Oklahoma Law Review

Volume 70 | Number 4

2018

# FERPA Close-Up: When Video Captures Violence and Injury

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# FERPA CLOSE-UP: WHEN VIDEO CAPTURES VIOLENCE AND INJURY

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*Abstract*

*Federal privacy law is all too often misconstrued or perverted to preclude the disclosure of video recordings that capture students victimized by violent crime or tortious injury. This misuse of federal law impedes transparency and accountability and, in many cases, even jeopardizes the health, safety, and lives of children. When properly construed, however, federal law is no bar to disclosure and, at least in public schools, works in tandem with freedom of information laws to ensure disclosure. This Article posits that without unequivocal guidance from federal administrative authorities, uncertainty regarding the disclosure of such recordings will continue to linger, jeopardizing the ability of plaintiffs to access needed information.*

*Table of Contents*



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## *I. Introduction: Zach Attack*

On a hot August day in northwest Arkansas, seven-year-old Zachary "Zach Attack" Moore left his house with his parents for a football game at the local elementary school.[1] While his parents, Brooke and Josh Moore, watched the game, Zach played with friends on the school playground, where tragedy unfolded.[2] The Moores did not see the accident. Summoned to the playground by frantic children,[3] another parent discovered Zach in desperate straits,[4] struggling to breathe and trapped beneath a metal bench weighing more than sixty pounds.[5] Doctors later diagnosed Zach as having suffered "multiple skull fractures, brain swelling and a hole in one of his arteries."[6] After being freed from the bench, Zach was medevaced to Arkansas Children's Hospital in Little Rock, 130 miles away.[7]

Zach had been an ordinarily energetic boy with his whole life ahead of him; suddenly, his parents wondered whether he would regain consciousness or even survive the day.[8] With Zach still unconscious in intensive care six days after the incident, his mother told local media, "Every single doctor that we have seen so far has asked us what has

1. Chandler Rogers, *Child Remains in ICU Six Days After Playground Accident*, 5 NEWS ONLINE (Aug. 25, 2015, 10:45 P.M.), http://5newsonline.com/2015/08/24/child-remains-in-icu-six-days-after-playground-accident/ (with video).

2. Laura Monteverdi, *Child Severely Injured in Playground Accident*, THV11 (Aug. 25, 2015, 7:15 P.M.), http://www.thv11.com/news/local/child-severely-injured-in-playground-accident/188884809.

3. Zuzanna Sitek & Laura Simon, *Video: Cedarville School District Releases Video of Playground Injury*, 5 NEWS ONLINE (Sept. 16, 2015, 5:06 P.M.), http://5newsonline.com/2015/09/16/video-cedarville-school-district-releases-video-of-playground-injury/ (story and video).

4. Rogers, *supra* note 1.

5. Sitek & Simon, *supra* note 3.

6. Rogers, *supra* note 1.

7. Monteverdi, *supra* note 2.

8. Rogers, *supra* note 1 (video).

happened, and we cannot tell them with certainty what has happened."[9] "I can't tell you how many times I've envisioned different scenarios of what could have happened or what did happen," added Zach's anguished father.[10] "I just want somebody to tell me that knows exactly what happened," he pleaded: "just tell me what happened."[11]

To determine what happened to Zach, the Moores enlisted the help of their family attorney, who, under the Arkansas Freedom of Information Act, asked the school district for a copy of the surveillance video of the playground at the time Zach was injured.[12] The school district refused the request, citing the privacy requirements of the federal Family Educational Rights and Privacy Act (FERPA).[13] When the Moores, through their attorney, made clear that their request was necessitated by a medical emergency and that they waived any of Zach's privacy interests,[14] the school district still refused,[15] insisting that federal law required the district to protect the identity of other children who appeared in the video.[16]

Zach's case is a tragic example of a legal error that has become all too common: educational institutions' improper reliance on FERPA to deny access to public records. This Article focuses on the misuse of FERPA to shield from public view videos that portray students victimized by violent crime or tortious injury. Regulations issued pursuant to FERPA, guidance from the federal Family Policy Compliance Office (FPCO), and judicial precedents all point to the propriety of public disclosure. Yet this problem persists, indicating an urgent need for unequivocal resolution.

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9. *Id.*

10. *Id.*

11. *Id.*

12. Complaint at Exhibit A, Atwell v. Foreman, No. CV-15-314 II (Ark. Cir. Ct. Sept. 4, 2015); Rogers, *supra* note 1. An electronic version of the Complaint is available at AOC PUBLIC COURTCONNECT, https://caseinfo.aoc.arkansas.gov/cconnect/PROD/public/ck_public_qry_main.cp_main_idx (last visited Mar. 17, 2018) (follow "Display case information and activities" hyperlink; then submit "17CV-15-314" in the "Case ID" window; then scroll to "Docket Entries" header and follow "Complaint" hyperlink).

13. Complaint, *supra* note 12, at Exhibit B (citing 34 C.F.R. "Part 39," probably meaning subpart A, part 99); Rogers, *supra* note 1, at 2. *See generally* 20 U.S.C. § 1232(g) (2012).

14. Verified Preliminary Draft of Complaint in *Atwell v. Foreman* at Exhibits C-D (Aug. 21, 2015), https://localtvkfsm.files.wordpress.com/2015/08/cedarville-schools-lawsuit.pdf.

15. Complaint, *supra* note 12, at Exhibit C (also found in the Verified Preliminary Draft of Complaint, *supra* note 14, at Exhibit E).

16. *Id.*; Rogers, *supra* note 1.

This Article begins in Part II by briefly exploring FERPA's history and explaining its purpose—to protect student privacy in education records.[17] Part III explains how FERPA has strayed from that purpose and too often acts as an obstacle to transparency and accountability. Part IV examines six specific FERPA-related issues arising when, in cases such as Zach's, video surveillance captures injurious events. Part V then demonstrates how disclosure of the video surveillance is consistent with FERPA. Part VI concludes.

## *II. FERPA by Design: Protecting Student Privacy*

FERPA was signed into law by President Gerald Ford on August 21, 1974.[18] For decades after its enactment, the law was known as "the Buckley amendment," named after its key Senate sponsor, Senator James L. Buckley. Using the federal spending power as its "hook" to regulate local and state authorities, FERPA prohibits the disclosure of personally identifiable information in student education records without the prior written consent of the student or, if the student is a minor, the student's parents.[19] FERPA also entitles parents or adult students "to inspect and review" the student's education records.[20] FERPA's scope is, critically, limited to "education records," a term encompassing only information "directly related to a student" and "maintained by an educational agency or institution" or its agent.[21] Excluded are records maintained for purposes of law enforcement, employment, or medical treatment.[22]

FERPA's prohibition on the disclosure of personally identifying information is further circumscribed by a dizzying array of exceptions. Principal among them—and sensibly so—is that education officials may

17. We follow FERPA's example and use the nominative *education* as an adjective to describe *records*. Otherwise we vary our adjectival usage between *education* and *educational* according to convention, both meaning *pertaining to education*, as distinct from *educational,* meaning *serving to educate*.

18. Education Amendments of 1974, Pub. L. No. 93-380, § 513, 88 Stat. 484, 571. Significant clarifying amendments were incorporated before the year was out. *See generally* U.S. DEP'T OF EDUC., LEGISLATIVE HISTORY OF MAJOR FERPA PROVISIONS, https://www2.ed.gov/policy/gen/guid/fpco/ferpa/leg-history.html (last modified Feb. 11, 2004).

19. 20 U.S.C. § 1232g(b)(1) (2012). When a student turns eighteen or attends a post-secondary educational institution, parental rights transfer to the child. 34 C.F.R. §§ 99.3, 99.5 (2017).

20. 20 U.S.C. § 1232g(a)(1)(A).

21. *Id.* §§ 1232g(a)(4)(A)(i)-(ii).

22. *Id.* §§ 1232g(a)(4)(B)(ii)-(iv).

disclose records upon a "legitimate educational interest;"[23] thus, for example, teachers may conference with a second teacher about a student's performance to develop a coordinated support plan. Another important exception concerns the disclosure of "directory information."[24] Subject to a student's opt out, an educational institution may disclose a "student's name, address, telephone listing, date and place of birth, major field of study, . . . dates of attendance, [and] degrees and awards received."[25]

Other FERPA exceptions pertain to law enforcement, legal process, consent, and emergencies. A limited exception allows disclosures to juvenile justice systems only "to effectively serve, prior to adjudication, the student whose records are released."[26] The law authorizes compliance with judicial orders and subpoenas.[27] A minor's parents always may consent to disclosure, "specifying records to be released, the reasons for such release, and to whom."[28] Pursuant to a 1998 amendment,[29] FERPA allows the disclosure of both personally identifying information and the disposition of the adjudication of a student in the event of a specified violent crime or "nonforcible sex offense."[30]

An emergency exception allows record disclosures "subject to regulations of the Secretary [of Education], in connection with an emergency, [to] appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons."[31] Regulations accordingly permit—but do not require—an educational

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23. *Id.* § 1232g(b)(1)(A).

24. *Id.* §§ 1232g(b)(1)-(2).

25. *Id.* § 1232g(a)(5)(A). "Directory information" also includes "participation in officially recognized activities and sports, weight and height of members of athletic teams, . . . and the most recent previous educational agency or institution attended by the student." *Id.*

26. *Id.* § 1232g(b)(1)(E)(ii)(I). The release must be authorized by state law, and subsequent disclosure is prohibited. *Id.* § 1232g(b)(1)(E)(ii)(II). A slightly more permissive provision applies to state laws enacted before November 19, 1974. *See id.* § 1232g(b)(1)(E)(i).

27. *Id.* §§ 1232g(b)(1)(J), (2)(B).

28. *Id.* § 1232g(b)(2)(A).

29. Higher Education Amendments of 1998, Pub L. No. 105-244, § 951, 112 Stat. 1581, 1835.

30. 20 U.S.C. § 1232g(b)(6)(B). Disclosure can be made generally—meaning to anyone who requests the information—if the accused is found in violation of institutional rules; otherwise, disclosure can be made to the victim only. *Id.* Specified violent crimes include arson, assault, burglary, homicide, vandalism, kidnapping, robbery, and rape; "nonforcible sex offense" refers to statutory rape and incest. 34 C.F.R. § 99.39 (2017).

31. 20 U.S.C. § 1232g(b)(1)(I).

institution to "take into account the totality of the circumstances" to determine whether an "articulable and significant threat to the health or safety of a student or other[s]" warrants disclosure.[32] In an enforcement letter from the FPCO, the Department of Education (DOE) further restricted this exception. Citing legislative history, the letter offered as exemplary emergencies an "outbreak of an epidemic"; a "case of a smallpox, anthrax or other bioterrorism attack"; or the September 11 terrorist attack.[33] Thus, a prerequisite to disclosure is "a *specific situation* that presents *imminent danger* to students or other members of the community, or that requires an *immediate need* for information in order to avert or diffuse serious threats to the safety or health of a student or other individuals."[34]

FERPA on its face provides no private cause of action as a remedy, an omission the United States Supreme Court confirmed in *Gonzaga University v. Doe* in 2002.[35] Prior to *Gonzaga University*, some federal courts entertained 42 U.S.C. § 1983 civil rights actions predicated on FERPA violations.[36] But the Court reasoned that the plain language of FERPA, which provides that "[n]o funds shall be made available [to non-compliant entities],"[37] constrains government funding of educational institutions *qua* institutions and provides for no other enforcement mechanism, much less an individual cause of action.[38] Section 1983 language from pre-*Gonzaga University* case law lingers,[39] but the Court's

32. 34 C.F.R. § 99.36(c) (2017); *accord* U.S. DEP'T OF EDUC., FERPA AND THE DISCLOSURE OF STUDENT INFORMATION RELATED TO EMERGENCIES AND DISASTERS 4 (June 2010), https://www2.ed.gov/policy/gen/guid/fpco/pdf/ferpa-disaster-guidance.pdf [hereinafter EMERGENCIES AND DISASTERS].

33. Letter from LeRoy S. Rooker, Dir., U.S. Dep't of Educ. Family Policy Compliance Office, to Strayer University (Mar. 11, 2005), https://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/strayer031105.html) [hereinafter Letter to Strayer University] (citing LeRoy S. Rooker, U.S. Dep't of Educ., Recent Amendments to Family Educational Rights and Privacy Act Relating to Anti-Terrorism Activities (Apr. 12, 2002), https://www2.ed.gov/policy/gen/guid/fpco/pdf/htterrorism.pdf; Joint Statement in Explanation of Buckley/Pell Amendment, 120 CONG. REC. S21,489 (Dec. 13, 1974)).

34. Letter to Strayer University, *supra* note 33.

35. 536 U.S. 273, 279 (2002); *see also* Wiggins v. Martin Cty. Bd. of Educ., No. 4-04-CV-17-FL(4), 2004 WL 3312156, at *3 (E.D.N.C. Aug. 18, 2004).

36. *E.g.*, Tarka v. Cunningham, 917 F.2d 890, 891 (5th Cir. 1990); Fay v. S. Colonie Cent. Sch. Dist., 802 F.2d 21, 33 (2d Cir. 1986); Lewin v. Med. Coll. of Hampton Roads, 931 F. Supp. 2d 443, 444 (E.D. Va. 1996).

37. 20 U.S.C. §§ 1232g(a)(1)(A), (a)(2), (b)(1), (b)(2), (e) (2012).

38. *Gonzaga Univ.*, 536 U.S. at 290.

39. *See* Lee v. S. Univ. Law Ctr., Civ. Action No. 07-632-JVP-SCR, 2008 WL 1995056, at *4 (M.D. La. May 7, 2008).

decision seems to leave no room for such a theory of liability (at least absent some other violation of fundamental rights).[40] FERPA is therefore enforceable only by the withholding of federal funding.

The FPCO, however, has strongly preferred collaborative rehabilitation to contempt.[41] Even if a school were to violate FERPA in one instance, the law authorizes the withholding of funds only for a "policy or practice" of violation.[42] A Connecticut court accordingly reasoned that "[d]isclosure on isolated occasions," with justification, would not necessarily place a state university in jeopardy of FERPA enforcement, even if the disclosures discretely violated the law.[43]

In the wake of Watergate, the authors of FERPA were concerned about government abuse that might be abetted by secretly accumulated personal data.[44] Thus the twin provisions of access and privacy complement one another. Education officials cannot maintain and use education records without the student understanding the basis for any adverse treatment and having an opportunity to seek redress. At the same time, educational institutions cannot exploit private information to impugn a student's reputation, to invade a student's privacy through disclosure, or to extort a student's submission upon threat of disclosure. Despite these straightforward objectives, a complex latticework of regulation, administrative guidance, and customary practice has arisen around FERPA in the four decades since its enactment.

