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Student government often controls the purse strings at college papers – and can interfere with an independent press.

REPORT

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The Student Press Law Center *Report* (ISSN 0160-3825), published three times each year by the SPLC, summarizes current cases and controversies involving the rights of the student press. The *Report* is researched, written and produced by journalism interns and SPLC staff.

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FIND MORE ONLINE

With student press, there's always more than meets the eye. We don't want our community to forget that this content, and more, is available online at www.splc.org/section/magazine, including:

- **First Amendment Showdown:** The First Amendment protects both the free expression of religion and a free press. Some Catholic schools protect one at the expense of the other.
- **A New Frontier:** Legal assaults on the press and a hostile climate from public officials is honing the way journalism is taught.



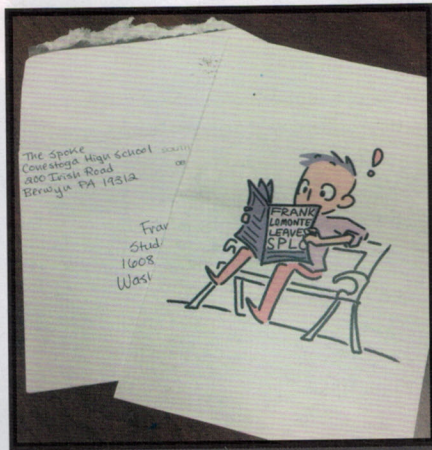
A MESSAGE FROM EXECUTIVE DIRECTOR FRANK D. LoMONTE

Frank LoMonte

Signing off – but not signing out – after nine years of adventure

When we announced that I'd be leaving the Student Press Law Center this summer, I received many hundreds of thoughtful messages from people around the country who'd benefited from calling the SPLC attorney hotline over the years. The one that's most meaningful, and the one that will be sitting on my desk when I show up for work at the University of Florida in August, is the handmade greeting card signed by the staff of The Spoke at Pennsylvania's Conestoga High School.

On January 2, 2008, while I was



unpacking boxes to settle into the office that would become my home, Henry Rome of the Spoke became hotline call #1. Henry was onto a story, the kind of story that mainstream professional newspapers used to break, 24,000 layoffs ago – about how, because of the school district's self-reporting honor system, nobody ran a rudimentary criminal-records check on a janitor who turned out to have a side job robbing banks.

With SPLC's help, Henry obtained the police and court files and district personnel records enabling him to break "Obligation to Report," which secured his status as National High School Student Journalist of the Year and launched a career that led to Princeton, to the Jerusalem Post, and now to Harvard graduate school. So the thank-

you card from this generation's Henry Rome was a reminder of the enduring value of student journalism as a force for civic good, and of the life-changing work that the SPLC does as the "lawyer of last resort" for thousands of grateful young people.

The words "honor" and "privilege" get thrown around a lot, but when you're a journalist or an attorney and people bring you their problems to solve, their trust truly is an honor and a privilege. The people working in student newsrooms – and they are people, they're not "children" or "kids" – are there because they're called to make positive change in their communities. I've taken their calls in the grocery aisle, over family dinners, and in the jetways of more airplanes than I can count. It has never once felt like "work."

If you are not an optimist by nature, working with student journalists will make you one. The one indispensable qualification for working at the Student Press Law Center is the certain knowledge that, if you ram your head into a brick wall very hard enough times, it is the wall that will break.

From where we now stand, we can see the end of Hazelwood School District v. Kuhlmeier, the discredited Supreme Court ruling that has placed a ceiling on the creativity and civic readiness of America's students for nearly three decades. We now know to a certainty that there will not be a fourth decade of Hazelwood in the newsrooms of America's schools. The consensus is too great. The momentum is too strong. And the principle – that the right amount of press freedom in schools is not "zero" – is too obvious.

Over the past three years, SPLC-led advocacy has

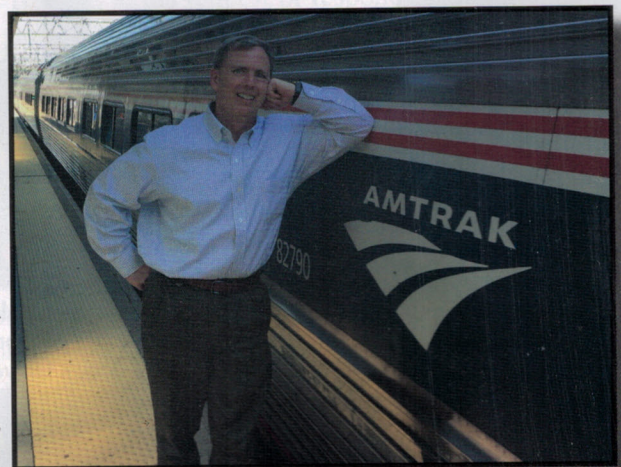
resulted in fortified legal protection for 1.1 million high school students and 667,000 college students – enabling them to bring their communities the information essential for informed civic participation. That progress is only possible because of the investments, large and small, of many hundreds of people too numerous to individually thank. If you've served on the SPLC's volunteer board, if you've signed up to take pro-bono legal cases, if you've come through our internship and fellowship programs or worked on our staff, if you've sold cookies or baked cakes or printed T-shirts to raise \$50 to keep the SPLC running – then these victories are your victories. In ways you can't see or appreciate, you saved good teachers' jobs. You passed laws. You gave students hope.

The SPLC isn't a person and it isn't a place. It's a shared belief that schools and colleges work better when we start each day from a place of trust and not from a place of fear. That is the animating principle that enables the SPLC to endure through generations of change.

I came into this job as a stranger and outsider to student media. I hadn't taught journalism, hadn't studied it in college, hadn't set foot in a newsroom of any kind for eight years, and I was following a legend, Mark Goodman. The welcome was immediate and genuine. People who didn't know trusted me with their worst problems on the toughest days of their careers. "You put on the cape," I told Mark, "and right away, people think you can fly."

It turns out I was wrong about that. When you put on the cape, you can fly.

Thank you, to everyone who believed that I could. -30-



A female editor in Wisconsin is told to rewrite a source's direct quote to make it misleading – and then written up for insubordination when she resists.

A female writer in Illinois is threatened with the shutdown of her newspaper, because she took a censored news story off-campus and published it on a personal blog instead.

Young women regularly report being pushed around by school authority figures, and a newly published article by Kansas professors Genelle Belmas and Piotr Bobkowski ("Mixed Message Media: Girls' Voices and Civic Engagement in Student Journalism") documents that girls experience censorship more acutely than boys.

The Active Voice project helps make schools more supportive and empowering through student-led and student-designed training and mentorship.



Left to Right: Shine Cho, Nashwa Bawab, Darlene Aderaju, Sophie Gordon & Sindhu Ravuri

The inaugural class of Active Voice Fellows have completed their mission. These Wonder Women presented the culmination of their service projects at the Lillian Lodge Kopenhagen Center's annual conference at FIU on April 20. You can view the video and learn more about their projects at theactivevoice.org

**MEET THE
NEW CLASS!**



Jamie Crockett
M.A. Student
University of Missouri



Melissa Gomez
Rising Senior
University of Florida



Morgan Maccherone
Rising Senior
Columbia University



Paula Pecorella
Rising Senior
Stony Brook University

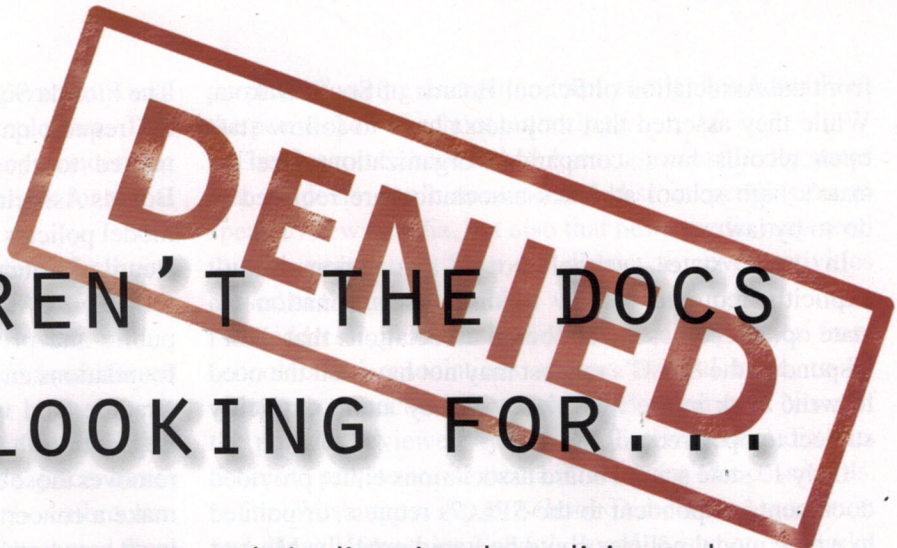


Savannah Robinson
Rising Junior
University of S. California



Naba Siddiq
Rising Sophomore
Texas Tech University

Follow the 2017-18 Active Voice Fellows at theactivevoice.org!



THESE AREN'T THE DOCS YOU'RE LOOKING FOR...

School Board Associations play a major role in directing the policies and practices at High Schools around the country. However, the vast majority maintain they're not subject to open records laws.

By James Hoyt



State school board associations have a lot of power to influence policy and represent the interests of publicly elected officials; but, sometimes, they use their status as nonprofit organizations as an excuse to avoid complying with state open records law.

State school board associations are nonprofit organizations that represent each state's numerous district school boards. They serve as school boards' voice in state capitals as well as being a unifying structure for school boards to set policy and objectives.

Their specific activities may vary from state-to-state, but often include advocating for or against state legislation, offering draft policies, conducting member training, and providing legal services.

These functions sound harmlessly mundane, and the associations themselves argue that the education, advocacy, and connectivity they provide strengthens member districts and, by extension, improves the quality of education. It can hardly be denied that they make a tangible impact on school operations and even state law.

Recently, opposition by the state school board association in Indiana blocked the passage of legislation designed to guarantee First Amendment protections to high school and college media. On a more local level, these associations often provide example policies covering everything from dress codes to bullying to student publications.

These nonprofits, which are membership-based, exist to represent and serve elected officials – school board members being elected by the residents in a given district. Their work affects thousands of students and families on

a day-to-day basis, but finding out what, exactly, these organizations are advising their members to do isn't so simple.

