FILED ELECTRONICALLY

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
CIVIL BRANCH
DIVISION 8
CASE NO. 16-CI-3229

UNIVERSITY OF KENTUCKY PLAINTIFF/APPELLANT

v. **UNIVERSITY OF KENTUCKY REPLY IN SUPPORT OF BRIEF ON APPEAL**

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

SUMMARY OF UNDISPUTED POINTS

The *Kernel's* response reveals its profound discomfort with how the University has cut through to the heart of this case, namely, the very real, personal, and fundamental privacy rights implicated by the *Kernel's* demand to see student sexual assault records. Nevertheless, in its response the *Kernel* either concedes or otherwise does not dispute several material points, such that the following are now conclusively established:

1. The U.S. Constitution prohibits government entities like the University from disclosing the intimate details of a sexual assault. *Bloch v. Ribar*, 156 F.3d 673, 685-687 (6th Cir. 1998).

2. The Family Educational Rights and Privacy Act ("FERPA") protects personally identifiable information in records directly related to students from being disclosed without student consent. Such "personally identifiable" information includes obvious identifiers like student names, but also includes entire records when a university reasonably believes the requester already knows the identity of the student or to whom the record relates. 34 C.F.R. 99.3; *Krakauer v. Montana ex rel. Christian*, ____ P.3d ____, 2016 WL 4978446 at *6 (Mont. 2016); *Press-Citizen v. University of Iowa*, 817 N.W.2d 480, 493 (Iowa. 2012); United States amicus brief in *Krakauer* at page 14. As the *Kernel* admits, this aspect of "personally

identifiable information" is equally applicable to the constitutional right of privacy cited above. *See Kernel's* response brief at page 6 ("The disclosure [in *Bloch*] obviously violated her privacy rights because the public already knew her identity").

3. The *Kernel* knows the identity of at least one of the sexual assault survivors at issue in this case. It does not deny it. The *Kernel* simply argues the absence of facts to prove its knowledge. Of course, the *Kernel* forgets it has published articles *admitting* it has spoken with a "spokesman for the victims" who the *Kernel* could not identify by name because, by the *Kernel's* own ironic admission, doing so "could identify [the student survivors]."[1]

There are, of course, points on which the parties disagree, but the law resolves those disputes in favor of the University and the students it has sought to protect.

ARGUMENT

I. FERPA protects the privacy rights of student sexual assault survivors

The *Kernel* paints FERPA as a law created to shield universities from public scrutiny. In truth, however, "Congress enacted FERPA to protect the privacy *of students* and their parents." *Krakauer*, 2016 WL 4978446 at *4 (citations omitted, emphasis added); 34 C.F.R. 99.2. *See also* Joint Statement in Explanation of the Buckley/Pell Amendment, 120 Cong. Rec. 39,858, 39, 862 (Dec. 13, 1974); 76 Fed. Reg. 765607 (2011). The *Kernel* also seeks to convince the Court that the University has declined to produce its investigative file to avoid scrutiny over how it handled sexual assault allegations against Dr. Harwood. The University, however, only seeks to protect the privacy rights of the student survivors. While the *Kernel* has confidently assumed the University is unwilling to let this Court review the file, the University's pending motion for the Court to conduct an *in camera* demonstrates otherwise.

1 Marjorie Kirk, *Kernel Obtains Withheld Records*, Kentucky Kernel (August 13, 2016), available online at http://www.kykernel.com/news/kernel-obtains-withheld-records-victims-say-uk-trying-to-protect/article_1434f31e-6175-11e6-8148-2f5a5ecb7147.html .

II. Regardless of whether it is reasonable to believe that the *Kernel* knows the students' identities, redaction is insufficient to protect their privacy rights

Regardless of whether it is reasonable for the University to believe the *Kernel* knows the students' identities, redaction still is insufficient to protect their privacy. This is so for two reasons. First, the constitutional right to privacy protects the disclosure of intimate details of a sexual assault. While there may be some debate as to what constitutes "intimate details," it surely includes names, information that reasonably could be used to identify individuals, and descriptions of the circumstances and explicit acts involved in the assault. Second, in all contexts, FERPA's protection of personally identifiable information is not limited to conventional markers like names, nor is it limited to cases in which the requester already knows the student's identity. Information in records is also protected by FERPA when that information, alone or in combination, is linked or linkable to specific students that likely would allow a reasonable person in the university community without personal knowledge of the relevant circumstances to identify the students with reasonable certainty. 34 C.F.R. 99.3. As previously explained on pages 4-5 and 19 of the University's principal brief, this is exactly the situation before the Court. The *Kernel's* arguments to the contrary are without merit.[2]

III. The investigative file constitutes "education records" under FERPA even though it concerns both students and an employee

The *Kernel* argues the investigative file is not protected by FERPA because it concerns a former university professor and therefore constitutes an "employment record" exempted from FERPA's protection. The *Kernel's* argument ignores the plain language of the statute on which its argument is based. It is true that FERPA exempts employee records from its prohibitions against disclosure, but *only if* such records relate *exclusively* to the person's employment *and are*

2 The *Kernel's* reliance on *Paul P. v. Farmer*, 92 F.Supp.2d 410 (D.N.J. 2000) is misplaced because that case predates the 2008 FERPA amendments on what constitutes protected "personally identifiable information"—including the provisions cited in this reply—by almost a decade.

not available for any other use or purpose. 20 U.S.C. §1232g(a)(4). Accordingly, courts and education law experts alike have recognized that "[the] exclusion for employment records does not apply where the record—although employment related—contains information 'directly related to a student,'" and in particular, where the student(s) at issue "claim to have experienced the treatment described" in the records. *Rhea v. Distr. Bd. of Trs. of Santa Fe Coll.*, 109 So.3d 851, 858 (Fla.App. 2013) (en banc); 5 James A. Rapp, *Education Law* §5:13.04[7][c] (2016) (copies attached as Appendix A).[3] Upon *in camera* review by this Court, it will be readily apparent that the University's investigative file directly relates to students even though it also concerns a former professor.

