IN THE COMMONWEALTH COURT OF PENNSYLVANIA

1154 CD 2017

CENTRAL DAUPHIN SCHOOL DISTRICT,
Appellant

v.

VALERIA HAWKINS, FOX 43 NEWS and the COMMONWEALTH OF PENNSYLVANIA OFFICE OF OPEN RECORDS
Appellees.

BRIEF *AMICUS CURIAE* of THE BRECHNER CENTER FOR FREEDOM OF INFORMATION, STUDENT PRESS LAW CENTER, NATIONAL FREEDOM OF INFORMATION COALITION and SOCIETY OF PROFESSIONAL JOURNALISTS, in support of Appellees

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Appeal from order dated August 1, 2017 by the Honorable William T. Tully, Court of Common Pleas of Dauphin County, docketed at No.16-CV-4401 MP, affirming the final determination of the Office of Open Records, docketed at AP 2016-0583.

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IDENTITY OF *AMICI CURIAE* AND STATEMENT OF INTEREST

Amici are organizations that regularly speak for the rights of journalists to gain access to the information they need to inform the public.

The Brechner Center for Freedom of Information is located at the University of Florida College of Journalism and Communications, where for 40 years the Center's legal staff has served as a source of research and expertise about the law of access to information. The Brechner Center regularly publishes scholarly research about the public's rights under open-government laws, responds to media inquiries about the workings of public-records statutes, and conducts educational programming to inform citizens about their access rights.

The Student Press Law Center is an IRS 501(c)(3) nonprofit headquartered in Washington, D.C., with a mission of supporting substantive, civic-minded journalism in schools and colleges nationwide. Since its founding in 1974, the SPLC has been the nation's only dedicated source of legal assistance serving the needs of student journalists and journalism educators. As such, its legal staff regularly assists in resolving disputes about access to records and student privacy, and its attorneys have authored many authoritative articles addressing the myths and misconceptions about the breadth of FERPA confidentiality.

The National Freedom of Information Coalition (NFOIC) is a nonprofit organization that works to raise public awareness about the importance of

transparency and to protect the public's right to open government. With offices at the Missouri School of Journalism, NFOIC awards grants to its affiliated state- and region-based freedom of information organizations for their work in fostering, educating, and advocating for open, transparent government. NFOIC also administers the Knight FOI Fund, a perpetual legal fund to assist litigants advocating for open government in important and meritorious legal cases.

The Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists, and protects First Amendment guarantees of freedom of speech and press.

SUMMARY OF ARGUMENT

We are reminded by every day's headlines of the vital importance of public access to government records. Education is one of government's most costly and most important undertakings. While privacy laws have a valid role in safeguarding the confidentiality of educational records in which there is no valid public interest, privacy laws cannot be interpreted as an all-encompassing secrecy blanket that conceals anything-and-everything about the operations of public schools.

The privacy interests involved in behavior aboard a school bus – a space that is hardly "private" – are minimal as compared with the overriding public interest in making sure that schools are safe and that school authorities are discharging their safety duties properly. Concealing videos that shed light on the operations of schools disserves the public's interest in accountability and runs counter to well-established principles of Pennsylvania law that exceptions to the accessibility of public records must be narrowly construed.

Contrary to the School District's assertion, there is no possibility whatsoever that federal financial sanctions will be imposed for disclosure of the video sought by FOX 43 News. The Family Educational Rights and Privacy Act ("FERPA") has never been enforced against any educational institution over its four-decade history, and by law cannot be enforced for compliance with a mandatory court order. Indeed, sanctions under such circumstances would be plainly unconstitutional under recent Supreme Court precedent. Were FERPA to operate as the Central Dauphin School District insists, it would violate bedrock principles of federalism. The Court should not construe FERPA to be unconstitutional where a narrower construction not only exists, but is the only construction that makes any sense.

ARGUMENT

I . Access to records of educational institutions is critical for effective public oversight.