Over the course of several months, the SPLC sent open records requests to school board associations in all 50 states, to gauge each school board association's response to a Freedom of Information Act (FOIA) letter.

The SPLC's letter asked for model policies relating to media access to school functions and monitoring of student social media. The model policies in question would be recommendations crafted and given to school boards across their respective states.

The responses varied widely.

Responses

The majority of school board organizations the SPLC contacted – 37 school board associations – either didn't respond to the request or responded with a denial. Most denied the request on the argument that they're private, non-profit organizations not subject to state open records laws.

In other cases, model policy access is gated and the policies themselves copyrighted. For example, the Minnesota School Board Association's letter of denial cited this copyright as a reason not to provide copies of the policies to the SPLC.

A few others, including the Maryland Association of Boards of Education and the Nevada Association of School Boards, responded by saying the model policies don't exist at all.

At least one inconsistency can be found in the response

from the Association of School Boards of South Dakota. While they asserted that they don't have to follow state open records laws, comparable organizations like the state's high school athletics association are required to do so by law.

In most states, school board associations aren't explicitly required by law to disclose information via state open records. School board associations that didn't respond to the SPLC's request may not have felt the need to write back in the first place, as they aren't explicitly subject to open records laws.

Only 13 state school board associations either provided documents responsive to the SPLC's request, or pointed to where model policies could be found publicly. Most of the associations said they were honoring the request out of a desire for transparency and not agreeing they were bound by state law. However, Iowa's and Oregon's school board associations did provide the responsive documents in accordance with state laws.

Iowa's state legislature passed a law requiring the Iowa Association of School Boards to comply with open records in 2010, after a financial scandal which Iowa Freedom of Information Council director Randy Evans called "a case study in how these things could go horribly wrong."

According to reporting from the *Sioux City Journal*, IASB executive director Maxine Kilcrease was drawing compensation around \$367,000 a year on a \$210,000 contracted salary. Other employees showed unaccounted-for raises and made suspicious charges to the association's credit card.

The IASB collected around \$1.3 million in fees from public school districts across the state. The misallocations of taxpayer dollars led directly to the legislation mandating IASB's transparency. Iowa also considers university foundations to be transparent organizations, subject to open records requests.

David Cuillier, a University of Arizona journalism professor, said school board associations are often funded by dues paid by government agencies and should comply with state transparency laws.

"They can hide behind technicalities and loopholes in the law, but that's not serving the public well," Cuillier said.

State SBA policies can present obstacles to student journalists looking to do their jobs, as happened in Pennsylvania in 2011. There, the state's school board association actually wrote a policy requiring students and staff to seek approval from the district's communications staff to speak to news media.

There were a few notable exceptions in transparency.

The Florida School Boards Association declined to honor the request on the basis of state law, but sent material related to the subject, anyway. The Vermont School Boards Association pointed to a public-facing manual of model policies available on its website, as did the Hawaii Board of Education.

State SBAs occupy the same grey area between public and private that other nonprofits like university foundations and private university police forces routinely straddle, and which the SPLC has covered extensively. Legislation has been introduced in some areas that removes those distinctions, but Cuillier said it's difficult to make a concerted effort when transparency is threatened in so many other areas in state legislatures nationwide.

"A lot of these [transparency groups] have their backs against the wall right now. With an onslaught of exemptions and bills designed to make everyone more secretive. So when you're spending all your time fighting those off, you don't have as much time to try to get good legislation integrated into statute," Cuillier said.

"From my vantage point, these membership organizations that are made up of government entities, whether they're counties, whether they are school districts, to me those entities need to be just as transparent as the member entities are. Because... that money is being derived from the taxpayers," Evans said.

Even in the majority of states where school associations didn't respond to FOIA requests, there are strong legal arguments that FOIA laws really do apply, since the organizations are 'public' in many respects, including being governed by boards comprised entirely of elected school board members.

A denial or non-response shouldn't be the final roadblock for a student journalist pursuing a story on their state SBA, however. Iowa and Oregon prove that solutions can be found through state legislators, and other state school boards have shown they are willing to provide information out of courtesy. In cases like South Dakota's, legal precedent might be found to aid journalists' and transparency advocates' cause.

Policies

Written policies govern the daily activities of students within their schools. These documents, sometimes presented in a student handbook, lay out the rights, limits and responsibilities students must abide by during the school day. These rules are the foundation for all manner of adverse consequences, from detention to expulsion.

The records request the SPLC submitted to the 50 state school board associations sought "model or recommended policies" concerning:

“(1) Monitoring of, and privacy of, the personal social media accounts of students or school employees. This includes, but is not limited to, any policy concerning demands for the login or password credentials for social media accounts.

(2) News media access to school personnel or facilities, including any policies limiting media interaction with students or employees.”

Both topics are areas of concern the SPLC has addressed previously.

In 2015, students at a Miami high school shared photos on social media of mold growing inside juice boxes served in the cafeteria and cockroaches in the bathrooms. The students later said the administration threatened them with suspensions and forced them to write apology letters over the incident.

The school claimed it never threatened any concrete actions against the students and only requested apology letters from two students who’d used profanity in their posts. Still, the principal retired amid the controversy.

In the results of the SPLC’s records request, some associations included policies concerning technology. The New Jersey School Board Association’s model policies include a provision allowing the use of recording and record-keeping on school-issued technology, like laptop cameras.

The Iowa ASB provided documents indicating model policies had only been developed for school district technology, not for any social media or other private technology possessed by employees and students.

In general, the news media and public meetings policies submitted by the responding associations clarified the place journalists have in school communities. None of the policies provided state that students need permission to speak to news media under normal circumstances.

Likewise, there were some promising indicators for access to meetings and events. Some policies, including Iowa and Kentucky, go so far as to explicitly state news media have access to public school meetings.

There are caveats – Kentucky includes a clause specifying that public meetings should be open to news media, but grants the chairperson the ability to close any meeting for the “maintenance of order.”

The New Jersey School Boards Association includes a section on the photographing of students for “commercial

purposes,” saying such photography isn’t allowed without the permission of school authorities.

The Oregon School Board Association explicitly states that students don’t need school district permission to speak to news media, but also that news media may need to seek permission from the district to cover activities closed to the general public.

In addressing social media, the shared policies from school board associations appear, by and large, to be written to protect employee and student privacy. None of the policies reviewed by the SPLC give school districts access to private social media information like passwords.

The Washington State School Directors’ Association and New Hampshire School Board Association model policies explicitly discourage accessing a district employee’s social media account in any way.

However, New Hampshire does recommend a policy

.....
“A lot of these [transparency groups] have their backs against the wall right now. With an onslaught of exemptions and bills designed to make everyone more secretive.”

David Cuillier, University of Arizona journalism professor

.....
requiring students or parents to turn over information published on personal social media channels if they’re pertinent to an ongoing investigation.

The NHSBA also recommends complying with a New Hampshire state law which prohibits school districts from requesting personal social media information from students.

This is the crux of such a request for documents from these organizations – to verify that the advice, training, and model policies recommended by school board associations align with the law.

Still, where model policies outwardly observed the privacy of students and staff, some promoted the voluntary disclosure of information. The Missouri School Board Association includes a form where a parent may sign a form consenting to allow a school district to “examine my [electronic] device to the extent allowed by law.”

Similarly, the Texas Association of School Boards model policies encourage employees to turn over public information regarding their social media accounts if asked to by administration, but doesn’t make any provisions for private information like passwords.

Another interesting note on the TASB policies released, like some materials denied in other states, is that they’re copyrighted. Their response to SPLC read: “TASB is not a governmental entity subject to state public information laws but you may use the attached copyrighted materials for source and reference purposes. No permission is

granted to distribute, transfer, or adapt the materials, in whole or part.”

The variety and unreliability of response illustrates the currently ambiguous state of the law. Many state sunshine laws didn't foresee the rise of nonprofit professional organizations; such as school board associations, principals' associations and the like; and don't include language that folds such organizations under open records laws.

Meanwhile, other states have seen fit to pass laws aimed

directly at closing these statutory loopholes. The difficulty arises from uncertainty – the uncertainty surrounding the legal accuracy of policies and training provided by these organizations and the uncertainty of accessing documents that might provide clarification.

In an era where state legislatures are increasingly introducing exemptions to public disclosure laws, voters may need to pay closer attention to their local governments. **-30-**

REPORTING ON TRANSGENDER RIGHTS ISSUES

Cases about the legal status of transgender students are bubbling up through regional appeals courts that interpret federal law for their parts of the country. These courts are one rung below the U.S. Supreme Court, and their decisions are legally binding unless the Supreme Court overturns them. Highly publicized cases have already reached the appeals-court stage in the Seventh federal circuit (based in Chicago), the Sixth federal circuit (based in Nashville) and the Fourth federal circuit (based in Richmond).

A federal appeals court on May 30 upheld a preliminary ruling affirming the right of students to use school bathrooms that conform with their gender identity. The case involved Ash Whitaker, a transgender high school senior who fought for his right to use the boys' bathroom at his school. The unanimous opinion said: “A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX. ... Providing a gender-neutral alternative is not sufficient to relieve the School District from liability, as it is the policy itself which violates the Act.”

The Seventh Circuit ruling is the first to explicitly read Title IX as banning discrimination against transgender students. A similar ruling in the Fourth Circuit in the well-publicized case of Virginia teen Gavin Grimm focused not on Title IX itself, but on a now-defunct Obama-era policy that instructed

schools to consider gender identity to be protected under Title IX. (The Supreme Court directed the Fourth Circuit to reconsider this case after the Trump administration withdrew the Obama-era interpretation on which the circuit court's ruling was based.) A ruling last year in the Sixth Circuit upholding a preliminary injunction allowing a transgender girl to continue to use the girls' restroom at school found that federal sex discrimination law generally forbids gender identity discrimination.

The Seventh Circuit's reasoning goes like this: In a 1989 case called *Price Waterhouse*, the Supreme Court recognized that discrimination based on gender stereotyping violates Title VII. In that case, the Court found that a company's decision to deny promotion of a female employee because she acted and dressed too masculine was an act of gender stereotyping that constituted sex discrimination under Title VII. The Seventh Circuit applied that same reasoning in its decision. When a school discriminates against a transgender student because the student “does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth,” it is illegally discriminating against the student because of the student's sex.

