COMMONWEALTH OF KENTUCKY
WARREN CIRCUIT COURT
DIVISION NO. I
CASE NO. 17-CI-00233

***Filed Electronically***

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| WESTERN KENTUCKY UNIVERSITY | PLAINTIFF/APPELLANT/ INTERVENING DEFENDANT |
| v. | |
| COLLEGE HEIGHTS HERALD | DEFENDANT/APPELLEE |
| AND | |
| THE KERNEL PRESS, INC. D/B/A THE KENTUCKY KERNEL | DEFENDANT/APPELLEE |
| AND | |
| COMMONWEALTH OF KENTUCKY, *ex rel.* ANDY BESHEAR, ATTORNEY GENERAL | INTERVENING PLAINTIFF |

**BRIEF OF THE COLLEGE HEIGHTS HERALD AND KENTUCKY KERNEL REGARDING FERPA ISSUES**

Defendants-Appellees the College Heights Herald and Kentucky Kernel (collectively, the "Requesters"), through their undersigned counsel, jointly file this brief in response to the Court's November 21, 2017 Order requiring the parties to brief two threshold questions of law: (1) "whether the records at issue in this case are exempt from disclosure under Kentucky's Open Records Act because [the Family Educational Rights and Privacy Act] prohibits their release in whole or part" and (2) "whether the Attorney General has authority to conduct *in camera* review pursuant to Kentucky's Open Records Act and FERPA." For the reasons explained below, FERPA does not prohibit the release of redacted documents to the public, and the University's refusal to provide those redacted documents to the Attorney General was a willful violation of state law.

## INTRODUCTION

This is not a case about *student* privacy. Rather, it is about whether Western Kentucky University ("WKU" or "University") may prevent the public from learning how *it* investigated serious allegations of sexual misconduct against faculty members and staff—employees who enjoy no statutory protections under the Family Educational Rights and Privacy Act ("FERPA"). *See* 20 U.S.C. § 1232g(a)(4)(B)(iii). The University has admitted that in at least six of the 20 cases where it investigated alleged sexual misconduct by University employees between 2013 and 2016, it determined that there was a violation of WKU's sexual misconduct policy. Nevertheless, in each case, the University allowed the accused employee to resign without consequence or public acknowledgment. Complaint ¶¶ 10, 16. In the only case where the University has released any records to date (in response to a separate Open Records request), WKU allowed one of those professors to remain in the classroom for an entire academic year following the University's determination that he committed sexual misconduct, at which point he transferred to another public institution without anyone knowing about his transgressions at WKU. *See* Nicole Ares, *In the Dark: Records Shed Light on Sexual Misconduct at Kentucky Universities*, WKU COLLEGE HEIGHTS HERALD (May 2, 2017).

The public plainly has a right to know how its state universities investigate serious allegations of sexual misconduct. This includes not only the right to know about cases where a violation occurs, but also a right to understand what allegations were not similarly "punished" by the University (if an under-the-table resignation even counts as that). *See, e.g.*, 00-ORD-104; 97-ORD-121; 94-ORD-96. Recent news events have tragically illustrated what happens when a culture of secrecy in university employee discipline is allowed to trump the public's right to understand how its state-funded schools are protecting the health and safety of students. *See* Matt Mencarini, *MSU hid full conclusions of 2014 Nassar report from victim*, LANSING STATE JOURNAL

(Jan. 26, 2018); *cf. also* Tom Bartlett, *She Left Harvard. He got to Stay*, CHRONICLE OF HIGHER EDUCATION (Feb. 28, 2018) (showing how prominent university's culture of secrecy in investigating sexual misconduct complaints against faculty members allowed senior professor to continue harassing faculty and staff over a period of decades).

Contrary to the University's assertion, FERPA is no barrier to the disclosure of these documents. Indeed, the University did not even *cite* FERPA in its initial response denying the Requesters access to the records they sought ("Requested Documents"). Likewise, FERPA is only mentioned in passing in the University's responses to the Requesters' appeals to the Attorney General—and even there, the University only noted that *some* of the requested document might be subject to FERPA. It was not until the Attorney General exercised his statutory authority to request the documents for *in camera* review that WKU took the position that FERPA creates a blanket prohibition against sharing teacher disciplinary records with any party—including the Attorney General, for *in camera* review.

That is simply not true. The records at issue here are *teacher* disciplinary records—not *student* disciplinary records. Courts routinely hold that such records do not fall within FERPA's definition of "education records" even if they happen to mention students. *See, e.g.*, *Ellis v. Cleveland Municipal Sch. Dist.*, 309 F. Supp. 2d 1019 (N.D. Ohio 2004); *see also Jane Doe v. Northern Kentucky University*, 2016 WL 6237510 (E.D. Ky. 2016); *Briggs v. Board of Trustees Columbus State Community College*, 2009 WL 2047899 (S.D. Ohio July 8, 2009); *Wallace v. Cranbrook Educational Community*, 2006 WL 2796135 (E.D. Mich. 2006).

Moreover, federal regulations confirm that even "education records" may be released without a student or parent's consent when they have been "de-identified" to remove "personally identifiable information." 34 C.F.R. § 99.31(b)(1). That is all the requesters (and the Attorney

General) sought here: copies of *redacted* investigation records. Contrary to the University's claims, FERPA plainly permits that disclosure.

In addition, FERPA expressly allows that, even in *student* discipline cases, a university may publicly disclose the "final results" of any investigation of sexual misconduct, including "the name of the student, the violation committed, and any sanction imposed by the institution on that student," as well as the "name of any other student, such as a victim or witness," who has consented to the release of that information. 20 U.S.C. § 1232g(b)(6)(C). If FERPA permits such disclosures in student discipline cases, it plainly does not prohibit release of the same information about faculty misconduct investigations.

Because FERPA allows the disclosure of the redacted records sought here, the Open Records Act compels it. KRS 61.878(4). Indeed, the Kentucky Court of Appeals held in an analogous case that a public agency commits a willful violation of the Open Records law when it adopts a blanket policy against disclosing information that federal law permits the agency to disclose—just as WKU has done here. *See Cabinet for Health & Family Services v. Lexington H-L Servs., Inc.*, 382 S.W.3d 875, 883-884 (Ky. Ct. App. 2012).

Finally, WKU's assertion that it will lose all federal funding if it complies with the Attorney General's order to produce *redacted, teacher* discipline records cannot be taken seriously. Numerous universities throughout Kentucky—and around the country—routinely disclose such documents without consequence under FERPA. That includes other Kentucky universities that responded to identical requests from the Herald and the Kernel, none of whom were even threatened with a sanction for releasing redacted teacher discipline files. That is not a surprise; in the 40-year history of FERPA, "*no institution has ever lost funding* as a result of FERPA violations." Rob Silverblatt, *Hiding Behind Ivory Towers: Penalizing Schools That Improperly*

*Invoke Student Privacy to Suppress Open Records Requests*, 101 GEO. L.J. 493, 498 (January 2013) (emphasis added).

