFENDANT’S MEMORANDUM IN SUPPORT
OF ITS RESPONSE TO PLAINTIFF’S MOTION TO COMPEL OR,
IN THE ALTERNATIVE, PRECLUDE EVIDENCE**

Defendant Brown University (“Brown”) submits its memorandum responding to Plaintiff John Doe’s motion to compel or, in the alternative, preclude evidence (Doc. No. 26).

I. Status of Discovery

Brown has produced six witnesses for depositions – Gretchen Schultz (Title IX Council Chair), two of the three members of the hearing panel, and the three members of the appellate panel.¹ Five of the six depositions have been completed, with Professor Schultz’s deposition suspended pending this Court’s adjudication of Plaintiff’s motion. As the depositions have progressed, Plaintiff has requested that Brown produce various documents on a rolling basis, and Brown has given prompt attention to the compilation and production of the documents. The parties have scheduled depositions during the weeks of June 26 and July 3, including Deans Yolanda Castillo Appollonio, Maria Suarez, and Kristen Wolfe who have been served with document subpoenas at issue in the motion.

¹ The hearing panel member who has not been deposed graduated from Brown in May and is out of the country this summer.

II. The Discovery Matters Before The Court

Plaintiff's motion raises the following matters:

1. During Gretchen Schultz's deposition, Plaintiff requested that she disclose information and evidence obtained from her review of confidential education records in other student disciplinary proceedings.
2. Plaintiff has served subpoenas *duces tecum* upon Deans Castillo Appollonio, Suarez, and Wolfe of Brown's Office of Student Life seeking the production of records relating to Ann Roe (the complainant)² and Witness No. 9 (a female undergraduate at Brown). Specifically, the subpoenas seek (a) records received by the Office of Student Life from Ann Roe and/or Witness No. 9 regarding John Doe and (b) the Office of Student Life's records concerning no-contact orders between John Doe and the female students.³

Both matters raise issues under the Family Educational Rights and Privacy Act of 1974 ("FERPA") and its implementing regulations. 20 U.S.C. § 1232g, 34 C.F.R. 99. FERPA is the primary federal law that protects student education records. Brown is subject to FERPA, as a recipient of funds under programs administered by the United States Department of Education.

FERPA defines a "record" as "any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche." 34 C.F.R. § 99.3. Electronic records and e-mails are "computer media" within the definition. An "education record" is (1) directly related to a student and (2) maintained by the educational institution or a party acting for the institution. *Id.*

FERPA generally provides that before an educational institution may disclose a student's education records, it must obtain written consent from the student. 34 C.F.R. § 99.30. FERPA provides for exceptions to the consent requirement. *Id.* at § 99.31. An institution may disclose personally identifiable information from an education record without student consent to comply with a judicial order or a lawfully issued subpoena. *Id.* at § 99.31(a)(9)(i). Before complying

² Plaintiff has filed a separate action in this Court against Ann Roe. *John Doe v. Ann Roe*, C.A. No. 16-174-S.

³ The subpoenas refer to Ann Roe and Witness No. 9 by their names.

with the order or subpoena, the institution must make a “reasonable effort to notify” the student so that he or she may seek protective action. 20 U.S.C. § 1232g(b)(2)(B); 34 C.F.R. § 99.31(a)(9)(ii). The institution is not required to obtain any consent or acknowledgement from the student in response. It is required only to provide the requisite notice. FERPA does not define what constitutes timely notice.

III. Plaintiff’s Inquiry Requesting That Professor Schultz Disclose Information And Evidence From Other Confidential Disciplinary Proceedings

During the 2015-16 academic year, Brown implemented a Title IX Council, whose role is to review the information presented in an investigative report and determine if any individuals violated University policy. Professor Gretchen Schultz serves as the Chair of the Title IX Council. In each disciplinary case, three members of the Title IX Council form the hearing panel to consider evidence, deliberate, and render a decision by majority vote. Professor Schultz presides at the hearing as a non-voting member and administers the process with the three voting members.

Before the 2015-16 academic year, Professor Schultz served on Student Conduct Board panels that adjudicated sexual misconduct charges. For example, Professor Schultz presided on the Student Conduct Board panel that adjudicated during the fall of 2014 the disciplinary charges at issue in *John Doe v. Brown University*, C.A. No. 15-144-S.