Unlike other courts that have heard similar cases, the Seventh Circuit also decided that the school likely violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution. The Equal Protection Clause demands that government

agencies, including public schools, treat similar individuals equally. The Seventh Circuit found that Ash faced different treatment because of his sex. Under the Equal Protection Clause, sex-based classification is legal only if the government entity can show that it “serves important governmental objectives” and is “substantially related to the achievement of those objectives.” The school, the court said, will likely fail to meet this test.

It's important to note that this case, like the Sixth Circuit case, is at the preliminary injunction stage, meaning the decision is not set in stone. A preliminary injunction is simply a court order that “freezes” the situation until the case can get in front of a jury. But receiving a preliminary injunction is a signal that the judge believes the case has some reasonable chance of succeeding. The cases will now go back to district courts for trial. Those outcomes may then return to the circuit courts for further appeals, and ultimately to the Supreme Court.

Additionally, the Office for Civil Rights recently instructed its regional directors to “rely on Title IX and its implementing regulations, as interpreted in decisions of federal courts and OCR guidance documents that remain in effect, in evaluating complaints of sex discrimination against individuals whether or not the individual is transgender.”

For a quick-reference guide, see the reporting cheat sheet on the next page.

COVERING TRANSGENDER RIGHTS ISSUES

THE NEWS ANGLE

With cases making their way through the courts from North Carolina to Wisconsin, and a wave of proposed state laws affecting transgender students' rights, it's helpful to understand how sex-discrimination laws work and how the courts have applied them. These pointers will help student journalists cover this emotionally charged issue in a researched, factual way.

ASH WHITAKER — Seventh Circuit

The court unanimously ruled, "A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX. ... Providing a gender-neutral alternative is not sufficient to relieve the School District from liability, as it is the policy itself which violates the Act." The Seventh Circuit ruling is the first to explicitly read Title IX as banning discrimination against transgender students.

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GAVIN GRIMM — Fourth Circuit

A similar ruling in the Fourth Circuit in the well-publicized case of Virginia teen Gavin Grimm focused not on Title IX itself, but on a now-defunct Obama-era policy that instructed schools to consider gender identity to be protected under Title IX. In March, the Supreme Court directed the Fourth Circuit to reconsider this case after the Trump administration withdrew the Obama-era interpretation on which the circuit court's ruling was based.

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TERMS TO KNOW

Title IX: A federal law that forbids educational institutions that receive federal money from practicing sex discrimination.

Title VII: Another federal sex-discrimination statute similar to Title IX, but that applies to workplaces instead of schools.

Sex discrimination: Denying someone a benefit or opportunity because of that person's sex. The federal courts have interpreted creating a "hostile environment," such as by severe gender-based harassment, as being a form of sex discrimination.

RESOURCES FOR REFERENCE

Advocacy organizations that have directly participated in cases related to Title IX application to gender identity may be sources for journalists. They include (in support of gender identity being protected under existing law) the **Transgender Law Center** and the **American Civil Liberties Union**, and (in opposition to gender identity being protected under existing law) **Alliance Defending Freedom** and the **Liberty Center for Child Protection**. Not directly involved in bringing these cases, but also active in advocating for the rights of LGBT students, is New York-based **Lambda Legal**.

Law-school professors can be good sources of expertise available for media interviews. Knowledgeable experts who have written about the issue of transgender rights include:

Catherine Archibald, professor at University of Detroit Mercy School of Law

Terry Stuart Kogan, professor of law, University of Utah

David B. Cruz, professor at USC's Gould School of Law

MAKING IT LOCAL

Some states are moving toward legislation that restricts which bathrooms transgender individuals may use. This conflicts with a growing trend of gender neutral bathrooms at public universities across the country. As federal courts continue to hear cases regarding discrimination against transgender individuals, it's worth following any legislation being proposed in your state. It also is worth asking administrators at your school what policies and resources, if any, your school has regarding transgender students.



THE PRICE OF a FREE PRESS

One of the most crucial functions of a student newspaper is covering student government. At many colleges, however, student government controls the purse strings.

By Conner Mitchell

Student newspapers at colleges across the country routinely depend on allocated funding from their respective student governments to supplement advertising revenue and stay financially solvent.

In recent years, however, that funding has come under fire at several publications for what they were told were financial reasons – often a need to reduce student fees amid tuition increases or sagging enrollment. Further scrutiny, though, usually reveals more nefarious reasons for the push to cut newspaper funding.

Since 2016, student editors have reported coverage-based funding disputes at the University of Kansas, Wesleyan University, Delta State University, Southern Oregon University and UC - San Diego. But the issues have not stopped there. *The Daily Nebraskan* at the University of Nebraska, *The Pioneer* at the Long Island University-Post Campus and *The Advocate* at the University of Pittsburgh at Johnstown have all faced significant budget cuts in recent months.

A Daily Battle

Lani Hanson, editor-in-chief for the *Daily Nebraskan*, said the yearly battle over student fees allocated to the newspaper began decades ago, and is more easily won in some years than in others. This year, the publication requested \$134,882 – around \$3 of the \$611 each student at the university pays per semester – from the student government and was initially only granted \$114,650, amounting to a \$20,000 budget cut.

However, student senators voted in a March 9 meeting to amend the student fee bill and restore the *Daily Nebraskan's* funding to the requested amount. Student Body President Spencer Hartman vetoed the bill two days

later without offering an immediate explanation.

Hanson said that of the many frustrations for the *Daily Nebraskan* staff, one of the biggest was that the budget cut would only have saved students around 50 cents a semester in comparison to large projected tuition increases.

“Our state is in budget crisis and they’re about \$1 billion short of where they thought they were going to be,” she said. “[The student government is] expecting that the university is going to be getting significantly less from the state than they thought, so they’re looking at the possibility of cutting departments and raising tuition, so they’ve been especially hard on fee users this semester in an effort to keep student fees low.”

But the issue of the funding cut was not as simple as adjusting for state budget woes, Hanson said. During the initial presentations to the Committee for Fee Allocations, the *Daily Nebraskan* raised concerns about the impartiality of one of the committee members who had been outspoken against the paper’s coverage.

“He was named in a crime roundup and wanted his name taken out. He sort of appealed to the editor-in-chief at the time, and they were actually in the same fraternity, so I know that they had a lot of back and forth about why and why not his name should be removed from the story,” Hanson said. “He continued to sort of speak out against the *DN* in their fraternity house and has never been a big fan. That was a concern of ours. We thought that that had an impact on the decision that he helped to make to cut our funding.”

Hanson said she brought up the conflict privately with the Director of Administration for Student Government hoping to mutually benefit both parties by not publicly

airing the concern.

“She, I guess, didn’t think it was a problem and never really got back to us,” Hanson said. “I left that meeting feeling that my concerns were going to be addressed, but they really weren’t. We never heard anything about it until we met with the committee.”

Hanson brought the issue up again during the actual allocation meeting and said the committee chair agreed with her and removed the member from the committee. At the next meeting, however, a different member argued that Hanson, as a non-committee member, did not have the authority to bring up procedural issues. The committee voted to overturn the decision and reinstate the member to vote on the *DN* fee, which included the \$20,000 budget reduction.

Later in March, the entirety of the Nebraska student senate had an opportunity to override Hartman’s veto and reinstate the *Daily Nebraskan’s* requested funding, but the vote fell one senator short.

Hartman read a statement explaining his veto at the meeting, which said he “supports the *Daily Nebraskan* and maintains that stance today,” but said the paper should dip into its reserve funds to adjust for the necessary budget cut.

“It is for these reasons that I believe the *Daily Nebraskan* should come in line with the philosophy that this senate has applied to all the other fee users of fiscal responsibility,” Hartman’s statement read.

The failure to override the veto took the *Daily Nebraskan* to its last hope to retain its requested funding: the rarely-used Student Court. In a unanimous decision, the court ruled that Hartman’s line-item veto was unconstitutional within the student government bylaws, and restored the entirety of the *Daily Nebraskan’s* requested \$134,882.

In a *Daily Nebraskan* article published after the decision was rendered, Hanson said she was grateful for the support the paper received during the fight for funding.

“Full funding will allow *The Daily Nebraskan* to continue unhindered in providing its service to the UNL campus community,” she said. “I’m thankful for all the support we’ve received from our fellow students, faculty, alumni and many others throughout this process.”

A Pioneering Spirit

After an investigative report on a faculty lockout and a Board of Trustees meeting at Long Island University-Post, a university professor expressed concerns to faculty members that a \$13,000 cut to *The Pioneer’s* budget was “punitive and not budgetary,” according to a report by the *Queens Free Press*, a nonprofit newspaper based in New York.

Margaret Sullivan
@Sulliview

Following

When college and high school journalists need defending, these lawyers swoop in. For free. ... My column on @splc



Perspective | When student journalists need defending, these lawyers swoo...
The hotline never stops ringing at Student Press Law Center, but funding is scarce.
washingtonpost.com

“In recent months, millions of dollars in donations have rained down upon journalism organizations, prompted by President Trump’s verbal attacks on the news media and citizen support for the press’s role in America’s democracy. ... But one tiny outfit, working out of a windowless Washington office, has not benefited. That’s unfortunate since its constituency — vast numbers of high school and college journalists — is far bigger than the number of professional journalists.”

If that window-deprived organization sounds familiar, it should. *The Washington Post’s* Margaret Sullivan featured the “little nonprofit that could,” the Student Press Law Center, in a June 18 column that was retweeted from her Twitter account 111 times. The column prompted some Twitter nostalgia from long-ago beneficiaries of SPLC’s legal help, including *Post* investigative reporter Barton Gellman and *New York Times* columnist Nicholas Kristof. But maybe our favorite response came from a not-yet-world-famous-but-getting-there journalist, Heather Mongilio of Maryland’s *Çarroll Çounty Times*: “I would not have graduated from college without the SPLC. I cannot stress how much student journos need this org.”

Sullivan was the keynote at the SPLC’s tongue-in-cheek “inaugural ball” in January and has been a dedicated supporter of student journalism throughout a career that included stints as editor-in-chief of the *Buffalo News* and public editor for *The New York Times*. We encourage everyone to follow her insightful (and occasionally “d’aww”-inducing) columns about the state of media, student and professional alike, by way of her Twitter account, @Sulliview.