It is likely Senator Buckley and his principal cosponsor, Senator Claiborne Pell,[45] would scarcely recognize the administrative thicket they

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40. *E.g.*, *Wiggins*, 2004 WL 3312156, at *3.

41. *See* Lynn M. Daggett, *FERPA in the Twenty-First Century: Failure to Effectively Regulate Privacy for All Students*, 58 CATH. U. L. REV. 59, 64-66 (2008).

42. 20 U.S.C. §§ 1232g(b)(1), (2).

43. Haughwout v. Tordenti, No. CV166032526, 2016 WL 7444083, at *10 (Conn. Super. Ct. Nov. 17, 2016), *cited in* Frank LoMonte, *A (Rare) Faithful Reading of FERPA: Court Says Federal Privacy Law Doesn't Penalize One-Time Release of Records*, STUDENT PRESS L. CTR. (Dec. 28, 2016), http://www.splc.org/blog/splc/2016/12/haughwout-ccsu-ferpa-ruling.

44. Karen J. Stone & Edward N. Stoner, Revisiting the Purpose and Effect of FERPA 2-3 (Stetson Univ. Coll. of Law 23rd Annual Nat'l Conference on Law and Higher Educ., Feb. 2002), http://www.stetson.edu/law/academics/highered/home/media/2002/Revisiting_the_Purpose_of_FERPA.pdf (quoting 120 CONG. REC. 36,528-29 (1974) (entering into record Diane Divokey, *Cumulative Records: Assault on Privacy*, N.J. EDUC. ASS'N REV., Sept. 1973, at 16-18, on behalf of Sen. Buckley)).

45. At the time of this writing, Senator Buckley is ninety-five years old, but has turned his attention to the bigger political picture, having published a book in 2014, *Saving*

helped to create. Amid this complexity, commentators have found fault with FERPA for causing unintended harsh consequences as a result of its lawful invocation and with educational institutions for misuse and abuse of the statute.[46] Certainly Senators Buckley and Pell would not recognize FERPA at all were they to see it employed as a means to conceal official misconduct—or worse, to enable the victimization of the students whose rights the law was designed to protect.

## *III. FERPA Upside Down: Protecting Educational Institutions Rather Than Students*

Despite the best intentions of FERPA's drafters to create a law to protect the privacy of children and students—and despite the inclusion of affirmative access provisions—FERPA has become a go-to device for educational institutions to shield information against access by students and their parents. FERPA is even interposed to shield information from disclosure when a child has been the victim of a crime or serious injury on campus.

This misuse of the law is especially concerning when an employee of the educational institution might be the perpetrator of the crime or the cause of the student's injury. Video surveillance creates public records that can be crucial for investigators and parents. For instance, when a bus driver was accused of inappropriately touching a thirteen-year-old girl with special needs in Fairfax, Virginia in 2014, an attendant tipped off investigators to check bus surveillance video.[47] By the time the surveillance footage was requested, the video from that day had been recorded over.[48] Further review of surveillance video, however, captured the bus driver assaulting the same student two days later, and the driver was charged with assault.[49]

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*Congress from Itself: Emancipating the States and Empowering Their People*. Senator Pell passed away in 2009.

46. *See, e.g.*, Daggett, *supra* note 41. *See generally* Ann Maycunich, FERPA: An Investigation of Faculty Knowledge Levels and Organization Practices at Three Land-Grant Universities (2002) (unpublished Ph.D. dissertation), https://lib.dr.iastate.edu/cgi/viewcontent.cgi?article=2010&context=rtd.

47. Julie Carey, *Ex-Fairfax County School Bus Driver Charged With Assault of Special Needs Student*, NBC4 WASH. (Oct. 14, 2014, 12:57 P.M.), http://www.nbcwashington.com/news/local/Ex-Fairfax-Co-School-bus-driver-charged-assault-of-special-needs-student—279154611.html.

48. *Id.*

49. *Id.*

Sadly, Zach's story[50] is far from the first instance of a school wrongly using FERPA to shield information from disclosure—not even in Arkansas. In Russellville, Arkansas, in 2015, a nine-year-old boy with Down's Syndrome and other disabilities was traveling on a special-education bus when, court documents alleged, his aide attempted to suffocate him, placing "a glove or tissue" over his mouth.[51] The incident was recorded on bus surveillance video, which investigators reviewed.[52] The aide was charged with and pleaded guilty to aggravated assault.[53] The boy's mother was able to see the video, which she said showed her son "being suffocated," not "just once[;] I counted 15 times."[54] But the school district refused her request for a copy of the public record.[55] "I want the community to see what my son was put through," she explained.[56] The Russellville School District claimed that FERPA precluded release of the video to the parent, even though the video had been released to the Department of Human Services, the Sheriff's Office that investigated the incident, and the prosecutor's office.[57] The video was later obtained by the parent during the course of litigation against the school district.[58]

Student privacy concerns have been similarly invoked to obstruct media investigation of matters of public interest.[59] In 2013, sixteen-year-old

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50. *See supra* Part I.

51. *School District Denies Parent Bus Video of Bus Aide Assaulting Her Child*, ARK. MATTERS (KARK NEWS) (Aug. 28, 2015), http://www.arkansasmatters.com/news/local-news/school-district-denies-parent-bus-video-of-bus-aide-assaulting-her-child [hereinafter *School District Denies Parent*].

52. Michelle Storment, *Bus Aide Charged with Aggravated Assault After Restraining Special Needs Child*, RIVER VALLEY LEADER (May 13, 2015), http://www.rivervalleyleader.com/news/article_c24e3b04-f9b1-11e4-b579-b7c4fb336a78.html.

53. State v. Oliver, No. 58CR-15-273 (Ark. Cir. Ct. Oct. 7, 2015). The case is available in electronic format at AOC PUBLIC COURTCONNECT, https://caseinfo.aoc.arkansas.gov/cconnect/PROD/public/ck_public_qry_main.cp_main_idx (last visited Mar. 17, 2018) (follow "Display case information and activities" hyperlink; then submit "58CR-15-273" in the "Case ID" window). Oliver was sentenced to forty-eight months' probation and an $850 fine. Sentencing Order, *Oliver* (No. 58CR-15-273).

54. *School District Denies Parent*, *supra* note 51.

55. *Id.*

56. *Id.*

57. *Id.*

58. Order of Dismissal ¶ 3, Segura v. Russellville Sch. Dist., No. H-15-19 (Ark. Dep't of Educ. Aug. 31, 2015). Co-author Cone served as counsel for plaintiff Segura. The case was settled prior to hearing.

59. *See generally* Konrad R. Krebs, Case Note, ESPN v. Ohio State*: The Ohio Supreme Court Uses FERPA to Play Defense for Offensive Athletic Programs*, 20 JEFFREY S.

Damon Janes, a football player at the public Westfield Academy and Central School near Buffalo, New York, collapsed on the field.[60] He died three days later from a brain injury, and his death kicked off another round of debate over the safety and inherent risks in American football, especially for youth.[61] Janes's parents sued the school districts on various theories, including failure to establish baseline cognitive function for student athletes and inadequate training of staff to recognize signs of a brain injury.[62] When the *Buffalo News* sought copies of video recordings of football games from the aborted season—games obviously held in plain view of an invited public—officials refused, citing FERPA.[63] "Ridiculous," responded both Student Press Law Center Executive Director Frank D. LoMonte and New York State Committee on Public Access to Records Executive Director Robert J. Freeman.[64] The *News* quoted the Brocton Central School Superintendent, who justified the district's refusal to disclose records on the grounds that "[t]his is really sensitive stuff."[65]

Congress has tangled with educational institutions before over their stranglehold on information. In 1986, Lehigh University student Jeanne Clery was raped and murdered by a former student.[66] Her parents alleged in a successful lawsuit that the incident would not have happened had they known about the risk of violent crime on campus.[67] At the instigation of the non-profit they founded, federal law was amended to require affirmative disclosure of campus crime statistics.[68] FERPA was amended specifically to

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MOORAD SPORTS L.J. 573, 575-76 (2013) (discussing university use of FERPA to hide athletic scandals).

60. Matthew Spina, *Parents of High School Football Player Who Died File Claim*, BUFFALO NEWS (Jan. 27, 2014), http://buffalonews.com/2014/01/27/parents-of-high-school-football-player-who-died-file-claim/.

61. *Id.*

62. Matthew Spina, *Suit Filed in Football Player's Death Faults School Districts, Medical Response*, BUFFALO NEWS (Nov. 2, 2014), http://buffalonews.com/2014/11/02/suit-filed-in-football-players-death-faults-school-districts-medical-response/.

63. Spina, *supra* note 60.

64. *Id.*

65. *Id.*

66. *E.g.*, Rob O'Dell & Anne Ryman, *'It Means Her Life Was Not in Vain': The Tragedy That Gave Birth to the Clery Act*, AZ CENTRAL (ARIZ. REPUBLIC) (Apr. 15, 2016, 7:52 P.M.), http://www.azcentral.com/story/news/local/arizona-investigations/2016/04/15/tragedy-that-gave-birth-to-clery-act/82811052/.

67. *See Lehigh to Pay in Suit Filed Over Slaying*, N.Y. TIMES (July 27, 1988), http://www.nytimes.com/1988/07/27/us/education-lehigh-to-pay-in-suit-filed-over-slaying.html.

68. *See* 20 U.S.C. § 1092(f) (2012).

allow the disclosure of disciplinary outcomes to victims of violent crimes.[69] Despite this clear congressional directive, FERPA remains a sticking point in public information released about sexual assaults on campus. A 2014 investigation by the *Columbus Dispatch* and Student Press Law Center documented an alarming trend of secret campus justice imposing light penalties for violent crimes.[70] Worse, 85 of 110 colleges surveyed failed to respond at all to investigators' requests for information, which FERPA did not shield from disclosure.[71]

The Student Press Law Center interviewed FERPA's principal sponsor, former Senator James L. Buckley, to clarify the intent behind the law. "If someone commits a crime, I don't see any rationale for treating students differently than you treat anyone else," Buckley said.[72] "I hope somebody in Congress will take an interest in the entire law and rewrite the blessed thing to make it clear that you are talking about certain narrow areas of information."[73] He characterized the shielding of "vast numbers of non-academic records" as "twisted."[74]

### *IV. FERPA Up Close: Access to Video Surveillance*

The DOE charges the FPCO with the enforcement and policy administration of FERPA as it relates to educational institutions. In recent years, much confusion in the interpretation of FERPA has arisen from the proliferation of electronic media that were scarcely imaginable when FERPA was written.[75] This situation has only been further complicated by video surveillance and digital media, which have created exponentially greater volumes of data in which students are personally identifiable. Widely reported incidents of violence in schools have compounded the problem, amplifying public demands for security and accountability. FPCO

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69. Student Right-to-Know and Campus Security Act, Pub. L. No. 101-542, § 203, 104 Stat. 2381, 2385 (1990) (amending 20 U.S.C. § 1232g(b)(6)).

70. *College Disciplinary Boards Impose Slight Penalties for Serious Crimes*, COLUMBUS DISPATCH (Columbus, Ohio) (Nov. 23, 2014, 12:01 A.M.), http://www.dispatch.com/content/stories/local/2014/11/23/campus-injustice.html.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *See, e.g.,* Letter from LeRoy S. Rooker, Dir., U.S. Dep't of Educ. Family Policy Compliance Office, to B. Alan McGraw (Oct. 7, 2005), http://familypolicy.ed.gov/content/letter-tazewell-county-va-school-board-re-unauthorized-access-education-record-systems (analogizing authorized electronic access to student records to access to paper records in conventional mailbox).

policy guidance, however, has not kept up with pleas for guidance from educational institutions, parents, and concerned advocates.

Despite the lack of guidance, it is clear that the video surveillance records contemplated by this Article—namely, those that capture injury to students, whether intentional or accidental—are rarely properly withheld from disclosure under FERPA, especially when requested by or on behalf of the injured party. A review of the legal issues that arise in cases of intentional or accidental injury on campus reveals thin grounds on which to refuse disclosure and ample bases supporting disclosure.

*A. Privacy in Student Images*

Initial confusion stems from misunderstandings regarding what records FERPA *does* shield from disclosure. FERPA is not a "right of publicity" statute,[76] and it does not protect a student's likeness per se against exploitation. FERPA also is not a European-style data protection law, which is implicated upon mere capture of a person's image.[77] FERPA protects students' personally identifying information in a school's own education records.[78] Biometric data, which may be represented in a photographic or video image, are included.[79]

But the foremost goal of FERPA is protection of *educational* privacy.[80] That definitional *sine qua non* is often forgotten in hyper-technical readings of FERPA and its regulations. As described in Part II,[81] the statutory definition of education records, reinforced by regulation,[82] awkwardly hastens the analysis to focus on a two-part test, the twin pillars of student identification and record custodianship. As such, the forest is often missed for the trees; only *education* records—not *all* records—are being defined and protected. Even the FPCO's expert guidance has become muddled for missing this very point, as discussed below with respect to law enforcement records and captured images of multiple students.[83]

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76. *E.g.*, N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 2011).

77. *See*, *e.g.*, Case C-212/13, Ryneš v Úřad, 2014 E.C.R. 2428 (holding data protection law applicable to home video surveillance). *See generally* Richard J. Peltz-Steele, *The Pond Betwixt: Differences in the US-EU Data Protection/Safe Harbor Negotiation*, J. INTERNET L., July 2015, at 1, 15, 16 (outlining EU data protection framework).

78. 20 U.S.C. § 1232g(a)(4) (2012); 34 C.F.R. § 99.3 (2017) ("education record").

79. 20 U.S.C. § 1232g(a)(4); 34 C.F.R. § 99.3 ("biometric record" and "record").

80. *E.g.*, Red & Black Pub. Co. v. Bd. of Regents, 427 S.E.2d 257, 261 (Ga. 1993).

81. *See supra* text accompanying note 21.

82. 20 U.S.C. § 1232g(a)(4); 34 C.F.R. § 99.3 ("education record").

83. *See infra* Sections IV.B & IV.E (regarding definitional threshold of "education record").

