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Hon. Michael W. Mosman
U.S. District Court, District of Oregon
1615 United States Courthouse
1000 Southwest Third Avenue
Portland, OR 97204

Re: *Doe v. The Reed Institute and Jane Roe*
Case No. 3:15-cv-00617-MO
Defendant Reed's FERPA Letter

Dear Judge Mosman:

Introduction.

We represent Reed College (The Reed Institute) in this lawsuit. Pursuant to the court's scheduling order we are submitting this letter to discuss particular issues that affect Reed College as an institute of higher education and recipient of federal funding. Specifically as relates to the parties' request for this conference, during the initial meeting of counsel we raised the need for direction from the court about the scope of discovery of student records in light of the Family Educational Rights and Privacy Act, 20 USC § 1232g. That law, together with its regulations at 34 CFR Part 99, is generally referred to by the acronym FERPA. Administrative enforcement is through the Family Policy Compliance Office within the Department of Education. FERPA extensively restricts a college's ability to disclose identifying information about students, including in litigation. As the court can readily see from the complaint, plaintiff intends to seek discovery about the education records of students other than the plaintiff. We have prepared this letter to provide the court and counsel with an overview of our understanding of Reed's obligations under this law and to identify areas in which the court's guidance will facilitate discovery in this case.

FERPA conditions the receipt of federal funds for educational institutions on compliance with certain procedures. It allows students (and sometimes parents) access to education records while at the same time restricting access by others, and it allows the student some control over disclosure of his or her records. FERPA protects students' rights to privacy in part by limiting the transferability of education records without prior consent.

Scope of "education records" protected by law.

For purposes of FERPA, "education records" are any records, files, documents, and other materials that "contain information directly related to a student" and are maintained by an "educational institution" or a person acting for the institution. 20 U.S.C. § 1232g(a)(4)(A). Information is directly related to a student if it "has a close connection to that student." *Rhea v. District Bd. of Trustees of Santa Fe Coll.*, 109 So. 3d 851, 857 (Fla. Dist. Ct. App. 2013). Records therefore relate to a student if the matters addressed within "pertain to actions committed or allegedly committed by or against" the student and contain identifying information. *United States v. Miami Univ.*, 91 F. Supp. 2d 1132, 1149 (S.D. Ohio 2000), *aff'd*, 294 F.3d 797 (6th Cir. 2002). Student disciplinary records are education records, because they relate directly to a student and are maintained by educational institutions. *Miami Univ.*, 294 F.3d at 812 (6th Cir. 2002). The definition of "education records" is broad in scope; even video of students captured by a school surveillance camera is a protected education record because the students could be identified by face, body shape, or clothing. *Bryner v. Canyons School Dist.*, --- P.3d ----, 2015 UT App 131, ¶ 8 (May 29, 2015).

There is a narrow exemption for law enforcement records; that exemption applies only to records created by a law enforcement unit, for law enforcement purposes, and which are maintained by the law enforcement unit. 20 U.S.C.A. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8(b)(1). FERPA regulations narrow the potential exemption's scope in two important ways: First, the records created by campus law enforcement for law enforcement purposes, but maintained by another component of an educational institution, are not records of a law enforcement unit. 34 C.F.R. § 99.8(b)(2). In other words, law enforcement records in the hands of another department are protected by FERPA. Second, records created and maintained by campus law enforcement, exclusively for non-law enforcement purposes like a "disciplinary action" or a "proceeding conducted by the educational agency or institution" are also not records of a law enforcement unit. *Id.* Such education records are protected by FERPA's restrictions on disclosure.

We believe that all the records of other students that plaintiff will be seeking are education records of those other students. We have considered whether it would be feasible to provide only de-identified records; however, the nature of the events that would be described in disciplinary and other records would likely be so detailed that attempting to provide de-identified yet still meaningful production is unrealistic. Personally identifiable information is not limited to directly identifying information like name, address, social security number, date of birth, place of birth, or mother's maiden name, but also includes information that alone or in combination would allow a reasonable person in the school community to identify an individual, and also includes information requested by a person who the educational institution reasonably believes knows the identity of the student to whom the education records relate. 34 C.F.R. § 99.3. As a result, we have prepared a suggested protocol below which we believe should apply to non-party student records where requested by plaintiff or the individual defendant.

