FERPA AND THE PRESS: A RIGHT TO ACCESS INFORMATION?

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INTRODUCTION

In 1974, Senator James Buckley proposed the Federal Educational Rights and Privacy Act (FERPA)[1] as a measure to prevent schools from hiding individual student files from the students themselves.[2] When he initially offered the educational amendment, he stated that it was important to realize the "dangers of Government data gathering"[3] in the post-Watergate era, and that it was necessary to "protect the rights of students and their parents and to prevent the abuse of personal files and data in the area of federally assisted educational activities."[4] In the time since the passage of

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1. 20 U.S.C. § 1232g (2010).
2. 120 CONG. REC. 14,580 (1974).
3. *Id*.
4. *Id*. Senator Buckley reasoned:

> Some educators seem to feel that they know much more about the welfare and best interests of the child than do the parents, and therefore, once a child comes under their sway, they think they have the right to do what they themselves think is best for the child, without regard for values and beliefs of the parents.

Id.

the act, FERPA has provided important protections for students. Yet "[w]hat once seemed like a relatively straightforward statute has become a cumbersome set of requirements with ambiguous parameters."[5] The original goal of FERPA was to protect student files, but the Act has been amended multiple times, and today it is often difficult for colleges and universities to determine exactly what information should and should not be protected.[6] Supporters of the law call for a broad interpretation of protected material. For example, Father Jenkins, President of the University of Notre Dame, stated, "[b]eyond the limitations imposed by FERPA, it is Notre Dame's long-held belief and policy that our students deserve certain degrees of privacy as part of the educational process, and we have stood by that principle, even in the face of the criticism that might invite."[7] Colleges and universities often advocate for extensive protections, yet the critics, including various press outlets that want access to information, accuse certain colleges and universities of protecting too much, and of using FERPA to withhold everything from ordinary information such as lunch menus to damaging information such as athletic scandals.[8]

Even for colleges and universities that are protecting student records in good faith, there remains a lot of confusion about what FERPA does and does not protect, as well as how much the press can access. In 2009, for example, *The Columbus Dispatch* conducted an investigation to see whether colleges and universities would release requested athletics-related documents.[9] The results varied greatly from institution to institution.[10] While some colleges and universities released all of the requested information, others released none.[11] Some institutions redacted a few pieces of information, while others blacked out almost every name that appeared on a document.[12] The colleges and universities that withheld information cited

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5. Dixie Snow Huefner & Lynn M. Daggett, *FERPA Update: Balancing Access to and Privacy of Student Records*, 152 EDUC. LAW REP. 469, 470 (2001).

6. *Id*.

7. Mary Margaret Penrose, *Tattoos, Tickets, and Other Tawdry Behavior: How Universities Use Federal Law to Hide Their Scandals*, 33 CARDOZO L. REV. 1555, 1559 n.27 (2012).

8. Jill Riepenhoff & Todd Jones, *Secrecy 101: Athletic Departments use Vague Law to Keep Public Records from Being Seen*, COLUMBUS DISPATCH, May 31, 2009, *reprinted in* KNOXVILLE NEWS SENTINEL, June 6, 2009, http://www.knoxnews.com /news/2009/jun/06/secrecy-101-in-college-athletics/?print=1; *see also* Mary Margaret Penrose, *In the Name of Watergate: Returning FERPA to its Original Design*, 14 N.Y.U.J. LEGIS. & PUB. POL'Y 75, 96 (2011) ("Schools generally provide greater protection to themselves than they reciprocally provide to students in order to avoid unwanted disclosures. In fact, schools routinely rely upon FERPA for defensive purposes, thwarting the very protections that were intended.").

9. Riepenhoff & Jones, *supra* note 8.

10. *Id.*

11. *Id*.

12. *Id*. The University of Maryland even charged *The Columbus Dispatch* $35,330 to produce documents pertaining to football team travel records, summer em-

FERPA and student privacy as their reasons.[13] But what does FERPA protect, and what information, if any, does the press have a right to access from colleges and universities?

Part I of this note will discuss the background of FERPA and its original purpose. It will also highlight the evolution of the statute and examine key terms in the statutory language, such as "education records," and their meanings. Part II will detail how FERPA is used in practice today. Part III will elaborate on certain efforts by the press to access information held by colleges and universities, and will show that specific arguments advanced by the press—namely that they have a First Amendment right to access information and a right to obtain records under certain public records laws—have largely failed when colleges and universities maintained that they were acting in compliance with FERPA. Part IV of this Note will examine recent cases in which records were released and discuss how such decisions turned on the definition of "education records." Finally, the Conclusion will offer recommendations going forward.

I. BACKGROUND OF THE FEDERAL EDUCATIONAL RIGHTS AND PRIVACY ACT

At the time of its passage in 1974, FERPA had two purposes: (1) to assure students and their parents access to the student's education records, and (2) to protect records from release without the consent of the student.[14] Because the act was initially offered as part of the Education Amendments of 1974,[15] it was not the subject of any committee consideration before it was passed. As a result, it did not have any accompanying legislative history to guide those who would later be charged with its implementation.[16] In fact, after the law was first enacted, lawyers trying to interpret the new provision advised schools not to publicly distribute the weights of football players or the names of the actors in a school play.[17] However, Senators Buckley and Pell, co-authors of the act, did not intend this extreme interpretation.[18] To remedy this confusion, the Senators provided clarification for the act in a joint statement, declaring:

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ployment information of athletes, and NCAA violations. *Id.*

13. *Id*.

14. 120 CONG. REC. 39,862 (1974). *See also* 34 C.F.R. § 99.3 (2014) (for students under the age of 18, the Act gives parents the rights to access and disclose their child's education records); *see generally* Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2010).

15. Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484.

16. *Legislative History of Major FERPA Provisions*, U.S. DEP'T OF EDUC., http://www2.ed.gov/policy/gen/guid/fpco/ferpa/leg-history.html (last visited Sept. 20, 2014).

17. 120 CONG. REC. 39,863 (1974).

18. *Id*. ("This narrow reading of the law is not what its author intended to achieve, and he so stated during the floor debate . . . .").

> The purpose of the Act is two-fold—to assure parents of students, and students themselves if they are over the age of 18 or attending an institution or postsecondary education, access to their education records and to protect such individuals' rights to privacy by limiting the transferability of their records without their consent.[19]

Though Senators Buckley and Pell provided some insight into the purpose of the law, "more and more questions have arisen about FERPA's scope and meaning."[20] Due to these open questions of interpretation, press outlets have argued that colleges and universities have capitalized on the ambiguities in the law to protect everything from school lunch menus, travel records of athletic teams, and campus parking tickets.[21] Yet, colleges and universities emphasize that they are complying with federal law and are making every effort to be stewards of student privacy.[22] Though the debate continues, one thing is clear: FERPA has greatly changed over time.[23]

Under FERPA as it was originally enacted, the law provided a list of protected information including grades, test scores, and health information.[24] However, in their joint statement, Senators Buckley and Pell removed the original list that enumerated exactly what was protected and instead wrote that the law protected "education records."[25] The current

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19. 120 CONG. REC. 39,862 (1974).