This case is about the ability of journalists to gain access to records that Pennsylvania law entitles the public to inspect (here, a video shot aboard a school bus that is believed to have captured an altercation between a student and a parent of some community prominence), the type of records on which journalists rely every day. Access to public records is the lifeblood of watchdog reporting, and there is perhaps no aspect of public life requiring greater vigilance than education. Using public records, journalists have been able to expose and redress terrible inequities and injustices in America's schools, including the rigging of standardized test results,[1] the overuse of dangerous restraining tactics on unruly children,[2] and the retention of predatory teachers with known records of serious misconduct.[3] Journalists are not alone in their dependence on documents obtained

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[1] *See* Heather Vogell & John Perry, *CRCT scores surge: Miracle or masquerade?*, The Atlanta Journal-Constitution (Dec. 14, 2008) (beginning series of investigative reports that exposed widespread inflating of standardized test scores, as teachers and administrators changed incorrect answers on students' scoresheets); John Perry, *Cheating our children: Suspicious school test scores across the nation,* The Atlanta Journal-Constitution (Mar. 25, 2012) (expanding on initial story and finding that testing results in 200 school districts across the country exhibited suspicious patterns emblematic of falsification).

[2] Ellie Silverman, *Special-ed student confined 617 times in 6 months despite state laws*, The Seattle Times (Nov. 12, 2016).

[3] Bethany Barnes, *How Portland Public Schools helped educator evade allegations of sexual misconduct*, The Oregonian (Aug. 17, 2017).

through public-records requests to expose the shortcomings of schools. Access to records about student discipline have enabled the ACLU and other advocacy groups to document great racial disparities in school suspensions and expulsions, a phenomenon that has become known as "the school-to-prison pipeline."[4]

Regrettably, those in public education too often regard federal privacy law as a "get out of accountability free" card, to be played whenever journalists or concerned parents inquire about whether their communities' schools are safe and effective. FERPA is the knee-jerk response when questions arise that an educational institution would prefer not to answer, even when the information sought is not educational in nature. For instance, Northern Kentucky University recently was sanctioned by a federal district court for frivolously invoking FERPA to obstruct the deposition of a basketball coach being asked for his recollections

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[4] Council of State Governments Justice Center & Public Policy Research Institute, "Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement) (July 2011), *available at* https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf (documenting that, over the course of their K-12 education, 31 percent of Texas students received at least one out-of-school suspension, but 83 percent of African-American male students did, almost always for nonviolent incidents); New York Civil Liberties Union, "How School Discipline Feeds the School-to-Prison Pipeline" (Oct. 2013), *available at* https://www.nyclu.org/sites/default/files/publications/nyclu_STPP_1021_FINAL.pdf (examining a decade's worth of public records from New York City schools to show that out-of-school disciplined doubled from 2001 to 2011, with black students serving more than one-half of the suspensions although they make up less than one-third of the student population).

about a sexual-assault complaint lodged against three of his players.[5] Oklahoma State University invoked FERPA when confronted with why it allowed a known serial sex offender to roam loose on the campus without notifying even the university's own police.[6] There is a manifest public interest in interpreting FERPA in a sensibly narrow manner to avoid such abuses.

In each of the aforementioned instances of impactful investigative reporting, journalists had to get past unfounded FERPA objections to obtain the records essential for exposing school wrongdoing. An overly broad interpretation of student privacy law would have made each of those investigative news stories impossible, and so the safety and integrity of public schools depends in no small measure on a commonsense reading of FERPA.

Perhaps most unjustly, FERPA has been invoked even to obstruct requests from grieving family members who want to know how their children were injured or killed at school, including the family of a Valdosta, Ga., teen that was forced to go to court to obtain access to a security video showing their child's last moments

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[5] Doe v. Northern Kentucky Univ., No. 2:16-CV-28, 2016 WL 6237510 (N.D. Ky. Oct. 24, 2016).

