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TOPIC:

FERPA VS. PUBLIC RECORDS LAWS

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INTRODUCTION:

Transparency and privacy are laudable goals, though they can be in tension – a tension made especially clear in the context of public institutions of higher education. Media and members of the public frequently seek information about students under their states' public or open records statutes in an effort to gather information on events ranging from student conduct code violations to NCAA investigations. Colleges and universities, meanwhile, are required by the federal Family Educational Rights and Privacy Act ("FERPA") to protect the privacy of all "education records" directly related to a student and maintained by an institution.

With the proliferation of public/open records requests, colleges and universities are increasingly accused of using FERPA as a shield to avoid releasing embarrassing or otherwise negative information. Consequently, campus counsel and administrators must understand their obligations under FERPA and be able to articulate those obligations to requestors who often feel strongly about their right to access such information.

This NACUANOTE addresses some of the most common arguments universities may face when responding to public records requests and suggests responses that may assist and inform the requestor with respect to the institution's FERPA obligations. Often, re-orienting the conversation from the university's actions to the university's obligations under federal law can prove helpful. University officials can remind requestors that, under FERPA, information directly related to students cannot be disclosed without prior written consent. Such information includes the student's name, address, names of parents or family members, as well as personal

identifiers such as social security numbers or student numbers.[2] Still other indirect identifiers—such as one's "place of birth, race, ethnicity, gender, physical description, disability, activities and accomplishments, and disciplinary actions" —can also lead to a student's identity and, likewise, may not be released.[3]

In addition to these categories of information that identify a particular student, the 2008 amendments to the FERPA regulations provide several considerations for determining whether additional information in an education record must be treated as personally identifiable because of other available information. These considerations include whether the information (1) can indirectly identify a student by combining it with other released information; (2) can be reasonably linked to an individual by a member of the university community with no special knowledge; or (3) is being requested by an individual or organization that the school reasonably believes knows the identity of the student to whom the record relates because of the requestor's special knowledge, *i.e.* a "targeted request."[4]

Institutions should be mindful that in addition to referencing FERPA, some state records laws specifically exempt student records from disclosure—sometimes with even greater privacy protections. Thus, when appropriate, campuses should take the opportunity to point to state law, as well as federal law, to highlight their obligations to protect the privacy of students.[5]

Some examples of criticisms often heard by institutions to be covered in detail below assert that the records are not actually covered by or protected by FERPA; that undue redactions have been undertaken; that "privileged individuals" such as student athletes are being shielded; or that the institution is withholding records that the subject student has a right to under FERPA. But as always, each request requires a fact-sensitive, individualized analysis, and public universities should consult their legal counsel as they address the questions and concerns of the media and the public at large.

COMMON ASSERTIONS:

(1) **"The records I am seeking are not 'education records'**[6] **– they have nothing to do with the student's academics or education and are not protected by FERPA."**

This question exposes one of the most frequent misconceptions about FERPA, which is that the only records it protects are "academic" records like transcripts, course work, or class schedules. In fact, FERPA applies much more broadly to all records directly related to a student that are maintained by the institution, including non-academic disciplinary records, financial aid records, documents related to NCAA investigations, general correspondence from students, and even a student's employment file at the university so long as the employment is the result of the individual's status as a student.[7] As noted by Steven McDonald, editor of *The Family Educational Rights and Privacy Act: A Legal Compendium*, "[v]irtually every record that you have anywhere on your campus and that has anything to do with an identifiable student is an 'education record' subject to FERPA."[8] This has been the consistent position of the Department of Education's Family Policy Compliance Office (FPCO) [9], which is designated by the US Department of Education to investigate complaints and violations under FERPA and to provide technical assistance to educational institutions to ensure compliance with the statute and its regulations.[10]

Regrettably, some courts have strayed from deferring to the plain language of the definition of "education records." In doing so, and in reaching what appears to be result-oriented decisions by finding that disciplinary records, NCAA/compliance records, and/or student complaints about

University employees are not education records, [11] courts have created confusion rather than clarity. Thus, rather than looking to FERPA for the narrow categories of education records that schools are permitted to release,[12] these courts view the definition as being malleable.

Such a view taken by courts and requestors appears to be rooted, in part, in the fallacy that FERPA applies only to:

> official records, files, and data directly related to [students], including all material that is incorporated into each student's cumulative record folder, and intended for school use or to be available to parties outside the school or school system, and specifically including, but not necessarily limited to, identifying data, academic work completed, level of achievement (grades, standardized achievement test scores), attendance data, scores on standardized intelligence, aptitude, and psychological tests, interest inventory results, health data, family background information, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns.[13]

Upon its initial enactment, FERPA did indeed only apply to the above laundry list of "official records." But weeks after taking effect, Congress replaced the limiting language with the more inclusive term "education records," which brought in all types of student records; such as admissions records, financial aid records, disciplinary records, counseling records, faculty grade books, and athletic records.[14]

Notwithstanding the confusion and lack of consistency from courts, those conducting a plain language analysis of the statutory definition of "education records" offer campuses clear guidance as to their obligations under FERPA when determining whether a document is an education record.[15] A series of Ohio cases regarding student athlete disciplinary records proves instructive here. In *State* ex rel. *Miami Student v. Miami University*[16], the Supreme Court of Ohio found that student disciplinary records were not education records protected by FERPA, because they did not relate to scholastic or academic performance, and thus required disclosure of the records to the media, albeit with certain personally identifiable information redacted.[17] But the Sixth Circuit Court of Appeals subsequently held otherwise, finding:

