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OPINION OF THE MONTANA SUPREME COURT
***KRAKAUER V. STATE*, 396 MONT. 247,**
445 P.3D 201 (2019) (*KRAKAUER II*)
(JULY 3, 2019)

SUPREME COURT OF MONTANA

JON KRAKAUER,

Petitioner, Appellee,
and Cross-Appellant,

v.

STATE OF MONTANA, by and through its COMMISSIONER OF HIGHER EDUCATION, CLAYTON CHRISTIAN,

Respondent
and Appellant,

v.

JOHN DOE,

Intervenor
and Appellant.

No. DA-18-0374

Appeal from the District Court of the First Judicial District, in and for the County of Lewis and Clark, Cause No. ADV 14-117
Honorable Mike Menahan, Presiding Judge

Before: Laurie MCKINNON, James Jeremiah SHEA, Dirk M. SANDEFUR, Ingrid GUSTAFSON, Justices.

Opinion by: LAURIE McKINNON

¶ 1 The Commissioner of Higher Education, Clayton Christian (Commissioner), and John Doe appeal an order from the First Judicial District Court, Lewis and Clark County, granting Jon Krakauer's motion to release Doe's educational records. We reverse and dismiss Krakauer's original petition with prejudice, and we affirm the District Court's decision not to award Krakauer attorney fees.

¶ 2 The Commissioner presents the following issues for review:

1. Did the District Court err in concluding Doe had no expectation of privacy in his educational records?
2. Did the District Court err in ruling the futility of redaction issue was moot?
3. Did the District Court err when it held Doe's demand for individual privacy in his educational records did not clearly exceed the merits of their public disclosure?

¶ 3 Because we conclude resolution of the Commissioner's issues is dispositive, we do not reach the additional issues Doe presents for review.

Factual and Procedural Background

¶ 4 Krakauer, a writer who chronicled instances of sexual misconduct on or near the University of Montana (the University) campus, seeks the release of Doe's educational records from the Commissioner.

The records contain detailed information about student disciplinary proceedings the University initiated against Doe over highly publicized allegations of sexual assault. In *Krakauer v. State*, 2016 MT 230, 384 Mont. 527, 381 P.3d 524 (*Krakauer I*), we reversed and remanded the District Court's decision ordering the Commissioner to release Doe's records. The instant appeal arises from the District Court's subsequent order on remand; as such, we incorporate the procedural and factual background from *Krakauer I*, ¶¶ 2-8, and recite the additional facts that have arisen since.

¶ 5 In January 2014, Krakauer submitted a request for the release of Doe's educational records to the Commissioner. The Commissioner refused to release the records, asserting state and federal law prevented him from doing so. Krakauer then initiated this action and argued the Commissioner wrongly denied him access to Doe's records, citing the right to know under the Montana Constitution. The District Court granted summary judgment to Krakauer and ordered the Commissioner to release Doe's educational records. The Commissioner appealed, and in *Krakauer I*, we reversed and remanded the case to the District Court to conduct an in-camera review of Doe's records with the following instructions: (1) determine whether there was an adverse final ruling against Doe during his student disciplinary proceedings, which would have allowed for the release of certain, limited information as an exception to the general prohibition against the release of educational records under the Family Educational Rights and Privacy Act of 1974, as amended, 20 U.S.C. § 1232g (FERPA); (2) factor the enhanced privacy interests of students into the analysis of whether the Montana Constitution permits disclosing

Doe's educational records; and (3) determine whether the potential for redacting Doe's personally identifying information affects the privacy analysis and the ultimate determination about what records, if any, can be released.

¶ 6 Following our decision, the District Court granted Doe a motion to intervene in the case. The court then conducted an in-camera review of Doe's educational records. First, the District Court did not make a finding about whether an adverse ruling against Doe existed that would have permitted the release of limited information from Doe's records. Second, although recognizing students' enhanced privacy interests in their educational records, the court found Doe's personal information in the records was already substantially available to the public through unsealed court records and significant media coverage of Doe's contemporaneous public criminal trial. Therefore, it held Doe did not have a subjective or actual expectation of privacy in the records at issue, which rendered the issue of redaction moot. Third, the District Court concluded that even if Doe had a privacy interest in his records, his privacy interest did not clearly exceed the merits of public disclosure due to Doe's status as a high-profile student-athlete at the time of the disciplinary proceedings, the scholarships he received from the University, the attendant publicity of the alleged sexual assault, and the public's compelling interest in understanding the disciplinary procedures employed by a state university.

¶ 7 The District Court later denied Krakauer an award of attorney fees. Both the Commissioner and Doe appeal the District Court's order to release Doe's

records, and Krakauer cross-appeals the order denying him attorney fees.