Active Voice
@ActiveSpeech

Following

The incomparable @Sulliview at #BallOfRights meeting self-professed “@washingtonpost fanboy” and @SPLC intern @jamesjhoyt. #CureHazelwood



“*Pioneer* students have encountered a gag order since early in the current administration,” university professor Willie Hiatt said in an email to faculty members. “But the crackdown worsened after [then] Editor-in-Chief Maxime Devillaz’s comprehensive reporting on the Brooklyn faculty lockout and direct action and the Board of Trustees meeting.”

According to the report, Devillaz faced a number of obstacles in reporting the story of campus labor unrest, including being stonewalled by university administrators who instead elected to speak only through hired communications personnel.

Devillaz also was told the story could not run with a contributed picture without prior review from the university public relations office.

“This crackdown is serious on many fronts,” Hiatt said in the email. “The fundamental disregard for First Amendment rights (telling tuition-paying students that they cannot speak) opens the door to litigation and National Labor Relations Board intervention.”

Current *Pioneer* Editor-in-Chief Caroline Ryan told the SPLC that staff members were notified last fall of the impending budget cut. She said the paper requested \$40,000 but was only granted \$27,000 – not nearly enough to cover the semesterly print budget.

“The administration told us they didn’t have the money to fund the *Pioneer* and had to make cuts to the budget,” she said in an email. “They suggested we make up the money in advertising. But since our staff no longer receives stipends, we cannot find anyone willing to do all the extra work for a business manager position. Therefore we cannot make up the money in ad sales at this time.”

Ryan said the budget cut has had an extremely adverse effect on the *Pioneer*’s daily operations. Despite having an award-winning staff, Ryan said the university still will

not provide adequate funding.

“This has affected the *Pioneer* greatly. As we near the end of the semester, we have to think about how we are going to scrape by to print the remaining issues,” she said. “We are exploring our options on how we can get money to finish printing and buy needed supplies for next year. We are fortunate to have a great support system from our faculty and alumni, and have also requested more money from campus life [the paper’s current funding outlet] to help us get through the rest of the semester.”

A Fierce Advocate

After *The Advocate* at University of Pittsburgh at Johnstown began printing a compilation of student crime citations, an anonymous petition surfaced to cut the entirety of the paper’s print budget – nearly \$9,000. The petition, which was presented at a March 14 student government meeting, argued that publishing crime reports was creating a hostile campus environment and hurting future job prospects for named students.

“This policy and practice is creating a hostile environment on campus and could potentially prevent students from seeking employment or admission to graduate school,” the petition read in part.

When the petition was first filed, the university’s humanities division chairman, Michael Stoneham, told the *Daily American* that he feels student reporters have to be “objective” and take into consideration the emotional distress a report can have on a student.

“To be fair you have to treat all failures as failure ... at the time, I don’t believe it is a reporter’s reason to condemn, malign a person,” he said. “I think that when presenting the record, I think you have to present it that it doesn’t represent particular bias by the reporter, the school.”

UNDER THE DOME

North Dakota

True leaders, North Dakota wasn’t content to sit idly by while the New Voices movement they launched produced more comprehensive student press laws than their own. The Peace Garden State kicked off the legislative season by passing a bill extending the John Wall New Voices Act to protect educators from

retaliation based on their defense of students exercising their rights under the law. The bill also exempts schools from liability based on student speech.

Indiana

Despite a daring Hail Mary attempt to add student press protections to an appropriations bill, New Voices legislation died in Indiana under near-constant opposition from the state’s school boards’, principals’,

and superintendents’ associations. The original stand-alone bill enjoyed strong grassroots support from students and educators but was ultimately pulled from the Senate floor in the face of possible opposition from the Department of Education.

Rhode Island

The thirteenth state made good on last year’s dashed effort to pass New Voices legislation in Rhode

However, student body president Kyle Maguire announced on March 22 that he would veto any attempts to cut *The Advocate's* funding.

"I definitely want *The Advocate* here. It's our student newspaper," Maguire told WJAC, Pittsburgh's local NBC affiliate. "It's an important student organization on campus."

According to WJAC, *The Advocate's* editor-in-chief, Peijia Zhang, said the paper would not stop publishing crime reports despite the public backlash.

"If we do not acknowledge these public records – public criminal records – publicly, we are kind of setting a lower standard," she said.

A Delicate Balance

Chris Evans, First Amendment Chair of the College Media Association, said his experience with student newspaper censorship usually centers on when advisers face retaliation for controversial coverage. However, he said financial-based censorship is an issue publications face often.

"Funding is often an end-run around saying that 'we are shutting you down because of issues of content,'" Evans said. "Typically administrators are concerned about the image of the school. It's a PR issue, usually. Sometimes college officials are concerned about the way they will be portrayed or the school will be portrayed, they're concerned about the way alumni will look at the school, and often it's about content that is offensive or embarrassing to them."

"They don't think of the [First Amendment] implications. At public colleges they are just in this 'what is best for the university' mind-set and there are some people who see that in a very external, top-down, let's control everything kind of way."

Part of ensuring student government funding isn't retroactively cut, Evans said, is having a good line of communication with the student government leaders. He said establishing a professional relationship is the best method, especially for publications that would have an otherwise difficult time finding alternative funding options.

"You're setting the precedent that 'this is the way things work at this school,'" Evans said. "Once you walk away from that and you go to this uncertain level of funding in the world, whether it's alumni who will give or not give, or it's advertising, you put the student newspaper in jeopardy in a way that it wouldn't be if you have money coming from a regular source like student government."

The American Association of University Professors, the College Media Association, the National Coalition Against Censorship, and the Student Press Law Center outlined the issues of financial censorship for student journalists in a 2016 report for the Association of American University Presidents.

"The knowledge that continued financial support for a journalism program, adviser, or publication may be contingent on pleasing campus authorities imposes a chill on the independence of journalistic coverage that invariably will produce more timid journalism that ill serves the public interest," the report said.

The report also argued that for student journalism to be at its most effective, whatever entity supplies funding to the paper must be completely separated from any editorial decisions.

"Effective campus journalism requires a source of financial support fully insulated from content-based judgments by those who are the subjects of the journalists' coverage," the report said. **-30-**

Island. After introducing twin bills in the House and Senate, advocates managed to push a vote during the legislatures budget stalemate. As part of a "consent calendar" vote on undisputed bills, HB 5550 cleared the Senate unanimously and is awaiting transmission to the governor.

Arizona

In a devastating conclusion to a near-fairytale story, Arizona Gov. Doug Ducey vetoed Sen. Kimberly Yee's New Voices bill after it

cleared the House with strong bipartisan support and the Senate with unanimous support. Sen. Yee introduced the bill 25 years after she, herself testified in favor of a similar bill as a high school journalist.

Nevada

The Silver State succeeded where their neighbors to the Southeast failed. Gov. Brian Sandoval signed Nevada's New Voices legislation in June after the bill cleared the Senate unanimously and enjoyed

bipartisan support in the House. The bill takes effect Oct. 1.

Vermont

As of July 1, the Green Mountain State has one of the strongest student press freedom bills in the country. Gov. Phil Scott signed the New Voices protections as part of an omnibus education bill on May 25, guaranteeing free speech protections for student journalists in public colleges and K-12.

NEW VOICES

LUCKY THIRTEEN!

After Indiana and Arizona went bust, the 13th state to ratify the U.S. Constitution became the 13th state to ensure the constitutional rights of student journalists.

Thirteen cheers for Rhode Island!

Nevada won big when Gov. Sandoval signed the New Voices bill June 2.

JACKPOT

Vermont doubled down on student press rights when Gov. Scott signed New voices into law May 25.

JACKPOT

Rhode Island claimed the pot when Gov. Raimondo signed New Voices July 19.

JACKPOT

To check the status of live campaigns or to launch a New Voices campaign in your state, visit newvoicesus.com

A New Hope

Embattled community college newspapers in New Jersey are showing new life just as a campaign to pass student press legislation ramps up.

By Molly Cooke

In a time characterized as the death spiral of print journalism – a time when the President of the United States has declared a “running war with the media” – it’s rare to see a newspaper come back to life. One such heartening underdog is Mercer County Community College’s *The College VOICE*, which swept eight of 13 categories in its division this year for the annual New Jersey Collegiate Press Association’s College Newspaper Contest.

No one would have predicted such success just two years ago, when *The College VOICE* lay dormant for the 2014-2015 school year with no prospective future. The newspaper, which was founded in the late 1960s, had garnered major attention after uncovering an English professor’s fraudulence, ultimately resulting in his resignation in the spring of 2012. A subsequent lack of support from college administrators led adviser Holly Johnson to step down from her position in the spring of 2014, however. As such, *The College VOICE* ceased to exist for a year until professor Matthew Kochis was hired on to raise it from the dead beginning in fall of 2015.

Johnson said an issue that all newspapers face – but particularly smaller community college papers must deal with – is losing the trust of the establishment.

“If an administrator sort of sours on talking to the student newspaper based on one article, it may be really hard to get them to talk about the next article,” Johnson explained.

So far, it seems the paper has made great strides in reestablishing its credentials and relationship with the college. Community college journalism often produces colorful stories both on and off the page, but even by those standards, the tale of the *VOICE*’s demise and subsequent resurrection is an intriguing one. And it began with a time-traveling professor.

Back to the Future Past

In April of 2012, the *VOICE* reported that Professor Jamal Eric Watson was being investigated by the university. Reasons for such scrutiny could have been related to several issues, including a previous felony conviction for larceny, a restraining order filed over a domestic dispute and a complaint from the University of Delaware that Watson was missing several classes he was assigned to teach – classes that conflicted with his teaching schedule at MCC.

Further investigation by the *VOICE* revealed that Watson was on staff as an instructor at five other colleges where his assigned schedules frequently conflicted. The commute, the staff calculated, would have made it physically impossible to juggle all of the competing commitments – the distance between the furthest institutions was around 80 miles. Watson resigned that May.

Johnson recused herself from advising on stories related to Watson when her students were writing them. They were important, but he was a member of her own department and she knew him personally, so she brought in another professor to guide the publication. This didn’t stop retaliation from other faculty members in the fall of 2012.

At the first English department meeting for the fall semester, Johnson says a fellow professor grabbed her by the face out of anger about the Watson story. She and some newly hired English department staff who were horrified by the scene filed a complaint and the offending faculty member took an early retirement, but Johnson was forced to wait out an entire year for her attacker to finish their time at the college and was met with red tape concerning accommodations during that period.