> Under a plain language interpretation of the FERPA, student disciplinary records are education records because they directly relate to a student and are kept by that student's university. Notably, Congress made no content-based judgments with regard to its "education records" definition . . . a detailed study of the statute and its evolution by amendment reveals that Congress intends to include student disciplinary records within the meaning of "education records" as defined by the FERPA. This intention is evinced by a review of the express statutory exemptions from privacy and exceptions to the definition of "education records."[18]

After that decision, the Ohio Supreme Court, in matter involving ESPN's request for student-athlete records regarding an NCAA investigation and correspondence between various individuals inside and outside Ohio State University relating to that investigation, abandoned its earlier narrow reasoning in *Miami Student* in favor of the Sixth Circuit's broader reading of "education records", holding that "the plain language of the statute does not restrict the term 'education records' to 'academic performance, financial aid, or scholastic performance.'"[19] Rather, the term applies to all records that "contain information that is directly related to students" and that are maintained by the University.[20] Thus, so long as the e-mails, letters, and memos relating to the investigation of a former football coach "contain[ed] information

identifying student-athletes," the Court concluded that the records "are directly related to the students."[21]

(2) **"The document has the student's name in it, but it is not 'directly related' to the student. Turn it over!"**

Notwithstanding the occasional case law discrepancies, all education records containing information directly related to a student, and maintained by the institution, are protected from disclosure.[22] But what does "directly related" mean? It is not defined in the statute nor in FERPA's regulations. What if the student's name appears in the document, but the document is really focused on something or someone else?

FPCO's directive to schools is that if a student's name or other "personally identifiable information" is attached to a record maintained by a university, then that document (or at least the portion related to the identified student) is that student's education record.[23] Indeed, FERPA's statutory language links the prohibition of disclosure of education records to "personally identifiable information contained therein,"[24] leading to the logical conclusion that if information is "personally identifiable," it also will qualify as "directly related to a student" and thus constitute an "education record."[25]

In its response to comments in the final regulations, the Department of Education highlighted that the:

> use of the phrase "directly related to the individual's attendance as a student" to describe records that do not fall under this exclusion from the definition of education records is not inconsistent with the term "personally identifiable" as used in other parts of the regulations and should not be confused. The term "personally identifiable information" is used in the statute and regulations to describe the kind of information from education records that may not be disclosed without consent. See 20 U.S.C. 1232g(b); 34 CFR 99.3, 99.30. While "personally identifiable information" maintained by an agency or institution is generally considered an "education record" under FERPA, personally identifiable information does not fall under this exclusion from the definition of education records if the information is not directly related to the student's attendance as a student. For example, personally identifiable information related solely to a student's activities as an alumnus of an institution is excluded from the definition of education records under this provision. We think that the term "directly related" is clear in this context and will not be confused with "personally identifiable."[26]

Such reasoning is best illustrated by a Florida appellate court sitting *en banc* when considering whether the name of a student who sent an email complaining about an instructor's allegedly inappropriate conduct should be redacted prior to releasing the email.[27] The court noted that while the instructor "may be the primary subject of the email, the e-mail also directly relates to its student author."[28] In particular, the "e-mail describes that student's personal impressions of the classroom educational atmosphere in the context of [the instructor's] teaching and methodology" and the treatment the student experienced as a member of the instructor's class.[29] Consequently, the court rejected the requesting party's suggestion that a record cannot "relate" directly to *both* a student *and* to a teacher. Rather, the court found, "[i]f a record contains information directly related to a student, then it is irrelevant under the plain language in FERPA that the record may also contain information directly related to a teacher or another person."[30]

Other courts, though, have suggested that conflating "directly related" with "personally identifiable" is inappropriately broad because it would require institutions to withhold public records based on a merely incidental relationship to students. In doing so, these courts appear to distinguish between records that contain information "directly related to a student" and those that are only peripherally or tangentially relate to a student.

In particular, one state court determined that "[t]he names of the victim in and witnesses to an alleged incident of sexual harassment by a teacher d[id] not relate closely enough with the educational process to warrant the statutory protection of 'educational records' in FERPA."[31] In another case, a federal district court found that while the records involving allegations of physical altercations by instructors "clearly involve[d] students as alleged victims and witnesses, the records themselves [we]re directly related to the activities and behaviors of the teachers themselves and are therefore not governed by FERPA."[32] Thus, there is no absolutely predictable judicial resolution of the tensions between the terms "directly related" and "personally identifiable."

Yet, it is important to note that some of the decisions attempting to reconcile the meaning of these two terms were focused on discovery fights rather than records requests.[33] Unfortunately, rather than easily resolving the issue through the mechanism permitted under FERPA, such as with a subpoena[34] or a litigation waiver exception,[35] courts needlessly attempted to reinterpret the definition of "education records" by seeking some sort of carve-out when the disputed records primarily focused on a matter or individual other than a student.

While such reasoning and interpretation runs counter to the plain language of FERPA, in taking this approach, courts have exhibited their willingness to listen to arguments from requestors that there should be a distinction between records that are "directly related to" a student and those records that are merely "peripherally related" to a student. Given the willingness of courts to accept such arguments, schools need to be more effective in explaining their positions to requestors.