20. Huefner & Daggett, *supra* note 5, at 470.

21. Riepenhoff & Jones, *supra* note 8 (stating that when members of the press asked Senator Buckley about what FERPA is being used to protect today, he was "stunned" and said, "[t]hat's not what we intended. The law needs to be revamped. Institutions are putting their own meaning into the law."); *The Family Educational Rights and Privacy Act (FERPA)*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, http://www.rcfp.org/ferpa-hipaa-and-dppa/family-educational-rights-and-privacy-act-ferpa (last visited Sept. 20, 2014).

22. Penrose, *supra* note 7, at 1559, nn. 24–25.

23. Huefner & Daggett, *supra* note 5, at 470.

24. Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484.

> Any and all official records, files, and data directly related to their children, 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.

Id.

25. 120 CONG. REC. 39,862 (1974); *see generally Legislative History of Major FERPA Provisions*, U.S. DEP'T OF EDUC., http://www2.ed.gov/policy/gen/guid/fpco/ferpa/leg-history.html (last visited Sept. 20, 2014) (stating that FERPA has been amended nine times: P.L. 93-568, Dec. 31, 1974, effective Nov. 19, 1974

statute defines "education records" as "those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution."[26] Critics have argued that this definition is far too broad,[27] but the statute does provide some additional guidance in Section 1232g(b)(1), where it refers to "education records" as "personally identifiable information."[28] Alone, the term does not provide much additional guidance, but the Code of Federal Regulations, as amended in 2008, states that "personally identifiable information" includes, but is not limited to, the following:

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

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(Buckley/Pell Amendment); P.L. 96-46, Aug. 6, 1979 (Amendments to Education Amendments of 1978); P.L. 96-88, Oct. 17, 1979 (Establishment of Department of Education); P.L. 101-542, Nov. 8, 1990 (Campus Security Act); P.L. 102-325, July 23, 1992 (Higher Education Amendments of 1992); P.L. 103-382, Oct. 20, 1994 (Improving America's Schools Act); P.L. 105-244, Oct. 7, 1998 (Higher Education Amendments of 1998); P.L. 106-386, Oct. 28, 2000 (Campus Sex Crime Prevention Act); P.L. 107-56, Oct. 26, 2001 (USA PATRIOT Act of 2001)).

26. 20 U.S.C. § 1232g(a)(4)(A) (2010).

27. Brief of Appellant at 30, United States v. Miami Univ., 294 F.3d 797 (2002) (No. 00-3518).

> The plain language of FERPA's definition of education records is not helpful. If interpreted in a completely literal and simplistic manner as suggested by the district court, FERPA would sweep within its purview an absurd array of information never intended to be kept confidential by Congress. Moreover, if interpreted in this manner, FERPA could be used, as The Chronicle [sic] and others fear it is being used by many universities, as a device to shelter campus crime from public scrutiny. Such a result is not what Congress had in mind.

Id.

28. 20 U.S.C. § 1232g(b)(1) ("No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information . . . .").

student to whom the education record relates.[29]

Schools are able, and have been since FERPA's inception, to release directory information (including names, addresses, and telephone numbers) separate from "education records" without violating FERPA,[30] but what was originally intended to protect grades and test scores in 1974,[31] has been changed to encompass much more. Now, under 34 C.F.R. § 99.3 (f) and (g), information that is *merely linkable* to a student is protected, as is information relating to a student when a college or university *believes* the requestor knows the identity of the student.[32]

As more information falls under the protection of FERPA, it becomes more difficult for press outlets to access records and exercise a right to information.[33] As written, however, the statute still leaves many questions

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29. 34 C.F.R. § 99.3 (2014).

30. 120 CONG. REC. 39,862 (1974); *see generally Model Notice for Directory Information*, U.S. DEP'T OF EDUC., http://www2.ed.gov/print/policy/gen/guid/fpco/ferpa/mndirectoryinfo.html (last visited Sept. 20 2014) (stating that colleges and universities have some leeway in determining how they define directory information, providing a model notice for directory information, and emphasizing that colleges and universities may choose to include all of the information listed or portions of it). *See also UTK FERPA Policy*, UNIV. OF TENN., http://ferpa.utk.edu/policy.php (last visited Sept. 20, 2014) (stating that the following is considered directory information at the University of Tennessee: name, local address, permanent address, NetID, university email address, telephone number, classification, most recent previous educational institution attended, graduate or undergraduate level, full-time or part-time status, college, major, dates of attendance, degrees and awards, participation in school activities and sports, weight, and height); *Directory Information*, UNIV. OF SAN DIEGO, http://www.sandiego.edu/registrar/ferpa/directory.php (last visited Sept. 20, 2014) (designating directory information at the University of San Diego as name, university email address, major, dates of attendance, participation in officially recognized activities and sports, degrees, honors, awards, and photograph).

31. *See generally* STUDENT PRESS LAW CENTER, FERPA AND ACCESS TO PUBLIC RECORDS, *available at* http://www.splc.org/pdf/ferpa_wp.pdf (last visited Sept. 20, 2014) ("FERPA does not provide a student with an invisible cloak so that the student can remain hidden from public view while enrolled at (college).") (citing News & Observer Publ'g Co. v. Baddour, No. 10CVS1941, Memorandum Ruling of Hon. Howard E. Manning, Jr. at 2 (N.C. Super. Ct. April 19, 2011)).

32. 34 C.F.R. § 99.3(f) & (g) (2009). *See generally* Family Educational Rights and Privacy Act, 73 Fed. Reg. 74,806, 74,831 (Dec. 9, 2008) (to be codified at 34 C.F.R. pt. 99) (emphasis added). When the Department of Education undertook the 2008 amendments to the term "personally identifiable information," the Department stated:

> We removed the "easily traceable" standard from the definition of *personally identifiable information* because it lacked specificity and clarity. We were also concerned that the "easily traceable" standard suggested that a fairly low standard applied in protecting education records, *i.e.*, that information was considered personally identifiable only if it was easy to identify the student.

Id. at 74,831. During the comment phase, some commenters argued that the proposed, and ultimately adopted, definition "would provide school officials too much discretion to conceal information the public deserves to have in order to debate public policy." *Id*. at 74,829.