By default, subject to a student's opt out, FERPA expressly excludes from its scope mundane data such as "directory information."[84] Directory information includes a "student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received."[85] The DOE has updated this exclusion to include e-mail addresses and photographs.[86]

As these definitions suggest, FERPA was not designed to halt the publication of student directories or the athletic rosters and graduation announcements that appear in local newspapers. Unless a parent or adult student affirmatively opts out of disclosure, entering a U.S. educational institution is not like vanishing from the Muggle world to King's Cross Platform 9¾ en route to Hogwarts.[87] FERPA has not compelled schools to remove team photos from trophy cases,[88] though FERPA is often misused by schools to conceal athletic scandal.[89] FERPA has not compelled schools to suppress news releases about student achievements,[90] though schools have lawfully protected information such as a student's financial need as the basis of a scholarship award.[91] Images captured by third parties, including student media, camera-toting parents, and local news crews at Friday night football, are not records of the educational institution and, therefore, are not covered by FERPA.[92]

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84. 20 U.S.C. § 1232g(a)(5)(A).

85. *Id.*

86. 34 C.F.R. § 99.3 ("directory information" part (a)).

87. *See* HARRY POTTER AND THE SORCERER'S STONE (Warner Bros., Heyday Films & 1492 Pictures 2001).

88. *Cf.* Paul J. Batista, *Student Athletes and the Buckley Amendment: Right to Privacy Does Not Include the Right to Sue*, 14 MARQ. SPORTS L. REV. 319, 331-35 (2004) (describing FERPA applicability to student athletes and NCAA requirement of express authorization to disclose data).

89. Michael Bragg, *FERPA Defense Play: Universities Often Cite the Federal Student Privacy Law to Shield Athletic Scandals*, STUDENT PRESS L. CTR. (Mar. 31, 2015, 11:14 A.M.), http://www.splc.org/article/2015/03/ferpa-defense-play.

90. David Chartrand, *FERPA Tales: It Doesn't Always Apply*, *in* REPORTER'S GUIDE TO FERPA: NAVIGATING THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (Soc'y Prof'l Journalists ed., n.d.), http://www.spj.org/ferpa5.asp.

91. *E.g.*, Sonny Albarado, *Introduction: FERPA Often Misconstrued*, *in* REPORTER'S GUIDE TO FERPA: NAVIGATING THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT, *supra* note 90.

92. *See Naming Names: Identifying Minors*, STUDENT PRESS L. CTR. (Jan. 2011), http://www.splc.org/article/2011/01/naming-names-identifying-minors.

That is not to say that photographic or video images cannot become education records shielded from disclosure by FERPA. On one end of the spectrum, a school might capture video of students making class presentations, plainly FERPA-protected. At the other end of the spectrum, video that merely documents or confirms directory information, such as athletic participation or receipt of an award, is far removed from the intended scope of FERPA's protection. A New York court in *Jacobson v. Ithaca City School District* concluded that a video recording of a protestor on campus was not an education record, despite the appearance of other students on the recording.[93] "The mere fact that information may be held by an educational agency is insufficient to make it an educational record," the court explained.[94] The school district failed to tie the recording "in any way to the educational performance of the students depicted" or show "that copies of the video recordings are maintained with, referenced in, or indexed to, any individual student files maintained by the central registrar or custodian of student records."[95] Routine video surveillance presents an arguable case for secrecy at best and falls decidedly closer to the non-educational pole of the spectrum.

*B. Campus Law Enforcement*

FERPA is also no bar to the disclosure of campus law enforcement records.[96] By definition, FERPA excludes from its scope "records [1] maintained by a law enforcement unit of the educational agency or institution [2] that were created by that law enforcement unit [3] for the purpose of law enforcement."[97] Confusion about the applicability of the exclusion arises from the fact that student misconduct sometimes reverberates into both of the somewhat overlapping, somewhat bifurcated spheres of institutional policy and law enforcement. At one pole, an offense

93. 39 N.Y.S.3d 904, 907 (Sup. Ct. 2016).

94. *Id.*

95. *Id.*

96. This issue is sometimes confused with access to campus law enforcement under state freedom of information (FOI) law. Public access to campus law enforcement records at private schools has been a challenging subject in FOI law when private-sector units are empowered to act like police, implicating citizens' rights and the public interest in accountability. *See generally, e.g.*, Chava Gourarie & Jonathan Peters, *Why Private-College Police Forces Are a New Front in the Fight Over Public Records*, COL. JOURNALISM REV. (Feb. 29, 2016), https://www.cjr.org/united_states_project/private_police_records.php. That issue is unrelated to the operation of FERPA and, at any rate, leaves no room for ambiguity when public schools are concerned.

97. 20 U.S.C. § 1232g(a)(4)(B)(ii) (2012).

such as cheating is handled as an educational matter only, a question of institutional policy, without implicating school security or law enforcement. The law enforcement exclusion, then, does not apply. Cheating accomplished by a break-in,[98] however, implicates both institutional policy and law enforcement. And even at the opposite pole, an offense such as vandalism or assault, which presents plainly as a law enforcement matter, may also precipitate collateral consequences under educational or institutional policy.[99] Records within the law enforcement unit remain excluded from FERPA, notwithstanding the existence of educational or other institutional policy records concerning the same matter.

In one of the few cases of video surveillance and FERPA to reach a final decision, a New York trial court had no trouble concluding that a video-surveillance recording was not an education record subject to FERPA. The 2005 case, *Rome City School District Disciplinary Hearing v. Grifasi*, arose over video of a fight involving two students.[100] After reviewing the definition of a "law enforcement unit" in FERPA, the court concluded summarily that "the videotape in question . . . was recorded to maintain the physical security and safety of the school building" and in no way related to "the educational performance of the students."[101] Thus, FERPA did not preclude disclosure.[102] This analysis properly recognized *education* as an essential element in a record's creation and purpose, as discussed above.[103]

Unfortunately, *Rome City* is diluted as precedent by a confounding FPCO guidance letter from 2004 concerning the problem of multiple students.[104] The 2004 letter summarily treated a video recording as an

98. *E.g.*, Christopher Mele, *Student Arrested After Crawling Into a Duct to Steal an Exam*, N.Y. TIMES (May 4, 2017), https://www.nytimes.com/2017/05/04/us/university-of-kentucky-stolen-test.html.

99. *See, e.g.*, Norwood v. Slammons, 788 F. Supp. 1020, 1022-23 (W.D. Ark. 1991) (rejecting for lack of standing plaintiff's theory that record subjects waived FERPA privacy and therefore not reaching question of FERPA applicability to university judicial board records regarding sexual assault allegations against student athletes); *'Prank' Leads to Criminal Charges; Nearly Half of Seniors to Miss Graduation*, WGN TV (May 11, 2016, 4:25 P.M.), http://wgntv.com/2016/05/11/prank-leads-to-criminal-charges-nearly-half-of-seniors-to-miss-graduation/.

100. 806 N.Y.S.2d 381, 382 (Sup. Ct. 2005).

101. *Id.* at 383.

102. *Id.*

103. *See supra* Section II.A.

104. Letter from FPCO to Berkeley County School District (Feb. 10, 2004) (on file with authors). This oft-cited letter is so difficult to locate that we wonder whether every attorney or judge who cites it has actually read it. The letter, which we could not find in the FPCO online public library, is often cited as "7 FAB 40" or "104 LRP 44490." "FAB" stands for

education record, citing the twin "pines" of student identification and school custodianship, notwithstanding the "forest" of educational creation and purpose.[105] As discussed later in this Section and again in Section IV.E, we believe this conclusion to be erroneous, and the FPCO itself might no longer employ the same approach. Nevertheless, the Utah Court of Appeals, in *Bryner v. Canyons School District*, permitted a school to rely on the 2004 letter to conclude that video recordings were education records based only on students' personal identifiability and school custodianship.[106] In a footnote, the court dismissed the significance of law enforcement creation and purpose, instead pointing to regulatory language to hold as dispositive a record's custodianship in an education unit.[107]

Classification can become an especially sticky problem when records are shared across the education-law enforcement boundary—for example, when suspicious circumstances in an educational context lead to a report to law enforcement.[108] DOE regulations provide that a record from the education side of the divide does not lose privacy protection as a law enforcement record merely because it is handled and employed by a law enforcement

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"FERPA Answer Book" and refers to a collection of FPCO guidance documents in a back edition of the loose-leaf *What Do I Do When . . . The Answer Book on the Family Educational Rights and Privacy Act (FERPA)*, published by "LRP," which is LRP Publications, a Florida-based media company. *See What Do I Do When . . .* , LRP PUBLC'NS, https://www.shoplrp.com/product_p/300086.htm (last visited Aug. 4, 2017). We could not find *What Do I Do When . . .* in any library via WorldCat. We thank attorney Thomas E. Myers, see *infra* notes 187-196 and accompanying text, who shared a copy of the 2004 letter with our diligent UMass Law librarian, Jessica Almeida. We subsequently confirmed that the letter is available via subscription to LRP's proprietary resource website, SPECIAL ED CONNECTION, https://www.specialedconnection.com/LrpSecStoryTool/splash.jsp (last visited Aug. 4, 2017). While we have no doubt about the legitimacy of the 2004 letter as an official FPCO document, we suggest that its obscurity should subtract substantially from its precedential value.

105. Letter from FPCO to Berkeley County School District, *supra* note 104.

106. 2015 UT App 131, ¶¶ 21–26, 351 P.3d 852, 858-59 (2015), *cert. denied*, 366 P.3d 1213 (Table) (Utah 2016), *cert. denied*, 137 S. Ct. 49 (Mem) (2016).

107. *Id.* ¶ 26 n.5, 351 P.3d 859 n.5 (citing 34 C.F.R. § 99.8(b)(2)).

108. LeRoy S. Rooker, U.S. Dep't of Educ., Recent Amendments to Family Educational Rights and Privacy Act Relating to Anti-Terrorism Activities (Apr. 12, 2002), https://www2.ed.gov/policy/gen/guid/fpco/pdf/htterrorism.pdf [hereinafter Recent Amendments] ("Of course, a school official, based on his or her own observations, may notify law enforcement officials of suspicious activity or behavior."); *cf.* Ohio v. Clark, 135 S. Ct. 2173, 2182 (2015) (holding that teachers who performed mandatory reporting of possible child abuse were not converted to law enforcement officials for Confrontation Clause purposes when teachers' primary objective was protection of child and not "uncovering and prosecuting criminal behavior").

unit.[109] Indeed, under FERPA's own terms, such records are not created by the law enforcement unit. Regardless, FERPA may permit sharing education records with law enforcement units upon a range of circumstances. For example, after shootings in Arizona and Virginia, the FPCO specifically contemplated in a 2011 policy document that campus education personnel and law enforcement authorities may share "legitimate education interests" in student information, even in circumstances shy of emergency.[110]

Of course, the converse remains true, too. In a 1991 decision, *Bauer v. Kincaid*, a federal court evinced little patience for the argument that records created by campus law enforcement and shared after redaction with education officials were private under FERPA merely because their disclosure would reveal students' names, which are private in collateral education records.[111] The court relied heavily on statements by Senator Buckley in FERPA's legislative history, such as his concern over "ethnic attitudes, personality tests, family life, values and social development," and "potentially prejudicial and anecdotal comments and factual inaccuracies [in] school records."[112] In contrast, the court concluded, "criminal investigation and incident reports" are not "educationally related information" within FERPA.[113] Law enforcement records, "although they may contain names and other personally identifying information, . . . relate in no way whatsoever to . . . individual student academic performance, [or] financial aid or scholastic probation."[114] The FPCO reasoned similarly in a 2006 advice letter, in which the office pointed again to record creation and purpose as the touchstone of the law enforcement exclusion.[115] Records

109. 34 C.F.R. § 99.8(c)(2) (2017); *see also* Belanger v. Nashua, N.H., Sch. Dist., 856 F. Supp. 40, 50 (D.N.H. 1994) (holding selected district attorney juvenile court files "education records" under FERPA when parent sought access under FERPA, and district attorney was not a "law enforcement" unit of the educational institution that would exclude records from FERPA).

110. EMERGENCIES AND DISASTERS, *supra* note 32, at 6.

111. 759 F. Supp. 575, 591 (W.D. Mo. 1991).

112. *Id.* at 590.

113. *Id.* at 591.

114. *Id.*; *cf.* Jacobson v. Ithaca City Sch. Dist., 39 N.Y.S.3d 904, 908 (Sup. Ct. 2016) (holding that video recordings are not educational records because they are not "indexed to . . . any individual student files maintained by the central registrar or custodian of student records").

115. Letter from LeRoy S. Rooker, Dir., U.S. Dep't of Educ. Family Policy Compliance Office, to Montgomery County Public Schools (Feb. 15, 2006), https://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/montcounty0215.html [hereinafter Montgomery County Public Schools Letter]

identifying student witnesses were therefore excluded from FERPA when witness statements were collected by school security in the course of an investigation into "possible violation of criminal laws," even when school security performed dual disciplinary and law enforcement roles.[116]

DOE regulations flesh out the definition of a law enforcement unit. FERPA's exclusion embraces a unit charged with enforcing local, state, or federal law or referring violations to external authorities; the exclusion also applies to a unit charged with "[m]aintain[ing] the physical security and safety of the agency or institution."[117] As articulated by the FPCO in the 2006 letter referenced above, however, non-law enforcement duties, such as "investigation of incidents . . . that lead[] to a disciplinary action," do not forfeit law enforcement status.[118] By the same token, "a disciplinary action or proceeding conducted by the educational . . . institution" is not a law enforcement purpose, so "[r]ecords created and maintained by a law enforcement unit exclusively" for that non-law enforcement purpose are not law enforcement records.[119] The potential for confusion over "disciplinary action" is evident, though, with institutional policy and safety marking opposite poles.

