No. 21A-

IN THE

Supreme Court of the United States

JOHN DOE,

Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF CONTRA COSTA,

Respondent,

MEGAN KEEFER; KEITH ROGENSKI, SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT,

Real Parties In Interest.

TO THE HONORABLE ELENA KAGAN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT

APPLICATION FOR IMMEDIATE STAY OF INDEFINITE EMERGENCY REMOVAL FROM PUBLIC HIGH SCHOOL

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QUESTIONS PRESENTED

1. Whether a public high school may indefinitely suspend a student from campus under Title IX, pursuant to the Emergency Removal provisions in 34 C.F.R. § 106.44, subd.(c), without evidence showing that the student presents "an immediate threat to the physical health or safety of any student or other individual."

2. Should this Court issue a stay of an Emergency Removal order issued pursuant to 34 C.F.R. § 106.44, subd. (c) in order to prevent irreparable harm to a student where school administrators make no showing that the student presents "an immediate threat to the physical health or safety of any student or other individual"?

PARTIES TO THE PROCEEDING

Petitioner JOHN DOE, through his guardian ad litem JANE DOE, was, at all times relevant, a 15-year-old first-year student at California High School, a high school within the San Ramon Valley Unified School District.

Respondent MEGAN KEEFER was, at all times relevant, an individual in her official capacity as Principal and Title IX Coordinator Designee, California High School, a high school within Respondent San Ramon Valley Unified School District, and the decisionmaker who decided and imposed and upheld the Title IX Emergency Removal decision and order.

Respondent KEITH ROGENSKI was, at all times relevant, an individual in his official capacity as the individual designated by Respondent San Ramon Valley Unified School District as the employee responsible for coordinating the District's response to complaints and for complying with state and federal civil rights laws. Respondent KEITH ROGENSKI serves as the compliance officer and responsible employee who handles complaints regarding sex discrimination, receiving and coordinating the investigation of complaints and ensuring district compliance with law.

SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT (hereinafter "District") was, at all times relevant, a business entity of form unknown, having its principal place of business in Contra Costa County in the State of California. The San Ramon Valley Unified School District covers an 18 square mile area, encompassing the communities of Alamo, Blackhawk, Danville, Diablo, and San Ramon (including the new Dougherty Valley communities in east San Ramon) as well as a small portion of the cities of Walnut Creek and Pleasanton. The District is comprised of 36 schools serving more than 32,000 students in Transitional Kindergarten through Grade 12.

CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual. Respondent San Ramon Valley Unified School District is a public school district in Contra Costa County in the State of California

and has no shareholders. The remaining Respondents are individuals named in their official capacities as employees of the District.

RELATED PROCEEDINGS BELOW

- *Doe v. Keefer, et al.*, No. CIVMSN21-1450, Superior Court Of The State Of California For Contra Costa County. Order denying Petitioner's request for immediate stay of the Emergency Removal entered August 9, 2021. (Appendix A.)
- *Doe v. Superior Court for the County of Contra Costa*, No. A163237, California Court Of Appeal, First Appellate District. Order denying the petition for writ of supersedeas/prohibition and accompanying stay request issued August 12, 2021. (Appendix B.)
- *John Doe v. S.C. (Keefer)* No. S270383, California Supreme Court. Docket entry of order denying petition for review and application for stay issued August 25, 2021. (Appendix C.)

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TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT;

Pursuant to Rules 22, and 23 of the Rules of this Court, and 28 U.S.C. § 1257, Applicant/Petitioner John Doe respectfully requests that this Honorable Court issue a stay of his indefinite Emergency Removal from his public high school. The stay would be in effect pending judicial review in the California Superior Court of the merits of his petition for writ of mandate to set aside the public high school's arbitrary Emergency Removal order, which was issued and is maintained in the absence of any emergency and absence of any showing that Petitioner poses an "immediate threat to the physical health or safety of a student or other individual arising from the allegations of Title IX Sexual Harassment." (Appendix D, p. 17; see, 34 C.F.R. § 106.44, subd. (c).)

In *Goss v. Lopez* (1975) 419 U.S. 565, the Supreme Court held that students in public schools are entitled to constitutional due process. The court also found that when the school delays in granting this right, "the student meanwhile will *irreparably lose his educational benefits*." (*Goss*, at 581, n. 10, emphasis added.) This is a recognition that the loss of time, in the school setting, is irreparable. This request for a stay involves the irreparable loss of the benefits and experiences of high school.

This case appears to be one of first impression challenging a public high school's Emergency Removal of a student in reliance on new federal Title IX regulations at 34 C.F.R. § 106.44, subd. (c), which applies to some 15.3 million K-12 students in the United States,[1] as well as students at community colleges and private and public colleges and universities.

Emergency Removal is an appropriate tool for school administrators to

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[1] California Department of Education, Fingertip Facts on Education in California (April 29, 2021) https://www.cde.ca.gov/ds/ad/ceffingertipfacts.asp
Nationwide, 15.3 million student attend grades 9 to 12.
https://nces.ed.gov/fastfacts/display.asp?id=372#K12-enrollment

address actual emergencies and threats to student safety, but not where, when challenged, the school administrators cannot show an emergency or a threat to the physical health or safety of a student or other individual arising from the allegations of Title IX sexual harassment.

In the absence of unequivocal direction from courts regarding the showing required before school administrators may impose an Emergency Removal on a student pursuant to 34 C.F.R. § 106.44, subd. (c), or to maintain the Emergency Removal when challenged by the student, school administrators may arbitrarily decide that an "emergency" situation exists the moment any allegation of sexual harassment is made, regardless of its lack of veracity and the absence of an actual and "immediate threat to the physical health or safety of any student or other individual." The result is that students such as Petitioner are indefinitely separated from their educational programs and activities without any evidence or showing of an emergency or threat.

Students removed by school administrator on an emergency basis simply have no recourse to challenge the Title IX Emergency Removal other than by seeking writ relief, injunction, or applications for stay from the courts. Given the procedural posture of trial court stay orders, the issues presented here are unlikely to ever be addressed by courts except on request for extraordinary relief or this application for a stay. Without a stay, students suffer the irreparable and harmful consequences of lengthy, indefinite suspensions.

Here the California Superior Court trial judge denied that stay and set a hearing on the merits of the Emergency Removal for January 7, 2022, meaning that the student will suffer a five-month suspension from campus, with no showing of an emergency and no showing of an immediate threat to anyone.

Rather than an indefinite suspension under the guise of Emergency Removal, the District can simply have Petitioner avoid contact with Jane Roe and make sure they are not assigned to the same classes.

JURISDICTION

Petitioner sought a stay of the improper Emergency Removal order from the California Superior Court, the California Court of Appeal, and the California Supreme Court without success. The California Supreme Court denied Petitioner's request for a stay of the Emergency Removal and petition for review on August 25, 2021. The relief sought in this Application is not available from any other court or judge. This Court has jurisdiction to issue the requested relief in the form of a stay pursuant to 28 U.S.C. § 1257 and Rule 23.

STATEMENT OF THE CASE

The record of the California Superior Court proceedings was filed with the Court of Appeal, Exhibits In Support Of Petition For Writ Of Supersedeas, Prohibition And/Or Other Appropriate Relief, which is attached as Appendix D. Petitioner believes the materials are essential to understand this application for stay due to the factual nature of an Emergency Removal and stay relief.

I. FACTUAL SUMMARY

Petitioner John Doe, 15, dated classmate Jane Roe, 15, from approximately March 17, 2021, until April 13, 2021. After school on Tuesday, April 13, 2021, Petitioner informed Jane Roe via text messages that he did not love her and was breaking up with her. Jane Roe did not want to break up, and asked to talk, but Petitioner reiterated that he was "done with this relationship." (Appendix D, p. 118.)

At 7:37 p.m. on April 13, 2021, Jane Roe sent text messages to Petitioner pleading, "No [John] please, I can change" and "I know how to." Jane Roe sent a series of text message to Petitioner saying, "Please don't do this. I love u aka love u a lot. And I need u. [John] please talk to me what did I even do." (Appendix D, pp. 135-136.)

At 7:40 p.m., Petitioner responded, "we've been talking about this, please don't beg me it's not changing my mind, I'm done with this relationship. I have to go." (Appendix D, p. 136.)

At 7:41 p.m., Jane Roe responded "No [John] please. I have been there for u. And I need u in my fucking life. And I like u hella." (Appendix D, p. 136.)

At 7:42 p.m., Petitioner wrote "you don't need me in your life to live." Jane Roe responded, "I do, u have been there for me. And you always loves (sic) me. Loved. Cared about me. And never gave up on me." (Appendix D, p. 137.)

At 7:58 p.m., Petitioner texted Jane Roe, "we are done". (Appendix D,

Exhibit 6, p. 137.)

On April 15, 2021, Petitioner and Jane Roe were in theater class again and he offered her his hand to help her get up from sitting on the floor. (Appendix D, p. 137.)

Thereafter, Jane Roe told at least one other student that Petitioner had sexually assaulted her in a classroom with the teacher Laura Woods[2] and other students in the room. (Appendix D, pp. 111-112, 117, 127.)

According to social worker Lacy Canton, on April 21, 2021, Jane Roe told her that Petitioner had "sexually assaulted her last Wednesday [April 14] during theater class." (Appendix D, pp. 130-131.) Ms. Canton reported that Jane Roe also claimed that she had heard that another student had been sexually assaulted by "the perpetrator," John Doe, and said that John Doe sent numerous "provocative" messages to her, including pictures of his genitals. (*Id.*)

Social worker Ms. Canton emailed a "Student Incident" report to Respondent Keefer. (*Id.*)

On April 22, 2021, Respondent Megan Keefer called Petitioner to her office and informed him generally that Jane Roe had alleged that during a support period after their Theater class on April 15, 2021, Petitioner had sexually assaulted her. Petitioner denied the allegations. (Appendix D, p. 16.)

A. THE DISTRICT ISSUES THE EMERGENCY REMOVAL ORDER

Respondent Megan Keefer then left the room and returned moments later with a "Notice of Title IX Emergency Removal of Student" dated April 22, 2021, which asserts in relevant part:

> In response to the initial allegations, the District has undertaken an individualized safety and risk analysis and has determined that you pose an immediate threat to the physical health or safety of a student or other individual

[2] As a public school teacher, Laura Woods is a mandatory reporter. The District has provided no evidence indicating that Ms. Woods saw or heard what Jane Roe claims occurred.

> arising from the allegations of Title IX Sexual Harassment. The specific reasons for the decision are: substantial evidence leading to allegations of sexual assault(s) to students while on campus.
>
> (Appendix D, pp. 143-144.)

Respondents did not provide any evidence nor even describe the evidence that Respondents claimed justified the issuance of the Emergency Removal order. (*Id.*)

Petitioner was required to leave school immediately and was told not to return and that he would be completing his school year through independent study, with no direct instruction. (Appendix D, p. 16.) Petitioner was not provided any information about how he was supposed to complete his schoolwork until Monday, April 26, 2021. (*Id.*) Petitioner was told that he would need to personally contact his teachers to get assignments and instructions. Petitioner repeatedly requested and was not provided any results or analysis from any individualized safety and risk analysis. (Appendix D, p. 18.)

On April 26, 2021, after Respondents imposed the Title IX Emergency Removal on Petitioner, Jane Roe filed a Formal Complaint under the District's Title IX Sexual Harassment Complaint Procedures. (Appendix D, pp. 110-112.) In her Formal Complaint, which the District first provided to Petitioner almost three months later on July 13, 2021, Jane Roe alleges:

> In theatre, 4/15, during 5th period, [Petitioner] was involved.
>
> [Petitioner] started making out with me when I said no, He started going to my neck and started giving me hickeys when I kept saying no He started touching my boobs and kept playing with them when I kept saying no He then went down in my pants started rubbing and fingering me when I grabbed his hands to pull them out and I said no, he asked why, I said because we are in school plus I am not feeling the best He then kept doing it the he grabbed my hand and put my hand in his pants and I kept pulling my hand out and saying no
>
> (Appendix D, pp. 111-112.)

On Friday, April 30, 2021, Petitioner's Advisor sent an email to Respondent Keefer with the subject "Challenge to Removal of [John Doe] …" noting that Doe "is now receiving no instruction – either live or remote" and "has been removed from his academic environment and deprived of his educational opportunities." (Appendix D, pp. 193-194.) "This is effectively a suspension," the email continued, "which as a matter of long-standing federal law requires meaningful notice and a hearing – neither of which [John Doe] has been provided." (*Id.*)

On Monday, May 4, 2021, Petitioner's Advisor sent a follow-up email to Respondent Keefer attaching Petitioner's sworn declaration, including images of the text messages supporting exactly what Petitioner had told Respondent Keefer on April 22: that he had broken up with Jane Roe on April 13, and Roe was very upset and begged him not to break up with her. (Appendix D, pp. 192-193.) The declaration, signed under penalty of perjury, asserted that Jane Roe's allegations against him are "completely false." (Appendix D, p. 139.)

On May 7, 2021, Respondents issued a CORRECTED Notice of Title IX Emergency Removal of Student.

> In response to the initial allegations, the District has undertaken an individualized safety and risk analysis and has determined that you pose an immediate threat to the physical health or safety of a student or other individual arising from the allegations of Title IX Sexual Harassment. The specific reasons for the decision are: substantial allegations of sexual assault(s) to students while on campus.
>
> (Appendix D, pp. 101.)

The change is that Respondents no longer refer to "substantial evidence" as justification for the Emergency Removal order but rather refer to "substantial *allegations*." (Emphasis supplied.)

B. THE DISTRICT DENIES PETITIONER'S CHALLENGE TO THE EMERGENCY REMOVAL ORDER

On May 17, 2021, Petitioner's advisor requested a meeting to challenge the Title IX Emergency Removal order. (Appendix D, pp. 20, 104.)

On May 19, 2021, Petitioner was permitted to make a statement and present information to challenge the determination of "substantial allegations of sexual assault(s) to students while on campus." (*Id*.) Petitioner again denied the allegations, asserted that he does not pose a danger to anyone, and submitted a signed declaration under penalty of perjury attesting that Jane Roe's allegations are "completely false." (*Id*.; see also Appendix D, pp. 135-139.)

On May 21, 2021, Respondent Megan Keefer issued an "Outcome of Challenge to Title IX Emergency Removal of Student," upholding her own Title IX Emergency Removal decision. (Appendix D, pp. 104-105.) By challenging the Title IX Emergency Removal decision, Petitioner has exhausted his administrative remedies. Petitioner has no further avenue of administrative appeal to challenge Respondents' decision regarding the Title IX Emergency Removal.

On June 2, 2021, Jane Roe changed her allegations and claimed that the alleged conduct had occurred on April 13, 2021, hours before she and Petitioner broke up and she had begged him not to break up with her. (Appendix D, p. 81.)

On June 3, 2021, the District issued an Amended Notice of Allegations of Title IX Sexual Harassment by a Complainant. The Amended Notice, signed by Ken Nelson, Title IX Coordinator for the District states that F3Law attorneys serve as the investigator, judge, and appellate body vis-a-vis the District's Title IX administrative process. (Appendix D, p. 82.)

C. PETITIONER SEEKS A STAY PENDING JUDICIAL REVIEW OF THE EMERGENCY REMOVAL ORDER

On July 12, 2021, Counsel for Respondents confirmed that the Emergency Removal order would remain in effect for the start of the 2021-2022 school year. (Appendix D, p. 164.)

On July 13, 2021, the District provided Petitioner with an evidence packet for the first time. The evidence contains no witness statements. (See Appendix D, pp. 107-108, pp. 109-139.)

On July 30, 2021, Petitioner filed his Petition for Writ of Mandate to seek judicial review of the District's final Emergency Removal order. (Appendix D, p. 9.)

On August 4, 2021, Petitioner filed his application for an *ex parte* order to stay the Emergency Removal, which was amended to redact students' names. (Appendix D, Exhibit 5, pp. 57-79.)

Petitioner also sought to disqualify the District's law firm of F3Law as attorneys from the firm were actually conducting all roles in the Title IX administrative process, serving as investigator, decider, and appellate decider. (Appendix D, Exhibit 2, pp. 24-37.)

On August 9, 2021, the trial court denied Petitioner's *ex parte* application for a stay of the Emergency Removal order. (Appendix A.)

Petitioner is informed and believes, and on that basis alleges that on Friday, August 6, Respondent Kravitz informed Petitioner that he would have two options if the Emergency Removal was not struck down: (1) Independent Study, and (2) the District's new "Virtual Academy." The Virtual Academy is district-wide, so Petitioner has not been returned to his peer group at California High School. After Petitioner's request for a Stay of the Emergency Removal was denied on Monday, August 9, Petitioner immediately requested that he be enrolled in the Virtual Academy. As of the morning of August 11 – the second day of school – Petitioner had not received classroom links. The harm to Petitioner in not attending in-person education is not only educational, but also emotionally damaging, and precludes Petitioner from participating in the comradery, physical education and other

opportunities that are associated with attending high school.

D. PETITIONER HAS EXHAUSTED HIS APPLICATION FOR STAY RELIEF IN ALL LOWER COURTS

On August 11, 2021, Petitioner filed his Petition for Writ of Supersedeas, Prohibition, and/or Other Appropriate Relief in the First Appellate District.

On August 12, 2021, Division Five of the First Appellate District denied Petitioner's Petition. (Appendix B.)

On August 25, 2021, the California Supreme Court denied Petitioner's Petition for Review and requested stay of Emergency Removal order. (Appendix C.)

REASONS FOR GRANTING THE APPLICATION

I. EMERGENCY REMOVAL UNDER 34 C.F.R. 106.44, SUBD. (C) DOES NOT PERMIT REMOVAL OF STUDENTS FROM CAMPUS WITHOUT AN EMERGENCY OR SHOWING OF AN IMMEDIATE THREAT TO THE PHYSICAL HEALTH OR SAFETY OF ANY STUDENT OR OTHER INDIVIDUAL

> **(c) Emergency removal.** Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.
>
> (34 C.F.R. § 106.44, subd. (c).)

Federal regulations do not permit the maintenance of an Emergency Removal order in the absence of an emergency and in the absence of a showing of an

immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment.

Respondents issued their Emergency Removal order on April 22, 2021 based on the allegations of sexual harassment; however, Petitioner timely challenged the removal order as lacking any evidentiary support that Petitioner posed an immediate threat to the physical health or safety of any student or other individual. Respondents presented no evidence that Petitioner poses a threat to the physical health or safety of any student or other individual. Respondents' determination that Petitioner "poses an immediate threat to the physical health or safety of a student(s) or other individual(s)" in the absence of any such showing, is arbitrary and capricious.

In *Goss v. Lopez* (1975) 419 U.S. 565, the Supreme Court held that students in public schools are entitled to constitutional due process. The court also found that when the school delays in granting this right, "the student meanwhile will irreparably lose his educational benefits." (*Goss*, at 581, n. 10, emphasis added.) This is a recognition that the loss of time, in the school setting, is irreparable. This request for a stay involves the irreparable loss of the benefits and experiences of high school.

In the absence of unequivocal direction from courts and lawmakers regarding the showing required before a school may impose an "Emergency removal" on a student pursuant to 34 C.F.R. § 106.44, subd. (c), some school administrators have decided that an "emergency" situation exists the moment an allegation of sexual misconduct is made, regardless of its lack of veracity and the absence of an actual and "immediate threat to the physical health or safety of any student or other individual." The result is that students such as Petitioner are indefinitely separated from their education programs and activities without any evidence.

Students removed from school on an emergency basis have no recourse to challenge the Title IX Emergency removal, which can last for months while the Title IX investigation is ongoing. Given the procedural posture of trial court stay orders under Code Civ. Proc., § 1094.5, subd. (g), the issues presented are unlikely

to ever be addressed except on request for extraordinary relief.

II. RIGHT TO DUE PROCESS APPLIES TO PUBLIC K-12 SCHOOLS AND PUBLIC POST-SECONDARY EDUCATION.

The Fourteenth Amendment of the United States Constitution guarantees the right to procedural due process. (USCS Const. Amend. 14.) It is triggered when a state agency seeks to deprive a person of protected interests. (*Goss v. Lopez* (1975) 419 U.S. 565, 572.) A state cannot deprive a person of a public education without providing sufficient procedural due process. (*Coplin v. Conejo Valley Unified School District* (1995) 903 F. Supp. 1377.) "California has enshrined the right to education within its own Constitution. Accordingly, 'established California case law holds that there is a fundamental right of equal access to public education, warranting strict scrutiny of legislative and executive action that is alleged to infringe on that right.' (*O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1465.)" (*Collins v. Thurmond* (2019) 41 Cal.App.5th 879, 896.)

California statutory law, Code Civ. Proc., § 1094.5, requires that (1) there be "a fair trial," which "means that there must have been 'a fair administrative hearing'"; (2) the proceeding must be conducted "in the manner required by law"; (3) the decision must be "supported by the findings"; and (4) the findings must be "supported by the weight of the evidence," or where an administrative action does not affect vested fundamental rights, the findings must be "supported by substantial evidence in the light of the whole record."[3] (Code Civ. Proc., § 1094.5, subds. (a)-(c).) Petitioner's fundamental right to access to his public-school educational programs and activities are denied by Respondents' improper administrative removal order.

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[3] The Court may refrain from evaluating the sufficiency of evidence if there are errors in the administrative process. (*Doe v. Regents of University of California* (2018) 28 Cal.App.5th 44, 61.)

III. A STAY IS NECESSARY TO PREVENT STUDENTS' IMPROPER SEPARATION FROM THEIR EDUCATIONAL PROGRAMS AND ACTIVITIES WHILE JUDICIAL REVIEW IS PENDING.

Students have no other remedy to address unfair administrative disciplinary actions without first exhausting judicial remedies under Code Civ. Proc., § 1094.5. (*Pomona College v. Superior Court* (1996) 45 Cal.App.4th 1716, 1722–1723 (Code Civ. Proc., § 1094.5 applicable to private universities); *Gupta v. Stanford University* (2004) 124 Cal.App.4th 407, 411 (Code Civ. Proc., § 1094.5 applied to student who was subject to university disciplinary proceedings); *Doe v. Regents of the University of California* (9th Cir. 2018) 891 F.3d 1147, 1155 ("A party must exhaust judicial remedies by filing a § 1094.5 petition, the exclusive and 'established process for judicial review' of an agency decision."))

Under Code Civ. Proc., § 1094.5, subd. (g), trial courts have discretion to issue a stay of the operation of the administrative order or decision and are only required to be satisfied that the stay is not against the public interest. The statute does not require the court to make any additional findings in order to grant the stay. (*Canyon Crest Conservancy v. County of Los Angeles* (2020) 46 Cal.App.5th 398, 407.) If the Legislature had intended to require the trial court to make further findings to issue a stay, the Legislature would have included such language in Code Civ. Proc., § 1094.5, subd. (g).

Trial courts, however, impose on students additional burdens for the stay, not required by the statute, such as establishing that the stay is in the public interest or meeting the burden for issuance of a preliminary injunction.

The stay should issue in student conduct matters unless there is a showing that satisfies the court that the requested stay would be *against the public interest.* Petitioner has no burden to show the requested stay is in the public interest. Although "public interest" is not defined in the statute, there is most certainly public interest in fair disciplinary proceedings at California colleges, universities and high schools and little public interest, absent some evidence of danger, in the imposition of sanctions and discipline prior to judicial review on the merits.

Trial courts may not require, as often happens, that the student satisfy the two interrelated factors of (1) the likelihood that the plaintiff will prevail on the merits at trial and (2) the interim harm the plaintiff may suffer if the injunction is denied as compared to the harm that the defendant may suffer if the injunction is granted. (*Right Site Coalition v. Los Angeles Unified School Dist.* (2008) 160 Cal.App.4th 336, 338-339, 342; *Association of Orange County Deputy Sheriffs v. County of Orange* (2013) 217 Cal.App.4th 29, 49 (there must be "some possibility that the plaintiff would ultimately prevail on the merits of the claim."); *County of Kern v. T.C.E.F., Inc.* (2016) 246 Cal.App.4th 301, 317; see also *American Indian Model Schools v. Oakland Unified School Dist.* (2014) 227 Cal.App.4th 258, 271 (trial court's issuance of a preliminary injunction was also proper under Code Civ. Proc., § 1094.5, subd. (g), as not against the public interest.))

Without a stay, the student may suffer the entire adverse consequences of an improper Emergency Removal order, only to prevail later on the merits.

CONCLUSION

Based on the foregoing arguments in this application, the Applicant respectfully requests that the Circuit Justice or the Court issue a stay in light of the actual facts of the case and the well-settled law that students may not be separated from their educational programs, even temporarily, without Due Process.
Dated this 30th Day of August, 2021.

Respectfully Submitted,

By: /s/ Mark M. Hathaway
Counsel of Record

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APPENDIX A

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF CONTRA COSTA

N21-1450

JOHN DOE, an individual, minor through his parent and next friend JANE DOE,

Petitioner,

v.

MEGAN KEEFER, an individual, in her official capacity as Principal, California High School and Title IX Coordinator Designee, California High School; KEITH ROGENSKI, an individual, in his official capacity as Assistant Superintendent of Human Resources; SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT, a California corporation; and DOES 1 through 20, inclusive

Respondents.

Case No.: NC21-1450

[Hon. Barry Baskin, Dept. 7]

NOTICE OF ORDER DENYING PETITIONER'S *EX PARTE* APPLICATION FOR STAY OF ADMINISTRATIVE DECISION PENDING COURT REVIEW OF WRIT PETITION

Date: August 9, 2021
Time: 1:30 p.m.
Dept: 7

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 9, 2021 at 1:30 p.m., Petitioner's *ex parte* application for stay of administrative decision pending court review of writ petition came on for hearing before Honorable Barry Baskin in Department 7. Mark Hathaway, of Hathaway Parker,

and Dan Roth, of Law Office of Dan Roth, appeared on behalf of Petitioner. David R. Mishook and Jacqueline M. Litra, of Fagen Friedman & Fulfrost, LLP, appeared on behalf of Respondent. Judge Barry Baskin, having considered the parties' pleadings and oral arguments, denied Petitioner's e*x parte* application for stay of administrative decision pending court review of writ petition.

No court reporter was present and there is no transcript of the *ex parte* hearing.

HATHAWAY PARKER

Dated: August 10, 2021 By: _____

Mark M. Hathaway
Jenna E. Parker
Attorneys for Petitioner

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 445 South Figueroa Street, 31st Floor, Los Angeles, CA 90071.

On August 10, 2021, I served the foregoing document described NOTICE OF ORDER DENYING PETITIONER'S EX PARTE APPLICATION FOR STAY OF ADMINISTRATIVE DECISION PENDING COURT REVIEW OF WRIT PETITION on all interested parties listed below by transmitting to all interested parties a true copy thereof as follows:

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ATTORNEYS FOR RESPONDENTS

☐ BY FACSIMILE TRANSMISSION from FAX number (213) 529-0783 to the fax number set forth above. The facsimile machine I used complied with Rule 2003(3) and no error was reported by the machine. Pursuant to Rule 2005(i), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this declaration.

☐ BY MAIL by placing a true copy thereof enclosed in a sealed envelope addressed as set forth above. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

☐ BY PERSONAL SERVICE by delivering a copy of the document(s) by hand to the addressee or I cause such envelope to be delivered by process server.

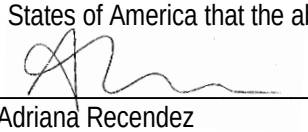
☐ BY EXPRESS SERVICE by depositing in a box or other facility regularly maintained by the express service carrier or delivering to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served.

☒ BY ELECTRONIC TRANSMISSION by transmitting a PDF version of the document(s) by electronic mail to the party(s) identified on the service list using the e-mail address(es) indicated.

☒ I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on August 10, 2021 in Los Angeles, California



Adriana Recendez

APPENDIX B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

JOHN DOE,
Petitioner,
v.
SUPERIOR COURT FOR THE COUNTY OF CONTRA COSTA,
Respondent;
MEGAN KEEFER, KEITH ROGENSKI, and SAN RAMON VALLEY SCHOOL DISTRICT,
Real Parties in Interest.
A163237
Contra Costa County No. NC211450

BY THE COURT:*

The petition for writ of supersedeas/prohibition and accompanying stay request are denied.

Date: 8/12/2021 Simons, J., , Acting P.J.

* Before Simons, Acting P.J., Burns, J., and Rodriguez, J. (Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution)

APPENDIX C

Appellate Courts Case Information

Supreme Court

Change court

Disposition

JOHN DOE v. S.C. (KEEFER)
Division SF
Case Number S270383

Only the following dispositions are displayed below: Orders Denying Petitions, Orders Granting Rehearing and Opinions. Go to the Docket Entries screen for information regarding orders granting review.

Case Citation:
none

Date	Description
08/25/2021	Petition and Stay denied

Click here to request automatic e-mail notifications about this case.

APPENDIX D

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT
DIVISION _____

A_____

JOHN DOE,
Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF CONTRA COSTA,
Respondent,

MEGAN KEEFER; KEITH ROGENSKI;
and SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT,
Real Parties in Interest.

FROM A DECISION OF THE SUPERIOR COURT OF CALIFORNIA,
COUNTY OF CONTRA COSTA · THE HONORABLE BARRY BASKIN
PHONE NO. (925) 608-1107 · DEPARTMENT 7 · CASE NO. NC21-1450

IMMEDIATE STAY IS REQUESTED OF RESPONDENTS' ADMINISTRATIVE ORDER OF MAY 21, 2021 (SUPERIOR COURT'S DENIAL OF REQUEST FOR STAY OF THE ADMINISTRATIVE ORDER WAS ISSUED ON AUGUST 9, 2021)

EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF SUPERSEDEAS, PROHIBITION AND/OR OTHER APPROPRIATE RELIEF

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Attorneys for Petitioner John Doe

TABLE OF EXHIBITS
(Chronological)

TABLE OF EXHIBITS
(Alphabetical)

EXHIBIT 1

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Attorneys for Petitioner John Doe

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR CONTRA COSTA COUNTY

JOHN DOE, an individual, minor through his parent and next friend JANE DOE,

Petitioner,

v.

MEGAN KEEFER, an individual, in her official capacity as Principal, California High School and Title IX Coordinator Designee, California High School; KEITH ROGENSKI, an individual, in his official capacity as Assistant Superintendent of Human Resources; SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT, a California corporation; and DOES 1 through 20, inclusive

Respondents.

Case No.: N21-1450

PETITION FOR WRIT OF MANDATE

[Code Civ. Proc., §§ 1085, 1086, 1094.5]

PER LOCAL RULE, THIS CASE IS ASSIGNED TO DEPT 7, FOR ALL PURPOSES.

Petitioner, an aggrieved high school student in the San Ramon Unified School District,

petitions for writ of mandate under Code Civ. Proc., § 1094.5, or in the alternative under Code Civ. Proc., § 1085, directed to Respondents in order to redress their improper Title IX disciplinary decision and order. Petitioner alleges further:

THE PARTIES

1. Petitioner JOHN DOE, through his guardian ad litem JANE DOE, was, at all times relevant, a 15-year-old first-year student at California High School, a high school within Respondent SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT, and a resident of San Ramon in Contra Costa County in the State of California.

2. Respondent MEGAN KEEFER was, at all times relevant, an individual in her official capacity as Principal and Title IX Coordinator Designee, California High School, a high school within Respondent SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT, and the decisionmaker who decided and imposed and upheld the Title IX Emergency Removal decision and order on Petitioner JOHN DOE.

3. Respondent KEITH ROGENSKI was, at all times relevant, an individual in his official capacity as individual designated by Respondent SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT as the employee responsible for coordinating the district's response to complaints and for complying with state and federal civil rights laws. Respondent KEITH ROGENSKI serves as the compliance officer and responsible employee who handles complaints regarding sex discrimination, receiving and coordinating the investigation of complaints and ensuring district compliance with law.

4. SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT (hereinafter "District") was, at all times relevant, a business entity of form unknown, having its principal place of business in Contra Costa County in the State of California. The SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT covers an 18 square mile area, encompassing the communities of Alamo, Blackhawk, Danville, Diablo, and San Ramon (including the new Dougherty Valley communities in east San Ramon) as well as a small portion of the cities of Walnut Creek and Pleasanton. The District is comprised of 36 schools serving more than 32,000 students in Transitional Kindergarten through Grade 12. The SAN RAMON VALLEY UNIFIED

SCHOOL DISTRICT purposely conducts substantial educational business activities in the State of California, and was the primary entity owning, operating and controlling California High School and employing Respondents MEGAN KEEFER and KEITH ROGENSKI, and was responsible for monitoring and controlling their activities and behavior.

5. Petitioner uses the pseudonyms of "John Doe" and "Jane Roe" in the Petition to due to federal and state regulations governing student records and student discipline and to preserve privacy in a matter of sensitive and highly personal nature, which outweighs the public's interest in knowing the parties' identity. Use of the pseudonyms does not prejudice Respondents because the identities of Petitioner and Jane Roe are known to Respondents. (See, Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99); *Starbucks Corp. v. Superior Court* (2008) 68 Cal.App.4th 1436 ["The judicial use of 'Doe plaintiffs' to protect legitimate privacy rights has gained wide currency, particularly given the rapidity and ubiquity of disclosures over the World Wide Web"]; see also *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531; *Johnson v. Superior Court* (2008) 80 Cal.App.4th 1050; *Roe v. Wade* (1973) 410 U.S. 113; *Doe v. Bolton* (1973) 410 U.S. 179; *Poe v. Ullman* (1961) 367 U.S. 497; *In Does I thru XXIII v. Advanced Textile Corp.* (9th Cir. 2000) 214 F.3d 1058; see, Cal. Rules of Court, rule 2.550.)

JURISDICTION AND VENUE

6. The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus directed to any inferior tribunal, corporation, board, or person. (Cal. Const., art. VI, § 10; see Code Civ. Proc. § 1084 ["mandamus" synonymous with "mandate"]; Code Civ. Proc. § 1085.)

7. Petitioner, an aggrieved high school student, seeks to exhaust judicial remedies through this petition for writ of mandate following Respondents' decision to impose a Title IX Emergency Removal, which is now final.

8. The doctrine of exhaustion of judicial remedies precludes an action that challenges the result of a quasi-judicial proceeding unless the plaintiff first challenges the decision though a petition for writ of mandamus. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70.)

9. Administrative mandamus is available for review of "any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer . . ." (Code Civ. Proc. § 1094.5, subd. (a).)

10. Ordinary mandate is a traditional remedy by which a court compels an inferior tribunal to perform a legally required duty. (Code Civ. Proc., § 1085.)

11. The Superior Court for the County of Contra Costa, the county where the Respondents are situated, is the proper court for the hearing of this action. (Code Civ. Proc. § 395.)

THE REGULATORY AND LEGAL FRAMEWORK

I. INTRODUCTION.

12. This is one of numerous cases that have arisen amidst the national controversy stemming from the U.S. Department of Education's Office for Civil Rights ("OCR")[1] threatening to withhold federal dollars in order to impose its guidance on schools as to how to investigate and adjudicate allegations of sexual misconduct[2] in order to stem a purported tide of sexual violence in American schools. OCR's efforts affect the rights of some 50 million students who attend elementary, middle, and high schools across the United States, as well as the distribution of $57.34 million in Federal funds to support K-12 public education.[3] OCR's threatened withholding of funds put tremendous pressure upon schools to aggressively prosecute males accused of sexual misconduct and severely discipline male students alleged to have engaged in sexual misconduct regardless of their innocence.[4]

13. As discussed below, OCR's efforts to enforce Title IX compliance applies to all public and private educational institutions that receive federal funds, including the District.

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[1] The Office for Civil Rights (OCR) is a sub-agency of the U.S. Department of Education and enforces several Federal civil rights laws, including Title IX.

[2] See, David G. Savage and Timothy M. Phelps, *How a Little-known Education Office Has Forced Far-reaching Changes to Campus Sex Assault Investigations*, (August 17, 2015) Los Angeles Times.

[3] Source: https://educationdata.org/public-education-spending-statistics

[4] A 2015 study examined why a high "percentage of sexual assault allegations are false" and the rationale behind many of these false allegations as being "retribution for a real or perceived wrong, rejection or betrayal." Reggie D. Yager, *What's Missing From Sexual Assault Prevention and Response*, (April 22, 2015), pgs. 46–62 http: ssrn.com/abstract=2697788).

A. Title IX.

14. The issue of sexual assaults in schools is, at the federal level, primarily addressed by an act of Congress known as Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688. From Title IX's enactment in 1972 until 1997, the Department of Education never asserted jurisdiction over student-on-student rape or sexual assault. In 1997, however, the Department issued regulations that required schools to have policies and procedures in place to deal with such conduct.[5]

15. Title IX requires every school that receives federal funds to establish policies and procedures to address sexual assault, including a system to investigate and adjudicate charges of sexual assault by one student against another. A school violates a student's rights under Title IX regarding student-on-student sexual violence if: (1) the alleged conduct is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's educational programs;[6] and (2) the school, upon notice, fails to take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects. The fundamental principle of such a system is that it be "prompt and equitable."[7]

16. On May 6, 2020, Education Secretary Betsy DeVos unveiled long-awaited federal regulations that bolster the rights of the accused students and give schools more flexibility in how they handle Title IX cases.[8] The new regulations come after years of wide-ranging research, input from sexual assault survivors, advocates, falsely accused students, school administrators, Title IX coordinators, and over 124,000 public comments.

17. In addition to Title IX and other relevant federal law, a state may have laws that govern campus sexual assault disciplinary proceedings, as California does.

---

[5] See generally Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. Ky. L. Rev. 49, 56-59 (2013).

[6] OCR requires that the conduct be evaluated from the perspective of a reasonable person in the alleged victim's position, considering all the circumstances.

[7] 34 C.F.R. § 106.8 (b).

[8] https://www.ed.gov/news/press-releases/secretary-devos-takes-historic-action-strengthen-title-ix-protections-all-students

B. California Law Regarding Student Discipline.

18. California's procedural and substantive standards for student disciplinary proceedings begin with Code Civ. Proc. § 1094.5 subdivisions (b):

> The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

C. Internal and External Pressure on School

19. One federal court recently held that "[a]ccused students are entitled to have their cases decided on the merits . . . and not according to the application of unfair generalizations or stereotypes because of social or other pressures to reach a certain result." (*Doe v. Brandeis Univ.* (D.Mass. 2016) 177 F.Supp.3d 561, 608.) This recognition of the effect of outside pressures on campus administrators is crucial in order to understand why the regulatory environment often plays a role in campus sexual assault proceedings where the accused student is invariably male.

20. There is non-governmental pressure as well. Victims' advocacy groups have made far more noise than groups advocating for the rights of the accused and have, to date, largely controlled the public debate. Again, there are financial considerations here. If a school is perceived as being on the wrong side of the "campus rape culture" issue—such as at Stanford, Occidental, and the University of Virginia—applications can be impacted, alumni and donor giving can slow, reputations can experience harm, and the school suffers. The bottom line is that in this highly politically charged environment, schools believe that the safer course of action is to accept all complaints and find accused students guilty when charged with sexual assault.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The District's Title IX Policies.

21. The District's Title IX policies are set forth in the District's 2020-2021 Family Handbook ("Handbook"), and the District's Title IX Sexual Harassment Complaint Procedures

("Procedures") (collectively, the "Policies").

22. The District is a recipient of federal funds and is bound by Title IX and its regulations.

23. The District's authority to enforce its Policies is delegated by the District to Respondent Keith Rogenski in his official capacity as Assistant Superintendent of Human Resources, and to Respondent Megan Keefer in her official capacity as Title IX Coordinator Designee at California High School.

24. The Policies apply to the District's employees and students.

25. The Policies promise students the right to "fair and equitable treatment" and to "not be discriminated against based on your sex." (Handbook p. 75.)

26. The Policies promise students "the right to be provided with an equitable opportunity to participate in all academic extracurricular activities, including athletics." (Handbook p. 75.)

27. The Policies provide,

> **Emergency Removal**
>
> A student may not be disciplined for alleged Title IX Sexual Harassment until the formal complaint process is completed and a determination of responsibility has been made. However, on an emergency basis, the district may remove a student from the district's education program or activity, provided that the district conducts an individualized safety and risk analysis, determines that removal is justified due to an immediate threat to the physical health or safety of any student or other individual arising from the allegations, and provides the student with notice and an opportunity to challenge the decision immediately following the removal. This authority to remove a student does not modify a student's rights under the Individuals with Disabilities Education Act or Section 504 of the Rehabilitation Act of 1973. (34 CFR 106.44.) (Procedures, p. 4.)

28. The Federal Regulations cited in the Policies make clear that Emergency Removal is appropriate only in situations concerning "genuine emergencies involving the physical health or safety of one or more individuals." (85 Fed. Reg. 30225.)

B. Reported Alleged Conduct

29. Petitioner John Doe dated classmate Jane Roe from approximately March 17, 2021, until April 13, 2021.

30. On Tuesday, April 13, 2021, Petitioner informed Jane Roe via text messages that he did not love her and was breaking up with her.

31. Jane Roe did not want to break up, and asked to talk, but Petitioner reiterated that he was "done with this relationship."

32. At 7:37 p.m. on April 13, 2021, Jane Roe sent text messages to Petitioner pleading, "No [John] please, I can change" and "I know how to."

33. At 7:37 p.m. on April 13, 2021, Jane Roe sent a series of text message to Petitioner saying, "Please don't do this. I love u aka love u a lot. And I need u. [John] please talk to me what did I even do."

34. At 7:40 p.m., Petitioner responded, "we've been talking about this, please don't beg me it's not changing my mind, I'm done with this relationship. I have to go."

35. At 7:41 p.m., Jane Roe responded "No [John] please. I have been there for u. And I need u in my fucking life. And I like u hella."

36. At 7:42 p.m., Petitioner wrote "you don't need me in your life to live."

37. At 7:42 p.m., Jane Roe responded, "I do, u have been there for me. And you always loves (sic) me. Loved. Cared about me. And never gave up on me."

38. At 7:58 p.m., Petitioner texted Jane Roe, "we are done".

39. The only time after April 13, 2021, that Petitioner had any physical contact with Jane Roe was two days later, on April 15, 2021, when he offered her his hand to help her get up from sitting on the floor. Petitioner never had any nonconsensual physical contact with Jane Roe.

40. On Thursday, April 22, 2021, Petitioner was removed from classroom instruction at California High School.

41. Respondent Megan Keefer called Petitioner into her office and verbally informed him generally that Jane Roe had alleged that during a support period after their Theater class on April 15, 2021, Petitioner had sexually assaulted her. Petitioner denied that allegation.

42. Respondent Megan Keefer then left the room and returned moments later with a "Notice of Title IX Emergency Removal of Student" dated April 22, 2021, which reads,

Dear [Petitioner],

On April 22, 2021, the San Ramon Valley Unified School District ("District") received allegations of Title IX Sexual Harassment against you.

In response to the initial allegations, the District has undertaken an individualized safety and risk analysis and has determined that you pose an immediate threat to the physical health or safety of a student or other individual arising from the allegations of Title IX Sexual Harassment. The specific reasons for the decision are: substantial evidence leading to allegations of sexual assault(s) to students while on campus.

Accordingly, the District has determined that you should be removed from the District's education program or activity on an emergency basis under Title IX of the Education Amendments of 1972 and its implementing regulations.

The Title IX Coordinator will notify the Board of Education of its determination that you are eligible for a Title IX emergency removal and should not be allowed to participate in the the (sic) District's education programs or activities until after the investigation into the allegations of Title IX Sexual Harassment concludes.
No person is permitted to intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in the Title IX procedures. If any individual is harassed or intimidated because of filing a complaint or participating in any aspect of the District's Title IX Sexual Harassment Complaint Procedures, that individual may file a complaint alleging such treatment using the District's Board Policy. See attached copies and links:

http://www.gamutonline.net/district/sanramonvalleyusd/DisplayPolicy/1050532/

http://www.gamutonline.net/district/sanramonvalleyusd/DisplayPolicy/1050533/

http://www.gamutonline.net/district/sanramonvalleyusd/DisplayPolicy/1050895/

You can challenge this emergency removal decision under Title IX by contacting Megan Keefer.

Sincerely,

Title IX Coordinator Designee

43. Petitioner was required to leave school immediately and was told not to return.

44. Petitioner was not provided any information about how he was supposed to complete his schoolwork until Monday, April 26, 2021. Petitioner was told that he would need to personally contact his teachers to get assignments and instructions.

45. Petitioner was not provided any results or analysis from any individualized safety and risk analysis.

46. Pursuant to the Federal Regulations, a Title IX Emergency Removal may only be implemented in cases of "genuine emergencies involving the physical health or safety of one or more individuals."

47. Respondents did not conclude that there was a genuine emergency involving the physical health of safety of anyone to justify a Title IX Emergency Removal of Petitioner from the District's education programs or activities.

48. "Substantial evidence" does not support a "genuine emergency" involving physical health or safety.

49. Under the District's Procedures, there must be an identified "immediate threat to the physical health or safety of any student or other individual arising from the allegations."

50. Respondents did not identify any "immediate threat" to anyone's physical health or safety which would justify a Title IX Emergency Removal of Petitioner from the District's education programs or activities.

51. On April 26, 2021, a Formal Complaint was filed by Jane Roe against Petitioner under the District's Title IX Sexual Harassment Complaint Procedures. The Formal Complaint alleges:

> In theatre, 4/15, during 5th period, [Petitioner] was involved.
> [Petitioner] started making out with me when I said no, He started going to my neck and started giving me hickeys when I kept saying no He started touching my boobs and kept playing with them when I kept saying no He

> then went down in my pants started rubbing and fingering me when I grabbed his hands to pull them out and I said no, he asked why, I said because we are in school plus I am not feeling the best He then kept doing it the he grabbed my hand and put my hand in his pants and I kept pulling my hand out and saying no

52. Petitioner continues to deny the false and salacious allegations levelled by Jane Roe after Petitioner broke up with her and she pleaded with him to take her back, but he declined.

53. There is no evidence to support that Petitioner and Jane Roe resumed a dating or intimate relationship after they broke up in the early morning on April 13, 2021.

54. Petitioner and Jane Roe never had any intimate contact on school grounds, other than kissing while they were dating.

55. Respondent imposed the Title IX Emergency Removal before receiving a formal complaint from Jane Roe.

56. Respondent imposed the Title IX Emergency Removal before collecting any evidence that might support Jane Roe's allegations.

57. Respondent's actions in imposing a Title IX Emergency Removal are arbitrary and capricious, and an unlawful abuse of discretion.

58. On May 7, 2021, Respondent Megan Keefer issued a "CORRECTED Notice of Title IX Emergency Removal of Student." The only change to the document is the purported justification for the Title IX Emergency Removal. Respondent Megan Keefer characterized the initial explanation in the April 22, 2021 "Notice of Title IX Emergency Removal of Student" as a "typographical error." The "corrected" version explains, "The specific reasons for the decision are: substantial allegations of sexual assault(s) to students while on campus."

59. The phrase, "substantial allegations of sexual assault(s) to students while on campus" is nonsensical and devoid of any actual meaning.

60. The "CORRECTED Notice of Title IX Emergency Removal of Student" still articulates no "genuine emergency" involving anyone's physical health or safety that would justify a Title IX Emergency Removal of Petitioner from the District's education programs or activities.

61. Even after correcting the Title IX Emergency Removal order, Respondents still cannot

identify any "immediate threat" to anyone's physical health or safety to justify the Title IX Emergency Removal of Petitioner from the District's education programs or activities.

62. On May 17, 2021, Petitioner's advisor requested a meeting to challenge the Title IX Emergency Removal.

63. On May 19, 2021, Petitioner was permitted to make a statement and present information to challenge the determination of "substantial allegations of sexual assault(s) to students while on campus."

64. Petitioner again denied the allegations, asserted that he does not pose a danger to anyone, and submitted a signed declaration under penalty of perjury attesting that Jane Roe's allegations are "completely false."

65. On May 21, 2021, Respondent Megan Keefer issued an "Outcome of Challenge to Title IX Emergency Removal of Student," upholding her own Title IX Emergency Removal decision.

66. By challenging the Title IX Emergency Removal decision, Petitioner has exhausted his administrative remedies.

67. Petitioner has no further avenue of administrative appeal to challenge Respondents' decision regarding the Title IX Emergency Removal.

III. RESPONDENTS' ACTIONS AND DECISION ARE INVALID

68. On information and belief, Respondents' final administrative order or decision is invalid under Code Civ. Proc. § 1094.5 because Respondents proceeded without, or in excess of, jurisdiction; failed to conduct a fair trial; and committed a prejudicial abuse of discretion. Respondents have failed to proceed in the manner required by law.

69. Alternatively, on information and belief, Respondents' final administrative order or decision is invalid under Code Civ. Proc. § 1085 because Respondents has a clear, present, and ministerial duty to follow Title IX and the District's Policies and not subject students to Title IX Emergency Removal short of an immediate threat to the physical health or safety of a student or other individual, and Petitioner has clear, present and beneficial rights to his education, his reputation, Due Process, and equitable treatment under Title IX and the District's Policies. Respondents' actions are arbitrary, capricious, and lacking in evidentiary support.

A. Doctrine of Judicial Non-Intervention Does Not Apply.

70. The doctrine of judicial nonintervention into the academic affairs of schools does not apply in instances of non-academic affairs, such as the District's Title IX proceeding. (See *Banks v. Dominican College* (1995) 35 Cal.App.4th 1545; *Paulsen v. Golden Gate University* (1979) 25 Cal.3d 803.)

B. Respondent's Administrative Action Affects Vested Fundamental Rights.

71. The District's administrative process affects Petitioner's vested fundamental right to public education, and his vested fundamental right under Title IX to equal access to education programs and activities.

72. Respondents' actions and decision deprive Petitioner of fundamental vested rights; therefore, the reviewing court must exercise its independent judgment to independently weigh the evidence pursuant to Code Civ. Proc., § 1094.5, subd. (c).

73. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, other than the relief sought in this petition. "The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested." (Code Civ. Proc. § 1086.)

74. Petitioner has requested the administrative record of Respondents administrative action and decision and reserves the right to amend this Petition when Respondents produce the complete administrative record.

75. Petitioner brings this action not only for his own interest, but to protect the rights of other individuals and members of the public who have been subjected to wrongful and unfair disciplinary proceedings by the District and other institutions of higher learning.

76. Petitioner is obligated to pay an attorney for legal services to prosecute this action. Petitioner may be entitled to recover attorney's fees as provided in Code Civ. Proc., § 1021.5, or alternatively Govt. Code, § 800, if Petitioner prevails in the within action.