33. Riepenhoff & Jones, *supra* note 8.

unanswered.[34] What is protected by FERPA? What exactly are "education records"? What should the press have access to, and does the press have any recourse against colleges and universities that refuse to disclose certain information? Finally, can the First Amendment or state open records laws provide any protection for the press?

II. FERPA IN PRACTICE

FERPA's statutory language clearly indicates that if a college or university receives federal funding, it cannot release "education records," but courts have disagreed as to exactly how FERPA protects records.[35] Some have argued that FERPA creates a blanket prohibition on the release of records, and others have claimed that it only *denies funding* to those that do.[36] In *WFTV, Inc. v. School Board of Seminole*, the Fifth District Court of Appeal in Florida held,

> FERPA does not prohibit the disclosure of any educational records. FERPA only operates to deprive an educational agency or institution of its eligibility for applicable federal funding based on their policies and practices regarding public access to educational records if they have any policies or practices that run afoul of the rights of access and disclosure privacy protected by FERPA.[37]

However, other courts have held that FERPA does prohibit the disclosure of records because it imposes contractual obligations on colleges and universities: once they have accepted federal funds, they are required to keep pertinent information private.[38] In *Owasso Independent School Dis-*

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34. *See generally* Lynn M. Daggett, *FERPA in the Twenty-First Century: Failure to Effectively Regulate Privacy for All Students*, 58 CATH. U.L. REV. 59 (2008); Susan P. Stuart, *Fun with Dick and Jane and Lawrence: A Primer on Education Privacy as Constitutional Liberty*, 88 MARQ. L. REV. 563 (2004); Lynn M. Daggett & Dixie Snow Huefner, *Recognizing Schools' Legitimate Educational Interests: Rethinking FERPA's Approach to the Confidentiality of Student Discipline and Classroom Records*, 51 AM. U.L. REV. 1 (2001).

35. *See generally* Kirwan v. The Diamondback, 721 A.2d 196 (Md. 1998) (discussing whether or not FERPA prohibits the release of "education records").

36. *See supra* notes 32–34. It is important to note, however, that "[p]rivate and parochial schools at the elementary and secondary levels generally do not receive such funding and are, therefore, not subject to FERPA." *FERPA General Guidance for Parents*, U.S. DEP'T OF EDUC., http://www2.ed.gov/policy/gen/guid/fpco/ferpa/parents.html (last visited Sept. 20, 2014).

37. WFTV, Inc. v. Sch. Bd. of Seminole, 874 So. 2d 48, 57 (Fla. Dist. Ct. App. 2004) (emphasis omitted). *See generally* Penrose, *supra* note 7, at 1579 ("[T]he Department of Education, the entity responsible for both interpreting and enforcing FERPA has never ever sought to withdraw any school's federal funding.").

38. *See* United States v. Miami Univ., 294 F.3d 797, 809 (6th Cir. 2001) (holding that "FERPA unambiguously conditions the grant of federal education funds on the educational institutions' obligation to respect the privacy of students and their parents" and that "the United States may enforce the Universities' 'contractual' obligations

trict v. Falvo, for example, the Supreme Court held, "[u]nder FERPA, schools and educational agencies receiving federal financial assistance must comply with certain conditions. One condition specified in the Act is that sensitive information about students may not be released without [the student's] consent."[39] However, because of its conditional funding nature, it is not always clear what constitute FERPA's requirements.

Moreover, although the statutory language spelled out above provides some guidance for what constitutes "education records," in practice that line has been hard to draw.[40]

> The designation of a document as an education record under FERPA means not only that it is subject to restrictions against release without parental consent [or the consent of the student], but also that parents [and students] have a right to inspect and review the record, a right to a hearing to challenge the content of the record to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy rights of the student, and a right to insert a written explanation by the parents regarding the content of the records.[41]

Courts have employed the statutory phrases "directly related to a student" and "maintained by an educational agency" to determine whether records are protected, but there remain inconsistencies in application. For example, the Supreme Court of Ohio held that records that identify a student are "directly related to a student" even if the records do not pertain to academic performance, financial aid, or scholastic performance.[42] The First District Court of Appeal in Florida held that an unredacted e-mail written by a college student about "personal impressions of the classroom educational atmosphere in the context of [the professor's] teaching and methodology" was not directly related to the student when it contained information about the professor in addition to the student.[43] Similarly, courts

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through the traditional means available at law").

39. Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 534 U.S. 426, 428 (2002) (citation omitted). Although Owasso and WFTV are not cases directly concerning colleges or universities, the holdings of these cases are still applicable and relevant to college and university law.

40. *See* Penrose, *supra* note 8, at 95 (arguing that the terms "education records" and "maintained" have been abused by colleges and universities and that "the Privacy Act of 1974 provides the best blueprint for improving FERPA's 'education records' definition").

41. Brief for the United States as *Amicus Curiae* Supporting Petitioners at 17, Owasso Independent Sch. Dist. No. I-011 v. Falvo, 534 U.S. 426 (2002) (No. 00-1073) (citing 20 U.S.C. 1232g(a)(1)(A) & (2)).

42. State ex rel. ESPN v. Ohio State Univ., 970 N.E.2d 939, 947 (Ohio 2012).

43. Rhea v. Dist. Bd. of Trs. of Santa Fe Coll., 109 So. 3d 851, 858 (Fla. Dist. Ct. App. 2013). For information held not to be "education records," see Ellis v. Cleveland Mun. Sch. Dist., 309 F. Supp. 2d 1019 (N.D. Ohio 2004) (holding records relating to allegations of corporal punishment by a substitute teacher were not directly related to

have differed regarding the appropriate interpretation of the phrase "maintained by the school." Using this phrase, some courts have held that peer-graded classroom work and assignments are not "education records,"[44] whereas records received from a psychiatrist about a student and kept in the school's file are "education records."[45] E-mails about students that were stored on the computer hard drives of individual teachers are not "education records,"[46] and neither are internal memos and e-mails about a student when the e-mails were not centrally maintained by the college or university.[47] However, when a department retains copies of all e-mails relating to students, the e-mails are considered to be "education records."[48] These differing interpretations do little to truly define the term "educational record" and leave many unanswered questions—not least of which is what constitutes "educational record." If the document merely mentions a student, is it an "education record?" If the information is maintained on computer servers generally but not in a single, central file, is it not an "education record?"

Despite these lingering questions, once information is classified as an "education record," it is generally protected by FERPA from release.