One helpful solution is for all parties involved to think of education records not as stand-alone *documents* but as specific, student-related *information derived from a document or other record* that may consist of the entire document or simply a select portion of the document. That is, unquestionably, some documents that are sought under a records request address different facets of university business, such as an investigation of a faculty member or the compliance efforts of a university, and do not relate specifically or exclusively to a student. But if such records include personally identifiable information related to a student, then they "are directly related to the individual's attendance as a student," *and* that information, therefore, is "not excluded from the definition of education records under FERPA."[36]

Put simply, it is irrelevant whether a requestor's interest in documents may relate more to university employees than students. If the *documents themselves* contain personally identifiable information of a student, then a careful analysis under FERPA will require evaluating whether an exception applies, or whether consent from the student would be needed to avoid redaction or withholding. For example, the majority of an e-mail message maintained by a university may be unconnected to a student, but if information in that message is "directly related" to a student and identifiable, then the discrete reference to the student constitutes an education record even though the email message as a whole might not. In this scenario, to comply with FERPA and to be responsive to the requestor, university personnel should remove any personally identifiable information related to the student and release the remaining portion of the document. Courts have upheld this approach[37] and FPCO likely would as well.[38]

(3) **"Thanks for the records, but you appear to be wedded to your black marker. Why so many redactions?"**

It is common to hear from requestors that universities are "hiding information" or disregarding the intent of public records laws by redacting too aggressively. A variety of restrictions under FERPA may contribute to redactions, and it may be constructive to articulate some of the common bases for redaction.

In the simplest case, if an individual asks for the disciplinary report for a named student, the institution may not release a redacted copy of the report because the requestor knows the identity of the student who is the subject of the report. This is a common example of a targeted request.

Furthermore, universities also may not disclose "[o]ther information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty."[39] For example, a requestor in Pennsylvania sought all de-identified records or reports of academic honor code violations maintained by the school district. Relying on affidavits of school officials, the Pennsylvania court concluded that the reports, even in de-identified form, contained elements that could potentially identify the students involved in the infractions.[40] Consequently, the reports were not released.[41]

Moreover, the presence of information about other students embedded in a record focusing on the actions of the student at issue in the request may require redaction of large sections of a document. FPCO spoke to the concern about excessive redaction of education records in its 2008 amendments, noting that:

> [W]hile we have attempted to provide a balanced standard for the release of de-identified data for school accountability and other purposes, FERPA is a privacy statute, and no party has a right under FERPA to obtain information from education records except parents and eligible students. The fact that information is a matter of general public interest does not give an educational agency or institution permission to release the same or related information from education records without consent . . . . We believe that the regulatory standard for de-identifying information from education records establishes an appropriate balance that facilitates the release of appropriate information for school accountability and educational research purposes while preserving the statutory privacy protections in FERPA.[42]

Note, however, that so long as (1) the request is not targeted towards a particular student, or (2) other publicly available information combined with the redacted portion of the document would not lead to the identification of the student, the release of the properly redacted record would not violate FERPA and therefore would be subject to release under a public or open records request.[43]

(4) **"You're giving these records special treatment just because they relate to an athlete/ a student government leader/a highly publicized event, and it would make the university look bad!"**

As noted by the Iowa Supreme Court, "[C]ommentators have criticized FERPA for permitting institutions to behave inconsistently–revealing student information when it puts the university in a good light and withholding it when it does not."[44] In reality, the decision to release or withhold certain records depends not on the potential effect on the institution but on the effect upon the student(s) involved. And, simply put, the analysis should be the same for each and every student enrolled at the institution. But because of the high profile nature of certain students or events on campus, "personally identifiable" information can mean something very different for each individual student.

The tension these circumstances can create is demonstrated best in a decision involving a request for records related to a high profile sexual assault by two football players at the University of Iowa. The University argued that, given the notoriety of the case, "no amount of redaction of personal information would prevent the newspaper from knowing the identity of various persons referenced in records relating to that incident."[45] The party requesting the records responded by noting the University's "peculiar argument that FERPA applies on a sliding scale, saving its most vigorous application to records concerning crimes and alleged crimes that are the most notorious." Despite this retort, the court found in favor of the University, concluding that the preservation of student privacy remains the overarching goal of FERPA and, as such, "an entire record can be withheld where redaction would not be enough to protect the identity of a student."[46]

Universities should therefore use these opportunities to educate requestors regarding the obligations that institutions have to preserve student privacy and explain that they must be consistent in their application of the law, regardless of whether the student is a basketball player, a teaching assistant, or a working parent taking a single course during the fall semester.

(5) **"The document I'm seeking is a simple email or kept by an adjunct professor or coach– it's not 'maintained' by the institution, so it's not protected by FERPA."**

Like "directly related," FERPA's regulations do not define what it means for records to be "maintained by" an institution. The US Supreme Court in *Owasso Independent School District v. Falvo*[47] mused whether the word "maintain" implies that FERPA records are records "kept by a single central custodian, such as a registrar."[48] The Court suggested, without deciding or giving specific guidance to schools, that FERPA-protected records are those documents that are "kept in a filing cabinet in a records room at the school or on a permanent secure database,"[49] rather than documents that are kept or used for just a short period of time.

