

A STUDENT PRESS LAW CENTER WHITE PAPER

## FERPA and access to public records

The clash between student privacy interests and the public's right to newsworthy information about the workings of schools and colleges can be a frustrating one for journalists at all levels. Many of the arguments raised against disclosure of government records turn out to be based on myths and misunderstandings about what are – and are not – confidential student records.

A 1974 federal law, the Family Educational Rights and Privacy Act (“FERPA”), requires schools to enact and enforce policies to safeguard the confidentiality of students’ “education records.”<sup>1</sup> Virtually every court that has been asked to define “education records” has applied a limited and common-sense understanding of the term, like this definition by a Maryland appeals court:

[FERPA] was not intended to preclude the release of any record simply because the record contained the name of a student. The federal statute was obviously intended to keep private those aspects of a student’s educational life that relate to academic matters or status as a student.<sup>2</sup>

Or, as a North Carolina judge memorably declared in an April 2011 memorandum: “FERPA does not provide a student with an invisible cloak so that the student can remain hidden from public view while enrolled at (college).”<sup>3</sup>

Nevertheless, schools and colleges persistently cite FERPA to deny journalists’ requests for public records, even when the records have little relation to a student’s “educational life,” including:

- Parking tickets issued to student athletes.<sup>4</sup>
- The minutes and recordings of public committee meetings.<sup>5</sup>
- The findings of investigations into academic dishonesty in college athletic programs.<sup>6</sup>
- The amount of taxpayer money paid out to a family that filed a liability suit against a school district.<sup>7</sup>
- Names of recipients of complementary football tickets.<sup>8</sup>

This paper sets out to “de-mythify” federal privacy law, and to help everyone involved with FERPA – those responding to requests for information as well as those making requests – understand what types of information should legitimately be withheld from disclosure. Courts have addressed the FERPA status of many commonly-requested school records, and generally have ruled against blanket claims of secrecy and in favor of at least partial disclosure.

### **Background on public records laws**

Every state has a public-records law requiring state and local government agencies – including public schools and colleges (though not private ones) – to disclose upon request the documents they maintain.<sup>9</sup> These laws go by different names – “sunshine laws,” freedom-of-information acts, or open-records acts – but all of them work in basically the same way: government agencies must, within a reasonable time (or within a specified number of days) allow inspection and copying of any type of medium that records information. The requester need not provide any justification for wanting the information, and if access is denied, the burden is on the government agency to point to a justification in the law. Refusal to produce public records can result in fines, awards of attorney fees, and under some state laws, even jail time.

Courts generally give state open-records laws the broadest possible interpretation, and any exception to disclosure is applied as narrowly as possible. The benefit of the doubt is supposed to go to the party requesting access.

Even without FERPA, there are safeguards in place to deter the release and publication of non-newsworthy information about private individuals. Every state open-records act excludes certain categories of records from disclosure because legislators have decided there is no overriding public interest in the information. These exclusions commonly include medical information, confidential attorney-client communications, and “identity theft” information such as Social Security numbers. And almost every state open-records act incorporates a discretionary balancing test that enables an agency to refuse a request for records if disclosure would constitute an unwarranted invasion of individual privacy. Moreover, every state recognizes a legal claim for invasion of privacy if severely embarrassing and non-newsworthy personal information is published without consent.

### **FERPA: What it means, how it works**

The Family Educational Rights and Privacy Act initially became law in November 1974. Sen. James Buckley of New York presented the provision as a floor amendment in response to “growing evidence of the abuse of student records across the nation.”<sup>10</sup>

Buckley had two main concerns. First, schools traditionally had provided parents with very limited access to student files. This left parents with little opportunity to correct inaccurate and stigmatizing information in their child’s records, even when schools relied on those records to classify or punish students.<sup>11</sup> Second, many schools lacked consistent policies governing access to student records and granted third parties – such as police and health departments – access to sensitive student records even while denying parents the same access.<sup>12</sup>

FERPA was intended to address these concerns by conditioning the receipt of federal funds on the requirement that schools grant parents (and students 18 or older) access to their own records. The law also withholds federal funds from any school with “a policy or practice of permitting the release of education records” or of the “personally identifiable information” contained in those records, unless the adult student or parent has consented or another exception in the law applies.<sup>13</sup> FERPA applies to any educational institution that receives any federal funding, which includes all public schools and the vast majority of private institutions.

The act defines “education records” as “those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.”<sup>14</sup> In other words, there are two essential criteria for a document to be confidential under FERPA: it must “directly relate” to a student, and it must be “maintained” by the institution. The law explicitly exempts several types of documents from the definition of “education records,” including teachers’ notes and records of non-student employees.<sup>15</sup>

The “directly relate” prong of FERPA is widely misunderstood or ignored, but it substantially narrows the scope of what FERPA covers. To be a confidential FERPA record, a document must not merely mention a student; it must actually be about that student. For example, in a January 2011 ruling, a Florida state court ordered the University of Florida to release tapes and transcripts of Student Senate meetings that the college was withholding under FERPA. The judge ruled that, although the documents contained the names and voices of students, they were not the records “of” any particular student for FERPA purposes.<sup>16</sup>

Significantly, Congress amended FERPA in 1992 expressly to remove privacy protection for records created by a police or campus security agency “for the purpose of law enforcement.” As a result of this change, it is illegitimate for a police or public safety department to cite FERPA in refusing to release an arrest record, an incident report, or the identities of students named in those documents.<sup>17</sup>

Congressional discussion in the course of amending the law in December 1974 sheds some light on the intentions of FERPA’s main sponsors, Buckley and Rhode Island Sen. Claiborne Pell. In addition to Buckley and Pell’s formal joint statement explaining the amendments, there was an enlightening exchange between Pell and New Hampshire Sen. Thomas McIntyre. McIntyre asked Pell to confirm McIntyre’s understanding that “education record” was intended to encompass “everything in institutional records maintained for each student in the normal course of business and used by the institution in making decisions that affect the life of the student.”<sup>18</sup> Pell agreed with McIntyre’s understanding of the law’s intent.

