IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

DARNELL RHEA,

Appellant,

v.

Case No. 1D11-3049
L.T. Case No. 01-2010-CA-003685

THE DISTRICT BOARD OF TRUSTEES OF SANTE FE COLLEGE, FLORIDA,

Appellee.

BRIEF OF *AMICI CURIAE* BOARDS OF TRUSTEES OF SIX UNIVERSITIES AND DISTRICT BOARDS OF TRUSTEES OF TWENTY FLORIDA COLLEGES IN SUPPORT OF APPELLEE'S MOTION FOR REHEARING, REHEARING *EN BANC*, AND CERTIFICATION OF A QUESTION OF GREAT PUBLIC IMPORTANCE

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PRELIMINARY STATEMENT

The *amici curiae* are the Boards of Trustees of Florida Atlantic University, Florida Gulf Coast University, Florida State University, the University of Central Florida, the University of South Florida, and the University of West Florida, and the District Boards of Trustees of Broward College; Chipola College; College of Central Florida; Florida State College at Jacksonville; Gulf Coast State College; Hillsborough Community College; Indian River State College; Lake-Sumter Community College; Miami Dade College; North Florida Community College; Northwest Florida State College; Palm Beach State College; Pasco-Hernando Community College; Polk State College; Seminole State College of Florida; South Florida State College; St. Johns River State College; State College of Florida, Manatee-Sarasota; Tallahassee Community College; and Valencia College.

Reference to the record on appeal shall be by "R" followed by the volume number and page number(s), *e.g.*, (R1:30).

Reference to the documents contained in the Appendix to this Brief shall be by "App." followed by the letter tab, *e.g.*, (App. A).

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are the Boards of Trustees of six universities in the State University System and the District Boards of Trustees of twenty postsecondary educational institutions in the Florida College System. *See* § 1000.21(3), (6), Fla. Stat. (2011). Each of these colleges and universities is an "educational agency or institution," as defined in 20 U.S.C. § 1232g(a)(3), and is therefore subject to the Family Educational Rights and Privacy Act ("FERPA").

This case is of fundamental importance to these *amici*. *Amici* have long implemented their obligations under FERPA consistent with clear guidance from the United States Department of Education. Consistent with this guidance and their students' expectations of privacy, *amici* have treated records that personally identify students as "directly related" to the student and protected from disclosure.

This Court's opinion adopts a narrower and less precise definition of "education records." The standard adopted by the Court injects uncertainty and confusion into a matter of the most sensitive concern to *amici* and their students. Without clear, bright-line rules that minimize individual discretion, *amici* will be exposed (despite their best efforts) to the constant danger of violating the Florida Public Records Act or FERPA, with potentially punishing consequences. Accordingly, this case affects the vital interests of these *amici* and their students.

SUMMARY OF ARGUMENT

On July 19, 2012, this Court held that a record containing personally identifiable student information is confidential only if the record is primarily, and not incidentally, related to the student. It thus required disclosure of a record that identifies a student by name, reveals the student's enrollment in a particular class, and reflects the student's impressions of the classroom experience. This holding represents a radical departure from long-standing practice of bright-line protection for personally identifiable information.

The standard adopted by the Court introduces confusion and subjectivity where clear, objective rules are indispensable. This standard (and the precarious, discretionary judgments it requires) will subject these *amici* to impossible choices between disclosure, which threatens to violate the United States Department of Education's broad view of student privacy, and non-disclosure, which threatens to violate Florida's Public Records Act and subject *amici* to litigation and liability for attorney's fees. The new standard also defeats the intent of a recent amendment to Florida law designed to harmonize state and federal student privacy protections, and will stifle student speech or subject students to retaliation and inconsistency in application.

For these reasons, the Court should grant Appellee's Motion for Rehearing, Rehearing *En Banc*, and Certification of a Question of Great Public Importance.

ARGUMENT

Each year, hundreds of thousands of students attend Florida's public colleges and universities. In the course of their studies, from enrollment to graduation, these students confide a broad spectrum of information—from the routine to the most private and sensitive—to the institutions they attend. Students quite naturally and reasonably expect that Florida's colleges and universities will act responsibly and faithfully to protect the information entrusted to them.

This expectation has been well-founded. As a matter of policy and principle, Florida's colleges and universities have been keenly protective of their students' privacy. Student privacy is a long-standing and deeply cherished value of Florida's public colleges and universities, and one that has been recognized by Congress and the Florida Legislature as critically important.

Both Congress and the Legislature have created broad protections for student privacy—protections designed to transcend the public interest in open and accessible records. Both Congress and the Legislature have carefully weighed the public interest in open records against the specific and competing interest in student privacy, and both have resolved that tension in favor of student privacy.

The Court's opinion overturns the balance struck by Congress and the Legislature, as well as the interpretation that has long prevailed in postsecondary education. In fact, the United States Department of Education has consistently

espoused the position that records containing personally identifiable student information are by definition "directly related" to that student. Florida colleges and universities have universally adhered to this official interpretation—an interpretation that is logical, understandable, and straightforward. No record can have a more direct relationship to a student than one that identifies that student.