[6] Tyler Kingkade, *Nathan Cochran Pleads Guilty to Sexual Battery at OSU, But Won't Face Prison*, Huffington Post (Sept. 23, 2013), *available at* http://www.huffingtonpost.com/2013/09/23/nathan-cochransexual-battery_n_3975964.html.

in a high-school gymnasium.[7] While the court in that case did in fact order disclosure over the school district's FERPA objection, the family incurred a cruel and needless ordeal. If the Court countenances the Central Dauphin School District's irrationally broad interpretation of FERPA, more such abuses will proliferate.

Access to security videos is especially important because those videos are often the public's only way of effectively keeping watch over increasingly heavily policed schools, where students regrettably have been injured by overzealous security tactics. To cite one recent example, a 13-year-old Columbus, Ga., student was gravely injured, leading to amputation of his leg, after a school contractor put him in a restraining hold described by witnesses as a "body slam."[8] The school claimed that the student was able to walk under his own power and showed no signs of distress, but a news blogger obtained a leaked copy of school surveillance

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[7] Jeff Black, *Video released in mysterious death of Georgia teen Kendrick Johnson leaves questions unanswered*, NBC News (Oct. 30, 2013), *available at* https://www.nbcnews.com/news/other/video-released-mysterious-death-georgia-teen-kendrick-johnson-leaves-questions-f8C11502245. This case is not isolated; a family in upstate New York was similarly denied access to a school-recorded video of the football game where their son was fatally injured on the field, forced to go to court to obtain the footage that the school wrongfully classified as a FERPA education record. *See* Matthew Spina, *Parents of High School Football Player Who Died File Claim*, The Buffalo News (Jan. 27, 2014).

[8] Richard Hyatt, *Surveillance Video Shows Student Being Carried Out*, AllonGeorgia.com (Oct. 23, 2016), *available at* http://muscogee.allongeorgia.com/exclusive-surveillance-video-shows-student-being-carried-out/.

video – video that the school had been withholding on FERPA grounds – showing the student being picked up and carried to his school bus, belying the school's official account.[9] These are the kind of essential public-service news stories that will go untold if security videos are taken off the public record.

II. FERPA is a narrow statute that must necessarily apply only to educational records centrally maintained in a file corresponding to the student

Counsel for Fox 43 and for the Pennsylvania NewsMedia Association will amply demonstrate in their briefs that the trial court correctly determined that a school-bus surveillance video does not meet the statutory definition of an "education record." *Amici* therefore address this definitional issue only briefly, to emphasize that the trial court's conclusion is the only plausible understanding of FERPA – for the best interests of educational institutions as well as requesters.

Any discussion of the FERPA status of documents must begin and end with the Supreme Court's authoritative word in Owasso Independent School Dist. No. I-011 v. Falvo, 534 U.S. 426 (2002). In Owasso, the Supreme Court – with the *amicus* support of the U.S. Department of Education, which has been delegated exclusive authority to interpret and enforce FERPA – rejected a broad reading of the phrase "education records." The justices held that disclosing the scores on peer-graded quiz papers did not violate FERPA, because the statute applies only to

[9] *See id.*

records that are "maintained" by the school, and these papers had not been filed away in a central repository so as to be retrievable as part of each student's permanent record. *Id.* at 433. Although school litigators routinely wave off the Owasso holding as *dicta* – and a few courts have been persuaded to do the same – the "central maintenance" requirement was in fact decisive to the outcome of the case. The quiz papers qualified as FERPA education records in every way – they contained student identifiers, they disclosed information about the students' educational performance, that information was not otherwise publicly known or observable – and yet the Court found FERPA inapplicable, solely because of the failure to maintain the papers centrally with the students' permanent records. "Decisive" is the opposite of *dicta*.

That the Supreme Court did not find a federally protected privacy right even in student grades is noteworthy. If "education records" means anything to the average person, it means "grades" – far more than it means "pictures of people's faces." Yet even grades, the Court decided, did not qualify for FERPA protection unless memorialized in a central repository and retrievable by the name of the corresponding student. In this case, as is customary at schools everywhere, it is established that recordings are kept in two locations – normally, in the district's Transportation office (not in student-by-student files), and if a Right-to-Know

dispute arises, in a safe belonging to the District's records custodian (again, not in student-by-student files).