/ / /

/ / /

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays the court for judgment as follows:

1. That the court issue a peremptory writ in the first instance commanding Respondents to set aside their decision to proceed with disciplinary charges in violation of their jurisdiction and lawful authority;

2. For an alternative writ of mandate directing Respondents to set aside their decision to proceed with disciplinary charges in violation of their jurisdiction and lawful authority, or to show cause why a peremptory writ of mandate to the same effect should not be issued;

3. For reasonable attorney's fees and litigation expenses as permitted by statute, in addition to any other relief granted or costs awarded;

4. For all costs of suit incurred in this proceeding; and

5. For such other and further relief as the court deems proper.

HATHAWAY PARKER

DATED: July 29, 2021 By: _____
Mark M. Hathaway
Attorney for Petitioner

VERIFICATION

I am the attorney for Petitioner in this action. Such party is absent from the county where this action is pending. I make this verification for and on behalf of that party for the reason pursuant to California Code Civ. Proc., § 446. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on the date below at Los Angeles, California.

Date: July 29, 2021

Mark M. Hathaway

EXHIBIT 2

MARK M. HATHAWAY
(CA 151332; DC 437335; NY 2431682)
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Attorneys for Petitioner John Doe

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR CONTRA COSTA COUNTY

JOHN DOE, an individual, minor through his parent and next friend JANE DOE, Petitioner, v. MEGAN KEEFER, an individual, in her official capacity as Principal, California High School and Title IX Coordinator Designee, California High School; KEITH ROGENSKI, an individual, in his official capacity as Assistant Superintendent of Human Resources; SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT, a California corporation; and DOES 1 through 20, inclusive Respondents.	Case No.: NC21-1450 [Hon. Barry Baskin, Dept. 7] ***EX PARTE* APPLICATION FOR ORDER TO DISQUALIFY FAGEN, FRIEDMAN & FULFROST, LLP ("F3LAW") AS ATTORNEYS FOR RESPONDENTS** [*Proposed Order lodged herewith*] Date: August 5, 2021 Time: 11:00 a.m. Dept. 7

TO THE COURT AND ALL PARTIES AND THEIR ATTORNEYS:

PLEASE TAKE NOTICE that Petitioner hereby submits his Ex Parte Application for an Order

To Disqualify Fagen, Friedman & Fulfrost, LLP ("F3Law") As Attorneys For Respondents on August 5, 2021 at 11:00 a.m. in Dept. 7 before Hon. Barry Baskin

There is urgency because Petitioner is seeking to stay the operation of Respondents' administrative decision to exclude Petitioner from campus and the attorneys from F3Law who conducted the Title IX adjudicative process as investigator, judge, and appellate judge now seek to represent Respondents in this Writ of Mandate action.

Petitioner's application is based on the Petition for Writ of Mandate herein; this application; the supporting memorandum of points and authorities; the declaration of Mark M. Hathaway and exhibits thereto, the pleadings, files, and records in this action; and any such argument as may be received by this Court at the hearing on the application.

HATHAWAY PARKER

Dated: August 4, 2021

By: _____
MARK M. HATHAWAY
JENNA E. PARKER
Attorneys for Petitioner

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MEMORANDUM OF POINTS AND AUTHORITIES

Petitioner, an aggrieved high school student in the San Ramon Valley Unified School District, petitions for writ of mandate under Code Civ. Proc., § 1094.5, or in the alternative under Code Civ. Proc., § 1085, directed to Respondents in order to redress their improper Title IX administrative decision and order to exclude him from campus though an administrative process lacking in Due Process. The attorneys seeking to represent Respondents in this writ matter were the same attorneys who served during the Title IX adjudicative process as investigator, judge, and appellate judge. Accordingly, these attorneys and their firm must be disqualified, thereby protecting the integrity of the judicial review.

I. THE FAGEN, FRIEDMAN & FULFROST, LLP FIRM AND ITS ATTORNEYS (COLLECTIVELY "F3LAW") MUST BE DISQUALIFIED TO AVOID PREJUDICE TO PETITIONER AND TO ENSURE CONFIDENCE IN THE JUDICIAL SYSTEM, PARTICULARLY WHERE, AS HERE, NO PREJUDICE TO RESPONDENTS WILL BE WORKED BY THE PROPOSED DISQUALIFICATION.

Respondent SRVUSD is an agency currently undertaking an administrative action against Petitioner's minor son. Three F3Law attorneys are tasked with investigating, decision making, and appellate authority at the agency level. Their firm therefore cannot serve as counsel in the judicial review of their own colleagues' work.

The June 3, 2021, "Amended Notice of Allegations of Title IX Sexual Harassment by a Complainant," signed by Ken Nelson, Title IX Coordinator for defendant San Ramon Valley Unified School District (SRVUSD) demonstrates that the F3Law is prohibited from representing the District in this litigation. Specifically, the letter establishes that F3Law attorneys serve as the investigator, judge, and appellate body *vis a vis* defendant SRVUSD's unfair and unbiased administrative process:

/ / /

/ / /

/ / /

> During the investigation, the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the District and not on the parties. The following individuals will serve as the Title IX team for [complainant Jane Roe's] Formal Complaint:
>
> • **Title IX Coordinator**: Ken Nelson, Director of Student Services
> San Ramon Valley Unified School District
> Knelson@srvusd.net
> (925) 552-5052
>
> • **Investigator**: Alejandra Leon, Attorney
> Fagen, Friedman & Fulfrost, LLP
>
> • **Decisionmaker**: Katy McCully Merrill, Attorney,
> Fagen, Friedman & Fulfrost, LLP
>
> • **Appellate Decisionmaker**: Vanessa Lee, Attorney
> Fagen, Friedman & Fulfrost, LLP
>
> (June 3, 2021, Amended Notice of Allegations at p. 2, attached here to as Exhibit 1.)

This is not a circumstance where a law firm represents and advises an agency at the administrative level and then later in Superior Court; F3Law is acting as the agency. F3Law attorneys would appear to owe a duty of loyalty and confidentiality to its client, San Ramon Valley Unified School District (SRVUSD), and should be working on behalf of the SRVUSD to minimize risk, litigation exposure, and cost and to assist SRVUSD to comply with its duty to provide a fair and impartial Title IX adjudicative process, not to conduct the process themselves. There can be no attorney-client communication privilege or work-product protection for F3Law's acting as the Title IX investigator, as the Title IX Decisionmaker, and also as the Title IX Appellate Decisionmaker and F3Law's duties owed to SRVUSD appear to conflict with the students' interest and right to a fair, thorough, and impartial Title IX administrative process, which prejudices the complainant student and the Respondents in this writ action, as well as Petitioner.

Well-established California law prohibits continuing representation by F3Law.

/ / /

A. LAWYER AS WITNESS

First, Rule 3.7 of the Rules of Professional Conduct and the comments thereto provide:

> Rule 3.7 Lawyer as Witness
>
> (a) A lawyer shall not act as an advocate in a trial in which the lawyer is likely to be a witness unless:
>
> (1) the lawyer's testimony relates to an uncontested issue or matter;
>
> (2) the lawyer's testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) the lawyer has obtained informed written consent* from the client. If the lawyer represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the lawyer is employed.
>
> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm* is likely to be called as a witness unless precluded from doing so by rule 1.7 or rule 1.9.
>
> Comment
>
> [1] This rule applies to a trial before a jury, judge, administrative law judge or arbitrator. This rule does not apply to other adversarial proceedings. This rule also does not apply in non-adversarial proceedings, as where a lawyer testifies on behalf of a client in a hearing before a legislative body.
>
> [2] A lawyer's obligation to obtain informed written consent* may be satisfied when the lawyer makes the required disclosure, and the client gives informed consent* on the record in court before a licensed court reporter or court recorder who prepares a transcript or recording of the disclosure and consent. See definition of "written" in rule 1.0.1(n).
>
> **[3] Notwithstanding a client's informed written consent,* courts retain discretion to take action, up to and including disqualification of a lawyer who seeks to both testify and serve as an advocate, to protect the trier of fact from being misled or the opposing party from being prejudiced. (See, e.g., *Lyle v. Superior Court* (1981) 122 Cal.App.3d 470.)**

(Rule 3.7, **bold** added.)

Here, the participation of F3Law attorneys as investigator, decisionmaker, and appellate decisionmaker during the purported administrative process at the District level unquestionably prejudices petitioner and would also cause any reasonable observer to so conclude. F3Law will learn confidential information in their representation of SRVUSD, and must act in the interests and for the benefit of SRVUSD, and not impartially, which is adverse to Petitioner and to the rights and interests of the complainant student as well. This fact alone justifies disqualification.

Indeed, this very issue was discussed at length just last year by the Court of Appeal:

> "The 'advocate-witness rule,' which prohibits an attorney from acting both as an advocate and a witness in the same proceeding, has long been a tenet of ethics in the American legal system, and traces its roots back to Roman Law." (*Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197, 1208 (*Kennedy*).) California's current version of the advocate-witness rule provides, "A lawyer shall not act as an advocate in a trial in which the lawyer is likely to be a witness unless: [¶] (1) the lawyer's testimony relates to an uncontested issue or matter; [¶] (2) the lawyer's testimony relates to the nature and value of legal services rendered in the case; or [¶] (3) the lawyer has obtained informed written consent from the client." (Rules Prof. Conduct, rule 3.7(a), fn. omitted.) A comment to the rule clarifies that the informed-consent exception is not absolute: "Notwithstanding a client's informed written consent, courts retain discretion to take action, [*582] up to and including disqualification of a lawyer who seeks to both testify and serve as an advocate, to protect the trier of fact from being misled or the opposing party from being prejudiced." (*Id.*, com. 3, asterisk omitted, citing *Lyle v. Superior Court* (1981) 122 Cal.App.3d 470 (*Lyle*).) In other words, a court retains discretion to disqualify a likely advocate-witness as counsel, notwithstanding client consent, where there is "a convincing demonstration of detriment to the opponent or injury to the integrity of the judicial process." (*Lyle*, *supra*, at p. 482.)
>
> Neither California's advocate-witness rule nor its official comments specify how an advocate-witness's dual role might mislead the trier of fact or prejudice the opposing party. However, this topic is addressed in an official comment to the rule's national counterpart, rule 3.7 of the ABA Model Rules of Professional Conduct, addressing why the opposing party or the tribunal may have "proper objection" to the dual role: "A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof." (ABA Model Rules Prof. Conduct, rule 3.7, com. 2.) 3 California courts have agreed that one purpose of the advocate-witness rule is to prevent fact finder confusion regarding whether an advocate-witness's statement is to be considered proof or argument. (See, e.g., *People v. Donaldson* (2001) 93 Cal.App.4th 916, 928–929 (*Donaldson*) [quoting from foregoing comment]; *People ex rel. Younger v. Superior Court* (1978) 86 Cal.App.3d 180, 197 (*Younger*) ["the jury may have difficulty keeping properly segregated the arguments of the attorney acting as advocate and his testimony as a witness"].) They have identified another, related purpose of avoiding the risk of "the jurors' tying [counsel's] persuasiveness as an advocate to his credibility as a witness … ." (*Younger*, supra, at p. 196; see also *Donaldson*, *supra*, at p. 928 ["'The very fact of a lawyer taking on both

roles will affect the way in which a jury evaluates the lawyer's testimony, the lawyer's advocacy, and the fairness of the proceedings themselves'"]; Tuft et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2019) ¶ 8:378, p. 8-93 [detriment to opposing party or judicial integrity "may be claimed where the attorney's testimony is on the key issue in the case on which there is conflicting testimony, and the attorney then proposes to argue to the jury why his or her testimony is more credible than the conflicting evidence"].)

The advocate-witness rule does not expressly address pretrial representation. (Rules Prof. Conduct, rule 3.7(a) [absent specified exception, "A lawyer shall not act as an advocate in a trial in which the lawyer is likely to be a witness" (italics added)]; see also ABA Model Rules of Professional Conduct, rule 3.7(a) [absent specified exception, "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness" (italics added)]. Nevertheless, to effectuate the rule's purpose of avoiding fact finder confusion, we interpret the rule's use of the term "trial" to encompass a pretrial evidentiary hearing at which counsel is likely to testify. (See *Younger*, *supra*, 86 Cal.App.3d at pp. 192–193 [concluding, in dicta, that prosecutor violated California's then-current version of advocate-witness rule, notwithstanding rule's limitation to "trial," by both testifying and arguing about photographic identification procedures during pretrial hearing; "the word 'trial' is broad enough to include a pretrial hearing at which the testimony of witnesses is taken and a contested fact issue is litigated"].) Further, though the parties cite no California authority on point, and we have found none, "most courts recognize that an attorney who intends to testify at trial may not participate in 'any pretrial activities which carry the risk of revealing the attorney's dual role to the jury.' [Citation.] In particular, a testifying attorney should not take or defend depositions." (*Waite, Schneider, Bayless & Chesley Co., L.P.A. v. Davis* (S.D. Ohio 2015) 253 F.Supp.3d 997, 1018–1019; see also, e.g., *LaFond Family Trust v. Allstate Property and Casualty Ins. Co.* (D.Colo., Aug. 8, 2019, No. 19-cv-00767-KLM) 2019 U.S.Dist. Lexis 133523, pp. *13–*18 [granting motion to disqualify counsel from taking or defending depositions "in furtherance of Rule 3.7's purpose," and rejecting asserted need for "separate factual inquiry" into likelihood of revelation at trial of dual role]; *Lowe v. Experian* (D. Kan. 2004) 328 F.Supp.2d 1122, 1127 (Lowe) [applying advocate-witness rule to disqualify counsel from participating in evidentiary hearings and in taking or defending depositions; "Depositions are routinely used at trial for impeachment purposes and to present testimony in lieu of live testimony when the witness is unavailable. Testimony from an oral deposition could not be easily read into evidence without revealing [counsel's] identity as the attorney taking or defending the deposition. Videotaped depositions present an even greater concern" (fn. omitted)].

> In exercising its discretion to disqualify counsel under the advocate-witness rule, a court must consider: (1) """whether counsel's testimony is, in fact, genuinely needed"""; (2) "the possibility [opposing] counsel is using the motion to disqualify for purely tactical reasons"; and (3) "the combined effects of the strong interest parties have in representation by counsel of their choice, and in avoiding the duplicate expense and time-consuming effort involved in replacing counsel already familiar with the case." (*Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 580–581 (*Smith*).) "[T]rial judges must indicate on the record they have considered the appropriate factors and make specific findings of fact when weighing the conflicting interests involved in recusal motions." (Id. at p. 582.) The court's exercise of discretion must be affirmed on appeal if there is any fairly debatable justification for it under the law. (See *McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal.App.5th 1083, 1124 [217 Cal. Rptr. 3d 47] (*McDermott*).)
>
> (*Doe v. Yim* (2020) 55 Cal. App. 5th 573, 581-84.)

Accordingly, F3Law must be disqualified to effectuate the objectives of the advocate-witness rule and related considerations.

B. Court Has Inherent Authority Under Code Civ. Proc., § 128 To Disqualify Counsel When Appropriate

Second, Code of Civil Procedure, § 128, subd. (a)(5) gives this Court inherent authority to disqualify counsel when appropriate:

> (a) Every court shall have the power to do all of the following:
>
> ***
>
> (5) To control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.
>
> (Code Civ. Proc. § 128.)

It is well-established that:

> A trial court is empowered to disqualify counsel through its inherent power "[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto." (Code Civ. Proc., § 128, subd. (a)(5); see *In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572,

> 586.) A motion to disqualify counsel may implicate several important interests, including "a client's right to chosen counsel, an attorney's interest in representing a client, the financial burden on a client to replace disqualified counsel, and the possibility that tactical abuse underlies the disqualification motion. [Citations.]" (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1144–1145 (*SpeeDee Oil*).) At its core, a motion to disqualify "involve[s] a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility. [Citation.] **The paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one's choice must yield to ethical considerations [**670] that affect the fundamental principles of our judicial process.** [Citations.]" (*Id.* at pp. 1145–1146; see also *Comden v. Superior Court* (1978) 20 Cal.3d 906, 915 [145 Cal. Rptr. 9, 576 P.2d 971] (*Comden*).
>
> (*M'Guinness v. Johnson* (2015) 243 Cal. App. 4th 602, 613 **bold** added.)

It bears note that disqualification is *not* disfavored:

> [W]e conclude that while disqualification is a drastic measure and motions to disqualify are sometimes brought by litigants for improper tactical reasons, disqualification is not "generally disfavored."
>
> (*M'Guinness v. Johnson*, *supra*, 243 Cal. App. 4th at 627.)

Here, to permit lawyers who serve as the investigator and tribunal to serve in any capacity as attorneys during court review thereof would call into question the integrity of the entire administrative and judicial process while casting the legal profession in an exceptionally ill light. This is particularly so in this type of proceeding, which, as set forth in great detail in petitioner's petition, is at the forefront of the evolving manner in which society in general and the educational system in particular address the competing interests of the accused and the victim in school sexual misconduct matters.

C. NO PREJUDICE TO RESPONDENTS.

Third, SRVUSD will suffer *no* prejudice from the disqualification of F3Law given SRUSD has already applied for (and likely will receive) appointed defense counsel from its insurance carrier(s). (See, Hathaway Declaration at ¶ 2.) Accordingly, there is no reason why, at a minimum, this Court should not stay the administrative decision below and stay this litigation to ascertain whether insurance-appointed defense counsel will take the reins in this matter, rendering the disqualification inquiry moot.

II. EX PARTE APPLICATION FOR STAY IS PROPERLY BEFORE THE COURT.

Ex parte applications are governed generally by Cal. Rules of Ct., Rule 3.1200 et seq. An *ex parte* application must be in writing and must include the following: (1) An application containing the case caption and stating the relief requested; (2) a declaration in support of the application; (3) a declaration, competent and abased on personal knowledge, regarding the notice provided to other parties pursuant to Cal. Rules of Ct., Rule 3.1204; (4) a memorandum; and (5) a proposed order. Here, Petitioner has filed the required *ex parte* application documents. Under Cal. Rules of Ct., Rule 3.1202, the *ex parte* application must state the name, address, and telephone number of any attorney known to the applicant to be an attorney for any party. The names, addresses and telephone numbers are below:

Jacqueline M. Litra
Fagen Friedman & Fulfrost LLP
6300 Wilshire Blvd Ste 1700
Los Angeles, CA 90048-5219
Phone: (323) 330-6300
Fax: (323) 330-6311
Email: jlitra@f3law.com
ATTORNEYS FOR RESPONDENTS

David Mishook
Fagen Friedman & Fulfrost LLP
70 Washington Street, Suite 205
Oakland, California 94607
Phone: 510.550.8200
Fax: 510.550.8211
Email: dmishook@f3law.com
ATTORNEYS FOR RESPONDENTS

Pursuant to Cal. Rules of Ct., Rule 3.1203, the party seeking an *ex parte* order must notify all parties no later than 10:00 a.m. the court day before the *ex parte* appearance, absent a showing of exceptional circumstances that justify a shorter time for notice. All parties were notified, as shown in the Declaration of Mark Hathaway, ¶ 1.

III. CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court issue an order to disqualify Fagen, Friedman & Fulfrost, LLP ("F3Law") as attorneys for Respondents in this matter.

HATHAWAY PARKER

DATED: August 4, 2021 By: _____

Mark M. Hathaway
Jenna E. Parker
Attorney for Petitioner

DECLARATION OF MARK M. HATHAWAY

I, Mark M. Hathaway, declare:

I am an attorney admitted to practice in all courts in the State of California, the State of Illinois, the State of New York, and the District of Columbia and am a Certified Specialist in Taxation Law by the California State Bar Board of Legal Specialization. I am responsible for representation of Petitioner in this matter. I have personal and first-hand knowledge of the facts set forth in this Declaration, unless otherwise stated, and, if called as a witness, I could and would testify competently to those facts.

1. On Wednesday August 4, 2021, before 10:00 a.m. I have been in contact via telephone and email with counsel for Respondents and gave notice that Petitioner is proceeding with his *ex parte* application for stay on Thursday, August 5, 2021 at 11:00 a.m. in Dept. 7. Counsel for Respondents replied and stated that Respondents will appear at the hearing and oppose the stay application.

2. On Tuesday, August 3, 2021, I spoke with Jacqueline M. Litra, Fagen Friedman & Fulfrost LLP, about my concerns with the F3Law attorneys conducting the entire administrative process against Petitioner and then also acting as advocates for their own administrative actions in this writ of mandate matter. Ms. Litra advised me that Respondents had tendered the litigation and were seeking insurance counsel.

3. Attached hereto as Exhibit 1 is a true and correct **redacted** copy of the Amended Notice of Allegations of Title IX Sexual Harassment by a Complainant, which reflects on page 2 that the entire Title IX investigation and adjudication process is conducted by attorneys with F3Law, who are serving as the investigator, judge, and appellate body to review their own decision.

I declare under the penalty of perjury in the State of California that the foregoing is true and correct. Signed in Los Angeles, California.

Date: August 4, 2021

Mark M. Hathaway

Exhibit 1

San Ramon Unified School District

June 3, 2021

Via Electronic Mail Simultaneously to Both Parties

Re: Amended Notice of Allegations of Title IX Sexual Harassment by a Complainant

Dear Complainant and Respondent:

On April 26, 2021, a Formal Complaint was filed by Name Redacted ("Complainant") against Petitioner ("Respondent") under the San Ramon Valley Unified School District's ("District") Title IX Sexual Harassment Complaint Procedures.[1] The Formal Complaint alleges:

- On April 15, 2021, Respondent sexually assaulted and sexually harassed Complainant during fifth period theater class by kissing her on her mouth and neck without her consent, fondling her breasts without her consent, fondling and penetrating her vulva and vagina without her consent, and forcing her to touch his penis under his clothing by forcing her hand into his pants without her consent.

On June 2, 2021, Complainant notified the investigator that the alleged conduct occurred on April 13, 2021. Accordingly, the allegation is amended as follows:

- On April 13, 2021, Respondent sexually assaulted and sexually harassed Complainant during fifth period theater class by kissing her on her mouth and neck without her consent, fondling her breasts without her consent, fondling and penetrating her vulva and vagina without her consent, and forcing her to touch his penis under his clothing by forcing her hand into his pants without her consent.

If, during the course of the investigation, the District determines additional allegations regarding Complainant or Respondent need to be investigated, the Title IX Coordinator will notify the parties of the additional allegations.

Educational institutions subject to Title IX of the Education Amendments of 1972 and its implementing regulations must respond without deliberate indifference and using the Title IX Sexual Harassment Grievance Process in the District's Title IX Sexual Harassment Complaint Procedures to address allegations of "Title IX Sexual Harassment," as that term is defined in the Title IX regulations and the District's Title IX Sexual Harassment Complaint Procedures. This

[1] Any allegations not rising to the level of Title IX Sexual Harassment, as defined in 34 CFR 106.30, will be simultaneously investigated to determine whether any violations of other District Board Policies ("BP") or Administrative Regulations ("AR") have occurred, including, but not limited to, BP/ AR 5145.7, *Sexual Harassment*, and BP/ AR 5131.2, *Bullying*.

includes investigating formal complaints containing allegations of Title IX Sexual Harassment under the District's Title IX Sexual Harassment Complaint Procedures.

The District has determined that the alleged conduct, if true, would constitute Title IX Sexual Harassment and, therefore, is within the scope of the District's Title IX Sexual Harassment Complaint Procedures. As such, the District will investigate the Formal Complaint under its Title IX Sexual Harassment Complaint Procedures. A copy of which is enclosed with this letter.

The investigation of the Formal Complaint in no way implies that the District has made a decision on the merits of the allegations in the Formal Complaint. Respondents are presumed to be not responsible for Title IX Sexual Harassment until the conclusion of the Title IX Sexual Harassment Complaint Procedures. Only after the District has investigated the Formal Complaint in accordance with its Title IX Sexual Harassment Complaint Procedures, including reviewing any applicable evidence, will it make a determination regarding responsibility.

During the investigation, the District will serve as a neutral fact finder, collecting relevant evidence. During the investigation, the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the District and not on the parties. The following individuals will serve as the Title IX team for this Formal Complaint:

- **Title IX Coordinator**: Ken Nelson, Director of Student Services
  San Ramon Valley Unified School District
  KNelson@srvusd.net
  (925) 552-5052
- **Investigator**: Alejandra Leon, Attorney
  Fagen, Friedman & Fulfrost, LLP
- **Decisionmaker**: Katy McCully Merrill, Attorney,
  Fagen, Friedman & Fulfrost, LLP
- **Appellate Decisionmaker**: Vanessa Lee, Attorney
  Fagen, Friedman & Fulfrost, LLP

If you have any concerns regarding conflict of interest or bias regarding any of these individuals, please notify the Title IX Coordinator immediately.

The District's Title IX Sexual Harassment Complaint Procedures contain a full summary of your rights and responsibilities during the District's processing of the Formal Complaint. These include, but are not limited to, the right of the parties to review any evidence obtained as part of the investigation that is directly related to the allegations raised in the Formal Complaint, including evidence upon which the District does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source so that you can meaningfully respond to the evidence prior to conclusion of the investigation.

You may have an advisor of your choice, who may be, but is not required to be, an attorney, and who may accompany you to any related meeting or proceeding and who may act as your support person during investigation interview(s), review evidence collected, and assist with examination questions, subject to restrictions applicable to both parties that will be explained to you during this process.

The District prohibits knowingly making false statements or knowingly submitting false information during the Title IX Sexual Harassment Complaint Procedures. No person is permitted to intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under the District's Title IX policies or procedures. If any individual is harassed or intimidated because of filing a complaint or participating in any aspect of the District's Title IX Sexual Harassment Complaint Procedures, that individual may file a complaint alleging such treatment using The District's Board Policy and Administrative Regulation 1312.3, *Uniform Complaint Procedure*.

This Formal Complaint is eligible for the District's Title IX informal resolution process at any time prior to a determination being reached in this matter. In informal resolution, the District appoints a trained employee or contractor to facilitate the resolution of the Formal Complaint by providing an opportunity for the parties involved to voluntarily resolve the complaint allegations. Additional information regarding the informal resolution process is available upon request.

Thank you for your cooperation. If you have any questions about the process, please do not hesitate to contact me.

Sincerely,

Ken Nelson
Title IX Coordinator

Enclosures
Title IX Sexual Harassment Complaint Procedures
BP / AR 1312.3, *Uniform Complaint Procedure*

PROOF OF SERVICE

STATE OF CALIFORNIA)
)ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 445 South Figueroa Street, 31st Floor, Los Angeles, CA 90071.

On August 4, 2021, I served the foregoing document described EX PARTE APPLICATION FOR ORDER TO DISQUALIFY FAGEN, FRIEDMAN & FULFROST, LLP AS ATTORNEYS FOR RESPONDENTS on all interested parties listed below by transmitting to all interested parties a true copy thereof as follows:

Jacqueline M. Litra
Fagen Friedman & Fulfrost LLP
6300 Wilshire Blvd Ste 1700
Los Angeles, CA 90048-5219
Phone: (323) 330-6300
Fax: (323) 330-6311
Email: jlitra@f3law.com
ATTORNEYS FOR RESPONDENTS

David Mishook
Fagen Friedman & Fulfrost LLP
70 Washington Street, Suite 205
Oakland, California 94607
Phone: 510.550.8200
Fax: 510.550.8211
Email: dmishook@f3law.com
ATTORNEYS FOR RESPONDENTS

☐ **BY FACSIMILE TRANSMISSION** from FAX number (213) 529-0783 to the fax number set forth above. The facsimile machine I used complied with Rule 2003(3) and no error was reported by the machine. Pursuant to Rule 2005(i), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this declaration.

☐ **BY MAIL** by placing a true copy thereof enclosed in a sealed envelope addressed as set forth above. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

☐ **BY PERSONAL SERVICE** by delivering a copy of the document(s) by hand to the addressee or I caused such envelope to be delivered by messenger or process server.

☐ **BY EXPRESS SERVICE** by depositing in a box or other facility regularly maintained by the express service carrier or delivering to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served.

☒ **BY ELECTRONIC TRANSMISSION** by transmitting a PDF version of the document(s) by electronic mail to the party(s) identified on the service list using the e-mail address(es) indicated.

☒ I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on August 4, 2021 in Los Angeles, California

Adriana Recendez

EXHIBIT 3

[Exempt From Filing Fee
Government Code § 6103]

FAGEN FRIEDMAN & FULFROST, LLP
David R. Mishook, SBN 273555
dmishook@f3law.com
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Attorneys for SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT, MEGAN KEEFER, KEITH ROGENSKI

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA, MARTINEZ

JOHN DOE, et al.,

Petitioner,

vs.

MEGAN KEEFER, et al.,

Respondents.

CASE NO. NC21-1450

OPPOSITION TO EX PARTE TO DISQUALIFY RESPONDENTS' COUNSEL

Date: August 5, 2021
Time: 11:00 a.m.
Dept.: 7

The Hon. Hon. Barry Baskin, Dept. 7

Trial Date: None Set

Respondents Megan Keefer and Keith Rogenski (named here in their official capacities as officials of the San Ramon Valley Unified School District) and the San Ramon Unified Valley Unified School District ("District") hereby provide this opposition to Petitioner John Doe's *ex parte* application to disqualify the law firm of Fagen Friedman & Fulfrost, LLP, from representing Respondents in this action.

I. INTRODUCTION AND BACKGROUND

Petitioner seeks an emergency order from this Court that disqualifies the entire law firm of Fagen Friedman & Fulfrost LLP ("F3") from representing Respondents—a California public agency and its officials—in this Petition for Writ of Administrative Mandate or, alternative, Traditional Writ of Mandate. In his Petition, Petitioner challenges his emergency removal from his

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educational program pursuant to 34 C.F.R., section 106.44(c), pending the outcome of District Title IX investigation into allegations that Petitioner engaged in a sexual assault while on a District high school campus.

Petitioner argues that three attorneys employed by F3, Alejandra Leon, Esq., Katy McCully Merrill, Esq., and Vanessa Lee, Esq., are acting as Investigator, Decisionmaker and Appellate Decisionmaker for the District in the Title IX administrative action and that this creates a conflict of interest. Petitioner cites to California Rules of Professional Conduct ("CRPC") 3.7—governing situations in which an attorney may act as a witness—to support his argument that this Court must use its inherent power to disqualify an entire law firm from representation of Respondents.

Petitioner's argument includes both factual and legal misstatements and errors which wholly undermine his motion. First, contrary to the implication otherwise included in the *ex parte*, the Title IX matter involving Petitioner is still in the investigative stage. (Declaration of Jacqueline Litra, ¶ 2.) It is untrue, therefore, that F3 attorneys have acted as investigator, decisionmaker and appellate decisionmaker already. Second, the very language of rule 3.7 only suggests limitations on attorneys *who will* act as witnesses from being advocates and specifically allows lawyers in the lawyer/witnesses firm to represent the client. Third, Petitioner has not provided any argument on how attorney involvement in the as-to-yet unfinished Title IX process has any bearing on the very narrow question of the emergency removal Petitioner challenges in this writ petition.

II. ARGUMENT

Petitioner alleges in his *ex parte* that three attorneys of F3 have been tasked with investigating, deciding and sitting over an appeal of an (ongoing) administrative action under Title IX at the agency level. Petitioner implies, but provides no evidence or legal argument, that the District's election to employ professional legal counsel in the Title IX process is somehow improper. Petitioner implies that the Title IX process is somehow "unfair and unbiased [*sic.*]" because of F3's role "acting as the agency." According to Petitioner, F3 should be "minimiz[ing] risk, litigation exposure, and cost" to the District and, somehow, fails to do that through its roles.

The above rhetorical arguments, whether or not true, are not connected at all to the instant

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litigation or the instant defense of the District. Logically, were it not three attorney-employees of F3 acting as investigator, decisionmaker, and appellate decisionmaker for the District, it would be three District employees with (presumably) the same duty of loyalty. In fact, following Petitioner's logic, the involvement of attorneys with the duty to minimize risk, litigation exposure, and cost would *increase* Petitioner's due process in the ongoing Title IX investigation. Yet, Petitioner implies the opposite without evidence.

The above considerations are, however, immaterial to the *ex parte* and only obfuscate the core issue. The question for this Court is whether there are legal grounds to take the extraordinary step of removing the District's chosen counsel in defending Respondents against the allegation that Petitioner's emergency removal was improper. Indeed, after notifying the District through its counsel at F3 of Petitioner's intent to seek *ex parte* applications, Petitioner also seeks to deprive the District of a defense through F3.

The *only* citation provided by Petitioner is to CPRC 3.7 which, on a plain reading, is inapposite. CPRC 3.7 applies to situations in which the counsel for a party advocating in court will also serve as a witness. That section provides, "A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by rule 1.7 or rule 1.9." Here, there is no allegation the undersigned is likely to be called as a witness, nor is there an allegation that Petitioner is a former client of F3 so as to fall under the prescriptions of CPRC 1.7 or 1.9. As such, rule 3.7 simply does not apply.

Further, Petitioner provides no argument or evidence that any member of F3 would be called as a witness *in this action*. The Petition for Writ of Mandate challenges the emergency removal decision of respondent Keefer, who is the Principal and Title IX Coordinator Designee of the District at California High School. The Petition does not mention any attorney from F3 as a decisionmaker in the decision at hand. Even if the ongoing Title IX investigation was relevant to the Petition or this *ex parte*, Petitioner does not allege that Ms. Leon, Ms. McCully Merrill or Ms. Lee—let alone Ms. Litra or the undersigned—would be called as witnesses in this proceeding.

Ultimately, Petitioner confuses and conflates two separate issues—one before this court and one not. Petitioner challenges here the decision of a District employee acting under the Title

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IX regulations to institute an emergency removal during the pendency of a Title IX investigation. That decision was not made by F3 attorneys and F3 attorneys are not anticipated fact witnesses. Separately, the District continues to conduct a Title IX administrative action which is still in the investigative stage. That action *has not* resulted in any final decision subject to a Petition for Writ of Mandate and *is not* before this Court.

If the Title IX administrative action results in a final adverse decision against Petitioner which Petitioner seeks to challenge in this Court, then Petitioner may cite to Rule 3.7.[1] This is not that case and the undersigned is not nor would be a witness. For these reasons, Petitioner's *ex parte* must be denied.

III. CONCLUSION

Respondents ask that the *ex parte* be denied and that Respondents be allowed the legal representation of *their* choice to continue in these proceedings.

DATED: August 4, 2021

FAGEN FRIEDMAN & FULFROST, LLP

By: _____
David R. Mishook
Attorneys for SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT, MEGAN KEEFER, KEITH ROGENSKI

272-180/6157334.1

[1] Neither the District nor F3 would concede that there is anything untoward in F3's representation in Court.

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[Exempt From Filing Fee
Government Code § 6103]

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Attorneys for SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT, MEGAN KEEFER, KEITH ROGENSKI

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA, MARTINEZ

JOHN DOE, et al.,

Petitioner,

vs.

MEGAN KEEFER, et al.,

Respondents.

CASE NO. NC21-1450

DECLARATION OF JACQUELINE LITRA IN SUPPORT OF OPPOSITION TO EX PARTE TO DISQUALIFY COUNSEL

Date: August 5, 2021
Time: 11:00 a.m.
Dept.: 7

The Hon. Hon. Barry Baskin, Dept. 7

Trial Date: None Set

I, Jacqueline Litra, declare as follows:

1. I am an attorney duly admitted to practice before this Court. I am a partner with Fagen Friedman & Fulfrost, LLP, attorneys of record for SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT, MEGAN KEEFER, and KEITH ROGENSKI. If called as a witness, I could and would competently testify to all facts within my personal knowledge except where stated upon information and belief.

2. My office advises San Ramon Valley Unified School District ("District") in Title IX matters and I am familiar with the administrative action involving John Doe (whose name is

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known to me). The Title IX administrative action is ongoing and is still at the investigative stage. Ms. McCully will be involved in this matter only after the investigative report is issued and Ms. Lee would be involved only if there is an appeal of the decision by either party. Petitioner is afforded numerous due process rights both during the investigative phase and through the decision and appellate phase.

3. The emergency removal decision made by the District was pursuant to 34 C.F.R. § 106.44(c). That decision was made by a District employee as alleged by Petitioner, and not an attorney at F3.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 4th day of August, 2021, at Lansing, Michigan.

Jacqueline M Litra

Jacqueline Litra

272-180/6157341.1

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Alameda, State of California. My business address is 70 Washington Street, Suite 205, Oakland, CA 94607.

On August 5, 2021, I served true copies of the following document(s) described as **OPPOSITION TO EX PARTE TO DISQUALIFY RESPONDENTS' COUNSEL AND DECLARATION OF JACQUELINE LITRA IN SUPPORT OF OPPOSITION TO EX PARTE TO DISQUALIFY COUNSEL** on the interested parties in this action as follows:

MARK M. HATHAWAY
(CA 151332; DC 437335; NY 2431682)
JENNA E. PARKER (CA 303560)
HATHAWAY PARKER INC.
445 S. Figueroa Street, 31st Floor
Los Angeles, California 90071
Telephone: (213) 529-9000
Facsimile: (213) 529-0783
E-Mail: mark@hathawayparker.com
E-Mail: jenna@hathawayparker.com

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address adodds@f3law.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 5, 2021, at Oakland, California.

Alena Dodds

EXHIBIT 4

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Attorneys for Petitioner John Doe

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR CONTRA COSTA COUNTY

JOHN DOE, an individual, minor through his parent and next friend JANE DOE, Petitioner, v. MEGAN KEEFER, an individual, in her official capacity as Principal, California High School and Title IX Coordinator Designee, California High School; KEITH ROGENSKI, an individual, in his official capacity as Assistant Superintendent of Human Resources; SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT, a California corporation; and DOES 1 through 20, inclusive Respondents.	Case No.: NC21-1450 [Hon. Barry Baskin, Dept. 7] **REPLY TO OPPOSITION TO *EX PARTE* APPLICATION FOR ORDER TO DISQUALIFY FAGEN, FRIEDMAN & FULFROST, LLP ("F3LAW") AS ATTORNEYS FOR RESPONDENTS** Date: August 5, 2021 Time: 11:00 a.m. Dept. 7

TO THE COURT AND ALL PARTIES AND THEIR ATTORNEYS:

PLEASE TAKE NOTICE that Petitioner hereby submits his reply in support of his Ex Parte

Application for an Order To Disqualify Fagen, Friedman & Fulfrost, LLP ("F3Law") As Attorneys For Respondents on August 5, 2021 at 11:00 a.m. in Dept. 7 before Hon. Barry Baskin

HATHAWAY PARKER

Dated: August 5, 2021

By: _____
MARK M. HATHAWAY
JENNA E. PARKER
Attorneys for Petitioner

REPLY MEMORANDUM OF POINTS AND AUTHORITIES

I. F3LAW'S OPPOSITION SHOWS WHY DISQUALIFICATION IS APPROPRIATE

Respondents' opposition to petitioner's *ex parte* application *compounds* the untenable position in which the F3Law firm finds itself.

First, Respondents argue:

> [C]ontrary to the implication otherwise included in the ex parte, the Title IX matter involving Petitioner is still in the investigative stage. (Declaration of Jacqueline Litra, ¶ 2.) It is untrue, therefore, that F3 attorneys have acted as investigator, decisionmaker and appellate decisionmaker already.
>
> (Opposition at 2:12-15.)

Even if this is factually accurate, it is misleading given the mandatory procedures Respondents have advised Petitioner he will be subject to:

> During the investigation, the District will serve as a neutral fact finder, collecting relevant evidence. During the investigation, the burden of gathering evidence sufficient ot reach a determination regarding responsibility rests on the District and not on the parties. The following individuals **will** serve as the Title IX team for this Formal Complaint.
>
> (See, Amended Notice of Allegations dated June 3, 2021 at p. 2, **bold** added.)

Accordingly, *unless the Amended notice was intended to be misleading, the identification of the three F3Law attorney/investigator/judges/justices is mandatory absent some type of good cause or impossibility*. Accordingly, the contention that the F3Law attorneys have not acted in these mandatory capacities "yet" is specious, further warranting disqualification.

Second, Respondents argue:

> Logically, were it not three attorney-employees of F3 acting as investigator, decisionmaker, and appellate decisionmaker for the District, it would be three District employees with (presumably) the same duty of loyalty. In fact, following Petitioner's logic, the involvement of attorneys with the duty to minimize risk, litigation exposure, and cost would increase Petitioner's due process in the ongoing Title IX investigation. Yet, Petitioner implies the opposite without evidence.

(Opposition at 3:1-6.)

This sounds nice with its rhetorical implication that attorney involvement "increases" due process, but, in reality misses the mark entirely. If "district employees" (or, for that matter, retained *investigators, or attorneys who would not be providing litigation representation*) were conducting the administrative proceeding, they would not be subject to the Rules of Professional conduct or voluminous caselaw and other authorities that prohibit attorneys from being witness-advocates. Accordingly, this argument rings hollow as well and fails to alter the fact that F3Law must be disqualified to protect the integrity of the system and to avoid setting a precedent that permits attorneys to improperly participate in roles they should not.

Third, Respondents fail to address the fact that this matter has been tendered to an insurance carrier that will likely appoint defense counsel that is entirely independent from the administrative process, thereby preserving the integrity of the system and, for that matter, render the disqualification issue moot.

II. CONCLUSION

Based on the foregoing, and the parties other filings in connection with this application, as well as such argument as the Court may hear, Petitioner respectfully requests that this Court issue an order to disqualify Fagen, Friedman & Fulfrost, LLP ("F3Law") as attorneys for Respondents in this matter.

HATHAWAY PARKER

DATED: August 5, 2021 By: _____

Mark M. Hathaway
Jenna E. Parker
Attorney for Petitioner

PROOF OF SERVICE

STATE OF CALIFORNIA)
)ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 445 South Figueroa Street, 31st Floor, Los Angeles, CA 90071.

On August 5, 2021, I served the foregoing document described REPLY TO OPPOSITION TO EX PARTE APPLICATION FOR ORDER TO DISQUALIFY FAGEN, FRIEDMAN & FULFROST, LLP AS ATTORNEYS FOR RESPONDENTS on all interested parties listed below by transmitting to all interested parties a true copy thereof as follows:

Jacqueline M. Litra
Fagen Friedman & Fulfrost LLP
6300 Wilshire Blvd Ste 1700
Los Angeles, CA 90048-5219
Phone: (323) 330-6300
Fax: (323) 330-6311
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ATTORNEYS FOR RESPONDENTS

David Mishook
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Fax: 510.550.8211
Email: dmishook@f3law.com
ATTORNEYS FOR RESPONDENTS

☐ **BY FACSIMILE TRANSMISSION** from FAX number (213) 529-0783 to the fax number set forth above. The facsimile machine I used complied with Rule 2003(3) and no error was reported by the machine. Pursuant to Rule 2005(i), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this declaration.

☐ **BY MAIL** by placing a true copy thereof enclosed in a sealed envelope addressed as set forth above. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

☐ **BY PERSONAL SERVICE** by delivering a copy of the document(s) by hand to the addressee or I caused such envelope to be delivered by messenger or process server.

☐ **BY EXPRESS SERVICE** by depositing in a box or other facility regularly maintained by the express service carrier or delivering to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served.

☒ **BY ELECTRONIC TRANSMISSION** by transmitting a PDF version of the document(s) by electronic mail to the party(s) identified on the service list using the e-mail address(es) indicated.

☒ I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on August 5, 2021 in Los Angeles, California

Adriana Recendez

EXHIBIT 5

MARK M. HATHAWAY
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Attorneys for Petitioner John Doe

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR CONTRA COSTA COUNTY

JOHN DOE, an individual, minor through his parent and next friend JANE DOE, Petitioner, v. MEGAN KEEFER, an individual, in her official capacity as Principal, California High School and Title IX Coordinator Designee, California High School; KEITH ROGENSKI, an individual, in his official capacity as Assistant Superintendent of Human Resources; SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT, a California corporation; and DOES 1 through 20, inclusive Respondents.	Case No.: NC21-1450 [Hon. Barry Baskin, Dept. 7] AMENDED EX PARTE APPLICATION FOR STAY OF ADMINISTRATIVE DECISION PENDING COURT REVIEW OF WRIT PETITION; DECLARATION; EXHIBITS [*Proposed Order lodged concurrently*] Date: August 5, 2021 Time: 11:00 a.m. Dept: 7

TO THE COURT AND ALL PARTIES AND THEIR ATTORNEYS:

PLEASE TAKE NOTICE that Petitioner hereby submits his Ex Parte Application For Stay Of Administrative Disciplinary Action Pending Court Review Of Writ Petition, set for hearing on August 5, 2021 at 11:00 a.m. in Dept. 7 before Hon. Barry Baskin.

There is urgency because Respondents issued a Title IX Emergency Removal of Petitioner from California High School pending a Title IX investigation that has been ongoing for 105 days since April 22, 2021, Respondents notified Petitioner on July 12, 2021 that the Emergency Removal would continue for the new school year, and in-person classes for the Fall 2021 semester are scheduled to start on August 10, 2021[1].

Petitioner is asking for a stay of the administrative disciplinary action (or a TRO and OSC re Preliminary Injunction) until the Court can consider Petitioner's writ petition on the merits.

A stay causes Respondents no prejudice while preventing further irrevocable harm to Petitioner.

Petitioner's motion is based on the Petition for Writ of Mandate; this application; the supporting memorandum of points and authorities; the declaration of Petitioner; the declaration of Mark M. Hathaway and exhibits thereto, the pleadings, files, and records in this action; and any such argument as may be received by this Court at the hearing on the application.

HATHAWAY PARKER

Dated: August 5, 2021 By: _____

MARK M. HATHAWAY
JENNA E. PARKER
Attorneys for Petitioner

[1] https://www.srvusd.net/district/calendar

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Petitioner, through his Guardian ad litem, is a 15-year-old first-year student at California High School. In April 2021, Petitioner broke up with his short-term girlfriend, Jane Roe, who pleaded with him not to break up with her. A few days later, Petitioner was verbally informed by Respondent Megan Keefer that Jane Roe was accusing Petitioner of sexually assaulting her after they broke up. The allegations are completely fabricated, and Petitioner has had no contact with Jane Roe since they broke up, except for one time when he offered her his hand to help her get up from sitting on the floor. Based solely on Jane Roe's allegations, Respondent Megan Keefer imposed a Title IX Emergency Removal on Petitioner, and he has not been allowed to return to in-person education programs or activities since. One hundred and five days later, a Title IX investigation is supposedly still ongoing, though Petitioner has received few updates and been provided with limited evidence gathered by Respondents. (Exhibit 6, attached hereto.)

In-person classes at California High School are scheduled to begin in just a few days on August 10, 2021. There is no emergency, and Petitioner does not now present, and has not ever presented an immediate threat to the physical health or safety of any student or other individual. On July 12, 2021, however, Respondents notified Petitioner that the Emergency Removal decision would continue for the new school year. (Exhibit 7.)

Petitioner petitions for writ of mandate under Code Civ. Proc., § 1094.5, or in the alternative under Code Civ. Proc., § 1085, directed to Respondents in order to redress their improper Title IX Emergency Removal order, which is now final. By this stay motion, Petitioner seeks a stay to avoid the irreparable harm caused by the lengthy separation from his academics and damage to his reputation. A stay is not against the public interest. (Code Civ. Proc., § 1094.5 subd. (g).) There is clear evidence of irreparable harm if the stay is denied, and colorable claim for writ relief and some likelihood that Petitioner will prevail on the merits

II. FACTUAL SUMMARY[2]

A. PETITIONER BREAKS UP WITH JANE ROE

[2] The factual summary is taken from Petitioner's verified Petition for Writ of Mandate at pages 6-12.

Petitioner John Doe dated classmate Jane Roe from approximately March 17, 2021, until April 13, 2021. After school on Tuesday, April 13, 2021, Petitioner informed Jane Roe via text messages that he did not love her and was breaking up with her. Jane Roe did not want to break up, and asked to talk, but Petitioner reiterated that he was "done with this relationship." (Exhibit 6, p. 26.)

At 7:37 p.m. on April 13, 2021, Jane Roe sent text messages to Petitioner pleading, "No [John] please, I can change" and "I know how to." Jane Roe sent a series of text message to Petitioner saying, "Please don't do this. I love u aka love u a lot. And I need u. [John] please talk to me what did I even do." (Exhibit 6, p. 26-27.)

At 7:40 p.m., Petitioner responded, "we've been talking about this, please don't beg me it's not changing my mind, I'm done with this relationship. I have to go." (Exhibit 6, p. 27.)

At 7:41 p.m., Jane Roe responded "No [John] please. I have been there for u. And I need u in my fucking life. And I like u hella." (Exhibit 6, p. 27.)

At 7:42 p.m., Petitioner wrote "you don't need me in your life to live." Jane Roe responded, "I do, u have been there for me. And you always loves (sic) me. Loved. Cared about me. And never gave up on me." (Exhibit 6, p. 28.)

At 7:58 p.m., Petitioner texted Jane Roe, "we are done". (Exhibit 6, p. 28.)

The only time after April 13, 2021, that Petitioner had any physical contact with Jane Roe was two days later, on April 15, 2021, when he offered her his hand to help her get up from sitting on the floor. Petitioner never had any nonconsensual physical contact with Jane Roe. (Exhibit 6, p. 28.)

B. RESPONDENTS IMPROPERLY IMPOSE TITLE IX EMERGENCY REMOVAL

On Thursday, April 22, 2021, Petitioner was removed from classroom instruction at California High School. Respondent Megan Keefer called Petitioner into her office and verbally informed him generally that Jane Roe had alleged that during a support period after their Theater class on April 15, 2021, Petitioner had sexually assaulted her. (Exhibit 6, p. 28.) Petitioner denied that allegation. (*Id.*) Respondent Megan Keefer then left the room and returned moments later with a "Notice of Title IX Emergency Removal of Student" dated April 22, 2021, which reads,

> Dear [Petitioner],
>
> On April 22, 2021, the San Ramon Valley Unified School District ("District")

received allegations of Title IX Sexual Harassment against you.
In response to the initial allegations, the District has undertaken an individualized safety and risk analysis and has determined that you pose an immediate threat to the physical health or safety of a student or other individual arising from the allegations of Title IX Sexual Harassment. The specific reasons for the decision are: substantial evidence leading to allegations of sexual assault(s) to students while on campus.

Accordingly, the District has determined that you should be removed from the District's education program or activity on an emergency basis under Title IX of the Education Amendments of 1972 and its implementing regulations.