The standard adopted by the Court, however, creates confusion and uncertainty by directing colleges and universities to assess the "fundamental character" of the record and determine whether records that personally identify students are nevertheless more nearly related to a professor (or some other person or subject) than to the student. This standard provides painfully little guidance where clear and bright-line rules are indispensable. Words such as "incidentally," "tangentially," or "peripherally" offer no assistance in the attempt to distinguish records reflecting endless varieties and combinations of subjects. The amorphous, scale-of-relatedness standard thus requires hopelessly subjective judgments and injects substantial confusion into the sensitive area of student privacy.

In the area of student privacy, confusion and subjectivity are fraught with danger for institutions and students alike. If the institution errs on the side of non-disclosure, it subjects itself to public-records litigation and liability for attorney's fees. If it errs on the side of disclosure, it exposes itself to federal administrative complaints and even the possible deprivation of federal funding. In any event, a

vague and open-ended standard invites litigation. Students who dare to complain in writing open themselves to retribution; other students with legitimate complaints stifle their comments for fear of public disclosure, denying an institution that relies on such critiques the benefit of those assessments. The absence of a clear standard will result in inconsistent application from case to case, institution to institution, and court to court, in a matter that should be characterized by uniformity.

The Court adopted its standard on the erroneous assumption that, for purposes of the Family Educational Rights and Privacy Act ("FERPA"), a record can be "directly related" only to one person—either the student or the professor. But "directly related" does not mean "primarily related," and therefore does not require a choice between alternatives. The United States Department of Education has more than once opined in written guidance that student complaints against professors are "directly related" to the student and thus "education records." This Court's opinion places Florida at odds with this federal interpretation of FERPA, despite the Legislature's recent, express incorporation of FERPA into Florida law.

This Court should reconsider its opinion and conclude that a record containing personally identifiable student information is a protected "education record" releasable, if at all, only in redacted form. This rule would be clear, cogent, and administrable. It would be in keeping with state and federal law, the prevailing practice of Florida's colleges and universities, and interpretations of the

United States Department of Education. It would protect institutions of higher learning from risking public-records litigation or federal sanctions with each new judgment call required by the application of an amorphous standard to an infinite diversity of facts and circumstances. Most importantly, it would vindicate the confidence that Florida's students place in the institutions they attend, and enable those institutions to guard and respect the privacy of their students.

I. CONGRESS AND THE FLORIDA LEGISLATURE HAVE GIVEN PRIORITY TO STUDENT PRIVACY.

In 1974, Congress considered the tension between public access to information and student privacy, and it emphatically resolved the conflict in favor of student privacy. Congress enacted and President Ford signed the Family Educational Rights and Privacy Act, Pub. L. No. 93-380, § 513, 88 Stat. 571 (codified as amended at 20 U.S.C. § 1232g), in response to the perceived abuse of student records by educational institutions that neglected to adopt policies curtailing the indiscriminate, public disclosure of student education records. *See*, *e.g.*, 120 Cong. Rec. 36,532 (Nov. 19, 1974); 120 Cong. Rec. 39,858 (Dec. 13, 1974). Congress placed such overarching importance on the privacy of students that it conditioned access to federal education funding on the adoption of policies to secure and protect student records. *See* 20 U.S.C. §§ 1232g(f), 1234c(a).

The legislative history of FERPA illuminates its purpose. Senator James Buckley of New York, the principal sponsor of FERPA, explained that the

"purpose of the Act is two-fold—to assure parents of students . . . access to their education records and to protect such individuals' rights to privacy by limiting the transferability of their records without their consent." 120 Cong. Rec. 39,862 (Dec. 13, 1974), *quoted in Frazer v. Fairhaven Sch. Comm.*, 276 F.3d 52, 67-68 (1st Cir. 2002). So clear was its purpose that Congress initially entitled FERPA, "Protection of the Rights and Privacy of Parents and Students." *See* FERPA, Pub. L. No. 93-380, § 513, 88 Stat. 571 (1974). FERPA was enacted to "stem the growing policy of many institutions to carelessly release educational information." *Bauer v. Kincaid*, 759 F. Supp. 575, 590 (W.D. Mo. 1991); *see also Student Press Law Ctr. v. Alexander*, 778 F. Supp. 1227, 1228 (D.D.C. 1991) ("[FERPA's] apparent purpose is to ensure access to educational records for students and parents and to protect the privacy of such records from the public at large.").