> The only parties who have a right to obtain access to education records under FERPA are parents and eligible students. Journalists, researchers, and other members of the public have no right under FERPA to gain access to education records for school accountability or other matters of public interest, including misconduct by those running for public office.[49]

Yet, if personally identifying information is redacted from the "education record," it may be released as long as the college or university does not believe that the requestor would know the student's identity after the redaction.[50]

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specific students, nor were they "education records," even though they included student witness statements); Wallace v. Cranbrook Educ. Cmty., No. 05-73446, 2006 WL 2796135 (E.D. Mich. Sept. 27, 2006) (holding that records relating to a school employee's misconduct were not directly related to specific students, nor "education records," even though students provided statements); Baker v. Mitchell-Waters, 826 N.E.2d 894 (Ohio Ct. App. 2005) (holding that records relating to abuse of students by teachers are not "education records").

44. *Owasso*, 534 U.S. at 429.

45. Belanger v. Nashua, N.H. Sch. Dist., 856 F. Supp. 40 (D.N.H. 1994).

46. S.A. v. Tulare Cnty. Office of Educ., No. CV F 08-1215 LJO GSA, 2009 WL 3296653, at *1 (E.D. Cal. Oct. 6, 2009) (holding that "education records" must be held in one, single file).

47. Phoenix Newspapers, Inc. v. Pima Cmty. Coll., No. C20111954, In Chambers Under Advisement Ruling Re: Plaintiff's Application for Order to Show Cause on Special Action at 3 (Ariz. Super. Ct. May 17, 2011).

48. State ex rel. ESPN v. Ohio State Univ., 970 N.E.2d 939, 947 (Ohio 2012).

49. Family Educational Rights and Privacy Act, 73 Fed. Reg. 74,806, 74,831 (Dec. 9, 2008) (codified at 34 C.F.R. pt. 99).

50. Press-Citizen Co., Inc. v. Univ. of Iowa, 817 N.W.2d 480, 492 (Iowa 2012).

III. EFFORTS BY THE PRESS TO ACCESS INFORMATION

Amidst all of this confusion regarding what amounts to an "education record" and whether or not colleges and universities are prohibited from releasing such information or just denied funding for doing so, press outlets have tried to gain access to pertinent information held by colleges and universities to cover relevant news stories. Press outlets and news agencies have focused on two main arguments to gain access to information in the possession of colleges and universities: (1) the First Amendment freedom of the press and its related right to access certain information,[51] and (2) the right to access public records under state open records laws.[52] However, neither of these avenues has produced the access to information desired by the media. Colleges and universities have largely denied the press access to records arguing that they are exempt under FERPA's broad definition of "education records" and "personally identifiable information," and various state and federal courts have, for the most part, upheld those actions.

A. First Amendment "Right of Access"

In order to understand the basis of the First Amendment argument advanced by the press, as well as the related right to access certain information, it is important to understand the evolution of the Supreme Court's jurisprudence on the issue. Over time, the Court has moved from a grand interpretation of the right to access information to a much narrower one. Whereas the Court originally saw the need for broad access to information to ensure public awareness and the ideals of a participatory democracy, the Court began to limit this view in the 1970s.[53] Though the press retains the First Amendment right to access information related to criminal court proceedings, there is little guarantee of the right to access much else, and as such, the press has largely failed to invoke this First Amendment argument successfully when trying to access information from colleges and universities.

In tackling the issue of whether or not the press has a right to access information, the Supreme Court held in *Martin v. City of Struthers, Ohio*, that "[t]he right of freedom of speech and press has a broad scope . . . . This freedom embraces the right to distribute literature, and necessarily protects the right to receive it."[54] The Court further emphasized this right in the

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51. *See infra* Part III.A.

52. *See infra* Part III.B.

53. *See* Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards A Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249 (2004). *See generally* Erik Ugland, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment*, 3 DUKE J. CONST. L. & PUB. POL'Y 113 (2008); Raleigh Hannah Levine, *Toward a New Public Access Doctrine*, 27 CARDOZO L. REV. 1739 (2006).

54. Martin v. City of Struthers, Ohio, 319 U.S. 141, 143 (1943) (quoting Lovell v.

1969 case of *Stanley v. Georgia*, holding that "[i]t is now well established that the Constitution protects the right to receive information and ideas."[55] The Court felt so strongly about this idea, that it stated this right was, in fact, "fundamental to our free society."[56]

However, in 1972, the Court took a step back and began to narrow the right to gather news. In *Branzburg v. Hayes*, the Court held that "[t]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."[57] Although the Supreme Court has held that there is a First Amendment right of access to criminal trials, proceedings, and records,[58] it has also held that "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."[59] To determine whether a qualified First Amendment "right of access" attaches, the Court established a two-part test: (1) whether the information in question has "historically been open to the press and general public,"[60] and (2) whether "public access plays a significant positive role in the functioning of the particular process in question."[61] If a plaintiff successfully meets the elements of this two-part test, the defendant will only prevail upon a showing of "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[62]

"[R]ecently, the Court has suggested that a general newsgathering right does not apply in cases where it may conflict with laws of general application (such as tort, property, or contract laws)."[63] Thus, the First Amendment freedom of the press and the related right to access information is largely limited to access to criminal proceedings and does not guarantee much beyond that right.[64] Since FERPA does have an exception in place for third parties to access law enforcement information and crime reports, the First Amendment "right of access" argument does not provide much

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Griffin, 303 U.S. 444, 452 (1938)).

55. Stanley v. Georgia, 394 U.S. 557, 564 (1969).

56. *Id*.

57. 408 U.S. 665, 684 (1972).

58. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980).

59. Houchins v. KQED, Inc., 438 U.S. 1, 15 (1978).

60. Press-Enterprise Co. v. Super. Ct. Cal., 478 U.S. 1, 8 (1986).

61. *Id.*

62. United States v. Miami Univ., 294 F.3d 797, 821 (6th Cir. 2001) (citing Press-Enterprise Co. v. Super. Ct. Cal., 464 U.S. 501, 510 (1984)).

63. McDonald, *supra* note 53, at 252. If one follows the school of thought that FERPA is a contractual agreement between the government and a college or university, the idea that the First Amendment does not provide access to information related to a contract would likely be detrimental to the argument that the press should have access to information regarding students.