The Title IX Coordinator will notify the Board of Education of its determination that you are eligible for a Title IX emergency removal and should not be allowed to participate in the the (sic) District's education programs or activities until after the investigation into the allegations of Title IX Sexual Harassment concludes.

No person is permitted to intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in the Title IX procedures. If any individual is harassed or intimidated because of filing a complaint or participating in any aspect of the District's Title IX Sexual Harassment Complaint Procedures, that individual may file a complaint alleging such treatment using the District's Board Policy. See attached copies and links:

http://www.gamutonline.net/district/sanramonvalleyusd/DisplayPolicy/1050532/

http://www.gamutonline.net/district/sanramonvalleyusd/DisplayPolicy/1050533/

http://www.gamutonline.net/district/sanramonvalleyusd/DisplayPolicy/1050895/

You can challenge this emergency removal decision under Title IX by contacting Megan Keefer.

Sincerely,

Title IX Coordinator Designee
(Exhibit 8.)

Petitioner was required to leave school immediately and was told not to return. (*Id.*) Petitioner was not provided any information about how he was supposed to complete his schoolwork until Monday, April 26, 2021. Petitioner was told that he would need to personally contact his teachers to get assignments and instructions. Petitioner was not provided any results or analysis from any

individualized safety and risk analysis.

C. PETITIONER IS INFORMED OF JANE ROE'S FALSE ALLEGATIONS

On April 26, 2021, after Respondents imposed the Title IX Emergency Removal on Petitioner, a Formal Complaint was filed by Jane Roe against Petitioner under the District's Title IX Sexual Harassment Complaint Procedures. The Formal Complaint, which Petitioner was first provided on July 13, 2021, alleges:

> On April 15, 2021, Respondent sexually assaulted and sexually harassed Complainant during fifth period theater class by kissing her on her mouth and neck without her consent, fondling her breasts without her consent, fondling and penetrating her vulva and vagina without her consent, and forcing her to touch his penis under his clothing by forcing her hand into his pants without her consent. (Exhibit 1.)

Petitioner continues to deny the false and salacious allegations levelled by Jane Roe after Petitioner broke up with her and she pleaded with him to take her back, but he declined. There is no evidence to support that Petitioner and Jane Roe resumed a dating or intimate relationship after they broke up after school on April 13, 2021. Petitioner and Jane Roe never had any intimate contact on school grounds, other than kissing while they were dating. (Exhibit 6, p. 30.)

D. RESPONDENTS ISSUE A 'CORRECTED' BUT STILL IMPROPER NOTICE OF TITLE IX EMERGENCY REMOVAL

On May 7, 2021, Respondent Megan Keefer issued a "CORRECTED Notice of Title IX Emergency Removal of Student." (Exhibit 3.) The only change to the document is the purported justification for the Title IX Emergency Removal. Respondent Megan Keefer characterized the initial explanation in the April 22, 2021 "Notice of Title IX Emergency Removal of Student" as a "typographical error." The "corrected" version explains, "The specific reasons for the decision are: substantial allegations of sexual assault(s) to students while on campus." (*Id.*) The phrase, "substantial allegations of sexual assault(s) to students while on campus" appears to be nonsensical and devoid of any actual meaning. The "CORRECTED Notice of Title IX Emergency Removal of Student" still articulates no "genuine emergency" involving anyone's physical health or safety that would justify a Title IX Emergency Removal of Petitioner from the District's education programs or activities.

E. PETITIONER UNSUCCESSFULLY CHALLENGES THE TITLE IX EMERGENCY REMOVAL ORDER

On May 17, 2021, Petitioner's advisor requested a meeting to challenge the Title IX Emergency Removal. (Exhibit 4, p. 1.)

On May 19, 2021, Petitioner was permitted to make a statement and present information to challenge the determination of "substantial allegations of sexual assault(s) to students while on campus." (*Id.*) Petitioner again denied the allegations, asserted that he does not pose a danger to anyone, and submitted a signed declaration under penalty of perjury attesting that Jane Roe's allegations are "completely false." (Id.; see also Exhibit 6, pp. 26-30.)

On May 21, 2021, Respondent Megan Keefer issued an "Outcome of Challenge to Title IX Emergency Removal of Student," upholding her own Title IX Emergency Removal decision. (Exhibit 4.) By challenging the Title IX Emergency Removal decision, Petitioner has exhausted his administrative remedies. Petitioner has no further avenue of administrative appeal to challenge Respondents' decision regarding the Title IX Emergency Removal.

Of note, on June 2, 2021, Jane Roe changed her allegations and claimed that the alleged conduct had occurred on April 13, 2021, the day she and Petitioner broke up. (Exhibit 1, p. 1.)

III. REGULATORY AND LEGAL BACKGROUND

A. TITLE IX

At the federal level the issue of sexual misconduct on in schools is primarily addressed by Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688. The Education Amendments of 1972 prohibit discrimination based on sex under any educational program activity receiving federal financial assistance. Specifically, the legislation known as Title IX of the Education Amendments of 1972 provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . . (20 U.S.C. § 1681(a).)

On August 14, 2020, the Department of Education amended the regulations implementing Title IX ("Regulations") to specify how recipients of Federal financial assistance covered by Title IX must

respond to allegations of sexual harassment and misconduct consistent with Title IX's prohibition against sex discrimination. (34 C.F.R. § 106.)

The Regulations require every school that receives federal funds to adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging sexual harassment, which encompasses sexual assault, dating violence, domestic violence, and stalking. "A recipient [of federal funding] with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent." The fundamental principle of such a system is that it be "prompt and equitable."

B. CALIFORNIA LAW REGARDING STUDENT DISCIPLINE

"The Fourteenth Amendment forbids the State to deprive any person of life, liberty, or property without due process of law." (*Goss v. Lopez* (1975) 419 U.S. 565, 572.)

California law does not require any specific form of disciplinary hearing; however, a school is bound by its own policies and procedures (*Berman v. Regents of University of California* (2014) 229 Cal.App.4th 1265, 1271-72) and the disciplinary hearing must comply with the fair hearing requirements of Code Civ. Proc., § 1094.5. (*Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 245-246.) Code Civ. Proc., § 1094.5 requires that (1) there be "a fair trial," which "means that there must have been 'a fair administrative hearing'"; (2) the proceeding be conducted "in the manner required by law"; (3) the decision be "supported by the findings"; and (4) the findings be "supported by the weight of the evidence," or where an administrative action does not affect vested fundamental rights, the findings must be "supported by substantial evidence in the light of the whole record."[3] (Code Civ. Proc., § 1094.5 (a)-(c).) The California Court of Appeal recently described the process due to students before a university may impose severe discipline:

> The most recent consensus appears to be that a student facing suspension or expulsion for nonconsensual sexual activity has the right to notice of the charges. (See, e.g., *Doe v. University of Southern California*, *supra*, 246 Cal.App.4th at p. 241.) The school must follow its own policies and procedures. (See, e.g., *Doe v. Regents of University of California* (2016) 5 Cal.App.5th 1055, 1078.) The accused

[3] The Court may refrain from evaluating the sufficiency of evidence if there are errors in the administrative process. (*Doe v. Regents of University of California* (2018) 28 Cal.App.5th 44, 61.)

> student must have access to the evidence. (See *Doe v. Regents of University of California* (2018) 28 Cal.App.5th 44, 57.) There must be an in-person hearing, including testimony from the parties and witnesses. (See, e.g., *Doe v. Westmont College* (2019) 34 Cal.App.5th 622, 637.) In addition, because most cases turn on credibility (he-said, she-said), the adjudicator or adjudicators must be able to see the parties' testimony and the testimony of important witnesses so their demeanor may be observed, and the accused student must have an opportunity for cross-examination. (See *Doe v. Allee* (2019) 30 Cal.App.5th 1036, (*Allee*); *Doe v. Occidental College* (2019) 40 Cal.App.5th 208, 224; *Doe v. University of Southern California*, *supra*, 29 Cal.App.5th at p. 1237.) He must also have "'a full opportunity to present his defenses.' [Citation.]" (*Doe v. Regents of University of California*, *supra*, 5 Cal.App.5th at p. 1104; see also *Doe v. Claremont McKenna College*, *supra*, 25 Cal.App.5th at p. 1070.)
>
> *Knight v. S. Orange Cmty. Coll. Dist.* (2021) 60 Cal.App.5th 854, 866.

C. DOCTRINE OF JUDICIAL NON-INTERVENTION DOES NOT APPLY.

The doctrine of judicial nonintervention into the academic affairs of schools does not apply in instances of non-academic affairs, such as this Title IX/student conduct proceeding at California High School. (See *Banks v. Dominican College* (1995) 35 Cal.App.4th 1545; *Paulsen v. Golden Gate University* (1979) 25 Cal.3d 803.)

IV. LEGAL STANDARD FOR STAY UNDER CODE CIV. PROC., § 1094.5(G)

A. STAY SHOULD ISSUE UNLESS RESPONDENTS CAN SATISFY THE COURT THAT A STAY IS AGAINST PUBLIC INTEREST

California's statutory framework provides that in a writ of mandate matter a court "may stay the operation of the administrative order or decision pending the judgment of the court" unless the court finds that a stay would be contrary to the public interest. (Code Civ. Proc., § 1094.5 (g).) Subdivision (g) requires only that before the issuance of a stay order "the court [be] satisfied that it is [not] against the public interest."[4] The statute does not require the court to make any additional findings in order to grant the stay. (*Canyon Crest Conservancy v. County of Los Angeles* (2020) 46 Cal.App.5th 398, 407.) If the Legislature had intended to require the trial court to make further findings to issue a stay, the

[4] Code Civ. Proc., § 1094.5 provides two standards for a stay; Code Civ. Proc., § 1094.5, subd. (h), which is applicable to applications for stay orders of state agencies regulating the medical profession, and Code Civ. Proc., § 1094.5, subd. (g), which is generally applicable for stay orders of other state agencies. (*Board of Medical Quality Assurance v. Superior Court* (1980) 114 Cal.App.3d 272, 276.)

Legislature would have included such language in Code Civ. Proc., § 1094.5, subd. (g).

Petitioners have no further burden for the stay, not required by the plain language of the statute, such as meeting the burden for issuance of a preliminary injunction or being required to establish that the stay is in the public interest as opposed to the Respondent having to satisfy the court that the stay is against the public interest. (Code Civ. Proc., § 1094.5, subd. (g).)

Without a stay, Petitioner will suffer the lasting and irreparable consequences of the Title IX Emergency Removal order, including the lengthy separation from his high school educational programs and activities and the ongoing damage to his reputation, even if he ultimately prevails in the administrative proceeding. On the other hand, if the evidence warrants a sanction, up to and including a suspension or expulsion, Respondents can impose a sanction at the proper time. (See, *Doe v. University of Southern California* (2018) 28 Cal.App.5th 26, 31-32; see also *Doe v. University of Southern California* (2016) 246 Cal.App.4th 221, 237 (stay was denied in 2014 and student served entire suspension sanction before USC's administrative order was set aside in April 2016); *Doe v. Allee* (2019) 30 Cal.App.5th 1036 (USC's administrative decision ordered set aside after 43 months, 23 days); *Doe v. University of Southern California* (2018) 29 Cal.App.5th 1212 (USC's administrative decision ordered set aside after 48 months, 29 days); *Doe v. University of Southern California* (2018) 28 Cal.App.5th 26 (USC's administrative decision upheld after 32 months 12 days); *Doe v. Carry (USC)* (Jan. 8, 2019, No. B282164) (USC's administrative decision set aside after 44 months, 1 day): *Doe v. Carry (USC)* (Feb. 14, 2020, No. B284183) (USC's administrative decision set aside after 52 months, 28 days); See, *Boermeester v. Carry* (Sep. 16, 2020, No. S263180), __Cal.5th __ , petition for review granted September 16, 2020 (Writ supersedeas granted in part by Court of Appeal); *Berman v. Regents of University of California* (2014) 229 Cal.App.4th 1265, 1271 (stay of disciplined granted pending resolution of the appeal.))

The Court's ruling on a party's application or motion for stay rests in the discretion of the Court. (Code Civ. Proc., § 1094.5(g).) This is not a preliminary injunction so at this initial stage of the writ proceeding, Petitioner does not need to show that he is likely to prevail on the merits at trial but should have "a colorable claim for writ relief" i.e. there is *some possibility* that he will ultimately prevail. (*Association of Orange County Deputy Sheriffs v. County of Orange* (2013) 217 Cal.App.4th 29, 49.) In

this case, no evidence has been produced to support the need for Petitioner's Emergency Removal from high school. There is no evidence that he poses an immediate threat to the physical health or safety of any student or other individual. Petitioner has least a colorable claim for writ relief, if not a strong likelihood of success on the merits.

B. RESPONDENT'S ADMINISTRATIVE ACTION AFFECTS VESTED FUNDAMENTAL RIGHTS.

Respondents' administrative process affects Petitioner's right to his public education. "California has enshrined the right to education within its own Constitution. Accordingly, "established California case law holds that there is a fundamental right of equal access to public education, warranting strict scrutiny of legislative and executive action that is alleged to infringe on that right." (*O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1465.)" (*Collins v. Thurmond* (2019) 41 Cal.App.5th 879, 896.)

Respondents' actions and decision deprive Petitioner of his fundamental vested right to public education; therefore, the reviewing court must exercise its independent judgment to independently weigh the evidence pursuant to Code Civ. Proc., § 1094.5, subd. (c).

Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, other than the relief sought in this petition. "The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested." (Code Civ. Proc., § 1086.)

Respondents' issuance of a Title IX Emergency Removal order without any evidence that Petitioner poses an immediate threat to the physical health or safety of any student or other individual is arbitrary and capricious.

Petitioner brings this action not only for his own interest, but to protect the rights of other individuals and members of the public who have been subjected to wrongful and unfair disciplinary proceedings at their public high school in California.

Petitioner is obligated to pay an attorney for legal services to prosecute this action. Petitioner may be entitled to recover attorney's fees as provided in Code Civ. Proc., § 1021.5, or alternatively Govt. Code, § 800, if Petitioner prevails in the within action.

V. ARGUMENT

A. RESPONDENTS' ACTIONS AND DECISION ARE INVALID

Respondents' actions and decision are invalid under Code Civ. Proc., § 1094.5. and alternatively, Code Civ. Proc., § 1085, as Respondents have presented no evidence of a genuine emergency involving the physical health or safety of any individuals. Jane Roe's uncorroborated, self-serving allegations are not sufficient to support Respondents' indefinite removal of Petitioner from in-person education programs and activities.

1. A Stay Is Not Against the Public Interest

While it may be true that a school has an interest in ensuring that its campus is a safe place for students and employees, the evidence does not support that a stay would interfere with that interest. Respondents have presented no evidence of a genuine emergency involving the physical health or safety of any individuals. Jane Roe's uncorroborated, self-serving allegations are not sufficient to support Respondents' indefinite removal of Petitioner, a 15-year-old student, from in-person education programs and activities. If unsupported allegations could justify a student's removal from high school, then any student could have their enemies and ex-partners removed from school simply by reporting a false Title IX allegation. Respondents did not conclude in their Title IX Emergency Removal orders that there was a genuine emergency situation involving the physical health of safety of anyone to justify a Title IX Emergency Removal of Petitioner from the District's in-person education programs and activities. (See Exhibit 3, Exhibit 8.) Respondents concluded only, "substantial allegations of sexual assault(s) to students while on campus," whatever that means. (Exhibit 3.) In the past 105 days, Respondents have presented no evidence demonstrating any "emergency" justifying Petitioner's continued removal from his public education. Respondents cannot meet their burden to show that a stay is against the public interest.

2. Balancing the Potential for Harm and Likelihood of Prevailing, a Stay Is Appropriate

The inquiry for the court at this stage is whether the harm that Petitioner will suffer during the pendency of the case if the motion is not granted exceeds any harm to the respondent, or to third parties, during the period in question if the preliminary injunction is imposed. (*California State Univ., Hayward*

v. National Collegiate Athletic Ass'n (1975) 47 Cal.App3d 533, 544.) The harm to Petitioner caused by the improper disciplinary action is the needless separation from his peers, teachers, and academic programs and activities, and harm to his reputation. (See *Goss v. Lopez* (1975) 419 U.S. 565, 589.)

There is no harm to Respondents, or to third parties, to stay the proceedings until the writ petition can be decided on the merits. If Respondents had evidence of a true emergency situation or an identifiable and immediate threat to the physical health or safety of any student arising from the allegations, it would have produced such evidence by now, 105 days after the investigation commenced.

Petitioner is likely to prevail on the merits of his action. Pursuant to the Federal Regulations, a Title IX Emergency Removal may only be implemented in cases of "genuine emergencies involving the physical health or safety of one or more individuals." (85 Fed. Reg. 30225.) In its Title IX Emergency Removal order, Respondents did not conclude that there was a genuine emergency involving the physical health of safety of anyone to justify removing Petitioner from the District's education programs or activities. (See Exhibit 3, Exhibit 8.) There is no evidence of a "genuine emergency" involving physical health or safety. Under the District's Procedures, there must be an identified "immediate threat to the physical health or safety of any student or other individual arising from the allegations." (Exhibit 2, p. 4.) Respondents did not identify any "immediate threat" to anyone's physical health or safety which would justify a Title IX Emergency Removal of Petitioner from the District's in-person education programs or activities

Even after correcting the Title IX Emergency Removal order, Respondents still cannot identify any "immediate threat" to anyone's physical health or safety to justify the Title IX Emergency Removal of Petitioner from the District's education programs or activities. (Exhibit 3.) There is no evidence to support that Petitioner and Jane Roe resumed a dating or intimate relationship after they broke up in the early morning on April 13, 2021. Petitioner and Jane Roe never had any intimate contact on school grounds, other than kissing while they were dating. (Exhibit 6, p. 30.)

In continuing to place unnecessary restrictions on Petitioner, Respondents have deprived Petitioner the right to due process, including the right to respond to evidence; the right to a hearing; and the right to cross-examine Jane Roe and witnesses before a neutral adjudicator. (*Knight v. S. Orange Cmty. Coll. Dist.* (2021) 60 Cal.App.5th 854, 866.)

B. PROOF OF SERVICE OF APPLICATION FOR STAY

As required by Code Civ. Proc., § 1094.5, Petitioner's application for the stay is accompanied by proof of service of a copy of the application on Respondents.

C. NO BOND REQUIRED FOR STAY.

The statute empowering the court to stay the operation of administrative decisions pending judgment in mandate proceedings does not require the petitioner to file a bond or undertaking as a condition of obtaining a stay order. (*Venice Canals Resident Home Owners Assn. v. Superior Court* (1977) 72 Cal.App.3d 675, 679, *see* Code Civ. Proc., § 1094.5 subd. (g) [stay of administrative decision].)

D. EX PARTE APPLICATION FOR STAY IS PROPERLY BEFORE THE COURT.

Ex parte applications are governed generally by Cal. Rules of Ct., Rule 3.1200 et seq. An *ex parte* application must be in writing and must include the following: (1) An application containing the case caption and stating the relief requested; (2) a declaration in support of the application; (3) a declaration, competent and abased on personal knowledge, regarding the notice provided to other parties pursuant to Cal. Rules of Ct., Rule 3.1204; (4) a memorandum; and (5) a proposed order. Here, Petitioner has filed the required *ex parte* application documents. Under Cal. Rules of Ct., Rule 3.1202, the *ex parte* application must state the name, address, and telephone number of any attorney known to the applicant to be an attorney for any party. The names, addresses and telephone numbers are below:

Jacqueline M. Litra
Fagen Friedman & Fulfrost LLP
6300 Wilshire Blvd Ste 1700
Los Angeles, CA 90048-5219
Phone: (323) 330-6300
Fax: (323) 330-6311
Email: jlitra@f3law.com
ATTORNEYS FOR RESPONDENTS

David Mishook
Fagen Friedman & Fulfrost LLP
70 Washington Street, Suite 205
Oakland, California 94607
Phone: 510.550.8200
Fax: 510.550.8211
Email: dmishook@f3law.com
ATTORNEYS FOR RESPONDENTS

Pursuant to Cal. Rules of Ct., Rule 3.1203, the party seeking an *ex parte* order must notify all parties no later than 10:00 a.m. the court day before the *ex parte* appearance, absent a showing of exceptional circumstances that justify a shorter time for notice. All parties were notified, as shown in the Declaration of Mark Hathaway, ¶ 1.

VI. CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court issue a stay of the Title IX Emergency Removal order.

HATHAWAY PARKER

DATED: August 5, 2021 By: _____

MARK M. HATHAWAY
JENNA E. PARKER
Attorney for Petitioner

DECLARATION OF MARK M. HATHAWAY

I, Mark M. Hathaway, declare:

I am an attorney admitted to practice in all courts in the State of California, the State of Illinois, the State of New York, and the District of Columbia and am a Certified Specialist in Taxation Law by the California State Bar Board of Legal Specialization. I am responsible for representation of Petitioner in this matter. I have personal and first-hand knowledge of the facts set forth in this Declaration, unless otherwise stated, and, if called as a witness, I could and would testify competently to those facts.

1. On Wednesday August 4, 2021, before 10:00 a.m. I have been in contact via telephone and email with counsel for Respondents and gave notice that Petitioner is proceeding with his *ex parte* application for stay on Thursday, August 5, 2021 at 11:00 a.m. in Dept. 7. Counsel for Respondents replied and stated that Respondents will appear at the hearing and oppose the stay application.

2. Attached hereto as Exhibit 1 is a true and correct redacted copy of the Amended Notice of Allegations of Title IX Sexual Harassment by a Complainant. Redactions have been made to protect the true names of Jane Roe and Petitioner.

3. Attached hereto as Exhibit 2 is a true and correct copy of the Title IX Sexual Harassment Procedures of the San Ramon Unified School District.

4. Attached hereto as Exhibit 3 is a true and correct redacted copy of the Corrected Copy of Title IX Emergency Removal. Redactions have been made to protect the true name of Petitioner.

5. Attached hereto as Exhibit 4 is a true and correct redacted copy of Outcome of Challenge to Title IX Emergency Removal of Student Redactions have been made to protect the true name of Petitioner.

6. Attached hereto as Exhibit 5 is a true and correct copy of the redacted Notice of Access to Directly Related Evidence. Redactions have been made to protect the true names of Jane Roe and Petitioner.

7. Attached hereto as Exhibit 6 is a true and correct redacted copy of the Updated Evidence Packet dated July 15, 2021. Redactions have been made to protect the true names of Jane Roe and Petitioner.

8. Attached hereto as Exhibit 7 is a true and correct redacted copy of an email message from Jacqueline M. Litra, dated July 12, 2021 regarding the status of the Emergency Removal and its continuation. Redactions have been made to protect the true name of Petitioner.

9. Attached hereto as Exhibit 8 is a true and correct redacted copy of the initial Notice of Title IX Emergency Removal of Student, dated April 22, 2021. Redactions have been made to protect the true name of Petitioner.

I declare under the penalty of perjury in the State of California that the foregoing is true and correct. Signed in Los Angeles, California.

Date: August 5, 2021

Mark M. Hathaway

EXHIBITS

Exhibit 1

San Ramon Unified School District

June 3, 2021

Via Electronic Mail Simultaneously to Both Parties

Re: Amended Notice of Allegations of Title IX Sexual Harassment by a Complainant

Dear Complainant and Respondent:

On April 26, 2021, a Formal Complaint was filed by Name Redacted ("Complainant") against Petitioner ("Respondent") under the San Ramon Valley Unified School District's ("District") Title IX Sexual Harassment Complaint Procedures.[1] The Formal Complaint alleges:

- On April 15, 2021, Respondent sexually assaulted and sexually harassed Complainant during fifth period theater class by kissing her on her mouth and neck without her consent, fondling her breasts without her consent, fondling and penetrating her vulva and vagina without her consent, and forcing her to touch his penis under his clothing by forcing her hand into his pants without her consent.

On June 2, 2021, Complainant notified the investigator that the alleged conduct occurred on April 13, 2021. Accordingly, the allegation is amended as follows:

- On April 13, 2021, Respondent sexually assaulted and sexually harassed Complainant during fifth period theater class by kissing her on her mouth and neck without her consent, fondling her breasts without her consent, fondling and penetrating her vulva and vagina without her consent, and forcing her to touch his penis under his clothing by forcing her hand into his pants without her consent.

If, during the course of the investigation, the District determines additional allegations regarding Complainant or Respondent need to be investigated, the Title IX Coordinator will notify the parties of the additional allegations.

Educational institutions subject to Title IX of the Education Amendments of 1972 and its implementing regulations must respond without deliberate indifference and using the Title IX Sexual Harassment Grievance Process in the District's Title IX Sexual Harassment Complaint Procedures to address allegations of "Title IX Sexual Harassment," as that term is defined in the Title IX regulations and the District's Title IX Sexual Harassment Complaint Procedures. This

[1] Any allegations not rising to the level of Title IX Sexual Harassment, as defined in 34 CFR 106.30, will be simultaneously investigated to determine whether any violations of other District Board Policies ("BP") or Administrative Regulations ("AR") have occurred, including, but not limited to, BP/ AR 5145.7, *Sexual Harassment*, and BP/ AR 5131.2, *Bullying*.

includes investigating formal complaints containing allegations of Title IX Sexual Harassment under the District's Title IX Sexual Harassment Complaint Procedures.

The District has determined that the alleged conduct, if true, would constitute Title IX Sexual Harassment and, therefore, is within the scope of the District's Title IX Sexual Harassment Complaint Procedures. As such, the District will investigate the Formal Complaint under its Title IX Sexual Harassment Complaint Procedures. A copy of which is enclosed with this letter.

The investigation of the Formal Complaint in no way implies that the District has made a decision on the merits of the allegations in the Formal Complaint. Respondents are presumed to be not responsible for Title IX Sexual Harassment until the conclusion of the Title IX Sexual Harassment Complaint Procedures. Only after the District has investigated the Formal Complaint in accordance with its Title IX Sexual Harassment Complaint Procedures, including reviewing any applicable evidence, will it make a determination regarding responsibility.

During the investigation, the District will serve as a neutral fact finder, collecting relevant evidence. During the investigation, the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the District and not on the parties. The following individuals will serve as the Title IX team for this Formal Complaint:

- **Title IX Coordinator**: Ken Nelson, Director of Student Services
  San Ramon Valley Unified School District
  KNelson@srvusd.net
  (925) 552-5052
- **Investigator**: Alejandra Leon, Attorney
  Fagen, Friedman & Fulfrost, LLP
- **Decisionmaker**: Katy McCully Merrill, Attorney,
  Fagen, Friedman & Fulfrost, LLP
- **Appellate Decisionmaker**: Vanessa Lee, Attorney
  Fagen, Friedman & Fulfrost, LLP

If you have any concerns regarding conflict of interest or bias regarding any of these individuals, please notify the Title IX Coordinator immediately.

The District's Title IX Sexual Harassment Complaint Procedures contain a full summary of your rights and responsibilities during the District's processing of the Formal Complaint. These include, but are not limited to, the right of the parties to review any evidence obtained as part of the investigation that is directly related to the allegations raised in the Formal Complaint, including evidence upon which the District does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source so that you can meaningfully respond to the evidence prior to conclusion of the investigation.

You may have an advisor of your choice, who may be, but is not required to be, an attorney, and who may accompany you to any related meeting or proceeding and who may act as your support person during investigation interview(s), review evidence collected, and assist with examination questions, subject to restrictions applicable to both parties that will be explained to you during this process.

The District prohibits knowingly making false statements or knowingly submitting false information during the Title IX Sexual Harassment Complaint Procedures. No person is permitted to intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under the District's Title IX policies or procedures. If any individual is harassed or intimidated because of filing a complaint or participating in any aspect of the District's Title IX Sexual Harassment Complaint Procedures, that individual may file a complaint alleging such treatment using The District's Board Policy and Administrative Regulation 1312.3, *Uniform Complaint Procedure*.

This Formal Complaint is eligible for the District's Title IX informal resolution process at any time prior to a determination being reached in this matter. In informal resolution, the District appoints a trained employee or contractor to facilitate the resolution of the Formal Complaint by providing an opportunity for the parties involved to voluntarily resolve the complaint allegations. Additional information regarding the informal resolution process is available upon request.

Thank you for your cooperation. If you have any questions about the process, please do not hesitate to contact me.

Sincerely,

Ken Nelson
Title IX Coordinator

Enclosures
Title IX Sexual Harassment Complaint Procedures
BP / AR 1312.3, *Uniform Complaint Procedure*

Exhibit 2

San Ramon Unified School District

Title IX Sexual Harassment Complaint Procedures

AR 4119.12/4219.12/4319.12
Personnel

AR 5145.71
Students

The district does not discriminate on the basis of sex in any of its programs or activities, and it complies with Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations (34 C.F.R. Part 106). The district is committed to maintaining an educational and workplace environment free from sexual harassment.

Title IX Sexual Harassment Prohibited

Sexual Harassment as defined in Title IX (Title IX Sexual Harassment) is prohibited in district education programs or activities. Title IX Sexual Harassment is conduct on the basis of sex in an education program or activity that satisfies one or more of the following: (34 CFR 106.30, 106.44)

1. A district employee conditioning the provision of a district aid, benefit, or service on a person's participation in unwelcome sexual conduct

2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the district's education program or activity

3. Sexual assault as defined in 20 U.S.C. §1092(f)(6)(A)(v)

   For the purpose of this AR, the district defines "consent" as defined in California Penal Code Section 261.6 Consent: permission for something to happen or agreement to do something.

4. Dating violence as defined in 34 U.S.C. §12291(a)(10)

5. Domestic violence as defined in 34 U.S.C. §12291(a)(8)

6. Stalking as defined in 34 U.S.C. §12291(a)(30).

(cf. 4119.11/4219.11/4319.11 - Sexual Harassment)
(cf. 5145.7 - Sexual Harassment)

Term Definitions (34 C.F.R. §106.30)

The following Title IX definitions apply to the following terms used in this Administrative Regulation:

Complainant - an individual who is alleged to be the victim of conduct that could constitute Title IX Sexual Harassment.

Education program or activity - locations, events, or circumstances where the district has substantial control over both respondent(s) and the context in which alleged Title IX Sexual Harassment occurred.

Formal Complaint - a document filed by a complainant (or a complainant's parent or guardian) or signed by the Title IX Coordinator alleging Title IX Sexual Harassment against a respondent(s) and requesting that the District investigate the allegation.

Respondent - an individual who has been reported to be the perpetrator of the conduct that could constitute Title IX Sexual Harassment.

Supportive measures - non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to complainant(s) or respondent(s) before or after the filing of a formal complaint or where no formal complaint has been filed.

Title IX Sexual Harassment Complaints

The complaint procedures set forth in this Administrative Regulation will be used to address any report of Title IX Sexual Harassment in a district education program or activity to the extent required by Title IX.

Should the Title IX Regulations be modified or repealed, the district will implement only the aspects of these procedures required by law. If permitted by law, the district will address reports of sexual harassment, including Title IX Sexual Harassment, in accordance with AR 4030, Nondiscrimination in Employment, or AR 1312.3, Uniform Complaint Procedure, as applicable.

Non-Title IX Sexual Harassment Complaints

Reports of sexual harassment not covered by the definition of Title IX Sexual Harassment will be addressed in accordance with AR 4030, Nondiscrimination in Employment, or AR 1312.3, Uniform Complaint Procedure, as applicable. The determination of whether the allegations meet the definition of Title IX Sexual Harassment under Title IX will be made by the district's Title IX Coordinator.

(cf. 4030 - Nondiscrimination in Employment)
(cf. 1312.3 - Uniform Complaint Procedure)

Reporting Title IX Sexual Harassment

Anyone who believes they have experienced, witnessed or received a report of Title IX Sexual Harassment is strongly encouraged to report the incident to the district's Title IX Coordinator, district administrator, or any district employee with whom the person is comfortable.

District employees receiving a report of or witnessing Title IX Sexual Harassment are required to report it to the Title IX Coordinator. An employee who fails to promptly report or forward a report of Title IX Sexual Harassment to the Title IX Coordinator may be disciplined, up to and including dismissal.

Title IX Coordinator
Ken Nelson
699 Old Orchard Drive, Danville, CA 94526
(925) 552-5250
knelson@srusd.net

Processing Reports of Title IX Sexual Harassment

Upon receiving such a report, the Title IX Coordinator will promptly contact the complainant to discuss the availability of supportive measures, inform the complainant of the right to file a formal complaint and explain the process for filing a formal complaint. (34 CFR 106.44)

Supportive Measures

Upon receipt of a report of Title IX Sexual Harassment, the Title IX Coordinator will promptly contact the complainant to discuss the availability of supportive measures and will consider the complainant's wishes with respect to the supportive measures implemented. Supportive measures must be offered as appropriate, as reasonably available, and without charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures must be non-disciplinary, non-punitive, and designed to restore or preserve equal access to the district's education program and activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the district's educational environment or to deter sexual harassment. Supportive measures may include, but are not limited to, counseling,

extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escorts, mutual restrictions on contact between parties, changes in work locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures to complainants and respondents. (34 CFR 106.30, 106.44)

The district will maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the district's ability to provide the supportive measures. (34 CFR 106.30)

Administrative Leave

If a district employee is the respondent, the employee may be placed on administrative leave during the pendency of the formal complaint process. (34 CFR 106.44)

Emergency Removal

A student may not be disciplined for alleged Title IX Sexual Harassment until the formal complaint process is completed and a determination of responsibility has been made. However, on an emergency basis, the district may remove a student from the district's education program or activity, provided that the district conducts an individualized safety and risk analysis, determines that removal is justified due to an immediate threat to the physical health or safety of any student or other individual arising from the allegations, and provides the student with notice and an opportunity to challenge the decision immediately following the removal. This authority to remove a student does not modify a student's rights under the Individuals with Disabilities Education Act or Section 504 of the Rehabilitation Act of 1973. (34 CFR 106.44)

Formal Complaint

A formal complaint, with the complainant's physical or digital signature, may be filed with the Title IX Coordinator in person, by mail, by email. (34 CFR 106.30)

Even if the alleged victim chooses not to file a formal complaint, the Title IX Coordinator may sign a formal complaint in situations when a safety threat exists and in other situations as permitted under Title IX, including as part of the district's obligation to not be deliberately indifferent to known allegations of Title IX Sexual Harassment. In such cases, the Title IX Coordinator is not a party to the formal complaint. The Title IX Coordinator will provide notices to the complainant as required by Title IX.

The district may consolidate formal complaints of Title IX Sexual Harassment against more than one respondent, or by more than one complainant, or by one party against another, where the allegations of Title IX Sexual Harassment arise out of the same facts or circumstances.

Formal Complaint Process

The district treats complainants and respondents engaging in the formal complaint process equitably. Respondents are presumed not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of this formal complaint process. (34 CFR 106.45(b)(1)(iv)) The district complies with this formal complaint process before imposing disciplinary sanctions or other actions that are not supportive measures against a respondent. (34 CFR 106.45(b)(1)(i))

Anyone designated by the district as a Title IX Coordinator, investigator, decisionmaker, appeal decision maker, or informal resolution facilitator will not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent and will receive training in accordance with 34 CFR 106.45. (34 CFR 106.45(b)(1)(iii))

Written Notice of Allegations

Upon receipt of a formal complaint, the Title IX Coordinator must provide the known parties with written notice of allegations including the following: (34 CFR 106.45(b)(2))

1. Notice of this formal complaint process, including any informal resolution process

2. The allegations potentially constituting Title IX Sexual Harassment with sufficient details known at the time, including the identities of parties involved in the incident, if known, the conduct allegedly constituting Title IX Sexual Harassment, and the date and location of the alleged incident, if known. Such notice shall be provided with sufficient time for the parties to prepare a response before any initial interview.

   If, during the course of the investigation, new Title IX Sexual Harassment allegations arise about the complainant or respondent that are not included in this initial notice of allegations, the Title IX Coordinator must provide notice of the additional allegations to the parties.

3. A statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the complaint process

4. Notice that the parties may have an advisor of their choice who may be, but is not required to be, an attorney.

5. Notice that the parties and their advisors, if any, will have an opportunity to inspect and review evidence

6. Advise the parties that the district's code of conduct prohibits knowingly making false statements or knowingly submitting false information during the formal complaint process

7. When possible, the name of the investigator, informal resolution facilitator, decision maker and appeal decision maker, and inform the parties that, if at any time a party has concerns regarding a conflict of interest or bias regarding any of these persons, the party should immediately notify the Title IX Coordinator.

Dismissal of Formal Complaint

The Title IX Coordinator must dismiss a formal complaint if the alleged conduct: (1) would not constitute Title IX Sexual Harassment as defined in 34 CFR 106.30 even if proved, (2) did not occur in the district's education program or activity, or (3) did not occur against a person in the United States. Such conduct may still be addressed pursuant to other district Board policies and administrative regulations including, but not limited to, AR 4030 - Nondiscrimination in Employment, or BP/AR 1312.3, Uniform Complaint Procedure, as applicable.

At any time during the investigation, the Title IX Coordinator may dismiss a formal complaint of Title IX Sexual Harassment if: (1) the complainant notifies the district in writing that the complainant would like to withdraw the formal complaint or any allegations in the formal complaint, (2) the respondent is no longer enrolled or employed by the district, or (3) sufficient circumstances prevent the district from gathering evidence sufficient to reach a determination with regard to the formal complaint. (34 CFR 106.45)

Upon dismissal, the Title IX Coordinator will promptly send written notice of the dismissal and the reasons for the dismissal simultaneously to the parties and inform them of their right to appeal the dismissal of a formal complaint or any allegation in the formal complaint in accordance with the appeal procedures described in the "Appeals" section below. (34 CFR 106.45)

Informal Resolution

After a formal complaint of Title IX Sexual Harassment is filed, but at any time before a determination regarding responsibility is reached, the district may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication. The district shall not require a party to participate in the informal resolution process or to waive the right to an investigation and adjudication of a formal complaint. (34 CFR 106.45)

Prior to facilitating an informal resolution process, the district must: (34 CFR 106.45(b)(9))

1. Provide the parties with written notice disclosing:

a. the allegations;

b. the requirements of the informal resolution process including the circumstances under which the parties are precluded from resuming the formal complaint process arising from the same allegations;

c. the right of either party to withdraw from the informal resolution process and resume the formal complaint process at any time prior to agreeing to a resolution; and

d. that the district's informal resolution process is confidential and any consequences resulting from participating in the informal resolution process, including the records of the informal resolution process that will be maintained or could be shared.

2. Obtain the parties' voluntary, written consent to the informal resolution process

Informal resolution is not available to resolve allegations of Title IX Sexual Harassment by a student against an employee.

Investigation Procedures

The burden of proof and the burden of gathering evidence sufficient to reach a determination of responsibility rest on the district and not the parties.

Unless a party provides voluntary, written consent, the district cannot access, consider, disclose, or otherwise use a party's records maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in their professional capacity, which are made and maintained in connection with the provision of treatment to the party. (34 CFR 106.45(b)(5)(i))

During the investigation process, the district's designated investigator will: (34 CFR 106.45)

1. Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence

2. Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence

3. 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

4. Not limit the choice or presence of an advisor for either the complainant or respondent in any meeting or grievance proceeding. All party advisors are limited to providing support and may not be direct participants. This conduct expectation applies equally to complainants and respondents.

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

6. Prior to the completion of the investigative report, provide the parties, and their advisors, if any, an equal opportunity to inspect and review any evidence directly related to the allegations in the formal complaint including evidence the district does not intend to rely in reaching a determination, and provide the parties at least 10 days to submit a written response for the investigator to consider prior to the completion of the investigative report

7. Objectively evaluate all relevant evidence, including both inculpatory and exculpatory evidence, and determine credibility in a manner that is not based on a person's status as a complainant, respondent, or witness

8. Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to the determination of responsibility, send to the parties and their advisors, if any, the investigative report in an electronic format or a hard copy, for their review and written response

The district's investigator must not require, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under legally recognized privilege unless the person holding the privilege has waived the privilege. (34 CFR 106.45(b)(1)(x))

If the complaint is against an employee, rights conferred under an applicable collective bargaining agreement shall be applied to the extent they do not conflict with Title IX.

Written Determination

The Title IX Coordinator shall designate a decisionmaker to determine responsibility for the alleged conduct, who shall not be the Title IX Coordinator, investigator or appeal decisionmaker on the formal complaint. (34 CFR 106.45(b)(7))

After the investigative report has been sent to the parties, but before reaching a determination of responsibility, the decisionmaker will afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

The decisionmaker will notify the parties and witnesses of the following applicable timelines for the submission of questions and responses:

1. The parties have 7 calendar days to submit their questions to the decisionmaker after receiving notice of the opportunity to submit questions from the decisionmaker.

2. After receipt of the questions, the parties and witnesses will have 7 calendar days to submit their responses to the questions to decisionmaker.

3. When providing the questions and responses to both parties, the decisionmaker must explain to the party proposing the questions any decision to exclude a question as not relevant. Upon receipt of the responses to the questions, the parties will have 5 calendar days to submit limited follow-up questions.

Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence are offered to prove that someone other than the respondent committed the conduct alleged by the complainant or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. (34 CFR 106.45(b)(6)(ii)) The district's decisionmaker must not require, rely upon, allow, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under legally recognized privilege unless the person holding the privilege has waived the privilege. (34 CFR 106.45(b)(1)(x))

The written determination shall be issued within 90 calendar days of the receipt of the formal complaint. However, the time for completing the formal complaint process will be temporarily delayed during school recess periods exceeding three days. The timeline may be extended for good cause with written notice to the complainant and respondent of the extension and the reasons for the action. Good cause may include, but is not limited to, absence of a party, witness, or party advisor; concurrent law enforcement activity; participation in the informal resolution process; or need for language assistance or disability accommodation. (34 CFR 106.45(b)(1)(v))

The decisionmaker shall issue, and simultaneously provide to both parties, a written determination as to whether the respondent is responsible for the alleged conduct. (34 CFR 106.45(b)(7))In making this determination, the decisionmaker shall use the "preponderance of the evidence" standard for all formal complaints of Title IX Sexual Harassment. (34 CFR 106.45(b)(1)(vii)) The decisionmaker will objectively evaluate all relevant evidence, including both inculpatory and exculpatory evidence, and determine credibility in a manner that is not based on a person's status as a complainant, respondent, or witness. (34 CFR 106.45(b)(1)(ii))

The written determination will include the following: (34 CFR 106.45(b)(7))

1. Identification of the allegations potentially constituting Title IX Sexual Harassment as defined in 34 CFR 106.30;

2. A description of the procedural steps taken from receipt of the formal complaint through the written determination, including any notifications to the parties, interviews with parties and witnesses, site visits, and methods used to gather other evidence;

3. Findings of fact supporting the determination;

4. Conclusions regarding the application of the district's code of conduct or policies to the facts;

5. A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the district imposes on the respondent, and whether remedies designed to restore or preserve equal access to the district's educational program or activity will be provided by the district to the complainant

6. The district's procedures and permissible bases for the complainant and respondent to appeal

Unless a party provides voluntary, written consent, the district cannot access, consider, disclose, or otherwise use a party's records maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in their professional capacity, which are made and maintained in connection with the provision of treatment to the party. (34 CFR 106.45(b)(5)(i))

Appeals

Either party may appeal the district's decision or dismissal of a formal complaint or any allegation in the formal complaint, if: (1) the party believes that a procedural irregularity affected the outcome, (2) new evidence is available that could affect the outcome, or (3) a conflict of interest or bias by the Title IX Coordinator, investigator(s), or decisionmaker(s) affected the outcome. An appeal must be filed in writing with the Title IX Coordinator within 10 calendar days of receiving the written determination or dismissal, stating the grounds for the appeal and including any relevant documentation in support of the appeal. Appeals submitted after this deadline are not timely and shall not be considered.

If an appeal is timely filed, the district shall: (34 CFR 106.45(8))

1. Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties

2. Ensure that the appeal decisionmaker is trained in accordance with 34 CFR 106.45 and is not the decisionmaker(s) who reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator

3. Give both parties 10 calendar days to submit a written statement in support of or challenging the outcome

4. Issue a written decision describing the result of the appeal (e.g., affirms, reverses, remands, or amends the written determination regarding responsibility) and the rationale for the result within 20 calendar days from the deadline for the parties to submit their written statement in support of or challenging the outcome

5. Provide the written decision simultaneously to both parties within 5 business days of issuing the decision

Either party has the right to file a complaint with the U.S. Department of Education's Office for Civil Rights within 180 days of the date of the most recently alleged misconduct.

The complainant shall be advised of any civil law remedies, including, but not limited to, injunctions, restraining orders, or other remedies or orders that may be available under state or federal antidiscrimination laws, if applicable.

Remedies

When a determination of responsibility for Title IX Sexual Harassment has been made against the respondent, the district shall provide remedies to the complainant. Remedies must be designed to restore or preserve equal access to the district's education program or activity. Such remedies may include the same individualized services described above in the section "Supportive Measures," but need not be non-disciplinary or non-punitive and need not avoid burdening the respondent. (34 CFR 106.45) The Title IX Coordinator is responsible for effective implementation of any remedies. (34 CFR 106.45(b)(7)(iv))

Sanctions/Disciplinary Actions/Corrective Actions

The district shall not impose any disciplinary sanctions or other actions against a respondent, other than supportive measures as described above in the section "Supportive Measures," until the formal complaint process has been completed and a determination of responsibility has been made. (34 CFR 106.44)

For students in grades 4-12, discipline for sexual harassment may include suspension and/or expulsion. After the completion of the formal complaint process, if it is determined that a student at any grade level has committed sexual assault or sexual battery at school or at a

school activity off school grounds, the principal or Superintendent shall immediately suspend the student and shall recommend expulsion. (Education Code 48900.2, 48915)

(cf. 5144 - Discipline)
(cf. 5144.1 - Suspension and Expulsion/Due Process)

Other actions that may be taken with a student who is determined to be responsible for sexual harassment include, but are not limited to:

1. Transfer from a class or school as permitted by law

2. Parent/guardian conference

3. Education of the student regarding the impact of the conduct on others

4. Positive behavior support

5. Referral of the student to a student success team

   (cf. 6164.5 - Student Success Teams)

6. Denial of participation in extracurricular or co-curricular activities or other privileges as permitted by law

(cf. 6145 - Extracurricular and Cocurricular Activities)

When an employee is found to have committed sexual harassment or retaliation, the district shall take appropriate disciplinary action, up to and including dismissal, in accordance with applicable law and collective bargaining agreement.

(cf. 4117.7/4317.7 - Employment Status Report)
(cf. 4118 - Dismissal/Suspension/Disciplinary Action)
(cf. 4119.11/4219.11/4319.11 - Sexual Harassment)
(cf. 4218 - Dismissal/Suspension/Disciplinary Action)

Recordkeeping

The Title IX Coordinator shall maintain records of the following for a period of seven years: (34 CFR 106.45(b)(10))

1. All reported allegations and Title IX Sexual Harassment investigations, any determinations of responsibility, any disciplinary sanctions imposed on respondent, and any remedies provided to the complainant designed to restore equal access to the District's education program or activity

2. Any appeal and the result

3. Any informal resolution and the results.

4. Any actions, including any supportive measures, taken in response to a report or formal complaint of Title IX Sexual Harassment. In each instance, the district must document the basis for its conclusion that its response was not deliberately indifferent and the measures taken that were designed to restore or preserve equal access to the education program or activity. If no supportive measures were provided to the complainant, the district must document the reasons that such a response was not unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the district from providing additional explanations or detailing additional measures in the future.

5. All materials used to train the Title IX Coordinator, investigator(s), decisionmaker(s), and informal resolution facilitators. The district shall make such training materials publicly available on its website.

(cf. 1113 - District and School Web Sites)
(cf. 3580 - District Records)

Legal Reference:
EDUCATION CODE
200-262.4 Prohibition of discrimination on the basis of sex
48900 Grounds for suspension or expulsion
48900.2 Additional grounds for suspension or expulsion; sexual harassment
48985 Notices, report, statements and records in primary language
CIVIL CODE
51.9 Liability for sexual harassment; business, service and professional relationships
1714.1 Liability of parents/guardians for willful misconduct of minor
GOVERNMENT CODE
12950.1 Sexual harassment training
CODE OF REGULATIONS, TITLE 5
4600-4670 Uniform complaint procedures
4900-4965 Nondiscrimination in elementary and secondary education programs
UNITED STATES CODE, TITLE 20
1092 Definition of sexual assault
1221 Application of laws
1232g Family Educational Rights and Privacy Act
1681-1688 Title IX of the Education Amendments of 1972

UNITED STATES CODE, TITLE 34
12291 Definition of dating violence, domestic violence, and stalking
UNITED STATES CODE, TITLE 42
1983 Civil action for deprivation of rights
2000d-2000d-7 Title VI, Civil Rights Act of 1964
2000e-2000e-17 Title VII, Civil Rights Act of 1964 as amended
CODE OF FEDERAL REGULATIONS, TITLE 34
99.1-99.67 Family Educational Rights and Privacy
106.1-106.82 Nondiscrimination on the basis of sex in education programs
COURT DECISIONS
Donovan v. Poway Unified School District, (2008) 167 Cal.App.4th 567
Flores v. Morgan Hill Unified School District, (2003, 9th Cir.) 324 F.3d 1130
Reese v. Jefferson School District, (2000, 9th Cir.) 208 F.3d 736
Davis v. Monroe County Board of Education, (1999) 526 U.S. 629
Gebser v. Lago Vista Independent School District, (1998) 524 U.S. 274
Oona by Kate S. v. McCaffrey, (1998, 9th Cir.) 143 F.3d 473
Doe v. Petaluma City School District, (1995, 9th Cir.) 54 F.3d 1447

Management Resources:
CSBA PUBLICATIONS
Providing a Safe, Nondiscriminatory School Environment for Transgender and Gender-Nonconforming Students, Policy Brief, February 2014
Safe Schools: Strategies for Governing Boards to Ensure Student Success, 2011
FEDERAL REGISTER
Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, May 19, 2020, Vol. 85, No. 97, pages 30026-30579
U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS PUBLICATIONS
Q&A on Campus Sexual Misconduct, September 2017
Examples of Policies and Emerging Practices for Supporting Transgender Students, May 2016
Dear Colleague Letter: Title IX Coordinators, April 2015
Sexual Harassment: It's Not Academic, September 2008
Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, January 2001
WEB SITES
CSBA: http://www.csba.org
California Department of Education: http://www.cde.ca.gov
U.S. Department of Education, Office for Civil Rights: http://www.ed.gov/about/offices/list/ocr

Exhibit 3

California High School

9870 Broadmoor Drive • San Ramon, CA 94583 • 925-803-3200

Megan Keefer
Principal

Tucker Farrar
Assistant Principal

Catie Hawkins
Assistant Principal

Kathleen Martins
Assistant Principal

Jeffrey Osborn
Assistant Principal

Candace Molano
Office Manager

Original Notice Issued: April 22, 2021
Corrected Notice Issued: May 7, 2021

Petitioner
Petitioner Parent
Petitioner Parent

Re: CORRECTED Notice of Title IX Emergency Removal of Student

Dear Petitioner :

On April 22, 2021, the San Ramon Valley Unified School District ("District") received allegations of Title IX Sexual Harassment against you.