The Florida Legislature has also endorsed robust protections for student privacy. In 2009, the Legislature expressly recognized that the state's prior public-records exemptions for student records fell short of FERPA's student privacy provisions, and that the disclosure of information protected by FERPA would risk the loss of federal funds. The inconsistency required an immediate remedy:

> The Legislature finds that it is a public necessity to continue to make confidential and exempt from disclosure education records, as defined in [FERPA]. The state has historically protected education records from public disclosure and continues to provide for the confidential and exempt nature of education records; *however, the state does not currently conform to the federal definition of education records,*

> *which is more inclusive than the state law. Such inconsistency may result in noncompliance with federal law, for which public educational institutions could be sanctioned by the loss of all federal funds received from the United States Department of Education.*
>
> . . .
>
> The Legislature finds that in order to comply with the applicable federal requirements regarding the collection, use, and release of education records, such records must be made confidential and exempt from public disclosure. Therefore, the Legislature finds that state law must be updated to maintain consistency with federal requirements, including newly promulgated exemptions to public disclosure.

Ch. 2009-240, § 3, Laws of Fla. (emphasis added). The House Education Policy Council noted that, since the enactment of Florida's original exemptions for student records, Congress and the Department of Education had made substantial changes to FERPA and its implementing regulations. *See* Fla. H.R. Educ. Pol. Council, HB 7117 (2009) Staff Analysis 3 (Apr. 1, 2009). The amendments "align[ed]" state law with FERPA and "demonstrate[d] compliance with federal requirements," ensuring that "federal funds are not jeopardized." *Id*. at 1, 5.

Of course, the Public Records Act occupies a cherished place in Florida law. But the Legislature determined that student privacy is a paramount value. *See* §§ 1006.52(1), 1002.225(1), Fla. Stat. (2011) (declaring exempt and confidential all "education records," as defined by FERPA). It has protected student privacy with good reason: federal funds and student confidence are at stake. Thus, Florida's institutions of higher learning have long maintained

consistent policies to protect student privacy as required by state and federal law.

In enacting broader public-records exemptions for education records, the Legislature easily satisfied the stringent standards prescribed by the Constitution for the exemption of records from public inspection. The Constitution authorizes the Legislature to create exemptions only by a two-thirds vote of each chamber. Art. I, § 24(c), Fla. Const. The enactment must "state with specificity the public necessity justifying the exemption," and the exemption may be "no broader than necessary to accomplish the stated purpose of the law." *Id*. In enlarging the state's protection of student privacy, the Legislature acted unanimously, enacting the measure by a vote of 39-0 in the Senate and 115-0 in the House. And it not only exempted education records from public inspection, but it took an additional step and made them confidential, thus barring their public release. The Legislature emphatically ensured that student privacy would prevail over public-records laws.

II. CONSISTENT WITH OFFICIAL GUIDANCE, FLORIDA'S COLLEGES AND UNIVERSITIES HAVE IMPLEMENTED CLEAR AND BROAD PROTECTIONS FOR STUDENT PRIVACY.

The United States Department of Education has consistently taken the position, in both formal and informal guidance, that records containing personally identifiable student information are by definition "directly related" to the student, and are therefore education records under FERPA. The Department's position has long guided *amici*'s understanding of FERPA and has been accepted as a polestar

for Florida's colleges and universities in their efforts to comply with federal law.

While the Department communicates its interpretation of FERPA to academic institutions chiefly through informal communications, its interpretation is also reflected in guidance letters issued by the Family Policy Compliance Office of the Department's Office of Management (the "FPCO"). For example, the FPCO considered "whether, under FERPA, a professor who has been charged with sexual harassment may inspect and review the complaints filed against him which include statements of the students making the allegations." *See* App. A (Letter from LeRoy S. Rooker, Director of the FPCO, to Dr. Richard Rafes, Vice President and General Counsel to the University of North Texas (Oct. 17, 1997)). The FPCO concluded that the accused professor "must initially be denied access because the complaints are 'education records' under FERPA," and because an exception permitting the disclosure of education records to a professor with a "legitimate educational interest" did not apply. *Id*. at 2 ("His interest is strictly personal; that is, defending himself from the charges . . . ."). Thus, FERPA barred disclosure.

The FPCO took the same position in a guidance letter to Macomb Community College. There, the FPCO considered whether "a letter written by a student complaining about a professor is an education record subject to" FERPA. *See* App. B (Letter from LeRoy S. Rooker, Director of the FPCO, to John C. Bonnell, Professor of English, Macomb Community College (Aug. 8, 2001)). The

student complaint included information about the student's participation in class and the student's assessment of the professor. *Id*. at 1. The FPCO held that the student's letter "is an education record . . . since it contains information directly related to her." *Id*. at 2. In addition, the FPCO confirmed that release of the letter with the redaction of personally identifying information would satisfy FERPA. *Id*.

The FPCO later considered whether a school district may release in unredacted form "written and signed allegations [of] serious or criminal behavior" made by various students against another student, whose parents sought disclosure of the record. *See* App. C (Letter from LeRoy S. Rooker, Director of the FPCO, to Anonymous (Oct. 31, 2003)). The FPCO concluded that the "records are directly related to each student," including those who merely made allegations above their names and signatures. *Id*. "Because the documents at issue contain personally identifiable information about more than one student, the documents also meet the requirements to be the education records of each student named or mentioned in the document." *Id*. Thus, "the parent of each student . . . has a right to inspect and review only the information directly related to his or her child." *Id*. The FPCO did not conclude that the written allegations related directly to the student charged and only "incidentally" or "tangentially" to the students who made the allegations.