Standard of Review

¶ 8 The Commissioner, Doe, and Krakauer raise issues of constitutional law. "Our review of questions involving constitutional law is plenary. A district court's resolution of an issue involving a question of constitutional law is a conclusion of law which we review to determine whether the conclusion is correct." *Krakauer I*, ¶ 10 (quoting *Bryan v. Yellowstone Cty. Elementary Sch. Dist. No. 2*, 2002 MT 264, ¶ 16, 312 Mont. 257, 60 P.3d 381).

Discussion

¶ 9 Article II, Section 9, of the Montana Constitution provides the public's right to know: "No person shall be deprived of the right to examine documents . . . of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." We have accordingly recognized "a constitutional presumption that all documents of every kind in the hands of public officials are amenable to inspection. . . . " *Great Falls Tribune v. Mont. PSC*, 2003 MT 359, ¶ 54, 319 Mont. 38, 82 P.3d 876 (citation and emphasis omitted). The right to know is not, however, absolute—it may be overcome when the demands of individual privacy clearly exceed the merits of public disclosure. Mont. Const. art. II, § 9; *Associated Press, Inc. v. Mont. Dep't of Revenue*, 2000 MT 160, ¶ 24, 300 Mont. 233, 4 P.3d 5.

¶ 10 Article II, Section 10, of the Montana Constitution provides an individual's right of privacy:

"The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." The right of privacy is also not absolute—it may be infringed upon with the showing of a compelling state interest. Mont. Const. art. II, § 10.

¶ 11 The rights exist in tension with one another and conflict when the public seeks to examine documents an individual asserts a privacy interest in. Because neither right is absolute, we must balance the competing constitutional rights when they conflict. *Missoulian v. Bd. of Regents*, 207 Mont. 513, 529, 675 P.2d 962, 971 (1984). "Before balancing these interests, however, [we must determine] more precisely what interests are at stake." *Missoulian*, 207 Mont. at 529, 675 P.2d at 971.

¶ 12 We first determine whether an individual privacy interest exists. *Missoulian*, 207 Mont. at 529, 675 P.2d at 971. If a privacy interest exists, we then balance "the competing constitutional interests in the context of the facts of each case, to determine whether the demands of individual privacy clearly exceed the merits of public disclosure." *Associated Press*, ¶ 24 (quoting *Missoulian*, 207 Mont. at 529, 675 P.2d at 971) (emphasis omitted). "[T]he right to know *may* outweigh the right of individual privacy, depending on the facts." *Missoulian*, 207 Mont. at 529, 675 P.2d at 971.

¶ 13 1. Did the District Court err in concluding Doe had no expectation of privacy in his educational records?

¶ 14 We first consider whether Doe has an expectation of privacy in his educational records. To

determine whether a person has a constitutionally protected privacy interest with respect to certain records, we inquire: (1) "whether the person involved had a subjective or actual expectation of privacy"; and (2) "whether society is willing to recognize that expectation as reasonable." *Krakauer I*, ¶ 36; *Great Falls Tribune Co. v. Day*, 1998 MT 133, ¶ 20, 289 Mont. 155, 959 P.2d 508 (citing *Missoulian*, 207 Mont. at 522, 675 P.2d at 967).

¶ 15 The Commissioner and Doe argue the District Court erred when it concluded Doe has no subjective or actual expectation of privacy in his educational records because all students have an enhanced privacy interest in their educational records. Krakauer counters that Doe has no subjective or actual expectation of privacy in his educational records because: first, the University's Student-Athlete Conduct Code put Doe on notice his status as a student-athlete meant he would be "more visible" in the community, more "scrutinized" by the media, and he may have diminished "individual rights and privileges"; and second, the public already knows many private details contained in Doe's educational records, and thus, Doe cannot honestly assert an existing privacy interest in them.

¶ 16 In *Krakauer I*, we recognized a student's privacy interest in his educational records was different from "general privacy interests," and "courts must honor the unique privacy protection legislatively cloaked around the subject records by factoring that enhanced privacy interest into the balancing test." *Krakauer I*, ¶ 37. We recognized there was an "increased burden that must be shown by a petitioner in order to access protected student records. . . ."

Krakauer I, ¶ 37. We also noted in *Krakauer I*, federal and state statutes affirmatively establish heightened privacy interests for students in their educational records as a matter of law. *Krakauer I*, ¶ 37. This legislatively-cloaked, enhanced privacy protection is an important factor to consider in an analysis of a particular student's privacy interest in his educational records.