This understanding comports with Buckley’s original concern that parents needed more access to the records schools used to make academic and disciplinary decisions about students. It also suggests the law was not intended to apply to documents that only tangentially refer to students or that have no bearing

on schools' decisions about students.

The FERPA statute recognizes a class of basic demographic information known as "directory information," that can safely be released without invading privacy.<sup>19</sup> This includes such data as a student's name, address, phone number, honors and awards, and other basic demographics. Schools must tell students (or the parents of minor students) what will be disclosed and give them an opportunity to submit an opt-out form; for those who opt out, even directory information is not to be disclosed.

Schools can also freely release information about students over 18 after their deaths, since the right of privacy does not survive an individual's death.<sup>20</sup> (The Department of Education has left some ambiguity with regard to a child who dies before reaching 18. Since the right to bring an invasion-of-privacy claim belongs to a child's parents until the child turns 18, the Department may take the position that the FERPA privacy right remains with the parents even after the death of a minor child.)

### How FERPA is enforced

The U.S. Department of Education ("DOE") is in charge of enforcing FERPA. The DOE publishes binding rules for FERPA compliance in the Federal Register. It also issues opinion letters that, while not legally binding, serve as authoritative guidance as to what the Department does and does not consider a FERPA violation.

In a 2002 ruling, the U.S. Supreme Court held that individual citizens who believe their educational records have been released improperly have no right to bring suit under FERPA.<sup>21</sup> The only remedy for a FERPA violation is through a DOE enforcement action. Financial penalties are to be imposed only if, after issuing a notice of violation and a plan of correction, the Department determines that the school will refuse to comply with FERPA voluntarily in the future.<sup>22</sup> To date, the Department has never imposed a financial penalty on anyone for a FERPA violation.

### What are "education records"?

The Supreme Court has rarely been called upon to interpret FERPA, but in one of its few FERPA rulings, the Court made clear that not all records concerning students that contain student identities are confidential "education records."

In *Owasso Independent School District v. Falvo*,<sup>23</sup> a parent alleged that an Oklahoma school district's policy of allowing students to grade each others' quiz papers and call out their own grades in class violated FERPA. A U.S. district judge held that peer grading did not violate FERPA because grades put on papers by another student are not records "maintained by an educational agency or institution or by a person acting for such an agency or institution." Thus, the court concluded, such grades are not "education records" under the act. The Tenth Circuit U.S. Court of Appeals reversed, reasoning that if Congress prohibits teachers from discussing students' grades once they are recorded in grade books, then it makes no sense to allow the disclosure immediately beforehand. But the Supreme Court rejected the Court of Appeals'

logic, stating that "FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar, not individual assignments handled by many student graders in their separate classrooms."<sup>24</sup>

In a more recent case, a federal district court in California followed the logic of *Owasso*, and decided that e-mails about

<b>MYTH</b> Any document kept by a school or college that contains a student's name is a confidential education record.
FERPA classifies records as confidential only if they "directly relate" to an identifiable student. Courts have ordered the release of records including parking tickets and complaints against school employees – even though the records mention students – because they are not the "education records" of particular students.
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students stored on individual teachers' computer hard drives were not "education records" because the e-mails were not centrally "maintained" by the school – even though some of the e-mails undoubtedly referred to identifiable students' academic performance.<sup>25</sup> "FERPA does not contemplate that education records are maintained in numerous places," the judge wrote, echoing the Supreme Court in *Owasso*.

Similarly, an Arizona state-court judge ruled in May 2011 that the Arizona Republic newspaper was entitled to internal memos and emails from Arizona's Pima Community College concerning former Pima student Jared Loughner, who was charged in the January 2010 mass shootings in Tucson that gravely wounded U.S. Rep. Gabrielle Giffords. The judge decided that emails between individual college employees mentioning Loughner were not FERPA records because they were not centrally maintained by the college, and in fact were capable of being deleted by any of the recipients at any time.<sup>26</sup>

The *Owasso* case is especially significant for those seeking records from student government associations or similar student organizations. Although some student governments have attempted to claim that their correspondence and meeting records are confidential unless every participant executes a FERPA waiver,<sup>27</sup> there is no reason to think this is the case. Records created by students and kept by student organizations are not records of the educational institution, and under *Owasso*, they should be exempt from FERPA.

Significantly, the Department of Education filed a brief in the *Owasso* case laying out a very limited view of what qualifies as a FERPA education record:

The designation of a document as an education record under FERPA means not only that it is subject to restrictions against release without parental consent, but also that parents have a right to inspect and review the record, a right to a hearing to challenge the content of the record to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy rights of the student, and a right to insert into such records a written explanation by the parents regarding the content of the records.<sup>28</sup>

**MYTH** Crime reports that identify students are confidential.

Congress amended FERPA in 1992 specifically to prevent schools from withholding crime reports from the public. This applies even if the crime reports are kept by a “campus safety” rather than “police” agency. There is no basis under FERPA for blacking out the names of students from police incident reports.