In response to the initial allegations, the District has undertaken an individualized safety and risk analysis and has determined that you pose an immediate threat to the physical health or safety of a student or other individual arising from the allegations of Title IX Sexual Harassment. The specific reasons for the decision are: substantial allegations of sexual assault(s) to students while on campus.

Accordingly, the District has determined that you should be removed from the District's education program or activity on an emergency basis under Title IX of the Education Amendments of 1972 and its implementing regulations.

The Title IX Coordinator will notify the Board of Education of its determination that you are eligible for a Title IX emergency removal and should not be allowed to participate in the the District's education programs or activities until after the investigation into the allegations of Title IX Sexual Harassment concludes.

No person is permitted to intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in the Title IX procedures. If any individual is harassed or intimidated because of filing a complaint or participating in any aspect of the District's Title

IX Sexual Harassment Complaint Procedures, that individual may file a complaint alleging such treatment using the District's Board Policy. See attached copies and links:

http://www.gamutonline.net/district/sanramonvalleyusd/DisplayPolicy/1050532/
http://www.gamutonline.net/district/sanramonvalleyusd/DisplayPolicy/1050533/
http://www.gamutonline.net/district/sanramonvalleyusd/DisplayPolicy/1050895/

You can challenge this emergency removal decision under Title IX by contacting Megan Keefer.

Sincerely,

Title IX Coordinator Designee
Enclosures

http://www.gamutonline.net/district/sanramonvalleyusd/DisplayPolicy/1050532/
http://www.gamutonline.net/district/sanramonvalleyusd/DisplayPolicy/1050533/
http://www.gamutonline.net/district/sanramonvalleyusd/DisplayPolicy/1050895/

Exhibit 4

California High School

9870 Broadmoor Drive • San Ramon, CA 94583 • 925-803-3200

May 21, 2021

Petitioner
Petitioner Parent
Petitioner Parent

Re: Outcome of Challenge to Title IX Emergency Removal of Student

Dear Petitioner

On April 22, 2021, the San Ramon Valley Unified School District ("District") received allegations of Title IX Sexual Harassment against you.

In response to the initial allegations, the District undertook an individualized safety and risk analysis and determined that you pose an immediate threat to the physical health or safety of a student or other individual arising from the allegations of Title IX Sexual Harassment. The specific reason for the determination was: substantial allegations of sexual assault(s) to students while on campus.

As a result, the District determined that you should be removed from the District's education program or activity on an emergency basis under Title IX of the Education Amendments of 1972 and its implementing regulations.

On May 17, 2021, your advisor, on your behalf, requested a meeting to challenge the Title IX Emergency Removal. On May 19, 2021, you were provided the opportunity to make a statement and present any information to challenge the determination that you pose an immediate threat to the physical health or safety of a student or other individual arising from the allegations of sexual assault, Title IX Sexual Harassment. You stated that the allegations against you were false and that you do not pose a danger to anyone.

At the time of the individualized safety and risk analysis, you asserted that the Complainant was fabricating the allegations against you because you broke up with her. The District considered the allegations of sexual assault, Title IX Sexual Harassment, and your response to those allegations in making the initial assessment and determination. No new information was provided on May 19, 2021, to contradict the District's initial determination that you pose

an immediate threat to the physical health or safety of a student(s) or other individual(s) arising from the allegations of sexual assault, Title IX Sexual Harassment.

Accordingly, the determination that you pose an immediate threat to the physical health or safety of a student(s) or other individual(s) arising from the allegations of sexual assault, Title IX Sexual Harassment, is upheld. You will not be allowed to participate in the District's in-person education programs or activities until after a determination is made regarding the Title IX Sexual Harassment Formal Complaint.

Your emergency removal is purely a safety measure. It is not a factual determination regarding your responsibility for the allegations of sexual assault, Title IX Sexual Harassment, and is not disciplinary. You are deemed not responsible for the conduct set forth in the Notice of Allegations until a determination is made at the conclusion of the Title IX Sexual Harassment Complaint Procedures.

No person is permitted to intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in the Title IX procedures. If any individual is harassed or intimidated because of filing a complaint or participating in any aspect of the District's Title IX Sexual Harassment Complaint Procedures, that individual may file a complaint alleging such treatment using the District's Board Policy. See attached copies and links:

http://www.gamutonline.net/district/sanramonvalleyusd/DisplayPolicy/1050532/
http://www.gamutonline.net/district/sanramonvalleyusd/DisplayPolicy/1050533/
http://www.gamutonline.net/district/sanramonvalleyusd/DisplayPolicy/1050895/

Sincerely,

Megan Keefer
Title IX Coordinator Designee

Exhibit 5

SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT
699 Old Orchard Drive, Danville, California 94526
(925) 552-5052 • FAX (925) 837-2605

July 13, 2021

Via Electronic Mail Simultaneously to Both Parties and Advisors
Jane Roe @students.srvusd.net
dan@drothlaw.com
Petitioner
Petitioner Parent
Petitioner Parent

Re: Notice of Access to Directly Related Evidence

Dear Complainant and Respondent:

On April 28, 2021, the San Ramon Valley Unified School District ("District") notified you that it was opening an investigation under its Title IX Sexual Harassment Complaint Procedures into allegations raised in a Formal Complaint filed by Jane Roe ("Complainant") against Petitioner ("Respondent") alleging:

- On April 15[1], 2021, Respondent sexually assaulted and sexually harassed Complainant during fifth period theater class by kissing her on her mouth and neck without her consent, fondling her breasts without her consent, fondling and penetrating her vulva and vagina without her consent, and forcing her to touch his penis under his clothing by forcing her hand into his pants without her consent.

All directly related evidence obtained as part of the investigation is enclosed for you and your advisor to review. The enclosed evidence is all evidence directly related to the allegations of potential Title IX Sexual Harassment raised in the April 26, 2021 Formal Complaint. The evidence may include evidence that the District does not intend to rely upon in reaching a determination and/or inculpatory or exculpatory evidence. A copy of the evidence is enclosed.

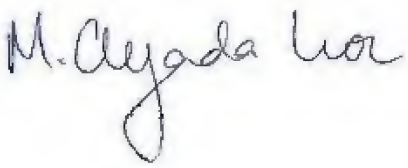
You have the right to respond to the directly related evidence prior to the conclusion of the investigation. If you wish to respond to the evidence, please submit a written response by July 23, 2021 at 5:00 pm to me at aleon@f3law.com. I will consider your written response prior to completion of the Investigative Report.

[1] On June 3, 2021, the District re-issued the Notice of Allegation to update the date of the alleged conduct from April 15, 2021 to April 13, 2021.

The parties and their advisors are required to keep the enclosed evidence confidential. The parties and their advisors may not share any information or records obtained through this process with any third party or the public or use any information or records for any purpose other than this process.

Should you have any questions regarding the contents of this letter, please contact me at aleon@f3law.com or 510-550-8237 at your earliest convenience.

Sincerely,



M. Alejandra Leon
Title IX Investigator

Exhibit 6

TITLE IX SEXUAL HARASSMENT FORMAL COMPLAINT

Please note that this information is intended to give you an overview of certain rights and options under the Title IX grievance process. For full policy definitions and San Ramon Valley Unified School District ("District") procedures, see Title IX Sexual Harassment Complaint Procedure.

This form should be completed by any Title IX Complainant who seeks to have the District process a complaint of "Title IX Sexual Harassment," as defined in the District's Title IX Sexual Harassment Complaint Procedure. This form may be filed with the Title IX Coordinator in person, by mail or by email at:

Title IX Coordinator(s):

Ken Nelson
699 Old Orchard Drive, Danville, CA 94526
knelson@srvusd.net
(925) 552-5052

Please contact the Title IX Coordinator if you have any questions regarding the process for filing or investigating Formal Complaints of Title IX Sexual Harassment.

Complainant Name: Jane Roe	Address: [redacted]
Telephone: [redacted]	Email Address: Jane Roe [redacted] srvusd.net
Respondent(s) Name(s): Petitioner	Respondent(s) Relationship(s) to the Complainant:

1. **What is your role in the District?**
   - ☑ Student
   - ☐ Employee
   - ☐ Other: _____

2. **Is/are the Respondent(s) enrolled or employed by the District and, if so, what is/are the Respondent(s) role(s) with the District (check all that apply)?**
   - ☑ Student(s)
   - ☐ Employee(s)
   - ☐ Other:_____
   - ☐ Not enrolled or employed by the District

3. **Where did the alleged conduct occur?** On campus in 5th period - theather class

4. **Check the box(es) below that best describe(s) the alleged incident (Note: may include online misconduct)**
   - ☐ Sexual harassment that is severe, pervasive, and objectively offensive that it effectively denied you equal access to the school's education program or activity (hostile environment sexual harassment)
   - ☐ Stalking
   - ☑ Sexual Assault
   - ☐ Domestic Violence
   - ☐ Dating Violence
   - ☐ An employee of the District conditioned an aid, service, or benefit on your participation in unwelcome sexual conduct (quid pro quo sexual harassment)
   - ☐ Other:_____

5. **Date(s) of incident(s) (or time frame during which behavior persisted):** 4/15 - during 5th period in class.

6. **Describe the alleged incident(s) with as much detail as possible including the place it occurred, date, time, and individuals involved (additional pages may be attached as needed):**

In theatre, 4/15, during 5th Period, Petitioner was involved

Petitioner started making out with me when I said no, He started going to my neck and startzd giving me hickeys when I kept saying no He started touching my boobs and kept playing with them when I kept saying no He then went down in my pants started rubbing and fingering me when I grabbed his hands to pull them out and I said no he asked why, I said because we are in school Plus I am not feeling the best He then kept doing it then he grabbed my hand and put my hand in his pants and I kept pulling my hand out and saying

Retaliation no

Neither the District nor any other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or the District's Title IX policies or procedures, or because an individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an Title IX investigation, proceeding, or hearing. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or Title IX Sexual Harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or Formal Complaint of Title IX Sexual Harassment, for the purpose of interfering with any right or privilege secured by Title IX or the District's Title IX policies or procedures, constitutes retaliation. Complaints alleging retaliation may be filed according to the District's Board Policy and Administrative Regulation 1312.3, Uniform Complaint Procedure.

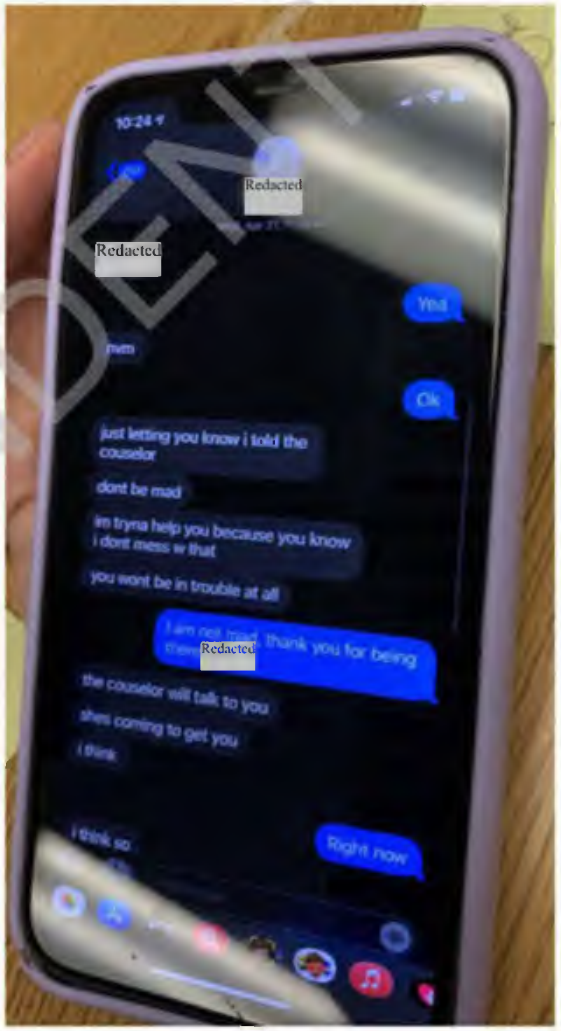
By signing this document, I assert that the information listed above is true to the best of my knowledge and that I am requesting the District to investigate this Formal Complaint of Title IX Sexual Harassment.

Name: Jane Roe

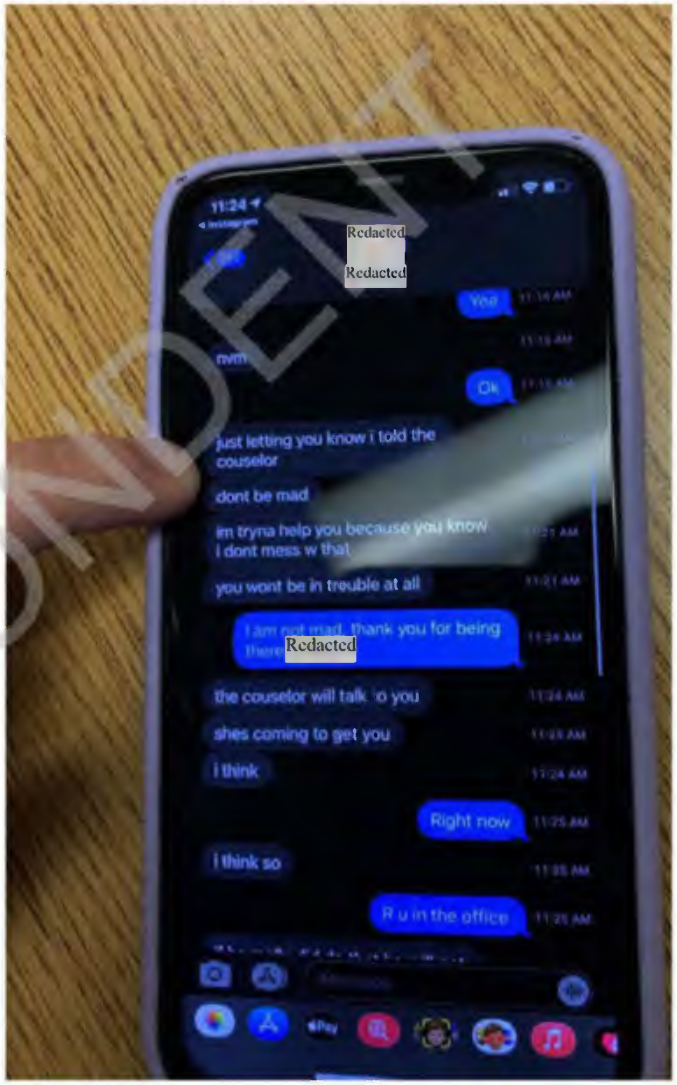
Signature: Jane Roe

Date: 4/26/21

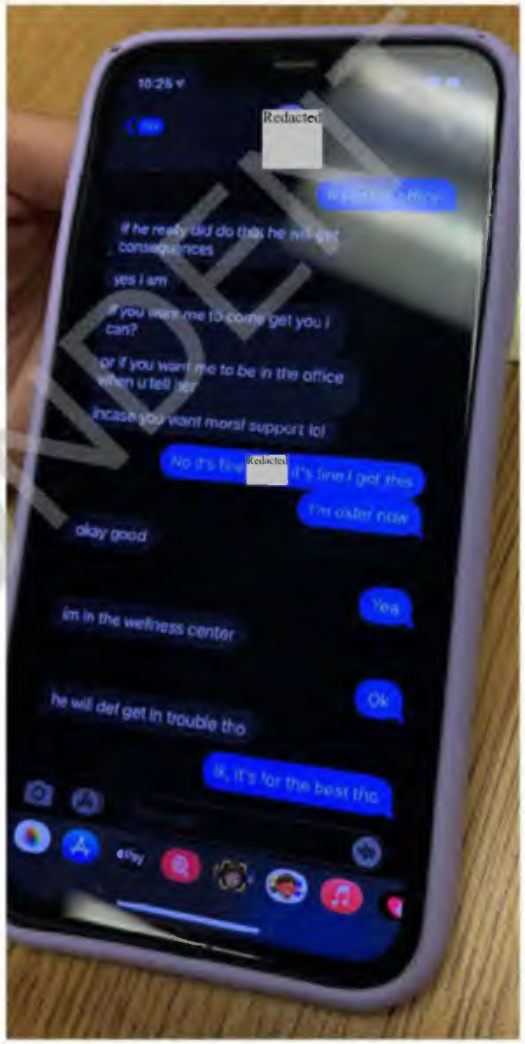
113



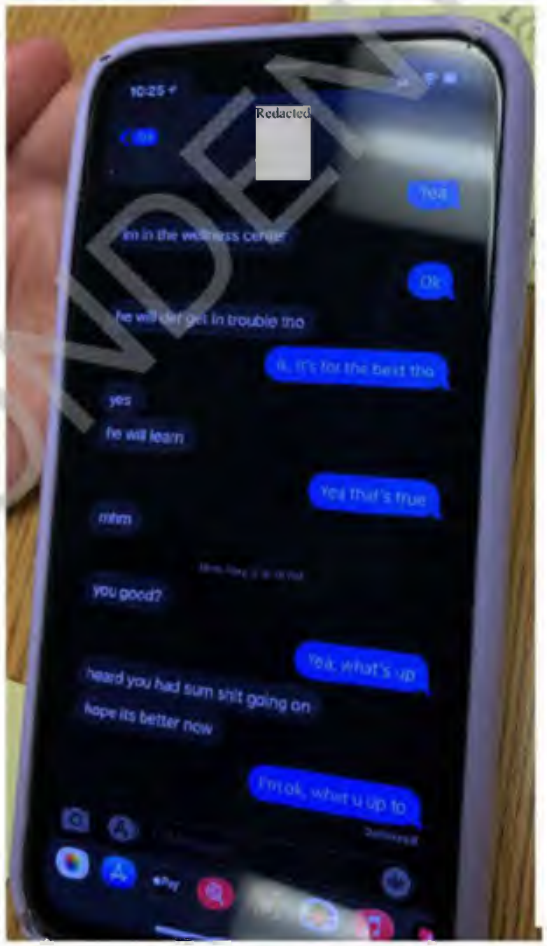
San Ramon Valley USD April 2021 Title IX Complaint000004



San Ramon Valley USD April 2021 Title IX Complaint000005


Redacted
if he really did do that he will get consequences
yes i am
if you want me to come get you i can?
or if you want me to be in the office when u tell her
incase you want moral support lol
Redacted
okay good
Yea
im in the wellness center
Ok
he will def get in trouble tho
ik, it's for the best tho

116




Students
Sink
Redacted
Petit ione r
and I were in this area
Other Students
other students
Area of teachers when we do comes
computer area
Teachers Desk area

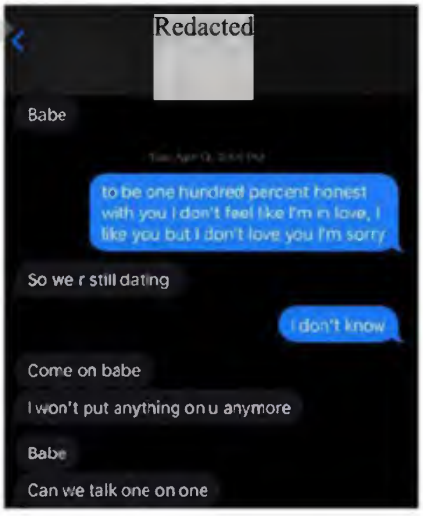
CONFIDENTIAL: INVESTIGATION MATERIAL
STUDENT RECORD (FERPA)

CALIFORNIA HIGH SCHOOL

Jane Roe, Complainant, vs. Petitioner, Respondent.	**DECLARATION OF** Petitioner **July 6, 2021**

I, Petitioner, attest to the following under penalty of perjury under the laws of the United States and the State of California, and would testify to each and every fact below under oath in a court of law:

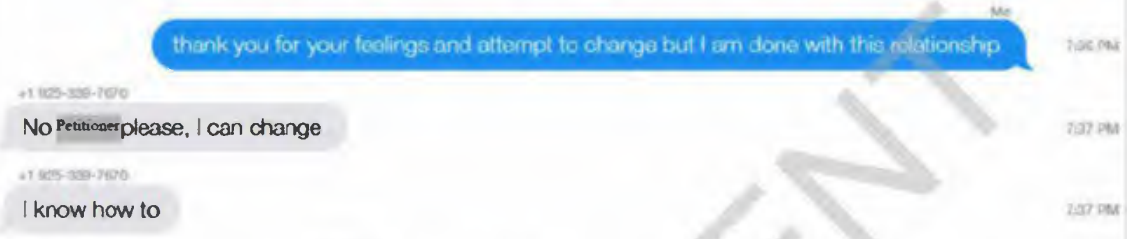
1. I am a student at California High School in San Ramon, California, where I just finished my first year.
2. I am 15 years old.
3. I dated a classmate named Jane Roe from approximately March 17, 2021, until April 13, 2021.
4. On April 13, 2021, Jane and I were in Student Support after Fifth Period, which lasts from 2:35 to 3:05. We were in Room FA106, where we had Drama the previous period. Jane came over to me and at some point started to kiss me. I kissed her back.
5. On April 13, 2021, at 3:54 p.m., I told Jane in a text message that I did not love her:



a. Jane did not want to break up, and asked to talk.

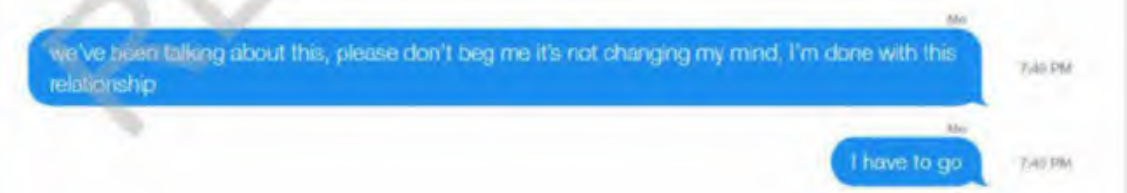
b. At 7:36 p.m., I texted Jane "thank you for your feelings and attempt to change but I am done with this relationship."

c. At 7:37 p.m., Jane texted me "No Petitioner please, I can change. I know how to."



d. At 7:38 p.m., Jane texted me "Please don't do th s I love u aka love u a lot. And I need u. Petitioner please talk to me what did I ven do."

e. At 7:40 p.m., I re ponded, "we've been talking about this, please don't beg me it's n t changing my mind, I'm done with this relationship. I have to go."

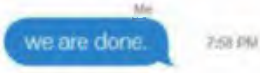


f. At 7:41 p.m., Jane responded "No Petitioner please. I have been there for u. And I need u in my fucking life. And I like u hella."

g. At 7:42 p.m., I wrote "you don't need me in you life t live."

h. At 7:42 p.m., Jane responded, "I do, u have been th re f r me. And you always loves (sic) me. Loved. Cared about me. And nev r gave up on me."

i. At 7:58 p.m., I wrote "we are done."



6. The only time after April 13, 2021, that I had any physical contact with Jane at all was on April 15, when I offered her my hand to help her get up from sitting on the floor.

7. I never had any nonconsensual physical contact with Jane ever.

8. On Thursday, April 22, 2021, I was removed from classroom instruction at California High School.
    a. Principal Megan Keefer called me into her office and said that Jane was alleging that during a support period after our Theater class on April 13, I sexually assaulted her.
    b. I explained that that was not true.
    c. Ms. Keefer did not provide written notice of the allegations against me.
    d. Ms. Keefer then left the room and returned with the attached letter, which she gave to me.
        i. Ms. Keefer said that a "threshold" had been reached under Title IX that warranted my emergency removal from school.
        ii. Ms. Keefer said there were "differences" in the accounts of what happened, but declined to provide any details about those differences or why they would result in my removal from school.
        iii. The letter says that the school had "undertaken an individualized safety and risk analysis and has determined that you pose an immediate threat to the physical health and safety of a student or other individual arising from the allegations of Title IX harassment. The specific reasons for the decision are: substantial evidence leading to allegations of sexual assault(s) to students while on campus."
        v. The letter says that the school will notify the Board of Education of its determination that I am "eligible for a Title IX removal and should not be allowed to participate in the District's education programs or activities until after the investigation into the allegations of Title IX Sexual Harassment concludes."
    e. I was required to leave the school immediately and told not to return.
    f. I was not given any information regarding my schoolwork on Friday, April 23, Saturday, April 24, Sunday, April 25.

g. On Monday, April 26, 2021, my mother contacted the school at 10:00 a.m. Assistant Principal Tucker Farrar called my mother at 2:50 p.m. and told her that I needed to follow up with my teachers to get assignments and instructions.

h. My Spanish teacher called my mother on Monday, April 26, asking me if everything was okay.

i. My lacrosse coach was not informed that I had been removed, and I had to email him to let him know I could not be at practice.

9. On April 28, 2021, I received a letter from the school containing Jane's allegation:

> On April 15, 2021, Respondent sexually assaulted and sexually h assed Complainant during fifth period theater class by kissing her on her mouth and neck without her consent, fondling her br asts without her consent, fondling and penetrating her vulva and vagina w thout her consent, and forcing her to touch his penis under his clothing y for ing her hand into his pants without her consent.

10. On June 3, 2021, I received a letter from the s hool amending Jane's allegation against me by changing the date of the allegation to April 13 – meaning that she was alleging that I assaulted he between 2:35 and 3:05, then I broke up with her at 3:54 p.m., and she begged to get back together with me starting at 7:37 p.m., as our text messages show.

11. Jane's allegation is compl tely false.

12. I broke up with Jane on April 13, 2021, and – with the exception of helping her stand p onc on April 15 – never had physical contact with her again.

13. Jane and I nev r had any intimate contact on school grounds beyond kissing.

Sworn und r pen lty of perjury under the laws of the United States and the State of California, this date: /7/2021

Petitioner

Petitioner


4:17
Jane
Jane
Babe
Tue, Apr 13, 3:54 PM
to be one hundred percent honest with you I don't feel like I'm in love, I like you but I don't love you I'm sorry
So we r still dating
I don't know
Come on babe
I won't put anything on u anymore
Babe
Can we talk one on one
later.
We hood
Good
Babe
I hope so
U hope so what u mean babe
iMessage
Pay

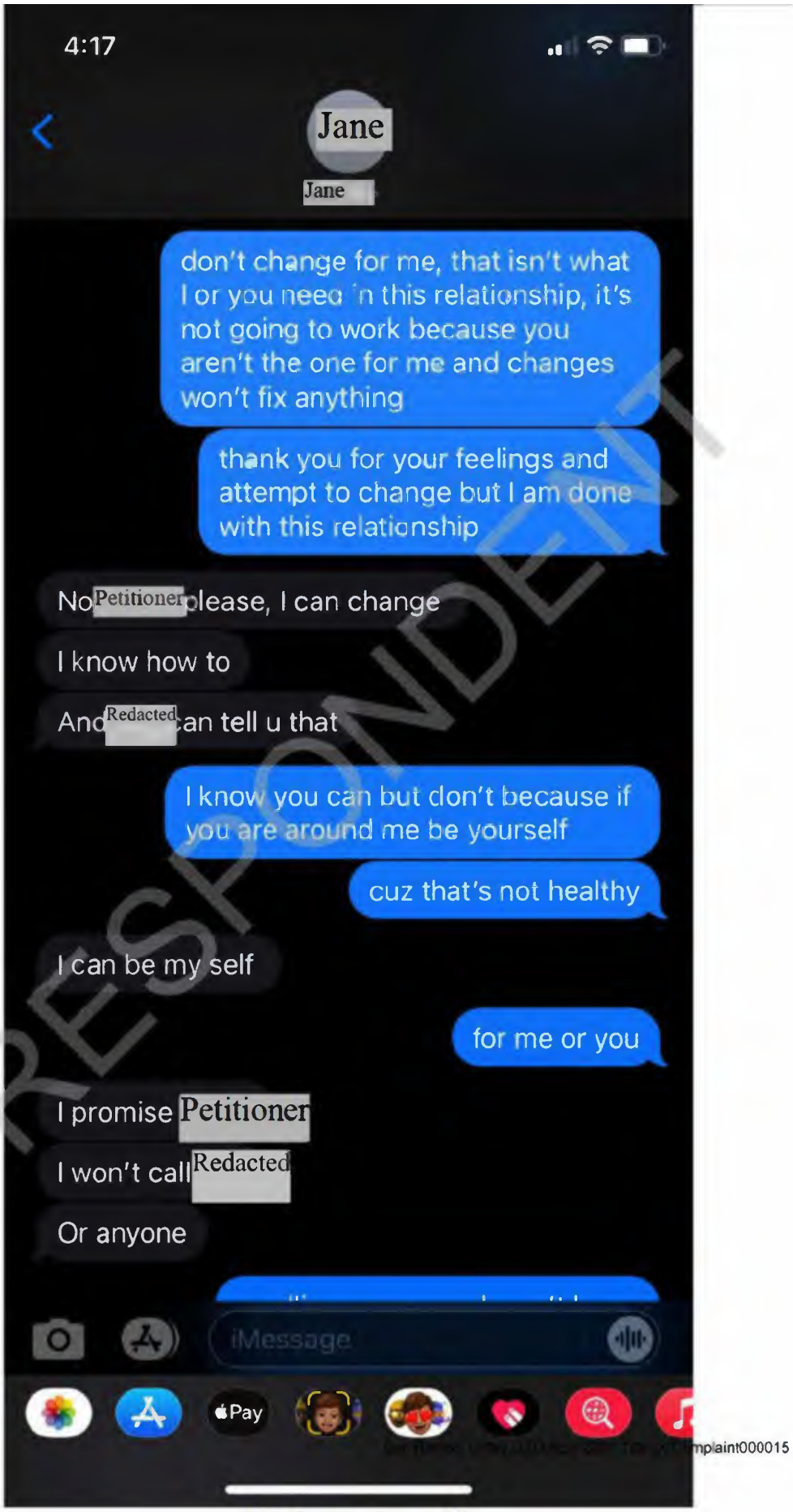
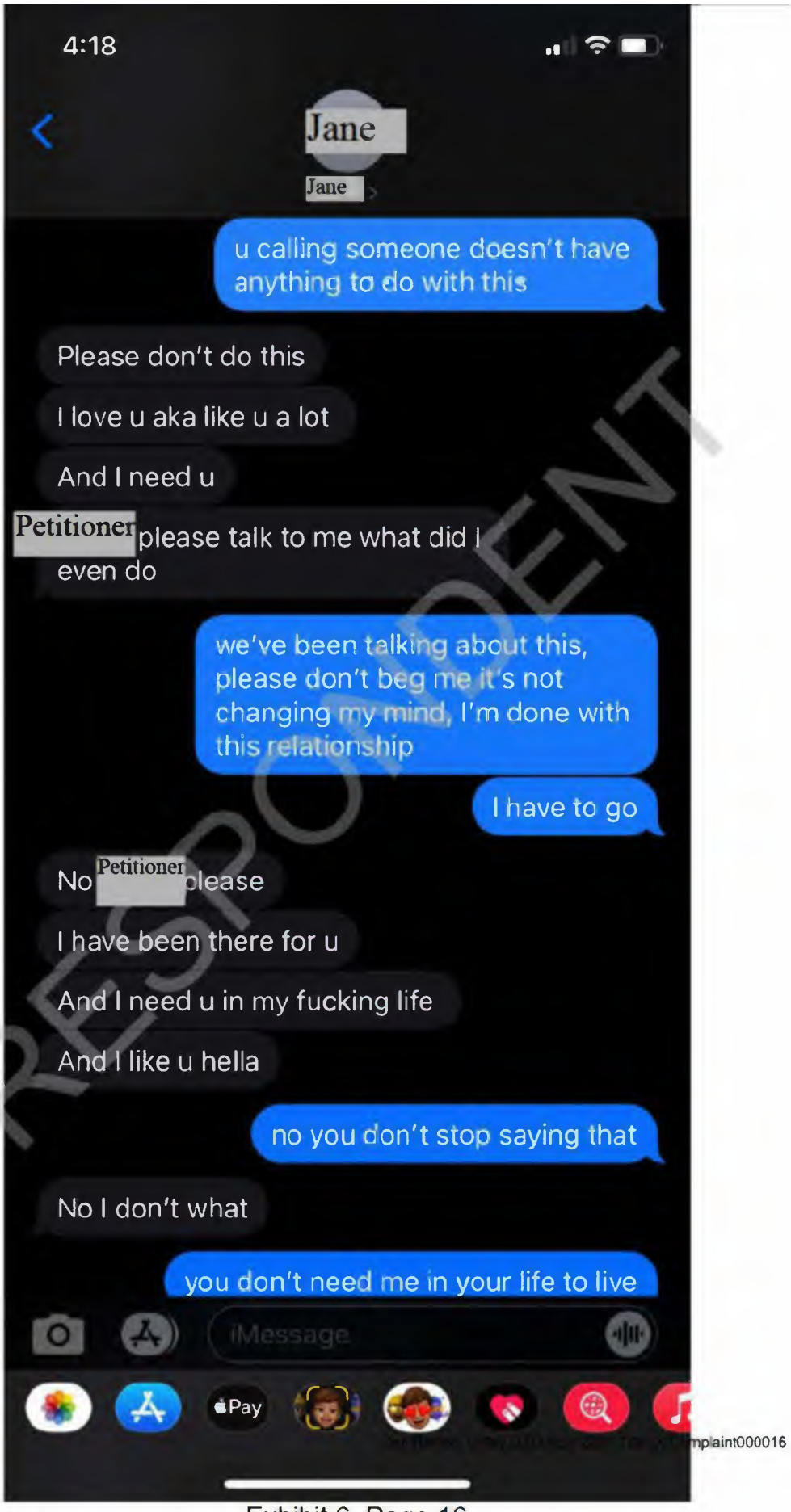
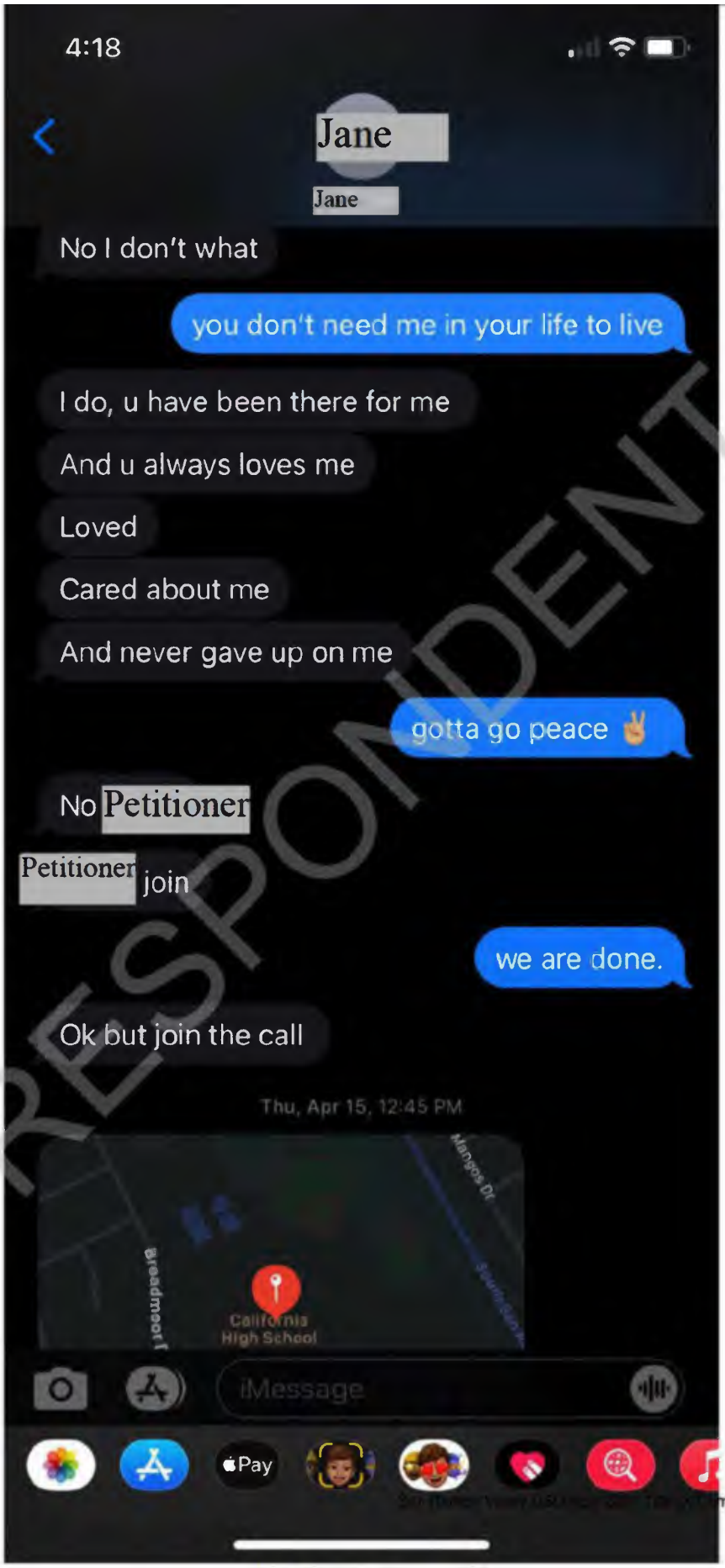


Exhibit 6, Page 15


4:18
Jane
Jane
u calling someone doesn't have anything to do with this
Please don't do this
I love u aka like u a lot
And I need u
Petitioner please talk to me what did I even do
we've been talking about this, please don't beg me it's not changing my mind, I'm done with this relationship
I have to go
No Petitioner please
I have been there for u
And I need u in my fucking life
And I like u hella
no you don't stop saying that
No I don't what
you don't need me in your life to live
iMessage
Pay


4:18
Jane
Jane
No I don't what
you don't need me in your life to live
I do, u have been there for me
And u always loves me
Loved
Cared about me
And never gave up on me
gotta go peace ✌
No Petitioner
Petitioner join
we are done.
Ok but join the call
Thu, Apr 15, 12:45 PM
Mangos Dr
Broadmoor
California High School
iMessage
Pay

20-21 California High School 9870 Broadmoor Dr, San Ramon CA 94583 Page 1 of 1	Student Schedule For Petitioner Grade: 09 Term(s): T3 T4 Courses enrolled: 7

	Term T3 (01/04/21 - 03/12/21)	Term T4 (03/14/21 - 06/03/21)
00	NDHSRN-1 (Mon S1, Mon S2, W/F S2) Health Liberatore, Emily Coleen HYBRID Rm: B-37	NDHSRN-1 (Mon S1, Mon S2, W/F S2) Health Liberatore, Emily Coleen HYBRID Rm: B-37
01	FLS2**-12 (Mon S1, Mon S2, T/R S2) Spanish II Rovo', Adalerto A (VC) Rm: WL-5	FLS2**-12 (Mon S1, Mon S2, T/R S2) Spanish II Rovo', Adalerto A (VC) Rm: WL-5
02	SCBLESR*-22 (Mon S1, Mon S2, W/F S2) Biology: The Living Earth Martin, Jacob C HYBRID Rm: S-3	SCBLESR*-22 (Mon S1, Mon S2, W/F S2) Biology: The Living Earth Martin, Jacob C HYBRID Rm: S-3
03	MAA1SR*-31 (Mon S1, Mon S2, T/R S2) Algebra 1 Panganthon, Myrafiel HYBRID Rm: 208	MAA1SR*-31 Mon S1, Mon S2, T/R S2) Algebra 1 Panganti on, Myra el HYBR D Rm: 208
04	ENE9SR*-41 (Mon S1, Mon S2, W/F S2) English 9 Shea, Nicholas HYBRID Rm: 311	EN R*-41 (on S1 Mon S2, W/F S2) English 9 Shea, Nicho as HYBRID m: 311
05	FATA1*-51 (Mon S1, Mon S2, T/R S2) Theatre Arts 1 Woods, Laura (VC) Rm: FA106	FAT 1*-5 (Mon S1, Mon S2, T/R S2) Theatre Arts 1 W ods, Laura (VC) Rm: FA106
06	PE9SR*N-61 (Mon S1, Mon S2, W/F S2) PE 9 Matthews, Lenard HYBRID Rm: GYM	PE9SR*N-61 (Mon S1, Mon S2, W/F S2) PE 9 Matthews, Lenard HYBRID Rm: GYM

Counselor: Sawyer, Jonathan

20-21 California High School 9870 Broadmoor Dr, San Ramon CA 94583 Page 1 of 1	Student Schedule For Jane Roe Grade: 09 Term(s): T3 T4 Courses enrolled: 7

	Term T3 (01/04/21 - 03/12/21)	Term T4 (03/14/21 - 06/03/21)
00	NDFL*N-101 (Mon S1, Mon S2, W/F S2) Freshman Leadership Cheng, Hannah (VC) Rm: 111	NDFL*N-101 (Mon S1, Mon S2, W/F S2) Freshman Leadership Cheng, Hannah (VC) Rm: 111
01	SCBLESR*-11 (Mon S1, Mon S2, T/R S2) Biology: The Living Earth Christensen, Sarah HYBRID Rm: S-1	SCBLESR*-11 (Mon S1, Mon S2, T/R S2) Biology: The Living Earth Christensen, Sarah HYBRID Rm: S-1
02	NDHSRN-21 (Mon S1, Mon S2, W/F S2) Health Liberatore, Emily Coleen HYBRID Rm: B-37	NDHSRN-21 (Mon S1, Mon S2, W/F S2) Health Liberatore, Emily Coleen HYBR D Rm: B-37
03	MAA1SR*-31 (Mon S1, Mon S2, T/R S2) Algebra 1 Panganthon, Myrafiel HYBRID Rm: 208	MAA1SR*-31 Mon S1, Mon S2, T/R S2) Algebra 1 Panganti on, Myra el HYBR D Rm: 208
04	ENE9SR*-41 (Mon S1, Mon S2, W/F S2) English 9 Shea, Nicholas HYBRID Rm: 311	EN R*-41 (on S1 Mon S2, W/F S2) English 9 Shea, Nicho as HYBRID m: 311
05	FATA1*-51 (Mon S1, Mon S2, T/R S2) Theatre Arts 1 Woods, Laura (VC) Rm: FA106	FAT 1*-5 (Mon S1, Mon S2, T/R S2) Theatre Arts 1 W ods, Laura (VC) Rm: FA106
06	PE9SR*N-61 (Mon S1, Mon S2, W/F S2) PE 9 Matthews, Lenard HYBRID Rm: GYM	PE9SR*N-61 (Mon S1, Mon S2, W/F S2) PE 9 Matthews, Lenard HYBRID Rm: GYM

Counselor: Goldenberg, Rachelle

High School In-Person
Monday Remote + T-F Block

Monday All Students Remote		
Time	**Minutes**	**Period Schedule**
8:15 - 8:45	30	Period A
8:45 - 8:50	5	Passing
8:50 - 9:20	30	Period 1
9:20 - 9:25	5	Passing
9:25 - 9:55	30	Period 2
9:55 - 10:00	5	Passing
10:00 - 10:30	30	Period 3
10:30 - 10:35	5	Passing
10:35 - 11:05	30	Period 4
11:05 - 11:35	30	Lunch
11:35 - 11:40	5	Passing
11:40 - 12:10	30	Period 5
12:10 - 12:15	5	Passing
12:15 - 12:45	30	Period 6
12:45 - 2:45	Asynchronous Work Completio Teacher Professional Developm nt & Department Collaboration	

**Minimum Days will follow the Monday Remo e Sch du e

Tuesday-Friday (all in-person students)					
		All In-Person Students on Campus	All In-Person Students on Campus	All In-Per n Studen o Campus	All In-Person Students on Campus
Time	**Minutes**	**Tuesday**	**Wednesday**	**Thur day**	**Friday**
8:15 - 9:30	75	Teacher Collaboration (Asynchronous Work Completion)	eriod	Teacher Coll boration (Asynchronous W rk Completion)	Period A
9:30 - 9:40	10	Passing	Passi g	Passing	Passing
9:40 - 10:55	75	Period	Pe od 2	Period 1	Period 2
10:55 - 11:10	15	Passi g	assing	Passing	Passing
11:10 - 12:25	75	Period 3	Period 4	Period 3	Period 4
12:25 - 1:00	35	L nch	Lunch	Lunch	Lunch
1:00- 1:10	10	Passing	Passing	Passing	Passing
1:10 2:25	75	Period 5	Period 6	Period 5	Period 6
2:25 - 35	10	Passing	Passing	Passing	Passing
2 35 - :15	40	Student Support	Student Support	Student Support	Student Support

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From: **Lacy Canton (EC)** <lcanton@srvusd.net>
Date: Wed, Apr 21, 2021 at 3:29 PM
Subject: Student incident
To: Megan Keefer <MKeefer@srvusd.net>

Hi Megan,

A student approached me stating that she was concerned about her friend who has reported to her that she was sexually assaulted on campus by another student.

I then pulled the friend, victim Jane Roe from her 4th period English class to check-in with her/ provide support.

Victim: Jane Roe shared with me that Petitioner sexually assaulted her last Wednesday during theater class. Jane and Petitioner were laying on the floor together cuddling du ng lass when Petitioner started kissing her and gave her a hicky on her neck. Jane told him she w s uncomfortable and asked him to stop, Petitioner then attempted to put his hands down her pants mul iple times, she continued to tell him to stop and say no, pulling away, pulling her pants tig e , ovin away from him, etc. Petitioner continued to advance and would not listen to her, and put his ands down her pants and attempted to penetrate her. She continued to ask him to stop nd tell him sh was uncomfortable, his behavior continued until the bell rang, he stopped and got up and left. Jane stated there were multiple witnesses to his behavior as they wer in a c ass oom with other students. Jane also stated that there were multiple inst nces with-i their 3 week relationship that Petitioner would touch her and kiss her in the clas room/ in public spaces where she would tell him "no" or that she was uncomfortable, in which he wo ld ign r her requests and make comments such as "you like this" "I thought you an d to c ddle, you said you liked it" and persist until she became agitated and would yell at him to top" or would run away.

After confiding in a friend, Jane learnin ed that sh Redacted had also been sexually assaulted by the alleged perpetra or, Petitioner when they dated previously.

After the assault Jane confided her mother who instructed her to block him on all social media accounts and end their elationship Jane stated that she received numerous "provocative" messages from Petitioner nclu ing p ctures of his genitals.

This information was eported to admin and to SRO officer Hamilton.

Lacy Canton
Social Worker, Wellness Center Coordinator
Pronouns She/ Her
Email: LCanton@srvusd.net
F: 925-820-5277

Be sure to visit the NEW Virtual Wellness Center for Cal High!
Cal High Virtual Wellness Center

Visit the *NEW* Virtual Wellness Center for San Ramon Valley High!
San Ramon Valley Wellness Center
"When you replace "I" with "We" illness becomes wellness." - Shannon Alder

If you or someone you know are in crisis and need immediate help, please call Contra Costa Crisis Center at 211 or 800-833-2900 or text HOPE to 20121.

REOPENING TOGETHER

- Return to In-Person Information and Resources
- Student Board Member
- Reopening Dashboard
- COVID-19 Case Dashboard
- SDC Return to In-person Learning
- Online Learning Help, Logins and Resources
- Student Password Support
- Student Email Access Instructions
- Social Services Resources
- How We Got Here
- ThoughtExchange FAQ
- Access to COVID Testing

Return to In-Person Information and Resources

At a special meeting on March 26, 2021, the SRVUSD Board of Education met to discuss and take action on a return to full-time, in-person instruction for hybrid students only. The Board voted unanimously to return hybrid students to full-day, in-person instruction four days per week, beginning March 29, 2021 for secondary and Tuesday, March 30, 2021 for elementary.

For both elementary and secondary (grades 1–12) the cohorts that were previ usly in a staggered "A/B" schedule will now come together to receive four full days of in-person inst uc on on their campuses.

Students in special education programs will maintain their current schedule and ser ices through the end of this school year. Secondary mild Special Day Classes will now attend fo r days per week, rather than two.

The resources on this page provide information relevant to b th the in-pers and fully remote learning models.

Select any link below to view more information

COVID SAFETY PLAN (CSP)

The SRVUSD CSP consists of the 3 documents found below. Click on any document to view its contents.

GUIDE to REOPENING 2020-21

View the Family Guide to Reopening

COVID-19 School Guidance Checklist

COVID-19 Prevention Program (CPP)

State of California Safe Schools For All Hub

PRESENTATIONS

To manually ma ipulate slides i.e. forward, r verse pa se, please select the 2nd version that is ADA compliant:

- Board Presentation | Moving Forward T gether Part II 1/26/21 (PDF)
- Board Presentation | Moving Forward Together 1/12/21 (PDF)
- Board Presentation | Reopening Together: A Plan for Returning to In-person Instruction w/clickable links
- Board Presentation | Reopening Together: A Plan for Returning to In-person Instruction w/captions (ADA Compliant)

FORMS

- SRVUSD Notice and Acknowledgment for Return to On-Campus Learning (PDF)

BELL SCHEDULES (EFFECTIVE UPON OPENING TO IN-PERSON)

- Preschool/TK/K Remote (PDF)
- 1-5 Remote (PDF)
- TK-5 In Person (PDF)
- Middle School Remote (PDF)
- Middle School In Person (PDF)
- High School Remote (PDF)
- High School In Person (PDF)
- Adult Transitions Remote (PDF)
- Adult Transitions Hybrid (PDF)
- County Preschool.pdf (PDF)

VIDEOS

- Sample Classroom | Elementary
- Sample Classroom | Secondary

BARGAINING UNIT CONTRACTS AND MOUS

- SRVEA Contract & MOUs
- CSEA II Contract & MOUs
- CSEA III Contract & MOUs
- SEIU Contract & MOUs

RESOURCES

- Declaration FAQ (PDF)
- Asynchronous Overview: At-Home Learning for Secondary Students (PDF)
- ThoughtExchange Results
- Post-COVID Decision Tree | Should I Return to School? (PDF)
- Daily Self Assessment | Home Health Screening (PDF)
- Declaration Results by School Site (PDF)

11/6/2020 Board Workshop and Town Hall

CONFIDENTIAL: INVESTIGATION MATERIAL
STUDENT RECORD (FERPA)

CALIFORNIA HIGH SCHOOL

Jane Roe
Complainant,

vs.