This Court should hold that FERPA does not prohibit the release of the Requested Documents, once properly de-identified in accordance with 34 C.F.R. §§ 99.3 and 99.31(b)(1).

## STATUTORY AND REGULATORY BACKGROUND

### I. The Open Records Act

The Kentucky General Assembly has declared that "the free and open examination of public records is in the public interest." KRS §61.871. The Act's enumerated exceptions "shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others." *Id.*; *see also Hardin County Schools v. Foster,* 40 S.W.3d 865, 868 (Ky. 2001) (Open Records Act therefore "demonstrates a general bias favoring disclosure").

This presumption of disclosure embodies and fosters the purposes of the Open Records Act, which "was intended to make transparent the operations of the state's agencies," so that the public may determine whether the public entity is operating according to the relevant statutory requirements and in service of the public good. *Lawson v. Office of Atty. Gen.,* 415 S.W.3d 59, 70 (Ky. 2013) (citing *Kentucky Bd. Of Examiners of Psychologists v. Courier-Journal & Louisville Times Co.,* 826 S.W.2d 324, 328 (Ky. 1992)). The foundational policy of disclosure in the Open Records Act not only allows the public "to know what its government is up to," but also prospectively shapes the actions of the government agency. *Id.*

If an agency determines that a record is exempt from disclosure, its response denying the request in whole or part must "include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld." KRS 61.880. Moreover, "the [Open Records] Act forbids *blanket* denials of ORA requests, *i.e.* the nondisclosure of an entire record or file on the ground that some part of the record

or file is exempt." *Kentucky New Era, Inc. v. City of Hopkinsville,* 415 S.W.3d 76, 88 (Ky. 2013). Rather, where only some of the information in a requested record is exempt, the agency has an affirmative obligation to "separate the excepted and make the nonexcepted material available for examination." KRS 61.878(4); *see also City of Fort Thomas v. Cincinnati Enquirer,* 406 S.W.3d 842, 850 (Ky. 2013) (blanket exemptions violate KRS 61.878(4)).

The burden of proof in Open Records Act case rests squarely on the agency claiming an exemption from disclosure. KRS 61.880(c)(2). Thus, in any administrative appeal, the Attorney General may require an agency to provide copies of the withheld documents in order to determine whether the Act's exemptions have been properly invoked. *Id.*

For purposes of its FERPA arguments,[1] WKU relies on KRS 61.878(k), which permits agencies to withhold "records or information the disclosure of which is prohibited by federal law or regulation." However, even under this exemption, agencies must release all information that federal statutes say they may; adopting a blanket policy of refusing to release documents that may be released under federal law is a willful violation of the Open Records Act. *See Cabinet for Health & Family Services v. Lexington H-L Services, Inc.*, 382 S.W.3d 875, 883-884 (Ky. Ct. App. 2012).

## II. Family Educational Rights and Privacy Act

The Family Educational Rights and Privacy Act ("FERPA") is federal "spending legislation" that conditions a University's receipt of federal funds on certain conditions. *Gonzaga University v. Doe*, 536 U.S. 273, 279, 281 (2002). The Act imposes both access and privacy requirements on recipients of federal funds.

The statute's primary provision, 20 U.S.C. § 1232g(a), grants parents of students enrolled

[1] WKU has invoked other exceptions to the Open Records Act as well. Under the scheduling order entered by this Court, however, those other exceptions are not addressed in this brief and will be addressed at a later date, if necessary.

at any educational institution rights to access certain information. (Those rights transfer to the students when he or she turns 18, *see* 20 U.S.C. § 1232g(d).) Chief among those rights is a parent's ability to access to their child's "education records." 20 U.S.C. § 1232g(1)(A). Parents also have the right to "a hearing . . . to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students." *Id.* § 1232g(a)(2). Likewise, parents must be given "an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records." *Id*.

As a corollary to these disclosure requirements, the Act limits the information that universities can share about students. As relevant here, the federal government can penalize a university for releasing certain information, but only where it "has a *policy or practice* of releasing, or providing access to, any personally identifiable information in education records" without written consent of a student or parent. *Id.* § 1232g(b)(1) (emphasis added).

That does not mean, however, that an institution is prohibited from turning over "education records" in all instances. Rather, the Secretary of Education's ("Secretary") implementing regulations expressly permit educational institutions to release "de-identified" education records that have been redacted to remove "personally identifiable information" of students—a category of information that "is narrowly defined by the Act's regulations as including only the student's name, parent's name, the student's or parent's address, social security number, or other information that would make the student's identity easily traceable." *Ellis v. Cleveland Municipal School Dist.*, 309 F. Supp. 2d 1019, 1022 (N.D. Ohio 2004) (quoting *Doe v. Woodford County Board of Education*, 213 F.3d 921, 926 (6th Cir. 2000)). In relevant part, the regulations provide:

> An educational agency or institution, or a party that has received education records or information from education records under this part, *may release the records or information without the consent required by § 99.30 after the removal of all personally identifiable information* provided that the educational agency or institution or other party has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.

34 C.F.R. § 99.31 (emphasis added).[2]

And even some otherwise identifying information about students may be disclosed in certain circumstances relevant here. For example, in the case of alleged sexual misconduct by students, a university may release the "final results" of its investigation—that is, "the name of the student, the violation committed, and any sanction imposed by the institution on that student," as well as the "name of any other student, such as a victim or witness," who has consented to the release of that information. 20 U.S.C. § 1232g(b)(6)(C). This information may be disclosed to the "alleged victim of any crime of violence (as that term is defined in section 16 of Title 18), or a nonforcible sex offense" in any case, or *to the public at large* anytime "the institution determines . . . that the student committed a violation of the institution's rules or policies with respect to such crime or offense." *Id.* § 1232g(b)(6)(A)-(B). In contrast, the Act places no

[2] Under the relevant regulation, 34 C.F.R. § 99.3, "personally identifiable information" means:

> (a) The student's name;
> (b) The name of the student's parent or other family members;
> (c) The address of the student or student's family;
> (d) A personal identifier, such as the student's social security number, student number, or biometric record;
> (e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;
> (f) Other 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; or
> (g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

limitations whatsoever on disclosing the "final results" of the kinds of investigations at issue here—of *faculty members or staff* accused of assaulting students or other university employees.

Moreover, even where FERPA applies, it imposes certain requirements on institutions concerning the maintenance and disclosure of "education records," a term defined by statute to mean "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." *Id.* § 1232g(a)(4)(A). (As noted below, however, that term does *not* include records concerning university employees that are "made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose" or that are "maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement." *Id.* § 1232g(a)(4)(B)(ii)-(iii).)