The Court's Owasso holding was rooted in, and consistent with, the legislative intent behind FERPA, which was never to create a subclass of invisible people. Congress enacted FERPA with a very specific concern in mind: That schools were maintaining files, without parents' knowledge, containing potentially damaging observations about their children that might be erroneous and might be shared with police, employers or graduate schools without a chance for the family to correct the errors.[10] In other words, FERPA applies to the file that a school would pull if an employer or a graduate school were to say, "Give me John Smith's file," or that a parent would receive if she asked to see her own child's file.

The Owasso Court worried, properly, about what a contrary rule might mean for the management of schools (and this was before the universal adoption of electronic communications that has only magnified the number of places in which information might be stored). If the Central Dauphin School District is right, and FERPA applies to all records in all formats pertaining to students regardless of whether they are kept with the student's permanent file or not, imagine the result when a parent says, "I want my child's FERPA records, to include every record in

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[10] *See* Zach Greenberg & Adam Goldstein, *Baking Common Sense into the FERPA Cake: How to Meaningfully Protect Student Rights and the Public Interest*, 44 J. LEGIS. 22, 26 (2017).

which he is identified or identifiable, regardless of where it is held." And imagine – since FERPA applies equally to colleges as well as K-12 schools, and this Court's disposition of the case will determine the scope of FERPA at all levels of education – that a student at Penn State University makes the same request. Penn State has 2,000 security cameras[11] and 17,000 employees.[12] If the School District's understanding of FERPA is right, then Penn State will be forced to search thousands of email baskets to gather any records in which the student is identified or identifiable, and to examine the footage from 2,000 surveillance cameras for images of the student's face – all within the statutory compliance deadline of 45 days. This cannot be the law.

It defies logic to define a video of an event that is visible to passersby as a "private" school record. By that reasoning, FERPA would be violated by showing a video of Friday night's high-school football game, if the video is kept by the school. Congress plainly intended that FERPA apply to records disclosing information that is actually confidential and not publicly known or knowable. *See, e.g.*, Bracco v. Machen, No. 01-2009-CA-4444 (Fla. Cir. Ct. Jan. 10, 2011) (videos of college Student Senate meetings are not protected by FERPA because there is

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[11] Cate Hansberry, *'We're being watched': 2,000 cameras monitor Penn State campus, more on the way,'* Centre Daily Times (April 20, 2014).
[12] Employee head count is presented on the Penn State University Human Resources page, https://ohr.psu.edu/prospective-employee.

no privacy interest in speaking at a meeting that a member of the public could observe). To hold that the outward appearance of a student riding a school bus is a piece of confidential information would, frankly, be disastrous for schools, since they take no precautions to keep this "confidential information" from being seen through bus windows.

Reinforcing the narrowness of what "education records" means, the Department of Education's regulations provide that, when a party other than the student seeks access to information from an education record, the record must be annotated to memorialize details about the requester and the request. 34 C.F.R. § 99.32(a)(2). It is inconceivable that thousands of inboxes, file drawers and security cameras everywhere on campus could be annotated with the name of the requester and the date of the request. This reinforces the Owasso understanding that FERPA is about a centralized records repository where records are kept corresponding to the student's identity, so that the student or parent could have a realistic opportunity when inspecting the file to see who else has requested it.

The U.S. Department of Education has said on numerous occasions that FERPA is a narrow statute covering only "education records" and not all information about a student. For example, the Department opined in a 2008 letter that it is not a FERPA violation for a visitor to sit in a classroom and observe the students' activities, even though the visitor will see the students' faces and learn

their names.[13] Since it would not be a FERPA violation for a visitor to sit on a school bus and observe the students' activities – indeed, *this very case* involves a visitor riding the school bus – it is absurd to say that viewing a recording of the same activity violates privacy.

