SUPREME COURT OF KENTUCKY
NO. 2019-SC-000468

UNIVERSITY OF KENTUCKY — APPELLANT

v

APPEAL FROM COURT OF APPEALS NO. 2017-CA-000394
FAYETTE CIRCUIT COURT NO. 16-CI-03229

THE KERNEL PRESS, INC.
d/b/a THE KENTUCKY KERNEL — APPELLEE

RESPONSE BRIEF OF APPELLEE, THE KERNEL PRESS, INC., d/b/a THE KENTUCKY KERNEL

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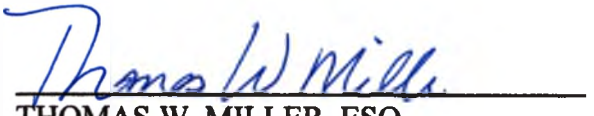
CERTIFICATE OF SERVICE REQUIRED BY CR 76.12(6)

The Undersigned does hereby certify that copies of this Response Brief were served upon the following named individuals by U.S. mail on this the 20th day of April, 2020: Kelly Stephens, Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Thomas Travis, Judge, Robert F. Stephens Courthouse, 120 N. Limestone, Suite 511, Lexington, Kentucky 40507; Vincent Riggs, Clerk of the Fayette Circuit Court, Robert F. Stephens Courthouse, 120 N. Limestone, Suite 103, Lexington, Kentucky 40507; Hon. Joshua M. Salsburey, Hon. Bryan H. Beauman, Hon. Donald C. Morgan, Sturgill, Turner, Barker & Moloney, PLLC, 333 West Vine Street, Suite 1500, Lexington, Kentucky 40507; and Hon. William E. Thro, General Counsel, University of Kentucky, Office of Legal Counsel, 301 Main Building, Lexington, Kentucky 40506; with courtesy copies to Attorney General Daniel Cameron, Commonwealth of Kentucky, Office of the Attorney General, 700 Capital Avenue, Suite 118, Frankfort, Kentucky 40601 and to Michael P. Abate, Esq., Kaplan & Partners, LLP, 710 W. Main Street, 4th Floor, Louisville, KY 40202.

The undersigned does also certify that the record on appeal has not been withdrawn by the undersigned from the Fayette Circuit Clerk's office on or before this date.



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INTRODUCTION

This case arises from the University's attempt to protect its professor, James Harwood ("Harwood"), who was alleged to have sexually harassed and assaulted students, got caught, and was then permitted to sign a settlement agreement pursuant to which the University permitted him to remain employed through the end of the school year, and promised not to disclose the terms of the agreement and not to disparage him. Unhappy with the University's response to the matter (or lack thereof), the victims of Harwood's assault caused the incident to be reported to the Kentucky Kernel, a student newspaper staffed largely by women. Thanks to the Kernel's accurate reporting, Harwood's misconduct was made public. Thereafter, the Kernel made an Open Records Act request for documents related to the University's investigation of Harwood.

The University's justification for refusing to respond to that request is ever-changing. Only before this Court does the University adopt, for the first time, the self-serving characterization of its investigative file concerning the wrongdoing of its former employee, James Harwood ("Harwood"), as a "Survivors' file." It is no such thing, nor is it an "education record" within the meaning of the Federal Education Rights to Privacy Act ("FERPA"). It is a record of the University's response to very serious allegations made against its own employee, whom it permitted to resign (with pay) following accusations that he assaulted his students. At every point in this litigation, the Kentucky Kernel has maintained that some degree of redaction is appropriate. The Kernel has no interest in learning or divulging personally identifying information about the victims of Harwood's assault. Regardless of the numerous suggestions in the University's Brief and the briefs submitted by its amici, the Kernel has never acknowledged that it knows the victims' name,

nor is there any evidence in the record of such knowledge other than bald expressions of belief on the part of the University and its amici. Never once has the Kernel published the names or any personally identifying information about the victims.

The Court of Appeals properly found that the University has refused to carry out its obligation to separate exempt material under the Kentucky Open Records Act from non-exempt, and has instead invoked (in the Court of Appeals' words) an "if it's not this exemption and then it's that exemption' approach". The University should not be permitted to exploit its students' statutory and constitutional privacy rights in order to cloak information about the manner in which it investigated and disciplined its employee.

STATEMENT CONCERNING ORAL ARGUMENT

The Kernel welcomes oral argument and the opportunity to respond to any questions the Court may have regarding this case. This case involves important issues surrounding the Kentucky Open Records Act, the enforcement of which is necessary to prevent governmental agencies from concealing their employees' misconduct and their own failures to adequately investigate and respond to accusations of misconduct.

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COUNTERSTATEMENT OF THE CASE

The Open Records Act request underlying this litigation is for an investigative file regarding a University employee's alleged misconduct. Following the publication of a Kentucky Kernel article reporting that the University had permitted Harwood (an associate professor of entomology) to resign under an agreement that allowed him to continue receiving pay and benefits through the end of August 2016 (R.A. 553 (Appx. 3)), Kernel reporter Will Wright made an Open Records Act request to the University's Official Custodian:

> I am requesting an opportunity to obtain copies of all records detailing the investigation by the University of Kentucky or the Office of Institutional Equity and Equal Opportunity of James Harwood and any allegations of sexual harassment, sexual assault or any other misconduct by James Harwood.

(R.A. 555 (Appx. 4)).[1] In response, the University offered its *first* justification for refusing to comply with the Act, asserting that the documents were exempt under various statutory exceptions (KRS 61878(1)(a), (i), and (j)) and were protected by the attorney-client privilege and/or work product doctrine. (R.A. 556 (Appx. 5)). The University made no mention of the Family Educational Rights and Privacy Act ("FERPA"), or of any constitutional basis for its refusal to disclose the documents.

After Mr. Wright appealed the University's refusal to produce the documents to the Office of Attorney General pursuant to KRS 61.880(2) (R.A. 558 (Appx. 6)), the University responded by repeating the same objections made in its initial refusal to provide the documents.

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[1] The Open Records request was misdated as January 18, 2016.

When pressed by the Attorney General to substantiate its denial of the request by providing written responses to specific inquiries about the exceptions and privileges on which it relied, and to explain why it could not redact names and personal identifiers of Dr. Harwood's accusers pursuant to KRS 61.878(4) (R.A. 561 (Appx. 7), the University adopted its *second* approach. In its "Supplemental Response," the University characterized the Kernel as an "eager" student newspaper engaged in "little more than voyeurism," and assured the Attorney General that "[t]he public already knows all it needs to know" about the matter and that the professor "has already practically experienced the fullest possible consequences" of his actions. (R.A. 565 (Appx. 8)). In addition to the previously invoked exceptions and privileges, the University made the new argument that it was affirmatively prohibited from producing the file by various federal laws – including FERPA as well as the Clery Act, 20 U.S.C. § 1092(f), and the Violence Against Women Act, 42 U.S.C. § 13925, *et seq*. The University also rejected the Attorney General's request that it provide a copy of the documents for an *in camera* review. (R.A. 599).

The Attorney General concluded that the University's denial of Mr. Wright's request violated the Kentucky Open Records Act. (R.A. 604 (Appx. 9)). In a lengthy and well-reasoned opinion (16-ORD-161), the Attorney General noted that it "wholeheartedly agree[d] that the identity of the complainant and witnesses, as well as their personally identifying information, must be shielded from disclosure." (R.A. 607 n. 4). This did not, however, entitle the University to shield the entire investigative file from disclosure – particularly without permitting the Office to conduct an *in camera* review pursuant to KRS 61.880(2)(c). *Id.*

The University appealed the Attorney General's decision to the Fayette Circuit Court pursuant to KRS 61.882. The Commonwealth of Kentucky, through the Attorney General, intervened in the action to seek a declaration of rights on the issue of the Office's authority to require government agencies to submit documents withheld from Open Records requests to the Office for *in camera* review. (R.A. 175).

The University devotes much ink to its assertion that the victims of Harwood's assault now oppose the Kernel's investigation into the agreement allowing Harwood to resign without any admission or finding of fault.[2] In reality, however, two of the individuals who alleged that Harwood had assaulted and harassed them approached the Kernel through a spokesperson. As reported in the Kernel's August 13, 2016, article (R.A. 794 (Appx. 11)), the spokesperson first contacted the Kernel about the case in March 2016 because Harwood's "victims were unhappy that Harwood could be allowed to continue working at another university without the full results of the investigation following him." The victims' spokesperson was reported as stating that the documents should be disclosed with names and identifying information redacted. (*Id.*).