IV. FERPA *prohibits* the University from disclosing the records at issue

Once again, the *Kernel's* arguments to the contrary are misplaced. The Supreme Court of Montana considered and rejected the same arguments earlier this year:

> It is also apparent to us that the Commissioner, as Chief Executive Officer of the Montana University System (MUS), was properly cognizant of the heavy strings that FERPA attached to the MUS' federal funding. Although FERPA has been characterized as "spending legislation," ***we find Krakauer's argument that it "prohibits nothing" delusive. FERPA is more than mere words in the wind.*** As outlined above, the University, a unit of the MUS, promised to abide by FERPA's directives in exchange for federal funding. By signing the Program Participation Agreement, the University acknowledged the potential consequence of loss of federal funding in the event that it violated FERPA. ***Whether or not FERPA explicitly prohibits state action, the financial risk it imposes upon MUS for violation of the statute is a real one. As the Commissioner stated, "The MUS should not be put in the position of predicting what decisions might be made by the federal government."***

Krakauer, 2016 WL 4978446 at *5 (citations omitted, emphasis added). *See also In re: The Lebanon Enterprise/Marion County BOE*, 10-OMD-128, 2010 WL 2740314 at *3 (copy attached as Appendix B). As the University has previously explained, this prohibition is incorporated into the Open Records Act via KRS 61.878(1)(k), but regardless, the mandates of FERPA control.

3 In addition to the principles cited here, *Rhea* adequately addresses the cases relied upon by the *Kernel* in support of its arguments to the contrary and the flaws inherent to such arguments.

CONCLUSION

For the reasons above and those argued in the University's principal brief, Court should reverse the decision of the Attorney General.

Respectfully submitted,

STURGILL, TURNER, BARKER & MOLONEY, PLLC

/s/ Joshua M. Salsburey
Stephen L. Barker
Joshua M. Salsburey
333 West Vine Street, Suite 1500
Lexington, KY 40507
Telephone No: (859) 255-8581
sbarker@sturgillturner.com
jsalsburey@sturgillturner.com
&
William E. Thro
General Counsel
University of Kentucky
Office of Legal Counsel
301 Main Building
Lexington, KY 40506-0032
Telephone No.: (859) 257-2936
william.thro@uky.edu
COUNSEL FOR UNIVERSITY OF KENTUCKY

CERTIFICATE OF SERVICE

I certify that on November 15, 2016, the foregoing document was electronically filed with the Clerk of this Court using the KY eCourts eFiling system, which will send notification of such filing to all parties registered to receive electronic filings and that I emailed and mailed this document U.S. mail, first class, postage prepaid, to the following: Thomas W. Miller, Esq. [twm@kentuckylaw.com] and Elizabeth C. Woodford, Esq. [ewoodford@kentuckylaw.com], MILLER, GRIFFIN & MARKS, P.S.C., 271 West Short Street, Suite 600, Lexington, KY 40507-1292; and La Tasha Buckner, Esq. [LaTasha.Buckner@ky.gov], Samuel Flynn, Esq. [Samuel.Flynn@ky.gov], and S. Travis Mayo, Esq. [Travis.Mayo@ky.gov], OFFICE OF THE ATTORNEY GENERAL, 700 Capitol Avenue, Suite 118, Frankfort, KY 40601; with courtesy copy by hand-delivery to Hon. Thomas L. Clark, Chief Judge, 511 Robert F. Stephens Courthouse, 120 North Limestone Street, Lexington, KY 40507.

/s/ Joshua M. Salsburey
COUNSEL FOR UNIVERSITY OF KENTUCKY

X:\WDOX\CLIENTS\60025\0408\PLEADING\00756257.DOCX

APPENDIX A

information regarding teaching assignments may be disclosed.[86]

The exclusion for employment records also does not apply where the record—although employment related—contains information "directly related to a student."[86.1] It has been held, for example, that a student's complaint of a faculty member's "inappropriate classroom behavior, his humiliating remarks to the students, and his unorthodox teaching methodologies" directly related to the student where it "describes that student's personal impressions of the classroom educational atmosphere in the context of [the faculty member's] teaching and methodology" and "[t]he student's knowledge of, and connection to, the information conveyed in the e-mail is not merely peripheral or tangential" but the student "claimed to have experienced the treatment described."[86.2] As such, "cases differentiate[] records that contain information 'directly related to a student,' on the one hand, from records that are directly related to a teacher or other school employee and are only peripherally or tangentially related to a student, on the other."[86.3] According to cases, "the former are 'education records' by definition; the latter are not."[86.4] Although "FERPA makes clear that certain employee records are not included within the definition of 'education record,' to be removed from the ambit of the 'education record' definition, those employee records must relate *exclusively* to the employee in his or her capacity as an employee."[86.5] Where an education record is involved, the appropriate action is to delete any personally identifiable information relating to the student.[86.6]

While it has been suggested that the exclusion of employment records effectively broadened the meaning of "education records" to include employment records, this construction is clearly inappropriate.[87] FERPA regulations reflect a broad reading of the exclusion. This is because not only must a student be in attendance at the

---

information from the education records of student graduate assistants who teach undergraduate classes are not exempt from FERPA and may not be disclosed to a union representing those students without consent or application of an exception), available at: http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/aft.html.

[86] Letter of LeRoy S. Rooker, Director, Family Policy Compliance Office, to Joseph W. Ambash (February 25, 2002) (recognizing that information relating to graduate students is subject to FERPA, but noting that a graduate student's instructional status and teaching assignments may be designated as directory information), available at: http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/josephambash.html.

[86.1] *See* 20 U.S.C. § 1232g(a)(4)(i).

[86.2] Rhea v. District Bd. of Trustees of Santa Fe College, 109 So. 3d 851 (Fla. Ct. App. 2013) (FERPA protected the identity of the student complainant).

[86.3] Rhea v. District Bd. of Trustees of Santa Fe College, 109 So. 3d at 856.