The federal agency charged with the implementation of FERPA has thus consistently held that records containing complaints or allegations by students,

whether against a professor or other students, are "directly related" to the student and strictly protected from disclosure, even if they reflect little or no information about the complainant other than her name. The FPCO has never suggested that records must be reviewed along a scale or continuum of relatedness or that records cannot "directly relate" to more than one person or subject. Its guidance letters make clear that a record directly relates to a student even if the identifiable student is *not* the subject matter of the record. And the FPCO's position is supported by obvious and compelling reasons. When students create even informal complaints about professors, they almost invariably act from concern for their own educational progress or likelihood of success in the class. Student complaints often contain information about class assignments, personal and instructional interactions, and other material relating to their success in the class. Concerns about instruction are most often situated wholly within the context of the student's educational progress.

Florida's colleges and universities have adhered to the interpretation communicated by the FPCO in both formal and informal guidance. They have consistently treated records with personally identifiable student information as "directly related" to those students, and therefore as their education records. The clear, predictable, and workable privacy policies adopted and long implemented by the *amici* have served them—and, more importantly, their students—well. The Court's interpretation departs from the FPCO's interpretation, defeats the plain

intent of the Legislature's amendment to Section 1006.52(1), Florida Statutes, is not compelled by a plain reading of FERPA, and introduces a host of perils and uncertainties that *amici* respectfully request this Court to avert.

III. THIS COURT'S OPINION HAS SEVERE CONSEQUENCES FOR THE STATE'S JURISPRUDENCE, ITS COLLEGES AND UNIVERSITIES, AND ITS STUDENTS.

This Court ruled that a record created by a student, which contained the student's name and the student's opinions and impressions of a particular professor's methods, and which therefore identified a class in which the student was enrolled, does not "directly relate" to the student under FERPA. *See* 20 U.S.C. § 1232g(a)(4)(A). The Court explained that the record related "primarily" to the professor's teaching methods and conduct and statements in the classroom, and only "incidentally" to the student. This conclusion is required neither by authority or the ordinary usages of language. In fact, it is contrary to both.

The Court's conclusion is not required by authority because it conflicts with interpretations adopted by the agency charged with FERPA's administration. *See* 20 U.S.C. § 1232g(g). Those interpretations make clear that a student complaint "directly relates" both to person complained of and the complainant, even if little or nothing is disclosed about the complainant other than her name. *See supra* Part II. It also makes clear that the record need not concern academics (as in the present case), but may relate to matters such as sexual harassment. *See*

id. These interpretations easily embrace the record at issue here, and this Court is bound to defer to reasonable interpretations adopted by a federal agency charged with administration of federal law, *Darbie v. State*, 711 So. 2d 1280, 1282-83 (Fla. 3d DCA 1998) (citing *Chevron*, *U.S.A., Inc. v. Natural Res. Defense Council*, *Inc.*, 467 U.S. 837 (1984)); *Skiff's Workingman's Nursery v. Dep't of Transp.*, 557 So. 2d 233, 234 (Fla. 4th DCA 1990) (same), and to Florida's colleges and universities that have considerable expertise and experience with respect to state and federal statutory protections of student privacy. Conversely, this Court is not bound by the federal-law interpretations of federal trial courts. *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1230 (Fla. 2011); *Carnival Corp. v. Carlisle*, 953 So. 2d 461, 465 (Fla. 2007). To the extent that the federal cases relied upon by the Court conflict with FPCO interpretations, the FPCO interpretations should prevail.

The Court's decision is inconsistent with *Johnson v. Deluz*, 875 So. 2d 1 (Fla. 4th DCA 2004), in which the Court directed that personally identifiable student information be redacted from a report of an investigation into alleged misconduct by a school principal. While the Court in *Johnson* construed an earlier iteration of Florida's student privacy protections, legislative history makes clear that recent amendments to those protections were not intended to narrow them.

This Court's conclusion is contrary to the ordinary usages of language because a record may, with literal accuracy, "directly relate" to more than one

person. The text of FERPA does not require or suggest an assessment of whether the record more closely relates to the student or the professor (or any other person or subject). FERPA does not ask whether a record relates "primarily" to a student or "primarily" to a professor, but whether it "directly" relates to the student. And a record that identifies a student has the most direct relationship to that student.

A recent decision of the Ohio Supreme Court, for example, rejects the narrow definition of "education records" adopted by some trial courts and instead follows the broader approach exemplified in *United States v. Miami University*, 294 F.3d 797 (6th Cir. 2002). In *State ex rel. ESPN v. Ohio State University*, 970 N.E.2d 939 (Ohio 2012), the Court found that emails regarding non-academic misconduct by student athletes are "directly related" to the students and protected as education records. The Court correctly rejected the position that, because they did not relate to "academic performance, financial aid, or scholastic performance," the records did not "directly relate" to the students. 970 N.E.2d at 946. The Court explained that "Congress made no content-based judgments with regard to its 'education records' definition." *Id*. (quoting *Miami University*, 294 F.3d at 812).