64. *Id*.

additional protection.[65]

Given existing precedent, it is difficult for press outlets to successfully argue that a news agency has an independent right to access information held by a college or university even if the information at issue is not classified as an "education record." However, in one case, a federal district court did uphold the right of the press to receive information.[66] In *Student Press Law Center v. Alexander*, student journalists along with the Student Press Law Center challenged a provision of FERPA that allowed colleges and universities to withhold personally identifiable information in the arrest and incident reports of campus police.[67] The D.C. District Court noted, "[t]he right to receive information and ideas 'is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution.' Therefore, plaintiffs' claim that the FERPA interferes with their ability to gather information regarding campus crimes implicates the First Amendment."[68] The court stated that the defendant must provide a reason for withholding the information and could not merely rely on FERPA as the justification.[69] It also held that the information was releasable, noting that its decision was "consistent with the interests of the public in greater access to information, [and] [t]hat interest is at its highest in matters that bear on personal safety and prevention of crime."[70]

Though the court upheld a First Amendment right to access information in *Student Press Law Center*, the application of the right is a narrow one because it applies only to crime reports—a right that was already guaranteed by the First Amendment.[71] Existing First Amendment jurisprudence allows access to criminal trials, proceedings, and records; thus, in this case, the court did not necessarily break any new ground by allowing the press

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65. Higher Education Amendments of 1992, Pub. L. No. 102-325, § 1555, 106 Stat. 448. *See generally* Ethan M. Rosenzweig, *Please Don't Tell: The Question of Confidentiality in Disciplinary Records under FERPA and The Crime Awareness and Security Act*, 51 EMORY L.J. 447, 478–79 (2002) (finding that colleges and universities treat disciplinary records differently from law enforcement records and arguing that disciplinary records should be released in a manner consistent with FERPA in order to increase campus safety while still not compromising privacy).

66. Stud. Press Law Ctr. v. Alexander, 778 F. Supp. 1227 (D.D.C. 1991).

67. *Id*.

68. *Stud. Press Law Ctr.*, 778 F. Supp. at 1233 (citations omitted) (quoting Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982)).

69. *Id*. at 1234.

70. *Id*.

71. Additionally, it is important to note that student journalists at private colleges and universities may not enjoy the same right of the freedom of the press. Brian J. Steffen, *A First Amendment Focus: Freedom of the Private-University Student Press: A Constitutional Proposal*, 36 J. MARSHALL L. REV. 139, 139 (2002) ("It has long been established in First Amendment jurisprudence that the federal Constitution protects the press against state action but not private action . . . . Among those private organizations that need not observe First Amendment rights of free expression are private institutions of higher education").

access to the criminal records at issue. In fact, following the court's ruling in *Student Law Press Center*, Congress amended FERPA to emphasize that law enforcement records are not "education records" and are not protected under the provisions of FERPA.[72]

Furthermore, in *United States v. Miami University*, the Sixth Circuit Court of Appeals distinguished criminal records from disciplinary records and held that the latter were protected under FERPA and not included in the right of the press to access information.[73] The case focused on an action brought by the United States on its own behalf, and on the behalf of the Department of Education, against Miami University and Ohio State University for releasing student disciplinary records.[74] *The Miami Student*, a student newspaper at Miami University, had, under the Ohio Public Records Act, requested records relating to crime trends on campus.[75] The University released records with redacted information; however, the student newspaper wanted records that only redacted the "name, social security number, or student I.D. number of any accused or convicted party," and the University had redacted the "identity, sex, and age of the accuseds [sic], as well as the date, time and location of the incidents giving rise to the disciplinary charges."[76] The student newspaper, unhappy with the records as received, took the issue to the Ohio Supreme Court. The Ohio Supreme Court found that the only potentially applicable exception to the public records act was one that excluded the release of information prohibited by state or federal law.[77] Because the Ohio court found that FERPA did not protect disciplinary records, Miami University was required to produce them.[78]

After the Ohio Supreme Court issued its decision, *The Chronicle of Higher Education* ("*The Chronicle*"), a newspaper that reports on college and university affairs, requested all disciplinary records from 1995 to 1996 from both Miami University and Ohio State University.[79] The Department

72. Higher Education Amendments of 1992, Pub. L. No. 102-325, § 1555, 106 Stat. 448 (1992). *See also* Bauer v. Kincaid, 759 F. Supp. 575 (W.D. Mo. 1991) (holding that a college or university must disclose campus security reports to a student newspaper when requested under state open records law).

73. United States v. Miami Univ., 294 F.3d 797 (6th Cir. 2001). *See generally* Benjamin F. Sidbury, *The Disclosure of Campus Crime: How Colleges and Universities Continue to Hide Behind the 1998 Amendment to FERPA and How Congress can Eliminate the Loophole*, 26 J.C. & U.L. 755, 780 (2000) (calling for FERPA to "be amended to provide for mandatory disclosure of all student disciplinary records where the student has committed any criminal offense").

74. *Id*. *See also* Gonzaga Univ. v. Doe, 536 U.S. 273, 274 (2002) (holding that FERPA does not provide for a private right of action in federal court).

75. *Miami Univ.*, 294 F.3d at 803.

76. *Id.*

77. *Id.*

78. *Id*.

79. *Id*. at 804.

of Education, upon hearing that both universities were going to release the records, filed for an injunction to prevent them from "releasing student disciplinary records that contain personally identifiable information, except as permitted under the FERPA."[80] The Department subsequently filed a motion for summary judgment, which the district court granted, thereby permanently enjoining both Miami University and Ohio State University from releasing the requested student disciplinary records.[81]

On appeal to the Sixth Circuit, *The Chronicle* argued that "to the extent it prohibits disclosure of student disciplinary records, the FERPA violates the First Amendment and the district court failed to recognize that violation."[82] The Sixth Circuit disagreed, holding, "[u]nder a plain language interpretation of the FERPA, student disciplinary records are education records [and are protected] because they directly relate to a student and are kept by that student's university."[83] Because they were found to be "education records," the Court held that there was no public right to access disciplinary records that pertain to criminal activities and punishment.[84] Additionally, the court found that student disciplinary hearings have never been open to the public, and thus held that this case failed the first prong of the two-part test as set forth in *Press-Enterprise II*.[85] The court further held that the case failed the second prong of the *Press-Enterprise II* test as well because public access does not play a significant role in disciplinary proceedings.[86] The court also emphasized that public access would not aid in disciplinary proceedings, but would only serve to make them more expensive and less effective as a teaching tool.[87] This holding, which differs from the decision that the court reached in *Student Press Law Center*, appears to have closed the door—at least in the Sixth Circuit—to any future, effective First Amendment claims in FERPA-related access cases.

Though disciplinary records could be compared to criminal records, the "right of access" implicit in the First Amendment's freedom of the press, as held by the courts, does not attach to disciplinary records or "education

80. *Id*.

81. *Id.* at 805.

82. *Id*. at 805. *See also* Brief of Appellant *The Chronicle of Higher Education* at 32–33, United States v. Miami Univ., 294 F.3d 797 (2002) (No. 00-3518) (stating that "there is no evidence that Congress ever intended FERPA to protect student disciplinary records involving criminal conduct").

83. *Miami Univ.*, 294 F.3d at 812.