This "disciplinary action" problem was at the heart of the matter in *United States v. Miami University*.[120] The Ohio public records law authorized exemption from disclosure co-extensive with FERPA.[121] With public universities caught in the middle, journalists clashed with the DOE over the disposition of student disciplinary records.[122] The journalists sought "records of all disciplinary proceedings handled by the university's internal judicial system."[123] The request seemed to acknowledge DOE's distinction between institutional policy matters and law enforcement matters. But the journalists were especially vexed that "serious criminal" matters would be excluded from public inspection by virtue of their seemingly arbitrary purpose and location in the student disciplinary process, rather than in law enforcement.[124] Nevertheless, the court extended *Chevron* deference to the DOE's stringently conjunctive reading of the statutory

116. *Id.*
117. 34 C.F.R. § 99.8(a)(1) (2017).
118. *Id.* § 99.8(a)(2).
119. *Id.* § 99.8(b)(2)(ii).
120. 294 F.3d 797 (6th Cir. 2002).
121. *Id.* at 803.
122. *Id.* at 815.
123. *Id.*
124. *Id.* at 814.

definition of law enforcement records, so the disciplinary records remained private.[125]

However, the conclusion that campus disciplinary records are not law enforcement records does not necessarily mean that FERPA shields the records from disclosure. It must be remembered that not every record of an institution, even a record containing personally identifying information about a student, is necessarily an "education record" under the purview of FERPA. Accordingly, the Georgia Supreme Court refused to block disclosure of the records of a student disciplinary court concerning hazing charges against social fraternities, ruling the records not educationally related.[126] The Maryland Court of Appeals reached the same conclusion with respect to student-athletes' parking tickets, further reasoning that that conclusion obviated the necessity of an inquiry into the law enforcement exclusion.[127] Applying similar logic but reaching a different conclusion, the FPCO opined in a 2002 advice letter that "disciplinary records relating to incidents that occurred in student housing," as distinct from campus law enforcement records, were education records protected by FERPA.[128] And again, in decisions such as *Bryner*, courts have relied on regulatory language in treating the location of a record as dispositive evidence of its education status, regardless of its contents.[129]

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125. *Id.* at 814-15 (citing Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-43 (1984)); *accord* 34 C.F.R. § 99.8(b)(1) (2017).

126. Red & Black Pub. Co. v. Bd. of Regents, 427 S.E.2d 257, 261 (Ga. 1993).

127. Kirwan v. Diamondback, 721 A.2d 196, 206 (Md. 1998).

128. Letter from LeRoy S. Rooker, Dir., U.S. Dep't of Educ. Family Policy Compliance Office, to Diane Walker, Director of Judiciary Programs, Kennesaw State Univ. (Sept. 27, 2002), https://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/kennesawuniversity.html. The FPCO distinguished the Georgia Supreme Court precedent on various grounds, including, inter alia, that organizations and not individuals were named in the hazing allegations. *Id.* The feeble efforts at distinction strongly suggest that the FPCO disagrees with the Georgia Supreme Court decision on the merits, and rather would have concluded that student disciplinary proceedings, even related to social infractions, do create education records under FERPA. *See* 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, 29 (2001) (concluding that FERPA embraces student disciplinary records, despite contrary court rulings). Regardless, the courts and FPCO agree in principle on the definition of law enforcement records.

129. *See supra* notes 106-107 and accompanying text; *see also* United States v. Miami Univ., 294 F.3d 797, 812 (6th Cir. 2002) ("Under a plain language interpretation of the FERPA, student disciplinary records are education records because they directly relate to a student and are kept by that student's university. Notably, Congress made no content-based judgments with regard to its 'education records' definition."), *quoted in* State *ex rel.* ESPN v. Ohio State Univ., 132 Ohio St. 3d 312, 2012-Ohio-3690, 970 N.E.2d 939, at ¶ 29. A law

Although the FPCO has not issued any official guidance regarding video surveillance, a brochure offering guidance to K–12 schools specifically addressed "Security Videos."[130] The brochure advised:

> Schools are increasingly using security cameras as a tool to monitor and improve student safety. Images of students captured on security videotapes that are maintained by the school's law enforcement unit are not considered education records under FERPA. Accordingly, these videotapes may be shared with parents of students whose images are on the video and with outside law enforcement authorities, as appropriate. Schools that do not have a designated law enforcement unit might consider designating an employee to serve as the "law enforcement unit" in order to maintain the security camera and determine the appropriate circumstances in which the school would disclose recorded images.[131]

Contrary to the intimation of the 2004 guidance letter,[132] the FPCO recognized that safety is the motivation for video surveillance—"security" explicitly modifies "camera"—pushing the analysis of video recordings toward law enforcement records by definition. Certainly "security cameras" are distinguishable readily from video applications that implicate educational purposes, such as recordings for a speech class or drama club. Indeed, the brochure took for granted that security cameras are located within any existing law enforcement unit, so if there is no such unit, a law enforcement custodian should be designated. Despite the unwavering FPCO position that student disciplinary records are distinguishable from law enforcement records, the brochure did not entertain the use of "security cameras" for non-law enforcement purposes, even if the implications of recorded misconduct might be dual. This position furthermore ignores the

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review note-writer thus concluded that body camera video recordings in schools are "education records" only because her analysis focused almost exclusively on recordings by "principals and assistant principals . . . during their interactions with students" for use in disciplinary matters. Sarah Pierce West, Comment, *They['ve] Got Eyes in the Sky: How the Family Educational Rights and Privacy Act Governs Body Camera Use in Public Schools*, 65 AM. U. L. REV. 1533, 1555-58 (2016).

130. FPCO, BALANCING STUDENT PRIVACY AND SCHOOL SAFETY: A GUIDE TO THE *FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT* FOR ELEMENTARY AND SECONDARY SCHOOLS (n.d.), http://www2.ed.gov/policy/gen/guid/fpco/brochures/elsec.pdf.

131. *Id.*

132. *See supra* notes 104-105 and accompanying text.

reality that schools routinely use their security and surveillance systems to prosecute and discipline students.

It is on this point, as to whether surveillance video is an education record, that there is the greatest lack of clarity. FPCO guidance from more than ten years ago, consonant with extant regulatory language, has been carried forward to interpret FERPA strictly, with superficial emphases on the familiar twin ideals of personal student identifiability and school custodianship. That reading of FERPA, though, strips the term "education" of meaning, disregarding the statutory purpose and the clear intent of FERPA and DOE regulations to distinguish and segregate educational and law enforcement functions. As Student Press Law Center Executive Director Frank LoMonte said in 2015, referencing *Bryner*, "Try saying with a straight face: 'A parent does not have a right to know who beat up her child because we wouldn't want to violate the attacker's privacy.'"[133] Later FPCO guidance suggests the more sensible recognition of the inherently non-educational nature of video surveillance.[134] The latter position accords with sound public policy, and the DOE and FPCO should forthrightly disavow the 2004 letter and clarify regulations accordingly.

*C. Health or Safety Emergency*

Apropos of safety and security trumping privacy, FERPA allows disclosure of education records in case of emergency. Specifically, the law contemplates disclosure "in connection with an emergency" to "appropriate persons"—without a student or parent's express permission and in accordance with DOE regulations—"if the knowledge of such information is necessary to protect the health or safety of the student or other persons."[135] According to regulations, recipients of emergency disclosures may include a student's parents,[136] teachers, school officials, or officials in

133. David Lim, *Judge Rules School Security Videos Subject to FERPA Protections*, STUDENT PRESS L. CTR. (June 15, 2015, 5:36 P.M.), http://www.splc.org/blog/splc/2015/06/judge-rules-security-videos-subject-to-ferpa-protections.

134. *Cf.* Lindeman v. Kelso Sch. Dist. No. 458, 172 P.3d 329, 331-32 (Wash. 2007) (en banc) (construing exemption of Washington public records law to find bus surveillance video unconnected with student educational records, despite personal identifiability of students).

135. 20 U.S.C. § 1232g(b)(1)(I) (2012); *accord* 34 C.F.R. §§ 99.31(a)(10), 99.36(a) (2017).

136. 34 C.F.R. § 99.36(a); *see also Dear Colleague Letter About Family Educational Rights and Privacy Act (FERPA) Final Regulations*, U.S. DEP'T OF EDUC. (Dec. 17, 2008), https://www2.ed.gov/policy/gen/guid/fpco/hottopics/ht12-17-08.html (emphasizing permissibility of health and safety disclosures to parents).

other schools "who have been determined to have legitimate educational interests in the behavior of the student."[137] DOE guidance added "law enforcement officials, public health officials, and trained medical personnel" as possible recipients.[138]

DOE regulations are peculiarly specific in protecting school discretion to make an emergency determination. On the front end, "an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals."[139] The school may disregard FERPA privacy upon identifying "an articulable and significant threat."[140] Then, on the back end, the school is entitled to deference as against DOE second-guessing: "If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution . . . ."[141] Given the FPCO policy guidance addressing emergency situations, the school district's steadfast refusal to release the surveillance video in Zach's case, especially when the video would aide his physicians in determining how to treat his injuries, is both baffling and appalling.

Accordingly, the FPCO has opined that "[t]his is a flexible standard under which the Department defers to school administrators."[142] Thus, "[i]n connection with a disaster, such as a flood," a school might find cause "to disclose to public health authorities immunization records to determine whether or not students are vaccinated for typhus or other water borne illnesses."[143] The FPCO approved the disclosure of records to state health authorities in light of "a student's suicidal statements, coupled with unsafe conduct and threats against another student," and the fact that "six students had died of unknown causes within the previous five months."[144]

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137. 34 C.F.R. § 99.36(b)(2)-(3).

138. Recent Amendments, *supra* note 108.

139. 34 C.F.R. § 99.36(c).

140. *Id.*

141. *Id.*

142. EMERGENCIES AND DISASTERS, *supra* note 32, at 4.

143. *Id.* at 5; *cf.* Letter from LeRoy S. Rooker, Dir., U.S. Dep't of Educ. Family Policy Compliance Office, to Martha Holloway, State Sch. Nurse Consultant (Feb. 25, 2004), https://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/alhippaa.html (recognizing applicability of FERPA rather than HIPAA to student health records maintained by educational institutions rather than healthcare providers).

144. Letter to Strayer University, *supra* note 33. When a father sued a university for failing to report to him his son's self-destructive behavior before the student's suicide, the Supreme Court of Iowa rejected negligence liability for reason of superseding causation.

In the past, the FPCO subjected the health and safety exception to "strict construction," per congressional intent.[145] A 2008 amendment removed express "strict construction" from the regulations in favor of a "totality of the circumstances" approach.[146] Even prior to this change, the DOE had opined that release must be "narrowly tailored considering the immediacy, magnitude, and specificity of information concerning the emergency," as well as its duration.[147] Those factors are suggestive of relevant circumstances under the totality approach.

Also prior to the rule change but of continuing relevance, the FPCO had opined that a health and safety emergency must involve "a *specific situation* that presents *imminent danger* to students or other members of the community, or that requires an *immediate need* for information in order to avert or diffuse serious threats."[148] Case-by-case inquiry remains essential.[149] The exception "does not support a general or blanket exception in every case in which a student utters a threat."[150] Thus, the FPCO rejected, absent case-by-case assessment for emergency need, a blanket statutory requirement in New Mexico that would have compelled the reporting of communicable diseases.[151] What constitutes a "blanket exception," though, is not entirely clear, and some courts have accepted school actions that could be reasonably construed as blanket exceptions. For example, a New York court in 1997 found that the emergency exception afforded qualified immunity to university officials, as against

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Jain v. State, 617 N.W.2d 293, 300 (Iowa 2000). Discussing FERPA, the court acknowledged the possibility of reporting pursuant to the emergency exception, but found no affirmative duty arising from the university's discretion. *Id.* at 298-99.

145. Recent Amendments, *supra* note 108 (citing *Joint Statement in Explanation of Buckley/Pell Amendment*, 120 CONG. REC. S21,489 (daily ed. Dec. 13, 1974)) (contemplating "smallpox, anthrax or other bioterrorism attack," or "another terrorist attack such as the September 11 attack"); *see also* FPCO, Family Educational Rights and Privacy Act (FERPA) Final Rule 34 CFR Part 99 Section-by-Section Analysis 13 (Dec. 2008), https://www2.ed.gov/policy/gen/guid/fpco/pdf/ht12-17-08-att.pdf (analyzing regulatory changes to facilitate disclosure of health and safety information to parents in wake of Virginia Tech shooting, if still in accordance with congressional intent).

146. 34 C.F.R. § 99.36(c) (2017).

147. Recent Amendments, *supra* note 108.

148. Montgomery County Public Schools Letter, *supra* note 115.

149. Family Educational Rights and Privacy, 73 Fed. Reg. 74,806, 74,837 (Dec. 9 2008) (codified at 34 C.F.R. § 99.36 (2017)).

150. Letter to Strayer University, *supra* note 33; *accord* 34 C.F.R. § 99.36(c).

151. Letter from LeRoy S. Rooker, Dir., U.S. Dep't of Educ. Family Policy Compliance Office, to University of New Mexico (Nov. 29, 2004), https://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/baiseunmslc.html.

civil rights claims, for having released "a list of the names and addresses of . . . black male students" to police searching for "an armed young black male suspect in a violent crime."[152]

*D. Subpoena or Court Order*

FERPA permits the unconsented disclosure of education records pursuant to a subpoena or court order.[153] In *Rome City*, discussed above in Section IV.B, the court concluded that the videotape in question, capturing a fight between two boys, was not an education record protected by FERPA.[154] Nevertheless, the court reassured the school district, nervous about its federal funding, that it would "be releasing this videotape upon specific Court Order by way of a judicial subpoena *duces tecum*, not by way of a voluntary disclosure."[155] Citing *Rome City*, a Connecticut court invited a parental petition for judicial order to obtain bus surveillance recordings alleged to reveal bullying.[156]

Parents and students must be notified of disclosure, subject to logical exceptions, such as when a subpoena issues in connection with a child abuse or neglect matter in which the parent is involved[157] or in the course of a federal grand jury investigation.[158] Notice affords a record subject—a student whose education record was disclosed—opportunity to object and seek a protective order.[159] Also, the DOE logically permits disclosure to a

152. Brown v. City of Oneonta, Police Dep't, 106 F.3d 1125, 1127 (2d Cir. 1997), *abrogated on other grounds by* Gonzaga Univ. v. Doe, 536 U.S. 273, 290 (2002). For consideration of the social policy implications of *Brown*, see Priyamvada Sinha, *Police Use of Race in Suspect Descriptions: Constitutional Considerations*, 31 N.Y.U. REV. L. & SOC. CHANGE 131, 140-42 (2006).

153. 20 U.S.C. §§ 1232g(b)(1)(J), (b)(2)(B) (2012).

154. Rome City Sch. Dist. v. Grifasi, 806 N.Y.S.2d 381, 383 (Sup. Ct. 2005).

155. *Id.*

156. Goldberg v. Reg'l Sch. Dist. No. 18, No. KNLCV146020037S, 2014 WL 6476823, at *7 (Conn. Super. Ct. Oct. 20, 2014).

157. 20 U.S.C. § 1232g(b)(2)(B).