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This is important because many of the documents that schools and colleges mistakenly believe to be FERPA records – for example, the footage from a security video shot aboard a school bus – cannot qualify as “education records” under the DOE definition. There is no right of a parent to have a hearing to challenge the accuracy of a security video, or to insert explanatory comments into the video. Thus, the Department itself has taken the position that FERPA applies only to the types of records that, in Senator McIntyre’s words, would be “used by the institution in making decisions that affect the life of the student.”

Also significantly, the Department made clear in a 2006 opinion letter that FERPA confidentiality applies to “records” and not to “information.” In other words, if information is gathered from a source other than a confidential school record, then disclosure of the information does not violate FERPA:

FERPA applies to the disclosure of tangible records and of information derived from tangible records. FERPA does not protect the confidentiality of information in general, and, therefore, does not apply to the disclosure of information derived from a source other than education records, even if education records exist which contain that information. As a general rule, information that is obtained through personal knowledge or observation, and not from an education record, is not protected from disclosure under FERPA.<sup>29</sup>

This should be reassuring for student journalists, because it affirms that information students gather during interviews – for example, a student’s discussion of his failing grades or his disciplinary record – is not “FERPA information,” and publication of the information violates no federal prohibition.

**Redacted records and FERPA**

The courts have been clear that, once the identifying information is removed from a document (“redacted”), it ceases to be a FERPA “education record,” and if it is otherwise subject to the state’s open-records law, it must be turned over.

In a 2003 case,<sup>30</sup> an Indiana appeals court directly confronted – and rejected – a university’s claim that one mention of FERPA information required withholding an entire document:

The Trustees claim that, because FERPA contains no provision for redaction of education records, redaction is prohibited. Indeed, the Trustees go so far as to suggest that if a 1000 page document consisting of otherwise discloseable material contained one line regarding a student’s grade, then the entire 1000 page document must be withheld pursuant to FERPA. We reject such an interpretation.<sup>31</sup>

More recently, the Montana Supreme Court ruled in 2007 that the Cut Bank Pioneer Press newspaper was entitled to documents (with names removed) disclosing the punishment imposed on two high school students for shooting people with pellet guns.<sup>32</sup> And a Florida appeals court decided that the records of an NCAA investigation into academic irregularities in the Florida State University athletic program – specifically, the transcript of an NCAA compliance hearing, and a committee report issued in response to the hearing – were not FERPA records because the student-athletes’ names were blacked out.<sup>33</sup>

The Department of Education, however, has given unclear guidance on this subject. The department revised its FERPA rules effective January 2009 to broaden the definition of “education records.” Under the Department’s revised interpretation, schools are to deny requests for records – even with all identifying information removed – if information in the records could be linked to a particular student by someone in the school community with inside knowledge (even if the general public would have no idea of the student’s identity).<sup>34</sup> Nor may schools release even name-withheld records to a requester the school “reasonably believes knows the identity of the student to whom the education record relates.”<sup>35</sup> In explaining these changes, the Department was openly dismissive of concerns that the changes would unduly shield schools from public scrutiny: “FERPA is

**MYTH** If a crime is handled through a student judicial conduct board and not the criminal justice system, then it’s confidential.

While the files of a campus disciplinary body may be confidential FERPA records, an entire crime cannot be wiped off the public record by processing it through a disciplinary panel. Reports and statistics kept by police or by public safety officers still are public. And FERPA does not cover a disciplinary panel’s finding of wrongdoing for behavior that would be a violent crime or a sex crime if prosecuted criminally.

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not an open records statute or part of an open records system. ... Journalists, researchers, and other members of the public have no right under FERPA to gain access to education records for school accountability or other matters of public interest, including misconduct by those running for public office.”<sup>36</sup>

The Department’s interpretation stands on shaky legal footing and may be vulnerable to challenge as an unreasonable ex-

# Sen. Buckley: Time to revisit FERPA



Former U.S. Sen. James Buckley of New York was the co-author of the Family Educational Rights and Privacy Act (“FERPA”), which often is referred to as “the Buckley Amendment.” In 2009, Buckley gave an interview to *The Columbus Dispatch* in which he bemoaned the excessively broad way in which FERPA has been applied to conceal public records, and said Congress should revisit and narrow the law. Audio of the entire interview is available on the *Dispatch*’s website at [http://www.dispatch.com/live/content/local\\_news/stories/extras/2009/ferpaextras.html](http://www.dispatch.com/live/content/local_news/stories/extras/2009/ferpaextras.html)

Here are some excerpts:

“ [T]he concern that I had and that the committee chairman had was the practice of many schools to keep parents from having access to comments in school records affecting their own children. ... That was the central concern, that parents would know what was being done about their children.”

“ If I had to rewrite the law, I think a lot of things would be clarified. ... I assumed that a certain amount of common sense would go into the application. But maybe I was just naïve being in my third year in public office.”

“ I think you now have a body of experience. I think a lot of information is not being let out that is not harmful. ... I don’t see where it would be much of a diversion of a tiny piece of the time of the Committees on Education in the House and in the Senate to say, ‘Okay, let’s update this law and fine-tune it.’”

pansion of the law. It is inconsistent with the way courts have interpreted FERPA – most notably with the *Cut Bank Pioneer Press* ruling. In that case, it was clear that the journalists knew who the two disciplined students were – journalists had interviewed the students’ parents at a school board hearing – yet that played no part in the court’s application of FERPA. It is impossible to reconcile the Department’s January 2009 regulation with the *Cut Bank Pioneer Press* case, and whether the rule can withstand legal challenge remains to be tested.