Further, the Department has said repeatedly that FERPA is a *records* confidentiality statute and not an *information* confidentiality statute, so that its focus is on the integrity solely of the student's permanent file, not on some fanciful duty of schools to keep their students invisible. As the Department told a Maryland school system:

> FERPA applies to the disclosure of tangible records and of information derived from tangible records. FERPA does not protect the confidentiality of information in general, and, therefore, does not apply to the disclosure of information derived from a source other than education records, even if education records exist which contain that information. As a general rule, information that is obtained through personal knowledge or observation, and not from an education record, is not protected from disclosure under FERPA.[14]

In other words, location matters. The Department has said that, if information about a student exists in place other than in an "education record," then it may be

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[13] *See* Letter of LeRoy S. Rooker, U.S. Department of Education Office of Family Policy Compliance, to Shari A. Mamas, Staff Attorney Education Law Center (Dec. 8, 2008), *available at* http://www.wrightslaw.com/law/osep/ferpa.classrm.observe.pdf.

[14] See Letter of LeRoy S. Rooker, U.S. Department of Education Office of Family Policy Compliance, to Montgomery County, Md., Public Schools (Feb. 15, 2006), *available at* http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/montcounty0215.html.

disclosed without violating FERPA. This further reinforces that the phrase "*education* record" actually means something and is not, as the School District would insist, synonymous with "record." The Department of Education itself acknowledges that schools keep records containing information about students that do not qualify as "education" records under FERPA.

Pennsylvania law, too, counsels in favor of a commonsense understanding of the meaning of "education records." Every state's public-records law, including Pennsylvania's, begins with the premise that exceptions to access are to be narrowly construed and that close judgment calls are to be made in favor of the public's right to be informed. Office of Gov. v. Scolforo, 65 A.3d 1095, 1100 (Pa. Commonw. 2013). There is ample precedent elsewhere for disclosing the very same types of records that Central Dauphin is withholding here, including on-point rulings in Louisiana (State v. Mart, 697 So.2d 1055 (La. Ct. App. 1997)), New York (In Matter of Rome City School Dist. v. Grifasi, 10 Misc. 3d 1034 (NY Sup. Ct. 2005)) and Washington (Lindeman v. Kelso Sch. Dist., 172 P.3d 329 (Wash. 2007)), so it clearly is possible to construe FERPA narrowly in a way that does not defeat the public's right of access. Since it is not just possible but eminently logical to interpret FERPA in a way that avoids the nonsensical expansion of "student educational privacy" to cover records that are neither educational nor private, the Right-to-Know-Law requires adopting that interpretation.

III. There is no possibility whatsoever of FERPA financial penalties for disclosure of the video at issue

A. Even when documents do constitute "education records," federal statutes and regulations foreclose financial sanctions for a single disclosure

The trial court correctly held that release of the security video would not result in the loss of federal funds so as to entitle the School District to claim the statutory exemption in Section 708(b)(1) of the Right-to-Know Law. It is, in fact, both a legal and a factual impossibility for the Department of Education to impose FERPA sanctions on a school district for releasing a security video in compliance with a judicial directive.

First and most importantly, the School District's argument presupposes that the video is in fact a FERPA-protected education record, when the court below has already made the factual finding that it is not. For this reason, the School District's reliance on Press-Citizen Co. v. Univ. of Iowa, 817 NW 2d 480 (Iowa 2012), is misplaced. In that case, the justices *assumed without deciding* that the documents at issue were confidential education records covered by FERPA. *See id.* at 486. Here, FOX 43 is not arguing for access to FERPA-protected education records; FOX 43 is arguing for access to records that – as the trial court made the factual finding – do not constitute education records at all. The "policy" and "practice" of producing records *not* protected by FERPA does not, it goes without saying, violate the statute.