[86.4] Rhea v. District Bd. of Trustees of Santa Fe College, 109 So. 3d at 856.

[86.5] Rhea v. District Bd. of Trustees of Santa Fe College, 109 So. 3d at 858.

[86.6] Rhea v. District Bd. of Trustees of Santa Fe College, 109 So. 3d 851 (faculty member was not entitled to have disclosed name of student who authored complaint although he was provided the details of the complaint).

[87] *See* Note, *Federal Genesis of Comprehensive Protection of Student Educational Record Rights: The Family Educational Rights and Privacy Act of 1974*, 61 Iowa L. Rev. 74, 90 (1975).

109 So.3d 851
District Court of Appeal of Florida,
First District.

Darnell RHEA, Appellant,
v.
The DISTRICT BOARD OF TRUSTEES OF SANTA FE COLLEGE, Florida, Appellee.

No. 1D11–3049.
|
March 13, 2013.

Synopsis
Background: Professor brought action against college for writ of mandamus to compel college to reveal the name of a student who sent an e-mail complaining about the professor's classroom behavior and teaching style, and for declaration of his rights under the college's rule regarding student complaints. The Circuit Court, Alachua County, Victor L. Hulslander, J., dismissed with prejudice. Professor appealed.

Holdings: The District Court of Appeal, Ray, J., held that:

[1] e-mail qualified as "education record" exempt from disclosure under public records law, and

[2] declaratory relief was not appropriate.

Affirmed.

Attorneys and Law Firms

***852** Darnell Rhea, pro se, Appellant.

Lisa J. Augspurger and Maria Dawson Torsney, of Bush & Augspurger, P.A., Orlando; Sylvia H. Walbolt, of Carlton Fields, P.A., Tampa; Christine Davis Graves, of Carlton Fields, P.A., Tallahassee, for Appellee.

Andy Bardos and Allen Winsor, of GrayRobinson, P.A., Tallahassee, for Florida Atlantic University, et al., Amici Curiae.

***853** ON APPELLEE'S MOTION FOR REHEARING, REHEARING EN BANC, AND CERTIFICATION OF A QUESTION OF GREAT PUBLIC IMPORTANCE

PER CURIAM.

The District Board of Trustees of Santa Fe College, Florida (the College), Appellee, has moved for rehearing, rehearing en banc, and certification of a question of great public importance. We grant the motion for rehearing to affirm the trial court's dismissal of Count One; the motions for rehearing en banc and certification are denied. We withdraw our prior opinion and substitute the following opinion in its place.

Darnell Rhea appeals an order dismissing

his second amended complaint, with prejudice, in his lawsuit against the College. Rhea's pleading comprised a petition for writ of mandamus alleging a violation of Florida's public records laws (Count One) and a petition for declaratory judgment alleging a violation of a college rule (Count Two). Concluding, as the trial court did, that Rhea has not stated a cause of action in either count, we affirm the dismissal order.

I. *Pleadings and Procedural History*

The second amended complaint alleged two claims. Count One, titled "Petition for Writ of Mandamus Violation of the Public Records Act," alleged that from August to December 2009, Rhea was an adjunct associate professor under the supervision of the Chairman of the Academic Foundations Department (the Chair) at the College, a state college created and operated under chapter 1001, Florida Statutes. On September 28, 2009, Rhea asked the Chair for a complete copy of a certain e-mail received in the normal course of the Chair's employment with the College. Rhea had previously received a copy of the e-mail with the name of the student author redacted. The Chair refused to comply with Rhea's repeated requests to disclose the author's name, on the ground that the student's identity is protected from disclosure under the protection provided for education records in the Family Educational Rights & Privacy Act (FERPA), 20 U.S.C. section 1232g (2009). The student gave no written consent to disclosure of his or her name. Count One alleged the e-mail, including the student's name, is a public record and, by refusing to disclose the complete, unredacted public record to Rhea, the College violated the law.

The e-mail in question complains of Rhea's inappropriate classroom behavior, his humiliating remarks to the students, and his unorthodox teaching methodologies. Rhea denied all of the negative e-mail allegations. He alleged, however, that he was effectively prevented from defending himself by demonstrating that the unnamed student was not in a position to comment fairly and accurately on his teaching methods and classroom conduct. Rhea asserted that neither the Florida statutes nor FERPA protects from disclosure the name of a student who writes an e-mail like the one in question. Rhea argued that pursuant to FERPA, a student's complaint about the teaching methods and classroom behavior of a public, postsecondary school employee who is not a student at the school is not an education record because it relates only tangentially, not directly, to the student. It is, instead, solely a teacher record and thus is not protected from disclosure under FERPA.

Count One alleged further that as a result of the Chair's unlawful refusal to give Rhea the unredacted e-mail, the College did not rehire Rhea, and he suffered damages. Count One requested a jury trial, damages, and attorney's fees and costs. This count also asserted Rhea's ***854** right to a writ of mandamus requiring the College to give him the complete record of all complaints from any student that Rhea's supervisors at the College have received.

Count Two is titled "Petition for Declaratory

Judgment Violation of Agency Rules." Rhea alleged that while the College is authorized to make rules that have the force of law, it has a corresponding duty to abide by its own rules. He sought a declaration of his rights under the College's rule 7.36 of the "Student Complaint Procedure: Students and Administration," which sets out procedures for students who wish to register a complaint against any employee of the College. The second count alleged that Rhea had a right under rule 7.36 to discuss any complaint from a student and to seek resolution of the complaint, before Rhea's supervisor heard of or saw the student's concern or complaint. The pleading asserted that the College had violated rule 7.36 and its duty to follow its own rules, as a result of which Rhea was not rehired and suffered personal harm. In addition to the request for declaratory relief, Count Two requested a jury trial, damages, and attorney's fees and costs.