“They acted like it was me who had done something wrong when I went to ask for help,” Johnson said. “The paper had faced a lot of really big stories and the amount of support that I felt like I got from the administration and the sort of fallout from them was pretty great. As a result, I felt like it was the right time to step down.”

Johnson waited another school year until the majority of her students had graduated to leave in the spring semester of 2014.

She had set up major programs in Communications and English to emphasize journalism education, ensuring the continuance of her classes by adjunct professors, but the number of students enrolled in them dwindled. Mercer hired Kochis in the summer of 2015 to revitalize the key classes required for the Communications and English majors. It was made clear during his interview, Kochis said, that reviving the newspaper would be an integral part of that job.

Journalism classes are independent of the student news publication at Mercer, but they aren’t mutually exclusive. Kochis recruits students from his classes to join the newspaper

club, but students aren't required to have taken journalism to write for the *VOICE*.

Kochis said he began consulting Johnson about what to do almost immediately.

"The newspaper had won awards while she advised it so I wanted to keep her exact model," Kochis said. "I worked a lot with Holly on how to go about modelling the club."

This was the beginning of a return journey to Mercer for Johnson, who returned to *The College VOICE* in a co-adviser capacity this spring 2017 semester.

"[Kochis] is untenured and I think that, for one thing, it's not necessarily a great idea to have somebody untenured doing the paper, though it's definitely better than having no one do it in terms of advising," Johnson said. "Also, he had a baby coming at the same time as the College Media Association's convention was happening so he knew he wouldn't be able to take students to that and he reached out and asked if I'd be able to do it, so I said 'yes' of course."

Johnson's return coinciding with a new presidential administration is no accident. Her main reason for coming back is the "era of fake news."

"I think probably the largest reason for me was feeling like after the election and seeing what's happening with what's going on in media in the larger sphere, that it's a really important time to not step away from student journalism and to ensure that students get training and that we're not letting free speech get chilled even further than it might already be by our current government administration," Johnson said. "I definitely felt compelled by the situation at large about the pressures the media is under. I feel like students really need the support."

Johnson went on to express regret for her, and the newspaper's, absence during years when students may have needed press the most.

"[The paper] has been revived, and admirably, by my co-adviser, but at the same time, it's like I feel pretty culpable and bad that during that period of time that I wasn't doing it, there was no voice for students on our campus," Johnson said. "That feels really sad. There were students who could've contributed who I think would've gotten a lot out of it, but I just didn't have the stamina to continue doing it so now I feel a sense of even greater obligation to the students we have. To feel as if this important institution in our campus would've just stopped, that's a big burden to bear."

To Boldly Go...

Mercer's current journalism students may be getting the opportunity of their lives, though, as *The College*

VOICE took first-place prizes in Feature Writing, Arts & Entertainment/Critical Writing, Photography, Overall Website and General Excellence in the two-year category of the NJCP's 2016-17 College Newspaper Contest, along with two second places and one first.

Students like Maria Ramos, who was first published in the paper during the fall 2016 term and is now editor-in-chief of the *VOICE*, are writing about relevant and difficult topics – like why a registered sex offender was allowed to enroll at the college – and being rewarded for it.

At a four-year school, Johnson admits, such a promotion would not happen so quickly. Turnover is one of the disadvantages of doing journalism at community college, but Kochis had devised a plan to deal with it.

"[The students] are only here for two years. The amount of time that it takes for us to train, place them in position and then have them put in leadership skills is very collapsed," Kochis explained. "One of the things that we did was selecting students who were strong writers and leaders to help advise and run the semester and vary per semester; and as I continued teaching the journalism class, I was able to find other members who would help keep the newspaper going."

Johnson added, "Because it's community college, not only are they commuting, but most of my students work at least 20 hours a week and are taking a full course load. The best students who do the best work for the newspaper are usually the most exhausted, overworked students on our campus. They still manage to do tremendous work, but I would say that that's definitely a hardship that you might not see elsewhere."

Ramos agrees that it's tough, but says she's up for the challenge. A second-year student, she plans to stay a third year and continue serving as editor-in-chief, with plans to continue growing the paper.

As of now, the 16-page paper, which covers news on the main campus in West Windsor as well as the James Kerney Campus in Trenton, is published three times a semester and the 1,500 printed copies are hand-distributed by students. Kochis says he'd like to continue increasing page count up to 20 and Ramos says she's focused on bolstering readership by improving the *VOICE*'s online presence.

"Let's be realistic, a lot of students are not going to pick up the paper from around the halls at school, but they're going to pick it up online," Ramos argued. "We're on our phones all day, we're on Facebook, we're on Twitter. So I say let's try to move a bit more on social media and try to get more students involved. I want that. I want the students to read us. Of course we have faculty and

staff reading us and they are readers, but it's a paper for students by students."

Progress can, however, be stalled by administrative barriers from the school, as it has been before.

Ramos recounts a growing enmity between herself and the college's public relations department regarding access to information that "any other student could go in and ask for."

Kochis is working on a grant to regain access to a room and facilities designated specifically for the club's journalism and production after their newsroom was absorbed for shared use under a Student Governance Association act while the newspaper was dormant. Having to use outdated computers and share facilities with the radio station "made it impossible to interview anyone."

Johnson recently forwarded the Student Press Law Center a screenshot of a mandatory online faculty training in which employees are instructed that they "should not talk to the press without explicit consent from the university."

But these roadblocks are likely more a result of negligence than of malice, Johnson wrote in her email referencing the lack of support she received back in 2012.

"In the end I think their actions were less a desire to silence the paper and more a result of college administrators in general not having a clear sense of what their obligations are where the student press is concerned," Johnson wrote. "I suspect working successfully with the student press is not covered in the Doctorate of Education (Ed.D.) programs that most of them come out of."

She continued, saying that she is optimistic that progress will continue if student press freedom legislation passes in New Jersey.

"I'm hopeful that the New Jersey New Voices legislation, if passed, will reduce this problem by clarifying for administrators what their obligations are, remove the guesswork, and hopefully establishing a stronger culture of First Amendment support across the state," Johnson wrote, noting that, "In many ways our school is more supportive of college press freedom than many of its peers if only because we in fact have a newspaper."

Return of the Viking

Johnson says Mercer was one of six community colleges represented at the New Jersey College Journalism Conference. Noticeably absent, she said, were members of the *Viking News* from Ocean County College, where students famously sued the school for violating the First Amendment by firing newspaper adviser Karen Bosley over a controversy surrounding the newspaper staff's

investigative journalism.

Though no staff or adviser for the *Viking News* could be reached by the SPLC for comment, it also seems to be a phoenix rising from the ashes of dying student papers. A recent copy of the newspaper could be found after spending less than five minutes on campus. An office designated as the newsroom's door boasts fliers encouraging students to apply to the staff, as do bulletin boards in the surrounding area.

However, the newspaper lacks a meaningful online presence. A post to its Facebook group from May explains: "We tried to get a temporary site up until the official one launches but it never came to fruition. Next fall the online version will have its own website and will be updated daily in some cases depending on the news of the day. The print version will still exist but it will be a monthly publication."

One thing is for sure, the seeds of truth sown by student press in the Garden State may be stronger than the weeds surrounding them. New Jersey's unique and varied student media ecosystem has even been the focus of study.

Simon Galperin recently capped off his M.A. in Social Journalism from CUNY by conducting a massive study of scholastic journalism in New Jersey. That's not as counterintuitive as it sounds. Galperin was a journalism undergraduate at Rutgers University, where he launched his own underground student news site – Muckgers.

In the final stretch for his graduate degree at CUNY, Galperin spent several months working to secure funding for grants to provide fellowship and training opportunities for undergraduate student journalists in New Jersey. Then, it occurred to him – he had no idea what it was student journalists actually needed.

What he did know was that 40 percent reported feeling unprepared for their careers after graduation according to research from the University of Georgia. He knew the problem, but not the source, and that's when he shifted focus to gathering information.

SPLC interviewed Galperin for a February 2017 podcast, and he discussed how he embarked on a months-long field review of student journalism in New Jersey – from interviews with educators and students to a survey to cataloguing all the student media outlets he could find.

You can read a summary of his findings on his Medium page: medium.com/@simongalp.

As Ramos puts it, "Papers in community colleges – well, everywhere – but including in community colleges, are very important and we need to keep promoting it and make sure people read and they know they exist." -30-

Legal Analysis

The new F-word: FERPA and public records

By Frank LoMonte

When student reporters sought public records from the University of Florida about a fraternity hazing episode in which pledges were forced to babysit a watermelon around-the-clock, the university responded by redacting the names of all of the participants. Including the watermelon.

The University's Public Records Center claimed that all the redactions – including the nickname that pledges had assigned to the watermelon (“Walter,” as reporters were able to learn elsewhere) – were required by federal student privacy law.

That a university would categorize the name of a watermelon as a federally protected “education record” exemplifies how frequently the Family Educational Rights and Privacy Act (“FERPA”) is misapplied in nonsensical ways to frustrate news coverage of colleges and schools.

It's been said that a talented prosecutor can convince a grand jury to indict a ham sandwich. If that is the case, then a talented education lawyer can convince a judge to classify that ham sandwich as a confidential education record. By categorizing documents as “education records,” colleges and schools can take advantage of exemptions in state freedom-of-information laws allowing agencies to conceal documents that otherwise would be public records.

In recent years, requesters relying on their state public-records laws have been denied access to the following documents on the grounds that they qualify as “education records” under FERPA:

- Parking tickets issued to student athletes.¹
- A tally of the number of college football players who reported concussions.²
- The findings of investigations into academic dishonesty in college athletic programs.³
- The amount of taxpayer money paid out to a family that filed a liability suit against a school district.⁴

It's not just journalists whose requests come up against seemingly inexplicable uses of “student privacy” to withhold non-private records. A mother in Northern California was told that the scores of her own child's high-school swimming meets were FERPA-protected secrets and could not be released.⁵ A family in Valdosta, Georgia, was forced to sue their late son's school district for access to a security-camera video that could have helped explain his mysterious death in the high-school gym, and a family in Buffalo was told that video of the football game where their son suffered a fatal injury was off-limits to disclosure because of FERPA.⁶

Under any commonsense understanding of educational privacy, none of these requests should have been rejected. They involve information that is neither “educational” nor, in many instances, information that identifiably points to a known person or gives away anything not already publicly observable.