158. 34 C.F.R. § 99.31(a)(9)(i) (2017).

159. *E.g.*, Letter from LeRoy S. Rooker, Dir., U.S. Dep't of Educ. Family Policy Compliance Office, to Linda Simlick (June 22, 1998), https://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/california.html (citing 20 U.S.C. § 1232g(b)(1)(J); 34 C.F.R. § 99.31(a)(9)(ii)); *see also* DeFeo v. McAboy, 260 F. Supp. 2d 790, 795 (E.D. Mo. 2003) (holding notice sufficient when record subject had opportunity to seek protective order). An educational institution is not obligated itself to seek a protective order. *In re* Subpoena Issued to Smith, 155 Ohio Misc. 2d 46, 2009-Ohio-7086, 921 N.E.2d 731, at ¶ 14.

court in the course of litigation between an educational institution and student.[160]

In ordering the disclosure of student records, courts balance the student's privacy interest against the requester's interest in disclosure. Courts have observed that FERPA on its face prohibits "a policy or practice of permitting the release of education records,"[161] and a properly narrow court order is not a policy or practice.[162] Because FERPA provides no private cause of action to remedy statutory violations, an educational institution may not resist disclosure on grounds that it would be subject to privacy litigation.[163] The Maryland Court of Appeals recognized that FERPA's deference to court orders does not mean that a court order of disclosure should follow automatically; rather, a trial judge must exercise equitable discretion in weighing interests.[164]

Case law demonstrates the requisite balance. One court approved a narrow subpoena on behalf of copyright owners to identify campus music pirates by Internet protocol address and time of computer access, regardless of whether the information sought might also be unprotected directory data.[165] Another court, in an intellectual property dispute over content allegedly copied into a book, denied "fishing expedition" requests for, inter alia, "[a]ll documents concerning the review by [defendant university personnel] of any dissertation of any . . . student," and "all documents

160. 34 C.F.R. § 99.31(a)(9)(iii). School districts persist nonetheless in relying on FERPA to resist disclosure of incriminating video. For example, in *Segura*, *see supra* notes 51-58 and accompanying text, the school district invoked FERPA to shield from disclosure video surveillance of a district staff member assaulting a disabled student on a bus. The school district resisted disclosure even after providing a copy of the video to the sheriff's office, prosecutor's office, and Department of Human Services, resulting in a criminal charge of aggravated assault. In a school district response to motion, the district asserted without citation, "The U.S. Office of Education, Family Compliance Office advises that under FERPA the parent can view the tape but with multiple students on it, a copy should not be released." Response to Motion at 2, Segura v. Russellville Sch. Dist., No. H-15-19 (Ark. Dep't of Educ. Aug. 25, 2015).

161. 20 U.S.C. §§ 1232g(b)(1), (2).

162. *E.g.*, Ellis v. Cleveland Mun. Sch. Dist., 309 F. Supp. 2d 1019, 1024 (N.D. Ohio 2004); Zaal v. State, 602 A.2d 1247, 1255-56 (Md. 1992).

163. D.L. v. Unified Sch. Dist. No. 497, 270 F. Supp. 2d 1217, 1244 (D. Kan. 2002), *vacated on other grounds*, 392 F.3d 1223 (10th Cir. 2004).

164. *Zaal*, 602 A.2d at 1256; Goldberg v. Reg'l Sch. Dist. No. 18, No. KNLCV146020037S, 2014 WL 6476823, at *6 (Conn. Super. Ct. Oct. 20, 2014) ("Congress implicitly entrusts to courts what equity and common sense require: courts have a gatekeeping function.").

165. Interscope Records v. Does 1-14, 558 F. Supp. 2d 1176, 1180 (D. Kan. 2008).

concerning the use of [name-brand] plagiarism detection service by students or faculty members."[166]

Heavily informed by circumstances,[167] the balancing test requires more than the usual, permissive standards of discovery or public records laws.[168] The aforementioned *Rome City* court, bolstering its subpoena *duces tecum*, wrote that upon balancing the interests of two combatant students, the due process rights of the student facing disciplinary hearing outweighed the school's assertion of confidentiality on behalf of his adversary.[169] Liberal construction of a state's public records law also may weigh in favor of disclosure.[170] In its balancing analysis, a court may employ *in camera* review to determine the relevance of information sought in the proceedings.[171] The court may also fashion a balanced remedy, such as "controlled access by counsel to the records," *in camera* or otherwise;[172] an admissibility hearing;[173] or a stipulated protective order against subsequent disclosure.[174] Thus, when a student alleged improper corporal punishment by a teacher, the court allowed discovery of education records, in part to advance the important public interest in identifying other possible incidents, though it ordered redaction of "the names and addresses of minor children who are purported to be student victims and student witnesses."[175]

### *E. The Problem of Multiple Students*

The disposition of video surveillance under FERPA can be complicated by the frequent appearance of multiple persons on a recording. For example, in the case of an aide alleged to have suffocated a child,[176] the video recording captured not only the aide and the student victim, but three to five other students at various times during the video.[177]

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166. *See* Alig-Mielcarek v. Jackson, 286 F.R.D. 521, 527 (N.D. Ga. 2012).

167. *See Zaal*, 602 A.2d at 1261-62.

168. Ellis v. Cleveland Mun. Sch. Dist., 309 F. Supp. 2d 1019, 1023 (N.D. Ohio 2004).

169. Rome City Sch. Dist. v. Grifasi, 806 N.Y.S.2d 381, 383 (Sup. Ct. 2005).

170. *Ellis*, 309 F. Supp. 2d at 1024 n.4 (interpreting Ohio law).

171. *Zaal*, 602 A.2d at 1261-63.

172. *Id.* at 1264.

173. *Id. Zaal* was a criminal matter; charged with the sexual abuse of his twelve-year-old granddaughter, the defendant sought access to educational records for purpose of impeachment. *Id.* at 1250-51.

174. D.L. v. Unified Sch. Dist. No. 497, 270 F. Supp. 2d 1217, 1244 (D. Kan. 2002), *vacated on other grounds*, 392 F.3d 1223 (10th Cir. 2004); Rios v. Read, 73 F.R.D. 589, 602 (E.D.N.Y. 1977).

175. *Ellis*, 309 F. Supp. 2d at 1025.

176. *See supra* Part III.

177. *See supra* note 141 and accompanying text.

Existing FPCO guidance is mixed on this problem. An advice letter published in 2003 focused on the multiple-student problem. When parents of a disabled student filed a due process claim against the school district under the Individuals with Disabilities Education Act (IDEA) and sought disciplinary records that would identify other students, the school refused to provide the records without first redacting personally identifying information.[178] The IDEA hearing officer ordered full disclosure, reasoning that because the disputed records "contain charges by other students of serious or criminal behavior," the due process rights of the student-accused were paramount.[179] The FPCO disagreed, however, finding no justification in the plain language of FERPA for the officer's conclusion.[180] Rather, the FPCO reasoned straightforwardly that the records were education records of each student named within them, so each student was entitled to FERPA protection.[181]

The following year, the FPCO extended this reasoning in the 2004 letter, discussed above in Section IV.B, specifically regarding a video that captured a fight.[182] The facts recounted in the 2004 letter were inconclusive as to whether the video, said to depict "an altercation between [the parent's] son and a police officer," also depicted other students.[183] In the 2004 letter, an FPCO officer opined that the parent could use FERPA access provisions to see a video of her child, but only "if the child was the only student pictured fighting in the tape."[184] "[I]f another student also was pictured fighting in the video, then the parent would not have FERPA inspection rights over that portion of the tape."[185] The *Rome City* court took notice of the 2004 letter, yet wasted no time in concluding that due process for a

178. Letter from LeRoy S. Rooker, Dir., U.S. Dep't of Educ. Family Policy Compliance Office, to Attorney for School District (Oct. 31, 2003), https://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/1031.html [hereinafter Letter to Attorney for School District]. In the FPCO's online public library, this letter is titled, "Letter of Technical Assistance to School District re: Disclosure of education records containing information on multiple students." *FERPA Online Library*, U.S. DEP'T OF EDUC., https://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/index.html?exp=8#two (last visited Mar. 19, 2018) (located under the subheading "2003 FPCO Letters").

179. Letter to Attorney for School District, *supra* note 178.

180. *Id.* The IDEA incorporates FERPA by express reference at 20 U.S.C. § 1417(c) (2012).

181. Letter to Attorney for School District, *supra* note 178.

182. Letter from FPCO to Berkeley County School District, *supra* note 104; *see also supra* note 104 and accompanying text.

183. Letter from FPCO to Berkeley County School District, *supra* note 104.

184. *Id.*

185. *Id.*

student-combatant facing disciplinary action sufficiently outweighed the privacy interests of students collaterally depicted, supporting court-ordered disclosure.[186]

More importantly, in the last decade, the FPCO position on video recordings has softened, according to Texas attorney Thomas E. Myers. In a presentation to education attorneys, Myers described the different course charted by two similar yet apparently unrelated Texas cases in 2006.[187] In both cases, cafeteria security cameras captured altercations involving multiple students, and the parents of involved students sought access to the recordings.[188] In a January 2006 opinion, the Texas Attorney General's Office opined, without citation, that "the [FPCO] has determined that videotapes of this type do not constitute the education records of students who did not participate in the altercation," so FERPA did not bar disclosure.[189] Then in a July 2006 opinion, the office opined, again without citation, that "[t]he DOE has . . . determined that the images of the students involved in the altercation do constitute the education records of those students," but that FERPA still did not bar disclosure because "the other students involved in the altercation are directly related to the requestors or the requestors's [*sic*] children."[190] "Shortly thereafter," Myers asserted, "FPCO provided similar advice in various informal guidance letters."[191]

Myers expanded on the possible change in FPCO position in 2016:

> In conference with FPCO, it is our understanding that FPCO's current position is that where a video (or other picture image) of one or more students is taken, the video or image is "directly related" to, and thus the "education record" of, the student or

186. Rome City Sch. Dist. v. Grifasi, 806 N.Y.S.2d 381, 383 (Sup. Ct. 2005) (citing Letter from FPCO to Berkeley County School District, *supra* note 104).

187. Thomas E. Myers, 2016 FERPA Update: Back to the Basics (Or Back to the Future?) at 15 (Apr. 2016) (paper presented at the Nat'l Sch. Boards Ass'n, Council of Sch. Att'ys School Law Seminar, Apr. 7-9, 2016), https://cdn-files.nsba.org/s3fs-public/01-Myers-2016-FERPA-Update-Paper.pdf.

188. Tex. Op. Att'y Gen. No. OR 2006-07701, 2006 WL 2140988, *1 (July 18, 2006); Tex. Op. Att'y Gen. No. OR 2006-00484, 2006 WL 208275, *1 (Jan. 13, 2006).

189. Tex. Op. Att'y Gen. No. OR 2006-00484, 2006 WL 208275, *2.

190. Tex. Op. Att'y Gen. No. OR 2006-07701, 2006 WL 2140988, *2.

191. Myers, *supra* note 187, at 15. The 2012 legal analysis of a Maine attorney concurs in Myers's conclusions, see *infra* text accompanying note 192, though it also refers non-specifically to "informal guidance from the FPCO." M. Thomas Trenholm, *Candid Camera: FERPA's Privacy Requirements Give Schools Reason to Pause*, SCH. L. ADVISORY, 2 (Fall 2012), https://schoollaw.com/wp-content/uploads/2013/08/728-FERPA-privacy-requirements-MTT-Fall-2012.pdf.

> students who are the focus of the video (such as two students in an altercation). If multiple students are the "focus" of the video, all students and their parents may view the video, although the school may not give copies of the video to any of the parents without the consent of the other parents. The video would not be a FERPA-protected education record for those students who are "set dressing" (walking down the hall, sitting on the bus, eating lunch, etc., but not involved in the altercation), since they are not the focus of the video. However, if the school uses the video to find witnesses to the altercation and the students are named or used as witnesses, the video becomes the witnessing student's education record also.[192]

Myers pointed to a 2015 Utah case to evidence judicial support for this position. In *Bryner v. Canyons School District*,[193] a parent sought access to the video recording of a fight involving his middle school child. Relying on the 2006 Texas Attorney General opinions and the 2003 FPCO guidance, the court ruled that the video recording of multiple students involved in the fight was an education record of those students who were "the focus or subject of the video."[194] But the court allowed access upon the parent's payment of $120 for the commercial redaction by blurring of other students' likenesses.[195] According to Myer, the FPCO itself "stated that it will provide formal guidance" in support of this modified position, but the question "has been pending for quite some time and no formal guidance has been issued yet."[196]

While the FPCO has not yet addressed video redaction, the *Bryner* redaction solution—however dubious on the education record determination, which took no account of the creation or purpose of the video but looked only to the personally identifying depictions—is wholly consistent with regulations on the disclosure of de-identified student records. In 2008, tension between FERPA and freedom of information (FOI) laws[197] culminated in rule changes to make clear the permissibility of

192. Myers, *supra* note 187, at 15.

193. 2015 UT App 131, ¶ 4, 351 P.3d 852, *cert. denied*, 366 P.3d 1213 (Utah 2016), *cert. denied*, 137 S. Ct. 49 (2016).

194. *Id.* ¶ 22, 366 P.3d at 858.

195. *Id.* ¶ 32, 366 P.3d at 860.

196. Myers, *supra* note 187, at 15.

197. *See generally* Richard J. Peltz, *From the Ivory Tower to the Glass House: Access to "De-Identified" Public University Admission Records to Study Affirmative Action*, 25 HARV. BLACKLETTER L.J. 181, 187-92 (2009).

disclosing sufficiently de-identified student records.[198] Regulations allow for the unconsented disclosure of records to any person "after the removal of all personally identifiable information," upon the "reasonable determination" that the record subject cannot be re-identified, "taking into account other reasonably available information."[199] The regulations define "Personally Identifiable Information" to include "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."[200] This can be a tricky and controvertible analysis in files that are heavy with multiple, cross-referenceable data points, such as admissions files.[201] However, the rule should be simple to apply when a blur, and if necessary a volume suppression, are all that is required to mask a student's identity.[202]

*F. Interaction of FERPA and State Freedom of Information Acts*

For public educational institutions (private educational institutions are not governed by state sunshine laws), FERPA and state FOI acts have coexisted uneasily since FERPA's inception.[203] The problem is not a straightforward application of the Supremacy Clause,[204] because FERPA is not a direct mandate authorized by Article I congressional power; rather, FERPA rewards voluntary compliance by state officials with the carrot of federal funding.[205] So when state law affirmatively requires the disclosure

198. *See* Family Educational Rights and Privacy, 73 Fed. Reg. 74,806, 74,834-36 (Dec. 9, 2008) (codified at 34 C.F.R. § 99.31).