Nor is the Court's conclusion necessary to protect the rights of professors. When a student complaint is viewed as grounds for possible adverse employment action, colleges and universities ordinarily facilitate discussions that involve both the student and professor. At the same time, FERPA expressly permits the release

of personally identifiable information pursuant to a subpoena, provided that affected students are notified. 20 U.S.C. § 1232g(b)(2). And the FPCO guidance letters recognize that, where applicable, the requirements of due process (which were not implicated in this public-records case) supersede FERPA. *See* App. The due process rights of professors, if any, are thus secure and do not require creation of a new standard that exposes student complaints to unlimited public inspection.

A. Implications for Florida's Jurisprudence.

The Court's opinion has serious jurisprudential consequences. FERPA conditions the availability of federal education funding on compliance with its student-privacy protections. *See* 20 U.S.C. §§ 1232g(f), 1234c(a). In 2009, the Florida Legislature amended state law to "align" the state's privacy protections to FERPA's, to "demonstrate compliance with federal requirements" and ensure that "federal funds are not jeopardized." Fla. H.R. Educ. Pol. Council, HB 7117 (2009) Staff Analysis 1, 5 (Apr. 1, 2009); *see also* Ch. 2009-240, Laws of Fla.

The decision in this case once again misaligns state and federal law. While the FPCO would hold the record at issue here to be a protected education record, *see supra* Part II, the Court, by application of a scale-of-relatedness standard that the FPCO does not recognize, has required its disclosure in unredacted form. This result frustrates the stated purpose of the recent amendment by the Legislature and requires Florida's colleges and universities to choose between adherence to FPCO

determinations or the significantly narrower construction adopted by this Court.

B. Implications for Florida's Colleges and Universities.

The Court's opinion represents a radical departure from the long-standing practices of Florida's colleges and universities and subjects them to perilous alternatives. The position adopted by the Court requires each institution to assess the "fundamental character" of each record and determine whether the record is "primarily" related to the student, or only incidentally, peripherally, or tangentially related to the student. Such questions will seldom yield clear and definite answers.

For example, it is unknowable whether the e-mail at issue in this case would have qualified for protection if it had contained, in addition to the student's name and personal experience in the classroom:

- The student's grade in the class.
- Information about an illness or disability of the student.
- A single reference to the student's performance in the class.
- Two references to the student's performance in the class.
- Three references to the student's performance in the class.
- The student's marital status, or other information about the student's personal circumstances.
- The student's financial situation.
- The student's derogatory opinions of a local politician.

- The student's post-graduation plans.

In each of these cases, the record might nevertheless relate "primarily" to the professor and only "incidentally" to the student. The confusion that results would require colleges and universities to make impossible judgments with respect to each individual document with severe legal and financial jeopardy if a court rules that the decision was wrong. (This case has already seen different judges make different findings about the same document.) The immense number of records requests directed to colleges and universities exacerbates this impossible burden.

The absence of clear, administrable rules in the sensitive area of student privacy will continually force institutions to a Hobson's choice: either to err on the side of non-disclosure and expose itself to public-records litigation and liability for attorney's fees, *see* § 119.12, Fla. Stat. (2011) (providing entitlement to attorney's fees in public-records actions), or to err on the side of disclosure and jeopardize their access to federal education funding, *see* 20 U.S.C. §§ 1232g(f), 1234c(a). Moreover, Section 1002.225(3), Florida Statutes, authorizes injunctive relief and an award of attorney's fees to a student aggrieved by an institution's violation of FERPA with respect to education records, while federal law authorizes parents and students to file administrative complaints with the FPCO for redress of alleged violations of FERPA, *see* 20 U.S.C. §§ 1232g(f), (g); 34 C.F.R. §§ 99.63, 99.67.

The absence of clear and objective guidance and workable rules will force

colleges and universities to navigate a minefield of legal catastrophes. A standard that leaves the character of each record to individual judgment will encourage public-records requests and embolden parties to pursue litigation. Colleges and universities are already inundated with requests for public records; a standard that introduces uncertainty and subjectivity will dramatically increase their number. An increase in litigation will be attended with heavy costs that the state's colleges and universities are ill-equipped to bear, even apart from awards of attorney's fees.

C. Implications for Florida's Students.

Most critically, the Court's decision disadvantages the students that attend Florida's colleges and universities, and disappoints their more-than-reasonable expectations of privacy. Students who are aware that records of their own creation might become publicly accessible—even by the news media—will either avoid the creation of records or subject themselves to retribution. And the decision serves as a trap for the unwary student who is unaware of the public-records consequences.

Chilled speech and retaliation are not imaginary dangers. In this very case, the professor demanded the name of the student that submitted the complaint and insisted that the student be expelled from college. (R1:30.) If student speech is chilled, or even forced into anonymous channels, colleges and universities will be denied the benefit of candid and credible assessments of academic experiences, including assessments of professors and their classroom techniques. Colleges and

universities will be handcuffed in their efforts to best serve the student population.