## **FERPA status of specific types of records**

As mentioned earlier, FERPA was amended in 1992 to specify that crime reports are not “education records” and therefore must be fully disclosed as provided by state law. The following section addresses the FERPA status of commonly requested types of records:

**Employment records:** If a student has a job with the institution, then routine employment records kept in the institution’s normal course of business are excluded by statute from FERPA.<sup>37</sup> If state open-records law allows access to employment records (salary information, personnel evaluations, and so on), then FERPA cannot be used to deny access to the records just because the employee happens to be taking classes. However, if the job is a work-study job open only to students, then employment-related records may be covered by FERPA.<sup>38</sup>

**Disciplinary records:** Although courts have reached con-

flicting conclusions about the FERPA status of student disciplinary records, they probably are confidential, with the exception of certain disciplinary-board outcomes at the college level.

During the 1990s, state courts in Ohio and Georgia ruled that documents related to student disciplinary infractions were outside the scope of FERPA because they were not “educational” in nature.<sup>39</sup> The North Carolina Supreme Court, however, reached a contrary result in a suit brought by that school’s student newspaper, *The Daily Tar Heel*.<sup>40</sup>

The Department of Education has forcefully defended the privacy of student disciplinary records, and in 1998 sued two Ohio universities and obtained a permanent injunction that blocked the schools from complying with open-records requests for student disciplinary records.<sup>41</sup> The Department took the position that FERPA protects all “personally identifiable information contained in student disciplinary records.” The Sixth Circuit sided with the Department’s interpretation, finding that FERPA’s plain language makes “no content-based judgments with regard to its ‘education records’ definition” but applies to all records that “directly relate to a student and are kept by that student’s university.”<sup>42</sup>

Because Congress amended FERPA in 1998 to specify that certain disciplinary outcomes are excluded from FERPA – specifically, findings that a student committed what criminal courts would treat as a crime of violence or a sex crime – the im-

plication is that other disciplinary outcomes are not. Therefore, it seems likely that future courts will say that Congress intended most disciplinary records to remain confidential.

Parking tickets and vehicle records: In *Kirwan v. The Diamondback*,<sup>43</sup> the Maryland Court of Appeals directly addressed – and rejected – the argument that FERPA prohibited a college from releasing copies of students’ parking tickets. The case was brought by the University of Maryland student newspaper, whose reporters had been tipped off that athletes and coaches were being granted special forgiveness for parking violations. The court stated that FERPA was “obviously intended to keep private those aspects of a student’s educational life that relate to academic matters,” and therefore did not cover parking tickets.

More recently, a North Carolina state court followed the reasoning of *Kirwan* and granted media organizations’ requests for parking tickets issued to student athletes at the University of North Carolina-Chapel Hill, rejecting UNC’s argument that the tickets were “education records” just because disciplinary sanctions were among the possible punishments.<sup>44</sup> (The court also ordered disclosure of coaches’ cell-phone records, finding that the phone numbers of student athletes also are not “education records.”)

Conversely, a Michigan appeals court ruled in 1998 that a student-athlete’s vehicle registration form filed with the University of Michigan was covered by FERPA, because the document “directly related to a university student and is maintained by the university in its files.”<sup>45</sup>

Settlements and litigation documents: A lawsuit or settlement agreement cannot be withheld solely because a student is involved in the case. The clearest cases are those in which students play only a tangential role, such as being referenced in a legal proceeding that concerns current or former school employees.

For instance, in *Herald Publishing Company v. Coopersville Area Public Schools*,<sup>46</sup> the Grand Rapids Press newspaper requested information about two settlement agreements involving alleged misconduct by school employees. The school system refused, arguing that FERPA exempts it from having to disclose how much money was paid to settle the suits.<sup>47</sup> A Michigan court disagreed, holding that even though students may have been victims or witnesses, the suit “clearly involves the actions of the employees of a public body at work and that public body’s expenditures.”<sup>48</sup> Therefore, the information sought by the newspaper was not an education record as defined by FERPA.<sup>49</sup> Federal courts in Michigan and Ohio have ruled similarly.<sup>50</sup>

Even where students (or their families) are participants in litigation, documents relating to the litigation cannot be withheld on the grounds of FERPA, although student identifying information can sometimes legitimately be redacted. In *Poway Unified School District v. Superior Court (Copley Press)*,<sup>51</sup> the San Diego Union-Tribune requested access to documents filed with a local school district placing the district on notice of an

impending lawsuit arising out of a hazing incident. The school district refused to supply the records, relying in part on a California law that implements FERPA. A district court ordered the records released (with only the names of students redacted), and the California Court of Appeals affirmed. The appeals court found no privacy interest in litigation documents, since court proceedings are a matter of public record, and stated that “[i]t defies logic and common sense” to define a party’s demand for payment as an education record.

In *Jennings v. University of North Carolina at Chapel Hill*,<sup>52</sup> a former student sued the University of North Carolina and its employees, alleging sexual harassment while she was a member of the soccer team.<sup>53</sup> The defendants moved to seal the depositions of the student and her parents, asserting that the depositions could be embarrassing to other former students because

<b>MYTH</b>	Student media outlets can’t publish confidential educational information like grades or disciplinary issues, because they’re covered by FERPA.
	The Department of Education’s chief FERPA officer said in a 1993 letter that FERPA does not apply to disclosures by student media outlets, since their information does not come from confidential school records. This is consistent with the U.S. Supreme Court’s ruling that student-graded quizzes are not FERPA records because they aren’t generated by school employees and filed with the school’s central office.
	<b>REALITY</b>

they contained information about “their private lives or bodies.”<sup>54</sup> The defendants argued that the students’ privacy interests were heightened by FERPA because they attended a federally funded university at the time the alleged comments were made.<sup>55</sup> A U.S. district court in North Carolina rejected that argument, holding that the existence of FERPA did not heighten the students’ privacy interests because “[t]he information at issue in the depositions is not an ‘educational record’ as defined by FERPA, nor is it the type of information that would be on a FERPA-protected educational record.”<sup>56</sup>