The College moved to dismiss both counts of the second amended complaint with prejudice and to strike Rhea's claims for attorney's fees and damages. After a hearing on the motions to dismiss and to strike, the trial court concluded, on Count One, that state and federal law do not require the College to provide Rhea with an unredacted copy of the e-mail. According to the court, the College is bound by state and federal law proscribing the College's disclosure of an unredacted copy containing the student author's name. On Count Two, the court found no justiciable issue as to the existence of any right Rhea may have under rule 7.36, nor did the court find a bona-fide, actual, and present need for a declaration. Because the second amended complaint represented Rhea's third attempt to file a legally sufficient claim, and it was deemed inadequate, the trial court exercised its discretion to dismiss the latest pleading with prejudice. *Boca Burger, Inc. v. Forum,* 912 So.2d 561, 567 (Fla.2005). In light of the dismissal with prejudice, the court ruled the motions to strike were moot. This appeal followed.

II. *Analysis*

A motion to dismiss raises a question of law as to whether the facts alleged in the complaint are sufficient to state a cause of action. *Meyers v. City of Jacksonville,* 754 So.2d 198, 202 (Fla. 1st DCA 2000). In considering the legal sufficiency of a complaint, the trial court's view is limited to the four corners of the complaint, the factual allegations of which are to be accepted as true. *Connolly v. Sebeco, Inc.,* 89 So.2d 482, 484 (Fla.1956). In doing so, the trial court must resolve all reasonable conclusions or inferences in favor of the plaintiff, as the non-moving party. *Weaver v. Leon Cnty. Classroom Teachers Ass'n,* 680 So.2d 478, 481 (Fla. 1st DCA 1996). It is well established that dismissal of a complaint with prejudice is a very severe sanction, to be invoked only when the pleader has failed to state a cause of action and it is conclusively shown the complaint cannot be amended in such a way as to state a claim. *Meyers,* 754 So.2d at 202. The standard of review for an order dismissing a complaint for failure to state a cause of action is de novo. *Hernandez v. Tallahassee Med. Ctr., Inc.,* 896 So.2d 839, 841 (Fla. 1st DCA

2005); *Landrum v. John Doe Pit Digger,* 696 So.2d 926, 928 (Fla. 2d DCA 1997) (stating that the district court's review of the trial court's dismissal order is limited to determining whether the complaint stated a cause of action).

***855** A. Count One: "Petition for Writ of Mandamus Violation of the Public Records Act"

[1] [2] To be entitled to a writ of mandamus, Rhea must establish that "he has a clear legal right to the performance of a clear legal duty by a public officer and that he has no other legal remedies available to him." *Hatten v. State,* 561 So.2d 562, 563 (Fla.1990); *see Plymel v. Moore,* 770 So.2d 242, 246 (Fla. 1st DCA 2000). Mandamus has been described as "a remedy to command performance of a ministerial act that the person deprived has a right to demand, or a remedy where public officials or agencies may be coerced to perform ministerial duties that they have a clear legal duty to perform." *Town of Manalapan v. Rechler,* 674 So.2d 789, 790 (Fla. 4th DCA 1996). For purposes of mandamus relief, a duty or act is ministerial when no room exists for the exercise of discretion and the law directs the required performance. *Shea v. Cochran,* 680 So.2d 628, 629 (Fla. 4th DCA 1996). Applied to the instant case, the law of mandamus required the trial court to determine whether Rhea alleged sufficient facts to state a claim that he has a clear legal right to the unredacted copy of the e-mail and that the College has a clear legal duty to provide it to him.

[3] On the question of whether Count One states a cause of action, we look first to Florida public records law. Where purely legal issues of whether a document is a public record and subject to disclosure are involved, we have de novo review. *State v. City of Clearwater,* 863 So.2d 149, 151 (Fla.2003); *Media Gen. Convergence, Inc. v. Chief Judge of the Thirteenth Judicial Circuit,* 840 So.2d 1008, 1013 (Fla.2003).

[4] A citizen's access to public records is a fundamental constitutional right in Florida. Article I, section 24(a) of the Florida Constitution (the "Sunshine Amendment") grants [e]very person ... the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf." This "self-executing" right to open records is enforced through the Public Records Law, chapter 119 of the Florida Statutes. It is the duty of each agency[1] to provide access to such records. § 119.01(1), Fla. Stat. (2009).

1 Appellee, which is part of the state system of community colleges established and governed by chapter 1001, Part III, Florida Statutes (2009), is a state agency. § 119.011(2), Fla. Stat. (2009) (defining agency as "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law ... and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency").

[5] [6] The Florida Supreme Court has construed the definition of public records to encompass all materials made or received by an agency, in connection with official business, which are used to "perpetuate, communicate or formalize knowledge of

some type." *Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc.,* 379 So.2d 633, 640 (Fla.1980). The physical format of the record is irrelevant; electronic communications, such as e-mail, are covered just like communications on paper. *See* § 119.01(2)(a), Fla. Stat. (2009) ("[a]utomation of public records must not erode the right of access to those records"); *Nat'l Collegiate Athletic Ass'n v. Associated Press,* 18 So.3d 1201, 1207 (Fla. 1st DCA 2009) (observing that "public records law is not limited to paper documents but that it applies, as well, to documents that exist only in digital form"). Because Rhea alleged that the e-mail at issue is a communication ***856** that was sent to, and received by, the College in connection with the transaction of its official business, he has sufficiently pled that it is a Florida public record subject to disclosure in the absence of a statutory exemption.

An exemption to Florida's Public Records Law exists for a student's "education records." This exemption provides that "[a] public postsecondary educational institution may not release a student's education records without the written consent of the student to any individual ..., except in accordance with and as permitted by the FERPA." § 1006.52(2), Fla. Stat. (2009). The Legislature has adopted FERPA's definition of "education records." § 1002.225(1), Fla. Stat. (2009). Thus, it was incumbent upon the trial court to look to FERPA, 20 U.S.C. section 1232g, to determine whether Rhea stated a cause of action that the unredacted e-mail must be disclosed, i.e., that the College must reveal the student's name.