199. 34 C.F.R. § 99.31(b)(1) (2017). Further information may be released for educational research upon pseudonymous encoding. *Id.* § 99.31(b)(2).

200. *Id.* § 99.3 (defining "Personally Identifiable Information" para. (f)).

201. *See* Family Educational Rights and Privacy, 73 Fed. Reg. at 74,829-31 (reviewing broad range of commentary on notice of proposed rule-making to update definitions); Peltz, *supra* note 197, at 193-96.

202. Blurring of student likenesses and muffling of their voices contented a New York court in authorizing disclosure of a video recording of a campus speaker, though the redaction was accomplished by parties' agreement and required for student privacy in state law "regardless of the applicability of FERPA," the court concluded. Jacobson v. Ithaca City Sch. Dist., 39 N.Y.S.3d 904, 908 (Sup. Ct. 2016).

203. Peltz, *supra* note 197, at 187-88.

204. U.S. CONST. art. VI, cl. 2.

205. *E.g.*, Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 68 (1st Cir. 2002) ("The statute takes a carrot-and-stick approach: the carrot is federal funding; the stick is the termination of such funding . . . ."); *see also* Goldberg v. Reg'l Sch. Dist. No. 18, No. KNLCV146020037S, 2014 WL 6476823, at *4 (Conn. Super. Ct. Oct. 20, 2014) (recognizing divergent court views

of records that contain FERPA-protected information, one can argue that the state legislature knowingly took the risk of FERPA non-compliance, which is within the state's prerogative.

This problem can be averted by construction of state sunshine laws to be co-extensive with FERPA. But that construction sometimes requires a stretch. State open records acts typically contain exemptions for "other laws"[206] and for personal privacy.[207] Open records laws are subject to broad construction, and, inversely, exemptions are subject to narrow construction.[208] Narrowly construed, "other laws" include only confidentiality mandates, not voluntary compliance as a condition of federal funding.[209] Similarly, when narrowly construed, privacy exemptions, which are not universal in state laws, are not so broad as the personally identifying standard of FERPA.[210] Thus FERPA does not readily fit within state sunshine exemptions and usually has its own statutory accommodation.[211]

Recognition of FERPA as an exemption in state sunshine law is the first step of the analysis; the next step requires reconciling FERPA and the open records law. The segregation of exempt and non-exempt information within

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as to whether conditional funding mechanism effects de facto mandate). Direct operation of federal law upon state officials would invite a federalism challenge. *See, e.g.*, Printz v. United States, 521 U.S. 898, 933 (1997).

206. *See* RICHARD J. PELTZ-STEELE, LAW OF ACCESS TO GOVERNMENT 322-23 (2012).

207. *See id.* at 305-06.

208. *E.g.*, *id.* at 358.

209. *E.g.*, State *ex rel*. Miami Student v. Miami Univ., 680 N.E.2d 956, 958-59 (Ohio 1997) (recognizing issue, but concluding it unnecessary to resolve because disputed records were outside scope of FERPA); *see also* Chi. Tribune Co. v. Bd. of Trustees, 680 F.3d 1001, 1005 (7th Cir. 2012) (recognizing that state courts might or might not construe Illinois FOIA exemption for federal law to embrace FERPA confidentiality as condition of funding). *But see* United States v. Miami Univ., 294 F.3d 797, 811 (6th Cir. 2002) (applying FERPA to education records, in disagreement with state ruling, but assuming that Ohio Public Records Act exemption for federal law embraces FERPA). *See generally* Kristin Knotts, *FOIA vs. FERPA/Scalia vs. Posner*, 38 S. ILL. U. L.J. 241, 244-50 (2014) (discussing state court approaches to FERPA-FOIA conflict in light of *Chicago Tribune Co. v. Board of Trustees of University of Illinois*); Mathilda McGee-Tubb, Note, *Deciphering the Supremacy of Federal Funding Conditions: Why State Open Records Laws Must Yield to FERPA*, 53 B.C. L. REV. 1045, 1059-67 (2012) (discussing divergent approaches to harmonizing state open records laws with FERPA).

210. *E.g.*, Red & Black Pub. Co. v. Bd. of Regents, 427 S.E.2d 257, 261 (Ga. 1993) (recognizing "serious questions" about interaction of state educational records exemption and FERPA).

211. *See, e.g.*, Peltz, *supra* note 197, at 189 (discussing conflict that existed in Arkansas law until 2001 amendment specifically accommodated FERPA).

records is a near universal norm of open records law.[212] To the extent that a public educational institution can, it must satisfy both FERPA and state open records law by redacting personally identifying information.[213] Thus, in *Osborn v. Board of Regents of the University of Wisconsin System*, the Wisconsin Supreme Court sided with the record requesters seeking access to de-identified student admission records.[214] The researchers had requested data from which personally identifying information was specifically redacted.[215] Recognizing that the researchers, therefore, had not sought "personally identifiable information" under FERPA, the court found that the request reached only "minimal information," "not sufficient, by itself," to render "a student's identity easily traceable."[216] By broadly denying access, the court concluded, "the University inappropriately relied on FERPA."[217] In consonance with Wisconsin law and the *Bryner* approach under FERPA, discussed above in Section IV.E, the University was allowed to demand that the requester-researchers shoulder "the actual, necessary and direct cost" of processing records for production.[218]

The *Osborn* approach accords with DOE interpretation of FERPA.[219] Upon comments raising the FERPA-FOIA problem in the 2008 revision of FERPA regulations, the DOE took pains to emphasize that "FERPA is not an open records statute or part of an open records system."[220] Nevertheless, the DOE concluded "that the regulatory standard for defining and removing personally identifiable information from education records establishes an appropriate balance that facilitates school accountability and educational

212. *Id.* at 189-90.

213. *See generally id.* at 193-96 (applying principle in context of admission records).

214. 2002 WI 83, ¶ 48, 254 Wis. 2d 266, 647 N.W.2d 158.

215. *Id.* ¶ 4, 647 N.W.2d at 161. *See generally* Robert Steinbuch & Kim Love, *Color-Blind-Spot: The Intersection of Freedom of Information Law and Affirmative Action in Law School Admissions*, 20 TEX. REV. L. & POL. 181, 194-200, 204-08 (2016) (discussing repetition of conflict in later studies in California and Arkansas, and agreeing with *Osborn* approach).

216. *Osborn*, 2002 WI 83, ¶ 30, 647 N.W.2d at 171.

217. *Id.* ¶ 31, 647 N.W.2d at 171.

218. *Id.* ¶ 6, 647 N.W.2d at 176. *But see* Milwaukee Journal Sentinel v. City of Milwaukee, 2012 WI 65, ¶ 48, 341 Wis. 2d 607, 815 N.W.2d 367 (quoting later Attorney General opinion concluding that cost of redaction itself is not within scope of statutorily permissible fees).

219. *See* Press-Citizen Co. v. Univ. of Iowa, 817 N.W.2d 480, 492 (Iowa 2012) (denying access to record in entirety when redaction would not be sufficient to mask student identity).

220. Family Educational Rights and Privacy, 73 Fed. Reg. 74,806, 74,831 (Dec. 9, 2008) (codified at 34 C.F.R. § 99.36).

research while preserving the statutory privacy protections in FERPA."[221] FPCO guidance issued before 2008 but subsequent to *Osborn* is consistent with these declarations. In 2006, the FPCO declined to review redactions to a student incident report made by a Texas school district endeavoring to comply simultaneously with Texas public records law and FERPA.[222] The FPCO could not construe the disclosure requirements of state law, the office explained.[223] Rather, "educational agencies and institutions . . . are in the best position to analyze and evaluate whether a redacted document is 'easily traceable' and, therefore, whether the information may be disclosed to a third party."[224]

## *V. Access to Video Surveillance*

Considering Zach's case, discussed in Part I, the family of an injured child—not to mention police and doctors—should be able to access video surveillance of the injurious incident.[225] The problem of video surveillance in schools points down a road with many forks in the analysis, and there is room for dispute, left or right, at some of those forks. Nevertheless, all roads lead to the same conclusion: disclose.

### *A. Video Recordings Usually Are Not "Education Records" Under FERPA*

A threshold problem arises in determining whether video surveillance is an education record at all within the scope of FERPA. Initially, FERPA pertains only to a video recording made or "maintained" by a covered educational entity.[226] Video surveillance captured by a local law enforcement camera, even if positioned to face school premises, is not a recording made by the educational institution. Video captured by a journalist or parent—for example, at a football game—is not a recording made by the school. FERPA neither precludes production of these videos nor compels their production. The law enforcement video would be subject to disclosure under state FOI law and possibly subject to analysis under the statutory exemption for ongoing investigation, but FERPA would have no

221. *Id.*

222. Letter from LeRoy S. Rooker, Dir., U.S. Dep't of Educ. Family Policy Compliance Office, to School District in Texas (Apr. 6, 2006), https://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/tx040606.html.

223. *Id.*

224. *Id.*

225. *See supra* Part I.

226. 20 U.S.C. § 1232g(a)(4)(A)(ii) (2012); 34 C.F.R. § 99.3 (2017) (definition of "Education records," part (a)(2)).

bearing. The privately recorded video would lie beyond both FERPA and FOI law, but could be produced voluntarily or upon compulsion in a law enforcement investigation.[227]

A video recording made or "maintained" by an educational institution can be an education record under FERPA.[228] A video recording might "identify [a] student with reasonable certainty,"[229] or otherwise might capture "facial characteristics" that constitute a biometric identifier.[230] A video recording, therefore, may be "directly related to a student" under FERPA.[231] But personal identifiability is not sufficient. Regulations contemplate a photograph as mere directory information, excepted from FERPA privacy.[232] The image of a student athlete in an online team roster or in a graduation announcement released to local media is, consequently, not private under FERPA.[233] Were an online athletic roster made more lively with the addition of video of a baseball player's home run, the recording still merely touts the student's achievement.[234] Shielding such a record from disclosure would contravene Senator Buckley's avowed intent to protect students against stereotyping, prejudice, and inaccuracy.

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227. A public record turned over to school authorities might gain FERPA protection as a record "maintained" by the educational institution, 20 U.S.C. § 1232g(a)(4)(A)(ii); 34 C.F.R. § 99.3 (definition of "Education records," part (a)(1)), for purposes of requests lodged with that institution. But FERPA still would have no bearing on a copy of the record simultaneously maintained by a third party outside the educational institution. FERPA binds only educational agencies and institutions, and their agents. 20 U.S.C. § 1232g(a)(3), (4)(A)(ii).

228. 34 C.F.R. § 99.3 (definition of "Record . . . including . . . video or audio tape, film").

229. *Id.* (definition of "Personally Identifiable Information," part (f)).

230. *Id.* (definition of "Biometric record"; definition of "Personally Identifiable Information," part (d)).

231. 20 U.S.C. § 1232g(a)(4)(A)(i); 34 C.F.R. § 99.3 (definition of "Education records," part (a)(1)).

232. 34 C.F.R. § 99.3 (definition of "Directory information," part (a), "photograph"). FERPA affords no privacy right to personal appearance per se. In a 2006 policy letter, responding to a school district's inquiry regarding whether FERPA was implicated by a parent's request to observe a child's special education classroom, the FPCO characteristically stated, "FERPA does not protect the confidentiality of information in general; rather, FERPA applies to the disclosure of tangible records and of information derived from tangible records." LeRoy S. Rooker, Dir., U.S. Dep't of Educ. Family Policy Compliance Office, to Shari A. Mamas (Dec. 8, 2008), http://www.wrightslaw.com/law/osep/ferpa.classrm.observe.pdf.

233. 34 C.F.R. § 99.3 (definition of "Directory information," part (a), "participation in officially recognized activities and sports" and "degrees, honors, and awards received").

234. *See id.* (definition of "Directory information," part (a)).

Arguably, a video surveillance image does little more than document a student's attendance[235]—like a team photo reports student participation or a game video memorializes a team win, each of which are education records not protected by FERPA.

The analysis might change were a track tryout recorded by the coach to ensure that every contender ran the requisite number of drills, or were a runner's hurdles recorded to help the student-athlete improve performance. The case certainly changes if a speech teacher records student presentations to review the recordings, give critiques, and provide qualitative assessments. A Kentucky court regarded in-classroom video recordings as education records when a camera had been installed to help a teacher "improve her teaching performance and manage her classroom."[236] If video surveillance is conducted for the purported purpose of assessing student compliance with performance expectations, that purpose moves the analysis closer to FERPA's function—to protect student privacy in education records. Still, the expectations must arise in the vein of education. Expectations that students will comport themselves merely within standards of the law, or will conduct themselves with discipline as to preserve the safety and security of the school environment, point to a FERPA-excepted law enforcement purpose, rather than a FERPA-protected educational purpose.

It seems, then, that the disposition of video surveillance as an education record or not under FERPA is, as the FPCO reasoned, a function of creation and purpose. A general school program of video surveillance—employing "security cameras"[237] beyond the confines of classrooms—is typically intended to fulfill a law enforcement function,[238] ensuring "physical

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235. *See id.* (definition of "Directory information," part (a), "dates of attendance").

236. Medley v. Bd. of Educ., 168 S.W.3d 398, 401, 405 (Ky. Ct. App. 2004) (remanding for determination whether teacher had legitimate educational interest to review FERPA-protected videotapes).

237. Surveillance and security are nearly interchangeable terms in the camera trade. *See, e.g.*, *Security Cameras*, BEST BUY, http://www.bestbuy.com/site/video-surveillance-systems/home-surveillance-cameras/pcmcat254000050005.c?id=pcmcat254000050005 (last visited June 28, 2017). In world trade, cameras are classified according to their mechanical functionality, regardless of their intended purpose. *See* WCO, HS NOMENCLATURE 2017 EDITION § XVI, ch. 85.25, http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/nomenclature/instruments-and-tools/hs-nomeclature-2017/2017/1685_2017e.pdf?la=en.