Second, the FERPA statute explicitly provides that disclosure in compliance with a court order does not constitute a legally prohibited release. *See* 20 U.S.C. § 1232g (b)(2)(B) ("compliance with judicial order" recognized as an exception to the prohibited "policy or practice" of releasing education records). Had the school districts in the aforementioned Mart, Grifasi and Lindeman cases been de-funded by the Department of Education for complying with judicial orders to produce surveillance videos, the Central Dauphin School District would produce documentation of that de-funding. Of course, no de-funding has occurred.

Third, the sole enforcer of FERPA is the U.S. Department of Education, and the Department has enacted regulations setting forth a multi-step enforcement process under which a "first offense" *cannot* result in any financial sanction. *See* 34 C.F.R. § 99.66. If the Department receives a timely complaint from a person alleging that her privacy was compromised, then the Department initiates an investigation to determine, first, whether a nonconsensual release of education records occurred, and if so, whether that release was pursuant to a "policy or practice" of releases. *Id.* If a finding of a "policy or practice" is made, then the Department may take only the following steps: (1) Issue a corrective plan and (2) provide a reasonable time for voluntary compliance with the plan. *Id.*, § 99.66(c)(1)-(2). Only if the school district is placed under a corrective plan and then fails to comply with the plan may the Department initiate proceedings to

withhold federal funding – but even then, the imposition of sanctions is discretionary and not mandatory. 34 C.F.R. § 99.67. This is very far indeed from satisfying Pennsylvania's statutory exemption for a release of records that "will" result in the loss of federal funding. So many contingencies would have to be triggered – contingencies that, it bears emphasizing, have never happened in the 44-year history of the statute[15] – as to make the loss of federal funding astronomically improbable. Even if the Department of Education overlooked the statutory exculpation for a release in compliance with a court order, the very worst the Department could do in this situation is place the School District under a plan of compliance. At *that* point, the District might have an argument to *future* requesters that continued disclosure of similar records would result in the loss of federal funding (though as explained below, that too is inconceivable), but we are not at that point.

Indeed, Department regulations *expressly recognize* that there may be times when compliance with FERPA is foreclosed by conflicting obligations under state or local law, and when those conflicts arise, educational agencies are required merely to give notice that a conflict exists. 34 C.F.R. § 99.61 In other words, the

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[15] *See* Greenberg & Goldstein, *supra*, at 27; Rob Silverblatt, *Hiding Behind Ivory Towers: Penalizing Schools That Improperly Invoke Student Privacy to Suppress Open Records Requests*, 101 GEO. L.J. 493, 498 (2013) (noting that in the 40-plus year history of FERPA, no institution has ever lost funding).

Department in no way requires or expects that educational institutions will violate state law in the name of avoiding a finding of FERPA noncompliance. For that regulation to mean anything, it must mean that an educational institution can avoid being penalized for the release even of actual education records (which, to emphasize, this video is not) by alerting the federal government to a state or local law requiring disclosure.

In Gonzaga Univ. v. Doe, the Supreme Court clarified the disclosure of "education records" by noting that "FERPA's nondisclosure provisions further speak only in term of institutional policy and practice *not on individual instances of disclosure*." 536 U.S. 273, 288 (2002) (emphasis added). *See also* 20 U.S.C .§§ 1232g(b)(1)-(2)(prohibiting the funding of "any educational agency or institution which has a *policy or practice* of permitting the release of education records") (emphasis added). The focus on disclosure thus is a holistic, or "aggregate" focus, and concern is not raised on "whether the needs of any particular person have been satisfied." Gonzaga, 536 U.S. at 288 (quoting Blessing v. Freestone, 520 U.S. 329, 343 (2008)). Recipient institutions thus can avoid termination of funding so long as they "comply substantially" with FERPA's requirements. *Id*.