The University's arguments shifted for a ***third*** time during the proceedings in Circuit Court. There, the University abandoned its reliance on attorney-client privilege and the work product doctrine, and instead primarily argued that the U.S. Constitution and

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[2] The Kernel refers to the women who were allegedly assaulted and harassed by Harwood as victims, consistent with the guidance provided by the Rape, Abuse & Incest National Network ("RAINN"), the largest nonprofit anti-sexual assault organization in the United States. "RAINN tends to use the term 'victim' when referring to someone who has recently been affected by sexual violence; when discussing a particular crime; or when referring to aspects of the criminal justice system." (https://www.rainn.org/articles/key-terms-and-phrases) (last visited March 11, 2020). As set out below, this case is about an investigative file concerning a particular crime allegedly committed by the University's employee. It refers to and relates to that employee.

FERPA forbade disclosure of the entire file and, if not, then the Open Records Act must be declared unconstitutional. (R.A. 414 (University's Brief)). However, in its Brief to the Circuit Court, the University consistently (and accurately) referred to the requested documents as an "investigative file". (R.A. 420, 428).

Despite having initiated the article that led to the Kernel's Open Records request, two individuals claiming to be Harwood's victims sought and received permission to file amicus briefs as Jane Doe 1 and Jane Doe 2, respectively. (R.A. 693). The Jane Does claimed to oppose disclosure of the investigative file, even in redacted form. Notably, the Jane Does were represented by a law firm which had previously represented the University. (R.A. 722 (Kernel's Obj. to Motion to File Amicus Brief)).[3] In their amicus brief, Jane Does 1 and 2 did not deny that, as reported by the Kentucky Kernel (R.A. 756), they approached the student newspaper through a spokesperson to call attention to Harwood's misconduct. They acknowledged that they had made the Kernel an "early ally" in their

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[3] Although the following information formerly appeared on the website for Baker Donelson, it was removed just prior to the filing of the Motion for leave to file an amicus brief. The content of the website, however, was quoted in the July 2015 Ethics Reporter issued by the Kentucky legislative Ethics Commission, which stated:

> [T]he UK Research Foundation ended a nine-month, $108,000 lobbying contract with the Washington, D.C. law firm of Baker, Donelson, Bearman, Caldwell & Berkowitz. On that firm's website, a note from 2008 states the firm "Assisted the University of Kentucky in doubling its annual direct earmarked appropriations from $16 million to around $30 million for projects in most of the funding bills including agriculture, science, defense, energy and water, homeland security and health and human services.

(R.A. 726). The Center for Responsive Politics reports that Baker Donelson spent $50,000 in 2015 on lobbying efforts on behalf of the University of Kentucky (R.A. 740), while another source reports that the University "has law and lobby firm Baker Donelson on retainer" (R.A. 746).

desire to ensure that Harwood could not obtain employment elsewhere without disclosure of the charges against him. (Amicus Brief, p. 3 (R.A. 758)).

Importantly, and despite taking the new position that redaction of their names and other identifying information would not protect their privacy, the documents on which the Jane Does relied in their amicus briefs **affirmatively established** that redaction would more than adequately protect their interests. They attached Declarations to their amicus brief which, in turn, included letters expressing their support of the University's handling of the matter, with their names and other identifying information redacted. (R.A. 768). (Appx. 11). Those letters were read aloud at an open University Board meeting and distributed to the press. (R.A. 804 (September 9, 2016, Courier-Journal article) (Appx. 12)). The letters referred to sexual harassment and assault, and identified the perpetrator as Harwood. Clearly, then, in the Does' own view, redaction of personally identifying information adequately protects their privacy interests while also permitting the public to learn how the University responded to the allegations. They placed their version of the incident with Harwood in a public record, and delivered their letters to the Board members and the journalists in attendance.

On January 23, 2017, the Circuit Court entered an Order reversing the Attorney General's Opinion and finding that the documents constituted "educational records" under FERPA. (R.A. 955, 963). The Court concluded that the documents constituted "educational records" under FERPA (*id.*), that the U.S. Constitution prevented the government from disclosing "the intimate details of a sexual assault survivor (*id.*), and that, while the file contained identifying information that could be redacted, "[t]he record is so extensively

laced with details of the alleged assault that redaction alone would not protect these complaining witnesses" (R.A. 965).

One day after the Court entered its Order, and long after the Kernel and the University had briefed and argued the dispute between them, the University responded to discovery requests propounded upon it by the Commonwealth. That response included a "Vaughan Index" of the investigative file regarding the accusations made against Harwood. (R.A. 982 (Appx. 13.))[4] The content of the Index is fundamentally irreconcilable with the Court's determination that every part of the file must be shielded from disclosure, such that no amount of redaction can protect student privacy concerns. Specifically, the Index states that the file includes:

- A "Final Determination Letter" from Title IX Deputy Compliance Officer Martha Alexander to Harwood (R.A. 985, Item No. 1);
- Copies of various University policies and procedures, attached as Ex. A, B and C to a 21-page "Final Investigative Report" (R.A. 985, Item Nos. 5-7);
- Email correspondence between Alexander and a complainant that includes "the "investigation process", attached as Ex. D to the Final Investigative Report (*id.*);
- Excerpts from a User Manual for one of the complainant's cameras (R.A. 987, Ex. Y to the Final Investigative Report);
- Alexander's notes regarding scheduling of interviews (R.A. 987, Item No. 21);
- Alexander's notes from interviews with Harwood's "co-workers (non-witnesses) regarding Harwood's professionalism and interactions with students" (R.A. 988, Item 5);
- Alexander's notes from "interview with co-worker (non-witness) regarding Harwood's professionalism and complaints" (R.A. 989, Item 8);
- Alexander's notes "from interview with Department Chair regarding Harwood's professionalism and complaints") (*id.*, Item No. 9);

[4] Citations are to the Index as attached to the Kernel's Motion to Alter, Amend, or Vacate. (R.A. 974).

- Email communications between Harwood and Alexander concerning, in part, "hearing scheduling" (R.A. 989, Item No. 16);

- Agreement and Release between Harwood and the University (R.A. 992, Item 1);

- "Notes from meeting with Harwood regarding terms of ending employment relationship with University") (*id.*, Item 2);

- Additional University Policies (*id.*, Item 6);

- "Alexander notes from meeting with Harwood regarding outcome of investigation") (R.A. 993, Item 7);

- "Alexander notes from initial meeting with Harwood" (*id.*, Item 11);

- Harwood's curriculum vitae (*id.*, Item 13);

- Harwood's "confidential employment documentation" (*id.*, Item 14);

- Alexander's notes from a meeting with "Complainant 1" regarding, in part "hearing procedure" (R.A. 995, Item 5);

- Email correspondence between Alexander and Complainant 1 "regarding scheduling a time to meet and hearing procedure" (*id.*, Item 9);

- Email correspondence between Alexander and Student E "regarding scheduling a time to meet" (*id*, Item 15).[5]

Based on the contents of the Index, the Kernel filed a Motion to Alter, Amend, or Vacate the Circuit Court's Opinion insofar as it concluded that every part of the file was protected from disclosure and no part of the file could be redacted so as to protect the student victims. (R.A. 974). The Kernel additionally requested that the Court make its

[5] Additionally, while some of the correspondence and notes in the file refer to "Students" designated by letters (e.g., "Students A, C, G"), or "Complainants" designated by number, others refer simply to communications with "Witnesses," who are not designated as students or non-students. It is not at all clear, therefore, that all of the communications which the University attempts to shield pursuant to FERPA or student privacy interests even involve students.

January 23, 2017, Opinion and Order final and appeal. (*Id.*). Although the Court denied the Kernel's motion to alter, amend, or vacate, it did make the Order final and appealable. (R.A. 1189). This appeal followed.