The *Owasso* language is *dicta* and therefore not controlling. Nevertheless, the language has been frequently quoted and relied upon by lower courts when arguments are advanced by requestors seeking the release of certain records. In particular, a few courts have used *Owasso* to hold that education records are only those institutional records that are deliberately preserved in the ordinary course of university business and maintained by a central custodian; not records that have a fleeting or transient nature, such as general or routine correspondence or student e-mails housed on an institutional network for the convenience, not of the school, but of the student.[50]

For example, an Arizona newspaper sought emails from a community college regarding a former student charged with several highly publicized homicides.[51] The college denied the request, citing FERPA, but the Arizona Supreme Court held that FERPA did not protect these emails, as they had not been "maintained" by the college – the "documents were not saved in a central location on a permanent database."[52] Rather, they were stored in "individual inboxes

or other locations," and not "kept by a central custodian."[53] Similarly, a California trial court opined that:

> [e]mails, like assignments passed through the hands of students, have a fleeting nature. An email may be sent, received, read, and deleted within moments. As such, Student's assertion that all emails that identify Student, whether in individual inboxes or the retrievable electronic database, are maintained in the same way the registrar maintains a student's folder in a permanent file, is fanciful.[54]

At the same time, these cases should not (and cannot) be misread to mean that education records only receive FERPA protection if they are maintained by a registrar or single central custodian. As noted earlier,[55] such a position by both courts and requestors is likely, due in part, to the misunderstanding that FERPA applies only to certain types of "academic records" housed in a central or single location of the institution, rather than the vast array of student records, including disciplinary, counseling, housing, and athletics records, which are maintained throughout the institution.[56]

Indeed, the Court in *Owasso* recognized that other individuals "acting for" the school–including teachers, administrators, and other school employees–can "maintain" documents for the institution under FERPA.[57] By way of example, an Indiana court determined that university trustees, who collected materials related to a student investigation, "were clearly acting for the university in maintaining these materials."[58] As such, those records were maintained by the university and subject to FERPA.

Put simply, there is no clear line as to what records will be considered "maintained" by a university and protected by FERPA. Education records are created, stored, and maintained by countless custodians in countless locations across campus, and the increase in online storage makes it possible to save just about every kind of record in perpetuity. Thus, it is helpful to look at the issue as a sliding scale. If the records are fleeting in nature like notes or tally sheets[59], or merely stored on an institution's server (as might be the case with students' personal email messages) with no intent to be used by the institution, there is a stronger argument that the records are not "maintained" by the institution and hence do not enjoy FERPA protections.[60] However, if the records are purposefully or consciously maintained by the university in the ordinary course of business, or fall within a document identified in an institution's record retention policy, they are more likely to be considered "maintained" and consequently viewed as an "education record and thereby protected."[61]

(6) **OK fine, I'm a student and I want every single piece of paper that relates to me.**

It is important to remember that FERPA is not just a privacy law; it also requires that colleges and universities permit students to inspect, review, and challenge the content of their education records.[62] So how should an institution proceed if it is faced with a broad request for "all records" pertaining to a particular student?[63]

In a letter to a parent regarding this issue, the FPCO noted that while

> a school district would be required to conduct a reasonable search for education records, it is the responsibility of the parent to clearly specify the records to which he or she is seeking access. If a parent makes a "blanket" request for a large portion of his or her child's education records and the parent believes that he or

> she was not provided certain records which were encompassed by that request, the parent should submit a follow-up request clarifying the additional records he or she believes exist.[64]

While this matter arose in the K-12 context, the same reasoning would apply to a college or university student requesting his or her own education records.

As a practical matter, should a university receive an especially broad request, institutions may want to first direct the student to the registrar's office (or another similar office maintaining the student's academic file) and also to the academic department where the student is majoring. From there, the institution can ask the student to be more specific with the request (*e.g.*, request specific documents related to student disciplinary files or residence hall applications), and inform the student that the university will make reasonable efforts to gather such records.

Additionally, schools should consider updating their respective records policies to include language that denotes the proper university official to whom requests should be addressed. For example, Princeton University's policy provides that education records are located primarily in various academic offices and "if the records are not maintained by the University official to whom the request was submitted, that official shall advise the student of the correct official to whom the request should be addressed."[65] And Purdue University specifically identifies in its student records policy the records custodian and location for each class of records that might be requested by a student.[66]

Outside of attempting to limit the request and directing the student to the appropriate office, institutions should be mindful that a student's request to inspect records is an obligation under FERPA and generally falls outside of the public records law. That is, a student is not making a request for a copy of a public record but seeking access to his or her education record. While campus officials will need to ensure that their respective state law or attorney general does not view this assertion as a distinction without a difference, it does provide potential avenues for schools to consider and/or present to the student-requestor. In particular, under FERPA a student has the right to inspect and review his or her records but not copies of such records unless obtaining copies is the only way one can exercise his or her inspection rights.[67] And unlike most state public records laws where public entities cannot charge for an employee's time, FERPA has no such prohibition. Charging students a reasonable fee to review their own records may be antithetical to the mission of the university and may cause some criticism, but it nevertheless may be a course of action to consider should a request be so burdensome due to excessive redactions or data extraction.

Of course, institutions need to be attentive that they do not dispose of relevant records once a request is received and pending. Yet FERPA does not specifically require that student records be kept for a specific or indefinite period of time,[68] nor does it require that students be notified when their records are disposed of or destroyed. However, any such disposal of student records must be in accordance with the institution's records retention policy. And when responding to blanket requests for one's education records, institutions should also turn to the guidance provided by FPCO, which is that FERPA does not require the creation of records, such as a progress report, or interim information that does not exist at the time of the request.[69]

CONCLUSION:

As demonstrated in this NACUANOTE, FERPA and state open and public records laws place important yet often conflicting obligations on public colleges and universities. As long as these seemingly diametrically opposed obligations exist, members of the media and others seeking student records will continue to challenge institutional decisions to withhold certain protected information. The best way to address these challenges is to ensure that requestors are aware of the institution's obligations under federal law and appropriate state law, and that the institution is clear and consistent in its application of the law. With that advice in mind, the institution can comply with federal law while maintaining the confidence and trust of students, parents, employees, alumni, and the public at large.