FERPA protects "education records" (and personally identifiable information contained therein) from improper disclosure.[2] Such records generally include "those records, files, documents, and other materials which ... (i) contain information *directly related to a student* and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A)(i)-(ii) (emphasis added). "Education records" do not include,

> in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose.
>
> 20 U.S.C. § 1232g(a)(4)(B)(iii).

Rhea contends that the e-mail at issue does not directly relate to its student author, and for this reason is not an "education record" within the meaning of FERPA. For support, Rhea relies on *Ellis v. Cleveland Municipal School District,* 309 F.Supp.2d 1019 (N.D.Ohio 2004), and other cases adopting its rationale. The *Ellis* line of cases differentiates records that contain information "directly related to a student," on the one hand, from records that are

2 FERPA, commonly known as the "Buckley Amendment," does not prohibit disclosure of education records. Rather, it provides for the withholding of federal funds from educational institutions that have a policy or practice of permitting the release of such records. 20 U.S.C. § 1232g(b)(1).

directly related to a teacher or other school employee and are only peripherally or tangentially related to a student, on the other. According to these federal authorities, the former are "education records" by definition; the latter are not. *See, e.g., Ellis,* 309 F.Supp.2d at 1022–23.

The issue in *Ellis* was whether FERPA covered incident reports related to physical altercations between substitute teachers and students, student and employee witness statements related to these incidents, and information related to subsequent discipline, if any, imposed on the teachers. *Id.* at 1021. Addressing "teacher discipline information," the court explained:

> In her document requests, plaintiff seeks records involving allegations of physical altercations engaged in by substitute teachers as well as student and employee witness statements related to those altercations.... Such records do not implicate FERPA because they do not contain information "directly related to a student." *While these* ***857** *records clearly involve students as alleged victims and witnesses, the records themselves are directly related to the activities and behaviors of the teachers themselves and are therefore not governed by FERPA.*

Id. at 1022–23 (internal citations and quotation marks omitted) (emphasis added). *Ellis* stands for the proposition that "FERPA applies to the disclosure of student records, not teacher records." *Id.* at 1022.

The federal district court in *Wallace v. Cranbrook Educational Community,* No. 05–73446, 2006 WL 2796135 (E.D.Mich. Sept. 27, 2006), drew a similar distinction between employee records and student records in its review of a magistrate judge's order compelling discovery. Cranbrook Educational Community (Cranbrook), relying primarily on students' statements alleging inappropriate employee behavior, terminated Wallace's employment as a school maintenance person and equipment mover. 2006 WL 2796135 at *1. After Wallace filed a complaint alleging improper termination, Cranbrook provided him with copies of the students' statements, with their names and addresses redacted. *Id.* Wallace moved to compel disclosure of the students' identities, and a magistrate judge ordered the relief Wallace sought. *Id.* Cranbrook objected to the magistrate judge's disclosure order, citing FERPA and other confidentiality and privacy concerns. *Id.*

Relying on *Ellis,* the *Wallace* court concluded that the student statements did not "directly relate to students" and were therefore not "education records" under FERPA. *Id.* at *4. The court noted that the statements were not education records for the additional reason that they related to Wallace in his capacity as an employee and thus qualified as an exception pursuant to 20 U.S.C. section 1232g(a)(4)(B)(iii). Because the records were not education records, the court found "no reason to redact the

statements as they are not protected from disclosure by FERPA." 2006 WL 2796135 at *6. Accordingly, the district court judge affirmed the disclosure order. *Id.* at *5–6, *8.

Like the courts in *Ellis* and *Wallace,* we believe the plain language of FERPA supports the distinction between information that is directly related to a student and that which is related to a student only tangentially or indirectly. By including the qualifier "directly" before "related," Congress excluded by inference any information relating only indirectly to a student from the purview of the information covered under the "education records" definition. *See Gay v. Singletary,* 700 So.2d 1220, 1221 (Fla.1997) (explaining doctrine of *inclusio unius est exclusio alterius*); *Smith v. State,* 982 So.2d 69, 70 & n. 1 (Fla. 1st DCA 2008) (noting that the express inclusion of one thing in a statute implies the exclusion of its opposite).

The scope of the words "directly related" is still, however, quite broad. *See United States v. Miami Univ.,* 294 F.3d 797, 812 (6th Cir.2001). Information is directly related to a student if it has a close connection to that student. *See Merriam–Webster's Collegiate Dictionary* 353–54 (11th ed. 2004) (defining "direct" in relevant part as "characterized by close, logical, causal, or consequential relationship"; defining "directly" as "in a direct manner"). Because "directly related" encompasses far more information than might be accorded privacy in most other contexts, Rhea's invitation to limit its scope is compelling. Further, *Ellis* lends support for this position. But to the extent that *Ellis* converts the "directly related" inquiry into a "primarily related" test, we disagree with its approach, despite its ***858** acceptance by other courts.[3] A plain-language interpretation of FERPA requires us to depart from the *Ellis* reasoning as applied to the factual allegations of this case.[4]

3 *See, e.g., Briggs v. Bd. of Trs. Columbus State Cmty. Coll.,* No. 2:08–CV–644, 2009 WL 2047899, at *5 (S.D.Ohio July 8, 2009) (concluding that student complaints about a professor did not directly relate to students and thus were not "education records"); *Wallace v. Cranbrook Educ. Cmty.,* No. 05–73446, 2006 WL 2796135, at **3–6 (E.D.Mich. Sept. 27, 2006) (holding that "student statements provided in relation to an investigation into a school employee's alleged misconduct" are not directly related to the students); *Hampton Bays Union Free Sch. Dist. v. Pub. Emp't Relations Bd.,* 62 A.D.3d 1066, 878 N.Y.S.2d 485, 488–89 (N.Y.App.Div.2009) (affirming a ruling that documentation relating to a probationary teacher's early termination based on misconduct was subject to disclosure and was not an education record protected from release under FERPA).

4 Although this Court relied on the *Ellis* court's distinction between directly and tangentially related information to require the disclosure of certain documents in *National Collegiate Athletic Association v. Associated Press,* 18 So.3d 1201, 1210–11 (Fla. 1st DCA 2009), we expressly limited our holding to the disclosure of versions of the documents with the students' names redacted.