Student consent requirements.

Generally, an academic institution is prohibited from disclosing education records to a third person absent the express and detailed written consent of the student. 20 U.S.C.A. § 1232g(b)(1); § 1232g(d). Prior to disclosing personally identifiable information from a student's education records, the educational institution must receive a signed and dated consent, which specifies the records that may be disclosed, states the purpose of the disclosure, and identifies the person or class of persons to whom disclosure may be made. 34 C.F.R. § 99.30.

No exception for routine discovery.

FERPA does not contain an exception for routine discovery requests in litigation, except in the limited circumstance of records of a student who is also a party to the litigation. See 34 C.F.R. § 99.31(a)(9)(iii)(A)-(B). See also *Doe v. Ohio*, 2013 WL 2145594 (S.D. Ohio May 15, 2013) (potential class members who had received no notice of their inclusion in the class could not be deemed to have waived their FERPA notification rights). We are not aware of any decision which interprets the "litigation" exception to permit disclosure of non-party education records pursuant only to a discovery request. Instead, FERPA contemplates that records may be subpoenaed or otherwise subject to court order, and mandates a protocol to be followed. The protocol requires the institution to notify the student (or parent if applicable) in advance of disclosure so that the student has an opportunity to seek protective action. In addition, any disclosures that are made may only be done so on the condition that the party to whom the information is disclosed will not redisclose the information absent prior consent from the student. 34 C.F.R. § 99.33(a)(1).

Need for notice to affected students of parties' names.

In order for a student to be able to exercise the right to object, we believe it is important for the student whose records are subpoenaed or subject to court order to be informed of the names of the parties to the litigation. The same should apply to any individuals who appear in those records as witnesses, or as claimants, or as victims. See generally http://familypolicy.ed.gov/faq-page. Otherwise the right to seek protection is not sufficiently meaningful; a student might have no objection for one person to see his or her records, but might have serious concerns about a different person seeing those records.

Reed's suggested protocol.

In order to ensure compliance with these restrictions and requirements, Reed proposes that any discovery of non-party student information be addressed as follows.

- A party requesting student records of a current student or former student must first identify whether the actual records are necessary; where feasible, that party must first

make a good faith determination whether statistical information would suffice. For example, if plaintiff complains that no female student has ever been expelled for a violation of the sexual misconduct policy and seeks discovery regarding this matter, it should be sufficient for Reed to provide statistical information identifying students by some code and by gender without revealing personally identifying information.

- A party requesting student records of any kind must identify them with particularity so that the student in question has no doubt as to what might be provided in response to the subpoena or order and so that any notice to the student will be readily understood.

- The notice to the student whose records are sought should include the full names of all parties. Absent this information a student may be unable to make an informed choice about whether or not to object to the production of the education records. This should apply to named witnesses and complainants, respondents or victims.

- The student should be provided a list of all persons to whom the records will be redisclosed.

- The student should be provided with instructions on how to raise objections (whether through Reed or by contacting the court if there are objections to disclosure).

- A student should be allowed at least 30 days to object. Former students may be living in other states or even in other countries. Some might wish to seek counsel to assist in their decision whether to object to the information being sought.

- The court should limit the date range for other student records. Plaintiff matriculated in 2010 and was expelled in 2014. Defendant Roe graduated in 2015. The four-year date range which reflects plaintiff's attendance should be appropriate for discovery purposes.

- The court should enter a protective order specific to any student records which will protect from public dissemination any identifying information, identify requirements for redisclosure (including the possibility of additional notice) and which will require the return or confirmed destruction of those records after the litigation is complete.

We appreciate your willingness to have this conference with counsel.

Very truly yours,

BARRAN LIEBMAN LLP

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