¶ 17 Although we recognized in *Krakauer I* a student has a statutorily-protected, enhanced privacy interest, that protection does not mean the interest is *absolute* when balanced against a competing constitutional interest. Indeed, § 20-25-515, MCA, which requires a student's permission before his records may be released, provides an exception when a court has issued a subpoena for the records. In requiring intervention and consideration by a court for issuance of a subpoena, the statute ensures a court will make the necessary constitutional inquiry and balancing when a student does not consent to disclosure. Such an inquiry would, for example, adequately address the situation where a student published his educational records himself or otherwise consented to their disclosure, thereby inviting a court to find the student—even with the enhanced protection afforded all students under the law—did not have an *actual* privacy interest in his records. Accordingly, a court must still determine whether a student has an actual privacy interest in his records based on the facts of the case. Where the court finds the privacy interest exists, the enhanced protection creates a robust protection in favor of individual privacy when weighed against the merits of public disclosure. *See* Mont. Const. Art. II, § 9; *Krakauer I*, ¶ 37.

¶ 18 To determine whether Doe has an expectation of privacy in his educational records, we first consider whether Doe has a subjective or actual privacy interest in his educational records. *See Krakauer I*, ¶ 36. We begin by observing the Court recently held in *Raap v. Bd. of Trs.*, 2018 MT 58, ¶ 12, 391 Mont. 12, 414 P.3d 788, whether a person has an actual or subjective expectation of privacy in certain records is a question of fact informed by notice. If the person had notice his records were subject to public disclosure or the public entity already made them publicly available, then he cannot have an actual or subjective expectation of privacy in the records. *Raap*, ¶ 12; *Billings Gazette v. City of Billings*, 2013 MT 334, ¶ 18, 372 Mont. 409, 313 P.3d 129; *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 23, 333 Mont. 331, 142 P.3d 864.

¶ 19 Here, the same statutes that provide students with additional privacy protections also provide students with notice of the very limited circumstances upon which a university may disclose their educational records to third parties, including the public at-large. Section 20-25-515, MCA, permits the public release of educational records only through a student's written permission or through a court subpoena. FERPA limits the non-consensual public release of educational records to a few exceptions. For example, under 20 U.S.C. § 1232g(b)(6)(B), an institution may disclose limited information about the final results of a disciplinary proceeding against a student who is an alleged perpetrator of a crime of violence or a nonforcible sex offense, "if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with

respect to such crime or offense."[1] A court may also order an institution to turn over educational records or publicly disclose them through a court order or subpoena.[2] 20 U.S.C. § 1232g(b)(2)(B).

¶ 20 The University of Montana Student Conduct Code also guarantees all students a right to confidentiality with respect to disciplinary proceedings. The Student Conduct Code notifies students that disciplinary proceedings are closed to the public; the University will not disclose related information to anyone not connected to the proceeding; while the University may disclose the fact that there is a disciplinary proceeding, the identity of individual students will remain confidential; and the University will disclose the results of the proceedings only to an alleged victim of a violent crime and "to those who need to know the results for purposes of record-keeping, enforcement of the sanctions, further proceedings, or compliance with Federal or State law."

¶ 21 Taken together, these statutes and policies indicate Doe did not have notice his educational records would be subject to public disclosure by the University. Quite the opposite, the statutes and policies provide students like Doe with steadfast assurances that the university system will affirmatively protect their

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[1] In *Krakauer I*, we noted the possibility that this exception applied. *Krakauer I*, ¶ 26. The District Court did not consider it on remand and, accordingly, we do not address it on appeal.

[2] As we observed in *Krakauer I*, ¶ 27 n.6, FERPA and its corresponding regulations require courts to give advance notice to students or parents before issuing a subpoena or order that might release a student's records so that the students or parents "may seek protective action. . . . " 34 C.F.R. § 99.31(a)(9)(ii); *see* 20 U.S.C. § 1232g(b)(2)(B).

records from disclosure, just as the University and the Commissioner have done here. Doe had notice the University could only disclose the results of his disciplinary proceedings to an alleged victim, essential University personnel, or other necessary individuals in compliance with federal or state law, which would include compliance with a judicial order or subpoena.[3] *See* 20 U.S.C. § 1232g(b)(2)(B); § 20-25-515, MCA. The University did not have a policy of disclosing educational records. In fact, absent Doe's consent or a judicial subpoena, the University could only disclose specific information from Doe's records in limited circumstances. Accordingly, Doe did not have notice his educational records were publicly available or the University would possibly publicly disclose them.

¶ 22 Krakauer points to the University's Student-Athlete Conduct Code—a separate policy from the Student Conduct Code that applies only to student-athletes—and argues language in the Student-Athlete Conduct Code notified Doe of possible disclosure of his records. In pertinent part, Krakauer points to the following selections:

> Being a student-athlete carries with it certain expectations, many that you would not

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[3] An individual has notice of possible disclosure of his records only when he knows the public entity holding his records may freely disclose them to the public. For example, notice that a university may disclose educational records to other discrete entities, such as an alleged victim or essential university personnel, is not notice of possible public disclosure for purposes of the rule. Similarly, notice of potential court-ordered public disclosure is not sufficient notice of possible public disclosure where the university would not (or could not) disclose the student's records, but for the judicial order.