84. *Id.* at 822 ("[S]tudent disciplinary proceedings govern the relationship between a student and his or her university, not the relationship between a citizen and 'The People.' Only the latter presumptively implicates a qualified First Amendment right of access to the proceedings and the records.") (internal citations omitted).

85. *Id*. at 823.

86. *Id.*

87. *Id*. at 823–24 (noting that the press does have access to information about crime on college and university campuses including statistics).

records" in general.[88] Even in cases where the records at issue were not found to be protected by FERPA, it is unlikely that a First Amendment "right of access" argument would persuade a court. Because First Amendment jurisprudence limits the scope of access to criminal proceedings, it is not clear that the press would have access to this information even when the information is not an "educational record."

B. Open Records Laws

Press outlets have also argued that they should have the right to access information under certain state open records laws. For the most part, state open records laws followed the passage of the Federal Freedom of Information Act passed in 1966, though some states had a pre-existing common law right to public records.[89] While many states have open records laws that mirror the federal act, others diverge from its provisions and sometimes the two separate acts create conflicts regarding what should be protected and not protected.[90]

> There may be occasions when records protected by federal law may be otherwise subject to disclosure under a state freedom of information act. Some state statutes specifically address this conflict, resolving the conflict in favor of preserving the confidentiality to the extent necessary to preserve federal funding, services, or information. Other states resolve the potential conflict by incorporating language into their statutes generally stating that the right to inspect records is subject to as otherwise provided by federal law. However, in some cases disclosure of federally protected records has been ordered under state public records laws.[91]

Because open records laws vary from state to state, the jurisprudence on the topic differs as well. Whereas a piece of information may be deemed to be protected in one state, another state may decide that it can be released to the public. Whether through exemptions, federal supremacy of FERPA,[92]

88. *See generally* Letter from Kelly E. Campanella, Assistant Attorney General, Georgia Department of Law, to Arthur Leed, Associate Director for Legal Affairs, University of Georgia (Oct. 26, 2012) (on file with the National Association of College and University Attorneys) ("It is now clear that postsecondary student disciplinary records are protected from disclosure by [FERPA] and, therefore, are exempt from Georgia's Open Records law.").

89. 5 U.S.C. § 552 (1970).

90. Roger A. Nowadzky, *A Comparative Analysis of Public Records Statutes*, 28 URB. LAW. 65, 67 (1996) (providing an analysis on the brief history of public records statutes). *See generally* Nathanael Byerly & J. Chadwick Schnee, *What Every Lawyer Needs to Know about the Right-to-Know Law*, 83 PA. B.A. Q. 116 (2012) (providing an example of one state's public records statute, summarizing important aspects of Pennsylvania's Right-to-Know Law, and explaining Penn State's exclusion from the requirements of the law).

91. Nowadzky, *supra* note 90, at 67–69.

92. *See generally* Mathilda McGee-Tubb, *Deciphering the Supremacy of Federal*

or a general lack of access to the information, often members of the press are unable to prevail on an open records argument.

For example, in 2009, ESPN claimed access to the Ohio State University ("Ohio State") records of an NCAA investigation under the Ohio Open Records Act,[93] but the Supreme Court of Ohio ruled that the act provided an exemption for records whose release would violate the provisions of FERPA.[94] The information ESPN had requested from Ohio State related to football players who had been implicated in a scheme to trade Ohio State memorabilia for tattoos.[95] Although the Ohio State football coach had been notified that certain players were involved in the scheme, he failed to notify any of his supervisors at the university about the issue.[96] An NCAA investigation ensued and, in relation to the allegations, ESPN made requests for "[a]ll documents and emails, letters and memos related to NCAA investigations prepared for and/or forwarded to the NCAA since 1/1/2010."[97] ESPN also filed follow-up requests relating to a mentor of one of the players.[98] Ohio State initially released over 5,000 pages of information but refused to respond to the follow-up requests and claimed that because the requests were overly broad and related to a pending investigation, they could not be released.[99]

The court held that Ohio State should have given ESPN a second opportunity to submit the records in a more concise manner.[100] Additionally, the court held that the Ohio Open Records Act did not provide an exemption for pending investigations. In spite of this, however, the court did not grant any relief on those claims.[101] Although the court found in favor of ESPN

Funding Conditions: Why State Open Records Laws Must Yield to FERPA, 53 B.C. L. REV. 1045 (2012) (arguing that as a conditional federal funding statute, FERPA is subject to the current unconstitutional conditions doctrine and trumps any contradictory state open records laws).

93. Ohio Rev. Code Ann. § 149.43 (LexisNexis 2012).
94. State ex rel. ESPN v. Ohio State Univ., 970 N.E.2d 939 (Ohio 2012).
95. *Id.* at 942.
96. *Id*.
97. *Id*. at 942–43.
98. *Id*. at 943.
99. *Id*.
100. *Id.*
101. *Id*. The Ohio Revised Code states in pertinent part:

> If a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section or by any other failure of a public office or the person responsible for public records to comply with an obligation in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, that awards court costs and reasonable attorney's fees to the person that instituted the mandamus action, and, if applicable, that includes an order fix-

regarding the broad request and pending investigation, it ultimately held that the information that ESPN sought qualified as "education records" and, therefore, was protected under FERPA.[102] Because the Department of Athletics kept copies of all emails sent or received by anyone in the department and retained documents pertaining to the investigation and organized them by student-athlete involved, they were "education records," and as "education records" they were not governed by the state's open records law.[103] The court held that information protected by FERPA could not be released regardless of the open records act on file.[104] The court also noted, however, that once personally identifying information was redacted from the documents, they would no longer be protected by FERPA and should be released:[105]

> The Public Records Act serves a laudable purpose by ensuring that governmental functions are not conducted behind a shroud of secrecy. However, even in a society where an open government is considered essential to maintaining a properly functioning democracy, not every iota of information is subject to public scrutiny. Certain safeguards are necessary.[106]

Following this decision, the Kentucky Attorney General issued a notice affirming a decision by the University of Kentucky to withhold records relating to a student athlete.[107] The *Kentucky Kernel*, a student newspaper, requested information under the Kentucky Open Records Act that included "memoranda, paperwork, and any other correspondence in the past two years . . . [as well as] any correspondence with the NCAA about Nerlens Noel."[108] The university denied the request and cited FERPA as the reason

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ing statutory damages under division (C)(1) of this section.

Ohio Rev Code Ann. §149.43(C)(1) (LexisNexis 2012).