All such records must be "maintained" by the University, *id.* § 1232g(4)(A)(ii), which "implies that education records are institutional records kept by a single central custodian, such as a registrar. . .." *Owasso Independent School District v. Falvo*, 534 U.S. 426, 435 (2002); *see also S.A. ex rel. L.A. v. Tulare Cty. Office of Educ.*, 2009 WL 3126322, at *7 (E.D. Cal. Sept. 24, 2009) ("FERPA does not contemplate that education records are maintained in numerous places."). Thus, not every single record that references a student constitutes an "education record." *See Knight News Inc. v. University of Central Florida Board of Trustees*, Case No. 2016-CA-004460-0 (Fla. 9th Cir. Ct. Aug. 11, 2016) ("Here, the requested information—records reflecting the spending habits of the student government—even assuming they directly relate to the students whose names were redacted, are not maintained by the university in the manner contemplated by FERPA of education records." (citing *Owasso*, 534 U.S. at 433-35)) (attached hereto as Exhibit 1).

Moreover, for each "education record," FERPA requires that universities create a separate "record of access" to be "kept with the education records of each student." 20 U.S.C. § 1232g(b)(4)(A). That access record must specifically identify "those who have requested access to a student's education records and their reasons for doing so." *Owasso*, 534 U.S. at 434 (citing 20 U.S.C. § 1232g(b)(4)(A)).

Violations of FERPA's access or privacy requirements are enforced solely by the U.S Department of Education. The statute permits the Secretary to take "appropriate actions" to enforce the law. 20 U.S.C. § 1232g(f). The law does not create a private right of action or any individual rights enforceable under 42 U.S.C. § 1983. *Gonzaga University*, 536 U.S. 273. Instead, it permits the Secretary to seek to withdraw federal funds from a university, but only where there is an established institutional policy or practice of inappropriate disclosures—not simply a disagreement about the appropriate scope of a particular disclosure. *See id.* at 288 ("FERPA's nondisclosure provisions further speak only in terms of institutional policy and practice, *not individual instances of disclosure*." (emphasis added)).

Moreover, the Secretary may only seek to withdraw federal funding if "there has been a failure to comply with this section, and [the Secretary] has determined that compliance cannot be secured by voluntary means." 20 U.S.C. § 1232g(f). That determination, in turn, can only be made after the matter is reviewed by the designated "review board" the Secretary established pursuant to 20 U.S.C. § 1232g(g). Here, "the Secretary created the Family Policy Compliance Office (FPCO) 'to act as the Review Board required under the Act [and] to enforce the Act with respect to all applicable programs.'" *Gonzaga University*, 536 U.S. at 289 (quoting 34 C.F.R. § 99.60)). Under controlling federal regulations, the FPCO will adjudicate all complaints filed against universities for violating FERPA. If it determines that a violation was committed, it "*may* also find

that the failure to comply was based on a policy or practice of the agency or institution or other recipient." 34 C.F.R. § 99.66(c) (emphasis added). Such a finding must, however, "[i]nclude[ ] a statement of the specific steps that the agency or institution or other recipient must take to comply" and "[p]rovide[ ] a reasonable period of time, given all of the circumstances of the case, during which the educational agency or institution or other recipient may comply voluntarily." *Id.* The Secretary may only withhold federal funds from a university if it "does not comply during the period of time set under § 99.66(c)." *Id.* § 99.67(a). Simply put, the Secretary cannot withhold funds from a university without giving it adequate notice of the alleged violation, the rights to an administrative hearing, and the opportunity to cure any supposed violation.

Not surprisingly, this extreme remedy is more theoretical than real. Indeed, in the 40-plus-year history of FERPA, "*no institution has ever lost funding* as a result of FERPA violations." Rob Silverblatt, *Hiding Behind Ivory Towers: Penalizing Schools That Improperly Invoke Student Privacy to Suppress Open Records Requests*, 101 GEO. L.J. 493, 498 (January 2013) (emphasis added); *see also* WKU's Responses to Herald's First Set of Discovery Requests Concerning FERPA Issues (attached as Exhibit 2), RFA No. 14 (admitting that WKU was "not aware of any educational institution ever losing funding as a result of violations of the FERPA").

## FACTUAL BACKGROUND

Requesters, the College Heights Herald and the Kentucky Kernel, submitted nearly identical requests to Western Kentucky University for copies of all Title IX investigative records concerning sexual misconduct allegations against university employees in the five years preceding October 2016. *See* Complaint ¶¶ 9, 15. Requesters did not seek any documents concerning Title IX investigations of students.

In response to each request, the University acknowledged that there had been 20 such investigations from 2013 to that time; that six of those cases "resulted in a finding of a WKU policy

violation"; and that all six of those employees were permitted to resign from their position without the University taking any formal disciplinary action against them. *Id.* ¶¶ 10, 16. Notably, neither of the original denial letters from the University invoked FERPA as a ground for refusing the requests; they simply argued that the documents in question were "preliminary" and therefore exempt under KRS 61.878(1)(j). *Id.*, Exhibits 2 & 8.

Both Requesters appealed to the Attorney General. *Id.* ¶¶ 11, 17 & Exhibits 3, 9. In response to those appeals, WKU asserted for the first time, and only in passing, that "FERPA and its implementing regulations protects student records contained within *many* of the files requested from [sic] the [Kernel/Herald] from disclosure." *Id.*, Exhibits 4 & 10 (emphasis added). Even then, the University did not rely on a blanket FERPA exemption from disclosure.

The Attorney General then requested *in camera* review of the documents from WKU. *Id.* ¶¶ 13, 19. The Attorney General informed the University that, "[i]In order to carry out its statutory duty, pursuant to KRS 61.880(2)(a), to issue a written decision stating whether the agency violated provisions of the Open Records Act," the Attorney General "requires that WKU provide a copy of the records involved in [the] request, including any records that you do not contend are exempt." *Id.*, Exhibit 5. The Attorney General further explained that, "[p]ursuant to KRS 61.880(2)(c) and 40 KAR 1:030 Section 3, the records will be held confidentially, will not be disclosed to the public, and will be destroyed at the time the decision is rendered." *Id.* And although FERPA was only raised in passing in the University's prior letter, the Attorney General noted that "[i]f the University asserts FERPA protection for the identity of students, *we will accept redacted copies of the records withheld but only to protect names and personal identifiers of students*." *Id.* (emphasis added).

WKU refused to provide even redacted records to the Attorney General, however. *Id.* ¶ 14. Instead, it argued that a federal regulation, 34 C.F.R. § 99.31, prohibited the release of the records

absent written consent, a "'legitimate educational interest,'" a "'health or safety emergency,'" or some "other exception contained within 34 CFR 99.31.'" *Id.*, Exhibit 6. Curiously, the University's letter argued that none of § 99.31's provisions applied to these records even though that regulation expressly permits to release of the very information the Attorney General requested: "de-identified" records that have been redacted to remove "all personally identifiable information." 34 C.F.R. § 99.31(b)(1).

The Attorney General subsequently issued an Open Records decision styled *In re: Matthew Smith and Nicole Ares/Western Kentucky University*, 17-ORD-014. Complaint ¶¶ 20-22. The opinion concluded that WKU, by deliberately refusing to provide the documents necessary to allow the Attorney General to conduct its *in camera* review, had "failed to meet its burden of proof in denying the requests" and "must make immediate provision for them to inspect and copy the disputed records with the exception of the names and personal identifiers of the complainant and witnesses . . .." *Id.*, Exhibit 12 (p. 6). WKU then appealed to this Court.