238. Mere recognition that the term "surveillance" describes the function is indicative of a law enforcement purpose. Every reference to "surveillance" in *Black's Law Dictionary* (10th ed. 2014) refers to a law enforcement context implicating the Fourth Amendment

security and safety,"[239] not to assess athletic or academic performance.[240] This was the conclusion of the New York court in *Rome City*,[241] which remains one of precious few decisions to analyze FERPA and video surveillance. After reviewing the definition of a "law enforcement unit" in FERPA, the court decided that "the videotape in question . . . was recorded to maintain the physical security and safety of the school building," and "not the educational performance of the students."[242]

Similarly, a Louisiana court eight years earlier reached the same conclusion in a case involving a bus surveillance video.[243] The court ordered disclosure of the videotape of a student's beating after the tape had been used as evidence in a criminal prosecution.[244] "[FERPA] does not preclude the release of information pertaining to students to the public," the court explained; "rather, it acts to control the careless release of educational information by educational institutions by threatening to withhold federal funds for doing so."[245]

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("electronic surveillance," "foreign intelligence surveillance," "roving surveillance," "search warrant," "surveillance," "video-surveillance warrant").

239. 34 C.F.R. § 99.8(a)(1)(ii) (2017).

240. *See generally* Kevin P. Brady, *"Big Brother" Is Watching, But Can He Hear, Too?: Legal Issues Surrounding Video Camera Surveillance and Electronic Eavesdropping in Public Schools*, 218 ED. L. REP. 1, 3 (2007) ("The initial justification for installing video camera surveillance in public schools was to significantly reduce school violence, vandalism and theft. Increasingly, however, the use of video camera surveillance technology is being increasingly adopted in public schools to assist in the evaluation of teacher and school staff job performance.").

241. Rome City Sch. Dist. v. Grifasi, 806 N.Y.S.2d 381 (Sup. Ct. 2005).

242. *Id.* at 383.

243. State v. Mart, 96-1584, p. 10 (La. App. 1 Cir. 6/20/97); 697 So. 2d 1055, *overruled on other grounds by In re* Matter Under Investigation, 2007-1853, p. 14 (La. 7/1/09), 15 So. 3d 972. A Kentucky Attorney General Opinion, No. 02–ORD–132 (July 17, 2002), apparently reached the opposite conclusion about bus surveillance video, as retold and distinguished in *Medley v. Board of Education*, 168 S.W.3d 398, 404 (Ky. Ct. App. 2004).

244. *Mart*, 96-1584 at p. 9, 697 So. 2d at 1057, 1060.

245. *Id.* at p. 7, 697 So. 2d at 1060. The latter phrase hints that the court might have been influenced by the fact that FERPA iterates spending conditions rather than mandates. However, collateral discussion of the state constitutional right of privacy points toward the non-educational nature of the record as the decisive rationale. Rejecting the government's contention that, for constitutional purposes, students might derive from FERPA an objective expectation of privacy "in their educational records," the court declared that "[FERPA] was not enacted to grant individual students the right of privacy." *Id.* at p. 9, 697 So. 2d at 1060 (citing Red & Black Pub. Co. v. Bd. of Regents, 427 S.E.2d 257, 261 (Ga. 1993) ("[W]e look to the Buckley Amendment's purpose, which was not to grant individual students the

Security seems to have been the primary purpose of playground surveillance in Zach's case.[246] The playground had been under construction,[247] and recess on a primary-school playground would afford no basis for athletic or academic assessment, especially on a weekday night.[248] The same is true for the bus surveillance video described in the Russellville School District case.[249] If the very purpose of the recording is security and safety, then the video recording is not an education record of Zach or any other student.

Ideally, a school would house video surveillance functions in a campus security office, as the FPCO advised in its 2007 brochure.[250] But for a small school, perhaps without a dedicated resource officer,[251] video surveillance might be a function of the same administrative officer who handles student disciplinary matters in education contexts.[252] The dual function of a school official does not transform the recordings into education records, because the video surveillance program was *created* for security and safety. Nor do the recordings become education records merely because violations of the

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right of privacy or access to educational records, but to control the careless release of educational information on the part of many institutions.")).

246. *See supra* Part I.

247. Sitek & Simon, *supra* note 3.

248. While working on this Article in June 2017, co-author Peltz-Steele was on a bus in San Juan Teotihuacán, Mexico, when it was boarded by police. They were armed with guns and a small video camera. They used the latter to capture the faces of every individual on the bus, drawing each rider's eyes with a deadpan, "*buenas tardes*." It struck us that this recording epitomized data gathering by video surveillance for the purpose of security and safety, well akin to general video surveillance of school grounds, as opposed to video recording for any other purported purpose, such as a qualitative audit of the transit experience.

249. *See supra* Part III.

250. *See* Trenholm, *supra* note 191, at 2 ("Until the FPCO issues clear guidance on this subject, schools should approach questions in this area by first determining whether a videotape belongs in any student's education record.").

251. A "school resource officer" is "a career law enforcement officer, with sworn authority, deployed in community-oriented policing, and assigned by the employing police department or agency to work in collaboration with schools and community-based organizations." 42 U.S.C. § 3796dd-8(4) (2012). This statutory definition for the purpose of federal funding further articulates a range of functions a school resource officer may perform, including the education of students in areas such as "crime prevention and safety," "conflict resolution, restorative justice, and crime awareness." *Id.* §§ 3796dd-8(4)(C), (E). This range of function reminds us that law enforcement functions may have positive as well as negative academic consequences, and still may remain law enforcement functions.

252. This is the case for schools throughout rural Arkansas, where co-author Cone practices.

student code of conduct and institutional safety policy might have collateral consequences in the education sphere. The video recordings are made for the *purpose* of security and safety.

A closer call might arise in a case such as that of Damon Janes, upon a school's recording of a football game.[253] If the school records the game for purpose of touting student achievement, perhaps attaching the video to news releases, or if the school records the game incidentally to event security, then the purpose is not educational, and the recording is not an education record. A coaching staff may record games, however, to review and improve student-athletes' performance. This purpose could be considered educational, triggering FERPA protection. In either case, the FPCO's 2006 advice letter on law enforcement records makes clear that exclusive purpose overrides creation. Even if athletic/education officials borrow a camera from the speech department to record the game for security purposes, the recording is not educational. Similarly, if a security officer volunteers to record the game to provide coaches and players the opportunity to review the performance of each team member, the recording was not made for the purpose of security and safety.

If the purpose is dual—that is, the video recording is used for both athletic/educational and security/safety purposes—then creation might control. Consonant with the court's decision in *Bauer v. Kincaid*,[254] if security staff record for security purposes and then copy the recording to coaching staff for performance review, or even to administrators to effect collateral academic penalties for student misconduct, the recording within the security unit remains unprotected by FERPA. However, under the DOE's stringent construction of education records—echoed by the FPCO after Virginia Tech and consonant with the court's decision in *Miami University* in 2002—if athletic or education staff record for athletic or educational purposes and then provide the recording to security staff to facilitate investigation of student misconduct, the recording remains an education record protected by FERPA in both units.

The problem is at its grayest if, for example, an administrator with control over both athletic and security units creates a recording for use by both units, for both assessment and security purposes, respectively. The court's *Chevron* deference to DOE stringency in *Miami University* suggests that the administrator's identity as an officer of the educational agency or institution controls after all, making the recording an education record

253. *See supra* Part III.

254. 759 F. Supp. 575, 591 (W.D. Mo. 1991).

within both units. However, the Georgia and Maryland courts' decisions on hazing charges and parking tickets suggest otherwise, leaving room for the argument that education officials engaged purely in the service of disciplinary enforcement do not necessarily create education records.[255] The matter is confused by the FPCO conclusion in 2002 that student housing violations were education records. Perhaps a distinction can be drawn in the offenses. Hazing often implicates crime, resulting in serious bodily injury or death.[256] Parking tickets, whatever the semantics of the violations or infraction, are usually handed out by uniformed officers and ultimately enforced and adjudicated through the justice system. A student housing violation, however, might as readily arise from excessive noise or the illicit use of a toaster oven as from a crime such as theft or consumption of an

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255. *See supra* Section IV.B. We respectfully disagree with Trenholm's contention, assuming he meant what he wrote:

> Video surveillance generally captures everything in the camera's lens at any given moment and does not become an educational record until a school makes a recording of a particular student doing something of interest to school officials. The recording is then considered an education record of each student of interest involved in the incident.

Trenholm, *supra* note 191, at 2.

Creation and purpose are the touchstone of the analysis. If both those factors point to security rather than education, it would make bad policy to suggest that the content of the captured image, much less education officials' post hoc reaction to it, dictates whether a recording is an education record. Unviewed, archived video would sit in legal limbo, pending official review. It would be far too easy for a school official, then, to "decide," perhaps upon a FOI request, that scandalous misconduct long stored in security footage archives is of an "educational" and, therefore, conveniently private nature.

We admit the possibility that a security camera might capture inadvertently information of an educational nature—a snapshot of a teacher's grade book, carelessly left open on a desk, for example—but we think the situation distinguishable by the exclusive classification of the grade book as educational and the inadvertence of the capture, beyond the purpose of the recording. A school official should not be able to, post hoc, characterize video created by and for security as an education record simply because the recorded security breach might also have violated academic standards. If officials crave that much discretion, it is simple enough to house surveillance wholly within an academic unit to begin with, sharing with security officials only pursuant to FERPA, however fatuous a policy choice that might be.

256. As we began this Article in June 2017, a tragedy at Penn State was playing heavily in the news. *See, e.g.*, *Here & Now: After Penn State Hazing Death, Professor Argues Fraternities Must Go* (WBUR, Boston radio broadcast June 19, 2017), http://www.wbur.org/hereandnow/2017/06/19/penn-state-hazing-fraternities.

illicit substance.[257] The 2007 FPCO brochure contemplated surveillance by "security cameras" exclusively as *modus operandi* of law enforcement.

### *B. Even When a Video Recording Is an Education Record, FERPA Allows for Disclosure*

Even in the rare instance that a video recording *is* an education record, FERPA affords ample avenues to disclose. At its most straightforward, FERPA forbids only "a policy or practice of permitting the release of education records."[258] A school official who makes an informed and reasoned decision *to depart* from the usual policy and practice, upon emergency circumstances and with the life and mind of a child hanging in the balance, does not violate FERPA. After all, FERPA has no private enforcement mechanism,[259] and the FPCO is staffed by bureaucrats, not monsters.[260] Sadly, Zach's case is not unique, but also it is not routine. At worst, the offending school district might draw a letter warning not to let a one-off exception become policy.

An emergency such as Zach's case is contemplated expressly by FERPA's health or safety exemption. An emergency doctor's request for information, combined with the gravity of Zach's injuries (severe brain trauma and multiple skull fractures), evidence an immediate critical need for information to provide potentially life-saving treatment.[261] Regulations specifically permit disclosure to a child's parents, law enforcement authorities, or medical personnel in an emergency, as circumstances might dictate, and consent by the parents of other children captured by the same video surveillance is not required.[262] The institution is entitled to assess the "totality of the circumstances" in recognizing the emergency threat to health or safety.[263] The totality approach is designed for flexibility,[264] and

257. *See, e.g.*, NE. UNIV., GUIDE TO RESIDENCE HALL LIVING 2, 4, 11, 17 (2016-2017), https://www.northeastern.edu/housing/wp-content/uploads/2015/07/GuideToResHallLiving_Northeastern-2016.pdf.

258. 20 U.S.C. §§ 1232g(b)(1), (2) (2012).

259. Gonzaga Univ. v. Doe, 536 U.S. 273, 287 (2002).

260. Dear reader, you needed a citation for that? Well the two are sometimes confused, especially in today's dystopian science fiction. *See, e.g.*, Alyssa Rosenberg, *In 'Snowpiercer,' Bureaucracy Is the Real Monster*, WASH. POST (July 7, 2014), https://www.washingtonpost.com/news/act-four/wp/2014/07/07/in-snowpiercer-bureaucracy-is-the-real-monster/ (reviewing SNOWPIERCER (SnowPiercer et al., 2013)). But we checked, and as yet, that's still fiction.

261. *See* 20 U.S.C. § 1232g(b)(1)(I); 34 C.F.R. §§ 99.31(a)(10), 99.36(a) (2017).

262. 34 C.F.R. § 99.36(a) (2017); Recent Amendments, *supra* note 108.

263. 34 C.F.R. § 99.36(c) (2017).

circumstances comprise factors such as "immediacy, magnitude, specificity of information concerning the emergency," and duration of the emergency.[265] The DOE will not second-guess a rational decision.[266] The FPCO approved disclosure in case of a public health threat, in which multiple, unknown students might have been at risk,[267] and signaled approval of disclosure in case of specific threats of violence against individual students.[268] The health consequences in Zach's case were life threatening with grave implications. Moreover, disclosure upon a documented emergency hardly risks the kind of blanket policy change that the FPCO rejected in New Mexico law.[269]

Another option for record requesters like Zach's parents is to immediately seek an access order from a court. Again, FERPA specifically contemplates a court's equitable balancing of student privacy against a requester's interest in disclosure. By definition, a court order upon analysis of case-specific facts cannot create a policy or practice that would contravene FERPA.[270] The statute does not revoke the power of a trial judge to exercise reasoned discretion, just as a school official might amid a health or safety emergency.[271] The court may employ its full range of tools to ascertain facts and craft an appropriately narrow order, including *in camera* review and an injunction against subsequent disclosure.[272] The copyright enforcement cases demonstrate that the court should not authorize a fishing expedition, but that the enforcement of property rights can support an appropriately narrow disclosure order.[273] The transparency and accountability policy of a public records law weighs similarly in favor of disclosure,[274] so surely a child's right to life tips the balance definitively. At the same time, court processes are slow; it would be irresponsible of an educational institution to insist on a court order pro forma in the face of an undisputed medical emergency.

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264. EMERGENCIES AND DISASTERS, *supra* note 32, at 4.
265. Recent Amendments, *supra* note 108.
266. 34 C.F.R. § 99.36(c) (2017).
267. EMERGENCIES AND DISASTERS, *supra* note 32.
268. Letter to Strayer University, *supra* note 33.
269. *See supra* note 151 and accompanying text.
270. *See supra* note 162 and accompanying text.
271. *See supra* note 164 and accompanying text.
272. *See supra* notes 171-174 and accompanying text.
273. *See supra* notes 164-165 and accompanying text.
274. *See supra* note 170 and accompanying text.