ENDNOTES:

[1] Jan Alan Neiger currently works as an Assistant Vice Provost for The Ohio State University. Prior to his position with the Office of Academic Affairs, he served as Assistant Vice President and Associate General Counsel for Ohio State. He gratefully acknowledges the efforts of the NACUA staff and committee members, who shared their time and talents in editing this Note.
[2] 20 U.S.C. § 1232g(a)(2)-(4)(A)(i)-(ii) (2012); 34 C.F.R. § 99.3(a)-(d) (2014). Although name and address can be designated as "Directory Information," such information may not be released when combined with other information that is not Directory Information.
[3] Family Educational Rights and Privacy Act, 73 Fed. Reg. 74,806, 74,831 (Dec. 9, 2008); *see also* 20 U.S.C. § 1232g(a)(4)(A)(i)-(ii); 34 C.F.R. § 99.3(e).
[4] 34 C.F.R. § 99.3(f)-(g); *see also* 20 U.S.C. § 1232g(b)(4)(A).
[5] See*, e.g.,* H.B. 4046, § 1, 2015 Leg., 84th Sess. (Tex. 2015) (to be codified as an amendment to TEX. GOV'T CODE ANN. § 552.114) ("Student record" means both information that constitutes an education record under FERPA and information in the record of an applicant for admission to an educational institution, including a transfer applicant); *see also* TENN. CODE ANN. § 10-7-504(a)(4) (Supp. 2011); VT. STAT. ANN. Tit. 1, § 317(c)(11).
[6] Education records are defined as records that "contain information directly related to a student" and that are "maintained by" a higher education institution. 20 U.S.C. § 1232g(a)(4).
[7] *See, e.g., United States v. Miami Univ.,* 294 F.3d 797 (6th Cir. 2002) (non-academic disciplinary records); Letter from LeRoy S. Rooker, Dir., Family Practice Compliance Office, Dep't of Educ., to L. Lee Tyner, Jr., Attorney, Univ. of Miss. (Feb. 12, 2002) (NCAA investigation-related documents); Letter from LeRoy S. Rooker, Dir., Family Practice Compliance Office, Dep't of Educ., to Edward M. Opton, Jr., Univ. Counsel, Regents of Univ. of Cal. (Sept. 17, 1999) (student's employment file); Letter from LeRoy S. Rooker, Dir., Family Practice Compliance Office, Dep't of Educ., to Doris Dixon, Dir. of Fed. Relations, NCAA (Mar. 12, 1999) (NCAA investigation-related documents); Letter from LeRoy S. Rooker, Dir., Family Practice Compliance Office, Dep't of Educ., to Doris Dixon, Dir. of Fed. Relations, NCAA (Oct. 22, 1998) (general correspondence from students); Letter from LeRoy S. Rooker, Dir., Family Practice Compliance Office, Dep't of Educ., to Charles L. Guest, General Counsel, Miss. State Univ. (Aug. 21, 1995) (NCAA investigation-related documents).
[8] PHYLLIS KARASOV, STEVEN J. MCDONALD & MARGARET O'DONNELL, NACUA, STUDENT PRIVACY: FROM FACEBOOK TO FERPA 15, (June 2006).
[9] Letter from LeRoy S. Rooker, Dir., Family Policy Compliance Office, Dep't of Educ., to Jerome Schad, Esq., Hudgson Russ Attorneys (Dec. 23, 2004) (concluding that records pertaining to a student that were derived from or admitted into evidence in an open due process proceeding remain education records and not subject to release); Letter from LeRoy S. Rooker, Dir., Family Policy Compliance Office, Dep't of Educ., to W. Joseph Hatley, Esq., Lathrop & Gage (Mar. 8, 2005) (indicating that information regarding a student that is maintained by a university is an education record, even if the information is publicly available elsewhere such as a newspaper story); Letter from LeRoy S. Rooker, Dir., Family Policy Compliance Office, Dep't of Educ., to David Cope, Assistant Professor, Univ. of N. Ala. (Nov. 2, 2004) (determining that records prepared by medical or clinical professionals for the purpose of documenting a student's disability and need for accommodation meet the definition of education records under FERPA).