## ARGUMENT

FERPA is not a blanket prohibition on releasing any document that mentions a student, even in redacted form. Rather, it is "spending legislation" that conditions a University's receipt of federal funds on certain conditions. *Gonzaga University*, 536 U.S. at 279, 281. The statute may only be enforced by the federal government, *id.*, and the sole remedy for violation of the statute is the withholding of federal funds from an "educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records" without written consent. 20 U.S.C. § 1232g(b)(2).

As explained below, there are at least three reasons why this statutory provision does not prohibit the release of the redacted records sought under the Open Records Act. First, properly

redacted records that do not contain "personally identifiable information" may be released even without consent. 34 C.F.R. § 99.31(b)(1). Second, case law from the Kentucky Supreme Court and numerous federal district courts within the Sixth Circuit (and elsewhere) establishes that de-identified student records, as well as teacher discipline records, do not qualify as "education records" for FERPA purposes. Third, releasing redacted documents in response to an Attorney General's order cannot possibly constitute "a policy or practice of releasing, or providing access to, any personally identifiable information in education records." 20 U.S.C. § 1232g(b)(2).

Thus, FERPA simply is not a barrier to the release of the redacted records sought here. The Kentucky Open Records Act therefore compels their release. KRS 61.878(4).

## I. FERPA and Its Implementing Regulations Permit the Release of Records Redacted to Remove "Personally Identifiable Information" of Students.

The Requesters *do not* seek access to the names or other identifying information of students who filed complaints against WKU faculty or Staff. Rather, they *only* seek access to redacted records that allow the Herald and the Kernel to understand essential information about which professors were accused of misconduct; what they were alleged to have done; how the University investigated the complaints; and what actions (if any) WKU took to shield students at WKU (or other institutions), including from those employees WKU determined committed sexual misconduct. The public absolutely has a right and need to know this kind of information in real time, *see Hardin County Schools v. Foster*, 40 S.W.3d 865, 869 (Ky. 2001) ("The public in general, the residents of the community, and most certainly the parents of children attending a particular school system have a strong interest in the conduct of disciplinary procedures in their school."), as recent news events have tragically shown, *see, e.g.*, Matt Mencarini, *MSU hid full conclusions of 2014 Nassar report from victim*, LANSING STATE JOURNAL (Jan. 26, 2018) (Michigan State University kept concerns about now-convicted sex offender Dr. Nassar secret even from those who

had filed complaints against him, including by providing the accuser and suspect different versions of reports noting results of internal investigation).

There is simply no statutory basis for WKU's contention that FERPA prohibits the release of redacted records of its investigations into faculty sexual misconduct. On the contrary, federal regulations expressly permit a university to release records properly redacted to remove the names and other identifying information of students mentioned in them. A regulatory subsection entitled "De-identified records and information" provides:

> An educational agency or institution, or a party that has received education records or information from education records under this part, *may release the records or information without the consent required by § 99.30 after the removal of all personally identifiable information* provided that the educational agency or institution or other party has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.

34 C.F.R. § 99.31(b)(1) (emphasis added). The Secretary's FERPA regulations further specify the precise information that must be deleted to properly de-identify a student record. It includes:

> (a) The student's name;
> (b) The name of the student's parent or other family members;
> (c) The address of the student or student's family;
> (d) A personal identifier, such as the student's social security number, student number, or biometric record;
> (e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;
> (f) Other 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; or
> (g) Information requested by a person who the educational agency or institution *reasonably believes* knows the identity of the student to whom the education record relates.

34 C.F.R. § 99.3 (emphasis added).[3] And the Kentucky Supreme Court has already made clear that such de-identified student information may be released notwithstanding FERPA. *See Hardin*

[3] To be clear, de-identification does not require heavy redaction. It simply permits an agency to redact

*County Schools*, 40 S.W.3d at 869 (ordering school district to release information about student discipline after redacting it to delete personally identifiable information).

Here, WKU could easily redact the requested documents to delete any complaining students' names, addresses, social security numbers, dates of birth, places of birth, and mothers' maiden names. Moreover, if the University can make a specific showing with regard to a particular investigation—which it has not even attempted to do here—WKU also might be able to make a case for withholding additional information that would permit a person with no knowledge of the facts to identify a particular student "with reasonable certainty," or if the University has a "reasonable belief" that the requester already knows the name of the specific student mentioned in the requested record. *Id.* But WKU did none of these things; it simply asserted that all investigative records concerning faculty are required to be withheld *in full* because the unredacted versions of the records might mention specific students. That is not the law.

Other Kentucky universities understand their obligation to release de-identified Title IX investigation files. That much can be seen from the response by Murray State to an identical records request from the Herald. Murray State, like WKU, took the position that records of an investigation into faculty sexual misconduct toward students constituted an "education" record. *See* Nov. 15, 2016 Murray State letter (attached as Exhibit 3). While the Requesters disagree with that assertion for reasons explained below, Murray State did not stop its analysis there. Rather, the University's letter appropriately goes on to note that "Murray State University is cognizant of KRS 61.878(4), wherein a public agency is required to make available for inspection that which is not

information that would allow a person without personal knowledge of the situation to identify a student with reasonable certainty. It does not permit a university wide latitude to over-redact details of the alleged violation, or its investigation thereof, that it prefers not to disclose. This Court need only look at the redacted records provided by Murray State University and the University of Louisville (Exhibits 3 & 4) to understand how a university can de-identify records without rendering them meaningless to the public.

exempted from release under KRS 61.878(1)." *Id.* Therefore, Murray State provided the Herald with several investigative files redacted to delete not only "personally identifying information such as names, but also . . . information which alone or in combination is linked or linkable such as to identify the students." *Id.* What Murray State did *not* attempt to do is withhold all information about the cases, including the names of the faculty being investigated, the basic contours of the allegations, or the outcomes of any disciplinary action.

Likewise, the University of Louisville responded to the Herald's request by providing redacted documents. Although not accompanied by the kind of explanatory letter that Murray State sent, the documents themselves show that the University of Louisville similarly believed its obligation under the Open Records Act, in view of FERPA, was to produce minimally redacted investigative files that deleted only the kind of personally identifying information referenced in 34 C.F.R. § 99.3. *See* University of Louisville Response, attached hereto as Exhibit 4. Again, and as with Murray State, those records provided the name of the accused faculty member, the basic facts concerning the allegation, and the result of the investigation.