According to the allegations in Rhea's complaint, the unredacted e-mail he seeks to obtain identifies the student and the student's enrollment in his class. Further, the e-mail describes that student's personal impressions of the classroom educational atmosphere in the context of Rhea's teaching and methodology. The student's knowledge of, and connection to, the information conveyed in the e-mail is not merely peripheral or tangential. As a member of the class, the student claimed to have experienced the treatment described in

the e-mail, and the e-mail is the student's own words. Although Rhea may be the primary subject of the e-mail, the e-mail also directly relates to its student author.

We reject any suggestion advanced by Rhea that a record cannot relate directly both to a student and to a teacher. If a record contains information directly related to a student, then it is irrelevant under the plain language in FERPA that the record may also contain information directly related to a teacher or another person.[5] While FERPA makes clear that certain employee records are not included within the definition of "education record," to be removed from the ambit of the "education record" definition, those employee records must relate *exclusively* to the employee in his or her capacity as an employee. 20 U.S.C. § 1232g(a)(4)(B)(iii). The allegations in Rhea's complaint do not support the application of this narrow language.

5 Rhea did not assert any due-process right to know the student author's identity in the context of a college formal disciplinary proceeding. The narrow issue presented by Rhea on appeal in this count is whether the e-mail contains information "directly related" to a student, triggering FERPA protections and exempting this record from Florida's chapter 119 requirements. We express no opinion as to whether the requirements of due process could, in some instances, supersede FERPA.

In dismissing Count One with prejudice, the trial court concluded that, having been given several opportunities to amend his pleading, Rhea failed to state a claim that the unredacted e-mail is not directly related to a student for purposes of FERPA. Because the plain, unambiguous language of section 1232g(a)(4)(A)(i) compels the trial court's ruling, we affirm the dismissal with prejudice.[6]

6 Given that the trial court's dismissal order addressed only Rhea's request for disclosure of "the e-mail in question" and the court did not rule on the broader request for disclosure of any other student complaints made about Rhea, we confine our discussion to the redacted student e-mail addressed in the trial court. *Miller v. Miller,* 709 So.2d 644, 645 (Fla. 2d DCA 1998).

*859 B. Count Two: "Petition for Declaratory Relief Violation of Agency Rules"

[7] Rhea's second count sought declaratory relief. Circuit courts have jurisdiction "to declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed." § 86.011, Fla. Stat. (2009). As the party seeking a declaration of rights, Rhea has the burden to demonstrate entitlement. *Groover v. Adiv Holding Co.,* 202 So.2d 103, 104 (Fla. 3d DCA 1967).

To be entitled to a declaratory judgment, Rhea must demonstrate that (1) a good-faith dispute exists between the parties; (2) he presently has a justiciable question concerning the existence or non-existence of a right or status, or some fact on which such right or status may depend; (3) he is in doubt regarding his right or status under the College's rule 7.36; and (4) a bona-fide, actual, present, and practical need for the declaration exists. *May v. Holley,* 59 So.2d 636, 639 (Fla.1952); *State Farm Mut. Auto. Ins. Co. v. Wallace,* 209 So.2d 719, 721 (Fla. 2d DCA 1968). The sufficiency of Rhea's allegations depends not on whether

the pleading demonstrates he will succeed in getting a declaration of rights under his assertions, but on whether the law even entitles him to a declaration of rights. *Rosenhouse v.1950 Spring Term Grand Jury,* 56 So.2d 445, 448 (Fla.1952).

Rhea sought a declaration of his rights under the College's rule 7.36. For students who want to register a complaint against any employee of the College, the rule's procedures require the student, first, to "[s]tate the complaint to the College employee involved and attempt to resolve the problem." Only if the problem remains unresolved is the student to proceed to the next step, contacting the College employee's immediate supervisor or a counselor for assistance. The rule also dictates the procedure the administration is required to take upon receipt of a complaint or concern.

Defending against Count Two, the College argued that the student's e-mail did not rise to the level of a complaint and never triggered the mandatory procedures in rule 7.36. Specifically, the College characterized the e-mail as an informal student comment or concern, rather than a filed, formal complaint.

[8] [9] We need not determine what right Rhea may have had to a declaration under rule 7.36 when he discovered the student author of the e-mail had proceeded directly to the administration without attempting first to resolve the issues with Rhea. A petition for declaratory relief must show "some useful purpose will be served" by the relief sought. *Kendrick v. Everheart,* 390 So.2d 53, 59 (Fla.1980). Because declaratory relief generally is not appropriate where the alleged controversy is moot, *Ashe v. City of Boca Raton,* 133 So.2d 122, 124 (Fla. 2d DCA 1961), a trial court must ensure that the controversy between the parties is "definite and concrete." *Green Party of Alaska v. State, Div. of Elections,* 147 P.3d 728, 732–33 (Alaska 2006). Rhea is no longer an employee of the College, and the student author of the e-mail is no longer a student at the College. The trial court correctly ruled that Rhea failed to make a prima facie showing that any present, justiciable question exists regarding his rights and a good-faith, actual, present, and practical need for a declaration exists. Given Rhea's failure to state a cause of action in Count Two, the trial court properly dismissed the count with prejudice.

***860** We AFFIRM the dismissal of Counts One and Two with prejudice.

LEWIS, ROBERTS, and RAY, JJ., concur.