How has FERPA evolved into what one legal commentator calls “an administrator's refuge from accountability?”⁷ And how can journalists who need information about the performance of educational institutions overcome the frivolous over-classification of documents as confidential “education

records?” Answering these questions requires understanding the history and purpose of the statute, and how courts have at times been fooled into accepting unfounded confidentiality arguments.

FERPA: How did we get here?

Sometimes called the Buckley Amendment after its chief sponsor, Sen. James Buckley, FERPA began its life as a well-intentioned attempt to protect students against inaccurate or incomplete information in school files that, unbeknownst to them or their families, might be used to their disadvantage in later life.⁸ Buckley's chief concern was not for privacy but for disclosure. He wanted families to be able to see, and correct, files they might not even know existed that might contain misleading information.

The “rights” portion of FERPA entitles students (or, in the case of minors, their parents) to inspect their “education records” and, where necessary, to insert corrective material into those records.⁹ The “privacy” portion then requires schools to refrain from a policy or practice of disclosing those education records to people without a need to know.¹⁰

Although not every court has agreed, the prevailing view of FERPA is that it overrides state public-records statutes by making students' education records off-limits to disclosure. Almost all state freedom-of-information laws exclude documents that are confidential under federal law, and FERPA is understood to be a federal declaration that education records are confidential. This is how FERPA comes into tension with the normal presumption that all records of state agencies, including schools and colleges, are to be made available for public inspection.

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.¹¹ 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 U.S. Supreme Court put some teeth into that definitional threshold in a 2002 ruling, *Owasso Independent School District v. Falvo*, involving a parent's challenge to an Oklahoma school district's practice of “peer grading” quiz papers during class.¹² The Supreme Court held that, even though students were being allowed to see their classmates' grades, the practice did not violate FERPA because the quizzes were not “education records.” They were not centrally maintained by the school, and indeed might be discarded by the teacher after the students' grades had been entered. “It is fanciful,” Justice Anthony Kennedy wrote, “to say [school authorities] maintain the papers in the same way the registrar maintains a student's folder in a permanent file.”¹³

The *Owasso* case reflects two important realities about FERPA: First, that it is not meant to be interpreted in an ultra-

literal way that interferes with schools' ability to do business, and second, that it is an exceedingly narrow statute pertaining only to the small subset of documents that a school regards as part of a student's permanent record.

That is not how FERPA is widely understood and applied today. Rather, because of a patchwork of inconsistent judicial interpretations and the U.S. Department of Education's refusal to offer clear guidance, the statute is regularly misapplied in ways that frustrate public accountability. A commentary in *the about* the role of FERPA in concealing scandal in college athletics observed:

One of the most egregious defects of the Buckley Amendment is its propensity to allow colleges and universities the wherewithal to manipulate the law, thereby protecting the institution while giving the appearance of protecting student privacy. As one administrator has observed, 'what seems apparent ... is that some college and university officials have grown accustomed to using the act - indeed, abusing it - as a defensive shield against disclosure of information that the public has a right to know and to which the Buckley Amendment has never had any relevance.'¹⁴

In one recent example, author Jon Krakauer was unable to obtain records from the state commissioner of education explaining why he overturned disciplinary sanctions against a star University of Montana football player after a campus disciplinary board found him liable for sexual assault. The Montana Supreme Court accepted the state's categorization of the documents as FERPA records, even though all of the damaging allegations about the player had already been publicly aired at his criminal trial.¹⁵ This is just one of many examples of how student privacy law frustrates the public's ability to monitor how well college disciplinarians respond - or don't - when students report sex crimes.

When asked, most courts take a commonsense view of FERPA and reject the attempts of college and school lawyers to classify everything student-related as confidential. When the University of Maryland tried to withhold athletes' parking tickets on the grounds of educational privacy, the state's highest court made short work of the university's claim:

[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.¹⁶

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)."¹⁷

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," and even when the records contain nothing that isn't already known or observable. And colleges even at times have withheld essential public-safety information, insisting (whether truthfully or not) that they believed FERPA tied their hands.

In an especially outlandish case, Oklahoma State University failed to tell even its own police department about a serial predator who'd been found liable on four counts of sexual battery in a secret campus disciplinary proceeding.¹⁸ When

TL;DR

- The Family Educational Rights and Privacy Act has become the go-to excuse for withholding public university records.
- Schools shield information by classifying everything as an "education record."
- One school redacted the nickname of a watermelon used in a fraternity hazing incident.
- FERPA was designed to give students and parents access to their own records.
- Also designed to protect student education records and personally identifiable information from negligent disclosure.
- You can tailor your records request to get around knee-jerk FERPA denials.
- A watermelon, ya'll. It was named "Walter."
- #LongLiveWalter

an investigation by student journalists brought the snafu to light - and the suspect was belatedly arrested and criminally charged - OSU claimed that FERPA precluded telling anyone, even police, that a potentially dangerous sex offender was at large in the community. An internal investigation concluded that the university's application of FERPA was wrong, but no Oklahoma State employee was ever held accountable and punished.

Importantly, the only penalty for violating FERPA is that the U.S. Department of Education can declare the educational institution ineligible for federal funding, which at most institutions would equate to a financial death sentence. Because the penalty is so drastic, it has never been imposed. In fact, Department of Education rules provide that penalties cannot be imposed unless the institution is found to have a policy or practice of disregarding privacy, is put on notice of the need to correct the policy or practice, and refuses to do so.¹⁹ Thus, it is a falsehood to say that granting a request for public records will result in the institution losing federal money.

It is clear that FERPA was never intended or understood to penalize a single decision to grant a request for public records, because the punishment - a loss that could equate to tens of millions of dollars a year at a large university - would be wildly disproportionate to the harm. Rather, FERPA is meant for that rare outlaw institution that routinely refuses to take basic precautions to safeguard student records.

What's not confidential?

Certain records are categorically exempt from FERPA and, at a public institution, should be readily and fully disclosed in response to a state freedom-of-information request. Statutorily exempt types of records include:

- Directory information, which is regarded as harmless identifying information that includes a student's honors and awards, dates of attendance and degree status, contact information, participation in sports and extracurriculars, and more.²⁰

- Records created for law enforcement purposes, which can include incident reports prepared not just by campus police but

by non-police security forces.²¹

• The outcomes of college disciplinary cases where a student is found to have committed behavior equating to a violent or sexual offense, including the following details about the case: The name of the offender, the nature of the offense, and the penalty received.²²

U.S. Department of Education interpretations also clarify that certain types of records are unprotected by FERPA and, when they fall within state public-records statutes, must be released. For example, once a student dies, his records cease to be protected by FERPA if he reached the age of 18 before death.²³ Thus, journalists were able to obtain and publish the school and college disciplinary records of Orlando nightclub shooter Omar Mateen, who killed 49 people in one of America's worst mass shootings in June 2016.²⁴ (The Department of Education has indicated that it will take a different position if the student dies before turning 18, on the grounds that the FERPA privacy right remains with the parents and never transferred to the child.)

It's also clear that FERPA cannot be used as a bludgeon to prevent students who come into possession of confidential information about other students from sharing it. FERPA is binding only on officials of an educational institution who have been entrusted with confidential records.

The Department of Education admonished the University of Virginia in 2008 to stop requiring victims of sexual assault to sign confidentiality agreements under which they were forced to promise, under threat of disciplinary action, never to discuss their cases with anyone.²⁵ And in January 2009, the Department amended its FERPA regulations to say explicitly that crime victims cannot be constrained from sharing information about the crimes, including any disciplinary penalty imposed on the offender.²⁶ So if colleges are forbidding crime victims from talking to the public, they're violating federal regulations.

The courts have been unanimous in ruling that information about students that makes its way into the legal system ceases to become confidential, even if the same information would have been confidential when maintained in a school record.

For instance, a U.S. district judge turned down the University of North Carolina-Chapel Hill's attempts to seal all of the witness statements entered into the court record in a sexual harassment case brought by a student-athlete, which the university tried to argue – unsuccessfully – would compromise FERPA-protected information. “The 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,” the judge ruled.²⁷ So it is never legitimate for a school or college to claim that copies of court documents are protected by FERPA.

Most importantly for journalists, the Department of Education has said repeatedly that FERPA confidentiality applies only to the physical education record itself, or to information coming directly out of that record. If information comes from another source – such as a witness' personal recollection – sharing that information does not implicate FERPA at all:

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.²⁸

This is the single most significant point for journalists to remember in pushing back against the expansion of FERPA into areas that Congress never envisioned or intended. FERPA is never an excuse for a school or college to say “we can't discuss anything about” an incident, even one in which students are disciplined. The public is entitled to know the nature of incidents that endanger school safety, even if the names of students who are penalized can legitimately be withheld. If the school's information comes from the police, or from any other source that's not a centrally maintained education record, then nothing in FERPA forbids sharing that information.

What's unclear?

Journalists, both student and professional, frequently find themselves needing access to public records from educational institutions that would readily be disclosed by any government agency other than a school. Several recurring scenarios have proven especially challenging for the courts to resolve and have resulted in conflicting interpretations.

(1) Email correspondence. School and college attorneys routinely insist that emails about students are “education records” and refuse to turn them over in response to journalists' requests. But several courts have disagreed, on the grounds that emails are not centrally maintained by educational institutions, and indeed are subject to being deleted by the sender and recipient at any time. Most recently, a U.S. district judge in Pennsylvania ruled that emails among school employees referring to a student could be withheld on FERPA grounds only if those emails were actually kept with the student's permanent school file: “These e-mails appear to be casual discussions, not records maintained by Defendant.”²⁹

(2) Surveillance videos. Courts are split on whether a security video recorded aboard a school bus or inside a school building should be categorized as a confidential FERPA record. Judges in New York and Louisiana have found that surveillance videos do not meet the statutory definition to be education records, while a court in Utah came down on the opposite side.³⁰ The pivotal fact in determining whether FERPA applies should be whether the statute implicitly covers the disclosure only of confidential information about a student that would not be outwardly observable, since a person's physical appearance while riding a bus or walking down a hallway is not confidential (and in fact the Department of Education has said, for this reason, that there is no FERPA violation in allowing a visitor to observe a class). A pending Minnesota case could lend some clarity to this unsettled area of the law. High school journalists in St. Louis Park, Minn., are suing for access to a surveillance video that would help them get to the bottom of dueling accounts of a hallway altercation.³¹ A popular athlete was accused of yanking the hijab from the head of a Muslim student, but received no disciplinary consequences. The school insists that the video is a confidential education record, and cannot be disclosed even with faces blurred because the journalists already know the identities of the students.