Even more recently, Northern Kentucky University released redacted records of an investigation of alleged misconduct by the Dean of its Law School, Jeffrey Standen. See Mackenzie Manley, *Investigation docs show Chase dean's office a "toxic" work environment*, THE NORTHERNER (Feb. 23, 2018). As the school newspaper's reporting on the case makes clear, NKU—like Murray State and the University of Louisville—released detailed summaries of allegations by students and staff against the Dean, which had been redacted to remove the names and other identifying information of complaining students. Similarly, the University of Cincinnati also released redacted Title IX investigation records that detailed allegations of sexual harassment and contact by former professor Bradley Garner, including allegations concerning multiple

students. *See* Kate Murphy, *Flute students accuse ex-University of Cincinnati professor of sexual misconduct over 2 decades*, CINCINNATI ENQUIRER (Feb. 6, 2018).[4]

Based on these documents, the Herald's Nicole Ares produced an important and multiple national award-winning piece of journalism that tracked the ways that Kentucky universities handled complaints of faculty sexual assault on college campus. *See* Nicole Ares, *In the Dark: Records Shed Light on Sexual Misconduct at Kentucky Universities*, WKU COLLEGE HEIGHTS HERALD (May 2, 2017).[5] Using *appropriately* de-identified documents from multiple universities, Ms. Ares told the stories of several Kentucky professors who were found to have violated their schools' sexual misconduct policies but nevertheless allowed to continue in place, resign quietly, and/or take jobs at different educational institutions.[6] The story even included a detailed recounting of how Western Kentucky University had permitted one of its own professors accused of sexual

[4] Within days, the professor was removed from a teaching position at New York University, which had been unaware of the allegations until publication of the Enquirer's investigation; he also lost his performance contract with instrument maker Yamaha Corp. *See* Kate Murphy, *Yamaha, NYU drop ex-CCM professor Bradley Garner after sexual harassment investigation*, CINCINNATI ENQUIRER (Feb. 7, 2018).

[5] Ms. Ares' story won the prestigious 2017 Betty Gage Holland Award for outstanding investigative journalism from The Student Press Law Center, and the Cox Institute for Journalism, Innovation, Management, and Leadership. It also won second place in the Hearst Journalism Awards Enterprise Reporting Category (the first-place story in that category also concerned a University's Title IX Investigation, *see* Kenny Jacoby, *Why Oregon's Title IX Investigation of Kavell Bigby-Williams's Alleged Rape Stalled Before it Began*, SPORTSILLUSTSRATED.COM (Oct. 25, 2017)).

[6] One of those professors, a Murray State lecturer, was accused by four separate students of sexual harassment, including one who accused him of offering her alcohol and kissing her on a school field trip. Even though the professor admitted he acted "inappropriately" toward that student, he was allowed to remain in the classroom for years without any notice to his students or the public. Similarly, *The Herald*'s reporting showed that a Northern Kentucky University professor kept his job despite having been found to have inappropriately touched and kissed multiple students over a decade. The professor had received two written warnings from NKU, and was strongly advised to keep his distance from students, but never terminated. His other employer—the Campbell County School District, for whom he drove a school bus—terminated him after receiving multiple complaints about his conduct toward even younger students. He eventually retired from NKU after publicity of the Campbell County allegations.

*The Herald* also reported on the case of an Eastern Kentucky University professor found to have sent more than 25 sexually explicit emails to a student. After the University's Equal Opportunity Office recommended "appropriate" disciplinary action against him, he resigned and began teaching the following year at Hofstra University. (In response to the Herald's request for comment, his attorney denied his resignation or relocation were related in any way to the findings of the investigation).

misconduct to remain in place for an entire academic year after he agreed to resign over allegations of sexual misconduct involving students. (This portion of the article was based on documents WKU turned over in response to a separate Open Records request to which it did *not* lodge a FERPA objection.)

These Kentucky universities are not alone in concluding that FERPA does not prohibit the release of records related to alleged faculty misconduct when appropriately redacted to remove personally identifying information. On the contrary, many important and groundbreaking stories have been published across the country based on such records obtained directly from universities and school districts that are likewise subject to FERPA.[7]

It was these other schools and universities—and not WKU—that correctly balanced their obligations under FERPA and the Open Records Act. FERPA simply does not prohibit the release of all information about investigations of faculty sexual misconduct. *See, e.g., Jane Doe v. Northern Kentucky Univ.*, 2016 WL 6237510, at *2 (E.D. Ky. Oct. 24, 2016) ("[R]ecords may be redacted to remove student's names and other identifying information" to comply with FERPA"); *Young v. Pleasant Valley Sch. Dist.*, 2008 WL 11336157, at *7 (M.D. Pa. June 26, 2008) ("Since

[7] *See, e.g.*, Emily DeRuy, *UC Berkeley Fires Professor for Sexually Harassing 4 Students*, THE SAN JOSE MERCURY NEWS (May 25, 2017) (reporting on case of a professor who was eventually dismissed for assaulting multiple students, years after complaints were filed against him that languished in an administrative process); Amy Harmon, *Chicago Professor Resigns Amid Sexual Misconduct Investigation*, THE NEW YORK TIMES (Feb. 2, 2016) (reporting on case of a University of Chicago professor who resigned after an investigation revealed that he "made unwelcome sexual advances to several female graduate students at an off-campus retreat" and engaged in sexual activity with a student who was "incapacitated due to alcohol and therefore could not consent" (internal quotation marks omitted)); Bethany Barnes, *How Portland Public Schools Helped Educator Evade Allegations of Sexual Misconduct*, THE OREGONIAN (August 17, 2017) (reporting on case about a high school teacher who was repeatedly accused of sexual misconduct toward female students over a period of decades but suffered no consequences (until he allegedly assaulted a male counterpart)); *See* Paul Pringle, *An Overdose, A Young Companion, Drug-Fueled Parties: The Secret Life of a USC Medical Dean*, THE LOS ANGELES TIMES (July 17, 2017) (reporting on case of a successful Medical School dean who was allowed to resign quietly from his position even though a young companion of his—whom he originally met on an escort service website—nearly died from a drug overdose in his presence).

the part of the record potentially relevant to the case is its description of the teacher's conduct, any private information about a student contained in the e-mails could be redacted.").

Moreover, as noted above, the statute *expressly permits* a University to publicly disclose the "final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence . . ., or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense," including "the name of the student, the violation committed, and any sanction imposed by the institution on that student." 20 U.S.C. § 1232g(6)(B)-(C). If FERPA permits the disclosure of such information about *students* who commit violations of a University's sexual misconduct policy, it must likewise permit the release of similar information about *faculty*, who the Act does not protect at all. WKU's contrary assertion lacks merit.

Because FERPA does not prohibit the release of de-identified investigation reports, the Open Records Act compels their disclosure. *See* KRS 61.878(4). Indeed, in *Cabinet for Health & Family Services v. Lexington H-L Services, Inc.*, the Kentucky Court of Appeals found that a state agency willfully violated the Open Records Act by adopting a blanket policy of refusing requests for records that federal law gave the agency the discretion to disclose:

> Had the Cabinet considered Appellees' requests on their merits and denied disclosure upon a reasonable basis, perhaps our opinion would be different. However, it is apparent that the Cabinet failed to make particularized analysis and instead relied on an all-encompassing policy of nondisclosure despite the purpose of the Act and despite the acknowledged applicability of KRS 620.050(12)(a) under these circumstances. The circuit court concluded that these denials were made in "bad faith," and we see no grounds to disagree with that conclusion.