All Citations

109 So.3d 851, 291 Ed. Law Rep. 521, 38 Fla. L. Weekly D600

End of Document

Filed 16-CI-03229 11/15/2016 Vincent Riggs, Fayette Circuit Clerk

APPENDIX B

Ky. Op. Atty. Gen. 10-OMD-128 (Ky.A.G.), 2010 WL 2740314

Office of the Attorney General

Commonwealth of Kentucky
10-OMD-128
July 6, 2010

In re: *The Lebanon Enterprise*/Marion County Board of Education

Summary: **Marion County Board of Education did not violate the Open Meetings Act in discussing two requests by individual students for a change in school assignment during a closed session held on June 8, 2010, as FERPA, codified at 20 U.S.C. §1232g, prohibits disclosure of "education records" and the personally identifiable information contained therein, and the corresponding federal regulation found at 34 C.F.R. §99.3 defines disclosure to include oral communication of such information. The closed session was therefore authorized under KRS 61.810(1)(k).**

Open Meetings Decision

***1** At issue in this appeal is whether the Marion County Board of Education violated the Kentucky Open Meetings Act during its June 8, 2010, meeting by going into closed session for the purpose of discussing "two (2) requests by individual students for waivers from the attendance areas established by the Board." In citing KRS 61.810(1)(f), rather than KRS 61.810(1)(k), as the specific provision authorizing the session, the Board failed to comply with KRS 61.815(1)(a); however, this office will not belabor the point as the Board acknowledged including "an inaccurate statutory citation" in "the agenda and during the meeting," in responding to both *Lebanon Enterprise* Editor/General Manager Stevie Lowery's complaint and her appeal.[1] Because this appeal presents no basis to depart from the reasoning found in 97-OMD-139, upon which the Board relied in arguing that consideration of a request for a waiver "include[s] discussion of confidential information regarding the individual students and their families," which is protected under the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. §1232g, and the Kentucky Family Education Rights and Privacy Act (KyFERPA), KRS 160.700, *et seq.*, this office must conclude that FERPA/KyFERPA, in conjunction with KRS 61.810(1)(k), authorized the closed session at issue.

By letter directed to Board Chairwoman Sister Kay Carlew, Superintendent Donald W. Smith, and Board Attorney Robert L. Chenoweth on June 9, 2010, Ms. Lowery submitted her complaint alleging that the subject discussion concerned "a redistricting issue that could

potentially affect an entire neighborhood of children in the school district," which "does not fall under the exemptions to the Open Meetings Act." To remedy the alleged violation, Ms. Lowery proposed that the Board "inform us about the discussion that took place during the closed session," and that the Board and Superintendent "(with the help of the board attorney) educate themselves on the Open Meetings Law." In her undated response,[2] Sister Carlew asserted that with the exception of the admitted procedural violation, "the Board's action in going into closed session was appropriate." Citing FERPA, KyFERPA, and 97-OMD-139, Sister Carlew asserted that said "privacy provisions prohibit not only the release of educational records, but also prohibit the oral dissemination of information contained in those educational records." According to Sister Carlew, the Board's discussion relating "to these two waiver requests necessarily included discussion of the attendance areas where the students resided. However, the closed session was not to discuss modification of the attendance areas." Sister Carlew acknowledged that "any discussion of redistricting must be addressed during an open session."

***2** Noting that from what she understood, "the information that was discussed was 'directory information,' and more specifically, a student's address, and that no information was actually disclosed "that would be considered an 'education record' of a student," Ms. Lowery initiated this appeal. Upon receiving notification of Ms. Lowery's appeal from this office, Mr. Chenoweth responded on behalf of the Board. As Mr. Chenoweth explained:

An individual parent's request for a transfer must be based on physical, psychological, or educational reasons, or based on family hardship. The application for a change in school assignment requires the parent to provide the reason for the request, including details regarding any claimed family hardship. These requests are considered by the Board on a case-by-case basis. The information contained in the forms goes beyond the student's name and address, but includes this other detailed information regarding the students and their families which is protected from public disclosure or discussion by [FERPA and KyFERPA].[3] Because these individual requests include this confidential information protected by FERPA and KyFERPA, the Board is authorized to conduct these discussions in closed session. *See* KRS 61.810(1)(k) and 97-OMD-139.

In 97-OMD-139, the Office of the Attorney General (OAG) quoted from the federal FERPA statute, and iterated that FERPA does not relate solely to documents, but to the information contained therein, and upheld a closed session discussion of student records and private personally identifiable student information. . . . Ms. Lowery is simply incorrect that the information discussed during the closed session constituted mere "directory information" under the above-cited statutes. While the discussion of these two waiver requests necessarily included reference to the students' names and addresses, the discussion was not merely about their names and addresses. During the discussion, the Board learned that there was widespread disinformation regarding the location of one of its attendance area boundaries, but that information was part of the discussion of one of the parents' reason for making the application for change in assignment, not as an independent discussion of attendance area boundaries.

. . .

[T]he Board did not discuss this boundary issue except to the extent that it related to the individual application and the parent's reason for seeking a waiver from the existing attendance area. The Board appreciates that any discussion of the boundary issue in relation to changing the attendance boundaries or taking action which affects more than the individual applicant must be discussed in open session. In light of this information having come to the Board's attention on June 8, 2010, a public session of the boundary issue is anticipated to be held at a future regular or special meeting. The mere fact that this information came to the Board's attention during an otherwise proper closed session does not negate the propriety of going into closed session as required by FERPA and KyFERPA to discuss and entertain individual parental requests for change in school assignment.

***3** In summary, Mr. Chenoweth acknowledged that the Board "referenced the incorrect statutory subsection in its agenda and during the meeting, but otherwise provided the specific reason for going into closed session, and the closed session was limited to a discussion of information protected by FERPA and KyFERPA and therefore excluded from public discussion by KRS 61.810(1)(k)."[4] When viewed in conjunction, KRS 61.810(1)(k), 20 U.S.C. §1232g(b)(1), and 34 C.F.R. §99.3, seem to validate this position. In the absence of any binding authority to the contrary, this office finds in favor of the Board consistent with 97-OMD-139.