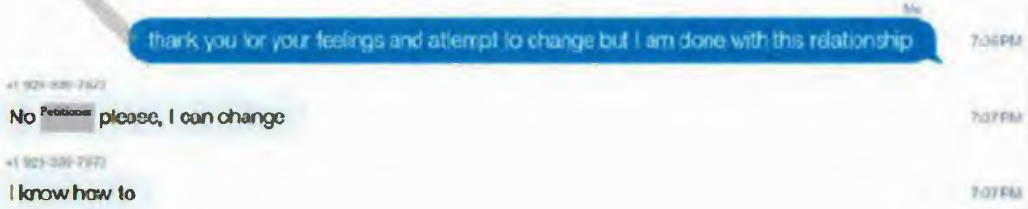
Petitioner
Respondent.

DECLARATION OF Petitioner

May 4, 2021

I, Petitioner, attest to the followiag under penalty of perjury under the laws of the United States and the State of California, and would testify to each and every fact below under oath in a court of law:

1. I am a first-year student at California High School in San Ramon, California.
2. I am 15 years old.
3. I dated a classmate named Jane from approximately March 17, 2021, until April 13, 2021.
4. On April 13, 2021, I told Kayla in a text message that I did not love her and was breaking up with her.
   a. Jane did not want to break up, and asked to talk.
   b. At 7:36 a.m., I texted Jane "thank you for your feelings and attempt to change but I am done with this relationship."
   c. At 7:37 a.m., Jane texted me "No Petitioner please, I can change. I know how to."



d. At 7:38 a.m., Jane texted me "Please don't do this. I love u aka love u a lot. And I need u. Petitioner please talk to me what did I even do."

e. At 7:40 a.m., I responded, "we've been talking about this, please don't beg me it's not changing my mind, I'm done with this relationship. I have to go."

f. At 7:41 a.m., Jane responded "No Petitioner please. I have been there for u. And I need u in my fucking life. And I like u hella."

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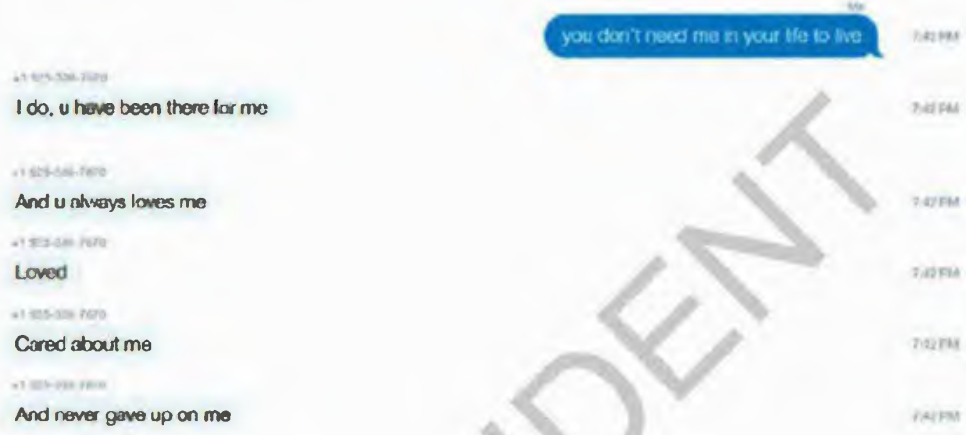
g. At 7:42 a.m., I wrote "you don't need me in your life to live."

h. At 7:42 a.m., Jane responded, "I do, u have been there for me. And you always loves (sic) me. Loved. Cared about me. And never gave up on me."



i. At 7:58 a.m., I wrote "we are done."

5. The only time after April 13, 2021, that I had any physical contact with Jane at all was on April 15, when I offered her my hand to help her get up from sitting on the floor.

6. I never had any nonconsensual physical contact with Jane ever.

7. On Thursday, April 22, 2021, I was removed from classroom instruction at California High School.

a. Principal Megan Keefer called me into her office and said that Jane was alleging that during a support period after our Theater class on April 13, I sexually assaulted her.

b. I explained that that was not true.

c. Ms. Keefer did not provide written notice of the allegations against me.

d. Ms. Keefer then left the room and returned with the attached letter, which she gave to me.

i. Ms. Keefer said that a "threshold" had been reached under Title IX that warranted my emergency removal from school.

ii. Ms. Keefer said there were "differences" in the accounts of what happened, but declined to provide any details about those differences or why they would result in my removal from school.

iii. The letter says that the school had "undertaken an individualized safety and risk analysis and has determined that you pose an immediate threat to the physical health and safety of a student or other individual arising from the allegations of Title IX harassment. The specific reasons for the decision are: substantial evidence leading to allegations of sexual assault(s) to students while on campus."

iv. The letter says that the school will notify the Board of Education of its determination that I am "eligible for a Title IX removal and should not be allowed to participate in the District's education programs or activities until after the investigation into the allegations of Title IX Sexual Harassment concludes."

e. I was required to leave the school immediately and told not to return.

f. I was not given any information regarding my schoolwork on Friday, April 23, Saturday, April 24, Sunday, April 25.

g. On Monday, April 26, 2021, my mother contacted the school at 10:00 a.m. Assistant Principal Tucker Farrar called my mother at 2:50 p.m. and told her that I needed to follow up with my teachers to get assignments and instructions.

h. My Spanish teacher called my mother on Monday, April 26, asking me if everything was okay.

i. My lacrosse coach was not informed that I had been removed, and I had to email him to let him know I could not be at practice.

8. On April 28, 2021, I received a letter from the school containing Jane's allegation:

On April 15, 2021, Respondent sexually assaulted and sexually harassed Complainant during fifth period theater class by kissing her on her mouth

and neck without her consent, fondling her breasts without her consent, fondling and penetrating her vulva and vagina without her consent, and forcing her to touch his penis under his clothing by forcing her hand into his pants without her consent.

9. Jane's allegation is completely false.

10. I broke up with Jane on April 13, 2021, and – with the exception of helping her stand up once on April 15 – never had physical contact with her again.

11. Jane and I never had any intimate contact on school grounds beyond kissing.

Sworn under penalty of perjury under the laws of the United States and the State of California, this 4th day of May, 2020:

Petitioner

Petitioner

Exhibit 7

---------- Forwarded message ---------
From: **Jacqueline M. Litra** <jlitra@f3law.com>
Date: Mon, Jul 12, 2021 at 6:42 PM
Subject: RE: Status of Emergency Removal
To: Dan Roth <dan@drothlaw.com>
Cc: Megan Keefer <mkeefer@srvusd.net>, dkravitz@srvusd.net <dkravitz@srvusd.net>,

Dear Mr. Roth:

The District and its Title IX team members are doing what they can to move the process forward in an efficient manner. However, accommodating Respondent's requests during the process has resulted in significant delays.

On May 3, 2021, the investigator initially sent Respondent a Notice of Interview scheduling his interview for May 5, 2021. In response to your requests, Respondent's interview was postponed until June 18, 2021. On June 18, 2021, you requested an opportunity to correct your error in Respondent's declaration by changing the times listed in Respondent's declaration from am to pm. You did not submit that revised declaration until July 7, 2021. Having now received the Respondent's amended declaration from you, the investigator will be issuing the directly related evidence to the parties soon.

The emergency removal of Respondent remains in effect. There are procedural timelines applicable to this process that cannot be modified by the District. We will continue to complete the process efficiently. However, the timeline at this stage is dependent on the timing of the parties' submissions. Considering the timing applicable to the party and witness submissions for the remainder of the process, it is possible the process will not be concluded before August 10, 2021.

Please let me know if you have any other questions.

Sincerely,

Jacqueline Litra

Exhibit 8

California High School

9870 Broadmoor Drive • San Ramon, CA 94583 • 925-803-3200

Megan Keefer
Principal

Tucker Farrar
Assistant Principal

Catie Hawkins
Assistant Principal

Kathleen Martins
Assistant Principal

Jeffrey Osborn
Assistant Principal

Candace Molano
Office Manager

April 22, 2021

Petitioner
Petitioner Parent
Petitioner Parent

Re: Notice of Title IX Emergency Removal of Student

Dear Petitioner :

On April 22, 2021, the San Ramon Valley Unified School District ("District") received allegations of Title IX Sexual Harassment against you.

In response to the initial allegations, the District has undertaken an individualized safety and risk analysis and has determined that you pose an immediate threat to the physical health or safety of a student or other individual arising from the allegations of Title IX Sexual Harassment. The specific reasons for the decision are: substantial evidence leading to allegations of sexual assault(s) to students while on campus.

Accordingly, the District has determined that you should be removed from the District's education program or activity on an emergency basis under Title IX of the Education Amendments of 1972 and its implementing regulations.

The Title IX Coordinator will notify the Board of Education of its determination that you are eligible for a Title IX emergency removal and should not be allowed to participate in the the District's education programs or activities until after the investigation into the allegations of Title IX Sexual Harassment concludes.

No person is permitted to intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in the Title IX procedures. If any individual is harassed or intimidated because of filing a complaint or participating in any aspect of the District's Title IX Sexual Harassment Complaint Procedures, that individual may file a complaint alleging such treatment using the District's Board Policy. See attached copies and links:

http://www.gamutonline.net/district/sanramonvalleyusd/DisplayPolicy/1050532/
http://www.gamutonline.net/district/sanramonvalleyusd/DisplayPolicy/1050533/
http://www.gamutonline.net/district/sanramonvalleyusd/DisplayPolicy/1050895/

You can challenge this emergency removal decision under Title IX by contacting Megan Keefer.

Sincerely,

Title IX Coordinator Designee

Enclosures

http://www.gamutonline.net/district/sanramonvalleyusd/DisplayPolicy/1050532/
http://www.gamutonline.net/district/sanramonvalleyusd/DisplayPolicy/1050533/
http://www.gamutonline.net/district/sanramonvalleyusd/DisplayPolicy/1050895/

PROOF OF SERVICE

STATE OF CALIFORNIA)
)ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 445 South Figueroa Street, 31st Floor, Los Angeles, CA 90071

On August 5, 2021, I served the foregoing document described AMENDED EX PARTE APPLICATION FOR STAY OF ADMINISTRATIVE DECISION PENDING COURT REVIEW OF WRIT PETITION; DECLARATION; EXHIBITS on all interested parties listed below by transmitting to all interested parties a true copy thereof as follows:

Jacqueline M. Litra
Fagen Friedman & Fulfrost LLP
6300 Wilshire Blvd Ste 1700
Los Angeles, CA 90048-5219
Phone: (323) 330-6300
Fax: (323) 330-6311
Email: jlitra@f3law.com
ATTORNEYS FOR RESPONDENTS

David Mishook
Fagen Friedman & Fulfrost LLP
70 Washington Street, Suite 205
Oakland, California 94607
Phone: 510.550.8200
Fax: 510.550.8211
Email: dmishook@f3law.com
ATTORNEYS FOR RESPONDENTS

☐ **BY FACSIMILE TRANSMISSION** from FAX number (213) 529-0783 to the fax number set forth above. The facsimile machine I used complied with Rule 2003(3) and no error was reported by the machine. Pursuant to Rule 2005(i), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this declaration.

☐ **BY MAIL** by placing a true copy thereof enclosed in a sealed envelope addressed as set forth above. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

☐ **BY PERSONAL SERVICE** by delivering a copy of the document(s) by hand to the addressee or I cause such envelope to be delivered by process server.

☐ **BY EXPRESS SERVICE** by depositing in a box or other facility regularly maintained by the express service carrier or delivering to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served.

☒ **BY ELECTRONIC TRANSMISSION** by transmitting a PDF version of the document(s) by electronic mail to the party(s) identified on the service list using the e-mail address(es) indicated.

☒ I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on August 5, 2021 in Los Angeles, California

Adriana Recendez

EXHIBIT 6

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR CONTRA COSTA COUNTY

JOHN DOE, an individual, minor through his parent and next friend JANE DOE, Petitioner, v. MEGAN KEEFER, et al. Respondents.	Case No.: NC21-1450 [Hon. Barry Baskin, Dept. 7] [Proposed] ORDER GRANTING EX PARTE APPLICATION FOR STAY OF ADMINISTRATIVE DISCIPLINARY ACTION IN EXCESS OF JURISDICITON PENDING COURT REVIEW OF WRIT PETITION Date: August 5, 2021 Time: 11:00 a.m. Dept: 7

Having considered the papers submitted in support of and in opposition to Petitioner's *ex parte* application for stay of administrative action pending court review of the Petition, and the argument and testimony in support of and in opposition to the stay, and finding good cause therefore;

IT IS HEREBY ORDERED that the operation of the underlying administrative decision or order is stayed pending further order of the court.

Dated: _____

_____
Hon. Barry Baskin
JUDGE OF THE SUPERIOR COURT

PROOF OF SERVICE

STATE OF CALIFORNIA)
)ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 445 South Figueroa Street, 31st Floor, Los Angeles, CA 90071

On August 4, 2021, I served the foregoing document described [Proposed] ORDER GRANTING STAY OF ADMINISTRATIVE ACTION PENDING COURT REVIEW OF PETITION on all interested parties listed below by transmitting to all interested parties a true copy thereof as follows:

Jacqueline M. Litra
Fagen Friedman & Fulfrost LLP
6300 Wilshire Blvd Ste 1700
Los Angeles, CA 90048-5219
Phone: (323) 330-6300
Fax: (323) 330-6311
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ATTORNEYS FOR RESPONDENTS

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Email: dmishook@f3law.com
ATTORNEYS FOR RESPONDENTS

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☐ **BY MAIL** by placing a true copy thereof enclosed in a sealed envelope addressed as set forth above. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

☐ **BY PERSONAL SERVICE** by delivering a copy of the document(s) by hand to the addressee or I cause such envelope to be delivered by process server.

☐ **BY EXPRESS SERVICE** by depositing in a box or other facility regularly maintained by the express service carrier or delivering to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served.

☒ **BY ELECTRONIC TRANSMISSION** by transmitting a PDF version of the document(s) by electronic mail to the party(s) identified on the service list using the e-mail address(es) indicated.

☒ I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on August 4, 2021 in Los Angeles, California

Adriana Recendez

EXHIBIT 7

[Exempt From Filing Fee
Government Code § 6103]

FAGEN FRIEDMAN & FULFROST, LLP
David R. Mishook, SBN 273555
dmishook@f3law.com
Jacqueline M. Litra, SBN 311504
jlitra@f3law.com
70 Washington Street, Suite 205
Oakland, California 94607
Phone: 510-550-8200
Fax: 510-550-8211

Attorneys for SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT, MEGAN KEEFER, KEITH ROGENSKI

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA, MARTINEZ

JOHN DOE, et al.,

Petitioner,

vs.

MEGAN KEEFER, et al.,

Respondents.

CASE NO. NC21-1450

OPPOSITION TO EX PARTE REQUEST TO STAY EMERGENCY REMOVAL; APPENDIX

Filed Concurrently With: Declaration of Jacqueline Litra; Declaration of Dave Kravitz

Date: August 9, 2021
Time: 1:30 p.m.
Dept.: 7

The Hon. Barry Baskin, Dept. 7

Trial Date: None Set

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TABLE OF AUTHORITIES

Pursuant to the Court's request at hearing on August 5, 2021, Respondents Megan Keefer and Keith Rogenski (named here in their official capacities as officials of the San Ramon Valley Unified School District) and the San Ramon Unified Valley Unified School District ("District") hereby provide this written opposition to Petitioner John Doe's *ex parte* application to stay enforcement of an April 22, 2021 emergency removal of Petitioner from the physical educational environment pursuant to 34 C.F.R., section 106.44, subd. (c).

I. INTRODUCTION

Petitioner seeks an *ex parte* order that this Court stay the enforcement of an emergency removal of Petitioner from the physical educational environment pending the outcome of a Title IX investigation stemming from allegations Petitioner sexually assaulted a young woman on the campus of the District's California High School on or about April 13, 2021. Petitioner's request for an *ex parte* order is in the context of Petitioner's Petition for Writ of Administrative Mandate otherwise challenging the District's emergency removal as arbitrary and capricious. The Writ Petition, itself, has been filed while the District's Title IX procedures—including an investigation, decision and possible appeal—are still ongoing.

Numerous factors compel this Court to deny Petitioner's request for a stay. First, case law does not allow the use of section 1084.5 procedures to take interlocutory appeals of decisions made by an agency prior to a final determination. Here, the emergency removal is one of several supportive measures that the federal regulations authorize pending the outcome of a Title IX investigation—akin (though not similar in every way) to an interim removal pending a final disciplinary decision. Such interim or preliminary orders are not appealable as they do not constitute the final determination of the agency and attempts to appeal are subject to dismissal for failure to exhaust. Further, Petitioner could have immediately claimed a violation of the implementing regulations in a complaint to the Department of Education's ("DOE") Office for Civil Rights ("OCR"), resulting in a review of the District's decision, but elected not to.

Second, Petitioner grossly misstates the requirements in the regulations for making an emergency removal determination. The applicable federal regulations, which came into effect only 12 months ago, provide for emergency removal of a student if, after an individualized safety and

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risk analysis, the recipient agency determines that the respondent poses an immediate threat to the physical health and safety of one or more persons "arising from the allegations of sexual harassment." Contrary to their moving papers, the commentary to the regulations makes clear that DOE purposefully did not define "individualized safety and risk analysis," "immediate threat," or "arising from allegations of sexual harassment"—substantively or procedurally—in order to give the greatest possible flexibility to decisionmakers. Not only does the use of the phrase "genuine emergency" in the commentary not provide a substantive requirement for determinations, but the commentary to the regulations imply that allegations of sexual assault or rape are straightforward grounds for emergency removal.

Third, Petitioner is incorrect that the emergency removal determination process requires that the District have provided him a factual showing of an immediate threat. Here, even the records attached to Petitioner's declaration make clear that Petitioner is accused of a sexual assault on campus in which he groped and manually penetrated the complainant despite her asking him to stop, and that there were accusations that Petitioner had engaged in similar conduct with another student at some point in the past. Weighed against these serious accusations, Petitioner denied engaging in non-consensual sexual contact with the complainant and alleged the complainant fabricated the allegations as a "jilted lover." If this Court has jurisdiction to review the District's decision, it must do so on a substantial evidence standard. However, contrary to Petitioner's entreaties that this Court simply reweight the evidence, the simple summary above establishes that a reasonable decisionmaker clearly could (and did) conclude that Petitioner posed an immediate threat to the physical health and safety of one or more persons "arising from the allegations of sexual harassment."

Finally, a discretionary stay is simply not warranted in this situation. Petitioner readily admits he was first subject to an emergency removal in April 2021, he appealed that decision unsuccessfully in May 2021, and he was informed in July 2021 that the emergency removal would remain in effect at the beginning of the 2021-2022 school year pending completion of the Title IX process. Petitioner did not seek redress in this Court (or with OCR) at any time during this 100 plus-day period, but waited until August 5, 2021, to seek an emergency stay. If the purpose of a stay is

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to preserve the status quo pending a judicial challenge, the status quo accepted for over three months by Petitioner is his emergency removal. Petitioner has, and will continue to be, provided equal access to an educational program, albeit not physically on campus. Further, the Title IX process will soon move to the decision phase—which provides robust due process. All of this must be concluded before the District could impose disciplinary measures under Education Code § 48900 *et seq.* Petitioner seeks here to disrupt this robust process with a judicial declaration that his denials alone suffice to preclude an emergency removal.

This is not what the regulations envisioned and it should be rejected by this Court.

II. ARGUMENT

A. The Emergency Removal Is Not a Final Decision of the District and, so, Is Not Reviewable Under Section 1094.5

Section 1094.5 of the Code of Civil Procedure authorizes this Court to issue a writ "for the purposes of inquiring into the validity of any final administrative order or decision" made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in an inferior tribunal[.]" (Code Civ. Proc., § 1094.5.) Finality implies exhaustion of administrative remedies; a "party must go through the entire proceeding" to "a final decision on the merits of the entire controversy" before resorting to the courts for relief. (*Kumar v. National Medical Enterprises, Inc.* (1990) 218 Cal.App.3d 1050, 1055.)

This includes decisions that provide for interim deprivation of rights pending a final decision. For example, in *Kumar*, *supra*, a physician sought to challenge continued restrictions on his hospital privileges following a partial remand order by the Superior Court on a 1094.5 petition. (*Id.* at p. 1055.) The Court of Appeal dismissed the physicians appeal of the Superior Court decision on the basis that the restrictions on his hospital privileges had been made at an intermediate level, and that the remand set the process back to a place prior to final review by the hospital's governing body. (*Ibid.*) Because his appeal from the trial court dealt only with an intermediate order restricting his privileges pending final administrative exhaustion, the Court of Appeal held that it had no authority under section 1094.5 to entertain further review. In other words, section 1094.5 does not permit review of an interim order—even if that interim order deprives the petitioner of a property

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right.

The same logic applies to the instant case. Section 106.44 of Title 34 of the Code of Federal Regulations sets forth requirements for a recipients response to sexual harassment.[1] In this case, the District determined that it would implement an emergency removal of Petitioner. (*See* 34 C.F.R. § 106.44 (c).) Importantly, Petitioner's emergency removal was decided pending a formal complaint being addressed through the Title IX grievance process set forth in the regulations. (*See* 34 C.F.R. § 106.44 (b).) The grievance process includes robust requirements for due process, including the opportunity to present evidence and respond to the investigative report, submit written cross examination questions, and appeal a final decision. (*See* 34 C.F.R. § 106.45.)

Much like an interim deprivation of hospital privileges pending review, an emergency removal determination in this context is a temporary measure pending a final administrative decision which will, here, either find the Petitioner responsible or not responsible for the conduct alleged. As will be outlined further, below, a temporary emergency removal like Petitioner's, made due to considerations for physical health and safety arising from the allegations of sexual assault, will end if Petitioner is found to be not responsible for the alleged conduct (as is the presumption at this stage, *see* 34 C.F.R. § 106.45(b)(1)(4)). If Petitioner is found responsible, the District would then move to disciplinary proceedings under the Education Code that provide its own standards, procedures, and due process for disciplinary removal from the educational environment. (*See* Ed. Code, § 48900 *et seq.*)[2] An interim determination—even one that deprives a student temporarily of

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[1] "Sexual Harassment," as defined by the 2020 Federal Regulations for Title IX, includes—in addition to unwelcome "*quid pro quo*" sexual contact and severe, pervasive and objectively offensive conduct—"sexual assault" as defined in 20 U.S.C. § 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. § 12291(a)(10), "domestic violence" as defined in 34 U.S.C. § 12291(a)(8), and (6) "stalking" as defined in 34 U.S.C. § 12291(a)(30). (34 C.F.R. § 106.30 (a).)

[2] Petitioner's numerous citations on pages 12 and 13 of his *ex parte* motion purporting to set forth due process under Title IX are wholly misplaced here. First, all the cited cases arose from Title IX hearings conducted at the post-secondary level. While Petitioner may be correct that "California law does not require any specific form of disciplinary hearing" in the post-secondary context, that is not true for elementary and secondary schools which are bound by the "specific form of disciplinary hearing" set forth in Education Code section 48900 *et seq.*, including section 48911 (suspensions) and 48918 *et seq.* (expulsion hearing procedures). Second, the cases cited by Petitioner all arose

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access to the physical educational environment—made prior to a final decision made in accordance to law is not appealable under section 1094.5. Rather, Petitioner must exhaust administrative remedies and reach a final determination on the merits in order to challenge Title IX determinations in this Court.

This is not to say that Petitioner has no recourse. Even interim decisions may be redressed through a complaint with OCR, acting on behalf of DOE. (34 C.F.R. § 106.3 (a).) In promulgating the regulations that first authorized emergency removals, DOE made clear that OCR may assess whether a recipient acted with deliberate indifference when making an individualized risk assessment under section 106.44(c). (85 Fed. Reg. 30235 (May 6, 2020).)[3] Through the complaint process, OCR is authorized to review a recipient's process in making an emergency removal determination, although OCR (like this Court) is not authorized to simply reweigh the evidence. (*Ibid.*)

B. Petitioner Misrepresents the Regulatory Requirements for Emergency Removal Determinations.

Reading Petitioner's *ex parte*, this Court would be excused for believing that in order to impose an emergency removal, a Title IX officer is required by the regulations to issue a detailed written factual finding establishing that a "genuine emergency" exists because a respondent poses an immediate threat to the physical health and safety of an individual on campus. For Petitioner, a respondent's denial of the underlying conduct, and denial that he or she presents an ongoing risk, is sufficient to overcome any other consideration taken by a Title IX officer. Anything else, according to Petitioner, would result in nefarious use of the emergency removal process by a student's "enemies" who know that allegations of sexual misconduct will result in injury to a respondent.

This is not what the regulations or commentary to the regulations state or permit. Under section 106.44(c), a recipient is authorized to make an individualized safety and risk analysis to

---

before August 2020, when 34 C.F.R., section 106.45 came into effect and DOE standardized procedures for Title IX grievance proceedings.

[3] The relevant sections of the Federal Regulations including DOE's commentary on 34 C.F.R., section 106.44(c) is attached hereto as an Appendix for the Court's benefit.

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determine if an "immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment" justifies removal of the respondent. The regulations do not prescribe what constitutes an "individualized safety and risk analysis," do not define "immediate threat," do not require any written factual findings, and do not use the term "genuine emergency." DOE specifically declined to prescribe any specific procedure for the analysis, stating that recipients "may, but need not, utilize some or all the procedures prescribed in § 106.45, such as providing for collection and presentation of evidence." (85 Fed. Reg. 30235.) All that is required for due process is that the recipient provide the respondent notice and an opportunity to challenge the decision "immediately following the removal." (34 C.F.R. § 106.44(c).) DOE specifically declined to set forth any process for emergency removals in part because DOE viewed the Title IX grievance procedure (i.e., the investigatory, decision and appeal procedure) as providing sufficient post-deprivation due process. (85 Fed. Reg. 30183 ["[T]he grievance process in § 106.45 provides robust due process protections for both parties[.]"].)

The lack of more robust definitions in the regulations is not an accident, but by design. In the commentary, DOE states that it explicitly declined "to require recipients to follow more prescriptive requirement to undertake an emergency removal (such as requiring that the assessment be based on objective evidence, current medical knowledge, or performed by a licensed evaluator)" so as to "leave as much flexibility as possible for recipients to address any immediate threat to the physical health or safety of any student or other individual." (85 Fed. Reg. 30225.) In this light, Petitioner's purported evidentiary objections to the District's emergency removal are misplaced. The District was not required to follow any specific process in the emergency removal so long as it made an individualized safety and risk analysis. The emergency removal determinations by Ms. Keefer provided to Petitioner following her meetings with Petitioner and complainant, and again after Petitioner had the opportunity to challenge, are facially "individualized." In other words, Ms. Keefer made her determination based on factors specific to the complaint (e.g., individualized), not categorically or automatically.

DOE also purposefully declined to provide any limitations on the grounds for emergency removal beyond "physical health and safety" and "arising from the allegations of sexual

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harassment." Contrary to Petitioner's insistence that the regulations require more, DOE implies that an individualized risk assessment can be based solely on the allegations made in a complaint. (*See* 85 Fed. Reg. 30225 ["A threat posed by a respondent *is not necessarily* measured solely by the allegations made by the complainant." (Emphasis added)].) The inclusion of the phrase "arising from the allegations of sexual harassment" was, according to DOE, meant to *broaden* the reach of emergency removals by "clarifying that the threats justifying a removal *could consist of* facts and circumstances 'arising from' the sexual harassment allegations." (*Ibid.*, emphasis added.) In fact, this language was explained to be included in opposition to a suggestion that emergency removals be limited "*only* to instances where a complainant has alleged sexual assault or rape[.]" (*Ibid.*, emphasis added.)

Most importantly, the commentary in the regulations primarily seeks to clarify when a recipient can impose an emergency removal in situations where the allegations of sexual harassment are limited to non-physical conduct (the more common definition of "sexual harassment"). When DOE uses the term "genuine emergency" in the commentary, DOE does not do so to augment or provide standards for an "individualized safety and risk analysis." Rather, DOE contrasts the phrase "genuine emergencies" with examples of situations—such as a belief that a respondent may interfere with a Title IX investigation or destroy evidence—in which DOE believes emergency removal does not apply. (85 Fed. Reg. 30225.) Taken together with DOE's commentary acknowledging that the nature of a complaint *could* alone trigger an emergency removal based on an individualized safety and risk analysis, the use of the phrase "genuine emergency" elsewhere in the comments is not meant to provide any substantive guidance—let alone imply that there must be a finding of an emergent threat. In fact, DOE explicitly states in its comments that beyond the plain language of the regulation, "We decline to add further bases that could justify an emergency removal under § 106.44(c)." (*Ibid.*)

Finally, in referencing sexual assault, DOE suggests that a recipient must consider emergency removal as a non-deliberately indifferent supportive measure. In responding to comments raising concerns about trauma a sexual assault may cause, and the effect that may have on a complainant's equal access to education, DOE explains:

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> A recipient may need to undertake an emergency removal in order to fulfill its duty not to be deliberately indifferent under § 106.44(a) and protect the safety of the recipient's community, and § 106.44(c) permits recipients to remove respondents in emergency situations that arise out of allegations of conduct that could constitute sexual harassment as defined in § 106.30.

(85 Fed. Reg. 30224.) DOE later explains that a recipient is *obligated* to provide a complainant with a non-deliberately indifferent response to a sexual assault report, of which, "Emergency removals under § 106.44(c) remain an option[.]" (85 Fed. Reg. 30226.) Taken together, these comments strongly suggest that DOE believes an allegation of sexual assault is more likely to justify an emergency removal than allegations of hostile environment sexual harassment.

C. Ms. Keefer Followed the Regulations to Arrive at an Appropriate Individualized Analysis, Which is Supported by the Evidence.

With clarity as to what the applicable regulations do, and do not, require, should this Court determine that Petitioner may bring the 1094.5 action, this Court can now turn to properly review the factual and procedural basis for Ms. Keefer's decision. As set forth, above, DOE purposefully declined to set forth in the regulations any clear definitions of what constitutes an "individualized safety and risk analysis" or provide more prescriptive language regarding situations in which a recipient might determine there is an immediate threat to physical health or safety. All this was to provide recipients, like the District, flexibility in applying the emergency removal provision in a manner that meets recipient's overall Title IX obligations.

In this case, it is undisputed that on April 22, 2021, Petitioner was called to the office of Ms. Keefer and told of allegations against him by complainant that Petitioner sexually assaulted complainant on April 13 in a classroom. Petitioner alleges that he explained to Ms. Keefer that it was not true. Petitioner alleges Ms. Keefer explained to Petitioner that there were differences in the accounts that she had been provided and that the information received led Ms. Keefer to institute an emergency removal.

Petitioner was provided notice of the emergency removal that same day. (Hathaway Declaration, Exh. 8.) On April 28, 2021, Petitioner admits he was provided with specifics of the complainant's allegations, namely:

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> On April 15, 2021 [*sic.*], Respondent assaulted and sexually harassed Complainant during fifth period theater class by kissing her on her mouth and neck without her consent, fondling her breasts without her consent, fondling and penetrating her vulva and vagina without her consent, and forcing her to touch his penis under his clothing by forcing her hands into his pants without her consent.

(*Id.*, Exh. 6, p. 13.) On May 7, 2021, Ms. Keefer issued an amended notice of emergency removal correcting a typographical error. (*Id.*, Exh. 3.) Petitioner's attorney waited until May 17, 2021, to proceed with a meeting to challenge the emergency removal. (*Id.*, Exh. 4, p. 1.) On May 19, 2021, Petitioner again denied the allegations and asserted that he does not pose a threat to anyone. (*Id.*, Exh. 4, p. 1.)

All of this information was taken into account by Ms. Keefer when Ms. Keefer provided Petitioner with a letter outlining the outcome of his challenge to the emergency removal on May 21. Ms. Keefer states that she considered "the allegations of sexual assault, Title IX Sexual Harassment, and [Petitioner's] response to those allegations in making the initial assessment and determination." As Petitioner had not provided any new facts, Ms. Keefer explained that it was her determination that Petitioner poses an immediate threat to the physical health or safety of a student or other individuals "arising form the allegations of sexual assault." (*Id.*, Exh. 4, pp. 1-2.)

The above must be evaluated by this Court, in a petition for writ of administrative mandate, under a substantial evidence standard. (Code Civ. Proc., § 1094.5, (c).) The substantial evidence standard is "very deferential." (*Doe v. Occidental College* (2019) 37 Cal.App.5th 1003, 1019, *reh'g denied (July 24, 2019), review denied (Oct. 9, 2019).*) This Court does not substitute its own judgement, but asks if "no reasonable person could reach the conclusion reached by the administrative agency, based on the record before it[.]" (*Ibid..*, *quoting*, *Doe v. Regents of University of California* (2016) 5 Cal.App.5th 1055, 1073.) "Substantial evidence means []more than a mere scintilla[] but less than a preponderance;[] it is an extremely deferential standard." (*Thomas v. CalPortland Company* (9th Cir. 2021) 993 F.3d 1204, 1208, quotation and citation omitted.)

Despite no requirement for making written findings, this Court can nevertheless review the evidence before Ms. Keefer to understand the basis of her decision. Ms. Keefer was provided with a detailed allegation of a sexual assault that took place in a classroom during the school day. Ms.

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Keefer was also provided with a general denial and claim that the complainant was fabricating a story due to a breakup. In weighing these facts, Ms. Keefer was allowed to consider the nature of the allegation—a sexual assault which took place in the middle of the day in a classroom—along with other information available at the time—to conclude that "safety and risk," analyzed on an individual basis, established an "immediate threat" to the physical health and safety of a student or others, all "arising from" the allegation of sexual harassment (e.g. sexual assault).

Ms. Keefer was not required by the regulations to detail her decision or analysis. However, it can be safely presumed that, despite Petitioner's denials, Ms. Keefer responded to the potential that Petitioner had exhibited a propensity to engage in sexually inappropriate conduct on campus—which poses a risk to the physical health and safety of others. As an interim measure, Ms. Keefer was not required to decide whether the allegation of sexual assault was or was not true.[4] That determination is part of the (ongoing) Title IX grievance procedure. Rather, Ms. Keefer was tasked with making an individualized determination based on the available information—which she did.

Here, Petitioner presents the Court with the same information before Ms. Keefer and asks this Court simply to reweigh the evidence in his favor. To do so would substitute this Court's judgment for that of Ms. Keefer, but here without the ability to speak directly with the complainant or Petitioner. Petitioner maligns the complainant (and theoretical "enemies and ex-partners" nefariously conspiring to coopt the Title IX processes to their own gain) in an attempt to focus this Court solely on Petitioner's own denials. However, this Court knows that Petitioner's denials must be (and were) weighed against the facts of the complaint and other information known to Ms. Keefer. In doing so, this Court cannot say that *no* reasonable person could have come to the same conclusion

[4] In fact, Ms. Keefer was prohibited from determining the truth of the allegations, as complainants formal complaint must be handled through the detailed processes of section 106.45. As outlined in Section B, DOE specifically declined to require any procedure for the "individualized safety and risk analysis" preceding emergency removals in part because DOE viewed the Title IX grievance process as the appropriate venue in which to adjudicate whether the sexual harassment allegations have any basis. By design, therefore, Ms. Keefer could only weigh complainant's allegation, Petitioner's denial, and any other information directly known to Ms. Keefer at the time to make her emergency removal determination. This type of deprivation early in a process based on initial information, such as removal of work privileges such as in *Kumar*, *supra*, or bail determinations in criminal court, are common in judicial or quasi-judicial proceedings.

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as Ms. Keefer and, as such, this Court must uphold the emergency removal.

D. <u>A Stay Is Not Warranted.</u>

Even were this Court to determine that Petitioner could challenge his emergency removal through a 1094.5 petition, a stay of the emergency removal is nonetheless unwarranted. Subsection (g) of section 1094.5 permits, but does not require, this Court to issue a stay of the operation of an administrative order pending a final order of this Court so long as the stay is not against the public interest. Petitioner does not provide this Court with a standard for its consideration of a stay, but does cite to cases in which courts have considered temporary and preliminary injunction standards in initial requests to stop an agency action in other contexts. (*See Association of Orange County Deputy Sheriffs v. County of Orange* (2013) 217 Cal.App.4th 29, 49 [reviewing preliminary injunction issued in 1085 writ petition]; *California State University, Hayward v. National Collegiate Athletic Assn.* (1975) 47 Cal.App.3d 533, 544 [discussing standard for issuance of preliminary injunction in complaint for injunctive relief]. *See, also, Doe v. University of Southern California* (2018) 28 Cal.App.5th 26, 31-32 [stating stay was granted by trial court in procedural history of case without legal analysis].)

With regard to *Association of Orange County Deputy Sheriffs*, *supra*, Petitioner cites the case for the proposition that he need not plead injunction standards in requesting a stay, but merely must show that he as a "colorable claim for writ relief[] i.e. there is *some possibility* that he will likely prevail." (*Ex <u>Parte</u>* at p. 14.) Association contains no such holding, however. Rather *Association* reviewed the denial of a writ which included an underlying denial of a preliminary injunction by the trial court. (*Association of Orange County Deputy Sheriffs*, *supra*, 217 Cal.App.4th 29, 49–50.) After holding that the trial court had properly denied the writ, the Court of Appeal quickly disposed of the appeal of the denial of a preliminary inunction. In so doing, the Court of Appeal cited case law that stated a trial court may not grant a preliminary injunction, regardless of the balance of interim harm, "unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim." (*Ibid.* citation omitted.) The Court of Appeal never mentioned, let alone provided standards for, a stay.

In general, the granting of a stay of a final order pending appeal (as with an administrative

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mandamus proceeding) is to preserve the status quo pending review. (*See, e.g., Venice Canals Resident Home Owners Assn. v. Superior Court* (1977) 72 Cal.App.3d 675, 682.) Here, two factors warrant strongly against the grant of a stay. First, as outlined above, Petitioner's arguments are contrary to the plain text of the emergency removal regulation and ignore significant commentary to the regulations that support the District's action, and so a stay pending review of the emergency removal determination would not maintain a status quo. Rather, a stay would return Petitioner to the educational environment only for the likelihood Petitioner to return to an emergency removal after the conclusion of this writ proceeding.

Second, the status quo at this time is Petitioner's emergency removal. Petitioner has known and been subject to the emergency removal since April 22, 2021. Even assuming Petitioner had to "exhaust" administrative remedies simply through requesting reconsideration, that reconsideration concluded on May 21, 2021, at which time Petitioner was notified in writing that the emergency removal would remain in effect for the duration of the Title IX process. (Hathaway Declaration, Exh. 4, p. 2 ["You will not be allowed to participate in the District's in-person education programs or activities until after a determination is made regarding the Title IX Sexual Harassment Formal Complaint."].) Further, on July 12, 2021, the District again confirmed, through counsel, that the emergency removal would remain in effect for the start of the 2021-2022 school year. (*Id.*, Exh. 7.) However, rather than seek a stay through a writ petition at any of those times, Petitioner waited until July 30, 2021 to file his action in this Court and until August 5, 2021 to request his stay via *ex parte* application. Petitioner does not explain this delay or why an emergency only exists now that the 2021-2022 school year is starting—especially now that the Title IX action is expected to move into its next phases.

If this Court were to "balance the equities" of Petitioner's stay request, it cannot say that the equities weigh in favor of Petitioner being reinstated to the physical school environment. Following Petitioner's emergency removal, the District notified Petitioner of the availability of supportive measures and invited Petitioner to engage in conversations regarding supportive measures available to support him during the Title IX process and removal. (Declaration of Jacqueline Litra ("Litra Declaration"), Exh. A, p. 1; Exh. B; Exh. C, pp. 2-3. *See also*, Hathaway Declaration, Exh. 1-2.)

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However, Petitioner never responded regarding supportive measures.

After receiving no response from Petitioner or his counsel regarding the District's attempts to implement supportive measures for Petitioner, on May 10, 2021, counsel for the District set up a call with Petitioner's counsel to explain that supportive measures such as in-home instruction or remote learning were available to Petitioner to facilitate his education during the emergency removal. (Litra Declaration at ¶ 6; *Id.*, Exh. D, p. 8) Once Petitioner elected remote instruction as a supportive measure on May 11, 2021, the District executed the necessary changes to Petitioner's schedule and he started remote instruction the following day, May 12. (*Id.*, Exh. D, pp. 3-8.) During the removal, the District has implemented supportive measures as needed to minimize disruption to Petitioner's education during the emergency removal. (*Id.*, Exh. D, pp. 1-2.)

The 2020-2021 school year ended on June 3, 2021. (Declaration of Dave Kravitz, Title IX Coordinator at ¶ 3.) The District has a meeting scheduled with Petitioner on Friday, August 6, 2021 at 1:00 pm, to review supportive measures for Petitioner for the 2021-2022 school year. (Declaration of Kravitz at ¶ 4.) The District will offer Petitioner the option to enroll in the District's "Virtual Academy" or the District's traditional independent study program, "Ventura School." (*Id.* at ¶ 4.) Both programs provide a UC-aligned (e.g. "A-G") curriculum and all courses are taught by credentialed District teachers. (*Id.* at ¶ 5.) Virtual Academy offers classes five days per week following a daily bell schedule, akin to a traditional high school. (*Ibid.*) This program, instituted due to the COVID-19 Pandemic, offers the same academic opportunities to students, albeit in an online environment. (*Ibid.*) Venture School offers a traditional independent study program outside of the traditional school setting as a flexible, alternative method of study, equal in quality and quantity to what students receive in traditional in-person school. (*Ibid.*) All courses are taught by credentialed District teachers who meet with each student at least once a week. (*Ibid.*) The District has a school counselor and social worker available to provide support and guidance in the areas of academic and social/emotional support. (*Ibid.*) The District is offering these supportive measures to Petitioner to maintain the status quo under the emergency removal and with Petitioner's equal access to education during the Title IX investigation in mind.

In contrast, if Petitioner were to be returned to in-person instruction, significant additional

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supportive measure would need to be implemented to ensure equal access to the educational environment for the complainant. Due to the reported trauma of the incident, complainant's parent has requested advanced notice and opportunity to request a transfer for complainant if Petitioner would be returning to in-person instruction at the same school as complainant. (Declaration of Dave Kravitz at ¶ 6.) Staying the emergency removal would, therefore, not result in a neutral outcome. Rather, it will require, through supportive measures at the request of complainant, her transfer to a new school environment so as to avoid contact with Petitioner.[5]

Given the above, Petitioner will not be prejudiced in continuing in virtual instruction during the pendency of the Title IX investigation pursuant to the emergency removal. In contrast, the public policy considerations in this case of staying the emergency removal determination and returning Petitioner to in-person instruction warrant in favor of the District. The measured individualized analysis of the circumstances by Ms. Keefer, the school-site principal, led to the conclusion that Petitioner poses an immediate threat to the physical health and safety to a student or individual in the physical school environment. Title IX, as well as California law, requires school officials to maintain a safe environment in order to ensure equal access to education for all students. In fact, the Title IX regulations specifically allow for the emergency removal of a student in the precise circumstances here. That determination should not be disturbed.

III. CONCLUSION

For the foregoing reasons, the Districts requests that this Court deny Petitioner's request for a stay of enforcement of the emergency removal determination.

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[5] The District, as set forth in Section C, does not believe that it is sufficient in this circumstance and under the regulations to simply separate Petitioner and respondent physically. Because the conduct that Petitioner is accused of includes a sexual assault on a District campus, the grounds for emergency removal—an immediate threat to the physical health and safety of any student or other individual—remains.

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DATED: August 6, 2021

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APPENDIX

resolution of student and employee complaints, alleging any action that would be prohibited by Part 106 of Title 34 of the Code of Federal Regulations, and also a grievance process that complies with § 106.45 for formal complaints of sexual harassment as defined in § 106.30. Section 106.8(c) thus clarifies that a recipient does not need to apply or use the grievance process in § 106.45 for complaints alleging sex discrimination that does not constitute sexual harassment.

Changes: None.

Supportive Measures

Overall Support and Opposition

Comments: Many commenters supported the definition of "supportive measures" in § 106.30 because the provision states that supportive measures may be offered to complainants and respondents; commenters asserted that supportive measures should be offered on an equal basis to all parties, except to the extent public safety concerns would require different treatment, stressing that respondents deal with their own strife as a result of going through the Title IX process. These commenters viewed the § 106.30 definition of supportive measures as appropriately requiring measures that do not disproportionately punish, discipline, or unreasonably burden either party. Many commenters appreciated that the § 106.30 definition of supportive measures included a list illustrating the range of services that could be offered to both parties, and several of these commenters specifically expressed strong support for mutual no-contact orders as opposed to one-way no-contact orders.

Many commenters opposed the § 106.30 definition of supportive measures because, while neither party should be presumed to be at fault before an investigation had been completed commenters argued that this provision will cause an overall decrease in the availability of support services and accommodations to victims. Commenters argued that the requirement that supportive measures be "non-disciplinary, non-punitive," "designed [but not required] to restore access," and not unreasonably burdensome to the non-requesting party, significantly limits the universe of supportive measures schools could offer to victims by prohibiting any measure reasonably construed as negative towards a respondent. These commenters believed the supportive measures definition was too respondent-focused and effectively prioritized the education of respondents over complainants. Several commenters identified the clause "designed to effectively restore or preserve" and questioned how OCR would review and determine whether a supportive measure met this requirement. One commenter asserted that supportive measures designed to restore "access," as opposed to *equal* access, contradicted the proposed definition of "sexual harassment" in § 106.30 as well as the Supreme Court's holding in *Davis* because restoring *some* access is an incomplete remedy for a denial of *equal* access.

Several commenters requested clarification that colleges and universities have flexibility and discretion to approve or disapprove requested supportive measures, including one-way no-contact orders, according to the unique considerations of each situation. Another commenter argued that § 106.30 should be modified to expressly state that schedule and housing adjustments, or removing a respondent from playing on a sports team, do not constitute an unreasonable burden on the respondent when those measures do not separate the respondent from academic pursuits. Commenters argued that § 106.30 should clarify what kind of burdens will be considered "unreasonable." Commenters urged the Department to modify the definition of supportive measures to require that all such measures be proportional to the alleged harm and the least burdensome measures that will protect safety, preserve equal educational access, and deter sexual harassment.

Many commenters suggested that the final regulations should require schools to implement a process through which the parties can seek and administrators can consider appropriate supportive measures, and at least one commenter suggested that a hearing similar to a preliminary injunction hearing under Federal Rule of Civil Procedure 65 should be used, particularly in cases where one party seeks the other party's removal from certain facilities, programs, or activities. At least one commenter asked the Department to specify that any interim measures must be lifted if the respondent is found not responsible.

Many commenters requested clarification as to what types of supportive measures are allowable in the elementary and secondary school context or requested that the Department expand the supportive measures safe harbor and definition to apply in the elementary and secondary school context. Other commenters asserted that there may be a greater need for supportive measures in cases involving international students, women in career preparatory classes such as construction, manufacturing, and wielding, and lower-income students, for whom dropping out of school could have more drastic and long-lasting consequences.

Many commenters requested that the Department reconsider or clarify the requirement in § 106.30 that the Title IX Coordinator is responsible for effective implementation of supportive measures, arguing that Title IX Coordinators cannot fulfill all the duties assigned to them under the proposed rules (especially if a recipient has only designated one individual as a Title IX Coordinator) and asserting that the responsibility to implement supportive measures could be easily delegated to other offices on campus.

Discussion: The Department appreciates commenters' support for the § 106.30 definition of supportive measures, and we acknowledge commenters' arguments that the language employed in the proposed definition of the term "supportive measures" is too respondent-focused or lessens the availability of measures to assist victims. The Department disagrees that this provision prioritizes the needs of one party over the other. For example, the § 106.30 definition states that the individualized services can be offered "to the complainant or respondent" [800] free of charge, that the services shall not "unreasonably" burden either party, and may include services to protect the safety "of all parties" as well as the recipient's educational environment, or to deter sexual harassment. The Department disagrees that the requirements for supportive measures to be non-disciplinary, non-punitive, and not unreasonably burdensome to the other party indicate a preference for respondents over complainants or prioritize the education of respondents over that of complainants. These requirements protect complainants and respondents from the other party's request for supportive measures that would unreasonably interfere with either party's educational pursuits. The

[800] We emphasize that a "complainant" is any individual who has been alleged to be the victim of conduct that could constitute sexual harassment, and a "respondent" is any individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment, so a person may be a complainant or a respondent regardless of whether a formal complaint has been filed or a grievance process is pending (and irrespective of who reported the alleged sexual harassment—the alleged victim themselves, or a third party). *See* § 106.30 defining "complainant" and defining "respondent."

plain language of the § 106.30 definition does not state that a supportive measure provided to one party cannot impose *any* burden on the other party; rather, this provision specifies that the supportive measures cannot impose an *unreasonable* burden on the other party. Thus, the § 106.30 definition of supportive measures permits a wide range of individualized services intended to meet any of the purposes stated in that provision (restoring or preserving equal access to education, protecting safety, deterring sexual harassment).

We do not believe that it would be appropriate to specify, list, or describe which measures do or might constitute "unreasonable" burdens because that would detract from recipients' flexibility to make those determinations by taking into the account the specific facts and circumstances and unique needs of the parties in individual situations.[801] For similar reasons, we decline to require that supportive measures be "proportional to the harm alleged" and constitute the "least burdensome measures" possible, because we believe that the § 106.30 definition appropriately allows recipients to select and implement supportive measures that meet one or more of the stated purposes (*e.g.,* restoring or preserving equal access; protecting safety; deterring sexual harassment) within the stated parameters (*e.g.,* without being disciplinary or punitive, without unreasonably burdening the other party). The "alleged harm" in a situation alleging conduct constituting sexual harassment as defined in § 106.30 is serious harm and the definition of supportive measures already accounts for the seriousness of alleged sexual harassment while effectively ensuring that supportive measures are not unfair to a respondent; even if a supportive measure implemented by a recipient arguably was not the "least burdensome measure" possible, in order to qualify as a supportive measure under § 106.30 the measure cannot punish, discipline, or unreasonably burden the respondent.