382 S.W.3d 875, 883-884 (Ky. Ct. App. 2012) (Lambert, Joseph E., by special designation pursuant to KRS 21.580). The same is true here; federal law expressly permits even "education records" to be de-identified and released to the public, yet WKU continues to assert a blanket

policy against their disclosure. That is not merely a substantive violation of the Open Records law, but a *willful* one committed in "bad faith." *Id.*

## II. Records of Investigations into Alleged Assaults by Faculty Members on Students are Not FERPA "Education Records."

As just explained, FERPA does not prohibit the release of redacted documents to the Requesters. Therefore, this court need not even consider the question of whether records of investigations into alleged sexual misconduct by faculty are "education records." If it were to reach that question, however, it should conclude that the requested records do not meet the relevant statutory definition. Thus, FERPA cannot justify a blanket prohibition on the release of the Requested Documents.

### A. Courts Have Consistently Held that Faculty Investigation Records that Happen to Mention Students are Not "Education Records," Particularly When Redacted to Remove Identifying Information.

Case law requires this Court to conclude that files concerning Title IX investigations of faculty and staff do not constitute "education records" under FERPA. As noted above, the statute defines that term to mean "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." 20 U.S.C. § 1232g(a)(4)(A) (emphasis added). The statute expressly excludes from this definition any records concerning university employees "made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose . . .." *Id.* § 1232g(a)(4)(B).

The Kentucky Supreme Court considered this statutory provision in *Hardin County Schools v. Foster,* 40 S.W.3d 865 (Ky. 2001). There, the Court was asked to determine whether de-identified *student* disciplinary information met the definition of FERPA "education record," as

the circuit court had held in that case. *Id.* at 867. The Supreme Court disagreed; it held that, once de-identified, the record "does not contain any information which directly relates to a particular student and thus is not an educational record within the meaning of the federal statute." *Id.* at 868. That was true despite the fact that the requested records would reveal "[t]he identity of the school, year of occurrence, reason for the disciplinary action and the type of action." *id.* at 869. That same logic applies here; when properly de-identified, the records will not contain any information that "directly relates" to a particular student and therefore cannot qualify as an "education record" under FERPA.

Federal courts within the Sixth Circuit have concluded, similarly, that records concerning investigations into faculty and staff misconduct do not qualify as "education records" under FERPA because they are not "directly related" to identifiable students. In *Ellis v. Cleveland Municipal Sch. Dist.*, 309 F. Supp. 2d 1019 (N.D. Ohio 2004), for example, a student brought a lawsuit against a school district regarding alleged abuse by substitute teachers. In discovery, the student sought related incident reports, student (and employee) witness statements, and information regarding the school's discipline of substitute teachers. The Court rejected the school's FERPA-based objection for numerous reasons.

First, *Ellis* held that "FERPA applies to the disclosure of student records, not teacher records." *Id.* at 1022 (citing *Klein Independent Sch. Dist. v. Mattox*, 830 F.2d 576, 579 (5th Cir.1987). "Thus, courts have held FERPA does not prevent the disclosure of records specifying reasons for teacher certificate revocations or the names of the victim and witnesses to an alleged incident of sexual harassment by a teacher." *Id.* (collecting authorities). And, "[c]ourts have similarly held that student witness statements are not governed by FERPA." *Id.* (citing *Staub v. East Greenbush School Dist. No. 1*, 128 Misc.2d 935, 491 N.Y.S.2d 87,88 (1985)).

Second, the court found that records containing information "on such altercations which involved alleged assaults or corporeal punishment of the student by the substitute teacher . . . . do not implicate FERPA because they do not contain information 'directly related to a student.'" *Id.* at 1023. "While these records clearly involve students as alleged victims and witnesses, *the records themselves are directly related to the activities and behaviors of the teachers themselves* and are therefore not governed by FERPA." *Id*. (all emphasis added).

Third, the Court concluded that finding teacher discipline records not to be "education records" was the best way to serve Congress's desire to "protect the safety of students in schools." *Id.* at 1024. The court explained:

> As in *Rios* [*v. Reed*, 73 F.R.D. 589 (E.D.N.Y. 1977)], where the trial court concluded that FERPA should not be used as a cloak for alleged discriminatory practices, *FERPA should not operate to protect allegations of abuse by substitute teachers from discovery in private actions designed to combat such abuse*. While this Court reaches no conclusions as to the merits of plaintiff's claim in this case, the individual and social importance of the issues raised by its claims is undeniable . . ..

*Id*. at 1024 (emphasis added). These same vital policy interests are present here: the Requesters seek to understand threats to student safety; what the university did to investigate those allegations; and what consequences, if any, flowed from the alleged wrongdoing. The discovery of this information is of great "social importance." *Id.*; *see also Hardin County Schools*, 40 S.W.3d at 869 ("The public in general, the residents of the community, and most certainly the parents of children attending a particular school system have a strong interest in the conduct of disciplinary procedures in their school.").

*Wallace v. Cranbrook Educational Community*, 2006 WL 2796135 (E.D. Mich. 2006), followed *Ellis*'s lead in holding that records concerning faculty members do not "directly relate[ ]" to the students that happened to be mentioned therein. In that case, a teacher who had been accused

of inappropriate sexual behavior toward students sought discovery in a wrongful termination suit against the school. He asked for production of the investigatory notes and students' statements gathered during the school's investigation, but the school argued that disclosure would violate FERPA. Citing *Ellis* and other case law, the Court held that the documents were not "education records" because they did not "directly relate[ ]" to students. The Court additionally concluded that the records were more accurately characterized as falling within FERPA's exception for documents related to employees under § 1232g(a)(4)(B)(iii).

Yet another court in this Circuit followed *Ellis*'s reasoning just a few years later. In *Briggs v. Board of Trustees Columbus State Community College*, 2009 WL 2047899 (S.D. Ohio July 8, 2009), a student sued her college, alleging that a professor subjected her to unwanted gender-based attention and sexual harassment while she was a student there. As part of the discovery in her civil case, the plaintiff sought "every document relevant to any student complaint/concern lodged against" the defendant. *Id.* at *1. The court ordered the defendant to produce those records over an objection that FERPA prohibited their disclosure, holding that it "agrees with the conclusion reached by the court in *Ellis* that records relating directly to school employees and only indirectly to students are not 'education records' within the meaning of FERPA." *Id.* at *5. The Court also noted that this result was consistent with Congress's goal of promoting student health and safety because "production of the documents requested by plaintiff would serve the interests of not only plaintiff but of other students as well." *Id.* at *4.