> experience if you were not a student-athlete. Because of the public nature of competition, you are more visible to the community than a non-student-athlete.
>
> [. . .]
>
> Past student athletes have learned that their actions are scrutinized more closely by the press. You should conduct yourself with that knowledge.
>
> [. . .]
>
> By virtue of becoming a member of an athletic team, however, you become subject to certain responsibilities and obligations which could include the acceptance of loss of some individual rights and privileges.

¶ 23 Krakauer's argument that the Student-Athlete Conduct Code somehow diminishes student-athletes' right of privacy is fundamentally flawed. Section 20-25-512, MCA, forbids contracts between a university and a student waiving the student's right of privacy and due process of law. Even so, nowhere does the Student-Athlete Conduct Code notify student-athletes their educational records are subject to public disclosure by the University, nor does it attempt to minimize or eliminate their right of privacy. If anything, the passages from the Student-Athlete Conduct Code serve only as a warning to student-athletes that their status as an athlete may subject them to greater scrutiny from both the University and the public at-large. Moreover, neither Montana nor federal laws distinguish between types of students entitled to a right of privacy. All students—regardless of their success in academics or athletics, their involvement

in campus or community organizations, or their general prominence or popularity—have an enhanced privacy interest in their educational records.

¶ 24 Krakauer further urges us to conclude, as the District Court did, that the public's knowledge of a substantial amount of Doe's private information in his educational records weighs against Doe asserting a privacy interest in them. Krakauer points to the fact that Doe's personal information contained in the records was already substantially available to the public through unsealed court records and significant national media coverage of Doe's public criminal trial.

¶ 25 The public's independent knowledge of certain information contained in a student's private educational records does not in any way diminish, let alone eviscerate as claimed by Krakauer, a student's actual or subjective expectation of privacy in his records. *See Montana Human Rights Div. v. Billings*, 199 Mont. 434, 441-42, 649 P.2d 1283, 1287 (1982) (holding, while information contained in certain private records may already be a matter of general knowledge, the records may still contain "damaging information which the individuals involved would not wish and in fact did not expect to be disclosed"). An individual can maintain an expectation of privacy in his private records even in the face of the public's knowledge of their contents. *See Missoulian*, 207 Mont. at 525, 675 P.2d at 969 ("[N]early all private matters contain some component of innocuous information or general knowledge. However, that component does not transform private matter into public."). Public knowledge of a student's private information cannot efface or diminish the student's expectation of privacy. To hold otherwise would allow the public to defeat a significant privacy

interest in certain records simply because the public has learned of the records' contents through other means.[4]

¶ 26 Krakauer also contends our decision in *Svaldi v. Anaconda-Deer Lodge Cty.*, 2005 MT 17, 325 Mont. 365, 106 P.3d 548, indicates media publicity is a proper factor to consider in the privacy analysis. In *Svaldi*, a prosecutor told a newspaper about a potential deferred prosecution agreement with a local teacher whom the state accused of assaulting students, and the prosecutor sent the newspaper the teacher's initial offense report. *Svaldi*, ¶ 10. The teacher sued the county for damages, alleging the prosecutor's conversation with the newspaper violated her privacy rights under the Criminal Justice Information Act. *Svaldi*, ¶¶ 11, 14. We balanced the teacher's right of privacy in the initial offense report with the public's right to know the report's contents, ultimately concluding the teacher's demand of individual privacy in the initial offense report did not clearly exceed the public's right to know the report's contents. *Svaldi*, ¶¶ 28-31. We also noted how the public's prior knowledge of the allegations against the teacher weighed against her claim that her privacy rights were violated in the first place. *Svaldi*, ¶ 32.

¶ 27 *Svaldi*, however, is distinguishable. First, the public-school teacher held a position of public

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[4] However, if the person claiming a privacy interest was the one who initially released the record to the public, a court may conclude, after examining the facts, the person's expectation of privacy in the information is necessarily diminished. That is not the case here. Doe did not disseminate information contained in his educational records, and he neither initiated nor had control over the media coverage of his case.

trust and was accused of a crime that went directly to her ability to properly carry out her public duties—the care and instruction of children. Doe, as a student, was not in a position of public trust, and therefore society is more willing to accept his privacy interest in his educational records as reasonable. Second, in *Svaldi*, ¶ 32, our discussion about the fact that the public already knew the information the prosecutor disseminated explained our conclusion that the prosecutor did not violate the teacher's right of privacy or negligently breach a duty owed to her regarding that right. Doe has not sued the Commissioner over a violation of his right to privacy. Consequently, *Svaldi*'s discussion about the public's knowledge is distinguishable.