In a thorough, well-reasoned Opinion, the Court of Appeals reversed the Circuit Court. The Court of Appeals expressly acknowledged that "[t]he complaining students who alleged to have been sexually assaulted have a privacy interest in the nondisclosure of their identities", and held that "FERPA precludes the University from releasing to the Kernel unredacted education records contained in the Title IX investigation file." (*Id.*, p. 14, 17).[6] However, those holdings did not resolve the case because the University had failed to do what it was required to do under the Act:

> The University, at various times throughout this dispute, has given many reasons why the entire file should be exempt but given no explanation as to how a specific exemption applies to a particular record. This is particularly troublesome where some of the records may be exempt but others clearly are not. We cannot say that the circuit court's finding that all records are exempt from disclosure under FERPA was supported by any substantial evidence. **Some records certainly are not directly related to any student such as a camera manual, University policies, and scheduling notes. While we could reverse on the clearly erroneous standard, we also hold that this case must be reversed and remanded as a matter of law. We do so because the University has yet to fulfill its statutory responsibilities under the Open Records Act.**

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[6] By the time the case reached the Court of Appeals, the University's reliance on the Clery Act and the Violence Against Women Act was relegated to a conclusory assertion in a footnote, with no explanation or support. (University's Brief in the Court of Appeals, p. 11 n. 8). See also Court of Appeals Opinion, p. 21 n. 5 (noting that some of the University's claimed exemptions, "such as the federal Violence Against Women Act have been relegated to nothing more than a footnote in the University's appellate brief." The University did, however, continue to correctly characterize the file as an investigative record. (UK Brief, p. 4).

Before this Court, the University appears to have abandoned its reliance on these two statutes altogether, and has adopted the new and self-serving label, "Survivors file."

(Opinion, p. 21) (all emphasis added).

The University repeatedly criticizes the Court of Appeals' Opinion as failing to indicate that it conducted an *in camera* review of the documents at issue. The Court of Appeals found, however, that the Circuit Court had made an erroneous conclusion that all of the records "in the investigative file" were covered by FERPA. (*Id.*, p. 28-29). Relying on this Court's holding in *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842 (Ky. 2013), the Court held that *in camera* inspection by the trial court should be resorted to only "if disclosure of the nature of the information withheld and its relationship to the exemption cannot be done without defeating the exemption." (*Id.*, p. 24). Rather than satisfying its burden of establishing that the documents within the investigative file were exempt, the University failed to separate exempt from nonexempt documents. (Opinion, p. 23-24). The Court held:

> [T]he University has taken the indefensible position that the records are exempt because it says they are and it must be believed. That position is directly contrary to the goal of transparency under the Open Records Act.

(*Id.*). The Court of Appeals found that the Index itself was deficient, because within each category (e.g., "Final Investigative Report", "Miscellaneous notes", "Student C"), the University simply claimed that all material was exempt and repeated the same exemptions for each category of documents.[7] The Court held: "**The University, in an 'if it's not this**

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[7] The Court held:

> Within each category, the University claimed all material was exempt, redundantly making the same statement:
>
> > The records indexed under this tab are exempt in whole or in part pursuant to FERPA, the [Violence Against Women Act], Clery, and/or the U.S. Constitution consistent with KRS 61.878(1)(k). The records are further exempt in whole or in part pursuant to KRS 61.878(1)(a), (i) and/or (j) as

exemption and then it's that exemption' approach, has at some point claimed that 'all' or 'some' of the requested materials fall under five different exemptions." (*Id.*, p. 13) (emphasis added). For that reason, the Court of Appeals remanded the case so that the University could do what it should have done in the first instance: "submit a proper index compliant with this opinion or otherwise satisfy its burden of proof that each record in the Title IX investigation file is exempt." (*Id.*, p. 30).

Following the University's unsuccessful petition for a rehearing in the Court of Appeals, this Court granted discretionary review.

ARGUMENT

This case is not, as the University pretends, about the statutory and constitutional privacy rights of the victims of sexual assault by the University's former employee, Harwood. (UK Brief, p. 1). This case is about the University's exploitation of its students' privacy interests in an effort to conceal from the public its "investigation" into Harwood's alleged misconduct – an investigation that culminated in the University's agreement to permit him to resign with pay, and without the consequences of the allegations against him following him to his next campus. The University may have adopted the self-serving characterization of the investigative file as "the Survivors' file," but its true purpose in refusing to the disclose the documents was made abundantly clear in its Supplemental Response to the Attorney General: the University believes that "[t]he public already knows

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> preliminary records and/or records for which disclosure would create an unwarranted invasion of personal privacy.

(Opinion,, p. 8-9).

all it needs to know" about the harassment of its students, and Harwood has "already practically experienced the fullest possible consequences" of his actions. (R.A. 565).

I. FERPA Does Not Apply to Every Document in the Investigative File

A. The University's Index makes clear that not every document in that file qualifies as an "education record."

This issue was preserved for appeal through the Kernel's Response to the University's Brief in support of its appeal to the Circuit Court (R.A. 530, 539-544), its Motion to Alter, Amend, or Vacate (R.A. 974-980), and its Brief to the Court of Appeals (Kernel Brief, p. 9-18).

The University's characterization of the investigative file in its entirety as an "education record" that it must withhold pursuant to FERPA, a federal statute, is supported by a single case from a single state intermediate court (*Rhea v. District Bd. of Trustees of Santa Fe College*, 109 So.3d 851 (Fla. DCA 2013)) and an excerpt from a secondary source. That characterization is at odds with the plain language of FERPA, and a myriad of federal (and state) case law interpreting that federal statute.

Because the individual file is not an "education record" that is subject to FERPA in the first instance, the University's arguments regarding what is or is not (redactable) "personally identifying information" under FERPA places the cart well before the horse. If the file is not an "education record" as defined below, then FERPA does not apply and cannot supply any basis for the University's refusal to disclose the file, without regard to whether the University believes that the Kernel knows the identities of the student victims.

FERPA defines "education records" as follows:

> For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), **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.
>
> (B) **The term "education records" does not include**—
>
> . . .
>
> **(iii) 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 . . . .**

20 U.S.C. § 1232g(a)(4) (all emphasis added).

Federal courts (including two (2) United States District Courts within the Sixth Circuit Court of Appeals) apply the above-quoted definition in accordance with its plain text: documents that are not "**directly related**" to a student do not fall within the scope of FERPA, and educational institutions' files regarding student complaints against teachers are therefore not subject to any FERPA considerations. Courts throughout the country recognize that "the federal courts are uniquely situated to render opinions regarding the meaning and application of federal statutes." *Griffin v. Bruner*, 793 N.E.2d 974, 977 (Ill. App. 2003). See also *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 556 (N.C. 2012) ("although they are 'not binding on North Carolina's courts, the holdings and underlying rationale of decisions rendered by lower federal courts may be considered persuasive authority in interpreting a federal statute'"); *Glukowsky v. Equine One, Inc.*, 848 A.2d 747, 755 (N.J.

2004) ("the principle of comity instructs state courts to give due regard to a federal court's interpretation of a federal statute").[8]

In *Ellis v. v. Cleveland Municipal Sch. Dist.*, 309 F.Supp.2d 1019 (N.D. Ohio 2004) (Appx. 14),[9] 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, holding that FERPA protects educationally-related information, not records related to an alleged incident of harassment by a teacher. Such records did not implicate FEPRA because they did not contain information "directly related to a student" within the meaning of § 1232g(a)(4). "**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.* at 1023 (all emphasis added). That conclusion "is not only consistent with the language of the statute itself but also operates to protect the safety of students in the schools." *Id.* The Court explained:

> As in *Rios* [*v. Reed*, 73 F.R.D. 589, 600 (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**

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[8] Certainly, only decisions by the United States Supreme Court constitute binding authority in the state courts as to the interpretation of federal statutes. Nevertheless, this Court has characterized federal authority interpreting federal statutes as, at the least, "persuasive." *U.S., ex rel. U.S. Attorneys ex rel., E., W. Districts of Kentucky v. Kentucky Bar Ass'n*, 439 S.W.3d 136, 147 (Ky. 2014). See also *Louisville & N.R. Co. v. Home Fruit & Produce Co.*, 220 S.W.2d 558, 560 (Ky. 1949) ("Since the shipment involved in the present case was an interstate shipment and the Interstate Commerce Act, 49 U.S.C.A. is applicable thereto, the rulings of the Federal court thereon are persuasive if not binding on this court")

[9] Unpublished cases are attached together at Appendix 13.