(3) Small data sets. Journalists and researchers frequently report that when they ask for statistics having to do with students – even tangentially – schools will respond with “FERPA” if the request involves a small group of individuals.³² For instance, the *Columbus Dispatch* was denied a statistical breakdown of the number of times students brought guns into Ohio schools on the grounds that some districts might have only one or two

gun offenses.³³ There is much less to the “small data set” issue than meets the eye. First, Department of Education guidelines explicitly say there is no federal “size requirement” that dictates when a group of students becomes so small that the number cannot be released.³⁴ Second, the Department has said that its concern is whether a person who does not already have personal knowledge of the situation could make a “match” between the data and a particular student. It is irrelevant whether a school employee could make the match, because “they are presumed to have inside knowledge of the relevant circumstances and of the identity of the students.”³⁵ Recently, a Louisiana judge ordered the release of state Department of Education statistics showing how many students in each school are classified as economically disadvantaged or are learning English as a second language, which the state had “suppressed” on FERPA grounds.³⁶

Another area of uncertainty is whether, and how, FERPA confidentiality can be waived so that otherwise-private records can be accessed if there is an overriding public interest in disclosure.

Under ordinary principles of state privacy law, a person can implicitly waive privacy by acting in a way that’s inconsistent with a “reasonable expectation of privacy.” For instance, a person’s marital troubles or substance-abuse problems are not normally a matter of public interest or concern, but they become newsworthy when the person gains celebrity as a movie star or runs for elected office. It’s unclear whether FERPA works the same way, or whether a formal written waiver is the only way a student can forfeit confidentiality protection.

Colleges in fact do give out information about student disciplinary cases where doing so suits the colleges’ public-relations agendas, indicating that they believe FERPA can be waived by engaging in scandalous behavior that becomes widespread public knowledge.

When a racist fraternity chant captured on video and posted to YouTube provoked a nationwide outcry, University of Oklahoma President David Boren publicly expelled the two students identified as ringleaders, even though their identities were easily discernible.³⁷ The University of Alabama disclosed the punishment imposed on a student who posted racial slurs on a Facebook page set up to facilitate exchanging tickets for Crimson Tide sporting events, although the student’s name was publicly available.³⁸

In these instances, and others like them, universities have tacitly acknowledged that they have an obligation to explain themselves to the public that can override any student’s right to privacy, particularly where the student has misbehaved in a way that attracts widespread attention. And in no case have these universities suffered any federal sanctions for discussing disciplinary actions against identifiable individuals.

While the U.S. Department of Education has never said that FERPA is waivable except by an explicit, signed document, there is a growing consensus that it’s possible to waive FERPA confidentiality by acting in a way inconsistent with privacy.

In a pair of recent rulings, Florida courts found that taking on a campus elected office waived the confidentiality of records about participation in student government – in one case, records of election-violation complaints brought against student candidates, and in the other, records of reimbursements paid to student elected officials for business expenses.³⁹ Florida courts twice ruled that students “implicitly consented” to the

release of information about their participation in student government when they ran for office, even without a formal written privacy waiver.

Confusion in the courts

Despite what would appear to be unmistakable guidance from the Supreme Court in the *Owasso* case, courts at times have deferred to colleges’ mislabeling of records as FERPA-protected even when they are not centrally maintained and even when they do not pertain directly to identifiable students. Two especially extreme rulings illustrate how challenging it can be for a requester to overcome a college’s insistence that a document qualifies as an education record.

In 2008, the University of Iowa launched an internal investigation into the mishandling of an athlete’s complaint that two fellow athletes had sexually assaulted her in a campus housing unit. That investigation resulted in a housecleaning that cost two Iowa vice presidents their jobs, and the local newspaper wanted to know why. The *Iowa Press-Citizen* requested records of an internal investigation into the behavior of the vice presidents conducted by an outside law firm – and ran smack into FERPA.

The Iowa Supreme Court concluded that the entire investigatory report – even without student names – could be withheld because it referred to known students, even though all the identities of the involved students had already been aired in criminal court proceedings: “we conclude that educational records may be withheld in their entirety where the requester would otherwise know the identity of the referenced student or students even with redactions.”⁴⁰

At Ohio State University, the school’s storied football program faced the risk of NCAA sanctions after evidence came to light that athletes were trading sports memorabilia for tattoos. Sports journalists at ESPN sought access to university records to determine how deep the scandal went into the athletic department, and specifically, what the school’s acclaimed football coach, Jim Tressel, did or didn’t know. Ohio State classified essentially all of the records that ESPN requested – including Tressel’s emails with a local football booster not employed by the university – as “education records.” The Ohio Supreme Court agreed and allowed the university to deny almost all of ESPN’s request: “[T]he records here generally constitute ‘education records’ subject to FERPA because the plain language of the statute does not restrict the term education records to academic performance, financial aid, or scholastic performance.”⁴¹

These cases are clearly wrongly decided – inconsistent with the Supreme Court’s and the Department of Education’s narrow understanding of FERPA – and yet they are binding law in their respective states. And such botched interpretations embolden college and school attorneys to believe they can fool judges into accepting that just about anything referring to a student is a confidential FERPA record.

Fortunately, most judges are not so credulous, and in recent years, many courts have seen through specious claims of FERPA confidentiality.

In October 2016, a federal judge sanctioned attorneys representing Northern Kentucky University for the bad-faith use of FERPA to obstruct a witness interview. While a key witness was being questioned in a federal Title IX lawsuit over the university’s handling of a rape complaint against NKU basketball players, the university’s counsel repeatedly

interrupted the deposition and ordered the witness not to answer questions, claiming – falsely – that recounting his recollections about the rape case would violate FERPA.⁴²

Judge William O. Bertlesman also denied NKU's attempt to have the entire case sealed and all of the witnesses gagged; the university had argued that even releasing information in the context of a court case could trigger a FERPA violation.

A series of ongoing cases holds the promise of clarifying when FERPA can and cannot be invoked as an excuse for withholding records that state law makes public.

In two lookalike "reverse FOIA" cases, the University of Kentucky and Western Kentucky University are each suing their own student-run newspapers in an attempt to evade an order from the state Attorney General to turn over the records of outcomes of sexual harassment cases against professors. The universities claim that, because the complaints and witnesses may be students, the records are FERPA education records even though they are stored with the personnel files of the employees and not maintained as student records.

The Oregon Supreme Court is deliberating whether notices filed with the University of Oregon teaching hospital indicating an intent to file a lawsuit can be protected against disclosure by FERPA. The state Court of Appeals ruled in 2016 that a pre-lawsuit notice cannot be withheld from journalists as an education record unless the notice "describes and directly relates to activities of a student or the educational status of a student."⁴⁴

These cases will help lend guidance to educational institutions and courts in determining what can be withheld as an education record, but their precedents will be binding only within their states. It has been challenging to get a FERPA case in front of the U.S. Supreme Court for a definitive interpretation, because FERPA cases almost always involve interpreting state freedom-of-information laws, and the Supreme Court will not accept cases where the decisive issue is the application of a state, rather than federal, statute.

Getting past the FERPA firewall

Until Congress or the Supreme Court clarifies that FERPA applies only to confidential and centrally maintained records that relate to a student's educational life, abuses will continue. Requesters can try a few workarounds to get past an unfounded claim of FERPA confidentiality, though in most states taking the agency to court is ultimately the only recourse, and that can be an unsatisfying one.

First, avoid making a "targeted request" that will tip off the agency that you're interested in one specific student or case. If the request obviously points at an identifiable student, it can be denied even if the requester agrees to accept the records without names. Rather than asking for all correspondence with the NCAA involving academic dishonesty by basketball players during the month of May – which seems to pinpoint a specific player – ask for that correspondence covering the past two years and involving all teams.

Second, consider whether some entity outside the campus – a police department, a regulatory agency, a public official who sits on the board of governors – might have copies of the same records. If the records have been shared with outsiders, there's a good chance they don't qualify as FERPA education records, since FERPA records normally can be shown only to people inside the institution with an educational need to know.

Third, when agencies invoke FERPA groundlessly, point

out other agencies that have harmlessly disclosed the same or comparable records without penalty. For example, colleges frequently claim that information about fraternity hazing cases is a FERPA-protected secret – except that Arizona and South Carolina universities have been disclosing it for years.⁴⁵ School districts often claim that statistics about the number of students who commit disciplinary offenses is confidential – except that Massachusetts and Virginia put those same statistics online.⁴⁶ If federal privacy law really applied to these records, they'd be private everywhere.

If you're a current or former student at the institution, file a written request to inspect your own FERPA records, and see what you get back. What you almost certainly will not get back are the records that the institution regards as FERPA records for public-records purposes – emails, surveillance videos, parking tickets and the like. And if those records are not treated as FERPA records when a student exercises the right of access, then they cannot legally be treated as FERPA records when the institution is faced with a freedom-of-information request.

If your institution doesn't fully honor your FERPA access request – if you aren't afforded access to emails, surveillance videos and other such records – file a complaint with the U.S. Department of Education's Office of Chief Privacy Officer, which enforces FERPA compliance. Once a school confronts the self-defeating consequences of over-classifying records as FERPA-protected, its attitude may change.

FERPA can be restored to the sensibly narrow confines that its authors and the Supreme Court have always understood, but the first step is to help the public understand how much information is being lost – and how often scandals are minimized or concealed – in reliance on misinterpretations of a badly broken law.

Attorney Frank D. LoMonte is executive director of the Student Press Law Center.