Despite the weight of legal authority, the Department of Education muddied the picture with its 2009 FERPA rules changes. As part of those changes, the Department advised that FERPA can apply to records pertaining to alumni as well as current students. In illustrating that point, the Department gave – as an example of the type of alumni record that would be confidential – “a settlement agreement that concerns matters that arose while the individual was in attendance as a student.”<sup>57</sup> No explanation of “settlement agreement” was provided.

It seems clear in context that the Department could only be referring to settlements containing otherwise confidential educational information, such as a settlement agreement placing a student in an individualized education plan to accommodate a learning disability. Nevertheless, at least one state agency has already found the Department’s guidance confusing.

In a 2010 ruling, the Mississippi Ethics Commission dealt with a dispute between the Hattiesburg American and the University of Southern Mississippi over records relating to the

termination of an assistant tennis coach, who also was a university graduate student.<sup>58</sup> A university attorney asserted that all records responsive to the newspaper's request, including the agreement resolving the coach's employment lawsuit, were "education records" under FERPA.<sup>59</sup> The Ethics Commission ruled that - in light of the Department's position on the confidentiality of former students' settlement agreements - Southern Miss did not violate the law by withholding the records. But the Commission sharply questioned the DOE's position:

A convincing public policy argument can be made against the U.S. Department of Education's inclusion of former student employees in the class of persons protected by FERPA, especially where the student's claim arose solely from his or her employment. Numerous factual scenarios can be posed which indicate such a broad interpretation of FERPA frustrates the purpose of state and federal open records laws, such as the Mississippi Public Records Act. Moreover, one could legitimately ask whether a graduate assistant coach is truly 'employed as a result of his or her status as a student.'

Reports of employee misconduct: A clear majority of courts have ruled that reports involving misconduct by school or college employees do not fall within FERPA, even if students are mentioned as victims or as complainants. FERPA covers only records "directly related to" a student, and an investigation of employee misconduct does not "directly" relate to any particular student. Therefore, even the student names in such records

<b>MYTH</b>	If any part of a document contains FERPA information, then the entire document is confidential.
	If it is possible to redact only the identifying information that makes an education record traceable to an individual student, then the personal information must be redacted and the remaining document disclosed.
	<b>REALITY</b>

can be disclosed.

A federal district court in Ohio, for instance, ruled that records identifying students involved in altercations with substitute teachers were not protected: "Such records do not implicate FERPA because they do not contain information 'directly related to a student.' While these records clearly involve students as alleged victims and witnesses, the records themselves are directly related to the activities and behaviors of the teachers themselves and are therefore not governed by FERPA."<sup>60</sup>

A federal district court in Michigan reached the same conclusion, finding that "student statements provided in relation to an investigation into a school employee's alleged miscon-

duct" were not education records - and thus did not need to be redacted - because they did not directly relate to students.<sup>61</sup>

In a 2003 ruling, an Indiana appeals court held that FERPA required the redaction of any personally identifiable informa-

<b>MYTH</b>	Schools that slip up and release records they shouldn't have released will lose all of their federal funding.
	FERPA and the Department of Education's FERPA rules say this extreme remedy - which has never been used in the 36-year history of FERPA - is proper only if the school cannot be brought into voluntary compliance with the law. The Department has issued some 150 letter notices alerting schools to potential FERPA violations, yet has never financially penalized any of them.
	<b>REALITY</b>

tion about students in records of a university investigation into allegations that an employee, Indiana basketball coach Bobby Knight, mistreated student athletes.<sup>62</sup> Given the weight of contrary precedent, the Indiana Newspapers case appears unlikely to be followed by courts outside of Indiana.

Psychological tests: A few courts have specifically held that documents related to the psychological evaluation of a student are education records under FERPA. In *John K. v. Board of Education*,<sup>63</sup> parents sought access to their daughter's responses to an ink-blot test administered by a school district psychologist in Illinois. The school system argued that the student's responses were not education records, but rather materials maintained by the psychologist for her exclusive use. The Appellate Court of Illinois disagreed, explaining that the raw data should properly be classified as a test result and holding that a student's responses to such tests were "patently included within the education record" as defined by FERPA.<sup>64</sup>

### FERPA abuses proliferate

In the absence of clear guidance from Congress or the Department of Education, abuses of FERPA have exploded. It has become routine for some schools and colleges to cry "FERPA" in response to virtually any open-records request, putting requesters in the position of having to wage a costly, time-consuming public-records lawsuit to get answers.

One of the worst patterns of abuse took place at the University of Wisconsin-Milwaukee, which during 2007-08 wrongfully cited FERPA to block access to college records so many times that the student newspaper, *The UWM Post*, was forced to file suit. Among the records that UWM claimed were confidential student records were: audio recordings and transcripts of a public committee meeting in which student committee members participated and student audience members spoke; the names of college employees who sat on campus disciplinary boards; and audit documents alleging misuse of state travel money, including some trips taken by student leaders.