¶ 28 In this case, the public has already learned substantial portions of Doe's educational records through other means—unsealed court records, the media, and even Krakauer's own investigation and novel. However, information contained in a student's educational records is broader than that offered during a public criminal trial, which is governed by rules of evidence, burdens of proof, and constitutional protections not applicable to educational records. The District Court fundamentally erred by holding the public's knowledge of the personal information in Doe's records negated his expectation of privacy in them. Based on FERPA, § 20-25-515, MCA, the University's Student Conduct Code, and the facts of this case, Doe demonstrated he had an actual expectation of privacy in his educational records, and he did not have notice of possible public disclosure of those records. We accordingly conclude Doe had an actual or subjective expectation of privacy in his educational records.

¶ 29 Turning to the second part of the privacy inquiry, we next consider whether society is willing to recognize Doe's expectation of privacy in his educational records as reasonable. *See Krakauer I,* ¶ 36. We have long held society is less willing to recognize as reasonable the privacy expectation of an individual who holds a position with a high level of public trust when the information the public seeks bears on that individual's ability to perform public duties, such as spending public money or educating children. *Billings Gazette*, ¶ 49. Unlike a student's *enhanced* privacy interest, such individuals have a *reduced* privacy interest. *See Svaldi*, ¶ 31 (concluding that a public school teacher held a position of public trust and the allegations against her—an assault against a student—went directly to her ability to carry out her duties; accordingly, there was no requirement to withhold the allegations against the teacher from public scrutiny); *Bozeman Daily Chronicle v. City of Bozeman Police Dep't*, 260 Mont. 218, 227, 859 P.2d 435, 440-41 (1993) (investigative documents associated with allegations of sexual intercourse without consent by an off-duty police officer were proper matters for public scrutiny because "such alleged misconduct went directly to the police officer's breach of his position of public trust . . . "); *Great Falls Tribune Co. v. Cascade Cty. Sheriff*, 238 Mont. 103, 107, 775 P.2d 1267, 1269 (1989) ("[L]aw enforcement officers occupy positions of great public trust. Whatever privacy interest the officers have in the release of their names as having been disciplined, it is not one which society recognizes as a strong right.").

¶ 30 The District Court found Doe was a high-profile student-athlete who enjoyed a position of prom-

inence and popularity and who received "valuable consideration for his skills in the form of an athletic scholarship." The court stated, "Although he is not a public official or university employee, Doe is a public representative of the University of Montana." However, even a student who is a "public representative" of a university plainly does not occupy a position of public trust. Doe was not, for example, a law enforcement officer, teacher, or government official, nor was he charged with performing public duties.[5] Doe was a student. Even if, as Krakauer suggests, his popularity benefited both the University and himself (and even though Doe was an especially prominent sports figure), Doe simply was not a public official; as a student, he was entitled to an enhanced privacy interest in his educational records. Were we to expand the group of public officials having a reduced privacy interest to include, as suggested here, any student in whom the public is interested, the enhanced student privacy interest would be rendered meaningless. Statutes enacted by our legislature embody public policy. The federal and state statutes providing enhanced privacy protections support the idea that society is willing to recognize Doe's privacy expectation is reasonable.

¶ 31 Accordingly, we conclude society is willing to recognize as reasonable Doe's actual or subjective

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[5] The District Court found Doe received an athletic scholarship from the University. The record contains little evidence about Doe's finances, but even if he did receive an athletic scholarship, and even if that scholarship was publicly-funded (the Commissioner asserts it most likely would not be), a student who receives a scholarship—even a publicly-funded one—does not occupy a position of public trust. Nor is the student charged with performing public duties.

expectation of privacy in his educational records. Our decision is rooted in federal and state laws, the University's policies safeguarding students' privacy rights, and our conclusion that Doe neither holds a position of public trust nor performs public duties. The District Court erred when it held Doe did not have a privacy interest in his educational records. We conclude he does.

¶ 32 2. Did the District Court err in ruling the futility of redaction issue was moot?

¶ 33 In the past, we have recognized redacting individuals' names while disclosing records to the public can sufficiently protect their privacy interests while still allowing disclosure of relevant public information. *Yellowstone Cty. v. Billings Gazette*, 2006 MT 218, ¶¶ 24-25, 333 Mont. 390, 143 P.3d 135 (citing *Worden v. Montana Bd. of Pardons and Parole*, 1998 MT 168, ¶ 29, 289 Mont. 459, 962 P.2d 1157). When appropriately employed, redaction offers a means for disclosing relevant public information while protecting a privacy interest. However, in *Krakauer I* we cautioned that redaction cannot adequately protect privacy interests in every instance: "[W]hen an educational institution is asked to disclose education records about a particular person, then no amount of redaction in the records themselves will protect the person's identity because the requestor knows exactly whom the records are about." *Krakauer I*, ¶ 38 (internal quotations and alterations omitted). Consequently, on remand, we required the District Court to consider whether redaction was futile and the impact it would have on the court's decision to release Doe's records. *Krakauer I*, ¶ 38.