For a full listing of FCPO's technical assistance letters, see the FERPA Online Library at http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/index.html?exp=5.
[10] 20 U.S.C. § 1232g(g); 34 C.F.R. § 99.60.
[11] *See, e.g*. *Briggs v. Bd. of Trs., Columbus State Cmty. Coll.,* No. 2:08-CV-644, 2009 U.S. Dist. LEXIS 92950, at * 15 (S.D. Ohio July 8, 2009) (stating that records relating directly to school employees, which concerned student complaints of harassment and only indirectly to students, are not "education records"); *Red & Black Pub. Co. v. Bd. of Regents*, 427 S.E.2d 257, 261-62 (Ga. 1993) (holding that discipline records are not "education records within the meaning of [FERPA]" and therefore are subject to disclosure under Georgia's open records law); *Kirwan v. Diamondback*, 721 A.2d 196, 206 (Md. 1998) (holding that 'education records' within the meaning of [FERPA] do not include records of parking tickets or correspondence between the NCAA and the University regarding a student athlete accepting a loan to pay parking tickets"); *Mem. re. Decision on Plaintiff's Mot. for Summ. J. at 6,, News & Observer Publ'g Co. v. Baddour* (N.C. Super. Ct. 2012) (No. 10-CV-001941). ("This kind of misbehavior (impermissible benefits [under NCAA rules] – non-academic) does not relate to the classroom, test scores, grades, SAT or ACT scores, academic standing or anything else relating to a student's education progress or discipline for violating the educational rules. . . . " (emphasis omitted)).
[12] *See, e.g.,* 34 C.F.R. § 99.31(a)(13) (2015) .(regarding disclosure of final results of a disciplinary proceeding to alleged victim of a crime); *id.* §§ 99.31(a)(10), 99.36(a) (stating that personally identifiable information may be disclosed to protect the health and safety of students or other individuals); *id.* §§ 99.31(a)(11), 99.37 (allowing disclosure of information that would not generally be considered harmful or an invasion of privacy, otherwise known as "directory information").
[13] *See* FAMILY POLICY COMPLIANCE OFFICE, LEGISLATIVE HISTORY OF MAJOR FERPA PROVISIONS (June 2002),http://www2.ed.gov/policy/gen/guid/fpco/pdf/ferpaleghistory.pdf .
[14] *Id. See also* STEVEN J. MCDONALD, NACUA, TENSIONS BETWEEN FERPA AND PUBLIC RECORDS REQUESTS: RESPONDING TO INFORMATION REQUESTS FROM THE MEDIA (June 2010), http://www-local.legal.uillinois.edu/nacua10/presentations/6J_handout.pdf.
[15] *See MacKenzie v. Ochsner Clinic Found.,* No. 02-3217, 2003 U.S. Dist. LEXIS 15385, at *11 (E.D. La. Aug. 20, 2003) , ("The plain meaning of the statutory language reveals that Congress intended for the definition of ["education records"] to be broad in scope" (quoting *Belanger v. Nashua, N.H., Sch. Dist.*, 856 F. Supp. 40, 48 (D.N.H. 1994))); *Connoisseur Commc'n of Flint, L.P. v. Univ. of Mich.*, 584 N.W.2d 647 (Mich. Ct. App. 1998) (finding that a student-athlete automobile information sheet is an education record because it contains information directly related to the student-athlete and is maintained by the university); *An Unincorporated Operating Division of Ind. Newspapers, Inc. v. Trs. of Ind. Univ.,* 787 N.E.2d 893, 907-08 (Ind. Ct. App. 2003), (holding that the investigation into a coach's behavior that contained information directly related to students was an education record).
[16] 680 N.E.2d 956 (Ohio 1997).
[17] *Id.* at 956.
[18] *United States v. Miami Univ.,* 294 F.3d 797, 812 (6th Cir. 2002).
[19] *State* ex rel*. ESPN, Inc*. *v. Ohio State Univ.*, 970 N.E.2d 939, 946-47 (Ohio 2012) (per curiam).
[20] *Id*. at 947.
[21] *Id.*
[22] 20 U.S.C. § 1232g(a)(4)(A) (2012).
[23] Family Educational Rights and Privacy Act, 73 Fed. Reg. 74,806 (Dec. 9, 2008) (codified at 34 C.F.R. pt. 99).
[24] 20 U.S.C. § 1232g(b)(1).
[25] *See* Family Educational Rights and Privacy Act, Op. Mich. Att'y Gen. 7245 (2010), http://www.ag.state.mi.us/opinion/datafiles/2010s/op10322.htm/.
[26] Family Educational Rights and Privacy Act, 73 Fed. Reg. 74,805, 74,805 (Dec. 9, 2008); 34 C.F.R. § 99 (2015).
[27] *Rhea v. Dist. Bd. of Trs. of Santa Fe Coll.*, 109 So.3d 851, 853 (Fla. Dist. Ct. App. 2013) (en banc) (per curiam).
[28] *Id*. at 858.
[29] *Id.*
[30] *Id.*
[31] *Bd. of Educ. of Colonial Sch. Dist. v. Colonial Educ. Ass'n*., No. 14383, 1996 WL 104231, at *6 (Del. Ch. Dec. 2, 1996). This reasoning also demonstrates the narrowing application of "education" to mean