Among those records excluded from application of the Open Records Act in the absence of a court order are "[p]ublic records or information the disclosure of which is prohibited by federal law or regulation." KRS 61.878(1)(k). Both FERPA, codified at 20 U.S.C.A. § 1232g, and the implementing regulations codified at 34 C.F.R. § 99 *et seq.*, are incorporated into the Open Records Act by the express language of this provision.[5] FERPA regulates access to "education records," defined at § 1232g(a)(4)(A) as "those records, files, documents, and other materials which-(i) contain information directly related to a student; and (ii) are maintained by an education agency or institution or by a person acting for such agency or institution." FERPA also precludes disclosure of personally identifiable student information to third parties in the absence of a parent or eligible student's prior written consent. As this office understands it, the goal of this legislation is "'to end denial of access to parents and students, and to prevent violations of student and family privacy rights by the release of unscreened records to third parties without parental or student consent.'" 99-ORD-217, p. 5 (citation omitted). To that end, the term "education records" has been and was "intended to be broadly construed, and the exceptions . . . must be narrowly construed since the value of [the parents'] right of access and [students'] right of privacy "depreciates with every item that is excluded from the definition of 'education record.'" OAG 91-177, p. 4 (citation omitted); 98-ORD-162.

Resolution of this Open Meetings dispute, as previously indicated, turns on the language of KRS 61.810(1)(k),[6] 20 U.S.C. §1232g(b)(1)[7] and 34 C.F.R. §99.3.[8] Although this office has applied

FERPA (and KyFERPA) in the context of appeals filed under the Open Records Act on multiple occasions, the question of how FERPA applies in the context of an Open Meetings dispute, and more specifically, whether discussion of information contained in "education records" may be held in closed session, has arisen far less frequently - only twice to be exact. In 97-OMD-139 and 98-OMD-142, the Attorney General held that the Housing Appeals Committee and the Financial Aid Professional Judgment Committee, respectively, were public agencies for purposes of the Open Meetings Act. Pursuant to KRS 61.810(1)(k) and 20 U.S.C. §1232g, the Attorney General determined that each committee was authorized to discuss the matter entrusted to it during a closed session.

***4** Having quoted the definition of "education records," and the language of 20 U.S.C. §1232g(b)(1), in 97-OMD-139 the Attorney General reasoned as follows:
It is the opinion of this office that 20 U.S.C. § 1232g(b)(1) bars not only the release of education records, but also the disclosure of personally identifiable information in those records, including information relating to student housing, and specifically housing appeals. Although there are no published decisions supporting this position, it is confirmed by Ellen Campbell, program specialist in the Family Policy Compliance Office of the U.S. Department of Education, the agency charged with interpretation and enforcement of FERPA. Ms. Campbell indicates that her office has concluded that information pertaining to student housing falls within the definition of education records, and therefore cannot be disclosed to third parties in the absence of a parent or eligible student's prior written consent.

Ms. Campbell also confirms that FERPA restricts discussion of education records and personally identifiable information in those records in a public meeting. She notes that according to the federal regulations implementing FERPA disclosure means "to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records to any party, by any means, including oral, written, or electronic means." 34 CFR Part 99.3. Clearly then, public discussion of personally identifiable information, including student housing information, is restricted in the same manner as release of records containing that information. Eastern Kentucky University [the Marion County Board of Education] risks the loss of federal funds if it engages in public discussion of these matters. Pursuant to KRS 61.810(1)(k), the Housing Appeals Committee [the Board] may properly go into closed session to discuss housing appeals [individual requests for a change in school assignment including] since federal law requires it to do so. See also KRS 160.720(2), the state analogue to the Family Educational Rights and Privacy Act, restricting "release or disclosure of records, reports, or identifiable information on students to third parties other than directory information . . . without parental or eligible student consent."

In the absence of any binding authority to the contrary, this office reaches the same result here.[9] Because federal and state law not only prohibit disclosure of "education records," but also personally identifiable information contained therein, and 34 CFR §99.3 specifically defines

"disclosure" to include oral communication, the Marion County Board of Education was permitted under KRS 61.810(1)(k) to discuss the individual requests for a change in school assignment during the closed session held on June 8, 2010.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.846(4)(a). The Attorney General should be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceedings.

*5 Jack Conway
Attorney General
Michelle D. Harrison
Assistant Attorney General

Footnotes

1 Contrary to the Board's assertion, however, the Act does not "recognize a class of violations of lesser gravity then the remaining class of violations and therefore capable of being dismissed as merely 'technical.'" 00-OMD-114, p. 3.

2 Because Ms. Lowery did not challenge the timeliness of the Board's response, this office assumes that it was provided within three business days per KRS 61.846(1).

3 Mr. Chenoweth enclosed a copy of Board Policy 09.11, "School Attendance Areas," in addition to a blank copy of an "Application for Change in School Assignment," both of which verify this assertion.

4 As Mr. Chenoweth correctly noted, this office is "not equipped to resolve factual disputes between the complainant and the agency," and "the only evidence presented by the complainant is second hand information apparently received by the newspaper from one of the parents who attended the meeting."

5 As indicated, the state counterpart, KyFERPA, is codified at KRS 160.700 *et seq*. KyFERPA is incorporated into the Open Records Act by operation of KRS 61.878(1)(l), which authorizes public agencies to withhold public records or information "the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly."

6 KRS 61.810(1)(k) provides an exception to the general rule of open public meetings for "[m]eetings which federal or state law specifically require to be conducted in privacy[.]"

7 Pursuant to 1232g(b)(1):
No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (1) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to [specified individuals under specified conditions listed at (b)(1)(A)-(J)].

8 Under this regulation, disclosure means "to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record."

9 Given that no section of FERPA or KyFERPA *specifically* requires that any meeting "be conducted in privacy," a credible argument can be made that a strict application of KRS 61.810(1)(k) does not authorize closed session discussions of subject matter protected under those laws. However, because this office has previously determined that such discussions are protected, independent research did not reveal any controlling authority on this issue, and our attempts to consult with a representative from the Family Policy Compliance Office of the U.S. Dept. of Education were unsuccessful, the Attorney General is guided by governing precedent.

Ky. Op. Atty. Gen. 10-OMD-128 (Ky.A.G.), 2010 WL 2740314

End of Document

Filed 16-CI-03229 11/15/2016 Vincent Riggs, Fayette Circuit Clerk