> **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).[10] The important policy considerations identified by the *Ellis* Court are present here: had it not been for the Kernel's investigation, the University's efforts to protect its employee (described by the University as having "already practically experienced the fullest possible consequences" of his actions) and to hide his misconduct from subsequent employers and students would have succeeded. Instead, his abuse has been "discovered," which is of great "social importance". Of equal social importance is discovery of the University's response to these serious accusations.

Similarly, in *Wallace v. Cranbrook Educ. Comm.*, 2006 WL 2796135 (E.D. Mich. 2006) (Appx. 14), a teacher 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

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[10] Even if the records could qualify as "education records" as defined by FERPA, however, the *Ellis* Court noted that "FERPA is not a law which absolutely prohibits the disclosure of educational records; rather it is a provision which imposes a financial penalty for the unauthorized disclosure of educational records." *Id.* at 1023. Moreover, "the 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.'" *Id.* (Citing 20 U.S.C. § 1232(g)(b)(1) and (2)).

records were more accurately characterized as falling within FERPA's exception for documents related to employees under § 1232g(a)(4)(B)(iii).[11]

Ellis and *Wallace* 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. *Cummerlander v. Patriot Preparatory Academy*, 2013 WL 12178140, *1

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[11] Closer to home, United States District Court Judge Bertelsman 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 Plaintiff 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 (the same counsel who is now representing the University of Kentucky) 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.

Even more recently, in *Dahmer v. Western Kentucky University*, 2019 WL 1781770 (W.D.K.Y. Apr. 23, 2019), the Magistrate for the Western District of Kentucky compelled WKU to disclose documents requested by a plaintiff in a sex discrimination suit brought by WKU's former' student government president against the University. The order compelled production of all student complaints of discrimination in the SGU, all complaints of sexual harassment or inappropriate behavior against a particular faculty member, student witness statements or complaints submitted to WKU's Title IX office, and copies of any settlement agreements entered by WKU related to Title IX or sex discrimination. In each instance, the University argued that FERPA prohibited the disclosure of the relevant documents; in each instance, the judge disagreed. The Court repeatedly emphasized that "FERPA is designed to protect records relating to student academic performance, financial aid, and scholastic probation." *Id.* at *3. The Court held that the requested records were "records of fact and discipline against individuals associated with the institution." *Id.* The Court recognized that information about particular students mentioned in the records might justify a protective order to accommodate their privacy interests, but the Court rejected WKU's attempt to shield all student witness statements from production.

(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"); *Briggs v. Bd. of Trustees Columbus State Cmty. Coll.*, 2009 WL 2047899, *1 (S.D. Ohio 2009) (although the plaintiff sought complaints made by other students against an employee, the records related not to those student, but to the incidents of alleged improper conduct on the part of the employee, and so FERPA did not apply); *Young v. Pleasant Valley School Dist.*, 2008 WL 11336157, *7 (M.D. Penn. 2008) (emails containing complaints about a teacher's performance are not the types of records covered by FERPA because they are "directly related to a teacher and only tangentially related to the student"); *Matter of Hampton Bays Union Free Sch. Dist. v. Public Employment Relations Bd.*, 62 A.D.3d 1066 (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); *Brouillet v. Cowles Pub. Co.*, 791 P.2d 526 (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, the Court held that "[t]his law protects student records, not teacher records"); *National Collegiate Athletic Ass'n v. Assoc. Press*, 18 So.3d 1201 (Fla. D.C.A. 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 records" 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").

While the University discounts these multiple holdings as unpersuasive because "[s]ome of the cases do not involve open records requests" (University Brief, p. 23),[12] it cites no Kentucky case directly addressing whether the entirety of an investigative file concerning alleged wrongdoing by an employee is properly viewed as "directly related" to the student(s) who made the complaint. The University makes no real effort to distinguish *Ellis*, *Wallace*, or the other cases cited above, other than to insist that this Court should ignore the holdings of two federal courts sitting in the Sixth Circuit and instead adopt the reasoning of the Florida District Court of Appeals.[13] *Ellis* and *Wallace*, however, are

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[12] The University contends that cases interpreting FERPA in the context of a discovery request should be ignored because, in those cases, "a party at least arguably had a direct and specific need for the records and, consistent with FERPA (and unlike open records requests), could obtain a court order or subpoena for the records sought in the course of their litigation . . . ." (University's Brief, p. 13). Under the Open Records Act, however, the Kernel is not required to prove a "need" for the records. The necessity is inherent in the General Assembly's declaration of the purpose of the Act: "free and open examination of public records is in the public interest." KRS 61.871. Further, the University reads language into the "court order" exception to FERPA that is not there. Section 1232g(b)(2) permits disclosure even of "education records" if "furnished in compliance with judicial order", with no limitation as to the type of dispute in which such an order may be issued. The University cites no authority for the proposition that it could be found to have violated FERPA if it produces the documents pursuant to an order issued in this action.

[13] The University criticizes *Ellis* and *Wallace* as holding that an investigative file regarding an assault would "directly relate" to a student if the individual who commits an assault on a student is another student, but not if the alleged attacker is an employee – a result it characterizes as "absurd." But, FERPA's provisions take into account and resolve exactly such a scenario. Section 1232g(b)(6)(A) provides that the statute shall not be construed to prohibit a postsecondary educational institution from disclosing to an alleged victim of a crime the final results of a disciplinary proceeding conducted against the alleged perpertrator. And, § 1232g(b)(6)(B) permits the public to be informed of the final results of any disciplinary proceeding conducted by an institution against a student who is the

federal court decisions interpreting the scope of a federal statute. Those cases are entitled to at least as much consideration as the Florida District Court of Appeals' holding in *Rhea v. Dist. Bd. of Trustees of Santa Fe Coll.*, 109 So.3d 858 (Fla. App. 2013).

Upon a closer reading, however, even *Rhea* fails to support the University. There, the target of a university's investigation – a professor accused of misconduct – sought an *unredacted* copy of an email *from a student* complaining about the professor's inappropriate behavior. The professor had already received a redacted version of that email.

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perpetrator of a crime if the institution determines that the student violated the institution's rules or policies with respect to that crime.

When both the attacker and the victim are students, then, the attacker's status as a student will not justify the institution's refusal to disclose the results of the investigation. As explained in *U.S. v. Miami University*, 294 F.3d 797 (6th Cir. 2002), a case on which the University relies,

> These two exemptions clearly evolve from a base Congressional assumption that student disciplinary records are "education records" and thereby protected from disclosure. Working from that base, **Congress selected two particular situations in which otherwise protected student disciplinary records may be released**. And even then, Congress significantly limits the amount of information that an institution may release and the people to whom the institution may release such information. In the first provision, Congress balanced the privacy interests of an alleged perpetrator of any crime of violence or nonforcible sex offense with the rights of the alleged victim of such a crime and concluded that the right of an alleged victim to know the outcome of a student disciplinary proceeding, regardless of the result, outweighed the alleged perpetrator's privacy interest in that proceeding. Congress also determined that, if the institution determines that an alleged perpetrator violated the institution's rules with respect to any crime of violence or nonforcible sex offense, then the alleged perpetrator's privacy interests are trumped by the public's right to know about such violations. In so doing, **Congress acknowledged that student disciplinary records are protected from disclosure but, based on competing public interests, carefully permitted schools to release bits of that information while retaining a protected status for the remainder**.

Id. at 812-13 (emphasis added). While the University may consider the distinction between disciplinary records concerning a student attacker and investigative records concerning an employee attacker to be "absurd," Congress clearly felt otherwise.

Rhea does not, therefore, provide grounds for the University's characterization of its entire investigative file as an education record.

Further, the *Rhea* Court acknowledged that its characterization of the email as an "education record" departed from a line of federal cases interpreting and applying FERPA, notably including *Ellis* and *Wallace*, discussed above. Because *Ellis* and *Wallace* are federal courts' interpretation of a federal law, and because the rationale of those cases is consistent with the purposes underlying the Kentucky Open Records Act, this Court should be guided by those decisions in determining the breadth of FERPA, and not by *Rhea*.