academic records that is inconsistent with the guidance of the Department of Education, as discussed above.
[32] *Ellis v. Cleveland Mun. Sch. Dist.,* 309 F. Supp. 2d 1019, 1023 (N.D. Ohio 2004); *see also NCAA v. Associated Press,* 18 So. 3d 1201, 1211 (Fla. Dist.. Ct. App. 2009) (holding that certain documents were not education records because they "pertain to allegations of misconduct by the University Athletic Department, and only tangentially relate to the students who benefitted from that misconduct"); *BRV, Inc. v. Superior Court*, 143 Cal. App. 4th 742, 754-55 (2006); *Briggs v. Bd. of Tr., Columbus State Cmty. Coll.*, No. 2:08-cv-00644, 2009 WL 2047899 at *5 (S.D. Ohio July 8, 2009), *as modified on denial of reh'g* (Oct. 26, 2006); *Wallace v. Cranbrook Educ. Cmty.*, No. 05-73446, 2006 WL 2796135, at *4 (E.D. Mich. Sept. 27, 2006).
[33] *See, e.g., Ellis*, 309 F. Supp. 2d at 1021; *Briggs*, No. 2:08-cv-00644, 2009 WL 2047899, at *1.
[34] While FERPA generally requires obtaining written consent of a student's education record before it may be disclosed, an exception to this general rule is when schools release such records to comply with a lawfully issued subpoena or court order. 34 C.F.R. § 99.31(a)(9)(i) (2015).
[35] Letter from LeRoy S. Rooker, Dir., Family Policy Compliance Office, U.S. Dep't of Educ. to Doris Dixon, Dir. of Fed. Relations, NCAA (Oct. 22, 1998) ("[W]e have determined that there are instances where an educational institution must be allowed to defend itself if a student takes an adversarial position against an institution such as initiating a law suit or administrative hearing. We believe that the implied waiver of the right to consent extends to situations where a parent or student attempts to enlist the assistance of an entity that will possibly intervene in the matter against the school.").
[36] Family Educational Rights and Privacy Act, 73 Fed. Reg. 74806, 74,811 (Dec. 9, 2008).
[37] *See, e.g., Rhea v. Dist. Bd. of Trs. of Santa Fe Coll.*, 109 So.3d 851, 856-58 (Fla. Dist. Ct. App. 2013); *State* ex rel*. ESPN, Inc*. *v. Ohio State Univ.*, 970 N.E.2d 939, 947 (Ohio 2012); *see also Unincorporated Operating Div. of Ind. Newspapers, Inc. v. Trs. of Ind. Univ.*, 787 N.E.2d 893 (Ind. Ct. App. 2003) (holding that materials are not "education records" if the information that could lead to the identity of students has been redacted); *Osborn v. Bd. of Regents of Univ. of Wis. Sys.,* 647 N.W.2d 158, 168 n.11 (Wis. 2002) ("Once personally identifiable information is deleted, by definition, a record is no longer an education record since it is no longer directly related to a student.").
[38] *Cf.* 34 C.F.R. § 99.31(b). Moreover, when a record contains information about multiple students, an institution must redact the names and personally identifiable information of other students when providing access to one of the students identified in the record. *See K.L. v. Evesham Twp. Bd. of Educ.*, 32 A.3d 1136, 1150-51 (N.J. Super. 2011).
[39] *Id*.; *see also* Family Educational Rights and Privacy Act, 73 Fed. Reg. 74,806, 74,831 (Dec. 9, 2008) (codified as 34 C.F.R. pt. 99 ("[I]nformation, such as address, date and place of birth, race, ethnicity, gender, physical description, disability, activities and accomplishments, disciplinary actions, and so forth, can indirectly identify someone.").
[40] *Sherry v. Radnor Twp. Sch. Dist*,. 20 A.3d 515, 525 (Pa. Commw. Ct. 2011). *Cf. Osborn v. Bd. of Regents of Univ. of Wis. Sys*., 647 N.W.2d 158, 171 (Wis. 2002) (noting that the list requesting minimal information—"grade point average, test scores, race, gender, and ethnicity (if recorded)—is not sufficient, by itself, to trace the identity of an applicant. Although we recognize that in a small number of situations the requested information could possibly create a list of characteristics that would make an individual personally identifiable., we conclude that under the circumstances here, the information is not personally identifiable.").
[41] *Sherry,* 20 A.3d at 5225.
[42] Family Educational Rights and Privacy Act, 73 Fed. Reg. at 74,834.
[43] *See, e.g., An Unincorporated Operating. Div. of Ind. Newspapers, Inc. v. Trs. of Ind. Univ.,* 787 N.E.2d 893 (Ind. App. 2003) (holding investigatory materials relating to conduct of basketball coach subject to FERPA as records contained information directly related to individual students); *Bd. of Trs., Cut Bank Pub. Schs. v. Cut Bank Pioneer Press*, 160 P.3d 482, 488 (Mont. 2007) (explaining that FERPA does not prohibit the public release of student disciplinary records from which all personally identifiable information has been redacted); *K.L. v. Evesham Twp. Bd. of Educ.,* 32 A.3d 1136, 1151 (N.J. Super. Ct. 2011) (noting that when considering the "application of both FERPA's confidentiality requirement and a state law requiring disclosure of government records . . . such records should be released with appropriate redactions to comply with FERPA"); Ky. Kernel/Univ. of Kentucky, 08 Op. Ky. Att'y Gen. 052, at 6 (2008), http://ag.ky.gov/civil/orom/2008/08ord052.doc ("Because the [Student Government Association] officers' positions are conditioned on their status as full-time students, the postings they