To the extent that commenters are advocating for wider latitude for recipients to impose *interim* suspensions or expulsions of respondents, the Department believes that without a fair, reliable process the recipient cannot know whether it has interim-expelled a person who is actually responsible or not. Where a respondent poses an immediate threat to the physical health or safety of the complainant (or anyone else), § 106.44(c) allows emergency removals of respondents prior to the conclusion of a grievance process (or even where no grievance process is pending), thus protecting the safety of a recipient's community where an immediate threat exist. The Department believes that the § 106.30 definition of "supportive measures" in combination with other provisions in the final regulations results in effective options for a recipient to support and protect the safety of a complainant while ensuring that respondents are not prematurely punished.[802]

In response to commenters' concerns that omission of the word "equal" before "access" in the § 106.30 definition of supportive measures creates confusion about whether the purpose of supportive measures is intended to remediate the same denial of "equal access" referenced in the § 106.30 definition of sexual harassment, we have added the word "equal" before "access" in the definition of supportive measures, and into § 106.45(b)(1)(i) where similar language is used to refer to remedies. The Department appreciates the opportunity to clarify that whether or not a recipient has implemented a supportive measure "designed to effectively restore or preserve" equal access is a fact-specific inquiry that depends on the particular circumstances surrounding a sexual harassment incident. Section 106.44(a) requires a recipient to offer supportive measures to every complainant irrespective of whether a formal complaint is filed, and if a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances under § 106.45(b)(10)(ii).[803]

In order to ensure that the definition of supportive measures in § 106.30 is read broadly we have also revised the wording of this provision to more clearly state that supportive measures must be designed to restore or preserve equal access to education without unreasonably burdening the other party, which may include measures designed to protect the safety of parties or the educational environment, or deter sexual harassment. The Department did not wish for the prior language to be understood restrictively to foreclose, for example, a supportive measure in the form of an extension of an exam deadline which helped preserve a complainant's equal access to education and did not unreasonably burden the respondent but could not necessarily be considered designed to protect safety or deter sexual harassment.

The Department was persuaded by the many commenters who requested that the Department expand provisions that incentivize and encourage supportive measures. As previously noted, we have revised § 106.44(a) to require recipients to offer supportive measures to complainants. As explained in the "Proposed § 106.44(b)(3) Supportive Measures Safe Harbor in Absence of a Formal Complaint [removed in final regulations]" subsection of the "Recipient's Response in Specific Circumstances" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble, we have eliminated the proposed safe harbor regarding supportive measures altogether and, thus, we do not extend this safe harbor to elementary and secondary schools. As all recipients (including elementary and secondary school recipients) are now required to offer complainants supportive measures as part of their non-deliberately indifference response under § 106.44(a), the proposed safe harbor regarding supportive measures is unnecessary. The Department agrees that the need to offer supportive measures in the absence of, or during the pendency of, an investigation is equally as important in elementary and secondary schools as in postsecondary institutions. The final regulations revise the § 106.30 definition of supportive measures to use the word "recipient" instead of "institution" to clarify that this definition applies to all recipients, not only to postsecondary institutions.

[801] The recipient must document the facts or circumstances that render certain supportive measures appropriate or inappropriate. Under § 106.45(b)(10)(ii), a recipient must create and maintain for a period of seven years records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment and must document the basis for its conclusion that its response was not deliberately indifferent. Specifically, that provision states that if a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. Thus, if a recipient determines that a particular supportive measure was not appropriate even though requested by a complainant, the recipient must document why the recipient's response to the complainant was not deliberately indifferent.

[802] Section 106.44(c) (governing the emergency removal of a respondent who poses an immediate threat to any person's physical health or safety); § 106.44(d) (permitting the placement of non-student employees on administrative leave during a pending grievance process).

[803] *See* discussion in the "Section 106.44(a) Deliberate Indifference Standard" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble.

To preserve discretion for recipients, the Department declines to impose additional suggested changes that would further restrict or prescribe the supportive measures a recipient may or must offer, including requiring supportive measures that ''do'' restore or preserve equal access rather than supportive measures ''designed'' to restore or preserve equal access. Requiring supportive measures to be ''designed'' for that purpose rather than insisting that such measures actually accomplish that purpose protects recipients against unfair imposition of liability where, despite a recipient's implementation of measures intended to help a party retain equal access to education, underlying trauma from a sexual harassment incident still results in a party's inability to participate in an education program or activity. To the extent that commenters desire for the final regulations to specify that certain populations (such as international students) may have a greater need for supportive measures, the Department declines to revise this provision in that regard because the determination of appropriate supportive measures in a given situation must be based on the facts and circumstances of that situation. Supportive measures must be offered to every complainant as a part of a recipient's response obligations under § 106.44(a).

The Department declines to include an explicit statement that schedule and housing adjustments, or removals from sports teams or extracurricular activities, do not unreasonably burden the respondent as long as the respondent is not separated from the respondent's academic pursuits, because determinations about whether an action ''unreasonably burdens'' a party are fact-specific. The unreasonableness of a burden on a party must take into account the nature of the educational programs, activities, opportunities, and benefits in which the party is participating, not solely those educational programs that are ''academic'' in nature. On the other hand, the Department appreciates the opportunity to clarify that, contrary to some commenters' concerns, schedule and housing adjustments do not necessarily constitute an ''unreasonable'' burden on a respondent, and thus the § 106.30 definition of supportive measures continues to require that recipients consider each set of unique circumstances to determine what individualized services will meet the purposes, and conditions, set forth in the definition of supportive measures.[804] Removal from sports teams (and similar exclusions from school-related activities) also require a fact-specific analysis, but whether the burden is ''unreasonable'' does not depend on whether the respondent still has access to academic programs; whether a supportive measure meets the § 106.30 definition also includes analyzing whether a respondent's access to the array of educational opportunities and benefits offered by the recipient is unreasonably burdened. Changing a class schedule, for example, may more often be deemed an acceptable, reasonable burden than restricting a respondent from participating on a sports team, holding a student government position, participating in an extracurricular activity, and so forth.

The final regulations require a recipient to refrain from imposing disciplinary sanctions or other actions that are not supportive measures, against a respondent, without following the § 106.45 grievance process, and also require the recipient's grievance process to describe the range, or list, the disciplinary sanctions that a recipient might impose following a determination of responsibility, and describe the range of supportive measures available to complainants and respondents.[805] The possible disciplinary sanctions described or listed by the recipient in its own grievance process therefore constitute actions that the recipient itself considers ''disciplinary'' and thus would not constitute ''supportive measures'' as defined in § 106.30. If a recipient has listed ineligibility to play on a sports team or hold a student government position, for example, as a possible disciplinary sanction that may be imposed following a determination of responsibility, then the recipient may not take that action against a respondent without first following the § 106.45 grievance process. If, on the other hand, the recipient's grievance process does not describe or list a specific action as a possible disciplinary sanction that the recipient may impose following a determination of responsibility, then whether such an action (for example, ineligibility to play on a sports team or hold a student government position) may be taken as a supportive measure for a complainant is determined by whether that the action is not disciplinary or punitive and does not unreasonably burden the respondent. Certain actions, such as suspension or expulsion from enrollment, or termination from employment, are inherently disciplinary, punitive, and/or unreasonably burdensome and so will not constitute a ''supportive measure'' whether or not the recipient has described or listed the action in its grievance process pursuant to § 106.45(b)(1)(vi).

The Department reiterates that a recipient may remove a respondent from all or part of a recipient's education program or activity in an emergency situation pursuant to § 106.44(c) (with or without a grievance process pending) and may place a non-student employee respondent on administrative leave during a grievance process, pursuant to § 106.44(d).[806] Further, a recipient is obligated to conclude a grievance process within a reasonably prompt time frame, thus limiting the duration of time for which supportive measures are serving to maintain a status quo balancing the rights of both parties to equal educational access in an interim period while a grievance process is pending.

With respect to supportive measures in the elementary and secondary school context, many common actions by school personnel designed to quickly intervene and correct behavior are not punitive or disciplinary and thus would not violate the § 106.30 definition of supportive measures or the provision in § 106.44(a) that prevents a recipient from taking disciplinary actions or other measures that are ''not supportive measures'' against a respondent without first following a grievance process that complies with § 106.45. For example, educational conversations, sending students to the principal's office, or changing student seating or class assignments do not inherently constitute punitive or disciplinary actions and the final regulations therefore do not preclude teachers or school officials from taking such actions to maintain order, protect student safety, and counsel students about inappropriate behavior. By contrast, as discussed above, expulsions and suspensions would constitute disciplinary sanctions (and/or constitute punitive or unreasonably burdensome

[804] The 2001 Guidance at 16 takes a similar approach to the final regulations' approach to supportive measures, by stating that it ''may be appropriate for a school to take interim measures during the investigation of a complaint'' and for instance, ''the school may decide to place the students immediately in separate classes or in different housing arrangements on a campus, pending the results of the school's investigation'' or where the alleged harasser is a teacher ''allowing the student to transfer to a different class may be appropriate.''

[805] Section 106.44(a); § 106.45(b)(1)(i); § 106.45(b)(1)(vi); § 106.45(b)(1)(ix).

[806] For further discussion see the ''Additional Rules Governing Recipients' Responses to Sexual Harassment'' subsection of the ''Section 106.44 Recipient's Response to Sexual Harassment, Generally'' section of this preamble.

actions) that could not be imposed without following a grievance process that complies with § 106.45. The Department emphasizes that these final regulations apply to conduct that constitutes sexual harassment as defined in § 106.30, and not to every instance of student misbehavior.

These final regulations do not expressly require a recipient to continue providing supportive measures upon a finding of non-responsibility, and the Department declines to require recipients to lift, remove, or cease supportive measures for complainants or respondents upon a finding of non-responsibility. Recipients retain discretion as to whether to continue supportive measures after a determination of non-responsibility. A determination of non-responsibility does not necessarily mean that the complainant's allegations were false or unfounded but rather could mean that there was not sufficient evidence to find the respondent responsible. A recipient may choose to continue providing supportive measures to a complainant or a respondent after a determination of non-responsibility. This is not unfair to either party because by definition, ''supportive measures'' do not punish or unreasonably burden the other party, whether the other party is the complainant or respondent. There may be circumstances where the parties want supportive measures to remain in place or be altered rather than removed following a determination of non-responsibility, and the final regulations leave recipients flexibility to implement or continue supportive measures for one or both parties in such a situation.

The Department also declines to add an additional requirement that schools implement a process by which supportive measures are requested by the parties and granted by recipients, because we wish to leave recipients flexibility to develop processes consistent with each recipient's administrative structure rather than dictate to every recipient how to process requests for supportive measures. Although we do not dictate a particular process, these final regulations specify in § 106.44(a) that the Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. Complainants will know about the possible supportive measures available to them [807] and will have the opportunity to express what they would like in the form of supportive measures, and the Title IX Coordinator will take into account the complainant's wishes in determining which supportive measures to offer. The final regulations do prescribe that a recipient's Title IX Coordinator must remain responsible for coordinating the effective implementation of supportive measures, so that the burden of arranging and enforcing the supportive measures in a given circumstance remains on the recipient, not on any party. We acknowledge commenters' concerns that these final regulations place many responsibilities on a Title IX Coordinator, and a recipient has discretion to designate more than one employee as a Title IX Coordinator if needed in order to fulfill the recipient's Title IX obligations.[808]

With respect for a process to remove a respondent from a recipient's education program or activity, these final regulations provide an emergency removal process in § 106.44(c) if there is an immediate threat to the physical health or safety of any students or other individuals arising from the allegations of sexual harassment. A recipient must provide a respondent with notice and an opportunity to challenge the emergency removal decision immediately following the removal. Additionally, the grievance process in § 106.45 provides robust due process protections for both parties, and before imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent, a recipient must follow a grievance process that complies with § 106.45.

We acknowledge commenters' concerns regarding the provision in the § 106.30 definition supportive measures that the Title IX Coordinator must coordinate the effective implementation of supportive measures. However, we believe it is important that students know they can work with the Title IX Coordinator to select and implement supportive measures rather than leave the burden on students to work with various other school administrators or offices. The Department recognizes that many supportive measures involve implementation through various offices or departments within a school. When supportive measures are part of a school's Title IX obligations, the Title IX Coordinator must serve as the point of contact for the affected students to ensure that the supportive measures are effectively implemented so that the burden of navigating paperwork or other administrative requirements within the recipient's own system does not fall on the student receiving the supportive measures. The Department recognizes that beyond coordinating and serving as the student's point of contact, the Title IX Coordinator will often rely on other campus offices to actually provide the supportive measures sought, and the Department encourages recipients to consider the variety of ways in which the recipient can best serve the affected student(s) through coordination with other offices while ensuring that the burden of effectively implementing supportive measures remains on the Title IX Coordinator and not on students.

Changes: We have revised the definition for supportive measures in § 106.30 to refer to ''recipients'' instead of ''institutions'' which clarifies that the definition of supportive measures is applicable in the context of elementary and secondary schools as well as in the context of postsecondary institutions. We have added ''equal'' before ''access'' in the description of supportive measures designed to restore or preserve equal access to the recipient's education program or activity. We have revised the second sentence of this provision to clarify that supportive measures must be designed to restore or preserve equal access and must not unreasonably burden the other party, which may include measures also designed to protect safety or the recipient's educational environment, or deter sexual harassment.

No-Contact Orders

Comments: Several commenters focused on the list of possible supportive measures included in the definition of supportive measures in § 106.30 and viewed the express inclusion of mutual no-contact orders as a general prohibition on one-way no-contact orders, and asked the Department to clarify whether one-way no-contact orders were prohibited. Other commenters assumed one-way no-contact orders were prohibited, and expressed concern that by disallowing one-way no-contact orders, the onus would be placed on the victim to take extreme measures to provide for their own accommodations and prevent victims from getting the support they needed, or would discourage victims

[807] Section 106.45(b)(1)(ix) requires the recipient's grievance process to describe the range of supportive measures available to complainants and respondents. Additionally, the Title IX Coordinator must contact an individual complainant to discuss the availability of supportive measures, under § 106.44(a).

[808] *See* discussion in the ''Section 106.8(a) Designation of Coordinator'' subsection of the ''Clarifying Amendments to Existing Regulations'' section of this preamble.

Additional Rules Governing Recipients' Responses to Sexual Harassment

Section 106.44(c) Emergency Removal

Overall Support and Opposition to Emergency Removals

Comments: Some commenters believed that § 106.44(c) provides due process protections for respondents while protecting campus safety. Some commenters supported this provision because it allows educational institutions to respond to situations of immediate danger, while protecting respondents from unfair or unnecessary removals. At least one commenter appreciated the latitude granted to educational institutions under § 106.44(c) to determine how to address safety emergencies arising from allegations of sexual harassment. Some commenters asserted that this provision appropriately reflects many schools' existing behavior risk assessment procedures. Several commenters supported § 106.44(c) and recounted personal stories of how a respondent was removed from classes, or from school, and the negative impact the removal had on that student's professional, academic, or extracurricular life because the removal seemed to presume the "guilt" of the respondent without allegations ever being proved.

Some commenters wanted to omit the emergency removal provision entirely, arguing that if administrators at the postsecondary level have the power to preemptively suspend or expel a student, on the pretext of an emergency, then every sexual misconduct situation could be deemed an emergency and respondents would never receive the due process protections of the § 106.45 grievance process. One commenter suggested that instead of permitting removals, all allegations of sexual harassment should simply go through a more rapid investigation so that the respondent may remain in school and victims are protected, while any falsely accused respondent is quickly exonerated. Some commenters requested that this removal power be limited because of the negative consequences of involuntary removal; one commenter suggested the provision be modified so that the removal must be "narrowly tailored" and "no more extensive than is strictly necessary" to mitigate the health or safety risk. One commenter asserted that this provision should also require that interim emergency removals be based on objective evidence and on current medical knowledge where appropriate, made by a licensed, qualified evaluator.

Some commenters asserted that emergency removals should not be used just because sexual harassment or assault has been alleged, and that § 106.44(c) should more clearly define what counts as an emergency. Some commenters argued that emergency removals should be allowed if the sexual harassment allegation involves rape, but no emergency removal should be allowed if the sexual harassment allegation involves offensive speech.

Commenters argued that § 106.44(c) is unclear as to what constitutes an immediate threat to health or safety. Several commenters argued that emergency removals should be restricted to instances where there is "an immediate threat to safety" (not health), while other commenters argued this provision must be limited to "physical" threats to health or safety. Commenters argued that a "threat to health or safety" is too nebulous a concept to justify immediate removal from campus. According to one commenter, even speaking on campus in favor of the NPRM could be construed by schools or student activists as a threat to the emotional or mental "health or safety" of survivors, even though discussion of public policy is core political speech protected by the First Amendment.

One commenter stated that the use of the plural "students and employees" in § 106.44(c) may preclude an institution from taking emergency action when the immediate threat is to a *single* student or employee. Commenters argued that postsecondary institutions need the flexibility to address immediate threats to the safety of one student or employee in the same manner as threats to multiple students or employees. Some commenters asserted that § 106.44(c) would unreasonably limit a postsecondary institution's ability to protect persons and property, or to protect against potential disruption of the educational environment, and argued that an institution should have the discretion to invoke an emergency removal under circumstances beyond those listed in § 106.44(c). Commenters argued that § 106.44(c) is too limiting because it does not allow recipients to pursue an emergency removal where the respondent poses a threat of illegal conduct that is not about a health or safety emergency; commenters contended this will subject the complainant or others to ongoing illegal conduct just because it does not constitute a threat to health or safety. Commenters argued that in addition to a health or safety threat, this provision should consider the need to restore or preserve equal access to education as justification for emergency removals. One commenter asserted that a legitimate reason to institute an emergency removal of a respondent is a threat that the respondent may obstruct the collection of relevant information regarding the sexual harassment allegations at issue.

One commenter cited New York Education Law Article 129–B as an example of a detailed framework under which campus officials may conduct an individualized threat assessment, order an interim suspension, and provide due process; commenters asserted that courts hold that the due process required for an interim suspension does not need to consist of a full hearing.[955] Another commenter argued that this provision would constitute an unprecedented Federal preemption of Oregon's existing State and local student discipline rules, which establish the due process requirements for emergency removals from school. Commenters argued that § 106.44(c) would create a higher level of due process for emergency removals in situations that involve alleged sexual harassment than for any other behavioral violation, and that the proposed rules are unclear whether this heightened procedural requirement is triggered only when a complainant alleges sexual harassment as defined in § 106.30, or is also triggered in any case where a complainant alleges sexual harassment that meets a State law definition or school code of conduct that may define sexual harassment more broadly than conduct meeting the § 106.30 definition.

Some commenters suggested that § 106.44(c) be modified to require periodic review of any emergency removal decision, to promote transparency and eliminate the possibility of leaving a respondent on interim suspension indefinitely. Commenters argued that immediate removal is very traumatic, and respondents who have been removed have a significant potential to react by harming themselves or others thus recipients should reduce these risks by ensuring a safe exit plan with adequate support for the respondent in place.

Commenters asserted that the goal should be to preserve educational opportunities for all parties involved to the extent possible, so § 106.44(c) should require recipients to provide alternative academic accommodations for respondents who are removed. Some

[955] Commenters cited: *Haidak* v. *Univ. of Mass. at Amherst*, 299 F. Supp. 3d 242, 265–66 (D. Mass. 2018), *aff'd in part, vacated in part, remanded by Haidak* v. *Univ. of Mass.-Amherst*, 933 F.3d 56 (1st Cir. 2019).

commenters suggested that this provision should address a respondent's access to a recipient's program or activity, post-removal. Because emergency removal is not premised on a finding of responsibility and occurs *ex parte*, commenters argued that the recipient should be required to provide a respondent with alternative access to the respondent's academic classes during the period of removal and that failure to do so would be sex discrimination against the respondent. Some commenters argued that as to a respondent who is removed on an emergency basis and later found to be not responsible, the final regulations should require the recipient to mitigate the damage caused by the removal, for example, by allowing the respondent to retake classes or exams missed during the removal. One commenter suggested that a recipient should secure the personal property of the removed person (such as the respondent's vehicle) and be responsible for any loss or damage occurring to personal property during a removal.

Other commenters asserted that an individualized risk assessment should be required after every report of sexual assault. Commenters argued that because insurance statistics show a high degree of recidivism among college rapists, and because Title IX is also supposed to deter discrimination based on sex, schools should be required to consider the safety of other students on their campus if they know there is a possible sexual assailant in their midst.

One commenter suggested that licensing board procedures provide the best model for campus procedures because they offer the closest parallel to the types of behavior evaluated and issues at stake for respondents such as reputation, future livelihood, and future opportunities; the commenter asserted that court precedents hold that both public and private recipients must follow principles of fundamental due process and fundamental fairness in disciplinary processes,[956] and professional licensing board procedures adequately protect due process. One commenter applauded the Department for proposing to provide greater due process protections than what current procedures typically provide; however, this commenter asserted that Native American students attending institutions funded by the Bureau of Indian Affairs receive strong due process protections, including greater due process with respect to emergency removals than what § 106.44(c) provides, and the commenter contended that the stronger due process protections should be extended to non-Native American institutions.[957] According to this commenter, unlike Native American students attending schools funded by the Bureau of Indian Affairs, non-Native American students are at risk for permanent removal from campus with potentially devastating consequences.

One commenter asserted that § 106.44(c) should explicitly require the recipient to comply with the Clery Act, notify appropriate authorities, and provide any necessary safety interventions. Another commenter stated that recipients should be required to publicly report the annual number of emergency removals the recipient conducts under § 106.44(c).

Some commenters asserted that recipients need to do more than simply remove a respondent from its education program or activity. Commenters argued that trauma from sexual assault may cause a complainant to withdraw from an education program or activity, including due to fear of seeing the respondent, suggested that more resources should be made available to complainants, and asserted that the final regulations should specify best practices addressing how a recipient should respond to immediate threats.

Discussion: We appreciate commenters' support for the emergency removal provision in § 106.44(c). Revised in ways explained below, § 106.44(c) provides that in situations where a respondent poses an immediate threat to the physical health and safety of any individual before an investigation into sexual harassment allegations concludes (or where no grievance process is pending), a recipient may remove the respondent from the recipient's education programs or activities. A recipient may need to undertake an emergency removal in order to fulfill its duty not to be deliberately indifferent under § 106.44(a) and protect the safety of the recipient's community, and § 106.44(c) permits recipients to remove respondents in emergency situations that arise out of allegations of conduct that could constitute sexual harassment as defined in § 106.30. Emergency removal may be undertaken in addition to implementing supportive measures designed to restore or preserve a complainant's equal access to education.[958] While we recognize that emergency removal may have serious consequences for a respondent, we decline to remove this provision because where a genuine emergency exists, recipients need the authority to remove a respondent while providing notice and opportunity for the respondent to challenge that decision.

The Department does not believe that rushing all allegations of sexual harassment or sexual assault through expedited grievance procedures adequately promotes a fair grievance process, and forbidding an emergency removal until conclusion of a grievance process (no matter how expedited such a process reasonably could be) might impair a recipient's ability to quickly respond to an emergency situation. The § 106.45 grievance process is designed to provide both parties with a prompt, fair investigation and adjudication likely to reach an accurate determination regarding the responsibility of the respondent for perpetrating sexual harassment. Emergency removal under § 106.44(c) is not a substitute for reaching a determination as to a respondent's responsibility for the sexual harassment allegations; rather, emergency removal is for the purpose of addressing imminent threats posed to any person's physical health or safety, which might arise out of the sexual harassment allegations. Upon reaching a determination that a respondent is responsible for sexual harassment, the final regulations do not restrict a recipient's discretion to impose a disciplinary sanction against the respondent, including suspension, expulsion, or other removal from the recipient's education program or activity. Section 106.44(c) allows recipients to address emergency situations, whether or not a grievance process is underway, provided that the recipient first undertakes an individualized safety and risk analysis and provides the respondent notice and opportunity to challenge the removal decision. We do not believe it is necessary to restrict a recipient's emergency removal authority to removal decisions that are "narrowly tailored" to address the risk because § 106.44(c) adequately requires that the threat "justifies" the removal. If the high threshold for removal under § 106.44(c) exists (*i.e.*, an individualized safety and risk analysis determines the respondent poses an immediate threat to any person's physical health or safety), then

[956] Commenter cited: *Boehm* v. *Univ. of Pa. Sch. of Veterinary Med.*, 573 A.2d 575, 578 (Pa. Super. Ct. 1990).

[957] Commenters cited: 25 CFR 42.1–42.10.

[958] Section 106.44(a) requires a recipient to offer supportive measures to every complainant, including by having the Title IX Coordinator engage with the complainant in an interactive process that takes into account the complainant's wishes regarding available supportive measures.

we believe the recipient should have discretion to determine the appropriate scope and conditions of removal of the respondent from the recipient's education program or activity. Similarly, we decline to require recipients to follow more prescriptive requirements to undertake an emergency removal (such as requiring that the assessment be based on objective evidence, current medical knowledge, or performed by a licensed evaluator). While such detailed requirements might apply to a recipient's risk assessments under other laws, for the purposes of these final regulations under Title IX, the Department desires to leave as much flexibility as possible for recipients to address any immediate threat to the physical health or safety of any student or other individual. Nothing in these final regulations precludes a recipient from adopting a policy or practice of relying on objective evidence, current medical knowledge, or a licensed evaluator when considering emergency removals under § 106.44(c).

We agree that emergency removal is not appropriate in every situation where sexual harassment has been alleged, but only in situations where an individualized safety and risk analysis determines that an immediate threat to the physical health or safety of any student or other individual justifies the removal, where the threat arises out of allegations of sexual harassment as defined in § 106.30. Because all the conduct that could constitute sexual harassment as defined in § 106.30 is serious conduct that jeopardizes a complainant's equal access to education, we decline to limit emergency removals only to instances where a complainant has alleged sexual assault or rape, or to prohibit emergency removals where the sexual harassment allegations involve verbal harassment. A threat posed by a respondent is not necessarily measured solely by the allegations made by the complainant; we have revised § 106.44(c) to add the phrase "arising from the allegations of sexual harassment" to clarify that the threat justifying a removal could consist of facts and circumstances "arising from" the sexual harassment allegations (and "sexual harassment" is a defined term, under § 106.30). For example, if a respondent threatens physical violence against the complainant in response to the complainant's allegations that the respondent verbally sexually harassed the complainant, the immediate threat to the complainant's physical safety posed by the respondent may "arise from" the sexual harassment allegations. As a further example, if a respondent reacts to being accused of sexual harassment by threatening physical self-harm, an immediate threat to the respondent's physical safety may "arise from" the allegations of sexual harassment and could justify an emergency removal. The "arising from" revision also clarifies that recipients do not need to rely on, or meet the requirements of, § 106.44(c) to address emergency situations that do not arise from sexual harassment allegations under Title IX (for example, where a student has brought a weapon to school unrelated to any sexual harassment allegations).

We are persuaded by commenters that § 106.44(c) should be clarified. The final regulations revise this provision to state that the risk posed by the respondent must be to the "physical" health or safety, of "any student or other individual," arising from the allegations of sexual harassment. These revisions help ensure that this provision applies to genuine emergencies involving the physical health or safety of one or more individuals (including the respondent, complainant, or any other individual) and not only multiple students or employees. We agree with commenters who asserted that adding the word "physical" before "health or safety" will help ensure that the emergency removal provision is not used inappropriately to prematurely punish respondents by relying on a person's mental or emotional "health or safety" to justify an emergency removal, as the emotional and mental well-being of complainants may be addressed by recipients via supportive measures as defined in § 106.30. The revision to § 106.44(c) adding the word "physical" before "health and safety" and changing "students or employees" to "any student or other individual" also addresses commenters' concerns that the proposed rules were not specific enough about what kind of threat justifies an emergency removal; the latter revision clarifies that the threat might be to the physical health or safety of one or more persons, including the complainant, the respondent themselves, or any other individual. We decline to remove "health" from the "physical health or safety" phrase in this provision because an emergency situation could arise from a threat to the physical health, or the physical safety, of a person, and because "health or safety" is a relatively recognized term used to describe emergency circumstances.[959]

We decline to add further bases that could justify an emergency removal under § 106.44(c). We recognize the importance of the need to restore or preserve equal access to education, but disagree that it should be a justification for emergency removal; supportive measures are intended to address restoration and preservation of equal educational access, while § 106.44(c) is intended to apply to genuine emergencies that justify essentially punishing a respondent (by separating the respondent from educational opportunities and benefits) arising out of sexual harassment allegations without having fairly, reliably determined whether the respondent is responsible for the alleged sexual harassment. As explained above, we have revised § 106.44(c) to apply only where the immediate threat to a person's physical health or safety arises from the allegations of sexual harassment; this clarifies that where a respondent poses a threat of illegal conduct (perhaps not constituting a threat to physical health or safety) that does not arise from the sexual harassment allegations, this provision does not apply. Nothing in these final regulations precludes a recipient from addressing a respondent's commission of illegal conduct under the recipient's own code of conduct, or pursuant to other laws, where such illegal conduct does not constitute sexual harassment as defined in § 106.30 or is not "arising from the sexual harassment allegations." We disagree that a recipient's assessment that a respondent poses a threat of obstructing the sexual harassment investigation, or destroying relevant evidence, justifies an emergency removal under this provision, because this provision is intended to ensure that recipients have authority and discretion to address health or safety emergencies arising out of sexual harassment allegations, not to address all forms of misconduct that a respondent might commit during a grievance process.

The Department appreciates commenters' concerns that State or local law may present other considerations or impose other requirements before an emergency removal can occur. To the extent that other applicable laws establish additional relevant standards for emergency removals, recipients

[959] *E.g.*, 20 U.S.C. 1232g(b)(1)(I) (allowing disclosure, without prior written consent, of personally identifiable information from a student's education records "subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons"); 34 CFR 99.31(a)(10) and 34 CFR 99.36 (regulations implementing FERPA).

should also heed such standards. To the greatest degree possible, State and local law ought to be reconciled with the final regulations, but to the extent there is a direct conflict, the final regulations prevail.[960] While commenters correctly note that a "full hearing" is not a constitutional due process requirement in all interim suspension situations, § 106.44(c) does not impose a requirement to hold a "full hearing" and in fact, does not impose any pre-deprivation due process requirements; the opportunity for a respondent to challenge an emergency removal decision need only occur post-deprivation. For reasons described in the "Role of Due Process in the Grievance Process" section of this preamble, the Department has determined that postsecondary institutions must hold live hearings to reach determinations regarding responsibility for sexual harassment. However, because § 106.44(c) is intended to give recipients authority to respond quickly to emergencies, and does not substitute for a determination regarding the responsibility of the respondent for the sexual harassment allegations at issue, recipients need only provide respondents the basic features of due process (notice and opportunity), and may do so after removal rather than before a removal occurs. An emergency removal under § 106.44(c) does not authorize a recipient to impose an interim suspension or expulsion on a respondent *because* the respondent has been accused of sexual harassment. Rather, this provision authorizes a recipient to remove a respondent from the recipient's education program or activity (whether or not the recipient labels such a removal as an interim suspension or expulsion, or uses any different label to describe the removal) when an individualized safety and risk analysis determines that an imminent threat to the physical health or safety of any person, *arising from* sexual harassment allegations, justifies removal.

Section 106.44(c) expressly acknowledges that recipients may be obligated under applicable disability laws to conduct emergency removals differently with respect to individuals with disabilities, and these final regulations do not alter a recipient's obligation to adhere to the IDEA, Section 504, or the ADA. Due to a recipient's obligations under applicable State laws or disability laws, uniformity with respect to how a recipient addresses all cases involving immediate threats to physical health and safety may not be possible. However, the Department believes that § 106.44(c) appropriately balances the need for schools to remove a respondent posing an immediate threat to the physical health or safety of any person, with the need to ensure that such an ability is not used inappropriately, for instance to bypass the prohibition in § 106.44(a) and § 106.45(b)(1)(i) against imposition of disciplinary sanctions or other actions that are not supportive measures against a respondent without first following the § 106.45 grievance process. The Department does not believe that a lower threshold for an emergency removal appropriately balances these interests, even if this means that emergency removals arising from allegations of sexual harassment must meet a higher standard than when a threat arises from conduct allegations unrelated to Title IX sexual harassment. In response to commenters' reasonable concerns about the potential for confusion, we have added the phrase "arising from the allegations of sexual harassment" (and "sexual harassment" is a defined term under § 106.30) into this provision to clarify that this emergency removal provision only governs situations that arise under Title IX, and not under State or other laws that might apply to other emergency situations.

The Department does not see a need to add language stating that the emergency removal must be periodically reviewed. Emergency removal is not a substitute for the § 106.45 grievance process, and § 106.45(b)(1)(v) requires reasonably prompt time frames for that grievance process. We acknowledge that a recipient could remove a respondent under § 106.44(c) without a formal complaint having triggered the § 106.45 grievance process; in such situations, the requirements in § 106.44(c) giving the respondent notice and opportunity to be heard post-removal suffice to protect a respondent from a removal without a fair process for challenging that outcome, and the Department does not believe it is necessary to require periodic review of the removal decision. We decline to impose layers of complexity onto the emergency removal process, leaving procedures in recipients' discretion; in many cases, recipients will develop a "safe exit plan" as part of implementing an emergency removal, and accommodate students who have been removed on an emergency basis with alternative means to continue academic coursework during a removal period or provide for a respondent to re-take classes upon a return from an emergency removal, or secure personal property left on a recipient's campus when a respondent is removed. We disagree that a recipient's failure to refusal to take any of the foregoing steps necessarily constitutes sex discrimination under Title IX, although a recipient would violate Title IX by, for example, applying different policies to female respondents than to male respondents removed on an emergency basis. Nothing in the final regulations prevents students who have been removed from asserting rights under State law or contract against the recipient arising from a removal under this provision.

We decline to require an individualized safety and risk analysis upon every reported sexual assault, because the § 106.45 grievance process is designed to bring all relevant evidence concerning sexual harassment allegations to the decision-maker's attention so that a determination regarding responsibility is reached fairly and reliably. A recipient is obligated under § 106.44(a) to provide a complainant with a non-deliberately indifferent response to a sexual assault report, which includes offering supportive measures designed to protect the complainant's safety, and if a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances pursuant to § 106.45(b)(10)(ii). Emergency removals under § 106.44(c) remain an option for recipients to respond to situations where an individualized safety and risk analysis determines that a respondent poses an immediate threat to health or safety.

The Department appreciates commenters' assertions that § 106.44(c) should provide more due process protections, similar to those applied in professional licensing board cases or under Federal laws that apply to schools funded by the Bureau of Indian Affairs; however, we believe that § 106.44(c) appropriately balances a recipient's need to protect individuals from emergency threats, with providing adequate due process to the respondent under such emergency circumstances. Notice and an opportunity to be heard constitute the fundamental features of procedural due process, and the Department does not wish to prescribe specific procedures that a recipient must apply in emergency situations. Accordingly, the Department does not

[960] *See* discussion under the "Section 106.6(h) Preemptive Effect" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble; *see also* discussion under the "Spending Clause" subsection of the "Miscellaneous" section of this preamble.

wish to adopt the same due process protections that commenters asserted are applied in professional licensing revocation proceedings, or that are provided to Native American students in schools funded by the Bureau of Indian Affairs. The Department acknowledges that schools receiving funding from the Bureau of Indian Affairs must provide even greater due process protections than what these final regulations require, but these greater due process protections do not conflict with these final regulations. These final regulations govern a variety of recipients, including elementary and secondary schools and postsecondary institutions, but also recipients that are not educational institutions; for example, some libraries and museums are recipients of Federal financial assistance operating education programs or activities. These final regulations provide the appropriate amount of due process for a wide variety of recipients of Federal financial assistance with respect to a recipient's response to emergency situations.

As discussed in the "Clery Act" subsection of the "Miscellaneous" section of this preamble, postsecondary institutions subject to these Title IX regulations may also be subject to the Clery Act. We decline to state in § 106.44(c) that recipients must also comply with the Clery Act because we do not wish to create confusion about whether § 106.44(c) applies only to postsecondary institutions (because the Clery Act does not apply to elementary and secondary schools). We decline to require recipients to notify authorities, provide safety interventions, or annually report the number of emergency removals conducted under § 106.44(c), because we do not wish to prescribe requirements on recipients beyond what we have determined is necessary to fulfill the purpose of this provision: Granting recipients authority and discretion to appropriately respond to emergency situations arising from sexual harassment allegations. Nothing in these final regulations precludes a recipient from notifying authorities, providing safety interventions, or reporting the number of emergency removals, to comply with other laws requiring such steps or based on a recipient's desire to take such steps. For similar reasons, we decline to require recipients to adopt "best practices" for responding to threats. We note that these final regulations require recipients to offer supportive measures to every complainant, and do not preclude a recipient from providing resources to complainants or respondents.

Changes: We have revised § 106.44(c) so that a respondent removed on an emergency basis must pose an immediate threat to the "physical" health or safety (adding the word "physical") of "any student or other individual" (replacing the phrase "students or employees"). We have also revised the proposed language to clarify that the justification for emergency removal must arise from allegations of sexual harassment under Title IX.

Intersection With the IDEA, Section 504, and ADA

Comments: Some commenters applauded the "saving clause" in § 106.44(c) acknowledging that the respondent may have rights under the IDEA, Section 504, or the ADA. Several commenters asserted that § 106.44(c) would create uncertainty regarding the interplay between Title IX and relevant disabilities laws, which would further exacerbate the uncertainty regarding involuntary removal of students who pose a threat to themselves. Other commenters stated that the result of this provision would likely be different handling of Title IX cases for students with disabilities versus students without disabilities because of the requirements of the IDEA, Section 504, and the ADA. Some commenters believed this provision (and the proposed rules overall) appear to give consideration to the rights and needs of respondents with disabilities, without similar consideration for the rights of complainants or witnesses with disabilities. Commenters asserted that § 106.44(c) is subject to problematic interpretation because by expressly referencing the IDEA, Section 504, and the ADA this provision might wrongly encourage schools to remove students with disabilities because of implicit bias against students with disabilities, especially students with intellectual disabilities.

One commenter suggested that § 106.44(c) should track the definition of "direct threat" used in the Equal Employment Opportunity Commission's (EEOC) regulations, upheld by the Supreme Court,[961] and as outlined in ADA regulations[962] because this would give recipients and respondents a clearer standard and reduce the chances that removal decisions will be based on generalizations, ignorance, fear, patronizing attitudes, or stereotypes regarding individuals with disabilities.

Some commenters argued that this provision conflicts with the IDEA, Section 504, and the ADA, and that removals are not as simple as conducting a mere risk assessment, because the IDEA governs emergency removal of students in elementary school who are receiving special education and related services.[963] Commenters asserted that under the IDEA, a school administrator cannot make a unilateral risk assessment, and placement decisions cannot be made by an administrator alone; rather, commenters argued, these decisions must be made by a team that includes the parent and relevant members of the IEP (Individualized Education Program) Team and if the conduct in question was a manifestation of a disability, the recipient cannot make a unilateral threat assessment and remove a child from school, absent extreme circumstances. These commenters further argued that sometimes certain behaviors are the result or manifestation of a disability, despite being sexually offensive, *e.g.*, a student with Tourette's syndrome blurting out sexually offensive language. Commenters argued that under disability laws schools cannot remove those students from school without complying with the IDEA, Section 504, and the ADA. One commenter recommended that § 106.44(c) require, at a minimum, training for Title IX administrators on the intersection among Title IX and applicable disability laws. In the college setting, the commenter further recommended that Title IX Coordinators not be permitted to impose supportive measures that involve removal without feedback from administrators from the institution's office of disability services, provided that the student is registered with the pertinent office. If a student has an Individualized Education Plan (IEP) in secondary school, commenters recommended that the administration immediately call for a team meeting to determine the next steps.

Other commenters asserted that any language under § 106.44(c) must make clear that the free appropriate public education (FAPE) to which students

[961] Commenters cited: *Chevron U.S.A. Inc.* v. *Echazabal,* 536 U.S. 73 (2002).

[962] Commenters cited: 28 CFR 35.139(b) ("In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.").

[963] Commenters cited: *Glen by & through Glen* v. *Charlotte-Mecklenburg Sch. Bd. of Educ.,* 903 F. Supp. 918, 935 (W.D.N.C. 1995) ("[W]here student poses an immediate threat, [the school] may temporarily suspend up to 10 school days.").

with disabilities are entitled must continue, even in circumstances when emergency removal is deemed necessary under Title IX. Given this, one commenter recommended that the language in § 106.44(c) clarify that this provision does not supersede rights under disability laws.

Some commenters, while expressing overall support for § 106.44(c), requested additional guidance on the intersection of Title IX, the IDEA, and the ADA, and how elementary and secondary schools would implement § 106.44(c). The commenters asserted that the final regulations should be explicit that regardless of a student's IEP or "504 plan" under the IDEA or Section 504, the student is not allowed to engage in threatening or harmful behavior and that this would be similar to the response a campus might have to any other serious violation, such as bringing a firearm to class. Commenters also argued that the final regulations should clarify that separation of elementary and secondary school students with disabilities from classroom settings should be rare and only when done in compliance with the IDEA. Commenters argued that recipients must be made aware that a student with a disability does not have to be eligible for a free appropriate public education (FAPE) in order for § 106.44(c) to apply, and that recipients must not be misled into thinking there are different standards for elementary and secondary school and postsecondary education environments when it comes to equal access to educational opportunities.

Other commenters argued that § 106.44(c) may violate compulsory educational laws by removing elementary-age students from school on an emergency basis. When an elementary school student is removed under § 106.44(c), commenters wondered whether the school is supposed to have a designated site for housing or educating removed students during the investigation.

Discussion: Section 106.44(c) states that this provision does not modify any rights under the IDEA, Section 504, or the ADA. In the final regulations, we removed reference to certain titles of the ADA and refer instead to the "Americans with Disabilities Act" so that application of any portion of the ADA requires a recipient to meet ADA obligations while also complying with these final regulations. We disagree that this provision will create ambiguity or otherwise supersede rights that students have under these disability statutes. Additionally, we do not believe that expressly acknowledging recipients' obligations under disability laws incentivizes recipients to remove respondents with disabilities; rather, reference in this provision to those disability laws will help protect respondents from emergency removals that do not also protect the respondents' rights under applicable disability laws. With respect to implicit bias against students with disabilities, recipients must be careful to ensure that all emergency removal proceedings are impartial, without bias or conflicts of interest [964] and the final regulations do not preclude a recipient from providing training to employees, including Title IX personnel, regarding a recipient's obligations under both Title IX and applicable disability laws. Any different treatment between students without disabilities and students with disabilities with respect to emergency removals, may occur due to a recipient's need to comply with the IDEA, Section 504, the ADA, or other disability laws, but would not be permissible due to bias or stereotypes against individuals with disabilities.

As explained in the "Directed Question 5: Individuals with Disabilities" subsection of the "Directed Questions" section of this preamble, recipients have an obligation to comply with applicable disability laws with respect to complainants as well as respondents (and any other individual involved in a Title IX matter, such as a witness), and the reference to disability laws in § 106.44(c) does not obviate recipients' responsibilities to comply with disability laws with respect to other applications of these final regulations.

The Department appreciates commenters' suggestion to mirror the "direct threat" language utilized in ADA regulations; however, we have instead revised § 106.44(c) to refer to the physical health or safety of "any student or other individual" because this language better aligns this provision with the FERPA health and safety emergency exception, and avoids the confusion caused by the "direct threat" language under ADA regulations because those regulations refer to a "direct threat to the health or safety *of others*" [965] which does not clearly encompass a threat to the respondent themselves (*e.g.*, where a respondent threatens self-harm). By revising § 106.44(c) to refer to a threat to the physical health or safety "of any student or other individual" this provision does encompass a respondent's threat of self-harm (when the threat arises from the allegations of sexual harassment), and is aligned with the language used in FERPA's health or safety exception.[966] We note that recipients still need to comply with applicable disability laws, including the ADA, in making emergency removal decisions.

The Department appreciates commenters' varied concerns that complying with these final regulations, and with disability laws, may pose challenges for recipients, including specific challenges for elementary and secondary schools, and postsecondary institutions, because of the intersection among the IDEA, Section 504, the ADA, and how to conduct an emergency removal under these final regulations under Title IX. The Department will offer technical assistance to recipients regarding compliance with laws under the Department's enforcement authority. However, the Department does not believe that recipients' obligations under multiple civil rights laws requires changing the emergency removal provision in § 106.44(c) because this is an important provision to ensure that recipients have flexibility to balance the need to address emergency situations with fair treatment of a respondent who has not yet been proved responsible for sexual harassment. The Department does not believe that applicable disability laws, or other State laws, render a recipient unable to comply with all relevant legal obligations. For instance, with respect to compulsory education laws, nothing in § 106.44(c) relieves a recipient from complying

[964] Section 106.45(b)(1)(iii) requires all Title IX Coordinators (and investigators, decision-makers, and persons who facilitate informal resolution processes) to be free from conflicts of interest or bias against complainants and respondents generally or against an individual complainant or respondent, and requires training for such personnel that includes (among other things) how to serve impartially. A "respondent" under § 106.30 means any individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment; thus, a Title IX Coordinator interacting with a respondent undergoing an emergency removal must serve impartially, without conflict of interest or bias.

[965] 28 CFR 35.139(b) ("In determining whether an individual *poses a direct threat to the health or safety of others,* a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: The nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.") (emphasis added).

[966] *E.g.*, 20 U.S.C. 1232g(b)(1)(I) (allowing disclosure, without prior written consent, of personally identifiable information from a student's education records "subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons"); *see also* regulations implementing FERPA, 34 CFR 99.31(a)(10) and 99.36.

with State laws requiring that students under a certain age receive government-provided education services. As a further example, nothing in § 106.44(c) prevents a recipient from involving a student's IEP team before making an emergency removal decision, and § 106.44(c) does not require a recipient to remove a respondent where the recipient has determined that the threat posed by the respondent, arising from the sexual harassment allegations, is a manifestation of a disability such that the recipient's discretion to remove the respondent is constrained by IDEA requirements.

Changes: We have replaced the phrase "students or employees" with the phrase "any student or other individual" in § 106.44(c) and removed specification of certain titles of the ADA, instead referencing the whole of the ADA.

Post-Removal Challenges

Comments: Some commenters supported § 106.44(c) giving respondents notice and opportunity to challenge the removal immediately after the removal, because during a removal a respondent might lose a significant amount of instructional time while waiting for a grievance proceeding to conclude, and being out of school can harm the academic success and emotional health of the removed student. Other commenters asserted that respondents should not be excluded from a recipient's education program or activity until conclusion of a grievance process, and a post-removal challenge after the fact is insufficient to assure due process for respondents, especially because § 106.44(c) does not specify requirements for the time frame or procedures used for a challenging the removal decision.

Some commenters argued that the ability of a removed respondent to challenge the removal would pose an unnecessary increased risk to the safety of the community, especially because § 106.44(c) already requires the recipient to determine the removal was justified by an individualized safety and risk analysis. Commenters argued that a school's emergency removal decision should stand until a threat assessment team has met and given a recommendation to affirm or overrule the decision.

Some commenters asserted that § 106.44(c) is ambiguous about the right to a post-removal challenge and argued that the failure to provide more clarity is problematic because it is unclear if the "immediate" challenge must occur minutes, hours, one day, or several days after the removal. Commenters argued that a plain language interpretation of "immediately" may require the challenge to occur minutes after the suspension, but this could jeopardize the safety of the complainant and the community, because the very point of an interim suspension is to remove a known risk from campus. Other commenters argued that requiring an "immediate" post-removal challenge could undermine the respondent's due process rights, because the respondent might not be physically present on campus when the interim suspension (*e.g.,* removal) is issued. Some commenters argued that there should be a delay between when the removal occurred and when the opportunity to challenge occurs, because students and employees are often afraid of providing information to college administrations due to legitimate, reasonable fear for their own safety. Commenters requested that this provision be modified to give the respondent a challenge opportunity "as soon as reasonably practicable" rather than "immediately." Commenters asked whether providing a challenge opportunity "immediately" must, or could, be the same as the "prompt" time frames required under § 106.45.

Discussion: The Department appreciates commenters' support of the post-removal challenge opportunity provided in § 106.44(c). The Department disagrees with commenters who suggested that no challenge to removals ought to be possible, and believes that § 106.44(c) appropriately balances the interests involved in emergency situations. We do not believe that prescribing procedures for the post-removal challenge is necessary or desirable, because this provision ensures that respondents receive the essential due process requirements of notice and opportunity to be heard while leaving recipients flexibility to use procedures that a recipient deems most appropriate.[967] These final regulations aim to improve the perception and reality of the fairness and accuracy by which a recipient resolves allegations of sexual harassment, and therefore the § 106.45 grievance process prescribes a consistent framework and specific procedures for resolving formal complaints of sexual harassment. By contrast, § 106.44(c) is not designed to resolve the underlying allegations of sexual harassment against a respondent, but rather to ensure that recipients have the authority and discretion to appropriately handle emergency situations that may arise from allegations of sexual harassment. As discussed above, the final regulations revise the language in § 106.44(c) to add the phrase "arising from the allegations of sexual harassment," which clarifies that the facts or circumstances that justify a removal might not be the same as the sexual harassment allegations but might "arise from" those allegations.

The Department disagrees that a post-removal challenge is unnecessary because the individualized safety and risk analysis already determined that removal was justified; the purpose of a true emergency removal is to authorize a recipient to respond to immediate threats even without providing the respondent with pre-deprivation notice and opportunity to be heard because this permits a recipient to protect the one or more persons whose physical health or safety may be in jeopardy. The respondent's first opportunity to challenge the removal (*e.g.,* by presenting the recipient with facts that might contradict the existence of an immediate threat to physical health or safety) might be after the recipient already reached its determination that removal is justified, and due process principles (whether constitutional due process of law, or fundamental fairness) require that the respondent be given notice and opportunity to be heard.[968] Section 106.44(c) does not preclude a recipient from convening a threat assessment team to review the recipient's emergency removal determination, but § 106.44(c) still requires the recipient to give the respondent post-removal notice and opportunity to challenge the removal decision.

The Department expects the emergency removal process to be used in genuine emergency situations, but when it is used, recipients must provide an opportunity for a removed individual to challenge their removal immediately after the removal. The term "immediately" will be fact-specific, but is generally understood in the context of a legal process as occurring without delay, as soon as possible, given the circumstances. "Immediately" does not require a time frame of "minutes" because in the context of a legal proceeding the term immediately is not generally understood to mean an absolute exclusion of any time interval.