Absent a continuous disclosure of education records, there can be no violation of FERPA's requirements. In each provision the reference to individual

consent is in the context of describing the type of "policy or practice" that triggers a funding prohibition. *Id*. "FERPA was adopted to address systematic, not individual, violations of students' privacy by unauthorized releases of sensitive information in their educational records." Jensen v. Reeves, 45 F.Supp.2d 1265, 1276 (D.Utah 1999) (holding that principal's disclosure of information to parents complaining of sexual harassment regarding accused student did not violate FERPA). Multiple courts have agreed that an individual disclosure of information is not a "policy or practice" within the meaning of FERPA. *See* Weixel v. Board of Educ. of City of New York, 287 F.3d 138 (2d Cir. 2002) (school's alleged conduct of contacting a student's doctors, a potential home instructor, and a lawyer to provide defamatory and inaccurate information about student who was allegedly unable to attend classes for an extended period of time due to chronic fatigue syndrome and fibromyalgia did not constitute a "policy or practice" under FERPA); Daniel S. v. Bd. of Educ. of York Cmty. High Sch., 152 F. Supp. 2d 949 (N.D. Ill. 2001) (teacher's disclosure to his cross-country team that he had kicked two students out of his gym class did not involve "policy or practice" that violated provisions of FERPA).

B. The penalty structure of FERPA can logically apply only to a wholesale policy of failing to safeguard records

Congress equipped the Department of Education with only one remedy for a FERPA violation: complete disqualification from federal education funding. *See*

20 U.S.C. §1232g(b)(1) (providing that "no funds shall be made available" under any federal education program to an institution violating FERPA's prohibitions on disclosure.) Revoking the School District's federal funding would ruinous; according to its most recently published annual budget, the Central Dauphin School District derives $2.6 million a year in general operating funds from federal sources.[16] To insist that Congress intended to undermine the financial viability of academic institutions because they fulfilled a public-records request is simply nonsense.

Realistically, Congress intended FERPA to penalize only the rare outlier institution that wantonly makes a practice of handling confidential student education records carelessly. Otherwise, Congress would have provided milder intermediate penalties for one-off disclosures of records, just as is true of comparable education funding statutes. *See* Dep't of Educ., Adjustment of Civil Monetary Penalties for Inflation, 77 Fed. Reg. 60047, 60049 (Oct. 2, 2012) (amending 34 CFR Part 36) (specifying a range of civil monetary penalties for violating statutes administered by the Department of Education, all but one of which is capped at $35,000 per violation).

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[16] Central Dauphin School District, Final General Fund Budget, Fiscal Year 2017-18, *available at* http://www.cdschools.org/cms/lib04/PA09000075/Centricity/Domain/18/2017-18CentralDauphinSDGeneralFundBudgetPDE-2028Version.pdf.

It is nonsensical to take the position that, for example, the penalty for falsifying a crime report to mislead the public in violation of the federal Clery Act, 20 U.S.C. § 1092(f), is an offense carrying a capped penalty of $35,000, while the penalty for granting a request for public records is $2.6 million (or, at a university as large as Penn State, in the hundreds of millions of dollars). For its penalty structure to make any sense, FERPA must penalize only a one-in-a-million decision to abandon confidentiality as a routine institutional practice. This explains why, in its 44 years of existence, FERPA has never resulted in sanctions against any institution.

C. To interpret FERPA to impose crippling financial disqualification for granting requests for public records would render the statute unconstitutional

If FERPA did operate as the School District insists, it would be unconstitutional. The Supreme Court has held that Congress cannot extend to states "offers they can't refuse," by imposing coercive regulation at the threat of a financial "gun to the head." NFIB v. Sebelius, 132 S.Ct. 2566, 2604 (2012). The School District's interpretation of FERPA would render the statute unconstitutional as exceeding Congress' Spending Clause authority. This Court should avoid such an unconstitutional construction when the statute can be readily salvaged by a far more logical construction.