1. Curtis Killman, "OU student sues school over refusal to release parking-ticket records," *TULSA WORLD*, Oct. 25, 2013.
2. Tony Casey, "ETSU won't share football concussion numbers as NCAA faces class action lawsuit," *JOHNSON CITY PRESS*, Feb. 5, 2017.
3. *National Collegiate Athletic Ass'n v. Associated Press*, 18 So.3d 120 (Fla. 1st DCA 2009).
4. *The Herald Pub. Co., LLC v. Coopersville Area Pub. Sch.*, No. 09-1400-PZ (Mich. Cir. Ct. March 30, 2010).
5. Letter of Byron C. Smith, general counsel to Bret Harte Union High School District, to Mary C. Boblet, April 5, 2013, available at <http://s3.amazonaws.com/cdn.getsnetworks.com/spl/pdf/Bret%20Harte%20FERPA%20Fact.pdf>.
6. Adam Floyd, "KJ family wants school video," *THE VALDOSTA DAILY TIMES*, Oct. 11, 2013; Matthew Spina, "Parents of high school football player who died file claim," *THE BUFFALO NEWS*, Jan. 27, 2014.
7. Charles Drebes, *The Buckley Amendment: An Administrator's Refuge from Accountability*, 23 J.L. & Educ. 290, 291 (1994).
8. Erin Escoffery, Note, *FERPA and the Press: A Right to Access Information?*, 40 J.C. & U.L. 543 (2014).
9. 20 U.S.C. § 1232g(A)(1)(A), (B).
10. 20 U.S.C. § 1232g(b)(1).
11. 20 U.S.C. § 1232g(a)(4)(A).
12. 534 U.S. 426 (2002).
13. *Id.* at 433.
14. Matthew R. Salzwedel & Jon Ericson, *Cleaning Up Buckley: How the Family Educational Rights and Privacy Act Shields Academic Corruption in College Athletics*, 2003 WIS. L. REV. 1053, 1097 (2003).
15. *Krakauer v. State*, 381 P. 3d 524 (Mont. 2016).
16. *Kirwan v. The Diamondback*, 721 A.2d 196, 204 (Md. Ct. App. 1998).
17. *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).
18. Krystyna Biassou, "Oklahoma State under fire after sexual misconduct allegations," *USA TODAY COLLEGE*, Dec. 19, 2012.
19. 20 U.S.C. § 1232g(f) ("[A]ction to terminate assistance may be taken only if the

ON THE DOCKET

Supreme Court denies review in Keefe

The Supreme Court declined to hear the case of a nursing student who was expelled from his nursing program over posts he made on social media. Craig Keefe completed the practical nursing program at Central Lakes College in 2011 and subsequently enrolled in the associate degree nursing program. In the fall of 2012, a classmate reported some concerning Facebook posts by Keefe to one of their professors. In one of the posts, Keefe wrote about his frustration with a group project, saying there was “Not enough whiskey to control that anger.” The director of the nursing program decided to remove him, and Keefe filed suit in 2013. The lower court ruled in favor of the school, a decision that was upheld by the 8th Circuit Court of Appeals. The Supreme Court declined his appeal in April, allowing the 8th Circuit ruling to stand and leaving the issue of schools punishing personal social media use murky as ever.

Daily Tar Heel appeals lawsuit ruling

In September of 2016, the student newspaper at the University of North Carolina requested records from the school concerning Title IX investigations on campus. The university denied the *Daily Tar Heel's* request, citing the Family Educational Rights and Privacy Act (FERPA). Soon after, the publishers of the *Durham Herald* and *Charlotte Observer*, along with Capitol Broadcasting, which owns three local television news stations; joined the *Tar Heel* in filing a complaint against UNC. On May 3, they were dealt a blow by Superior Court Justice Allen Baddour who agreed with each of UNC's arguments in ruling the records need not be released. Baddour, the nephew of a former UNC athletic director who, likewise, faced a records lawsuit from the *Tar Heel* over public records. The elder Baddour ultimately lost that suit. The *Tar Heel* and co-complainants appealed the latest records decision on May 25.

Court rules students can record at school

This spring, the U.S. District Court for the District of Maine handed down a ruling on the use of recording devices by students. The case involves the parents of a student who were concerned that their son was coming home in obvious distress. The student has a developmental disability which limits his communicative abilities, and his parents requested several times to allow their son to attend school with a recording device as an accommodation under the Americans with Disabilities Act. April 28, U.S. District Court Judge Nancy Torreson ruled against the school district's motion for summary judgement in part. She found that recording can be a necessary component of free speech, and that *Tinker v. Des Moines* protects student free speech in public schools unless it constitutes a substantial disruption. Further, Torreson concluded the school could not enforce a nominally “neutral” blanket ban on recording devices under the First Amendment. The plaintiff's motion for summary judgment was likewise denied, and the case is moving forward for final adjudication.

Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.”).

20. 20 U.S.C. §1232g(a)(5).
21. 20 U.S.C. § 1232g(a)(4)(B)(ii).
22. 20 U.S.C. § 1232g(b)(6)(B), (C).
23. FERPA letter ruling, Dec. 14, 1994, letter to Meredith Braz of Bates College from Dr. LeRoy S. Rooker, Director, Office of Family Policy Compliance.
24. Mark Mazetti et al., “Omar Mateen, Twice Scrutinized by F.B.I., Shows Threat of Lone Terrorists,” *THE NEW YORK TIMES*, June 13, 2016.
25. U.S. Department of Education Clery Act Final Determination, Letter of Nancy Paula Gifford, Area Case Director, to John T. Casteen, President, University of Virginia, Nov. 3, 2008, available at <https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/cleryact/uva/UVAProgramReviewReport11032008.pdf>.
26. See Family Educational Rights and Privacy; Proposed Rule, 73 Fed. Reg. 57, 15573 (March 24, 2009).
27. *Jennings v. Univ. of N.C. at Chapel Hill*, 340 F. Supp. 2d 679, 684 (D. N.C. 2004).
28. Letter to Montgomery County, Md., Public Schools, Feb. 15, 2006, from Dr. LeRoy S. Rooker, U.S. Department of Education, Office of Family Policy Compliance, available at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/montgomery0215.html>.
29. *E.D. v. Colonial Sch. Dist.*, No. 09-4837, Memorandum Order (E.D. Pa. March 31, 2017). For the same result, see *Phoenix Newspapers, Inc. v. Pima Cmty. Coll.*, 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), involving emails among college employees about the student who went on to murder six people in a Tucson, Ariz., shooting spree that also gravely wounded U.S. Rep. Gabrielle Giffords.
30. *Compare Rome Sch. Dist. v. Grifasi*, 10 Misc. 3d 1034 (N.Y. Sup. Ct. 2005) (granting requester access to hallway surveillance video) and *State v. Mart*, 697 So. 2d 1055 (La. Ct. App. 1997) (ordering disclosure of school bus video) with *Bryner v. Canyons Sch. Dist.*, 351 P. 3d 852 (Utah Ct. App. 2015) (denying parent's request for access to hallway security-camera video).
31. Beatrice Dupuy, “St. Louis Park High School newspaper sues district for video of incident,” *THE STAR TRIBUNE*, Jan. 20, 2017.
32. Hechinger Report columnist Andre Perry wrote about this phenomenon in a Dec. 15, 2016, blog post (“Show me the data! Government restrictions hamper attempts to see how NOLA kids really fare”). In the column, Perry described how researchers were frustrated in seeking data to shed light on changing enrollment patterns in New Orleans public and private schools, commenting “parents, students and community members don't have a basis to make good decisions if they can't analyze information for themselves.”
33. Bill Bush, “Privacy law shields school-district tallies of gun incidents,” *THE COLUMBUS DISPATCH*, Dec. 10, 2013.
34. The Department's data-set guidelines, from the Privacy Technical Assistance Center, are available at http://ptac.ed.gov/sites/default/files/FAQ_Disclosure_Avoidance.pdf.
35. *Id.*
36. *Louisiana Educ. Dept. v. Deshotels*, No. C647953, Order (La. Dist. Ct. Oct. 11, 2016).
37. Sean Murphy, “University of Oklahoma Suspense Students,” *THE ASSOCIATED PRESS*, March 10, 2015.
38. Ed Enoch, “University of Alabama student suspended over racist, threatening posts,” *THE TUSCALOOSA NEWS*, Oct. 5, 2016.
39. *Knight News, Inc. v. Univ. of Cent. Fla.*, 200 So.3d 125 (Fla. 5th DCA 2016); *Knight News, Inc. v. Univ. of Cent. Fla. Bd of Trustees*, No. 2016-CA-004460-0, Order Granting Writ of Mandamus and Partial Final Judgment (Fla. Cir. Ct. Aug. 11, 2016), *aff'd* by Univ. of Cent. Fla. Bd. of Trustees v. *Knight News, Inc.*, ___ So.3d ___, Case No. 5D16-2876 (Fla. 5th DCA June 20, 2017) (*per curiam*).
40. *Press-Citizen Co. v. University of Iowa*, 817 NW 2d 480, 492 (Iowa 2012).
41. *State ex rel. ESPN v. State Univ.*, 132 Ohio St. 3d 212, 218 (Ohio 2012) (internal quotes omitted).
42. James Pilcher, “NKU gag order in sexual assault lawsuit denied, lawyers sanctioned,” *THE CINCINNATI ENQUIRER*, Oct. 24, 2016.
43. See Justin Story, “WKU, College Heights Herald to be in court Monday on records suit,” *Bowling Green Daily News* (May 13, 2017) (describing progress of parallel suits brought against student newspapers at University of Kentucky and Western Kentucky). A judge ruled against the Kentucky Kernel newspaper in January 2017 and overturned the state attorney general's directive to surrender the records, but the case is on appeal. See *Univ. of Kent. v. The Kernel Press, Inc.*, No. 16-CI-3229, Opinion and Order (Ky. Cir. Ct. Jan. 23, 2017).
44. *Or. Health & Sci. Univ. v. Oregonian Publ'g Co., LLC*, 278 Ore. App. 189, 211 (Ore. App. 2016).
45. Since 2013, the Arizona Republic has been publishing a database of disciplinary actions against Greek houses obtained from the state's three public universities, available at <http://archive.azcentral.com/news/projects/fraternities/>. South Carolina's Tucker Hippias Transparency Act requires state colleges to publish information about disciplinary sanctions against Greek organizations, and an example from the University of South Carolina is online at <https://www.sa.sc.edu/leadershipandservice/organizational-student-conduct/>.
46. The Massachusetts database is online at http://profiles.doe.mass.edu/state_report/ssdr.aspx. The Virginia statistics are available at http://doe.virginia.gov/statistics-reports/school_climate/index.shtml.

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