102. *ESPN*, 970 N.E.2d at 947 ("The records here—insofar as they contain information identifying student-athletes—are directly related to the students."). It seems that the records, however, may have been tenuously linked to the students in question:

> ESPN first claims that the requested records are not education records because records concerning Sarniak, a Pennsylvania businessman who was the mentor to an Ohio State football player implicated in the NCAA investigation concerning trading memorabilia for tattoos, and records relating to compliance by Ohio State coaches and administrators with NCAA regulations do not directly involve Ohio State students or their academic performance, financial aid, or scholastic performance.

Id. at 946.

103. *Id.*

104. *Id.* at 949.

105. *Id*. at 947–48.

106. *Id*. at 948 (citing State ex rel. Wallace v. State Med. Bd. of Ohio, 732 N.E.2d 960, 967 (Ohio 2000)).

107. Memorandum from the Kentucky Office of the Attorney General (Dec. 4, 2012) (on file with the National Association of College and University Attorneys) [hereinafter Kentucky Memorandum].

108. *Id*.

for withholding the records.[109] Not only did the university deny access to the student newspaper, but it also denied access to the Attorney's General office as it reviewed the issue.[110] Notwithstanding the denial however, the Attorney General upheld the actions taken by the university.[111] In fact, the Attorney General deferred to the university's characterization of the records as "education records" without viewing them for himself and stated that under the broad protection provided by both *State ex rel. ESPN, Inc. v. Ohio State University*[112] and *United States v. Miami University*[113], FERPA clearly supersedes the Kentucky Open Records Act.[114] This situation highlights the level of deference given to "education records" and FERPA's provisions to protect them. With this level of deference to FERPA, it is difficult for press outlets, and even more so for student-run newspapers, to clear the hurdle and gain access to relevant information. In practice, an argument based on access to records through state open records laws does not often beat FERPA.

Along similar lines, in a recent case involving the University of Iowa, the Supreme Court of Iowa held that the court did not have to examine the conflict between state open records laws and FERPA because the Iowa Open Records Act had a built-in FERPA exemption.[115] In *Press Citizen Company v. University of Iowa*, the *Iowa City Press-Citizen* submitted an open records request for information relating to an alleged sexual assault by two University of Iowa football players.[116] A criminal investigation followed the assault; one student pled guilty, and the other was convicted of a simple misdemeanor.[117] In its request for records, the *Press-Citizen* asked for "reports of attempted or actual sexual assaults; correspondence to or from various University officials relating to any such incidents; and e-mail, memos, and other records relating to any such incidents from [two weeks before the attack] to the present."[118] In response to the request, the University submitted minimal information to the *Press-Citizen* and claimed that all other records pertaining to the event were protected by FERPA as "educational records."[119] The *Press-Citizen* subsequently filed suit in state court. The lower court granted some relief by calling for the release of documents that it had determined were not education records and not protected

109. *Id*.
110. *Id.*
111. *Id.*
112. 970 N.E.2d 939 (Ohio 2012).
113. 294 F.3d 797 (6th Cir. 2001).
114. Kentucky Memorandum, *supra* note 107.
115. Press-Citizen Co., Inc. v. Univ. of Iowa, 817 N.W.2d 480 (Iowa 2012).
116. *Id.* at 482.
117. *Id*.
118. *Id*. at 483.
119. *Id.*

by FERPA.[120] On appeal, the *Press-Citizen* again claimed access to the records based on the Iowa Open Records Act which "establishes 'a presumption of openness and disclosure.'"[121] Although the Iowa Open Records Act lists sixty-four separate exemptions (the first being "[p]ersonal information regarding a student, prospective student, or former student maintained, created, collected or assembled by or for a school corporation or educational institution maintaining such records"),[122] the University of Iowa relied solely on the argument that the documents were protected under FERPA.[123] The Supreme Court of Iowa determined that "[f]or purposes of this appeal, we assume that the appealed [category of] documents are in fact 'education records' under FERPA."[124] The court refused to decide whether FERPA enjoys federal supremacy over the Iowa Open Records Act[125] because it found that a provision of the Iowa Open Records Act lists an exemption for FERPA-related information.[126] Furthermore, the court stated that because the students' records would be identifiable even if their names were redacted, the university does not have to release redacted copies of the records.[127]

> [A]n educational record must be withheld if the recipient would know the student to whom the record refers, even with the redaction of personal information, such as the student's name . . . . Given the notoriety of the . . . incident, the University contends that no amount of redaction of personal information would prevent the newspaper from knowing the identity of various persons

120. *Id*.

121. *Id*. at 484 (citing Gabrilson v. Flynn, 554 N.W.2d 267, 271 (Iowa 1996)).

122. Iowa Code Ann. § 22.7.

123. *Press-Citizen*, 817 N.W.2d at 484.

124. *Id*. at 486.

125. *Id*. at 487.

126. Iowa Code Ann. § 22.9. The Iowa Code Annotated states in pertinent part:

> If it is determined that any provision of this chapter would cause the denial of funds, services or essential information from the United States government which would otherwise definitely be available to an agency of this state, such provision shall be suspended as to such agency, but only to the extent necessary to prevent denial of such funds, services, or essential information.
>
> An agency within the meaning of section 17A.2, subsection 1, shall adopt as a rule, in each situation where this section is believed applicable, its determination identifying those particular provisions of this chapter that must be waived in the circumstances to prevent the denial of federal funds, services, or information.

Id.

127. *Press-Citizen*, 817 N.W.2d at 492. *But see* Bd. of Trs., Cut Bank Pub. Schs. v. Cut Bank Pioneer Press, 160 P.3d 482, 487 (Mont. 2007) (holding that though the newspaper requesting the records knew the students involved, student disciplinary records should still be released with the student names redacted). The *Press-Citizen* declined to follow *Cut Bank* because the case had been decided before the definition of "personally identifiable information" was amended in 2009. *Press-Citizen*, 817 N.W.2d at 492.

referenced in records relating to that incident.[128]

In contrast to this line of reasoning, in *Chicago Tribune Co. v. Board of Trustees of University of Illinois*, the District Court for the Northern District of Illinois held that the University of Illinois could not withhold admission records requests made by the *Chicago Tribune* because those records were not "education records" under FERPA.[129] The *Chicago Tribune* ran a series about the preferential treatment of certain applicants during the admissions process at the University of Illinois and filed a public records request for "the names of the applicants' parents and the parents' addresses, and the identity of the individuals who made a request or otherwise became involved in such applicants' applications."[130] The university denied the request and claimed that FERPA protected the records from disclosure, but the district court found that the exemptions to the public records law for information prohibited from disclosure by federal or state law should be interpreted narrowly and that FERPA itself did not prohibit disclosure, but rather provided federal funds for those institutions that did not disclose certain materials.[131] On appeal, however, the Seventh Circuit vacated the decision and held that federal courts did not have jurisdiction over the case because the point at issue was whether the state open records law protected the information.[132] The fact that the university was using federal law as a defense did not grant federal jurisdiction.[133] Ultimately, the court refused to decide whether the state open records law or the federal FERPA statute governed the records at issue.[134]

As seen in each of the cases discussed above, claims based on open records arguments tend to fail when matched against FERPA's provisions. Though open records laws value public access to information and are generally seen as a public good, they are balanced against personal privacy rights. Colleges and universities have used a broad interpretation of "education records" under FERPA in order to claim exemptions for records, and because many open records laws contain exemptions for FERPA-related information, press outlets often lose this argument. Moreover, even when an open record law does not contain a FERPA exemption, the federal supremacy argument may still prevent a valid open records claim.