Another flagrant abuse occurred at Laramie County Com-

munity College in Wyoming, where school officials took the extremely rare step of going to court to obtain an order forbidding a newspaper from publishing a leaked document.<sup>65</sup> The college's attorneys briefly convinced a state-court judge to issue a near-unprecedented order restraining the Wyoming Tribune Eagle from publishing a report about a negligent conduct allegation against the college's president – even though the newspaper had agreed to remove student names before publication. (It was pointed out to the judge – who belatedly realized his error – that even if FERPA did apply to the report, the FERPA violation would be the college's leak of the report to the newspaper, not the newspaper's publication of it, since FERPA does not apply to newspapers.)

Perhaps the most egregious misapplication of FERPA came to light as a result of a student rape victim's complaint to the advocacy group Security on Campus, Inc ("SOC"). The University of Virginia student was forced to sign a confidentiality agreement promising – under threat of disciplinary action – never to discuss her case with anyone if she wanted UVA's disciplinary panel to investigate her rape complaint. The university insisted that the form was necessary to comply with FERPA. SOC learned that similar "gag order" agreements were used at Georgetown University, the University of Central Florida, and elsewhere. In November 2008, after a complaint from SOC, the Department of Education issued a ruling condemning the practice.<sup>66</sup> The Department's January 2009 rule changes make clear that such "gag orders" are unlawful.

In an award-winning 2009 investigative series,<sup>67</sup> reporters Jill Ripenhoff and Todd Jones of the Columbus Dispatch documented the misuse of FERPA by college athletic departments to withhold records that fall well outside the Senate sponsors' definition of records "used by the institution in making decisions that affect the life of the student." The reporters encountered dozens of instances in which public universities refused to release – or released only in heavily redacted form – such documents as the passenger lists of football team flights, recipients of complementary football tickets, and correspondence with the NCAA regarding potential compliance violations.

The long history of well-documented excesses has led to calls for FERPA reform. Following the Columbus Dispatch series, U.S. Sen. Sherrod Brown, D-Ohio, wrote to the Department of Education urging the agency to issue rules clarifying and narrowing the scope of FERPA secrecy. "It is important that the public have confidence in the integrity of our higher education system, which requires a measure of transparency in reporting violations of the rules," Brown wrote.<sup>68</sup> As of September 2011, neither the Department nor Congress has moved to narrow or clarify FERPA, and the abuses continue.

### **Remedies and responses**

Journalists can apply some common-sense reporting techniques to maximize their chances of obtaining needed information without a legal battle. Doing so often requires educating school officials about their disclosure responsibilities and about the limits of FERPA.

First, as described above, many types of commonly request-

ed records – such as police reports and parking tickets – have been removed from FERPA by law, by Department of Education rule, or by court interpretation. Journalists who encounter a FERPA roadblock should research the law and be prepared to argue for access, escalating the request up the chain of command and making sure school or college lawyers are copied on all correspondence.

Second, all state public-records laws put the burden on the agency to come up with a legal justification for withholding records. The burden is never on the requester to come up with legal authority in favor of access. If an agency simply claims "student confidentiality," ask for a more specific legal justification, which will make it easier to challenge the denial if legal action becomes necessary.

Third, FERPA almost never should apply to anonymous statistical records. Journalists doing stories about trends should consider whether student names are really necessary, or whether the same point can effectively be made with redacted records.

Fourth, FERPA privacy is not all-or-nothing. If the identifying information can effectively be removed, then the agency is obligated to do so and to produce a partial record; FERPA is not a legitimate excuse for the blanket denial of a request.

Fifth, FERPA is waivable. An adult student can always consent to the disclosure of his education records to anyone (as can parents of minors), so journalists who have the cooperation of their sources should consider obtaining written FERPA releases if records are being withheld.

Sixth, FERPA precludes release of information only by the educational institution itself through its employees or agents. Students are not "agents" of the schools they attend, and so they can disclose what they know – for example, the details of a disciplinary proceeding in which they are involved – without implicating FERPA. Specifically, FERPA has no application to students' journalistic publishing, and if a school claims that students will be violating FERPA by publishing news they've gathered in a student journalistic publication, then the school is wrong. The Department of Education said as much in a 1993 opinion letter: "FERPA was not intended to apply to campus newspapers or records maintained by campus newspapers."<sup>69</sup>

Finally, news organizations that are wrongfully denied public records on the basis of FERPA should publicize the denial, write editorials, and bring the denial to the attention of federal officials. The Department of Education hears often from advocates for greater privacy, but rarely from those aggrieved by excessive secrecy.

### **Conclusion**

When FERPA has been raised as an obstruction to journalists' requests for public records, the courts have overwhelmingly applied a narrow, common-sense reading of FERPA that covers only academic and disciplinary records, or records of that nature, that directly identify students. Nonetheless, many schools and colleges continue operating under the oversimplified shorthand that if a document names or refers to a student, it is a FERPA record, without exception. Congress and the Department of Education have been slow to acknowledge the need for reform, even

though FERPA's primary Senate author has decried the way the law is being used. In the absence of federal reform, journalists can still obtain much of the essential information they need to perform their watchdog function if they learn the law, insist on a faithful application of it, and publicize the most egregious abuses.