¶ 34 The District Court did not make a clear determination about whether redaction was futile. It held the question was moot because it concluded Doe had no privacy interest in his records. Nevertheless, the District Court opined that if redaction was futile, "then there are no practical differences between releasing redacted and unredacted documents." Although the District Court's supposition is technically correct, we disagree with any resulting implication that the futility of redaction weighs in favor of releasing private records. Where redaction is futile—*i.e.*, where redaction cannot protect individual privacy interests—that futility cannot weigh in favor of releasing the private records.

¶ 35 Based on Doe's educational records and the District Court record before us, we conclude redacting Doe's personal information from his records is futile and would not serve to protect the enhanced privacy interest he has in those records. Krakauer asked for Doe's records by name. His request was to

> inspect or obtain copies of public records that concern the actions of the Office of the Commissioner of Higher Education in July and August 2012, regarding the ruling by the University Court of the University of Montana in which [Doe][6] was found guilty of rape and was ordered expelled from the University.

Krakauer could have requested information about the process by which the University or the Montana University System generally handle sexual assault or how the Commissioner reviews appeals of student

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6 This alteration is ours. Krakauer asked for Doe's records using Doe's legal name and not an anonymous pseudonym.

disciplinary proceedings. He could have requested general information about all sexual assault complaints over an appropriate, specified period of time, and he could have requested information about the appeals the Commissioner reviewed over that time. Had Krakauer done so, the Commissioner, under the appropriate circumstances, could have responded by supplying the appropriate records with each student's personally identifying information redacted to protect his or her privacy interests. But Krakauer requested information pertaining to one specific student, and now, no amount of redaction can protect that student's privacy interests.[7] Were Krakauer to receive Doe's records, there would be no doubt to whom the records pertained. Therefore, Doe's privacy interest in his educational records, which is enhanced, reasonable, and weighs heavily in favor of nondisclosure to begin with, receives no protection at all in the constitutional inquiry and balancing because redaction is futile.

¶ 36 3. Did the District Court err when it held Doe's demand for individual privacy in his educational

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[7] This is also the case under FERPA. FERPA prohibits institutions from releasing educational records or personally identifiable information contained therein without written consent. 20 U.S.C. § 1232g(b)(1). In the definition of *Personally Identifiable Information*, the regulations include "[i]nformation requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates." 34 C.F.R. § 99.3 (*Personally Identifiable Information* at (g)). Where the public requests a student's records by name, FERPA's regulations assume the information sought would allow the public to personally identify the student. Therefore, the regulations prohibit universities from releasing a student's information, even redacted, when a requestor specifically asks for a student's information by name. *See* 39 C.F.R. § 99.3(g); *see also Krakauer I*, ¶ 24.

records did not clearly exceed the merits of their public disclosure?

¶ 37 Having determined Doe has an actual privacy interest in his records which is reasonable but redaction is futile, we now balance Doe's privacy interest with the public's right to know the records' contents to determine whether Doe's "demand of individual privacy clearly exceeds the merits of public disclosure." Mont. Const. art. II, § 9. Unlike in *Krakauer I*, we now have Doe's educational records before us. We have reviewed Doe's records and are prepared to determine whether the District Court erred when it held Doe's demand for individual privacy in his educational records did not clearly exceed the merits of their public disclosure.

¶ 38 Although the District Court held Doe does not have an actual privacy interest in his educational records, it nonetheless applied the balancing test to the facts of the case. It held the four following factors weighed against Doe's right to privacy and in favor of the public's right to know: (1) Doe's status as a high-profile student athlete; (2) athletic scholarships Doe receives from the University, a public institution; (3) the public's knowledge about the details of the allegations against Doe; and (4) the public's interest in understanding the disciplinary procedures employed by the University, especially where Doe is a prominent and popular campus figure whose education is paid for in-part by public funds. We disagree with the District Court's balancing analysis.

¶ 39 After balancing the public's right to know the information contained in Doe's records with Doe's right of privacy, we conclude the demand of Doe's privacy clearly exceeds the merits of public disclosure.