Students will also be disadvantaged by the unavoidable inconsistencies that will result from a standard that affords no sure direction. From case to case, institution to institution, and even court to court, opinions regarding the character of similar records will vary dramatically. In a matter of such basic importance as privacy, students deserve equal, consistent, and predictable treatment.

The purpose of Florida's Public Records Act was not to stifle, embarrass, or scrutinize Florida's students. To the extent that public disclosure sheds light on the operation of colleges and universities, the purpose is advanced by the disclosure of redacted records. State and federal law should be construed to vindicate the ample measure of confidence that students repose in their colleges and universities, and to enable these institutions to act responsibly to protect the privacy of their students.

CONCLUSION

The Court's opinion places *amici* in an untenable position. It requires them to assess records under a new standard that offers little guidance and conflicts with the standard espoused by the United States Department of Education. As a result, it misaligns state and federal law, contrary to the intent of the Legislature, and creates doubt and confusion in a matter that imperatively demands bright-line rules. To avert these consequences, *amici* respectfully ask the Court to reconsider its decision or certify a question of great public importance to the Supreme Court.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was sent by United States Mail this thirteenth day of August 2012, to the following:

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I certify that the font used in this brief is Times New Roman 14 point and is in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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APPENDIX OF *AMICI CURIAE*

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APPENDIX A

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF MANAGEMENT

Dr. Richard Rafes
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OCT 17 1997

Dear Dr. Rafes:

This is in response to recent telephone conversations you have had with Ellen Campbell of my staff regarding the Family Educational Rights and Privacy Act (FERPA). 20 U.S.C. § 1232g; 34 CFR Part 99. Specifically, you ask whether, under FERPA, a professor who has been charged with sexual harassment may inspect and review the complaints filed against him which include statements of the students making the allegations. You also state that the professor's department chairman has also asked to inspect and review the complaints.

As you are aware, FERPA generally protects a student's privacy interests in "education records." The term "education records" is defined as:

> [T]hose 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.

20 U.S.C. § 1232g(a)(4). See also 34 CFR § 99.3 "Education records." FERPA provides that education records, or personally identifiable information from such records, may be disclosed by institutions of postsecondary education to third parties only after obtaining prior written consent of the student. 20 U.S.C. § 1232g(b)(1) and (d). See also 34 CFR § 99.30.

FERPA does provide a number of exceptions to the general rule requiring written consent prior to disclosure of personally identifiable information from education records. One exception provides that education records, or personally identifiable information from such records, may be disclosed to "other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests." 34 CFR § 99.31(a)(1). In this regard, FERPA requires an educational agency or institution to include in its annual notification a statement indicating whether it has a policy of disclosing personally identifiable information under

§ 99.31(a)(1), and, if so, a specification of the criteria for determining which parties are school officials and what the agency or institution considers to be a legitimate educational interest. The final rule amending the FERPA regulations, published on November 21, 1996, removed the requirement for schools to maintain a student records policy and revised the annual notification requirements. See 34 CFR § 99.7(a)(3)(iii). Enclosed is a copy of the amended FERPA regulations.

Under this provision, FERPA would generally allow the University to provide the department chairman with access to the complaints filed against the professor if the chairman can demonstrate a "legitimate educational interest" in the records. An example of such an interest would be if the chairman is responsible for reviewing the complaints and providing a recommendation about appropriate measures that the University should take. On the other hand, if he is merely protecting a subordinate who works for him or just curious about the charges but does not have a formal role in the process, then he would not be entitled to the records.

With regard to the professor against whom the charges were filed, he must initially be denied access because the complaints are "education records" under FERPA and, even though the professor is a school official, he does not have a "legitimate educational interest." His interest is strictly personal; that is, defending himself from the charges. If, however, the case progresses and the professor faces disciplinary action, then "due process" protections might allow him the right to review the complaints. Whether he is allowed the opportunity to review the records depends on the seriousness of the charges against him (i.e., does it involve a property interest such as loss of pay or job) and the timing of the hearing (pre or post-termination). In this regard, the University would need to do legal research about what type of due process protections attach based on 5th Circuit case law, since the amount of protections vary from circuit to circuit.

I trust that the above satisfactorily responds to your inquiry. Should you have additional questions about FERPA in general or this matter in particular, do not hesitate to contact us again.

Sincerely,

for LeRoy S. Rooker
Director
Family Policy Compliance Office

Enclosure

APPENDIX B

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF MANAGEMENT

AUG 8 2001

Mr. John C. Bonnell
Professor of English
Macomb Community College
14500 East 12 Mile Road
Warren, Michigan 48093

Dear Mr. Bonnell:

This is in response to your May 16, 2001, letter to this Office in which you ask whether a letter written by a student complaining about a professor is an education record subject to the Family Educational Rights and Privacy Act (FERPA), and whether such letter, if it is an education record, may be disclosed to others by a school official if the "name and all individuating characteristics" are redacted. This Office administers FERPA, and is responsible for providing technical assistance under the law.