## Endnotes

1. 20 U.S.C. § 1232g.
2. *Kirwan v. The Diamondback*, 721 A.2d 196, 204 (Md. Ct. App. 1998).
3. *News & Observer Publ'g Co. v. Baddour*, No. 10CVS1941, Memorandum Ruling of Hon. Howard E. Manning, Jr. at 2 (N.C. Super. Ct. April 19, 2011).
4. Elise Jenswold, Denied: OSU officials refused to release public records, *THE DAILY O'COLLEGIAN*, May 4, 2010, available at <http://www.ocolly.com/denied-1.1472546?pagereq=1> (last visited Sept. 6, 2011).
5. Kevin Lessmiller, Post, UWM, reach settlement in records lawsuit, *THE UWM POST*, Feb. 15, 2010, available at <http://www.uwmpost.com/2010/02/15/post-uwm-reach-settlement/> (last visited Sept. 6, 2011).
6. *National Collegiate Athletic Ass'n v. Associated Press*, 18 So.3d 120 (Fla. 1st DCA 2009).
7. *The Herald Pub. Co., LLC v. Coopersville Area Pub. Sch.*, No. 09-1400-PZ (Mich. Cir. Ct. March 30, 2010).
8. Jill Riepenhoff & Todd Jones, Secrecy 101: College athletic departments use vague law to keep public records from being seen, *THE COLUMBUS DISPATCH*, May 31, 2009, available at [http://www.dispatch.com/content/stories/local/2010/10/14/FERPA\\_MAIN.ART\\_ART\\_05-31-09\\_A1\\_VFE0G7F.html](http://www.dispatch.com/content/stories/local/2010/10/14/FERPA_MAIN.ART_ART_05-31-09_A1_VFE0G7F.html) (last visited Sept. 6, 2011).
9. A more in-depth discussion of the workings of state open-records laws is available in the SPLC's Freedom of Information Law Primer, available online at <http://www.splc.org/knowyourrights/legalresearch.asp?id=14>.
10. 121 Cong. Rec. 13,990 (1975). After critics expressed concerns about the initial law's vague and confusing language, Congress overhauled the measure in December 1974 and made the changes retroactive to the law's effective date. 120 Cong. Rec. 39,862 (1974).
11. 121 Cong. Rec. 13,990 (1975).
12. *Id.* at 13,990-91.
13. 20 U.S.C. § 1232g(b)(1).
14. 20 U.S.C. § 1232g(a)(4)(A).
15. 20 U.S.C. § 1232g(a)(4)(B).
16. *Bracco v. Machen*, No. 01-2009-CA-4444, Order Granting Plaintiff's Motion for Summary Judgment at 5 (Fla. Cir. Ct., 8th Cir. Jan. 10, 2011).
17. The Department of Education reemphasized in a June 2011 memo to educational institutions that FERPA does not prohibit the release of records gathered by a campus safety agency: "[S]chools that do not have specific law enforcement units may designate a particular office or school official to be responsible for referring potential or alleged violations of law to local police authorities. Some smaller school districts and colleges employ off-duty police officers to serve as school security officers. Investigative reports and other records created and maintained by these law enforcement units are not considered 'education records' subject to FERPA. Accordingly, schools may disclose informa-
18. 120 Cong. Rec. 39,858-59 (emphasis added).
19. 20 U.S.C. § 1232g(a)(5).
20. FERPA letter ruling, Dec. 14, 1994, letter to Meredith Braz of Bates College from Dr. LeRoy S. Rooker, Director, Office of Family Policy Compliance.
21. *Gonzaga University v. Doe*, 536 U.S. 273 (2002).
22. 20 U.S.C. § 1232g(f) ("[A]ction to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.").
23. 534 U.S. 426 (2002).
24. *Id.* at 435.
25. *S.A. v. Tulare County Office of Educ.*, 2009 WL 3216322, No. CV F 08-1215 LJO GSA (Sept. 24, 2009).
26. *Phoenix Newspapers, Inc. v. Pima Community College*, No. C20111954, In Chambers Under Advisement Ruling Re: Plaintiff's Application for Order to Show Cause on Special Action at 3 (Ariz. Super. Ct. May 17, 2011).
27. See, e.g., Carolyn Tillo, S.G. transparency initiative raises validity questions, *THE INDEPENDENT FLORIDA ALLIGATOR*, Sept. 16, 2009, available at [http://www.alligator.org/news/student\\_government/article\\_bc2a3294-196e-5a62-8a59-34018ec85128.html](http://www.alligator.org/news/student_government/article_bc2a3294-196e-5a62-8a59-34018ec85128.html) (last viewed Sept. 6, 2011).
28. *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, No. 00-1073, Brief for the United States as Amicus Curiae, at 15-16 (June 2001).
29. Letter to Montgomery County, Md., Public Schools, Feb. 15, 2006, from Dr. LeRoy S. Rooker, available at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/montcounty0215.html> (last viewed Sept. 6, 2011).
30. *Unincorporated Operating Div. of Ind. Newspapers, Inc. v. Trustees of Ind. Univ.*, 787 N.E.2d 893 (Ind. Ct. App. 2003).
31. *Id.* at 908.
32. *Bd. of Trustees, Cut Bank Pub. Sch. v. Cut Bank Pioneer Press*, 160 P.3d 482 (Mont. 2007).
33. See also *Osborn v. Board of Regents of Uni. of Wisc. Sys.*, 647 N.W.2d 158, 168 n. 11 (Wis. 2002) ("once personally identifiable information is deleted, by definition, a record is no longer an education record since it is no longer directly related to a student").
34. 34 C.F.R. § 99.3.
35. *Id.*
36. 73 Fed. Reg. 74,831 (Dec. 9, 2008).
37. 34 C.F.R. § 99.3(b)(3)(i)(A)-(C).
38. 34 C.F.R. § 99.3(b)(3)(ii)
39. See *Ohio ex rel Miami Student v. Miami Univ.*, 680 N.E.2d 956, 959 (Ohio 1997) (holding "university disciplinary records are not 'education records'" because they are "unrelated to academic performance, financial aid, or scholastic performance"); *Red & Black Publishing Co. v. Bd. of Regents of Univ. Sys. of Georgia*, 427 S.E.2d 257 (Ga. 1993) (allowing access both to records of the University of Georgia's Organization Court, which polices disciplinary infractions by student organizations, as well as that