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128. *Press-Citizen*, 817 N.W.2d at 490.

129. Chicago Tribune Co. v. Univ. of Illinois Bd. of Trs., 781 F. Supp. 2d 672 (N.D. Ill. 2011).

130. *Id*. at 673.

131. *Id*. at 675 (rejecting an argument by the *Chicago Tribune* that its right to access the records was protected under the First Amendment).

132. Chicago Tribune Co. v. Bd. of Trs. of Univ. of Illinois, 680 F.3d 1001, 1006 (7th Cir. 2012).

133. *Id*. at 1003.

134. *Id*. at 1006.

IV. CASES IN WHICH RECORDS WERE RELEASED

In a departure from the jurisprudence discussed above, a few courts have recently held that records sought were not "education records" and, therefore, not protected under FERPA. These cases differ from those above not only in the final judgment of the court, but also in the parties to the case. The following cases either involve a news agency or a college or university as a party, not both. Though this provides for a slightly different perspective, it offers an interesting comparison, as the cases below turn on the definition of "education records," not on a First Amendment "right of access" claim or an open records law claim.

In *National Collegiate Athletic Association v. The Associated Press*, the First District Court of Appeal of Florida held that documents that the NCAA placed on its own website and allowed member institutions to view did not qualify as "education records."[135] The case revolved around allegations that a learning specialist and an academic tutor at Florida State University ("Florida State") provided athletes with improper assistance.[136] The university had self-reported to the NCAA and the NCAA had held its own disciplinary proceedings regarding the misconduct, ultimately issuing penalties against Florida State.[137] Florida State appealed the penalties imposed by the NCAA and requested access to the records relevant to the enforcement proceeding.[138] The NCAA granted the law firm representing the university access to the password-protected transcript of the NCAA hearing.[139] The Associated Press then requested copies of both documents, claiming that they were public records, and filed suit when the NCAA refused to disclose the information.[140] The trial court rendered judgment for the plaintiffs, finding that that the records sought were public records "because they were received by an agency of the state government."[141] The court of appeals affirmed, stating that, although "[r]ecords created and maintained by the NCAA are not generally subject to public disclosure," since "the documents were received in connection with the transaction of official business by an agency, they are public records."[142] Furthermore, under FERPA, because the documents were not directly related to students, they were not considered "education records."[143]

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135. Nat'l Collegiate Athletic Ass'n v. Associated Press, 18 So. 3d 1201, 1204 (Fla. Dist. Ct. App. 2009).

136. *Id*. at 1204–05.

137. *Id*. at 1205.

138. *Id*.

139. *Id*. The NCAA did not disclose this information to the public.

140. *Id*. at 1205–06.

141. *Id.* at 1206.

142. *Id*. at 1204.

143. *Id*. at 1211 (stating redacted records were related to the University Athletic Department, and only tangentially related to students).

In *Wallace v. Cranbrook Educational Community* ("Cranbrook"), a maintenance person employed by Cranbrook was terminated for allegations, primarily based on anonymous student statements, of "inappropriate sexual behavior towards students."[144] During discovery in a suit alleging improper termination, Cranbrook released the student statements to the plaintiff with the students' names and addresses redacted.[145] After a magistrate ordered Cranbrook to produce the students' identifying information Cranbrook objected, in part, because it asserted that FERPA prohibited the disclosure of the identifying information.[146] In upholding the magistrate's disclosure order, the district court judge held that employee records were an exception under FERPA and were not considered "education records."[147]

> Education records do not include, "in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records 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."[148]

Thus, the court held that the unredacted student statements related to an employee and could be released.[149]

As seen in both *NCAA* and *Wallace*, plaintiffs have had more success fighting the defense of protection under FERPA by arguing that the information at issue is not, in fact, an "education record." Though claims that the press has a right to access information under the First Amendment or under certain state open records laws have often failed, the argument centering on the definition of "education records" has provided different results.

CONCLUSION

Although Senator Buckley originally intended for the Federal Education Rights and Privacy Act to protect information from mishandling by the federal government as well as by colleges, universities, and even primary schools, Congress has amended the statute multiple times and created more ambiguity as to what exactly is protected information. Members of the

144. Wallace v. Cranbrook Educ. Cmty., No. 05-73446, 2006 WL 2796135, at *1 (E.D. Mich. Sept. 26, 2006). *See also* Briggs v. Bd. of Trs. Columbus State Cmty. Coll., No. 2:08–CV–644, 2009 WL 2047899 (S.D. Ohio July 8, 2009) (holding that student complaints against a professor are directly related to the professor, not the student, and are not "education records").

145. *Wallace*, 2006 WL 2796135, at *1.

146. *Id*.

147. *Id.* at *5.

148. *Id.* at *5 (citing 20 U.S.C. § 1232g(a)(4)(B)(iii)).

149. *Id.* at *6.

press have attempted to access information only to be told it was an "education record" and as such, protected by FERPA. Because of this, press outlets and news agencies have brought cases to seek a right to certain information based on First Amendment rights and open record laws. Yet, in *United States v. Miami University*, the Sixth Circuit held that the press did not have a First Amendment right to access information, and in both *Press-Citizen Co., Inc. v. University of Iowa* and *State ex rel. ESPN v. Ohio State University*, the courts found that certain state open records laws did not provide access to information protected under FERPA.

Recently, however, in *NCAA v. Associated Press* and *Wallace v. Cranbrook Educational Community*, the courts have found exceptions to the statutory definition of "education record" and deemed certain information not an "education record" under the law, and thus accessible to the requestor. Though these cases differ from the others examined in this article because they do not involve a press outlet suing a college or university, they do provide helpful insights for press outlets looking to access information and those schools working to keep information confidential. Going forward, press outlets may be more likely to reach outcomes in their favor when the argument is about whether the piece of information sought is an "education record," rather than when the argument is about whether the press has a right to access the information. Colleges and universities concerned about their own responsibilities under FERPA should consider this evolving debate as well.