You provided with your inquiry a copy of the complaint letter to which you refer, which includes information about the student's participation in your class and her assessment of your class. You have redacted her name, and the section number of the class to which she refers in the letter. However, the date, November 6, 1998, the fact that she was a student in an English class taught by you, and the fact that she is married, have not been redacted.

FERPA affords eligible students, students who are 18 or over, or attending an institution of postsecondary education, certain privacy rights with respect to their education records. The term education records is defined in FERPA as those records which contain information that is directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. 20 U.S.C. § 1232g(a)(4)(A); 34 CFR §99.3 "Education Records." FERPA generally requires that a student provide written consent for the disclosure of personally identifiable information from their education records. 20 U.S.C. § 1232g(b); 34 CFR § 99.30. While there are certain exceptions to this prior written consent requirement, none allow general disclosure of education records.

However, consent would not be required if information were disclosed in a manner in which it were not personally identifiable. Section 99.3 of the FERPA regulations defines "personally identifiable information" as information that includes but is not limited to:

(a) the student's name;
(b) the name of the student's parent or other family member;
(c) the address of the student or the student's family;

(d) a personal identifier, such as the student's social security number or student number;
(e) a list of personal characteristics that would make the student's identity easily traceable; or
(f) other information that would make the student's identity easily traceable.

Each individual school is in the best position to determine whether redacted education records would be easily traceable to the student(s) to whom those records relate if disclosed to a particular party. A school district should take into consideration whether the party who is seeking access to the records has prior knowledge as to the identity of any of the students to whom the records relate or whether any subsequent parties to whom the information may be further disclosed could ascertain such identities.

In the circumstances you have presented, the letter from the student regarding you is an education record of hers since it contains information directly related to her. Even in personally identifying information has been redacted, it remains an education record under FERPA. However, FERPA would not prohibit the disclosure of the redacted version of the letter if such version does not include additional information which could identify the student by a party in receipt of such letter. It is unclear whether the information you have redacted from the letter to which you refer is sufficient to protect the identity of the student to whom the letter is related. That is, if the student could be identified based on any of the remaining information, including handwritten notes, by anyone (such as another student in the same class), then the letter should not be disclosed to unauthorized third parties without the student's consent.

I trust that the above information is responsive to your inquiry.

Sincerely,

for LeRoy S. Rooker
Director
Family Policy Compliance Office

APPENDIX C

October 31, 2003

Attorney for School District

Dear Attorney for School District:

This responds to your letter of September 30, 2003, in which you asked for an official opinion whether the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, permits the [District] to release certain information in education records related to one student to the parents of another student. My staff and I have spoken by telephone with you and with [the Hearing Officer], an impartial hearing officer for the State Department of Education, concerning this matter. This Office reviewed a copy of the Hearing Officer's August 16 and September 14, 2003, procedural orders in the matter. This Office administers FERPA and provides technical assistance to educational agencies and institutions to ensure compliance with the statute and regulations codified at 34 CFR Part 99.

The District and [Parents], parents of [Student], are engaged in "an impartial hearing brought by the Parents pursuant to Part 200 of the Commissioner's Regulations and Section 1415 of the Individuals with Disabilities Education Act" (IDEA). In response to the Parents' request for a copy of the Student's discipline records, the District provided them a copy of the requested records after it had "redacted those portions of the [S]tudent's records containing names of and/or personally identifiable information regarding other students." The Hearing Officer issued procedural orders (Orders) to the District on August 16 and September 14, 2003, to provide the Parents a "complete and accurate copy" of the Student's discipline records, to include the names and other personally identifiable information of other students also contained in those records. The documents at issue are written and signed allegations made by other students charging the Student with serious or criminal behavior. In response to the Orders, the District informed the Hearing Officer that release of the education records in unredacted form violated FERPA. The Hearing Officer suspended implementation of the ordered disclosure pending written clarification from this Office.

The Hearing Officer states that the names and other personally identifiable information of other students contained in the Student's education records are information directly related to the Student, and thus the information of the other students must be disclosed to the Parents. The Hearing Officer asserts that redaction of the identity of other students from the Student's education records prevents the Parents from exercising their FERPA right to access and review "a complete and accurate copy" of the Student's education records.

Because the documents at issue contain charges by other students of serious or criminal behavior on the part of the Student, the Hearing Officer believes that the "due process rights" of the Student apply to the documents, and thereby override FERPA's prohibitions on release of the other students' information to a third party, the Parents, without prior consent of the parents of the other students. The District believes that it is prohibited by FERPA from releasing the

information in the requested format because it may not release one student's information from education records in personally identifiable form to the parents of another student. You ask:

> Whether the District should disclose the above-mentioned student's disciplinary/educational records containing information regarding more than one student, pursuant to 34 CFR § 99.12, without first redacting the names and/or personally identifiable information of other students.