More recently, and even closer to home, the U.S. District Court for the Eastern District of Kentucky rejected a university's attempt to use FERPA to justify its refusal to provide information about sexual assaults where no student-identifying information was sought. In *Jane Doe v. Northern Kentucky University*, 2016 WL 6237510 (E.D. Ky. 2016), a plaintiff brought a claim that

Northern Kentucky University was deliberately indifferent to her allegations of sexual assault. Her counsel deposed NKU's athletic director and asked whether he was aware of allegations of rape against basketball players, whether he had asked the players if the allegations were true, whether those students had been disciplined, and what the outcome of the investigation was. None of the questions asked for the names of the students or other identifying information, yet NKU's attorney instructed the witness not to answer based upon FERPA. Not only did the Court reject such a broad interpretation of FERPA, but it awarded sanctions to the plaintiff's counsel, ordering the defendant to pay her costs and attorney fees incurred in litigating the motion to compel and appearing at the depositions. *Id.* at *4.

*Ellis, Wallace, Briggs,* and *Jane Doe* are consistent with the holdings of numerous other federal and state courts that records related to allegations against school employees are not transformed into "education records" within the meaning of FERPA merely because those records also refer to students. *See, e.g.*, *Cummerlander v. Patriot Preparatory Academy*, 2013 WL 12178140, *1 (S.D. Ohio 2013) ("[C]ourts have held that matters such as incident reports relating to non-educational matters 'are not educational records because, although they may contain names and other personally identifiable information, such records relate in no way whatsoever to the type of records which FERPA expressly protects, *i.e.*, records relating to individual student academic performance, financial aid or scholastic probation which are kept in individual student files."); *Young*, 2008 WL 11336157, at *7 (emails containing complaints about a teacher's performance are not FERPA education records because they are "directly related to a teacher and only tangentially related to the student"); *Matter of Hampton Bays Union Free School District v. Public Employment Relations Bd..*, 62 A.D.3d 1066, 1069 (N.Y. App. 2009) ("In our view, *teacher* disciplinary records and/or records pertaining to allegations of teacher misconduct cannot be

equated with *student* disciplinary records . . . and do not contain 'information directly related to a student.'") (emphasis in original); *National Collegiate Athletic Ass'n v. Assoc. Press*, 18 So.3d 1201, 1211 (Fla. 1st Dist. Ct. App. 2009) (transcript of hearing and university's response to allegations that an academic tutor had provided improper assistance to student athletes did not constitute "education record" within the meaning of FERPA because the records pertained "to allegations of misconduct by the University Athletic Department, and only tangentially relate[d] to the students who benefitted from that misconduct"); *BRV, Inc. v. Superior Court*, 143 Cal. App. 4th 742, 754-55, *as modified on denial of reh'g* (Oct. 26, 2006) (investigative report regarding superintendent's misconduct toward students was not an "education record" because it was not directly related "to the private educational interests of the student" and instead "its purpose was to investigate complaints of malfeasance" alleged against the superintendent); *Brouillet v. Cowles Pub. Co.*, 791 P.2d 526, 533 (Wash. 1990) (rejecting defendant's FERPA objection to plaintiff's request for records specifying reasons for teacher certification revocations for use in preparing investigative news article regarding teacher sexual misconduct with students and holding that FERPA "protects student records, not teacher records").

This Court should reach the same conclusion here. The Requested Documents are about faculty, not students. FERPA does not place them entirely off limits from disclosure—particularly where the documents could be easily redacted to remove any identifying information.

### B. The University's Discovery Responses Confirm that the Requested Documents are Not FERPA "Education Records."

If there were any doubt about whether the Requested Documents constituted "education records," it was removed by the University's response to the limited discovery that has been conducted thus far in this case. As noted above, FERPA requires that all universities provide parents with access to their child's "education records" on potential pain of losing their federal

funding. 20 U.S.C. § 1232g(a)(1). Yet, WKU effectively conceded in discovery that it would *not* grant access to the records requested in this case under FERPA.

The Herald propounded an interrogatory to WKU, asking, "[f]or each requested document you believe is protected by FERPA, please describe the circumstances under which a student whose name appears in the documents (such as a Complaining Student) and/or their parents or legal guardian would have access to unredacted copies of the Requested Document(s)." *See* Exh. 2, Interrogatory No. 5. WKU responded, in relevant part, that "the only circumstance where a student or student's parent or legal guardian would be provided access to unredacted copies of the Requested Documents would be under order by a Court of legitimate jurisdiction directing WKU to provide such documents." *Id.* (emphasis removed). Put differently, WKU does not believe that FERPA itself authorizes the release of the records to one of the students whose name appears in the records absent a separate order from a court. If that is so, the records cannot be considered "education records," because such records *must* be released to a parent. 20 U.S.C. § 1232g(a)(1). FERPA is, after all, a two-way street.

The court held precisely that in *Knight News Inc. v. University of Central Florida Board of Trustees*, Case No. 2016-CA-004460-0 (Fla. 9th Cir. Ct. Aug. 11, 2016) (Exh. 1). There, the court issued a writ of mandamus requiring a university to turn over unredacted records concerning amounts paid and/or reimbursed to student government leaders by the university. "Even assuming they directly relate to the students whose names were redacted," the records "are not maintained by the university in the manner contemplated by FERPA of 'education records.'" *Id.* ¶ 8 (citing *Owasso*, 534 U.S. at 433-35). Specifically, the "records are not kept in a centralized file on that particular student." *Id.* Therefore, "[i]f a student or parent requested that student's records as intended by FERPA, it is almost certain that that student or parent *would not* receive a copy of the

requested [records] records merely because the subject student's name appeared somewhere in those documents." *Id.* (emphasis added). The same is true here; the records are maintained by the Title IX coordinator—not the Registrar—and if a student requested their "education records" they would not receive a copy of the Requested Documents (absent a court order, according to WKU). Therefore, as in *Knight News*, FERPA simply does not bar disclosure of the requested records.

WKU also admitted in its response to the Herald's motion to compel that it did not maintain any access logs concerning the documents at issue in this case. *See* WKU's Response to Motion to Compel, p. 11 ("WKU has indicated that no FERPA access log exists."). This concession, too, is fatal to WKU's claim that Title IX Investigation records of faculty are "education records." The statute and regulations plainly require that a university must create a separate record of access that is kept with each education record and must "indicate *all individuals* (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have *requested or obtained* access to a student's education records maintained by such educational agency or institution." 20 U.S.C. § 1232g(b)(4)(A) (emphasis added); *see also* 34 C.F.R. § 99.32 (regulations requiring creation of FERPA access logs). Here, the records in question were sought by several entities and institutions, including the Herald, the Kernel, and the Attorney General. If the requested records really were FERPA records, the University would have been required to create some kind of *separate* access log noting those requests. It did not, for the simple reason that WKU did not treat these records as FERPA records until it needed a purported basis to refuse the Attorney General's request for *in camera* review.

## III. Releasing Redacted Records in Response to an Open Records Request Does Not Constitute a "Pattern or Practice" of Disclosing Personally Identifying Information.