[967] *E.g., Goss* v. *Lopez,* 419 U.S. 565, 582–83 (1975) ("Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable").

[968] *Goss,* 419 U.S. at 580 ("At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing.").

"Immediately" does not imply the same time frame as the "reasonably prompt" time frames that govern the grievance process under § 106.45, because "immediately" suggests a more pressing, urgent time frame than "reasonable promptness." This is appropriate because § 106.44(c) does not require a recipient to provide the respondent with any pre-deprivation notice or opportunity to be heard, so requiring post-deprivation due process protections "immediately" after the deprivation ensures that a respondent's interest in access to education is appropriately balanced against the recipient's interest in quickly addressing an emergency situation posed by a respondent's risk to the physical health or safety of any student or other individual. We decline to require the post-removal notice and challenge to be given "as soon as reasonably practicable" instead of "immediately" because that would provide the respondent less adequate post-deprivation due process protections.

Changes: None.

No Stated Time Limitation for the Emergency Removal

Comments: Some commenters viewed the absence of a time limitation with respect to how long an emergency removal could be as a source of harm to both respondents and complainants. Commenters asserted that, given how long the grievance process could take, students and employees removed from their education or employment until conclusion of the grievance process could experience considerable negative consequences. Commenters argued that the proposed rules should not encourage emergency removal, particularly not when other, less severe measures could be taken to ensure safety pending an investigation. Commenters proposed limiting an emergency removal to seven days, during which time an institution would determine in writing that an immediate threat to health or safety exists, warranting the emergency action, and if no such determination is reached, the respondent would be reinstated.

Discussion: The final regulations require schools to offer supportive measures to complainants and permit recipients to offer supportive measures to respondents. We decline to require emergency removals in every situation where a formal complaint triggers a grievance process. The grievance process is designed to conclude promptly, and the issue of whether a respondent needs to be removed on an emergency basis should not arise in most cases, since § 106.44(c) applies only where emergency removal is justified by an immediate threat to the physical health or safety of any student or other individual. Revised § 106.44(a), and revised § 106.45(b)(1)(i), prohibit a recipient from imposing against a respondent disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, without following the § 106.45 grievance process. Emergency removal under § 106.44(c) constitutes an exception to those prohibitions, and should not be undertaken in every situation where sexual harassment has been alleged. Rather, emergency removal is appropriate only when necessary to address imminent threats to a person's physical health or safety arising from the allegations of sexual harassment.

The Department declines to put any temporal limitation on the length of a valid emergency removal, although nothing in the final regulations precludes a recipient from periodically assessing whether an immediate threat to physical health or safety is ongoing or has dissipated.

Changes: None.

"Removal"

Comments: Commenters requested clarification in the following regards: Would removing a respondent from a class, or changing the respondent's class schedule, before a grievance process is completed (or where no formal complaint has initiated a grievance process), require a recipient to undertake emergency removal procedures? Under § 106.44(c) must a recipient remove a respondent from the entirety of recipient's education program or activity, or may a recipient choose to only remove the respondent to the extent the individual poses an emergency in a specific setting, *i.e.,* a certain class, student organization, living space, athletic team, etc.?

Commenters argued that the § 106.30 definition of supportive measures and § 106.44(c) regarding emergency removal could lead to confusion among recipients about what steps they can take to protect a complainant's safety and access to education prior to conclusion of a grievance process, or where no formal complaint has initiated a grievance process. One commenter suggested modifying this provision to expressly permit partial exclusion from programs or activities by adding the phrase "or any part thereof."

Commenters argued that § 106.44(c) would make it too difficult to remove a respondent before the completion of a disciplinary proceeding absent an extreme emergency. Commenters suggested that the Department should consider a more nuanced approach that provides schools with a range of options, short of emergency removal, that are proportionate to the alleged misconduct and meet the needs of the victim. Commenters requested that § 106.44(c) be revised to allow an appropriate administrator (such as a dean of students), in consultation with the Title IX Coordinator, discretion to determine the appropriateness of an emergency removal based on a standard that is in the best interest of the institution.

Some commenters argued that even where an emergency threat exists, § 106.44(c) does not provide a time frame in which the recipient must make this emergency removal decision, leaving survivors vulnerable to daily contact with a dangerous respondent. Commenters asserted that recipients should be able to remove a respondent from a dorm or shared classes before conclusion of a disciplinary proceeding, particularly when it is clear that the survivor's education will be harmed otherwise. Commenters asserted that 80 percent of rapes and sexual assaults are committed by someone known to the victim,[969] which means that it is highly likely that the victim and perpetrator share a dormitory, a class, or other aspect of the school environment and that § 106.44(c) (combined with the § 106.30 definition of "supportive measures") leaves victims in continual contact with their harasser, thereby prioritizing the education of accused harassers over the education of survivors. Commenters argued that survivors should not have to wait until the end of a grievance process to be protected from seeing a perpetrator in class or on campus, and this provision would pressure survivors to file formal complaints when many survivors do not want a formal process for valid personal reasons, because a formal process would be the only avenue for ensuring that a "guilty" respondent will be suspended or expelled. Commenters recommended adding language to clarify that nothing shall prevent elementary and secondary schools from implementing an "alternate assignment" during the pendency of an investigation, provided that the same is otherwise permitted by law.

One commenter suggested combining the emergency removal and supportive

[969] Commenters cited: U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Special Report: Rape and Sexual Assault Victimization Among College-Age Females, 1995–2013* (2014).

measures provisions into a single "interim measures" provision.

Discussion: The Department believes the § 106.30 definition of supportive measures, and § 106.44(c) governing emergency removals, in the context of the revised requirements in § 106.44(a) and § 106.45(b)(1)(i) (requiring recipients to offer supportive measures to complainants while not imposing against respondents disciplinary sanctions or other actions that are not "supportive measures") provide a wide range and variety of options for a recipient to preserve equal educational access, protect the safety of all parties, deter sexual harassment, and respond to emergency situations.

Under § 106.30, a supportive measure must not be punitive or disciplinary, but may burden a respondent as long as the burden is not unreasonable. As discussed in the "Supportive Measures" subsection of the "Section 106.30 Definitions" section of this preamble, whether a certain measure unreasonably burdens a respondent requires a fact-specific inquiry. Changing a respondent's class schedule or changing a respondent's housing or dining hall assignment may be a permissible supportive measure depending on the circumstances. By contrast, removing a respondent from the entirety of the recipient's education programs and activities, or removing a respondent from one or more of the recipient's education programs or activities (such as removal from a team, club, or extracurricular activity), likely would constitute an unreasonable burden on the respondent or be deemed disciplinary or punitive, and therefore would not likely qualify as a supportive measure. Until or unless the recipient has followed the § 106.45 grievance process (at which point the recipient may impose any disciplinary sanction or other punitive or adverse consequence of the recipient's choice), removals of the respondent from the recipient's education program or activity [970] need to meet the standards for emergency removals under § 106.44(c).[971] Supportive measures provide one avenue for recipients to protect the safety of parties and permissibly may affect and even burden the respondent, so long as the burden is not unreasonable. Supportive measures may include, for example, mutual or unilateral restrictions on contact between parties or re-arranging class schedules or classroom seating assignments, so complainants need not remain in constant or daily contact with a respondent while an investigation is pending, or even where no grievance process is pending.

Whether an elementary and secondary school recipient may implement an "alternate assignment" during the pendency of an investigation (or without a grievance process pending), in circumstances that do not justify an emergency removal, when such action is otherwise permitted by law, depends on whether the alternate assignment constitutes a disciplinary or punitive action or unreasonably burdens the respondent (in which case it would not qualify as a supportive measure as defined in § 106.30).[972] Whether an action "unreasonably burdens" a respondent is fact-specific, but should be evaluated in light of the nature and purpose of the benefits, opportunities, programs and activities, of the recipient in which the respondent is participating, and the extent to which an action taken as a supportive measure would result in the respondent forgoing benefits, opportunities, programs, or activities in which the respondent has been participating. An alternate assignment may, of course, be appropriate when an immediate threat justifies an emergency removal of the respondent because under the final regulations, emergency removal may justify total removal from the recipient's education program or activity, so offering the respondent alternate assignment is included within the potential scope of an emergency removal. Under § 106.44(a), the recipient must offer supportive measures to the complainant, and if a particular action—such as alternate assignment—does not, under specific circumstances, meet the definition of a supportive measure, then the recipient must carefully consider other individualized services, reasonably available, designed to restore or preserve the complainant's equal educational access and/or protect safety and deter sexual harassment, that the recipient will offer to the complainant.

We do not believe that the final regulations incentivize complainants to file formal complaints when they otherwise do not wish to do so just to avoid contacting or communicating with a respondent, because supportive measures permit a range of actions that are non-punitive, non-disciplinary, and do not *unreasonably* burden a respondent, such that a recipient often may implement supportive measures that do meet a complainant's desire to avoid contact with the respondent. For example, if a complainant and respondent are both members of the same athletic team, a carefully crafted unilateral no-contact order could restrict a respondent from communicating directly with the complainant so that even when the parties practice on the same field together or attend the same team functions together, the respondent is not permitted to directly communicate with the complainant. Further, the recipient may counsel the respondent about the recipient's anti-sexual harassment policy and anti-retaliation policy, and instruct the team coaches, trainers, and staff to monitor the respondent, to help enforce the no-contact order and deter any sexual harassment or retaliation by the respondent against the complainant. Further, nothing in the final regulations, or in the definition of supportive measures in § 106.30, precludes a recipient from altering the nature of supportive measures provided, if circumstances change. For example, if the Title IX Coordinator initially implements a supportive measure prohibiting the respondent from directly communicating with the complainant, but the parties later each independently decide to take the same lab class, the Title IX Coordinator may, at the complainant's request, reevaluate the circumstances and offer the complainant additional supportive measures, such as requiring the professor teaching the lab class to ensure that the complainant and respondent are not "teamed up" or assigned to sit near each other or assigned as to be "partners," during or as part of the lab class.

Commenters correctly observe that the final regulations prohibit suspending or

[970] As discussed in the "Section 106.44(a) 'education program or activity'" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble, the Title IX statute and existing regulations provide definitions of "program or activity" that apply to interpretation of a recipient's "education program or activity" in these final regulations, and we have clarified in § 106.44(a) that for purposes of responding to sexual harassment a recipient's education program or activity includes circumstances over which the recipient exercised substantial control. 20 U.S.C. 1687; 34 CFR 106.2(h); 34 CFR 106.2(i) (defining "recipient"); 34 CFR 106.31(a) (referring to "any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance").

[971] *Cf.* § 106.44(d) (a non-student employee-respondent may be placed on administrative leave (with or without pay) while a § 106.45 grievance process is pending, without needing to meet the emergency removal standards in § 106.44(c)).

[972] For discussion of alternate assignments when the respondent is a non-student employee, see the "Section 106.44(d) Administrative Leave" subsection of the "Additional Rules Governing Recipients' Responses to Sexual Harassment" subsection of the "Section 106.44 Recipient's Response to Sexual Harassment, Generally" section of this preamble.

expelling a respondent without first following the § 106.45 grievance process, or unless an emergency situation justices removal from the recipient's education program or activity (which removal may, or may not, be labeled a "suspension" or "expulsion" by the recipient). We do not believe this constitutes unfairness to survivors, or poses a threat to survivors' equal educational access, because there are many actions that meet the definition of supportive measures that may restore or preserve a complainant's equal access, protect a complainant's safety, and/or deter sexual harassment without punishing or unreasonably burdening a respondent. As discussed in the "Section 106.45(b)(1)(iv) Presumption of Non-Responsibility" subsection of the "General Requirements for § 106.45 Grievance Process" subsection of the "Section 106.45 Recipient's Response to Formal Complaints" section of this preamble, refraining from treating people accused of wrongdoing as responsible for the wrongdoing prior to evidence proving the person is responsible is a fundamental tenet of American justice. These final regulations appropriately ensure that respondents are not unfairly, prematurely *treated* as responsible before being proved responsible, with certain reasonable exceptions: Emergency removals, administrative leave for employees, and informal resolution of a formal complaint that resolves the allegations without a full investigation and adjudication but may result in consequences for a respondent including suspension or expulsion. In this way, the final regulations ensure that every complainant is offered supportive measures designed to preserve their equal educational access and protect their safety (even without any proof of the merits of the complainant's allegations) consistent with due process protections and fundamental fairness. As an example, a complainant understandably may desire as a supportive measure the ability to avoid being in the same classroom with a respondent, whether or not the complainant wants to file a formal complaint. A school may conclude that transferring the respondent to a different section of that class (*e.g.,* that meets on a different day or different time than the class section in which the complainant and respondent are enrolled) is a reasonably available supportive measure that preserves the complainant's equal access and protects the complainant's safety or deters sexual harassment, while not constituting an unreasonable burden on the respondent (because the respondent is still able to take that same class and earn the same credits toward graduation, for instance). If, on the other hand, that class in which both parties are enrolled does not have alternative sections that meet at different times, and precluding the respondent from completing that class would delay the respondent's progression toward graduation, then the school may determinate that requiring the respondent to drop that class would constitute an unreasonable burden on the respondent and would not quality as a supportive measure, although granting the complainant an approved withdrawal from that class with permission to take the class in the future, would of course constitute a permissible supportive measure for the recipient to offer the complainant. Alternatively in such a circumstance (where the complainant, like the respondent, cannot withdraw from that class and take it later without delaying progress toward graduation), the school may offer the complainant as a supportive measure, for example, a one-way no contact order that prohibits the respondent from communicating with the complainant and assigns the respondent to sit across the classroom from the complainant. As such an example shows, these final regulations allow, and require, a recipient to carefully consider the specific facts and circumstances unique to each situation to craft supportive measures to help a complainant without prematurely penalizing a respondent.

The Department does not believe it is necessary or appropriate to require a time frame for when a recipient must undertake an emergency removal, because the risk arising from the sexual harassment allegations that may justify a removal may arise at any time; further, § 106.44(a) requires a recipient to respond "promptly" to sexual harassment, and if an emergency removal is a necessary part of a recipient's non-deliberately indifferent response then such a response must be prompt. We reiterate that emergency removal is not about reaching factual conclusions about whether the respondent is responsible for the underlying sexual harassment allegations. Emergency removal is about determining whether an immediate threat arising out of the sexual harassment allegations justifies removal of the respondent.

We appreciate the opportunity to clarify that, where the standards for emergency removal are met under § 106.44(c), the recipient has discretion whether to remove the respondent from all the recipient's education programs and activities, or to narrow the removal to certain classes, teams, clubs, organizations, or activities. We decline to add the phrase "or any part thereof" to this provision because a "part of" a program may not be readily understood, and we believe the authority to exclude *entirely* includes the lesser authority to exclude partially.

Section 106.44(a) and § 106.45(b)(1)(i) forbid a recipient from imposing disciplinary sanctions (or other actions that are not supportive measures) on a respondent without first following a grievance process that complies with § 106.45. We reiterate that a § 106.44(c) emergency removal may be appropriate whether or not a grievance process is underway, and that the purpose of an emergency removal is to protect the physical health or safety of any student or other individual to whom the respondent poses an immediate threat, arising from allegations of sexual harassment, not to impose an interim suspension or expulsion on a respondent, or penalize a respondent by suspending the respondent from, for instance, playing on a sports team or holding a student government position, while a grievance process is pending. The final regulations respect complainants' autonomy and understand that not every complainant wishes to participate in a grievance process, but a complainant's choice not to file a formal complaint or not to participate in a grievance process does not permit a recipient to bypass a grievance process and suspend or expel (or otherwise discipline, penalize, or unreasonably burden) a respondent accused of sexual harassment. An emergency removal under § 106.44(c) separates a respondent from educational opportunities and benefits, and is permissible only when the high threshold of an immediate threat to a person's physical health or safety justifies the removal.

Because the purposes of, and conditions for, "supportive measures" as defined in § 106.30 differ from the purposes of, and conditions for, an emergency removal under § 106.44(c), we decline to combine these provisions. Both provisions, and the final regulations as a whole, do not prioritize the educational needs of a respondent over a complainant, or vice versa, but aim to ensure that complainants receive a prompt, supportive response from a recipient, respondents are treated fairly, and recipients retain latitude to address emergency situations that may arise.

Changes: None.

"Individualized Safety and Risk Analysis"

Comments: Many commenters argued that the lack of guidance in § 106.44(c) on the requirements for conducting the "individualized safety and risk analysis" is confusing, and should be better defined because it could lead to inconsistent results from school to school, county to county, and State to State. Some commenters expressed overall support for this provision, but argued that the power of removal should not be wielded without careful consideration, and requested clarity about who would undertake the risk analysis (*e.g.,* an internal or external individual on behalf of a recipient). Other commenters stated that § 106.44(c) should list factors to consider in the required safety and risk analysis including: whether violence was alleged (which commenters asserted is rare in cases involving alleged incapacitation), how long the complainant took to file a complaint, whether the complainant has reported the allegations to the police, and whether there are other, less restrictive measures that could be taken. Commenters argued that the risk assessment requirement may prevent the removal of respondents who are in fact dangerous because context and other nuances may not be accounted for in the assessment. One commenter stated that the § 106.44(c) safety and risk analysis requirements are "good, but sometimes not realistic" because threat assessment teams do not meet daily, and it is sometimes necessary to decide a removal in a matter of hours. Other commenters stated some recipients have already incorporated this sort of threat assessment into their decision matrix because postsecondary institutions are obligated to take reasonable steps to address dangers or threats to their students.

Some commenters were concerned that institutions lack sufficient resources to properly conduct the required safety and risk analysis, that institutions lack the proper tools to conduct assessments calibrated to the age and developmental issues of the respondent, and that institutions lack the training and knowledge to properly implement such assessments. Commenters asserted that this provision would require institutions to train employees to conduct an individualized safety and risk analysis before removing students on an emergency basis, but that such assessments are rarely within the capacity or expertise of a single employee, and thus may require a committee or task force dedicated for this purpose.

Discussion: Recipients are entitled to use § 106.44(c) to remove a respondent on an emergency basis, only where there is an immediate threat to the physical health or safety of any student or other individual. The "individualized safety or risk analysis" requirement ensures that the recipient should not remove a respondent from the recipient's education program or activity pursuant to § 106.44(c) unless there is more than a generalized, hypothetical, or speculative belief that the respondent may pose a risk to someone's physical health or safety. The Department believes that the immediate threat to physical health or safety threshold for justifying a removal sufficiently restricts § 106.44(c) to permitting only emergency removals and believes that further describing what might constitute an emergency would undermine the purpose of this provision, which is to set a high threshold for emergency removal yet ensure that the provision will apply to the variety of circumstances that could present such an emergency. The Department also believes that the final regulations adequately protect respondents, since in cases where the recipient removes a respondent, the recipient must follow appropriate procedures, including bearing the burden of demonstrating that the removal meets the threshold specified by the final regulations, based on a factual, individualized safety and risk analysis. We understand commenters' concerns that the individualized, fact-based nature of an emergency removal assessment may lead to different results from school to school or State to State, but different results may be reasonable based on the unique circumstances presented in individual situations.

Because the safety and risk analysis under § 106.44(c) must be "individualized," the analysis cannot be based on general assumptions about sex, or research that purports to profile characteristics of sex offense perpetrators, or statistical data about the frequency or infrequency of false or unfounded sexual misconduct allegations. The safety and risk analysis must be individualized with respect to the particular respondent and must examine the circumstances "arising from the allegations of sexual harassment" giving rise to an immediate threat to a person's physical health or safety. These circumstances may include factors such as whether violence was allegedly involved in the conduct constituting sexual harassment, but could also include circumstances that "arise from" the allegations yet do not constitute the alleged conduct itself; for example, a respondent could pose an immediate threat of physical self-harm in reaction to being accused of sexual harassment. For a respondent to be removed on an emergency basis, the school must determine that an immediate threat exists, and that the threat justifies removal. Section 106.44(c) does not limit the factors that a recipient may consider in reaching that determination.

We appreciate commenters' concerns that performing safety and risk analyses may require a recipient to expend resources or train employees, but without an individualized safety and risk analysis a recipient's decision to remove a respondent might be arbitrary, and would fail to apprise the respondent of the basis for the recipient's removal decision so that the respondent has an opportunity to challenge the decision. Procedural due process of law and fundamental fairness require that a respondent deprived of an educational benefit be given notice and opportunity to contest the deprivation;[973] without knowing the individualized reasons why a recipient determined that the respondent posed a threat to someone's physical health or safety, the respondent cannot assess a basis for challenging the recipient's removal decision. Recipients may choose to provide specialized training to employees or convene interdisciplinary threat assessment teams, or be required to take such actions under other laws, and § 106.44(c) leaves recipients flexibility to decide how to conduct an individualized safety and risk analysis, as well as who will conduct the analysis.

Changes: None.

"Provides the Respondent With Notice and an Opportunity To Challenge the Decision Immediately Following the Removal"

Comments: One commenter stated that during any emergency removal hearing, schools should be required to share all available evidence with the respondent, permit that person an opportunity to be heard, and allow the respondent's advisor to cross-examine any witnesses. According to the commenter, if these full procedural rights are not extended, this provision would create a loophole that allows emergency measures to effectively replace a full grievance process. Commenters also argued that a recipient's emergency removal decisions

[973] *See* the "Role of Due Process in the Grievance Process" section of this preamble.

would often be hastily made, and that recipients would ignore requirements that a removed student be given the opportunity to review or challenge the decision made by the recipient. Commenters argued that § 106.44(c) should include express language safeguarding students against abusive practices during the challenge procedure. One commenter suggested adding the word "meaningful" so the respondent would have "a meaningful opportunity" to challenge the removal decision, asserting that certain institutions of higher education in California have not consistently given respondents meaningful opportunities to "make their case." While supportive of § 106.44(c), one commenter suggested modifying this provision to require the recipient to send the respondent written notice of the specific facts that supported the recipient's decision to remove the student, so the respondent can meaningfully challenge the removal decision.

Some commenters asserted that if the respondent has a right to challenge the emergency removal, the recipient must offer an equitable opportunity for the complainant to contest an overturned removal or participate in the respondent's challenge process. Other commenters asked whether § 106.44(c) requires, or allows, a recipient to notify the complainant that a respondent has been removed under this provision, that a respondent is challenging a removal decision, or that a removal decision has been overturned by the recipient after a respondent's challenge.

Commenters argued that § 106.44(c) would also effectively mandate that an institution's employees must be trained to conduct hearings or other undefined post-removal procedures in the event that a respondent exercises the right to challenge the emergency removal. Commenters argued that this burden likely would require a dedicated officer or committee to carry out procedural obligations that did not previously exist, and these burdens were not contemplated at the time of the recipient's acceptance of the Federal funding. Commenters argued that § 106.44(c) would provide rights to at-will employees that are otherwise unavailable, restricting employment actions that are normally within the discretion of an employer.

Commenters requested clarification about the procedures for challenging a removal decision, such as: Whether a respondent's opportunity challenge the emergency removal means the recipient must, or may, use processes under § 106.45 to meet its obligations, including whether evidence must be gathered, witnesses must be interviewed, or a live hearing with cross-examination must be held; whether the recipient, or respondent, will bear the burden of proof that the removal decision was correct or incorrect; whether the recipient must, or may, involve the complainant in the challenge procedure; whether the recipient must, or may, use the investigators and decision-makers that have been trained pursuant to § 106.45 to conduct the post-removal challenge procedure; and whether the determinations about an emergency removal must, or may, influence a determination regarding responsibility during a grievance process under § 106.45.

Discussion: The Department disagrees that § 106.44(c) poses a possible loophole through which recipients may bypass giving respondents the due process protections in the § 106.45 grievance process. The threshold for an emergency removal under § 106.44(c) is adequately high to prevent recipients from using emergency removal as a pretense for imposing interim suspensions and expulsions. We do not believe it is necessary to revise § 106.44(c) to prevent recipients from imposing "abusive" procedures on respondents; recipients will be held accountable for reaching removal decisions under the standards of § 106.44(c), giving recipients adequate incentive to give respondents the immediate notice and challenge opportunity following a removal decision. We do not believe that recipients will make emergency removal decisions "hastily," and a respondent who believes a recipient has violated these final regulations may file a complaint with OCR.

The Department does not want to prescribe more than minimal requirements on recipients for purposes of responding to emergency situations. We decline to require written notice to the respondent because minimal due process requires some kind of notice, and compliance with a notice requirement suffices for a recipient's handling of an emergency situation.[974] We decline to add the modifier "meaningful" before "opportunity" because the basic due process requirement of an opportunity to be heard entails an opportunity that is appropriate under the circumstances, which ensures a meaningful opportunity.[975] While a recipient has discretion (subject to FERPA and other laws restricting the nonconsensual disclosure of personally identifiable information from education records) to notify the complainant of removal decisions regarding a respondent, or post-removal challenges by a respondent, we do not require the complainant to receive notice under § 106.44(c) because not every emergency removal directly relates to the complainant. As discussed above, circumstances that justify removal must be "arising from the allegations of sexual harassment" yet may consist of a threat to the physical health or safety of a person other than the complainant (for example, where the respondent has threatened self-harm).[976]

The Department disagrees that § 106.44(c) requires a recipient to go through excessively burdensome procedures prior to removing a respondent on an emergency basis. The seriousness of the consequence of a recipient's decision to removal of a student or employee, without a hearing beforehand, naturally requires the school to meet a high threshold (*i.e.,* an individualized safety and risk assessment shows that the respondent poses an immediate threat to a person's physical health or safety justifying removal). At the same time, § 106.44(c) leaves recipients wide latitude to select the procedures for giving notice and opportunity to challenge a removal.

A recipient owes a general duty under § 106.44(a) to respond to sexual harassment in a manner that is not deliberately indifferent. Where removing an individual on an emergency basis is necessary to avoid acting with deliberate indifference, a recipient must meet the requirements in § 106.44(c). The Department disagrees that § 106.44(c) imposes requirements on recipients that violate the Spending Clause, because recipients understand that compliance with Title IX will

[974] *E.g., Goss,* 419 U.S. at 578–79 (holding that in the public school context "the interpretation and application of the Due Process Clause are intensely practical matters" that require at a minimum notice and "opportunity for hearing appropriate to the nature of the case") (internal quotation marks and citations omitted).

[975] *Id.*

[976] As discussed in the "Section 106.6(e) FERPA" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble, the complainant has a right to know the nature of any disciplinary sanctions imposed on a respondent after the recipient has found the respondent to be responsible for sexual harassment alleged by the complainant, because the disciplinary sanctions are directly related to the allegations made by the complainant. By contrast, emergency removal of a respondent does not involve a recipient's determination that the respondent committed sexual harassment as alleged by the complainant, and information about the emergency removal is not necessarily directly related to the complainant. Thus, FERPA (or other privacy laws) may restrict a recipient's discretion to disclose information relating to the emergency removal.

require dedication of personnel, time, and resources.[977] Because this provision does not prescribe specific post-removal challenge procedures, we do not believe recipients face significant burdens in training personnel to comply with new or unknown requirements; this provision ensures that the essential features of due process of law, or fundamental fairness, are provided to the respondent (*i.e.*, notice and opportunity to be heard), and we believe that recipients are already familiar with these basic requirements of due process (for public institutions) or fair process (for private institutions).

In response to commenters' clarification requests, the post-removal procedure may, but need not, utilize some or all the procedures prescribed in § 106.45, such as providing for collection and presentation of evidence. Nothing in § 106.44(c) or the final regulations precludes a recipient from placing the burden of proof on the respondent to show that the removal decision was incorrect. Section 106.44(c) does not preclude a recipient from using Title IX personnel trained under § 106.45(b)(1)(iii) to make the emergency removal decision or conduct a post-removal challenge proceeding, but if involvement with the emergency removal process results in bias or conflict of interest for or against the complainant or respondent, § 106.45(b)(1)(iii) would preclude such personnel from serving in those roles during a grievance process.[978] Facts and evidence relied on during an emergency removal decision and post-removal challenge procedure may be relevant in a § 106.45 grievance process against the respondent but would need to meet the requirements in § 106.45; for example, a witness who provided information to a postsecondary institution recipient for use in reaching an emergency removal decision would need to appear and be cross-examined at a live hearing under § 106.45(b)(6)(i) in order for the witness's statement to be relied on by the decision-maker.

Changes: None.

How OCR Will Enforce the Provision

Comments: Commenters requested clarification about how OCR would enforce § 106.44(c), including what standard OCR would use in deciding whether a removal was proper; whether OCR would only find a violation if the recipient violates § 106.44(c) with deliberate indifference; whether violating this provision constitutes a violation of Title IX; whether OCR would defer to the determination reached by the recipient even if OCR would have reached a different determination based on the independent weighing of the evidence; whether a harmless error standard would apply to OCR's evaluation of a proper removal decision and only require reversing the recipient's removal decision if OCR thinks the outcome was affected by a recipient's violation of § 106.44(c); and whether OCR, or the recipient, would bear the burden of showing the correctness or incorrectness of the removal decision or the burden of showing that any violation affected the outcome or not.

Discussion: OCR will enforce this provision fully and consistently with other enforcement practices. OCR will not apply a harmless error standard to violations of Title IX, and will fulfill its role to ensure compliance with Title IX and these final regulations regardless of whether a recipient's non-compliance is the result of the recipient's deliberate indifference or other level of intentionality. Recipients whose removal decisions fail to comply with § 106.44(c) may be found by OCR to be in violation of these final regulations. As discussed above, a recipient may need to undertake an emergency removal under § 106.44(c) in order to meet its duty not to be deliberately indifferent to sexual harassment. However, OCR will not second guess the decisions made under a recipient's exercise of discretion so long as those decisions comply with the terms of § 106.44(c). For example, OCR may assess whether a recipient's failure to undertake an individualized risk assessment was deliberately indifferent under § 106.44(a), but OCR will not second guess a recipient's removal decision based on whether OCR would have weighed the evidence of risk differently from how the recipient weighed such evidence. While not every regulatory requirement purports to represent a definition of sex discrimination, Title IX regulations are designed to make it more likely that a recipient does not violate Title IX's non-discrimination mandate, and the Department will vigorously enforce Title IX and these final regulations.

Changes: None.

Section 106.44(d) Administrative Leave

Comments: Some commenters expressed support for § 106.44(d), asserting that this provision appropriately recognizes that cases involving employees as respondents, especially faculty or administrative staff, should have different frameworks than cases involving students.

Some commenters asserted that it is unclear what standard a recipient must satisfy before it may place an employee on administrative leave. Commenters recommended giving discretion to an elementary and secondary school recipient to implement an alternate assignment (such as administrative reassignment to home) for staff during the pendency of an investigation, provided the same is otherwise permitted by law.

Commenters wondered how the Department defines "administrative leave," whether § 106.44(d) applies to paid or unpaid leave, and whether that would depend on how existing recipient employee conduct codes or employment contracts address the issue of paid or unpaid leave. Commenters asked whether an employee-respondent placed on leave may collect back pay from the recipient, if the grievance process determines there was insufficient evidence of misconduct. One commenter argued that administrative leave must include pay and benefits, as well as lodging if the employee-respondent resided in campus housing.

One commenter asserted that treating non-student employees differently than students or student-employees under § 106.44(d) constitutes discrimination. Another commenter questioned why recipients can deny employees paychecks for months until the conclusion of a formal grievance process, but give immediate due process for students to challenge an emergency removal; the commenter asserted that the recipient could simply provide a free semester of college to cover any loss to a student yet the proposed rules do not require a recipient to give back pay to an employee. Some commenters argued that § 106.44(c) emergency removal requirements to undertake an individualized safety and risk analysis and provide notice and an opportunity to challenge should also apply to administrative leave so that employees receive the same due process protections as students. Commenters argued that school investigations can take several months and that being on leave, especially without pay, can be a severe hardship for many employees. Commenters asserted that the Department should explicitly require recipients to secure a removed employee's personal property and be responsible for any damage occurring to

[977] *See* discussion under the "Spending Clause" subsection of the "Miscellaneous" section of this preamble.

[978] Section 106.45(b)(1)(iii) requires all Title IX Coordinators, investigators, decision-makers, and persons who facilitate an informal resolution to be free from bias or conflicts of interest for or against complainants or respondents generally, or for or against any individual complainant or respondent.

the property before the removed employee can regain custody.

Commenters asserted that § 106.44(d) should apply to student-employee respondents and should be revised to limit the provision to administrative leave "from the person's employment," so that a student-employee respondent could still have access to the recipient's educational programs but the recipient would not be forced to continue an active employment relationship with that respondent during the investigation. For example, commenters argued, a recipient should not be compelled to allow a teaching assistant who has been accused of sexual harassment to continue teaching while the accusations are being investigated.

Commenters argued that § 106.44(d) should reference disability laws that protect employees parallel to the references to disability laws in § 106.44(c).

Discussion: The Department appreciates the support from commenters for § 106.44(d), giving a recipient discretion to place respondents who are employees on administrative leave during the pendency of an investigation.

We acknowledge commenters' concerns that § 106.44(d) does not specify conditions justifying administrative leave; however, we desire to give recipients flexibility to decide when administrative leave is appropriate. If State law allows or requires a school district to place an accused employee on "reassignment to home" or alternative assignment, § 106.44(d) does not preclude such action while an investigation under § 106.45 into sexual harassment allegations against the employee is pending.

The Department does not define "administrative leave" in this provision, but administrative leave is generally understood as temporary separation from a person's job, often with pay and benefits intact. However, these final regulations do not dictate whether administrative leave during the pendency of an investigation under § 106.45 must be with pay (or benefits) or without pay (or benefits). With respect to the terms of administrative leave, recipients who owe obligations to employees under State laws or contractual arrangements may comply with those obligations without violating § 106.44(d). Similarly, these final regulations do not require back pay to an employee when the pending investigation results in a determination that the employee was not responsible. Further, this provision does not require a recipient to cover the costs of lodging for, or to secure the personal property of, an employee placed on administrative leave, although the final regulations do not preclude a recipient from taking such actions. We note that these final regulations similarly allow—but do not require—a recipient to repay a respondent for expenses incurred as a result of an emergency removal or to take actions to secure personal property during a removal under § 106.44(c) (whether the removed respondent was a student, or an employee). We also note that § 106.6(f) provides that nothing in this part may be read in derogation of an individual's rights, including an employee's rights, under Title VII[979] and that other laws such as Title VII may dictate whether administrative leave should be paid or unpaid and whether a respondent should be repaid for expenses incurred as a result of any of the recipient's actions.

The Department acknowledges that being placed on administrative leave—especially if the leave is without pay—may constitute a hardship for the employee. However, no respondent who is an employee may be kept on administrative leave indefinitely, because § 106.44(d) does not authorize administrative leave unless a § 106.45 grievance process has been initiated, and § 106.45(b)(1)(v) requires the grievance process to be concluded within a designated reasonably prompt time frame. As proposed in the NPRM, § 106.44(d) provided that a recipient may place a non-student employee respondent on administrative leave during the pendency of an investigation; this was intended to refer to an investigation conducted pursuant to the § 106.45 grievance process. To clarify this point, the Department replaces "an investigation" with "a grievance process that complies with § 106.45" in § 106.44(d) to make it clear that a recipient may place a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. The Department also revised § 106.44(d) to provide that "nothing in this subpart" instead of "nothing in this section" precludes a recipient from placing a non-student employee respondent on administrative leave to clarify that § 106.44(d) applies to subpart D of Part 106 of Title 34 of the Code of Federal Regulations. This revision makes it clear that nothing in subpart D of Part 106 of Title, which concerns nondiscrimination on the basis of sex in education programs or activities receiving Federal financial assistance and which includes other provisions such as § 106.44 and § 106.45, precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45.

The Department appreciates commenters' suggestions that the same due process protections (notice and opportunity to challenge a removal) that apply to respondents under § 106.44(c) should apply to an employee placed on administrative leave under § 106.44(d). This is unnecessary, because § 106.44(c) applies to an emergency removal of *any* respondent. Any respondent (whether an employee, a student, or other person) who poses an immediate threat to the health or safety of any student or other individual may be removed from the recipient's education program or activity on an emergency basis, where an individualized safety and risk analysis justifies the removal. Thus, respondents who are employees receive the same due process protections with respect to emergency removals (*i.e.,* post-removal notice and opportunity to challenge the removal) as respondents who are students.

The Department also clarifies that pursuant to § 106.44(d), a recipient may place a non-student employee respondent on administrative leave, even if the emergency removal provision in § 106.44(c) does not apply. With respect to student-employee respondents, we explain more fully, below, that these final regulations do not necessarily prohibit a recipient from placing a student-employee respondent on administrative leave if doing so does not violate other regulatory provisions. For example, placing a student-employee respondent on administrative leave with pay may be permissible as a supportive measure, defined in § 106.30, for a complainant (for instance, to maintain the complainant's equal educational access and/or to protect the complainant's safety or deter sexual harassment) as long as that action meets the conditions that a supportive measure is not punitive, disciplinary, or unreasonably burdensome to the respondent. Whether a recipient considers placing a student-employee respondent on administrative leave as part of a non-deliberately indifferent response under § 106.44(a) is a decision that the Department will evaluate based on whether such a response is clearly

[979] For discussion of the revision to language in § 106.6(f) (*i.e.,* stating in these final regulations that nothing in this part may be read in derogation of *an individual's* rights instead of *an employee's* rights, under Title VII), see the "Section 106.6(f) Title VII and Directed Question 3 (Application to Employees)" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

unreasonable in light of the known circumstances. The Department will interpret these final regulations in a manner that complements an employer's obligations under Title VII, and nothing in these final regulations or in Part 106 of Title 34 of the Code of Federal Regulations may be read in derogation of any individual's rights, including any employee's rights, under Title VII, as explained in more detail in the "Section 106.6(f) Title VII and Directed Question 3 (Application to Employees)" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble.

Section 106.44(a) prohibits a recipient from imposing disciplinary sanctions against a respondent without following a grievance process that complies with § 106.45. Administrative leave without pay is generally considered disciplinary, and would likely be prohibited under § 106.44(a) in the absence of the § 106.44(d) administrative leave provision. The Department believes that while an investigation is pending, a recipient should have discretion to place an employee-respondent on any form of administrative leave the recipient deems appropriate, so that the recipient has flexibility to protect students from exposure to a potentially sexually abusive employee. Numerous commenters asserted that educator sexual misconduct is prevalent throughout elementary and secondary schools, and postsecondary institutions.[980] For these reasons, the final regulations permit, but do not require, what may amount to an interim suspension of an employee-respondent (*i.e.,* administrative leave without pay) even though the final regulations prohibit interim suspensions of student-respondents. We reiterate that any respondent may be removed on an emergency basis under § 106.44(c).

We do not believe that employees placed on administrative leave are denied sufficient due process under these circumstances, because in order for § 106.44(d) to apply, a § 106.45 grievance process must be underway, and that grievance process provides the respondent (and complainant) with clear, strong procedural protections designed to reach accurate outcomes, including the right to conclusion of the grievance process within the recipient's designated, reasonably prompt time frame. As previously explained, the Department revised § 106.44(d) to clarify that a recipient may place a non-student respondent on administrative leave during the pendency of a grievance process that complies with § 106.45.

Commenters erroneously asserted that because § 106.44(d) applies only to "non-student employees," a recipient is always precluded from placing an employee-respondent on administrative leave if the employee is also a student. We decline to make § 106.44(d) apply to student-employees or to change this provision to specify that administrative leave is "from the person's employment." Consistent with § 106.6(f), where an employee is not a student, we do not preclude a recipient-employer from placing a non-student employee on administrative leave during the pendency of a grievance process that complies with § 106.45. These final regulations do not prohibit a recipient from placing a student-employee respondent on administrative leave if doing so does not violate other regulatory provisions. As discussed above, placing a student-employee respondent on administrative leave with pay may be permissible as a supportive measure, defined in § 106.30, and may be considered by the recipient as part of the recipient's obligation to respond in a non-deliberately indifferent manner under § 106.44(a). Where a student is also employed by their school, college, or university, it is likely that the student depends on that employment in order to pay tuition, or that the employment is important to the student's academic opportunities. Administrative leave may jeopardize a student-employee's access to educational benefits and opportunities in a way that a non-student employee's access to education is not jeopardized. Accordingly, administrative leave is not always appropriate for student-employees. There may be circumstances that justify administrative leave with pay for student-employees, and the specific facts of a particular matter will dictate whether a recipient's response in placing a student-employee on administrative leave is permissible. For example, if a student-employee respondent works at a school cafeteria where the complainant usually eats, a recipient may determine that placing the student-employee respondent on administrative leave with pay, during the pendency of a grievance process that complies with § 106.45, will not unreasonably burden the student-employee respondent, or the recipient may determine that re-assigning the student-employee respondent to a different position during pendency of a § 106.45 grievance process, will not unreasonably burden the student-employee respondent. If a recipient places a party who is a student-employee on administrative leave with pay as a supportive measure, then such administrative leave must be non-disciplinary, non-punitive, not unreasonably burdensome, and otherwise satisfy the definition of supportive measures in § 106.30. With respect to a student-employee respondent, a recipient also may choose to take measures other than administrative leave that could constitute supportive measures for a complainant, designed to protect safety or deter sexual harassment without unreasonably burdening the respondent. For example, where an employee is also a recipient's student, it is likely that the recipient has the ability to supervise the student-employee to ensure that any continued contact between the student-employee respondent and other students occurs under monitored or supervised conditions (*e.g.,* where the respondent is a teaching assistant), during the pendency of an investigation. If a recipient removes a respondent pursuant to § 106.44(c) after conducting an individualized safety and risk analysis and determining that an immediate threat to the physical health or safety of any students or other individuals justifies removal, then a recipient also may remove a student-employee respondent from any employment opportunity that is part of the recipient's education program or activity.

The Department is persuaded by commenters who asserted that analogous disability protections should expressly apply for employee-respondents under § 106.44(d) as for respondents under the § 106.44(c) emergency removal provision. We have revised § 106.44(d) of the final regulations to state that this provision may not be construed to modify any rights under Section 504 or the ADA.

Changes: We have revised § 106.44(d) to clarify that it will not be construed to modify Section 504 or the ADA.[981] We also revised § 106.44(d) to clarify that nothing in subpart D of Part 106, Title 34 of the Code of Regulations, precludes

[980] *E.g.,* Charol Shakeshaft, *Educator Sexual Misconduct: A Synthesis of Existing Literature* (2004) (prepared for the U.S. Dep't. of Education) (ten percent of children were targets of educator sexual misconduct by the time they graduated from high school); National Academies of Science, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* 61 (Frasier F. Benya *et al.* eds., 2018) (describing the prevalence of faculty-on-student sexual harassment at the postsecondary level).

[981] As discussed in the "Section 106.6(f) Title VII and Directed Question 3 (Application to Employees)" subsection of the "Clarifying Amendments to Existing Regulations" section of this preamble, we revised the reference to "this section" to "this subpart" in § 106.44(d).

a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45.

Section 106.45 Recipient's Response to Formal Complaints

General Requirements for § 106.45 Grievance Process

Section 106.45(a) Treatment of Complainants or Respondents Can Violate Title IX

Comments: Commenters including students, professors, campus administrators, and attorneys, expressed appreciation and support for § 106.45(a). Some commenters asserted that § 106.45(a) is a welcome addition because in recent years, Federal judges have expressed concerns about how university treatment of respondents (or complainants) might run afoul of Title IX and contradict Title IX's promise of gender equity. Some commenters noted that although Federal courts have not assumed that all unfair procedures depriving respondents of a fair process necessarily equate to sex discrimination,[982] numerous Federal courts have identified plausible claims of an institutions' sex discrimination against respondents, and commenters cited Federal cases [983] where courts noted sex discrimination may exist where an institution failed to investigate evidence that the complainant might also have committed sexual misconduct in the same case, credited only female witnesses, ignored exonerating evidence because of preconceived notions about how males and females behave, used gender-biased training materials that portray only men as sexual predators or only women as victims, or denied the respondent necessary statistical information to test allegations of gender bias.

Other commenters gave examples of how they have observed sex-driven unfair treatment against respondents in campus Title IX proceedings. A few commenters pointed out that when a sexual harassment grievance process favors females over males in an attempt to be equitable to victims, the result is often that male victims of sexual harassment are not treated equitably; some commenters cited to statistics showing that similar percentages of men (5.3 percent) and women (5.6 percent) experience sexual violence other than rape each year,[984] that about 14 percent of reported rape cases involve men or boys, one in six reported sexual assaults is against a boy, one in 25 reported sexual assaults is against a man,[985] and that a survey of 27 colleges and universities revealed that 40.9 percent of undergraduate heterosexual males had experienced sexual harassment, intimate partner violence, or stalking, compared to 60.5 percent of undergraduate heterosexual females.[986] Some commenters opined that the Department's withdrawn 2011 Dear Colleague Letter contributed to more instances of universities applying grievance procedures in a sex-discriminatory manner (usually against respondents, who, commenters argued, are overwhelmingly male). At least one commenter supportive of § 106.45(a) cited a white paper by NCHERM cautioning colleges and universities to avoid applying grievance procedures in an unfair, biased manner (whether favoring complainants, or favoring the accused) and urging institutions to have balanced processes.[987] Several commenters, including attorneys and organizations with experience representing accused students, supported § 106.45(a) because although the provision only clarifies what is already the intent of the law, the provision is necessary to counter institutional bias in favor of female accusers and against male accused students, as both are entitled to equally fair procedures untainted by gender bias; one such commenter referred to § 106.45(a) as an "essential corrective" to gender bias that permeates campus sexual misconduct proceedings, and another believed that the provision will encourage schools to be more careful in how they treat both sides.

Discussion: The Department appreciates commenters' support for § 106.45(a) and acknowledges that many commenters have observed through personal experiences navigating campus sexual misconduct proceedings that some recipients have applied grievance procedures in a manner that shows discrimination against respondents on the basis of sex. We note that other commenters have recounted personal experiences navigating campus sexual misconduct proceedings perceived to be biased against complainants on the basis of sex. To the extent that such discriminatory practices occur, § 106.45(a) advises recipients against sex discriminatory practices during the grievance process and to avoid different treatment favoring or disfavoring any party on the basis of sex. However, to clarify that § 106.45(a) applies as much to complainants as to respondents, the final regulations revise the language in this provision but retain the provision's statement that how a recipient treats a complainant, or a respondent, "may" constitute sex discrimination under Title IX. The Department emphasizes that any person regardless of sex may be a victim or perpetrator of sexual harassment and that different treatment due to sex-based stereotypes about how men or women behave with respect to sexual violence violates Title IX's non-discrimination mandate.

Changes: The final regulations revise § 106.45(a) to state more clearly that treatment of a complainant or respondent may constitute sex discrimination in violation of Title IX.

Comments: Some commenters opposed § 106.45(a), claiming that this provision would harbor perpetrators by permitting them to claim a Title IX violation even if the recipient merely opens an investigation into their conduct, and would revictimize and retraumatize survivors. Some commenters argued that this provision operates from a premise of false equivalency since the respondent is not involved in the process on the basis of their sex but rather on the basis of their

[982] Commenters cited: *Nokes* v. *Miami Univ.*, 1:17–CV–482, 2017 WL 3674910 (S.D. Ohio Aug. 25, 2017); *Sahm* v. *Miami Univ.*, 110 F. Supp. 3d 774 (S.D. Ohio 2015); *Bleiler* v. *Coll. of the Holy Cross*, No. 1:11–CV–11541, 2013 WL 4714340 (D. Mass. Aug. 26, 2013).

[983] Commenters cited: *Doe* v. *Baum*, 903 F.3d 575 (6th Cir. 2018); *Doe* v. *Miami Univ.*, 882 F.3d 579 (6th Cir. 2018); *Rossley* v. *Drake Univ.*, 342 F. Supp. 3d 904 (S.D. Iowa 2018); *Doe* v. *Univ. of Miss.*, No. 3:16–CV–63, 2018 WL 3570229 (S.D. Miss. July 14, 2018); *Doe* v. *Univ. of Pa.*, 270 F. Supp. 3d 799 (E.D. Pa. 2017); *Doe* v. *Amherst Coll.*, 238 F. Supp. 3d 195 (D. Mass. 2017); *Doe* v. *Williams Coll.*, No. 3:16–CV–30184 (D. Mass. Apr. 28, 2017); *Saravanan* v. *Drexel Univ.*, No. 2:17–CV–03409, 2017 WL 5659821 (E.D. Pa. Nov. 24, 2017); *Marshall* v. *Ind. Univ.*, No. 1:15–CV–00726, 2016 WL 4541431 (S.D. Ind. Aug. 31, 2016).

[984] Commenters cited: Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report* Tables 2.1 and 2.2 (Nov. 2011).

[985] Commenters cited: National Alliance to End Sexual Violence, "Male Victims," ("About 14% of reported rapes involve men or boys, 1 in 6 reported sexual assaults is against a boy, and 1 in 25 reported sexual assaults is against a man."), *https://www.endsexualviolence.org/where_we_stand/male-victims/.*

[986] Commenters cited: The Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* (Westat 2015).

[987] Commenters cited: National Center for Higher Education Risk Management (NCHERM), *White Paper: Due Process and the Sex Police* 14–15 (2017) ("There are always unintended consequences to showing favoritism. If a college is known to be biased toward responding parties, this can chill the willingness of victims/survivors to report. If a college is known to be biased toward reporting parties, a victim/survivor's sense of safety or justice based on the campus outcome in the short run may be quickly compromised by a court order or lawsuit reinstating the responding party, giving her a Pyrrhic victory, at best. What is needed for all of our students is a balanced process that centers on their respective rights while showing favoritism to neither. Not only is that best, it is required by law.").

[Exempt From Filing Fee
Government Code § 6103]

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Attorneys for SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT, MEGAN KEEFER, KEITH ROGENSKI

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA, MARTINEZ

JOHN DOE, et al.,

Petitioner,

vs.

MEGAN KEEFER, et al.,

Respondents.

CASE NO. NC21-1450

DECLARATION OF JACQUELINE LITRA IN SUPPORT OF OPPOSITION TO EX PARTE REQUEST TO STAY EMERGENCY REMOVAL

Date: August 9, 2021
Time: 1:30 p.m.
Dept.: 7

The Hon. Hon. Barry Baskin, Dept. 7

Trial Date: None Set

I, Jacqueline Litra, declare as follows:

1. I am an attorney duly admitted to practice before this Court. I am a partner with Fagen Friedman & Fulfrost, LLP, attorneys of record for SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT, MEGAN KEEFER, and, KEITH ROGENSKI. If called as a witness, I could and would competently testify to all facts within my personal knowledge except where stated upon information and belief.