An educational agency or institution subject to FERPA may not have a policy or practice of disclosing education records, or non-directory, personally identifiable information from education records, without the written consent of the parent, except as provided by law. 20 U.S.C. § 1232g(b); 34 CFR Subpart D. "Education records" are defined as records that are directly related to a student, and maintained by an educational agency or institution or by a party acting for the agency or institution. 34 CFR § 99.3 ("Education records").

Under the FERPA regulations, "disclosure" means "to permit access to or the release, transfer, or other communication of *personally identifiable information* contained in education records to any party, by any means, including oral, written, or electronic means." 34 CFR § 99.3 ("Disclosure") (emphasis added). The regulations define "personally identifiable information" so that it includes, but is not limited to:

a. *The student's name*;
b. The name of the student's parent or other family member;
c. The address of the student or student's family;
d. A personal identifier, such as the student's social security number or student number;
e. *A list of personal characteristics that would make the student's identity easily traceable;* or
f. *Other information that would make the student's identity easily traceable.*

34 CFR § 99.3 ("Personally identifiable information") (emphases added). That is, FERPA-protected information may not be released in any form that would make the student's identity easily traceable. As stated above, a student's name or signature is "personally identifiable information" of that student.

The law governing the proper handling of a student's education records that contain personally identifiable information belonging to other students is clear. Indeed, the statute is unambiguous in that it states:

> If any material or document in the education record of a student includes information on more than one student, the parents of one such student shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material.

20 U.S.C. § 1232g(a)(1)(A). See also 34 CFR § 99.12(a).

Thus, absent the consent of the parents of the other students whose names appear in a student's education records, an educational agency or institution does not have authority to release such

personally identifiable information under FERPA. A school district should redact the names of, or information easily traceable to, any other students mentioned in a student's education records before providing a parent access to the student's education records. In cases where joint records cannot be easily redacted or the information segregated out, the school district may satisfy a request for access by informing the parent about the contents of the record.

The IDEA statute, on its face, makes FERPA applicable to IDEA proceedings. 20 U.S.C. § 1417(c). Further, the IDEA regulations contain similar language limiting the right of a parent in an IDEA proceeding to inspect and review education records of another student that might be contained in their child's education records. Specifically, it states:

> If any education record includes information on more than one child, the parents of those children have the right to inspect and review only the information relating to their child or to be informed of that specific information.

34 CFR § 300.564. It is clear from the IDEA regulations that parents are not entitled to a greater right of access to the education records belonging to other students in the context of an IDEA proceeding.

Based on the information provided, this Office has determined that the documents at issue are "education records" under FERPA. The records are directly related to each student, containing specific information such as the name of a student, the signature of a student, or information concerning the alleged behavior or actions of the Student. The District acknowledges that it maintains the documents at issue.

Because the documents at issue contain personally identifiable information about more than one student, the documents also meet the requirements to be the education records of each student named or mentioned in the document. This Office considers that the name and other personally identifiable information of each <u>other</u> student is directly related <u>only</u> to that other student, even when such information is contained within the education record of the Student. This Office considers the name and other personally identifiable information of the Student to be directly related <u>only</u> to the Student. The FERPA statute specifically provides in those circumstances that the parent of each student then has a right to inspect and review only the information directly related to his or her child.

Based on the information submitted, the District provided the Parents a copy of the requested documents from which the names and other personally identifiable information of other students had been removed. Release of a redacted copy of the documents at issue is in compliance with the FERPA regulations specific to the handling of education records of more than one student. Additionally, this Office considers that the Parents right of access was met by the District when it provided the Parents with redacted documents. The District's action is in compliance with FERPA because it did provide the Parents with access to the Student's education records in response to their request while still protecting the information from the education records of the other students from being improperly disclosed to the Parents. Further, we confirm that, under the circumstances described, disclosure of the personally identifiable information of other students to the Parents would generally be an improper disclosure under FERPA. Compliance with the Orders to the extent that the Orders require the District to act in a manner inconsistent

with the provisions of FERPA could subject the District to administrative action by the Secretary of Education and jeopardize the District's receipt of Federal education funds.

Based on the above cited statutory and regulatory authority that clearly requires compliance with FERPA in IDEA proceedings, we do not believe the Hearing Officer's claim is correct that the Student's "due process rights" justify the release of other students education records to the Parents. Rather, the IDEA "Due Process Procedures for Parents and Children" found in 34 CFR §§ 300.500 – 300.515 do not override any of the privacy rights of FERPA or IDEA. Accordingly, to the extent that the Orders require the District to release the names and personally identifiable information of other students contained in the Student's records, the Orders directly conflict with the statutory and regulatory provisions of both FERPA and IDEA, and the Parents are not entitled to the education records of other students that are contained in the education records of the Student.

I trust that this explains the scope and limitations of FERPA as it pertains to your inquiry. Should you have any additional questions, please do not hesitate to contact this Office again.

Sincerely,

/s/

LeRoy S. Rooker
Director
Family Policy Compliance Office