A review of the University's Vaughn Index indicates that a great number of documents within the file cannot conceivably relate to a student at all, "directly" (as required for a document to qualify as an "education record" under FERPA) or even indirectly. The file includes not only the University's "Final Determination Letter" sent to Harwood, but also notes from interviews with his co-workers, a camera user manual, copies of University policies and procedures, emails between University representatives and Harwood regarding scheduling, notes from meetings with Harwood, and Harwood's curriculum vitae. These documents are not "education records" at all. To the extent they contain any information subject to the Act's "personal privacy" exception, then, as discussed below, redaction is not only possible but mandatory.

Before this Court, the University argues, for the first time, that the camera manual included in the investigative file is an education record because it explains that the camera's time stamp does not automatically change when moved between time zones. (UK Brief, p. 17). This assertion lends no support at all to the University's characterization of the camera manual as an education record. A camera manual necessarily directly relates to the camera

to which it pertains, not to the student who happened to own the camera. Similarly, the University defends its characterization of emails by and to witnesses as "education records" by asserting that, "at times," those emails addressed witnesses' fears regarding retaliation. This does not explain, however, how those emails (which may or may not have been sent by students in the first instance) directly relate to one or more students. The University offers no explanation at all as to why documents such as Harwood's curriculum vitae and emails between University representatives and Harwood regarding scheduling could conceivably constitute educational records "directly" relating to a student.

The University attempts to generate errors in the Court of Appeals Opinion where none exist. For example, the University complains that the Court of Appeals did not make sufficiently clear whether it had reviewed the documents that Judge Clark reviewed *in camera*. (UK Brief, p. 17). Nothing in the Opinion, however, indicates that the Court of Appeals failed to conduct such a review. Moreover, as set out above, the Court of Appeals' holding was based on the University's fundamental failure to (a) establish that all of the documents in the investigative file were exempt, (b) to separate the exempt documents from the non-exempt documents, and (c) to provide an index that offered more than an "if it's not this, then it's that" rationale for its refusal to disclose.

The University devotes an entire section of its brief to its argument that documents do not have to be maintained by a single custodian, such as a registrar, in order to qualify as an education record (UK Brief, p. 14) – a point the Kernel has never disputed. Before the Court of Appeals and now before this Court, the Kernel has instead pointed out that the interpretation of FERPA adopted in *Ellis* and *Wallace* is (unlike *Rhea*) consistent with the entirety of FERPA, including the requirement in § 1232g(b)(4)(A) that educational

institutions keep "records of access" of those records. It is based on this requirement, in part, that the United States Supreme Court recognized that individual assignments handled in individual classrooms are not "education records" under FERPA. *Owasso Indep. Sch. Distr. v. Falvo*, 534 U.S. 426, 434 (2002).[14] As explained by one state court in concluding that a report analyzing students' allegations of misconduct against an employee are not "education records" under FERPA:

> Certainly the language of the statute, though broadly written, does not encompass every document that relates to a student in any way and is kept by the school in any fashion. A pupil record is one that "directly relates" to a student and is "maintained" by the school. We agree with the Supreme Court that the statute was directed at institutional records maintained in the normal course of business by a single, central custodian of the school. **Typical of such records would be registration forms, class schedules, grade transcripts, discipline reports, and the like**.

BRV, Inc. v. Superior Court, 143 Cal. App. 4th 742, 754-55, as modified on denial of reh'g (Oct. 26, 2006) (emphasis added) (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). *Ellis* and *Wallace* are in harmony with 1232g(a)(4)(B)(i).

Further, the Court of Appeals did not, as the University claims, narrowly interpret FERPA (UK Brief, p. 20), nor have the parties ever disputed that the Kentucky Open Records Act exempts from disclosure "[a]ll public records or information the disclosure of

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[14] The University characterizes this aspect of the *Falvo* opinion as dicta. However, the Supreme Court expressly pointed to 1232g(b)(4)(A) (the records custodian provision) as supporting its interpretation of FERPA as excluding assignments from the definition of "education records." *Id.* at 434.

which is prohibited by federal law or regulation."[15] KRS 61.878(k). The Court of Appeals held that, "[b]y enacting FERPA, the United States Congress has already balanced the privacy interests and the public interest in disclosure when it comes to education records .

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[15] The Kernel is puzzled by the University's reliance on *Chicago Tribune Co. v. Bd. of Trustees of Univ. of Illinois*, 680 F.3d 1001, 1004-05 (7th Cir. 2012). That case held that, even if the Illinois Freedom of Information Act purported to command the disclosure of particular information through a statutory provision permitting non-disclosure of information "specifically prohibited from disclosure by federal . . . law", the Supremacy Clause meant that the federal law at issue would prevail. The open records request, however, remained one arising under state law, and there was no federal question subject-matter jurisdiction in federal court. For that reason, the Seventh Circuit held that "the state court is the right forum to determine the validity of whatever defenses the University presents to the Tribune's request" and **declined to express any opinion on whether the requested information fell within FERPA** and its regulations. *Id.* at 1006. In passing, however, the Court did comment on the meaning of the Illinois statute's exemption of "[i]nformation specifically prohibited from disclosure by federal or State law":

> **What does it mean to say that information is "specifically prohibited from disclosure by federal ... law"? The 1974 Act does not by itself forbid any state to disclose anything**. It says that the Secretary of Education must not make grants to state bodies whose policy allows the disclosure of student records. Any state can turn down the money and disclose whatever it wants. The most one can say about federal law is that, *if* a state takes the money, *then* it must honor the conditions of the grant, including nondisclosure. See *Owasso Independent School District v. Falvo,* 534 U.S. 426, 428, 122 S.Ct. 934, 151 L.Ed.2d 896 (2002); *United States v. Miami University,* 294 F.3d 797 (6th Cir.2002). Honoring a grant's conditions is a matter of contract rather than a command of federal law. It is of course possible that information is "specifically prohibited from disclosure by federal ... law" when the state has entered into a contractual commitment with the federal government under which disclosure is forbidden as long as the contract lasts. But it is also possible that for the purpose of § 7(1)(a) information is "specifically prohibited from disclosure by federal ... law" only when federal law is unconditional—when there is nothing the state can do (such as turning down proffered funds) to honor the pro-disclosure norm in the Illinois FOIA.

Chicago Tribune Co. v. Bd. of Trustees of Univ. of Illinois, 680 F.3d 1001, 1004–05 (7th Cir. 2012) (emphasis added).

. . ." (Opinion, p. 15). It expressly acknowledged that "Kentucky takes the view that FERPA prohibits disclosure of education records under the Open Records Act" (*id.*, p. 16), and agreed that "FERPA precludes the University from releasing to the Kernal unredacted education records contained in the Title IX investigation file" (*id.*, p. 17). The Court correctly held, however, that not all documents in the investigative file can qualify as "education records" under the meaning of FERPA, because not each and every document can be deemed to "directly relate" to a student.

Continuing its theme of responding to arguments that have not been made, the University insists that the Kernel has made a "desperate attempt" to argue that FERPA is unconstitutional. (UK Brief, p. 25). Fortunately for the Kernel, any lack of standing to make such an argument is not problematic, since this simply is not a theory that the Kernel has ever advanced. To be clear: the Kernel finds no conflict between the University's obligations under FERPA (to protect "education records", but only those documents that qualify as "education records") and the Kentucky Open Records Act.

The Kernel *has* pointed out in the lower Courts, however, that the United States Supreme Court has characterized FERPA as "spending legislation", concluding that it does not create individual rights in students with regard to their "education records." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 279, 281 (2002). Any contention on the part of the University that its compliance with the Kentucky Open Records Act will result in a catastrophic lack of funding is unfounded because such an outcome would run afoul of the limits on Congress's power under the Spending Clause: "Congress may use its spending power to create incentives for States to act in accordance with federal policies" but when "pressure turns to compulsion, the legislation runs contrary to our system of federalism." *National*

Federation of Independent Business v. Sebelius, 567 U.S. 519, 577-78 (2012). This Court has instructed that, "if there are two ways to reasonably construe a statute, one upholding the validity and the other rendering it unconstitutional, we 'must adopt the construction which sustains the constitutionality of the statute." *Caneyville Volunteer Fire Dep't v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 808 (Ky. 2009). Consequently, any interpretation that would create the type of funding doomsday imagined by the University as a result of its compliance with the Kentucky Open Records Act must be rejected pursuant to the canon of constitutional avoidance. The United States Supreme Court has rejected the University's argument that reliance on the canon of constitutional avoidance when interpreting a statute amounts to a challenge to a statute's constitutionality:

> The canon [of constitutional avoidance] is not a method of adjudicating constitutional questions by other means . . . Indeed, one of the canon's chief justifications is that it allows courts to avoid the decision of constitutional questions. It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts . . . **The canon is thus a means of giving effect to congressional intent, not of subverting it** . . . .