2. My office advises San Ramon Valley Unified School District ("District") in Title IX matters and I am familiar with the administrative action involving John Doe (whose name is known to me). The Title IX administrative action is ongoing and is still at the investigative stage.

Fagen Friedman & Fulfrost, LLP
70 Washington Street, Suite 205
Oakland, California 94607
Main 510-550-8200 • Fax 510-550-8211

3. A true and correct copy of my May 4, 2021 email to Petitioner's counsel, Dan Roth, Esq., is attached hereto as "Exhibit A."

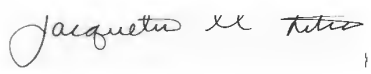
4. A true and correct copy of the May 7, 2021 email from Kenneth Nelson, former Title IX Coordinator, to Petitioner and Petitioner's parents regarding supportive measures is attached hereto as "Exhibit B."

5. A true and correct copy of my May 7, 2021 email to Mr. Roth offer supportive measures to facilitate Petitioner's education during the emergency removal process is attached hereto as "Exhibit C."

6. On May 10, 2021, I setup a call with Mr. Roth to explain that supportive measures, such as in-home instruction or remote learning, were available to Petitioner as needed. I explained to Mr. Roth that while both options offer the same academic opportunities, remote instruction would require Petitioner to change the class periods he shares with Jane Roe, whereas, in-home instruction would permit him to keep his current classes. A true and correct copy of emails exchanged between the parties regarding the implementation of supportive measures for Petitioner from May 11, 2021 to May 12, 2021 is attached hereto as "Exhibit D"

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 6th day of August, 2021, at Lansing, Michigan.



Jacqueline M. Litra

272-180/6158239.1

Fagen Friedman & Fulfrost, LLP
70 Washington Street, Suite 205
Oakland, California 94607
Main 510-550-8200 • Fax 510-550-8211

EXHIBIT A

Jacqueline M. Litra

From: Jacqueline M. Litra
Sent: Tuesday, May 4, 2021 6:34 PM
To: Dan Roth
Cc: mkeefer@srvusd.net; Kenneth Nelson
Subject: RE: Challenge to Removal of Petitioner; FERPA request - Declaration Attached

Categories: Important

Dear Mr. Roth:

The purpose of emergency removal is to address imminent threats posed to any individual's physical health or safety arising out of Title IX Sexual Harassment allegations. Emergency removal is not disciplinary and is not a determination of responsibility for Title IX Sexual Harassment allegations. Respondents are deemed not responsible for the allegations until a determination regarding responsibility is reached at the conclusion of the Title IX Sexual Harassment grievance process. If the Title IX decisionmaker determines a respondent is responsible for violation of Title IX, the District may impose disciplinary sanctions at that point.

Consistent with the Title IX regulations, Principal Keefer under took an individualized safety and risk analysis and determined Respondent to be an immediate threat to the physical safety of student(s) or other individual(s) arising from the allegations of sexual assault. As result, Respondent was eligible for emergency removal. Consistent with federal law, Respondent (and his parent) was notified of the emergency removal and of his opportunity challenge it. (See 34 CFR § 106.44(c).)

Prior to Principal Keefer's determination, Respondent did allege that Complainant was fabricating the allegations against him because he broke up with Complainant. Principal Keefer considered this allegation in making her assessment and determination. Accordingly, her assessment and determination stand.

Supportive measures remain available to Respondent. The Title IX Coordinator can meet with Respondent discuss those measures further.

Please let me know if you have any questions.

Sincerely,

Jacqueline Litra

Fagen Friedman & Fulfrost LLP

Jacqueline M. Litra
Direct: (323) 330-6329 | Mobile: (323) 829-8551
Email: jlitra@f3law.com | Web: www.f3law.com

From: Dan Roth <dan@drothlaw.com>
Sent: Tuesday, May 4, 2021 4:37 PM
To: Jacqueline M. Litra <jlitra@f3law.com>
Cc: Petitioner >; Petitioner Parent

Petitioner Parent

Subject: Re: Challenge to Removal of Petitioner ; FERPA request - Declaration Attached

EXTERNAL EMAIL

Dear Ms. Litra,

Please find below my communications with Principal Megan Keefer, along with the declaration I provided this morning.

Sincere regards,
Dan Roth

LAW OFFICE OF DAN ROTH
803 Hearst Avenue
Berkeley, CA 94710
(510) 849-1389 (phone)
(510) 295-2680 (fax)
dan@drothlaw.com
www.drothlaw.com

On Tue, May 4, 2021 at 10:48 AM Dan Roth <dan@drothlaw.com> wrote:

> Dear Ms. Keefer,
>
> Please contact me today to discuss my email from Friday. I am attaching Petitioner's sworn declaration, signed under penalty of perjury, which should provide everything you need to immediately reinstate him to class. Petitioner is not a danger to Jane Roe / or to anyone else. As you can see from the April 13 text messages included in the declaration, Petitioner broke up with Jane Roe / Complai on April 13 and refused to get back together with her despite her pleading with him. It appears that in her upset, she fabricated this heinous allegation against him. Further depriving Petitioner of his education in this context violates his rights under Title IX and the U.S. and California constitutions.
>
> My mobile number is Redacted . I look forward to speaking with you soon.
>
> Sincere regards,
> Dan Roth
>
> **LAW OFFICE OF DAN ROTH**
> 803 Hearst Avenue
> Berkeley, CA 94710
> (510) 849-1389 (phone)
> (510) 295-2680 (fax)
> dan@drothlaw.com
> www.drothlaw.com

On Fri, Apr 30, 2021 at 12:11 PM Dan Roth <dan@drothlaw.com> wrote:

Dear Ms. Keefer,

I represent California High School student Petitioner . Last week, you provided Petitioner the attached letter, indicating that "the District has undertaken an individualized safety and risk analysis and has determined that [he] pose[s] an immediate threat to the physical health or safety of a student or other individual." As a result, Petitioner is now receiving no instruction - either live or remote - but is instead completing his freshman year of high school doing independent learning. Petitioner has been removed from his academic environment and deprived of his educational opportunities. This is effectively a suspension, which as a matter of long-standing federal law requires meaningful notice and a hearing - neither of which Petitioner has been provided.

In order to mitigate this violation of Petitioners clearly-established constitutional rights, I ask that you please take immediate action to reinstate Petitioner to his rightful place alongside his fellow students for the remainder of the school year.

Pursuant to FERPA, please also provide Petitioner and me access to review all records constituting the "individualized safety and risk analysis," including all "substantial evidence leading to allegations of sexual assault(s) to students while on campus." *See* 20 U.S.C. § 1232g(a)(4)(A).

Sincere regards,
Dan Roth

LAW OFFICE OF DAN ROTH

803 Hearst Avenue
Berkeley, CA 94710
(510) 849-1389 (phone)
(510) 295-2680 (fax)
dan@drothlaw.com
www.drothlaw.com

the sender by reply e-mail and destroy all copies of the original message. Thank you.

EXHIBIT B

Jacqueline M. Litra

From: Kenneth Nelson <knelson@srvusd.net>
Sent: Friday, May 7, 2021 1:42 PM
To: Petitioner; Petitioner Parent s Petitioner Parent
Subject: Supportive Measures Meeting

EXTERNAL EMAIL

Good afternoon,

I would like to schedule a meeting with you and Petitioner to discuss the supportive measure available for him during the Title IX Sexual Harassment Complaint process. We will provide supportive measure to support him during the Title IX process and in receiving his education during the emergency removal. Please let me know your availability. I understand that Petitioner has an advisor/attorney. Petitioner's advisor/attorney can attend the supportive measures meeting but please let me know if they will be attending.

Ken Nelson
Title IX Coordinator - SRVUSD
knelson@srvusd.net
(925) 552-5052

Ken Nelson
Title IX Coordinator
knelson@srvusd.net
(925) 552-5052

EXHIBIT C

Jacqueline M. Litra

From: Jacqueline M. Litra
Sent: Friday, May 7, 2021 3:53 PM
To: Dan Roth
Cc: mkeefer@srvusd.net; Kenneth Nelson
Subject: RE: Challenge to Removal of Petitioner; FERPA request - Declaration Attached

Dear Mr. Roth:

We understand how difficult this process is for all parties involved. The District is committed to supporting the parties. If Respondent requires supportive measures to facilitate his education during the emergency removal, the District will provide those. Director Nelson recently reached out to Respondent and his parents to schedule a meeting to discuss such supportive measures. You are invited to be present for that meeting. If you decide to attend, I will join you.

As discuss in detail below, the District already responded to the challenge you posed to the emergency removal by email. Nothing in your emails reflected a request for a meeting for Respondent to challenge the basis for the emergency removal. Your email to Principal Keefer on April 30, 2021, alleged that the emergency removal violated Respondent's constitutional rights. Your email to Principal Keefer on May 4, 2021, submitted an document with images inserted purported to be from a text message conversation between Respondent and Complainant. You also alleged that the emergency removal violates Respondent's rights under Title IX and the U.S. and California constitutions.

After conferring with Mr. Keefer, I responded to your emails on her behalf on May 4, 2021. I explained the purpose of emergency removals established in the Title IX Regulations and their non-disciplinary nature. I also emphasized that supportive measures are available for Respondent and that the Title IX Coordinator was available to meet with Respondent to implement those. I also responded to the challenge you posed to the emergency removal by email on behalf of Principal Keefer and the District. Specifically: "Prior to Principal Keefer's determination, Respondent did allege that Complainant was fabricating the allegations against him because he broke up with Complainant. Principal Keefer considered this allegation in making her assessment and determination. Accordingly, her assessment and determination stand."

Consistent with your email submissions, Respondent was provided the opportunity to present facts that might contradict the basis for Principal Keefer's determination that emergency removal is justified. The District reviewed and considered your emails and the document you submitted on behalf of Respondent.

If you are now requesting an opportunity for Respondent to be heard to challenge the emergency removal, the District will immediately schedule a meeting for that purpose upon receipt of your confirmation.

Please understand that this is not an adversarial process. The District and its Title IX Coordinator are here to support both Respondent and Complainant throughout this process. The District is in the process of conducting an investigation consistent with the Title IX Regulations, in which both parties have been offered the opportunity to participate. The District is responsible for gathering evidence sufficient to reach a determination regarding responsibility on the allegations. However, both parties have an equal opportunity to submit evidence.

I would be happy to discuss any of this further. Please let me know if you have any questions or would like to schedule a time to discuss.

Sincerely,

Jacqueline Litra

Fagen Friedman & Fulfrost LLP

Jacqueline M. Litra
Direct: (323) 330-6329 | Mobile: (323) 829-8551
Email: jlitra@f3law.com | Web: www.f3law.com
Please consider the environment before printing this email.

From: Dan Roth <dan@drothlaw.com>
Sent: Friday, May 7, 2021 12:27 PM
To: Jacqueline M. Litra <jlitra@f3law.com>
Cc: mkeefer@srvusd.net; Kenneth Nelson <knelson@srvusd.net>; Petitioner

Petitioner Pare

Subject: Re: Challenge to Removal of Petitioner ; FERPA request - Declaration Attached

EXTERNAL EMAIL

Dear Ms. Litra,

We are still awaiting a response to my email to Ms. Keefer last week expressing Petitioner's desire to challenge his emergency removal. At this point he has been deprived of his educational opportunities for more than 10 days without a hearing, and must be reinstated. Failure to reinstate him constituted an ongoing violation of Petitioner's clearly-established constitutional rights, and will subject everyone involved to suit and potential liability under 20 U.S.C. section 1983.

Sincere regards,
Dan

LAW OFFICE OF DAN ROTH

803 Hearst Avenue
Berkeley, CA 94710
(510) 849-1389 (phone)
(510) 295-2680 (fax)
dan@drothlaw.com
www.drothlaw.com

On May 4, 2021, at 6:33 PM, Jacqueline M. Litra <jlitra@f3law.com> wrote:

Dear Mr. Roth:

The purpose of emergency removal is to address imminent threats posed to any individual's physical health or safety arising out of Title IX Sexual Harassment allegations. Emergency removal is not disciplinary and is not a determination of responsibility for Title IX Sexual Harassment

allegations. Respondents are deemed not responsible for the allegations until a determination regarding responsibility is reached at the conclusion of the Title IX Sexual Harassment grievance process. If the Title IX decisionmaker determines a respondent is responsible for violation of Title IX, the District may impose disciplinary sanctions at that point.

Consistent with the Title IX regulations, Principal Keefer under took an individualized safety and risk analysis and determined Respondent to be an immediate threat to the physical safety of student(s) or other individual(s) arising from the allegations of sexual assault. As result, Respondent was eligible for emergency removal. Consistent with federal law, Respondent (and his parent) was notified of the emergency removal and of his opportunity challenge it. (See 34 CFR § 106.44(c).)

Prior to Principal Keefer's determination, Respondent did allege that Complainant was fabricating the allegations against him because he broke up with Complainant. Principal Keefer considered this allegation in making her assessment and determination. Accordingly, her assessment and determination stand.

Supportive measures remain available to Respondent. The Title IX Coordinator can meet with Respondent discuss those measures further.

Please let me know if you have any questions.

Sincerely,

Jacqueline Litra

Jacqueline M. Litra
Direct: (323) 330-6329 | Mobile: (323) 829-8551
Email: jlitra@f3law.com | Web: www.f3law.com
Please consider the environment before printing this email.

From: Dan Roth <dan@drothlaw.com>
Sent: Tuesday, May 4, 2021 4:37 PM
To: Jacqueline M. Litra <jlitra@f3law.com>
Cc: Petitioner >; Petitioner Parent Steve Petitioner Parent

Subject: Re: Challenge to Removal of Petitioner ; FERPA request - Declaration Attached

EXTERNAL EMAIL
Dear Ms. Litra,

Please find below my communications with Principal Megan Keefer, along with the declaration I provided this morning.

Sincere regards,
Dan Roth

LAW OFFICE OF DAN ROTH
803 Hearst Avenue
Berkeley, CA 94710
(510) 849-1389 (phone)
(510) 295-2680 (fax)
dan@drothlaw.com
www.drothlaw.com

On Tue, May 4, 2021 at 10:48 AM Dan Roth <dan@drothlaw.com> wrote:

> Dear Ms. Keefer,
>
> Please contact me today to discuss my email from Friday. I am attaching Petitioner's sworn declaration, signed under penalty of perjury, which should provide everything you need to immediately reinstate him to class. Petitioner is not a danger to Jane Roe / or to anyone else. As you can see from the April 13 text messages included in the declaration, Petitioner broke up with Jane Roe / Complain on April 13 and refused to get back together with her despite her pleading with him. It appears that in her upset, she fabricated this heinous allegation against him. Further depriving Petitioner of his education in this context violates his rights under Title IX and the U.S. and California constitutions.
>
> My mobile number is Redacted . I look forward to speaking with you soon.
>
> Sincere regards,
> Dan Roth

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On Fri, Apr 30, 2021 at 12:11 PM Dan Roth <dan@drothlaw.com> wrote:

> Dear Ms. Keefer,
>
> I represent California High School student Petitioner . Last week, you provided Petitioner the attached letter, indicating that "the District has undertaken an individualized safety and risk analysis and has determined that [he] pose[s] an immediate threat to the physical health or safety of a student or other individual." As a result, Petitioner is now receiving no instruction - either live or remote

- but is instead completing his freshman year of high school doing independent learning. Petitioner has been removed from his academic environment and deprived of his educational opportunities. This is effectively a suspension, which as a matter of long-standing federal law requires meaningful notice and a hearing - neither of which Petitioner has been provided.

In order to mitigate this violation of Petitioner's clearly-established constitutional rights, I ask that you please take immediate action to reinstate Petitioner to his rightful place alongside his fellow students for the remainder of the school year.

Pursuant to FERPA, please also provide Petitioner and me access to review all records constituting the "individualized safety and risk analysis," including all "substantial evidence leading to allegations of sexual assault(s) to students while on campus." *See* 20 U.S.C. § 1232g(a)(4)(A).

Sincere regards,
Dan Roth

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dan@drothlaw.com
www.drothlaw.com

EXHIBIT D

Jacqueline M. Litra

From: Dan Roth <dan@drothlaw.com>
Sent: Wednesday, May 12, 2021 10:09 PM
To: Tucker Farrar
Cc: Megan Keefer; Kenneth Nelson; Petitioner; Petitioner Parent; Petitioner Parent; Jacqueline M. Litra
Subject: Re: Supports for Petitioner 's return to Remote Learning

EXTERNAL EMAIL

Thank you, Mr. Farrar. Please note that I made an error in my initial email: the new Algebra class is on 9.5, not 9.3, so the difference is more significant. Apologies for the confusion.

Best regards,
Dan

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803 Hearst Avenue
Berkeley, CA 94710
(510) 849-1389 (phone)
(510) 295-2680 (fax)
dan@drothlaw.com
www.drothlaw.com

On Wed, May 12, 2021 at 4:25 PM Tucker Farrar <tfarrar@srvusd.net> wrote:

Dan,

Thank you for reaching out about Petitioner s first day. I can understand how these disruptions would be challenging and I am sorry for this.

I will work with his new English Teacher to ensure that we make the appropriate adjustments to the curriculum so that he will have full access to the curriculum and will not be penalized and or miss out on learning objectives given the fact that they are on different Chapter in To Kill a Mockingbird.

I have reached out to his Teacher , his new PE teacher and I assure you Teacher will allow Petitioner to make up the missed work from today using the PLT4M program and will not be penalized for any late efforts.

Previously I taught math (for 13 years) and Algebra for many of those, and from this Big Ideas Algebra I textbook. I assure you that the difference in pacing that would land a class at sections 9.2 or 9.3 is not insurmountable. I will reach out to Math Teacher to explain that Petitioner is 1 section behind so she can make accommodations for him to get caught up. She might already have that under control for all I know. She has been teaching for 19 years and is one of our best teachers. I can also recommend our Cal High Peer Tutoring program, which is free, called Educore. Petitioner can sign up for free tutoring sessions up to 5 days a week from skilled and trained math tutors. We still have room in the program and I hear many success stories of students who attend sessions and are doing much better in their classes (math is

certainly a class where many students take advantage of the Educore peer tutoring program). I can also recommend that Petitioner attend Student Support this week and next for math supports with Math Teacher. Student Support (Tues-Friday from 2:35-3:15) was created for this exact situation. We knew that students would have learning disruptions and we built a period where students can login and get 1:1 and small group support directly from their teacher. 15 minutes one on one with a teacher in Student Support period can sometimes be similar to a 75 minute period in the focus, engagement, and live time questions and support that typically happens. Students tend to be much more focused and learn at higher rates when they are one on one with their teacher. I HIGHLY encourage Petitioner to utilize that Student Support time. And as long as Petitioner gets the ZOOM link there is no appointment necceeary.

None of the aforementioned issues will impact Petitioner's ability to earn the grades he deserves and he will not be penalized for late work during this transition to remote learning.

I will follow up with you once I check in with the English and Math teachers about helping to accommodate the difference and chapters and sections, respectively.

Please let me know if you have any questions.

Sincerely,

Tucker Farrar

---------- Forwarded message ---------
From: **Dan Roth** <dan@drothlaw.com>
Date: Wed, May 12, 2021 at 3:03 PM
Subject: Re: Challenge to Removal of Petitioner ; FERPA request - Declaration Attached
To: Megan Keefer <mkeefer@srvusd.net>
Cc: Jacqueline M. Litra <jlitra@f3law.com>, Kenneth Nelson <knelson@srvusd.net>, Petitioner , Petitioner Parent >, Petitioner Parent

Good Afternoon,

I am writing to note a few issues related to Petitioner's first day of remote learning.

- **English**: Petitioner's new classroom is on Chapter 24 of *To Kill A Mockingbird*, whereas his previous class was on Chapter 8.
- **PE**: Petitioner did not receive a Google classroom link and was unable to attend today's class.
- **Algebra**: Petitioner's new classroom is already on Unit 9.3, whereas his previous class was on Unit 9.2.

Please let us know how the school will be making up for the lost instruction, and the potential impact on Petitioner's grades caused by the ongoing disruption to his education.

Many thanks,
Dan

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803 Hearst Avenue
Berkeley, CA 94710
(510) 849-1389 (phone)
(510) 295-2680 (fax)

dan@drothlaw.com
www.drothlaw.com

On Tue, May 11, 2021 at 9:04 PM Dan Roth <dan@drothlaw.com> wrote:

That is great news - thank you, Ms. Keefer.

Best,
Dan

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(510) 295-2680 (fax)
dan@drothlaw.com
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On Tue, May 11, 2021 at 8:58 PM Megan Keefer <mkeefer@srvusd.net> wrote:

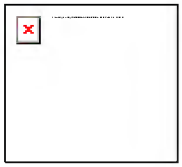
Dear Mr. Roth,

Thank you for the confirmation. Petitioner will receive emails from either his teachers or me with links to his remote classes either tonight or tomorrow morning.

Sincerely,

Megan Keefer
Principal
California High School

CHS Educore Virtual Peer Tutoring Program
SRVUSD Reopening Together
SRVUSD Instructional Technology Webpage
Parent/Student IT Help
Student Password Support
Staff IT Help



On Tue, May 11, 2021 at 8:52 PM Dan Roth <dan@drothlaw.com> wrote:

Dear Ms. Keefer,

Thank you so much. Yes, please do everything necessary to facilitate Petitioner beginning remote learning tomorrow.

Many thanks,
Dan

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(510) 849-1389 (phone)
(510) 295-2680 (fax)
dan@drothlaw.com
www.drothlaw.com

On Tue, May 11, 2021 at 8:47 PM Megan Keefer <mkeefer@srvusd.net> wrote:

Dear Mr. Roth,

Yes, I called Petitioner Parent this evening asking her for approval to change Petitioner's schedule to begin remote learning tomorrow. Would you like for me to facilitate this? I will need to have teachers email him with links to provide Petitioner with access to the remote classrooms. Please let me know if this is something you would like to happen.

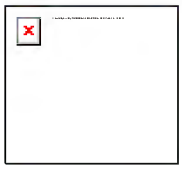
I will include both Petitioner and you in future communications.

Sincerely,

Megan Keefer
Principal
California High School

CHS Educore Virtual Peer Tutoring Program
SRVUSD Reopening Together
SRVUSD Instructional Technology Webpage
Parent/Student IT Help
Student Password Support

Staff IT Help



On Tue, May 11, 2021 at 8:14 PM Dan Roth <dan@drothlaw.com> wrote:

Dear Ms. Litra,

Thank you - we appreciate the District moving forward.

Principal Keefer, I understand you called Petitioner Parent this evening to inquire about this matter, and confirm whether or not this was what the family wanted. As Petitioner's counsel, I ask that you please include both him and me on all communications. If there needs to be a call this evening in order to ensure Petitioner's attendance via remote learning tomorrow, we can make that happen.

Many thanks,
Dan

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Berkeley, CA 94710
(510) 849-1389 (phone)
(510) 295-2680 (fax)
dan@drothlaw.com
www.drothlaw.com

On Tue, May 11, 2021 at 6:18 PM Jacqueline M. Litra <jlitra@f3law.com> wrote:

Dear Mr. Roth:

You are correct regarding the PE teacher. That was my mistake in preparing my prior email to you.

Period	Class	Teacher	Details	

A	Biology	New period, same teacher	
1	Spanish II	No change	
2	English 9	New period, new teacher	
3	Theatre 1	New period, same teacher	
4	PE 9	New period, new teacher	
5	Health	New period, new teacher	
6	Algebra 1	New period, new teacher	

The District is working to get this implemented for Respondent to be able to attend remotely tomorrow.

Sincerely,

Jacqueline

Jacqueline M. Litra
Direct: (323) 330-6329 | Mobile: (323) 829-8551
Email: jlitra@f3law.com | Web: www.f3law.com
Please consider the environment before printing this email.

From: Dan Roth <dan@drothlaw.com>
Sent: Tuesday, May 11, 2021 2:26 PM
To: Jacqueline M. Litra <jlitra@f3law.com>
Cc: mkeefer@srvusd.net; Kenneth Nelson <knelson@srvusd.net>; Petitioner >; Petitioner Parent >; Petitioner Parent
Subject: Re: Challenge to Removal of Brady Cruzen; FERPA request - Declaration Attached

EXTERNAL EMAIL

Good afternoon, Ms. Litra,

Thank you for your email and the proposed remote schedule. That schedule will work for now, though of course we maintain our objection to anything short of Petitioner's full-time return to in-person learning. One possible correction: I believe Petitioner's current PE teacher is

Teacher , so new Teacher would represent another change of teacher. Please provide us the logistics needed to get this going. Will Petitioner be able to attend class remotely tomorrow?

Thanks,

Dan

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dan@drothlaw.com
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On Tue, May 11, 2021 at 1:27 PM Jacqueline M. Litra <jlitra@f3law.com> wrote:

Dear Mr. Roth:

Below is a proposed remote learning schedule for Respondent and his parents to consider:

Period	Class	Teacher	Details	
A	Biology		New period, same teacher	
1	Spanish II		No change	
2	English 9		New period, new teacher	
3	Theatre 1		New period, same teacher	
4	PE 9		New period, same teacher	
5	Health		New period, new teacher	
6	Algebra 1		New period, new teacher	

If Respondent and his parents would like to proceed with this schedule change, the District will implement the changes.

Please let me know if you have any questions.

Sincerely,

Jacqueline

Jacqueline M. Litra
Direct: (323) 330-6329 | Mobile: (323) 829-8551
Email: jlitra@f3law.com | Web: www.f3law.com
Please consider the environment before printing this email.

From: Dan Roth <dan@drothlaw.com>
Sent: Tuesday, May 11, 2021 10:50 AM
To: Jacqueline M. Litra <jlitra@f3law.com>
Cc: mkeefer@srvusd.net; Kenneth Nelson <knelson@srvusd.net>
Subject: Re: Challenge to Removal of Petitioner ; FERPA request - Declaration Attached

EXTERNAL EMAIL

Dear Ms. Litra,

Thank you for speaking with me yesterday afternoon. I will write separately to confirm the details of our conversation, but want to move forward with the most urgent matter: the district's willingness to permit Petitioner to attend classes via remote learning. Petitioner would like to move forward with that. As you and I discussed, the school will put him in different classes from the four that he currently shares with the Complainant. While I do not believe there is any basis for Petitioner to be removed from class at all, our number one goal is to mitigate some of the loss to his education. Please let us know what steps we need to take so that Petitioner can be returned to classroom learning as soon as possible.

Thank you also for pointing out that the declaration of Petitioners that I sent was unsigned. That was my error, as I noted on our call last night. As you can see from the attached, Petitioner signed the declaration digitally on May 4 at 10:29 PDT.

Best regards,

Dan

LAW OFFICE OF DAN ROTH

803 Hearst Avenue
Berkeley, CA 94710
(510) 849-1389 (phone)
(510) 295-2680 (fax)
dan@drothlaw.com
www.drothlaw.com

On May 4, 2021, at 6:33 PM, Jacqueline M. Litra <jlitra@f3law.com> wrote:

Dear Mr. Roth:

The purpose of emergency removal is to address imminent threats posed to any individual's physical health or safety arising out of Title IX Sexual Harassment allegations. Emergency removal is not disciplinary and is not a determination of responsibility for Title IX Sexual Harassment allegations. Respondents are deemed not responsible for the allegations until a determination regarding responsibility is reached at the conclusion of the Title IX Sexual Harassment grievance process. If the Title IX decisionmaker determines a respondent is responsible for violation of Title IX, the District may impose disciplinary sanctions at that point.

Consistent with the Title IX regulations, Principal Keefer under took an individualized safety and risk analysis and determined Respondent to be an immediate threat to the physical safety of student(s) or other individual(s) arising from the allegations of sexual assault. As result, Respondent was eligible for emergency removal. Consistent with federal law, Respondent (and his parent) was notified of the emergency removal and of his opportunity challenge it. (See 34 CFR § 106.44(c).)

Prior to Principal Keefer's determination, Respondent did allege that Complainant was fabricating the allegations against him because he broke up with Complainant. Principal Keefer considered this allegation in making her assessment and determination. Accordingly, her assessment and determination stand.

Supportive measures remain available to Respondent. The Title IX Coordinator can meet with Respondent discuss those measures further.

Please let me know if you have any questions.

Sincerely,

Jacqueline Litra

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Direct: (323) 330-6329 | Mobile: (323) 829-8551
Email: jlitra@f3law.com | Web: www.f3law.com
Please consider the environment before printing this email.

From: Dan Roth <dan@drothlaw.com>
Sent: Tuesday, May 4, 2021 4:37 PM
To: Jacqueline M. Litra <jlitra@f3law.com>
Cc: Petitioner >; Petitioner Parent >
Subject: Re: Challenge to Removal of Petitioner ; FERPA request - Declaration Attached

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Dear Ms. Litra,

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Sincere regards,

Dan Roth

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> Dear Ms. Keefer,
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> Please contact me today to discuss my email from Friday. I am attaching Petitioner's sworn declaration, signed under penalty of perjury, which should provide everything you need to immediately reinstate him to class. Petitioner is not a danger to Complainar or to anyone else. As you can see from the April 13 text messages included in the declaration, Petitioner broke up with Complainar on April 13 and refused to get back together with her despite her pleading with him. It appears that in her upset, she fabricated this heinous allegation against him. Further depriving Petitioner of his education in this context violates his rights under Title IX and the U.S. and California constitutions.
>
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> Sincere regards,
>
> Dan Roth

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On Fri, Apr 30, 2021 at 12:11 PM Dan Roth <dan@drothlaw.com> wrote:

Dear Ms. Keefer,

I represent California High School student Petitioner . Last week, you provided Petitioner the attached letter, indicating that "the District has undertaken an individualized safety and risk analysis and has determined that [he] pose[s] an immediate threat to the physical health or safety of a student or other individual." As a result, Petitioner is now receiving no instruction - either live or remote - but is instead completing his freshman year of high school doing independent learning. Petitioner has been removed from his academic environment and deprived of his educational opportunities. This is effectively a suspension, which as a matter of long-standing federal law requires meaningful notice and a hearing - neither of which Petitioner has been provided.

In order to mitigate this violation of Petitioner s clearly-established constitutional rights, I ask that you please take immediate action to reinstate Petitioner to his rightful place alongside his fellow students for the remainder of the school year.

Pursuant to FERPA, please also provide Petitioner and me access to review all records constituting the "individualized safety and risk analysis," including all "substantial evidence leading to allegations of sexual assault(s) to students while on campus." *See* 20 U.S.C. § 1232g(a)(4)(A).

Sincere regards,

Dan Roth

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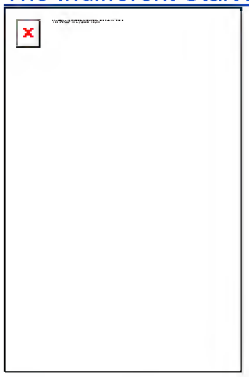
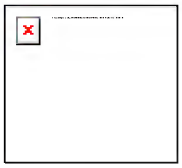
E-mail is covered by the Electronic Communications Privacy Act, 18 USC SS 2510-2521 and is legally privileged.

--

Tucker Farrar
Assistant Principal
Supporting Students A-G
California High School
Pronouns: He/Him/His
Educore Peer Tutoring @ CHS

Currently Reading/Listening
The Indifferent Start Above, Daniel James Brown





"Start by doing what's necessary; then do what's possible; and suddenly you are doing the impossible." - Francis of Assisi

[Exempt From Filing Fee
Government Code § 6103]

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dmishook@f3law.com
Jacqueline Litra, SBN 311504
jlitra@f3law.com
70 Washington Street, Suite 205
Oakland, California 94607
Phone: 510-550-8200
Fax: 510-550-8211

Attorneys for SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT, MEGAN KEEFER, KEITH ROGENSKI

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA, MARTINEZ

JOHN DOE, et al.,

Petitioner,

vs.

MEGAN KEEFER, et al.,

Respondents.

CASE NO. NC21-1450

DECLARATION OF DAVE KRAVITZ IN SUPPORT OF OPPOSITION TO EX PARTE REQUEST TO STAY EMERGENCY REMOVAL

Date: August 9, 2021
Time: 1:30 p.m.
Dept.: 7

The Hon. Hon. Barry Baskin, Dept. 7

Trial Date: None Set

I, Dave Kravitz, declare as follows:

1. I have been the Title IX Coordinator for SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT ("District") since June 11, 2021. If called as a witness, I could and would competently testify to all facts within my personal knowledge except where stated upon information and belief.

2. I am familiar with the administrative action involving John Doe (whose name is known to me). The Title IX administrative action is ongoing and is still at the investigative stage.

3. The District's 2020-2021 school year ended for students on June 3, 2021.

Fagen Friedman & Fulfrost, LLP
70 Washington Street, Suite 205
Oakland, California 94607
Main 510-550-8200 • Fax 510-550-8211

4. I am scheduled to meet with Petitioner regarding additional supportive measures available to him during the 2021-2022 school year.

5. While the emergency removal is in effect, the District will implement supportive measures to support Petitioner in accessing the District's educational programs remotely. The District will allow Petitioner to choose between enrolling in the District's Virtual Academy or its Venture School. Both options offer a high quality District education to students who need remote instruction and provide a UC-aligned (e.g., "A-G") curriculum. Virtual academy provides classes that meet five days per week, online, in a remote classroom with a credentialed District teacher following a daily bell schedule. This program, instituted due to the COVID-19 Pandemic, offers the same academic opportunities to students in an online environment. Venture School offers a traditional independent study program outside of the traditional school setting as a flexible, alternative method of study, equal in quality and quantity to what students receive in traditional in-person school. Study and assigned work in this program takes about the same amount of time as in-person school and uses District approved curriculum, but the schedule of the school day is less restricted. All courses are taught by credentialed District teachers who meet with each student at least once a week. The District has a school counselor and social worker available to provide support and guidance in the areas of academic and social/emotional support.

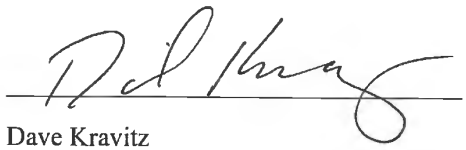
6. If Petitioner is deemed not responsible for the alleged sexual harassment at the conclusion of the Title IX process, he will be invited to return to traditional in-person instruction.

7. The parent of Jane Roe recently informed me that she was concerned about Petitioner attending school with Jane Roe and requested advanced notice and opportunity to request a transfer for Jane Roe if Petitioner would be returning to in-person instruction at the same school as Jane Roe.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 6th day of August, 2021, at Danville, California.

Fagen Friedman & Fulfrost, LLP
70 Washington Street, Suite 205
Oakland, California 94607
Main 510-550-8200 • Fax 510-550-8211



Dave Kravitz

272-180/6158204.1

Fagen Friedman & Fulfrost, LLP
70 Washington Street, Suite 205
Oakland, California 94607
Main 510-550-8200 • Fax 510-550-8211

PROOF OF SERVICE

Doe v. Keefer et al.
Contra Costa Superior Court Case No. NC21-1450

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Alameda, State of California. My business address is 70 Washington Street, Suite 205, Oakland, CA 94607.

On August 6, 2021, I served true copies of the following document(s) described as **OPPOSITION TO EX PARTE MOTION TO STAY EMERGENCY REMOVAL; DECLARATION OF JACQUELINE LITRA; DECLARATION OF DAVE KRAVITZ** on the interested parties in this action as follows:

Mark M. Hathaway
HATHAWAY PARKER
445 S. Figueroa Street, 31st Floor
Los Angeles, CA 90071
Telephone: (213) 529-9000
Facsimile: (213) 529-0783
E-Mail: mark@hathawayparker.com

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent from e-mail address dmishook@f3law.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 6, 2021, at Oakland, California.

David K. Mishook

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EXHIBIT 8

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Attorneys for Petitioner John Doe

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR CONTRA COSTA COUNTY

JOHN DOE, an individual, minor through his parent and next friend JANE DOE, Petitioner, v. MEGAN KEEFER, an individual, in her official capacity as Principal, California High School and Title IX Coordinator Designee, California High School; KEITH ROGENSKI, an individual, in his official capacity as Assistant Superintendent of Human Resources; SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT, a California corporation; and DOES 1 through 20, inclusive Respondents.	Case No.: NC21-1450 [Hon. Barry Baskin, Dept. 7] PETITIONER'S REPLY TO OPPOSITION TO APPLICATION FOR STAY ORDER Date: August 9, 2021 Time: 1:30 p.m. Dept: 7

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REPLY MEMORANDUM OF POINTS AND AUTHORITIES

I. THE FINAL EMERGENCY REMOVAL ORDER IS REVIEWABLE BY THIS COURT AND SUBJECT TO WRIT OF MANDATE RELIEF.

Respondents concede that the "emergency removal" decision is final and will remain in place indefinitely. (Opposition 2:25-26.)

Petitioner brought his *ex parte* application after informal efforts to attend in-person classes starting on August 10, 2021 were fruitless.

A petitioner for relief in administrative mandamus is pursuing a remedy which fundamentally lies in equity. (*City of Mountain View v. Superior Court* (1975) 54 Cal.App.3d 72, 81-82.)

A. CODE CIV. PROC., § 1094.5.

Administrative mandamus is available for review of "any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer . . ." (Code Civ. Proc. § 1094.5, subd. (a).)

Here, the relevant procedural background is:

1) The Emergency Removal order was issued on April 22, 2021. (Motion Exhibit 4, p. 1.)
2) Respondents held a hearing[1] on the Emergency Removal on May 19, 2021. (Exhibit 4, p. 1.)
3) On May 21, 2021, Respondents upheld their determination that Petitioner "poses an immediate threat to the physical health or safety of a student(s) or other individual(s)." (Exhibit 4, p. 1; see Opposition 2:25-26.)

Respondents' Emergency Removal order decision is now final. Petitioner has no further avenue of administrative appeal to exhaust and Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, other than the relief sought in his Petition.

---

[1] Purely documentary proceedings can satisfy the hearing requirement of Code Civ. Proc., § 1094.5, so long as the agency is required to accept and consider evidence from interested parties before making its final decision. (See *Poschman v. Dumke* (1973) 31 Cal. App. 3d 932, 938, disapproved on other grounds in *Armistead v. State Personnel Board* (1978) 22 Cal. 3d 198, 204, fn. 3; *Mahdavi v. Fair Employment Practice Com.* (1977) 67 Cal. App. 3d 326, 334 [compilation of cases holding that a hearing within the meaning of Code of Civil Procedure section 1094.5 may be a purely documentary proceeding]; *Friends of the Old Trees v. Department of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1391.)

B. CODE CIV. PROC., § 1085

Ordinary mandate is a traditional remedy by which a court compels an inferior tribunal to perform a legally required duty. (Code Civ. Proc., § 1085.) Here the duty is to allow Petitioner to attend his public high school.

Respondents' citation to *Kumar v. National Medical Enterprises, Inc.* (1990) 218 Cal.App.3d 1050, 1052, is not instructive. In *Kumar,* a doctor challenged the trial court's remand and seeking unconditional reinstatement of full staff privileges. The Court of Appeal dismissed the appeal, holding that the doctor had no right to appeal the trial court's order, since after the trial court set aside the decision of the hospital's governing board of directors, there was no final administrative decision from which he could appeal. Here, the final Emergency Removal order remains with no further administrative appeal possible.

C. EMERGENCY REMOVAL UNDER TITLE IX FEDERAL REGULATION 34 C.F.R. 106.44, SUBD. (C).

> (c) Emergency removal. Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.
>
> (34 C.F.R. § 106.44, subd. (c).)

Respondents issued their Emergency Removal order on April 22, 2021 based on the allegations of sexual harassment; however, Petitioner timely challenged the removal order as lacking any evidentiary support that Petitioner posed that an immediate threat to the physical health or safety of any student or other individual. Respondents presented no evidence that Petitioner poses a threat and presents no evidence in their Opposition filed this morning. Respondents' determination that Petitioner "poses an immediate threat to the physical health or safety of a student(s) or other individual(s)" in the absence of any such showing, is arbitrary and capricious.

D. OFFICE FOR CIVIL RIGHTS ("OCR") COMPLAINT PROVIDES NO PRIVATE RIGHT OF ACTION AND NO REMEDY FOR IMPROPER REMOVAL WITH NO EMERGENCY AND NO EVIDENCE THAT STUDENT POSES AN IMMEDIATE THREAT.

Respondents are incorrect that "[e]ven interim decisions may be redressed through a complaint with OCR, acting on behalf of DOE. (34 C.F.R. § 106.3 (a).)" (Opposition 5:5-6.) The Dept. of Education's Office for Civil Right reviews SRVUSD's process but provides no private right of action and no remedy to a student. 34 C.F.R. 106.3 provides:

> § 106.3 Remedial and affirmative action and self-evaluation.
>
> (a) Remedial action. If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity under this part, or otherwise violated this part, such recipient must take such remedial action as the Assistant Secretary deems necessary to remedy the violation, consistent with 20 U.S.C. 1682.
>
> (b) Affirmative action. In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex. Nothing herein shall be interpreted to alter any affirmative action obligations which a recipient may have under Executive Order 11246.
>
> (c) Self-evaluation. Each recipient education institution shall, within one year of the effective date of this part:
>
> > (1) Evaluate, in terms of the requirements of this part, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and non-academic personnel working in connection with the recipient's education program or activity;
> >
> > (2) Modify any of these policies and practices which do not or may not meet the requirements of this part; and
> >
> > (3) Take appropriate remedial steps to eliminate the effects of any discrimination which resulted or may have resulted from adherence to these policies and practices.
>
> (d) Availability of self-evaluation and related materials. Recipients shall maintain on file for at least three years following completion of the evaluation required under paragraph (c) of this section, and shall provide to the Assistant Secretary upon request, a description

of any modifications made pursuant to paragraph (c) (ii) of this section and of any remedial steps taken pursuant to paragraph (c) (iii) of this section.

(34 C.F.R. § 106.3.)

E. RIGHT TO DUE PROCESS AND FAIRNESS APPLIES TO K-12 AND POST-SECONDARY EDUCATION.

The Fourteenth Amendment of the United States Constitution guarantees the right to procedural due process. It is triggered when a state agency seeks to deprive a person of protected interests. (*Goss v. Lopez* (1975) 419 U.S. 565, 572.) A state cannot deprive a person of a public education without providing sufficient procedural due process. (*Coplin v. Conejo Valley Unified School District* (1995) 903 F. Supp. 1377.) "California has enshrined the right to education within its own Constitution. Accordingly, "established California case law holds that there is a fundamental right of equal access to public education, warranting strict scrutiny of legislative and executive action that is alleged to infringe on that right." (*O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1465.)" (*Collins v. Thurmond* (2019) 41 Cal.App.5th 879, 896.)

Code Civ. Proc., § 1094.5 requires that (1) there be "a fair trial," which "means that there must have been 'a fair administrative hearing'"; (2) the proceeding be conducted "in the manner required by law"; (3) the decision be "supported by the findings"; and (4) the findings be "supported by the weight of the evidence," or where an administrative action does not affect vested fundamental rights, the findings must be "supported by substantial evidence in the light of the whole record."[2] (Code Civ. Proc., § 1094.5 (a)-(c).) Here, Petitioner's fundamental right to access to his public-school educational programs and activities are denied by Respondents' improper administrative removal order.

II. LEGAL STANDARD FOR ISSUANCE OF STAY.

Petitioner's moving paper provide the correct standard for issuance of a stay under Code Civ. Proc., § 1094.5. The court has discretion to issue the stay, unless Respondents can satisfy the Court that a stay

[2] The Court may refrain from evaluating the sufficiency of evidence if there are errors in the administrative process. (*Doe v. Regents of University of California* (2018) 28 Cal.App.5th 44, 61.)

is against the public interest, which Respondents cannot do as they have presented no evidence of an emergency and no evidence that Petitioner poses an immediate threat.

III. CONCLUSION

Based on the foregoing, the moving papers and the Petition, Petitioner respectfully requests that this Court issue a stay of Respondents final Emergency Removal administrative order or decision.

HATHAWAY PARKER

DATED: August 6, 2021 By: _____

MARK M. HATHAWAY
JENNA E. PARKER
Attorney for Petitioner

PROOF OF SERVICE

STATE OF CALIFORNIA)
)ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 445 South Figueroa Street, 31st Floor, Los Angeles, CA 90071

On August 6, 2021, I served the foregoing document described PETITIONER'S REPLY TO OPPOSITION TO APPLICATION FOR STAY ORDER on all interested parties listed below by transmitting to all interested parties a true copy thereof as follows:

Jacqueline M. Litra
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ATTORNEYS FOR RESPONDENTS

☐ **BY FACSIMILE TRANSMISSION** from FAX number (213) 529-0783 to the fax number set forth above. The facsimile machine I used complied with Rule 2003(3) and no error was reported by the machine. Pursuant to Rule 2005(i), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this declaration.

☐ **BY MAIL** by placing a true copy thereof enclosed in a sealed envelope addressed as set forth above. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

☐ **BY PERSONAL SERVICE** by delivering a copy of the document(s) by hand to the addressee or I cause such envelope to be delivered by process server.

☐ **BY EXPRESS SERVICE** by depositing in a box or other facility regularly maintained by the express service carrier or delivering to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served.

☒ **BY ELECTRONIC TRANSMISSION** by transmitting a PDF version of the document(s) by electronic mail to the party(s) identified on the service list using the e-mail address(es) indicated.

☒ I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on August 6, 2021 in Los Angeles, California

Adriana Recendez

EXHIBIT 9

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Attorneys for Petitioner

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF CONTRA COSTA

JOHN DOE, an individual, minor through his parent and next friend JANE DOE, Petitioner, v. MEGAN KEEFER, an individual, in her official capacity as Principal, California High School and Title IX Coordinator Designee, California High School; KEITH ROGENSKI, an individual, in his official capacity as Assistant Superintendent of Human Resources; SAN RAMON VALLEY UNIFIED SCHOOL DISTRICT, a California corporation; and DOES 1 through 20, inclusive Respondents.	Case No.: NC21-1450 [Hon. Barry Baskin, Dept. 7] **NOTICE OF ORDER DENYING PETITIONER'S *EX PARTE* APPLICATION FOR STAY OF ADMINISTRATIVE DECISION PENDING COURT REVIEW OF WRIT PETITION** Date: August 9, 2021 Time: 1:30 p.m. Dept: 7

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 9, 2021 at 1:30 p.m., Petitioner's *ex parte* application for stay of administrative decision pending court review of writ petition came on for hearing before Honorable Barry Baskin in Department 7. Mark Hathaway, of Hathaway Parker,

and Dan Roth, of Law Office of Dan Roth, appeared on behalf of Petitioner. David R. Mishook and Jacqueline M. Litra, of Fagen Friedman & Fulfrost, LLP, appeared on behalf of Respondent. Judge Barry Baskin, having considered the parties' pleadings and oral arguments, denied Petitioner's e*x parte* application for stay of administrative decision pending court review of writ petition.

No court reporter was present and there is no transcript of the *ex parte* hearing.

HATHAWAY PARKER

Dated: August 10, 2021 By: _____

Mark M. Hathaway
Jenna E. Parker
Attorneys for Petitioner

PROOF OF SERVICE

STATE OF CALIFORNIA)
)ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 445 South Figueroa Street, 31st Floor, Los Angeles, CA 90071.

On August 10, 2021, I served the foregoing document described NOTICE OF ORDER DENYING PETITIONER'S EX PARTE APPLICATION FOR STAY OF ADMINISTRATIVE DECISION PENDING COURT REVIEW OF WRIT PETITION on all interested parties listed below by transmitting to all interested parties a true copy thereof as follows:

Jacqueline M. Litra Fagen Friedman & Fulfrost LLP 6300 Wilshire Blvd Ste 1700 Los Angeles, CA 90048-5219 Phone: (323) 330-6300 Fax: (323) 330-6311 Email: jlitra@f3law.com ATTORNEYS FOR RESPONDENTS	David Mishook Fagen Friedman & Fulfrost LLP 70 Washington Street, Suite 205 Oakland, California 94607 Phone: 510.550.8200 Fax: 510.550.8211 Email: dmishook@f3law.com ATTORNEYS FOR RESPONDENTS

☐ **BY FACSIMILE TRANSMISSION** from FAX number (213) 529-0783 to the fax number set forth above. The facsimile machine I used complied with Rule 2003(3) and no error was reported by the machine. Pursuant to Rule 2005(i), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this declaration.

☐ **BY MAIL** by placing a true copy thereof enclosed in a sealed envelope addressed as set forth above. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

☐ **BY PERSONAL SERVICE** by delivering a copy of the document(s) by hand to the addressee or I cause such envelope to be delivered by process server.

☐ **BY EXPRESS SERVICE** by depositing in a box or other facility regularly maintained by the express service carrier or delivering to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served.

☒ **BY ELECTRONIC TRANSMISSION** by transmitting a PDF version of the document(s) by electronic mail to the party(s) identified on the service list using the e-mail address(es) indicated.

☒ I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on August 10, 2021 in Los Angeles, California

Adriana Recendez

State of California)
County of Los Angeles)
)

Proof of Service by:
US Postal Service
Federal Express

I, Stephen Moore , declare that I am not a party to the action, am over 18 years of age and my business address is: 626 Wilshire Blvd., Suite 820, Los Angeles, California 90017; ca@counselpress.com

On 8/11/2021 declarant served the within: Exhibits in Support of Petition for Writ of Supersedeas, Prohibition and/or Other Appropriate Relief **upon:**

Copies	FedEx	USPS	
ELECTRONICALLY SERVED VIA TRUEFILING ON ALL PARTIES LISTED ON THE ATTACHED SERVICE LIST.			

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the address(es) designated by said attorney(s) for that purpose by depositing **the number of copies indicated above,** of same, enclosed in a postpaid properly addressed wrapper in a Post Office Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of California, or properly addressed wrapper in an Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of California

I further declare that this same day the **original and** copies has/have been hand delivered for filing OR the **original and** copies has/have been filed by third party commercial carrier for next business day delivery to:

ELECTRONICALLY FILED VIA TRUEFILING:

CALIFORNIA COURT OF APPEAL
First Appellate District, Pre-Division (Writs)
350 McAllister Street, First Floor
San Francisco, California 94102

I declare under penalty of perjury that the foregoing is true and correct:

Signature: /s/ Stephen Moore, Senior Appellate Paralegal, Counsel Press Inc.; ca@counselpress.com

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