¶ 40 The public's Article II, Section 9, right to know the information contained in Doe's records is weighty. The records are documents "in the hands of public officials" and, accordingly, there exists a constitutional presumption that the records are amenable to public inspection. *See Great Falls Tribune v. Mont. PSC*, ¶ 54. Just as we did in *Krakauer I*, we recognize the Montana University System's policies in responding to and handling complaints of alleged sexual assault are matters of high importance and concern to the public. *Krakauer I*, ¶ 35. The University's compliance with its federal obligations under Title IX is also a matter of public import and interest. Key to our democracy is the public's ability to understand the process and the reasoning employed by government officials like the Commissioner. We accordingly recognize the strong public interest in knowing how universities address allegations of sexual assault.

¶ 41 However, Doe's Article II, Section 10, right of privacy in his records is also weighty—federal and state law uniquely and affirmatively protect and enhance Doe's privacy interest in his educational records. Doe's enhanced protections establish an exceptional demand of individual privacy. The student privacy laws do not discriminate between subjective classifications of students—all students have an enhanced privacy interest. Doe's status as a high-profile student athlete does not diminish his enhanced privacy interest in his educational records. Further, a student who receives a scholarship, as alleged here[8]—even a publicly-funded scholarship—does not waive or diminish his

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8 The record before us does not indicate whether Doe received a scholarship at the time of his disciplinary proceedings or how that scholarship was funded.

enhanced privacy interest in his educational records. Doe has continuously asserted a privacy interest in his records, even going so far as to intervene to protect his interest and proceed under an anonymous pseudonym. There is no doubt that Doe's enhanced privacy interest touches every aspect of his records, as the records themselves contain extensive details about the allegations against him, the evidence the University gathered, and Doe's disciplinary proceedings.

¶ 42 Moreover, the University's student disciplinary proceedings are confidential—each participant swears to keep the proceedings private. Unlike a public criminal trial, student disciplinary proceedings do not provide the same procedural due process protections afforded to criminal defendants because the proceedings exist to protect a university's primary function—the education of students—and regulate the relationship between student and university. The information presented in a student disciplinary proceeding is often broader than that in a public criminal case and, thus, there is a greater need to keep the information presented confidential. The confidential nature of the proceedings also allows the University to promote candor with the students involved and to encourage victims to come forward where they might otherwise feel reluctant to endure the public scrutiny inherent in a public criminal trial.

¶ 43 We therefore recognize the strong merits of publicly disclosing information pertaining to the University's handling of sexual assault allegations, but we must also "honor the unique privacy protection legislatively cloaked around the subject records . . . ," *Krakauer I*, ¶ 37, Doe's continued defense of his privacy

interest, and the necessity to maintain confidentiality for student disciplinary proceedings. Accordingly, under the particular facts of this case, we conclude Doe's demand of individual privacy clearly exceeds the merits of public disclosure.

¶ 44 A student's privacy rights are not absolute, and whether disclosure is warranted will depend on the facts of each case. Where educational records may be redacted to prevent disclosure of personally identifiable information or other measures taken to ensure that personally identifiable information remains confidential, the demand for the student's privacy may not clearly exceed the merits of public disclosure. Here, a more generalized request for information and one in which the Commissioner could have redacted Doe's information in a manner that would have protected his privacy interest may have allowed for public disclosure. However, as we stated above, redaction will not sufficiently protect Doe's privacy interest.

¶ 45 We do not foreclose the possibility that the necessity behind a request for a specific student's educational record—even where redaction is futile—could overcome the student's privacy interest in the record. For example, a party might require the information in an educational record because the information is essential for prosecuting or defending a lawsuit where the primary issue is not public disclosure of the educational record itself. In *Catrone v. Miles*, 160 P.3d 1204, 1207-08, 1210-12 (Ariz. Ct. App. 2007), Andrew Catrone filed a malpractice suit against medical providers alleging negligence when his son, Patrick, was born with neurobehavorial problems, sensory motor deficits, hearing loss, and impaired cognitive functions. Patrick's brother, Austin,

was born of the same parents approximately one year before Patrick and suffered the same learning disabilities. In support of the theory that Patrick's impairments were genetic rather than the result of malpractice, the medical providers sought Austin's special educational records. Although the request for educational records was specific to Austin, the court allowed disclosure of Austin's educational records with redactions for privileged information and a requirement that the parties agree on the terms of a protective order. Similarly, in *Ragusa v. Malverne Union Free Sch. Dist.*, 549 F. Supp. 2d 288, 290, 293-94 (E.D.N.Y. 2008), Ragusa, a high school mathematics teacher, filed an employment discrimination action and sought educational records to show special education students in her classes had increased and the students reached their goals under her tutelage. The court explained that the records were relevant to Ragusa's claim and ordered the records released with personally identifiable information redacted.