Clark v. Martinez, 543 U.S. 371, 381-82 (2005) (citations omitted) (emphasis added).

In any event, as the University agrees (University Brief, p. 37), statutes are to be interpreted and applied according to their plain language. Indeed, even the case law on which the University relies points out that FERPA does not directly prohibit the disclosure of anything. See, e.g., *Chicago Tribune Co.*, 680 F.3d at 1004-05 (noting that FERPA "does not by itself forbid any state to disclose anything"). Instead, it provides that

> **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, as defined in paragraph (5) of subsection (a)) of students without the written consent of their

parents to any individual, agency, or organization, other than to the following

20 U.S.C.A. § 1232g(b)(2) (emphasis added).

KRS 61.878(1)(a) applies only to records "the disclosure of which is prohibited by federal law or regulation." Indeed, a federal court sitting in the Western District of North Carolina recently held that "an educational agency does not violate FERPA by releasing records or information unless it does so pursuant to an official policy or practice." *Charlotte-Mecklenburg Bd. of Educ. v. Disability Rights of N. Carolina*, 2019 WL 7373829, *4-5 (W.D.N.C. Dec. 31, 2019). "[T]he requirement placed on the participating institution is not that it must prevent the unauthorized release of education records, . . . but that it cannot improperly release such records as a matter of policy or practice." *Id.* (quoting *Gundlach v. Reinstein*, 924 F.Supp. 684, 692 (E.D. Penn. 1996)). The University's understanding of the scope of FERPA is far broader than the statute's text can support.

B. Documents within the investigative file that do not qualify as education records cannot be withheld pursuant to FERPA without regard to whether the University believes that the Kernel knows the victims' identities.

This issue was preserved for appeal through the Kernel's Response to the University's Brief in support of its appeal to the Circuit Court (R.A. 530, 538-544), its Motion to Alter, Amend, or Vacate (R.A. 974-980), and its Brief to the Court of Appeals (Kernel Brief, p. 9-18).

The University argues at length that the entire investigative file qualifies as "personally identifiable information" under FERPA and cannot be redacted because it "reasonably believes" that the Kernel knows the identity of the victims. The University, which bears the burden of proving that the documents are not subject to disclosure under one or more exceptions to the Open Records Act (including KRS 61.878(1)(a)) took no

discovery on this or any other question in the Circuit Court. The Kernel simply does not bear the burden of proving what it does not know.

In any event, however, the University skips a step.[16] The question of whether an educational institution reasonably believes that a requester knows the identity of the student about whom an education record relates arises only if the requested document is indeed an "education record" governed by FERPA. As set out above, education records are only those records, files, and documents which "contain information **directly related** to a student . . . ." 20 U.S.C. § 1232g(a)(4)(ii) (emphasis added). They do not include records which relate exclusively to an employee of an educational agency or institution in that person's capacity as an employee. § 1232g(a)(4)(iii). This Court of Appeals correctly held that "[n]ot all records maintained by a University that relate to a student are education records", and a distinction exists between records that may pertain in some general way to a student and those that "directly" relate to that student. (Opinion, p. 17). If (as the Court of Appeals

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[16] The amicus brief submitted by Jane Does 1 and 2 similarly ignores the threshold question of the whether each document in the investigative file is an "education record" as defined by FERPA in the first instance, other than to state that they do not take a position "about whether the University may or may not have erroneously withheld certain non-education records outside the scope of FERPA." (Jane Does' Amicus Brief, p. 12). For the reasons set out above, the University's Index makes clear that the file includes numerous documents that fall well outside of that definition.

To be clear, the Kernel's effort to enforce the Open Records Act in this case is not, as the Jane Does claim, some "unbridled journalistic pursuit[ ]" (Jane Does' Amicus Brief, p. 2). The Kernel has the greatest respect for the bravery shown by the victims of Harwood's assault in coming forward. The Kernel has no desire to subject the Does to any harm or trauma, which is why it has consistently agreed that the documents in the investigative file can and should be redacted. Yet, respectfully, the Does' desire that the Kernel cease its efforts to obtain the investigative file is not a proper consideration under the Kentucky Open Records Act. Neither the Kernel, nor other students at the University, nor Kentucky taxpayers are required to accept at face value the Does' assurance (expressed only after they became represented by counsel that formerly represented the University) that the University responded to the allegations against Harwood appropriately.

found) one or more documents in the file cannot qualify as "education records", then FERPA does not apply to that document – without regard to whether it contains "personally identifiable information." As to documents that are not education records, FERPA's distinction between requesters who are believed to know the identity of the student about whom a record generally pertains and those who do not is irrelevant. Stated differently, if a record does not directly relate to a student then it is not an education record and FERPA is no longer at play.

The cases on which the University relies to argue that it cannot redact any information due to its (alleged) belief that the Kernel knows the identity of the student victims make this distinction clear; in all of those cases, the documents found to be incapable of redaction were, in the first instance, education records, e.g., records that directly related to students, not employees. In *Krakauer v. State by & through Christian (Krakauer I),* 381 P.3d 524 (Mont. 2016), the requester sought records of a University's records of an appeal of a disciplinary case against a student. *Krakauer v. State by & through Comm'r of Higher Educ.*, 445 P.3d 201, reh'g denied (Aug 7, 2019), cert. denied sub nom. *Krakauer v. Christian*, 2020 WL 871716 (2020) ("*Krakauer II*"), likewise concerned a request for "detailed information about student disciplinary proceedings" that a university initiated by against a student. *Press-Citizen Co., Inc. v. University of Iowa*, 817 N.W.2d 480 (Iowa 2012) (emphasis added), arose from the university's response (or lack thereof) to alleged sexual assaults committed by its students, and the requester did not even preserve the argument that the records fell beyond the scope of FERPA. *Id.* at n. 4. Likewise, the Kentucky Attorney General Opinion on which the University relies, In re *Brad Penn/Scott*

County Public School District, 2018 WL 4290812 (18-ORD-168), concerned a request for records of student enrollment, not records concerning faculty or staff.[17]

Rather than adhering to its obligation pursuant to KRS 61.878(4) to separate exempt from non-exempt material, the University has adopted the untenable position that every document within the investigative file constitutes an "education record" (including a camera manual, Harwood's resume, and scheduling emails). The University's bald insistence that the Kernel knows the identity of the victims cannot be invoked as a justification for refusing to disclose documents that are not education records and so are not governed by FERPA in the first instance.

II. Compliance with the Kentucky Open Records Act Does Not Require the University to Violate Constitutional Privacy Interests, and KRS 61.878(1)(a) Does Not Exempt the Entire Investigative File.

This issue was preserved for appeal through the Kernel's Response to the University's Brief in support of its appeal to the Circuit Court (R.A. 530, 535-538, 546-551), its Motion to Alter, Amend, or Vacate (R.A. 974, 981), and its Brief to the Court of Appeals (Kernel Brief, p. 19-21).

The University's second basis for refusing to disclose any document within the investigative file rests on a novel and dangerously broad interpretation of the constitutional

[17] This same distinction applies to the "Supplemental Authority" that the University sought leave to file on April 16, 2020. In *In re The Courier Journal/University of Kentucky*, 20-ORD-031, the requester sought reports, complaints, or correspondence about misconduct about a student, named in the request. The Kernel has never requested a disciplinary record about a student, but records about the University's investigation into misconduct by its own employee. Further, and in contrast to the request at issue in the Attorney General Opinion, nothing about the Kernel's request supports the University's assumption that the Kernel knows the identities of Harwood's victims.

right to privacy – one designed to allow governmental agencies to avoid transparency rather than to protect the legitimate expectations of privacy of any individual. Relying on case law characterizing the "intimate details" of a sexual assault as falling within an individual's constitutionally-protected right to privacy, the University insists that *all* facts regarding an assault, including the University's investigation of it, are protected from disclosure even where identifying information about the victim is redacted. According to the University, then, a constitutional right to privacy exists purely in the abstract.