While Congress may condition the receipt of federal funds on accepting reasonable conditions under its Spending Clause authority, the financial penalty for

noncompliance cannot be "so coercive as to pass the point at which pressure turns into compulsion." South Dakota v. Dole, 483 U.S. 203, 211 (1987) (internal quotes and citation omitted). In the Sebelius case, the Supreme Court determined that pressure had become compulsion where states that were threatened with ineligibility for hundreds of millions of dollars in federal Medicaid funding if they rejected the Affordable Care Act's mandate to expand Medicaid eligibility.

Significantly, the Court views Spending Clause enactments with special skepticism, where, as here, the condition purportedly being imposed – exempting anything meeting FERPA's description of an education record from disclosure, regardless of the privacy and disclosure interests at stake and in derogation of state open-records laws – does not relate to the actual grant program. Sebelius, 132 S.Ct. at 2604; *see also* Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S.Ct. 2321 (2013) (striking down as an "unconstitutional condition" a federal policy conditions receipt of federal AIDS-education grants on an agreement to adopt a federal "party line" condemning prostitution, unrelated to the purpose of the grant program).

While courts at times have misinterpreted FERPA as a prohibition against honoring individual requests for public records, that interpretation is no longer tenable after Sebelius. If honoring a public records request will put a school district in violation of FERPA, and the result of being found in violation of FERPA is

disqualification from all federal funding, then FERPA fails the compulsion standard of Sebelius. Indeed, educational institutions have argued for decades that FERPA operates as Sebelius' "gun to the head," because refusing federal funds would so disastrous as to be no choice at all.

Interpreting statutes to be unconstitutional is a disfavored "nuclear option," and courts properly avoid doing so when a statute can be given a limiting and salvaging construction. DePaul v. Commonwealth, 600 Pa. 573, 589 (2009) ("[S]tatutes are to be construed whenever possible to uphold their constitutionality.") (quoting In re William L., 477 Pa. 322 (1978)). As the U.S. Supreme Court has repeatedly instructed, "the elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." Edward J. Bartolo Cop. v. Fla. Gulf Coast Bldg. & Constr. Trade Council, 485 U.S. 568, 575 (1988) (quoting Hooper v. Calif., 155 U.S. 648, 657 (1895)).

As a result, FERPA is readily harmonized with state open records laws by giving it the limited understanding that its drafters intended – as a prohibition on a policy or practice of failing to secure centrally maintained education records containing non-public information of the type that could be used detrimentally against a student if disclosed.

Amici from the Pennsylvania School Boards Association rely on a December 2017 advisory letter from the Department of Education to a different school district concerning the FERPA status of a school video, but that interpretation is of minimal value here. Courts properly defer to agency interpretations when they go through the rigors of formal notice-and-comment rulemaking, *see* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), but not when they issue informal guidance. The issuance of an advisory letter does not even constitute a "formal adjudication" (because there was no complaint to adjudicate), and these letters carry no precedential value even within the agency, let alone to a reviewing court. As the Supreme Court itself has said: "Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *See* Christensen v. Harris County, 529 U.S. 576, 587 (2000) (refusing to defer to wage-and-hour-law interpretation in policy manual of National Labor Relations Board, because it did not go through rigors of rulemaking). Further, deference to the Department's view should be at its nadir because the Department is opining in an area outside of its expertise. *See* Gonzales v. Oregon, 546 U.S. 243 (2006) (no special deference to Justice Department's interpretive rule governing physician-assisted suicide because the Attorney General does not have any special expertise

in making medical judgments). The status of records as public under state law is a matter beyond the knowledge of the Department of Education, which never even mentions the existence of state freedom-of-information laws in its FERPA regulations. The far more persuasive authority is history, and history shows no record that the Louisiana district in Mart, the New York district in Grifasi, or the Washington district in Lindeman was de-funded by the U.S. Department of Education for complying with judicial orders to disclose school surveillance videos.

CONCLUSION

For the foregoing reasons, the Court should affirm the finding of the trial court that the video does not constitute a confidential FERPA education record and is therefore subject to release under the Right-to-Know-Law.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2018, I caused a true correct copy of the foregoing Brief of Amicus Curiae to be served upon the following persons in the manner indicated below:

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