generate on the [student government] listserv must be considered education records." (internal quotations omitted)).
[44] *Press-Citizen Co. v. Univ. of Iowa*, 817 N.W.2d 480, 493 (Iowa 2012).
[45] *Id* at 490.
[46] *Id.* at 492.
[47] 534 U.S. 426 (2002).
[48] *Id.* at 434-35.
[49] *Id*. at 433.
[50] The issue here is not whether the records are directly related to the student. Such records certainly are. The issue is whether the records are "maintained" and used by the institution to carry out its duties and responsibilities.
[51] *Phoenix Newspapers, Inc. v. Pima Cmty. Coll.*, No. C201111954, slip op at 1 (Ariz. Sup. Ct. May 17, 2011).
[52] *Id.,* slip op. at 3.
[53] *Id*.
[54] *S.A. v. Tulare Cnty. Office of Educ.*, No. CVF 08–1215 LJO GSA, 2009 WL 3126322, at *7 (E.D. Cal. Sept. 24, 2009).
[55] *See supra,* notes 11 & 12.
[56] Note that it is irrelevant as to the medium upon which such records are kept for purposes of determining whether a record is maintained by the institution. FPCO's own guidance provides that the "term 'education records' is broadly defined as all records, files, documents and other materials" concerning a student recorded in any way, including both paper or email, except for those records specifically exempted under the statute. Letter from LeRoy S. Rooker, Dir., Family Policy Compliance Office, Dep't of Educ., to David Strom & Stephanie Baxter, In-House Counsel & Senior Associate Counsel, Am. Fed'n of Teachers (Aug. 21, 2000). And FERPA's regulations defines "record" as "any information recorded in any way, including, but not limited to, hand writing, print, computer media, video or audio tape, film, microfilm, and microfiche." 34 C.F.R. § 99.3.
[57] *Owasso Indep. Sch. Dist.* v. *Falvo*, 534 U.S. 426, 4335 (2002).
[58] *An Unincorporated Operating Div. of Ind. Newspapers v. Ind. Univ.*, 787 N.E.2d 893, 906 (Ind. Ct. App. 2003).
[59] *Bd. of Educ. of the Toledo City Sch. Dist. v. Horen*, No. 3:07CV3631, 2010 WL 3522373, at *25 (N.D. Ohio Sept. 8, 2010) (finding that a teacher's tally sheets of students' daily activities were "temporary vehicles assisting school staff in memorializing notes in the students' permanent records, but never themselves went into a 'records room,' the students' 'permanent file,' or on 'a permanent secure database'").
[60] Indeed, certain documents may be viewed by states' public records laws as non-records and not subject to disclosure because they are not used or relied on by the institution for purposes of documenting their operations, decisions, or procedures. *See, e.g., State ex rel. Sensel v. Leone,* 707 N.E.2d 496 (Ohio 1999) (reinstating trial court's judgment that unsolicited letters alleging the inappropriate behavior of a coach are not considered a "record" under the Ohio Public Records Act); NORTH CAROLINA DEPARTMENT OF CULTURAL RESOURCES, EMAIL AS A PUBLIC RECORD IN NORTH CAROLINA: A POLICY FOR ITS RETENTION AND DISPOSITION (REVISED JULY 2009), , TENSIONS BETWEEN FERPA AND PUBLIC RECORDS REQUESTS: RESPONDING TO INFORMATION REQUESTS FROM THE MEDIA, at 7 (June 2010), https://www.northcarolina.edu/sites/default/files/media/email_as_a_public_record_in_north_carolina_a_policy_for_its.pdf (email message not created or received as part of the business of government is considered a non-record).
[61] *See, e.g.*, *State* ex rel. *ESPN v. Ohio State Univ.*, 970 N.E.2d 939, 947 (Ohio 2012) (per curium) ("Ohio State's Department of Athletics retains copies of all e-mails and attachments sent to or by any person in the department; the e-mails cannot be deleted. The department also retains copies of all documents scanned into electronic records, which are organized by student-athlete. Ohio State has additionally collected documents related to its investigation of student-athletes . . . and has kept those documents in two secure electronic files. These records are not similar to the transient records involved in [*Owasso v.*] *Falvo* .").
[62] 20 U.S.C. § 1232g(a)(1)(A) (2012). *See e.g.,* a publication called "The Fountain Hopper" explaining to students their right to admission records and how to access such records. THE FOUNTAIN HOPPER, http://fountainhopper.com/ (last visited May 20, 2016).

[63] This issue gained more attention when the Student Press Law Center—which describes itself as "an advocate for student First Amendment rights, for freedom of online speech, and for open government on campus" STUDENT PRESS LAW CTR., http://www/splc.org/ (last visited Apr. 1, 2016)— launched its "Break FERPA" movement, encouraging individuals to "fix FERPA by breaking it." BREAK FERPA, STUDENT PRESS LAW CTR., http://www.splc.org/section/break-ferpa/ (last visited May 20, 2016). The initiative encourages individuals to "request your own FERPA records—defining 'records' in the same over-broad way that schools and colleges do when they're trying to withhold a public record. Legally, the school has 45 days to give you your own records, and they can't charge you for the service. See if they comply. Or if they get so overwhelmed by the enormous request for information that they cave and tell you—rightfully—those records aren't really covered by FERPA." *Id.* Although it caused hours of work for many universities, it's not clear that the "movement" produced any lasting impacts.
[64] Letter from LeRoy S. Rooker, Dir., Family Policy Compliance Office, U.S. Dep't of Educ., to Parent (Aug., 20, 2004), http://www2.ed.gov/policy/gen/guid/fpco/doc/hastings82004.doc.
[65] PRINCETON UNIV., RIGHTS, RULES, RESPONSIBILITIES: STUDENT PRIVACY RIGHTS UNDER FEDERAL LAW (2015), http://www.princeton.edu/pub/rrr/part2/index.xml#comp27.
[66] PURDUE UNIV., PURDUE UNIVERSITY POLICIES: RECORDS (Feb. 4, 2015), http://www.purdue.edu/policies/records/viiia4.html.
[67] *See* **34 C.F.R.** § **99.10.**
[68] *See id.* § 99.32(a)(1) ("[I]nstitution must maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student").
[69] FAMILY POLICY COMPLIANCE OFFICE, U.S. DEP'T OF EDUC., FERPA GENERAL GUIDANCE FOR STUDENTS (June 26, 2015), http://www2.ed.gov/policy/gen/guid/fpco/ferpa/for-eligible-students.pdf.