The case cited by the University to support this new and novel right to privacy divorced from any connection to an individual, *Bloch v. Ribar*, 156 F.3d 673 (6th Cir. 1998), concerned a sheriff's release of "highly personal and extremely humiliating" details of the rape of the plaintiff by a third party. The sheriff released the information in direct response to the plaintiff's public criticism of the sheriff's handling of the case. The Court held that a governmental official's disclosure of details about a sexual assault violated the plaintiff's constitutional right to privacy where the public already knew the plaintiff's identity. Nothing in *Bloch* can be read as permitting a governmental agency (whether a law enforcement entity or a university) to hide behind an individual's constitutional right to privacy when asked to produce records **in redacted form, with personally identifying information removed**, regarding the agency's response to a crime. Indeed, the law is directly to the contrary. See *U.S. Dept. of State v. Ray*, 502 U.S. 164, 176 (1991) (although summaries of interviews with refugees implicated interviewees' privacy interests when released in unredacted form, "disclosure of such personal information constitutes only a *de minimis* invasion of privacy when the identities of the interviewees are unknown . . . .); *Torres Consulting Law Group, LLC v. National*, 666 Fed. Appx. 643 (9th Cir. 2016)

(Freedom of Information Act's exemption of personnel and medical files "which would constitute a clearly unwarranted invasion of privacy" does not apply to documents once information identifying a particular individual is redacted).

The constitutional right to privacy is not unlimited. Like the personal privacy exception to the Kentucky Open Records Act, this right must be balanced against the public's interest in the accountability of governmental entities. Indeed, in the Supreme Court cases cited by the University to the Circuit Court in support of the constitutional right to privacy, the Court found that public interests outweighed the individuals' privacy interests. *Whalen v. Roe*, 429 U.S. 589, 602-05 (upholding law that required physicians to compile prescription records containing detailed patient information for a state-run database); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977) (compelling former president to disclose personal communications to archivists in light of the important public interest in preserving the materials and other factors). Consequently, the Sixth Circuit reads *Whalen* and *Nixon* narrowly, "and will only balance an individual's interest in nondisclosure of informational privacy against the public's interest in and need for the invasion of privacy where the individual privacy is of constitutional dimension." *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1061 (6th Cir. 1998).[18]

[18] The only case cited by the University in support of a constitutional right to privacy even where identifying information is redacted, *Northwestern Memorial Hosp. v. Ashcroft*, 362 F.3d 923 (7th Cir. 2004), is distinguishable. There, a physician brought an action against the federal government to challenge the constitutionality of the Partial Birth Abortion Ban of 2003, and also planned to testify as an expert witness. The government issued a subpoena to a hospital where the physician had worked to produce medical records of certain patients on whom he had performed late-term abortions using certain controversial methods. These medical records were not public records. Further, they concerned a procedure that Congress had declared to be a crime. *Id.* at 929.

Upon redaction of personally identifying information about the victims, the victims' privacy interests become virtually non-existent,[19] leaving only consideration of the public's interest, which weighs heavily in favor of disclosure. See *Yellowstone County v. Billings Gazette*, 143 P.3d 135, 141 (Mont. 2006) (redaction of non-party individuals' names from public records sufficiently protects constitutional right to privacy, "while still allowing disclosure of relevant public information"). The public has a strong interest in ensuring that the Commonwealth's largest publicly-funded educational institution responds appropriately to accusations of sexual harassment against one of its professors. The Open Records Act was enacted to further precisely that public interest. *Medley*, 168 S.W.3d at 402.

The University falls back on its "skillful Googler" argument, making multiple references to "the internet age." The suggestion that an individual's privacy interests should preclude disclosure under the Open Records Act simply because someone, someday, somehow could use the internet to identify the individual would so inflate the statutory and constitutional privacy exemptions as to make transparency laws like the Open Records Act utterly meaningless. Information cannot be cloaked with a privacy interest based upon the unsupported hypothesis that some unknown Googler might guess the identity of the person about whom the information pertains. If the Supreme Court's holding in *Whalen v. Roe*, 429 U.S. 589 (1977), is expanded "to protect all information which may 'lead to' the discovery of private information, very little information would be free from constitutional

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[19] This is especially true in light of the victims' decision to "speak" publicly about the assaults, not only through their spokesperson to the Kernel, but also through redacted letters that were read aloud at an open University Board of Trustees meeting. The constitutional right to privacy can be waived. *Dickinson v. Chitwood*, 181 F.3d 79 (1st Cir. 1998) (citing *Doe v. City of New York*, 15 F.3d 264, 269 (2d Cir. 1994)).

protection." *Paul P. v. Farmer*, 92 F.Supp. 2d 410, 416 (D.N.J.), aff'd, 227 F.3d 98 (3d Cir. 2000). *Whalen* cannot be read so broadly, particularly where, as here, the students themselves have used redaction to protect their privacy concerns in a letter shared with the University's Board and distributed to the press.

The University theorizes that "grade school children" may use search engines and social media to find information about the two Jane Does. This possibility, however (assuming it exists), flows not from the disclosure of the requested investigative file (in redacted form) but from the victims' own decision to publicly state that they were Harwood's students and that he assaulted them. Jane Doe 1 even identified Harwood as her PhD faculty advisor in a letter presented to the University's Board and distributed to the press. (R.A. 752, 773). To the extent additional information about the Does truly can be determined by skillful internet searches, then their own disclosures - not the Kernel's reporting or Open Records requests – have made that possible.

The University's reliance on a handful of Kentucky Attorney General Opinions is also misplaced. In *In re: Kenny Jacoby/University of Kentucky*, 19-ORD-199, 2019 WL 5663409, the Attorney General concluded that the redaction of details of a sexual assault by the University of Kentucky did not violate the Open Records Act. Notably, the request identified the complainant by name; like *Bloch*, therefore, the details of the assault were already linked with a named individual. Similarly, in *In re: The Courier Journal/Louisville Metro Police Department*, 17-ORD-075, 2017 WL 1528211, the Louisville Metro Police Department responded to an open records request for "copies of the file in the murder and rape case against David H. Becker" by providing the file but redacting the names of witnesses pursuant to KRS 61.878(1)(a). The Attorney General found the redaction to be

appropriate. The Police Department had already produced the investigative file, so the "'minimal addition' of the names in dispute 'would not significantly serve the public interest in monitoring the Department's execution of its official functions.'" (citing 17-ORD-075 (2017)). *Jacoby* and *Courier Journal/Louisville Metro*, then, stand only for a proposition with which the Kernel has consistently agreed: some degree of redaction is not only permissible but entirely appropriate. Here, in contrast, the University has not even attempted to redact any of the documents in the investigative file, and the Court of Appeals properly held that its failure to do so violated the Open Records Act.

III. The University's Challenge to this Court's Holding In *University of Kentucky v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373 (Ky. 1992), Should Be Rejected.

This issue was preserved for appeal through the Kernel's Response to the University's Brief in support of its appeal to the Circuit Court (R.A. 530, 551-552), and its Brief to the Court of Appeals (Kernel Brief, p. 21-25).

Finally, the University challenges long-standing Kentucky authority holding that the "preliminary documents" exceptions to the Open Records Act, KRS 61.878(1)(i) and (j), cease to apply to documents once they are adopted by the agency as part of its action. Here, it is undisputed that Harwood has resigned. He has publicly stated that he was found "not guilty" and "the case is closed." (R.A. 553). The Index created by the University reflects that the file includes a "Final Determination Letter", as well as an Agreement and Release between the University and Harwood. (R.A. 985, 992). For nearly twenty-five years, this Court has held that "investigative materials that were only preliminary in nature lose their exempt status once they are adopted by the agency as part of its action."

University of Kentucky v. Courier-Journal & Louisville Times Co., 830 S.W.2d 373 (Ky. 1992).