As noted above, the redacted records sought by the Herald and Kernel do not contain "personally identifiable information" and are not "education records." But even if both of those

things were true, FERPA does not expressly prohibit disclosure of such information in a single case in response to an Attorney General opinion. Rather, and as the Supreme Court held, "FERPA's nondisclosure provisions further speak only in terms of institutional policy and practice, *not individual instances of disclosure*." *Gonzaga University,* 536 U.S. at 288 (emphasis added)). The *Ellis* court similarly explained:

> [T]he language of the statute, on its face, appears to limit its prohibition to those situations where an educational agency "has a policy or practice of permitting the release of education records." *See* 20 U.S.C. § 1232(g)(b)(1) and (2). FERPA was designed to "address systematic, not individual, violations of students' privacy by unauthorized releases of sensitive information in their educational records." *Jensen v. Reeves,* 45 F.Supp.2d 1265, 1276 (D. Utah 1999) (citing *Gundlach v. Reinstein,* 924 F.Supp. 684 (E.D. Pa. 1996)). This focus on policies which systematically invade a student's privacy is thus consistent with the statute's allowances for the disclosure of such information in particular circumstances or pursuant to a court order on a case-by-case basis.

*Ellis*, 309 F. Supp. 2d at 1023–24.

Moreover, the statute's remedial provisions confirm that FERPA's penalties are only concerned about a *pattern* of uncorrected violations. Any parent may file a complaint about an alleged FERPA violation with the Family Policy Compliance Office. *See* 34 C.F.R. § 99.63. The FPCO then investigates the matter, *id.* §§ 99.64, 99.66(a), and issues written findings, *id.* § 99.66(b). *If* it finds a violation of the act, the FPCO *may* issue a written finding that the violation resulted from a policy or practice of the agency that violates FERPA. *Id.* § 99.66(c). However, any such finding must specify both the "specific steps that the . . . institution . . . must take to comply" and provide "a reasonable time frame" for compliance. *Id.* Only if the institution does not voluntarily comply may the Secretary withhold federal funds. *Id.* § 99.67(a).

It is undisputed that the Secretary has never imposed this severe penalty in the over 40-year history of the statute. It strains credulity to suggest that the first such penalty will be imposed in this case, where the University was ordered to disclose de-identified records concerning faculty

misconduct, just as numerous other institutions across the Commonwealth—and country—have voluntarily done *without consequence*.[8]

Finally, it bears repeating that the Attorney General's disclosure order does not portend routine disclosure of personally identifiable student information. Rather, the Attorney General's order in this case resulted from WKU's deliberate refusal to allow the Attorney General to assess the propriety of the specific redactions at issue here—and therefore its refusal to meet its burden of proof under KRS 61.880(2). WKU cannot be permitted to "bootstrap" its way into a FERPA defense by deliberately violating the Open Records law in this manner.

## IV. The Attorney General Is Entitled to View the Requested Records *In Camera*, As Contemplated by the Open Records Act.

The Open Records Act is clear: "The burden of proof in sustaining the action shall rest with the agency, and the Attorney General may . . . . request a copy of the records involved but they shall not be disclosed." KRS 61.880(2)(c). That is the unmistakable command of state law, and it must be honored in all Open Records cases for the Attorney General to be able to serve the kind of quasi-judicial role assigned to him by statute. *See Kentucky State University vs. The Kernel*

[8] Indeed, if FERPA really does permit the Secretary to withhold all of WKU's educational funding for complying with the Attorney General's opinion in this case, it would be unconstitutional. The Supreme Court has long held that conditions placed on the receipt of federal funding cannot be "so coercive as to pass the point at which pressure turns into compulsion." *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (internal quotes and citation omitted). And, in the recent decision striking down the mandatory expansion of Medicaid eligibility under the Affordable Care Act, the Supreme Court reaffirmed that threats to withhold significant amounts of federal funding if a state agency did not acquiesce to federal policy choices would constitute unconstitutional "economic dragooning." *NFIB v. Sebelius*, 567 U.S. 519, 582 (2012).

That constitutional problem is particularly acute where, as here, the condition (defunding universities) is not directly related to the purpose of the statute (ensuring students' access to their records and privacy). *See, e.g.*, *Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc.*, 133 S.Ct. 2321 (2013). And, as the Supreme Court further observed in rejecting an overbroad interpretation of FERPA in *Owasso*, courts should "hesitate before interpreting the statute to effect such a substantial change in the balance of federalism unless that is the manifest purpose of the legislation." *Owasso*, 534 U.S. at 432.

Simply put, Congress cannot override state laws regulating the release of information by its public institutions by threatening to withhold all federal funds. Such an exercise of power is antithetical to our federalist system and must be rejected out of hand, even if that were what the statute required.

*Press, Inc., d/b/a The Kentucky Kernel*, Civil Action No. 17-CI-199. (Franklin Circuit Ct. Oct. 13, 2017) (holding that KSU violated the Open Records Act by refusing to disclose the records for *in camera* review). WKU's blanket refusal to provide such information to the Attorney General can only be seen as a willful violation of the Act. *See Cabinet for Health & Family Services v. Todd County Standard, Inc.*, 488 S.W.3d 1, 8 (Ky. Ct. App. 2015), *as modified* (Mar. 4, 2016) ("The Cabinet cannot benefit from intentionally frustrating the Attorney General's review of an open records request; such result would subvert the General Assembly's intent behind providing review by the Attorney General under KRS 61.880(5)).

WKU grounds its FERPA arguments on the exception in KRS 61.878(1)(k), which allows an agency to deny *public* inspection of "records or information the disclosure of which is prohibited by federal law or regulation." Importantly, that exception does not permit an agency to withhold such records from the Attorney General, as required by KRS 61.880(2)(c).

Moreover, and for reasons explained above, it is clear that FERPA is no obstacle to even the public release of the redacted documents sought here. As already explained, FERPA simply does not apply to records of investigations of faculty and staff sexual misconduct, like the ones the Attorney General sought here. Moreover, and as also explained above, FERPA's implementing regulations expressly permit the public release of de-identified records, like the ones the Attorney General requested to review *in camera*. *See* 34 C.F.R. § 99.31(b); *Hardin County Schools,* 40 S.W.3d at 868-869. If FERPA permits the public disclosure of this de-identified information, it surely does not prohibit the *in camera* review of the same material by the state's chief law enforcement officer.

Moreover, WKU's refusal to provide the documents to the Attorney General for *in camera* review is particularly difficult to understand for the six professors the University concluded had

violated WKU's sexual misconduct policy. If those professors had been *students*, FERPA would expressly permit disclosure of "the name of the student, the violation committed, and any sanction imposed by the institution on that student," as well as the "name of any other student, such as a victim or witness," who has consented to the release of that information. 20 U.S.C. § 1232g(b)(6)(C). Because FERPA does not provide any protections for university employees, *see id.* § 1232g(a)(4)(B)(iii), it cannot be interpreted to provide faculty members with more rights than students would have under the statute.

## CONCLUSION

For the foregoing reasons, the Court should hold that the University's refusal to release redacted records, or to provide redacted records to the Attorney General for in camera review, is not required by FERPA and therefore contradicts the clear commands of the Open Records Act.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was sent via the Court's electronic filing system and U.S. mail, postage pre-paid, to each of the following on this the 1st day of March 2018:

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