- court's meetings).
40. DTH Publishing Corp. v. Univ. of North Carolina at Chapel Hill, 496 S.E.2d 8, 13 (N.C. Ct. App. 1998) (authorizing UNC disciplinary court to close its meetings, because meetings could not be conducted publicly without disclosing the contents of student's education records).
  41. United States v. Miami Univ., 294 F.3d 797 (6th Cir. 2002).
  42. Id. at 812.
  43. 721 A. 2d. 196, 204-206 (Md. 1998).
  44. Raleigh News & Observer Publ'g Co. v. Baddour, No. 10 CVS 1941, Order (N.C. Super Ct. May 12, 2011).
  45. Connoisseur Communication v. Univ. of Mich., 584 N.W.2d 647 (Mich. App. 1998).
  46. Docket No. 09-01400-PZ (Mich. Cir. Ct. March 30, 2010).
  47. Id. at 7.
  48. Id. at 8.
  49. Id. at 9.
  50. See Ellis v. Cleveland Municipal Sch. Dist., 309 F. Supp. 2d 1019, 1022 (N.D. Ohio 2004) (stating that it is "clear that Congress did not intend FERPA to cover records directly related to teachers and only tangentially related to students"); Wallace v. Cranbrook Educational Community, 2006 WL 2796135 (E.D. Mich. 2006) (holding that unredacted student witness statements about an employee's alleged inappropriate sexual advances toward students were not education records under FERPA).
  51. 62 Cal. App. 4th 1496 (1998).
  52. 340 F. Supp. 2d 679 (2004).
  53. Id. at 680.
  54. Id. at 681.
  55. Id. at 683.
  56. Id. at 684.
  57. Family Educational Rights and Privacy, 73 Fed. Reg. 15573, 15576 (March 24, 2008) (codified at 34 C.F.R. Part 99).
  58. Univ. of S. Miss., Miss. Ethics Comm'n, Pub. Records Opinion No. R-09-008 (March 5, 2010).
  59. Id. at 2.
  60. Ellis v. Cleveland Municipal Sch. Dist., 309 F. Supp. 2d 1019, 1022-23 (N.D. Ohio 2004).
  61. Wallace v. Cranbrook Educational Community, No. 05-73446, 2006 WL 2796135 at \*3-4 (E.D. Mich. Sept. 27, 2006). See also Bd. of Educ. of Colonial Sch. Dist. v. Colonial Educ. Ass'n, 1996 WL 104231, at \*6 (Del. Ch. 1996) ("The names of the victim in and witnesses to an alleged incident of sexual harassment by a teacher does not relate closely enough with the educational process to warrant the statutory protection of 'educational records' in FERPA."). Florida's attorney general issued a non-binding opinion in February 2010 in a case involving the discussion of student information during school board proceedings. Attorney General Bill McCollum advised that a county school board could not close its meetings to the public to hear a disciplinary complaint against a school employee who was accused of discriminating against a student on account of disability - even though information about the student would be discussed. "Sunshine Law, board meeting discussing student records," Fla. AGO 2010-04 (Feb. 16, 2010).
  62. Unincorporated Operating Div. of Ind. Newspapers, Inc. v. Trustees of Ind. Univ., 787 N.E.2d 893, 908 (Ind. Ct. App. 2003).
  63. 504 N.E. 2d 797 (Ill. App. Ct. 1987).
  64. Id. at 803. See also Parents against Abuse in Schools v. Williamsport Area School Dist., 594 A. 2d 796, 803 (Pa. Commw. Ct. 1991) ("FERPA excludes from the definition of 'education records' [the] records of a psychologist only if those records relate to a student who is at least 18 years old or attending a post-secondary educational institution and which are made or used only in connection with providing treatment.").
  65. Michael Van Cassell, LCCC censors story by WTE, WYOMING TRIBUNE EAGLE, May 22, 2010, available at [http://www.wyomingnews.com/articles/2010/05/22/news/01top\\_05-22-10.txt](http://www.wyomingnews.com/articles/2010/05/22/news/01top_05-22-10.txt) (last visited Sept. 6, 2011).
  66. Kristen Lombardi, Sexual Assault on Campus Shrouded in Secrecy, THE CENTER FOR PUBLIC INTEGRITY, Dec. 1, 2009, available at [http://www.publicintegrity.org/investigations/campus\\_assault/articles/entry/1838/](http://www.publicintegrity.org/investigations/campus_assault/articles/entry/1838/) (last viewed Sept. 6, 2011).
  67. Riepenhoff & Jones, supra note 7.
  68. Jill Riepenhoff & Todd Jones, Brown wants student-privacy limits, THE COLUMBUS DISPATCH, June 17, 2009, available at [http://www.dispatch.com/live/content/local\\_news/stories/2009/06/17/Brown.ART\\_ART\\_06-17-09\\_B1\\_2EE6VKK.html](http://www.dispatch.com/live/content/local_news/stories/2009/06/17/Brown.ART_ART_06-17-09_B1_2EE6VKK.html) (last viewed Sept. 6, 2011).
  69. Opinion Letter of Dr. LeRoy Rooker, U.S. Department of Education, re: FERPA complaint against University of New Mexico (addressee redacted by agency) (Sept. 20, 1993), available at <http://www.splc.org/pdf/ferpa93.pdf>.