The University's criticism of *Courier-Journal & Louisville Times Co.* as a "judicially created exception" to the Act (UK Brief, p. 38) fails on numerous grounds. First, this Court has long adhered to the presumption that, "when the General Assembly revises and reenacts a statute . . . , it 'is well aware of the interpretation of the existing statute and has adopted that interpretation unless the new law contains language to the contrary . . . ." *Ballinger v. Commonwealth*, 459 S.W.3d 349, 354-55 (Ky. 2015) (citing *Butler v. Groce*, 880 S.W.2d 547, 549 (Ky. 1994)). "If the legislators intend[ ] to depart from the existing statutory interpretation, it is incumbent that they use 'plain and unmistakable language' which leaves no doubt that a departure from the prior interpretation is intended.'" *Id.* Otherwise, when the legislature substantially re-enacts a statute, "**it will be deemed to have adopted the construction theretofore placed upon the statute by the court** unless the contrary is clearly shown by the language of the new enactment." *Brown v. Harrodsburg*, 252 S.W.2d 44, 45 (Ky. 1952) (emphasis added).[20]

This rule dooms the University's attack on *Courier Journal & City of Louisville*. That case was finally decided when this Court denied a petition for rehearing on June 25, 1992. The General Assembly revised and reenacted the Open Records Act in 1994 (1994

[20] In an effort to avoid this rule, the University cites a handful of United States Supreme Court cases in which concurring Justices have rejected the presumption adopted by this Court in *Ballinger*. (Brief, p. 38 n. 83). Kentucky law, not federal law, however, governs the manner in which the Kentucky Open Records Act is to be construed. See, e.g., *Finstuen v. Crutcher*, 496 F.3d 1139, 1148 (10th Cir. 2007) ("[w]e interpret state laws according to state rules of statutory construction"); *In re Tudor*, 342 B.R. 540, 554 (Bankr. S.D. Ohio 2005) ("Federal courts interpret state laws according to state rules of statutory construction").

Kentucky Laws Ch. 450 (H.B. 511)), in 2005 (2005 Kentucky Laws 94 (H.B. 59) and, with renumbering of exemptions by the Statute Reviser, 2005 Kentucky Laws 45 (H.B. 77)), in 2013 (2013 Kentucky Laws Ch. 32 (H.B. 167), and, most recently, this year (2018 Kentucky Laws 176 (H.B. 302)). On at least three occasions since the issuance of *Courier Journal & City of Louisville*, the General Assembly added to or expanded the statutory exceptions to the disclosure obligation. Through each amendment and re-enactment, however, the language of KRS 61.878(1)(i) and (j) remained exactly the same (although it was renumbered in 2005). No language indicating a desire to depart from this Court's interpretation appears in any version of the statute. The General Assembly must therefore be deemed to have adopted this Court's interpretation of the preliminary document exceptions in *Courier-Journal & City of Louisville*.

Second, this Court's decision in *Courier-Journal & City of Louisville* was based on the plain language of the Act. The Court held that "investigatory materials that were once preliminary in nature lose their exempt status once they are adopted by the agency as part of its action." 830 S.W.2d at 378. Any other conclusion would violate KRS 61.871, which provides:

> The General Assembly finds and declares that the basic policy of KRS 61.870 to 61.884 is that free and open examination of public records is in the public interest and the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others.

Id. This is the touchstone for the Courts' interpretation and application of the Act. If an exception to the Act is capable of being determined broadly or narrowly, the narrow interpretation is statutorily required to prevail every time.

This Court's holding in *Courier-Journal & City of Louisville Times* is also consistent with the plain language of the "preliminary" exemptions themselves. "Preliminary" means "[c]oming before and [usually] leading up to the main part of something happening before something that is more important, often in preparation for it". Black's Law Dictionary (10th ed. 2014). If the document becomes part of the "something that is more important", then it simply is no longer "preliminary." It is part of the final agency action. Had the General Assembly wished to redraft the preliminary disclosure exceptions following *Courier-Journal & City of Louisville* to make clear that a "preliminary" document remains protected from disclosure even after a final agency action, then it could – and would – have done so.

Third, *Courier-Journal & City of Louisville* is consistent with longstanding case law. In *Kentucky State Bd. of Medical Licensure v. Courier-Journal*, 663 S.W.2d 953 (Ky. App. 1983), a newspaper asked for all complaints filed against Kentucky physicians from 1970 to the present, as well as any memoranda, correspondence, or other supporting documentation, including reports of investigations, that related to the complaints. The Medical Licensure Board disclosed only those files related to formal complaints that had been filed by the board, and invoked the preliminary documents exception to justify its refusal to disclose the balance of the requested documents. The Court of Appeals held that "[i]t is beyond contention that complaints which 'initially spawned' any investigations of Kentucky physicians may not be excluded . . . ." *Id.* at 955. Once final action was taken by the Board, those documents were subject to public scrutiny. As to the letters, correspondence, and reports, the Court held: "If these documents were merely internal preliminary investigative materials, then they would be exempt under the statute and the

principles set out in *City of Louisville*. **However, once such notes or recommendations are adopted by the Board as part of its action, the preliminary characterization is lost, as is the exempt status.**" *Id.* (emphasis added).

Fourth, the University's characterization of the recent Court of Appeals case, *University of Kentucky v. Lexington H-L Services, Inc.*, 579 S.W.3d 858 (Ky. App. 2018), disc. rev. denied, August 21, 2019, as "overruling" *Courier-Journal & City of Louisville* is nonsensical. In that case, the Court of Appeals characterized the very argument made by the University here as "novel" but lacking any support. Citing (not overruling) *Courier-Journal & City of Louisville*, the Court held: "Records which are of an internal, preliminary and investigatory nature lose their exempt status once they are adopted by the agency as part of its action." *Id.* at 863 (citing *Courier-Journal*, 830 S.W.2d at 378). In *University of Kentucky v. Lexington H-L*, then, the Court applied a standard that was neither new nor "nebulous" (UK Brief, p. 40) but consistent with this Court's precedent.

Fifth, and finally the University's attempt to create a "panel split" within the Court of Appeals by pointing to the unpublished decision in *Martin v. Kentucky Dep't of Corr.*, 2018 WL 3090025 (Ky. App. 2018), fails.[21] There, a requester sought a copy of a Sexual

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[21] Of course, as an unpublished decision, *Martin* is not properly cited in any event unless there is no published opinion that adequately addresses an issue. CR 76.28(4)(c). In addition to *Courier-Journal & Louisville Times*, as well as *University of Kentucky v. Lexington H-L Services, Inc.*, there are numerous published opinions exhaustively addressing the "preliminary documents" exceptions. See *Palmer v. Driggers*, 60 S.W.3d 591 (Ky. App. 2001) (complaint filed against police officer was no longer subject to preliminary exception to disclosure under Act after city commission ended disciplinary hearings against officer upon his resignation); *Kentucky State Bd. of Medical Licensure v. Courier-Journal and Louisville Times*, 663 S.W.2d 953 (Ky. App. 1983) (inasmuch as final actions stemmed from complaints, complaints must be incorporated as part of final determination and so are not exempt under preliminary documents exemptions); *University of Louisville v. Sharp*, 416 S.W.3d 313 (Ky. App. 2013) (university's "communications meeting" regarding a pending merger between a university hospital and other medical

Offender Treatment Program ("SOTP") report prepared about him and submitted to the parole board, which denied the requester's request for parole. Quoting this Court's decision in *Courier-Journal & City of Louisville*, the *Martin* Court held that preliminary documents "are deemed adopted by a public agency's final determination when the 'final actions . . . taken necessarily stem from them.'" *Id.* at *2. The board's decision to deny parole did not stem from the SOTP report because the board's policies and procedures confined its decision to consideration of certain specifically enumerated factors. "These were the factors listed in the Board's order denying [the requester's] parole", not any findings, opinions, or recommendations from the requester's completion of the SOTP program. Whether under the published decision *University of Kentucky v. Lexington H-L Services, Inc*, or the unpublished decision *Martin*, however, the result in this case is the same: having taken its final action with regard to the investigation into Harwood, the investigative file is no longer "preliminary" and so cannot be withheld pursuant to KRS 61.878(1)(i) and (j).

CONCLUSION

For the reasons set forth above, the Court of Appeals Opinion and Order should be affirmed and this matter should be remanded in accordance with that Opinion and Order.

Thomas W. Miller

ATTORNEYS FOR THE APPELLEE

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entities did not constitute final agency action, and so email communications exchanged prior to the meeting were exempt from disclosure as "preliminary" under the Act).