As part of Professor Schulz’s deposition, Brown produced a reference sheet that Professor Schultz drafted during the 2014-15 academic year (the year in which incident involving Plaintiff and Ann Roe occurred), which outlines factors evidencing “consent” in a sexual interaction. Professor Schultz’s reference sheet was explored thoroughly by Plaintiff’s counsel during the deposition.

At various points during the deposition, Plaintiff sought to take his inquiry a step further by requesting that Professor Schultz disclose specific facts and evidence underlying other sexual

misconduct disciplinary proceedings at Brown. Brown's counsel raised FERPA concerns when the inquiry commenced and ultimately instructed Professor Schultz not to answer when the questioning focused specifically on the details of other disciplinary proceedings. Brown's counsel did so solely to ensure FERPA compliance.

Specifically, Plaintiff does not seek that Professor Schultz merely disclose information obtained from her personal knowledge or observation, or orally from others, which the Department of Education has stated is not protected under FERPA. Rather, Plaintiff seeks that Professor Schultz disclose information that she acquired from her review of confidential student education records as a panelist during other disciplinary proceedings. The FERPA concerns are not particular to Professor Schultz's deposition, as Plaintiff may intend to inquire about the details of other sexual misconduct complaints or proceedings with Deans Castillo Appollonio, Suarez, and Wolfe of Brown's Office of Student Life.

Plaintiff argues that there are no FERPA concerns because he will accept the requested information without names, addresses or student numbers. Such limitations or redactions, however, may not be sufficient because FERPA defines "personally identifiable information" to include "[o]ther information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty." 34 C.F.R. § 99.3.

The parties conferred in a good faith attempt to resolve the discovery dispute, but they have not reached an understanding as to the permissible scope under FERPA, if any, of Plaintiff's inquiry and the relevant time frame of such inquiry, if permitted. Brown also raised practical concerns that Plaintiff's inquiry may not be proportional to the needs of this case. Fed. R. Civ. P. 26(b)(1). Student disciplinary investigations and hearings can involve a significant

number of witnesses and exhibits. Plaintiff's intention to explore the information underlying other disciplinary cases could impede the expedited discovery track, and Brown wants this case to stay on course for a trial starting on July 18.

IV. The Subpoenas Served Upon the Office of Student Life Deans

Plaintiff has served subpoenas *duces tecum* upon Deans Castillo Appollonio, Suarez and Wolfe compelling Brown's production of the following documents:

(a) Any notes, records or other documentation regarding any complaints received by the Office of Student Life from [Ann Roe] and/or [Witness No. 9] regarding [Plaintiff John Doe]; (b) any notes, records, or other documentation relating to no-contact orders between [Plaintiff John Doe] and [Witness No. 9] and/or [Ann Roe].

Under 34 C.F.R. § 99.31(a)(9)(ii), Brown notified Ann Roe and Witness No. 9 of the subpoenas. Brown contacted Attorney Stephen Breggia, who is Ann Roe's counsel of record in John Doe's lawsuit against her. On June 25, Attorney Breggia responded that he is conferring with Ann Roe and may appear before this Court to oppose the disclosure of the records. Brown contacted Witness No. 9 by email, and she and her parents telephoned Brown's counsel on June 26. Witness No. 9 intends to consult with legal counsel. To avoid delay, Brown informed Ann Roe's counsel and Witness No. 9 of the expedited discovery schedule, this Court's telephone conference on June 28 with the parties' counsel, and the July 18 trial date.

In his motion, Plaintiff notes that, upon service of the subpoenas, Brown raised concerns about their broad scope (particularly as to e-mails) and the timing to comply. Brown has since compiled the responsive records.

V. There Is No Basis For A Preclusion Order Against Brown

Plaintiff suggests that this Court should enter a preclusion order limiting Brown's ability to present evidence at trial. Such a draconian sanction typically arises under Federal Rule of Civil Procedure 37(b) when a party has failed to comply with a court's discovery order. No such discovery order has been entered. Brown has simply raised concerns about FERPA issues and

ensuring the proportionality of the expedited discovery process, which this Court will resolve in its review and adjudication of the pending motion.

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CERTIFICATE OF SERVICE

I certify that, on the 27th day of June, 2016, I filed this Memorandum with the Court and served it electronically to counsel of record via the Court's CM/ECF system.

/s/ Steven M. Richard