### *C. Even if a Video Recording Captures Multiple Students, FERPA Allows for Disclosure, and at a Public Educational Institution, FOI Law Compels Disclosure*

FERPA does not preclude disclosure because a video recording captures multiple students. A single record, such as a teacher's grade book, may be an education record of multiple students. Similarly, a video recording, such as a recording of a play performed by the drama club, created and maintained for the purpose of reviewing and improving student performance, may be an education record of multiple students. Moreover, a recording might be an education record as to some students depicted and not others. For example, the same drama club recording might be an education record of a student performing on stage, but not an education record of a student incidentally pictured in the audience. The latter representation is more akin to an athletic team photo, neither created nor maintained for any educational purpose with regard to the latter student.[275]

If a recording is not an education record of any student besides the requester, then of course FERPA is no barrier to access.[276] If access to an education record is afforded under a FERPA exception, such as health and safety or court order, then FERPA is no barrier to access, because the exceptions obviate the consent requirement.[277] In crafting a narrow disclosure plan, a school official or court might take account of the scope of necessity. For example, if a recording were an education record as to multiple depicted students, and a medical emergency necessitated examination of the recording, disclosure might be limited to persons responsible for medical direction and treatment. In Zach's case, the Moores were content with their attorney's recounting of the accident when at last the recording was released. Immediate disclosure to Zach's doctors should not have required litigation.

In FERPA's early decades, redaction of identity in video recordings by blurring or similar obfuscation was not a practical option.[278] Even in the age of digital media, many educational institutions still might lack in-house capacity to redact video recordings. In a health or safety emergency, outsourcing redaction might take too long—though again, a health and

275. *See supra* notes 187-192 and accompanying text.

276. *See supra* Section V.A.

277. *See supra* Section V.B.

278. The much maligned "blue dot" that concealed the identity of Patricia Bowman in the rape trial that acquitted William Kennedy Smith was state of the art in 1991. *See generally*, *e.g.*, Joe Treen, *The Most Famous Woman Never Seen*, PEOPLE (Dec. 23, 1991), http://people.com/archive/the-most-famous-woman-never-seen-vol-36-no-24/.

safety emergency under FERPA does not require redaction. Today, redaction technology is fast becoming more efficient and readily available.[279] If an educational institution is confronted with a properly requested recording that is an education record of multiple students, and no FERPA exception or rationale to deviate from policy pertains, there is no excuse to withhold the recording from disclosure when redaction can obscure the identities of other students.

The access provisions of FERPA expressly contemplate records of multiple students. In three sentences, FERPA first imposes on educational institutions, as a condition of funding, recognition of a parent or student's "right to inspect and review" the student's education records.[280] Second, FERPA contemplates the possibility of an education record concerning multiple students:

> If . . . the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material.[281]

Though the statute does not employ a term such as "redaction," the reference to "part" suggests that a single record must be regarded as divisible, if possible. Third, FERPA requires that educational institutions establish "appropriate procedures" for access "within a reasonable time"—no more than forty-five days.[282] Propriety certainly admits of redaction, if necessary, and reasonable time to accomplish it.

Experience with the FPCO and DOE supports redaction in comportment with FERPA access. For example, in the 2008 regulation revision, the DOE hypothesized an incident witness statement naming multiple students: "John

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279. Products are developing fast in response to the demand created by pervasive cameras, especially in policing. *See, e.g.*, Lily Hay Newman, *Seattle Police Held a Hackathon to Figure Out How to Redact Body Cam Video Streams*, SLATE (Dec. 22, 2014, 2:32 P.M.), http://www.slate.com/blogs/future_tense/2014/12/22/seattle_police_hackathon_worked_on_redacting_body_cam_video_streams.html. Software and online tools now abound with variable pricing structures. *See generally*, *e.g.*, *Police Video Redaction Software*, POLICEONE.COM, https://www.policeone.com/police-products/Video-Redaction-Software/ (last visited June 30, 2017).

280. 20 U.S.C. § 1232g(a)(1)(A) (2012).

281. *Id.*; 34 C.F.R. § 99.12(a) (2017). The regulations offer no further elaboration.

282. 20 U.S.C. § 1232g(a)(1)(A).

grabbed Michael's backpack and hit him over the head with it."[283] The DOE explained that both John's and Michael's parents have a right to inspect and review the statement, though first it must be redacted to conceal the identity of the other named student.[284] If the identity of the other named student is already known to the requesting parents, however, then the statement may not be released at all, as FERPA provides that even an unnamed student is personally identifiable in an education record if reasonable persons in the school community can then identity the student "with reasonable certainty," or the educational institution "reasonably believes" the requester knows who the student is.[285] In the case of an unknown assailant, redaction nullifies any lingering argument against disclosure.

If redaction can conceal identity in a given video recording, FERPA's simultaneous compulsory access and privacy provisions seem to render redaction as the only possible solution. But were there any argument on the point, the tandem action of state FOI law and FERPA lay it to rest, at least in the case of public schools subject to FOI law.

FOI law typically requires maximum disclosure, broadly construed, subject to derogation only by exemption, narrowly construed.[286] Through whatever means of express statutory exemption (or construction of exemption), such as an "other law" exemption, FERPA constitutes an exemption from FOI disclosure. Thus, FOI law and FERPA play a zero-sum game with records and their contents. Redaction is an established norm in state FOI law, so a public entity ordinarily must segregate exempt and non-exempt content and release the non-exempt content.

Redaction has become established practice with photographic records,[287] and that norm is now transitioning comfortably into moving pictures[288] as

283. Family Educational Rights and Privacy, 73 Fed. Reg. 74,806, 74,833 (Dec. 9, 2008) (codified at 34 C.F.R. § 99.36 (2017)).

284. *Id.*

285. 34 C.F.R. § 99.3 (2017) (definition of "Personally Identifiable Information," parts (f)-(g)).

286. *See supra* note 208 and accompanying text.

287. *See, e.g.*, Showing Animals Respect & Kindness v. U.S. Dep't of Interior, 730 F. Supp. 2d 180, 197-98 (D.D.C. 2010) (approving redaction of faces in photographs for statutory privacy exemption of federal FOIA).

288. *See generally* Democratic Party of Wis. v. Wis. Dep't of Justice, 2016 WI 100, ¶ 80-97, 372 Wis. 2d 460, 888 N.W.2d 584 (Abrahamson, J., dissenting) (applying Wisconsin law; disagreeing, after review of video recording *in camera*, with majority conclusions that, on facts, recording cannot be redacted for disclosure without rendering content

video redaction technology becomes more advanced and readily available. In 2011, a federal trial court allowed the U.S. Bureau of Prisons to withhold from disclosure surveillance video implicating privacy concerns when undisputed affidavits established that the government lacked the technological capacity to redact.[289] Only three years later, the Transportation Security Administration released security-checkpoint video with the faces of federal employees redacted to protect their privacy under the federal Freedom of Information Act, and the Eleventh Circuit approved.[290] Similar results have been reached at the state level. In 2015, after a multiple-victim shooting at Seattle Pacific University, a Washington court upheld disclosure of surveillance video after pixelation of students' faces pursuant to a "victim or witness" exemption in state FOI law.[291] The court furthermore rejected students' demands for obfuscation by black boxes rather than pixelation, reasoning that the black boxes went too far to obscure the emergency response, as accountability was the central purpose of the FOI disclosure.[292]

More recently, a New York trial court, applying the state FOI law, required police to review and produce 190 hours of body-camera footage "with redactions as necessary to prevent the disclosure of exempt material," at least pending a showing that redaction would be impossible "without unreasonable difficulty."[293] An affidavit in the New York case established

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"meaningless," or, on law, that "meaningless" content need not be disclosed under state open records law; and reviewing comparable precedents of other states).

289. Mingo v. U.S. Dep't of Justice, 793 F. Supp. 2d 447, 454 (D.D.C. 2011).

290. Corbett v. Transp. Sec. Admin., 568 F. App'x 690, 704-05 (11th Cir. 2014).

291. Does v. King Cty., 366 P.3d 936, 944 (Wash. Ct. App. 2015).

292. *Id.*

293. Time Warner Cable News NY1 v. N.Y.C. Police Dep't, No. 150305/2016, 2017 WL 1354833, at *2 (N.Y. Sup. Ct. Apr. 7, 2017), *clarifying and affirming interim order in* 36 N.Y.S.3d 579 (Sup. Ct. 2016); *see also* W. Va. Reg'l Jail & Corr. Facility Auth. v. Marcum, 799 S.E.2d 540, 545, 548 (W. Va. 2017) (rejecting magistrate recommendation that inmate "cell extraction" video recording be released after redaction because of overarching security concern, but not for error in redaction methodology).

A contrary assertion in a 2016 New York trial court decision appears to be erroneous. The court in *Jacobson v. Ithaca City School District*, 39 N.Y.S.3d 904 (Sup. Ct. 2016), considered a video recording that was an education record under FERPA, but opined that were the case otherwise, "it would have been entirely exempt from disclosure under FOIL." *Id.* at 908. The court cited *MacKenzie v. Seiden*, 964 N.Y.S.2d 702 (2013), as follows:

> (*see e.g. Matter of MacKenzie v. Seiden*, 106 A.D.3d 1140, 1143, 964 N.Y.S.2d 702 [2013] [a document exempt from production pursuant to state or federal statute is "categorically excluded in its entirety and not subject to redaction or

that the New York Police Department (NYPD) possessed editing software capable of redaction by blurring.[294] Moreover, the New York court was reluctant to let the NYPD off the hook when counsel suggested possible foot-dragging in police acquisition of redaction technology. The court recounted that at oral argument,

> [t]he NYPD essentially took the position that, having ignored the substantial likelihood that the footage captured would be subject to a FOIL request, it could deny such a request on the basis of having to rely on outdated software. That position is untenable. Any true examination of the burden of this request must take into account the costs associated with updating software in order to make redactions. The NYPD cannot intentionally fail to update its technology during the procurement process . . . and simultaneously rely on outdated software as the reason to deny a FOIL request.[295]

Applying state law, the court refused to allow the NYPD to charge for the costs of review and redaction, though it recognized a question of fact in the time the process might reasonably require.[296] In the same vein, recently, the Supreme Court of Pennsylvania soundly rejected a state police argument that redaction of trooper audiovisual vehicle recordings would constitute the impermissible burden of producing a "new record" under the state FOI law.[297] *Au contraire*, the court held: "The redaction envisioned here is analogous to the printed copy of an existing, original agency document

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> deletion[,] . . . even though redaction might remove all details which tend to identify the victim" (quotation and citations omitted)]).

*Jacobson*, 39 N.Y.S.3d at 908 (parentheses, brackets, omissions, and additions being those of the *Jacobson* court, not ours). However, *MacKenzie*, 964 N.Y.S.2d at 706, concerned only the operation of New York law concerning victims of sex offenses "involving the alleged transmission of [HIV]," N.Y. CIV. RIGHTS LAW § 50-b(1) (McKinney 2006). Naturally, the statute is prophylactically protective of privacy and expressly expansive, prohibiting disclosure of any "report, paper, picture, photograph, court file or other documents." *Id.* *MacKenzie* made no mention of FERPA, nor any broad declaration about the interaction of the New York FOIL and statutory exemptions. Rather, the appellate division wrote specifically that "if a document is protected by Civil Rights Law § 50–b, a state statute, it would be categorically excluded in its entirety and not subject to redaction or deletion." *MacKenzie*, 964 N.Y.S.2d at 706 (citing precedent construing same statutory section).

294. *Time Warner Cable News NY1*, 36 N.Y.S.3d at 593-94.

295. *Id.* at 594-95.

296. *Id.* at 595, 597.

297. Pa. State Police v. Grove, No. 25 MAP 2016, 2017 WL 2645401, at *14 (Pa. June 20, 2017).

which is delivered to the requester with black markings blocking exempt material."[298]

Wholly consistent with the use of redaction to reconcile the twin demands of disclosure and privacy are the softened position of the FPCO on video surveillance,[299] and the experience of the courts, bolstered by complementary guidance from the DOE, on the permissible disclosure of sufficiently de-identified student records.[300] The limited precedent involving video surveillance under FERPA furthermore accords with the redaction approach. The Utah Court of Appeals opted for redaction at the parent-requester's expense in *Bryner v. Canyons School District*,[301] discussed earlier in Section IV.E.

### *VI. Conclusion: Zach Attack, Back at the Plate*

The video in Zach's case was ultimately released by court order—but almost a month after the accident.[302] The video showed Zach grasping at the bench, which was elevated in the air rather than planted in the ground, and the bench collapsing on his head.[303] The video therefore excluded any theory of assault, though it implicated questions of due care on the part of the school district and contractors.[304] Zach progressed to recovery.[305] But, it is impossible to know whether lack of information about his injuries affected or delayed treatment of his neurological condition. It is easy to imagine a case in which a student's life would depend upon transparency.

Policy guidance is urgently needed and long overdue from the DOE and FPCO regarding video surveillance that captures the infliction of injury on a student by staff, by another student, or by accident. FERPA is a meritorious privacy law designed to protect student privacy in education records. It was not designed to obstruct transparency and accountability, and it has been perverted wrongfully to those ends by some institutions

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298. *Id.*

299. *See supra* Section IV.E.

300. *See supra* Section IV.F.

301. 351 P.3d 852 (Utah Ct. App. 2015); *see supra* Section IV.E.

302. Sitek & Simon, *supra* note 3 (excerpting surveillance recording in video news story).

303. *Id.*

304. *Id.*

305. *Id.* Indeed, the heading of this Part derives from a tweet regarding Zach's recovery. *See* Dustin U (@13dwood), TWITTER (Apr. 2, 2016, 9:37 p.m.), https://twitter.com/13dwood/status/716439453376483328 ("Super proud to see #Zachattack44 back at the plate. #fsba #riverdogs").

purportedly seeking to avoid liability. Outdated, inconsistent, and likely erroneous guidance documents continue to be cited by educational institutions to support non-disclosure decisions that are prophylactically and opportunistically self-defensive.

General video surveillance, beyond the classroom, is an inherently law enforcement, and not educational, function, usually creating no education record under FERPA. Even when video surveillance does create education records, FERPA has ample mechanisms, including a health and safety exception, to provide for the disclosure of recordings when the best interests of injured children require. Moreover, FERPA affords school officials ample latitude to err on the side of disclosure in an emergency without fear of liability or reprisal. FERPA works in tandem with state FOI law to ensure that transparency and accountability are unimpeded by ill-founded assertions of privacy. FERPA's privacy protections should never be invoked to forestall justice.