¶ 46 Krakauer's assertion of his constitutional right to know must be seen for what it is: Krakauer is only interested in Doe's educational records because Doe is a high-profile athlete. Krakauer wants to know if the Commissioner showed favoritism towards Doe in the handling of Doe's sexual assault investigation because of that status. Krakauer's right to know the records' contents exists in direct tension and conflict with Doe's right of privacy in his educational records. Krakauer's request for Doe's records is premised solely upon Doe's status as a high-profile athlete for the University. By making a specific request for Doe's records, Krakauer made it clear that he is not interested in the Commissioner's handling of sexual assault

investigations generally; he is interested in only the Commissioner's handling of Doe's investigation because Doe is a high-profile athlete. Were we to find this a basis for disclosure, the right to know would always subsume the privacy interest, making the student's enhanced privacy interest always subject to the whim and caprice of public sentiment. Krakauer does not overcome Doe's enhanced privacy interest by demonstrating the public has an interest in how the Commissioner handled this particular investigation. The Commissioner's report is still about Doe, and Doe, under the law, is entitled to be treated the same as any other student.

Conclusion

¶ 47 Where a court finds a privacy interest exists, the student's enhanced privacy interest manifests a powerful "demand of individual privacy," when balanced against the public's right to know. *See* Mont. Const. art. II, § 9. Furthermore, the public's knowledge of portions of a student's private records does not justify public disclosure by diminishing or effacing the student's actual or subjective expectation of privacy in the records. Finally, when redacting certain identifying information is futile, the futility of redaction does not favor public disclosure. The futility of redaction leaves the enhanced and weighty privacy interest of a student unprotected.

¶ 48 Doe has an enhanced privacy interest in his educational records based on the federal and state laws protecting his privacy rights. He has an actual or subjective expectation of privacy in his educational records because he did not have notice his records were subject to possible release by the University,

even if some of the information was already public knowledge. His expectation of privacy is one that society is willing to recognize as reasonable. Moreover, Doe's demand of individual privacy in his records clearly exceeds the merits of public disclosure. Accordingly, we reverse the District Court's decision ordering the Commissioner to release Doe's records and dismiss Krakauer's petition with prejudice. Because Krakauer is not the prevailing party in this action under § 2-3-221, MCA, we affirm the District Court's decision not to award Krakauer attorney fees.

¶ 49 Reversed in part and affirmed in part.

/s/ Laurie McKinnon

We concur:

/s/ James Jeremiah Shea

/s/ Dirk M. Sandefur

/s/ Ingrid Gustafson

JUSTICE RICE CONCURRING IN PART AND DISSENTING IN PART

Justice Rice, concurring in part and dissenting in part.

¶ 50 I agree with the Court's well-articulated substantive analysis, but I partially disagree with the Court's application of the governing principles, and in the final result. We remanded in *Krakauer I* for the District Court to consider these principles, and, procedurally, to conduct an *in camera* review of the contested records. I would reverse in part and affirm in part the District Court's holding, and order a release of limited information in response to the Petitioner's request.

¶ 51 I believe the Court correctly concludes that Doe has a privacy interest in his educational records that society would recognize as reasonable, and thus I concur with the Court's reversal of the District Court's contrary conclusion. I further agree that Doe's privacy right has been enhanced under state and federal law, beyond a "general privacy interest[]," which is "an important factor to consider" in the constitutional balancing analysis. Opinion, ¶ 16. Indeed, protection of Doe's privacy interest was the reason we ordered an in camera review. *Krakauer I*, ¶ 39 ("We have recognized the efficacy of an *in camera* review of requested records by a district court to ensure that privacy interests are protected. . . . On remand, the District Court should review the requested documents in camera, and in the event it determines to release any document after conducting the balancing test, every precaution should be taken to protect the personal

information about other persons contained in the documents.").

¶ 52 The Court recognizes that FERPA provides students with notice that the privacy of their educational records is subject to exceptions that permit disclosure in limited circumstances, including through the judicial process. Similarly, the Student Conduct Code advises students that their records may be subject to disclosure in compliance with state and federal law, including release by judicial order. I thus disagree with the Court's conclusion that Doe did not have notice that his educational records were subject to disclosure in circumstances such as those here. Opinion, ¶¶ 19-21.

¶ 53 Balanced against the privacy interest, "there is a constitutional presumption that all documents of every kind in the hands of public officials are amenable to inspection, regardless of legislation, special exceptions made to accommodate the exercise of constitutional police power, and other competing constitutional interests, such as due process." *Great Falls Tribune v. Mont. PSC*, 2003 MT 359, ¶ 54, 319 Mont. 38, 82 P.3d 876 (emphasis in original) (citations omitted). Thus, going into the balancing test, the public's right to know is to be weighted with a presumption favoring release.

¶ 54 The reasoning of the U.S. District Court in *Doe v. University of Montana* is worth noting:

> [L]ost in all of this is the valid and compelling interest of the people in knowing what the University of Montana is up to. It has been established that the prevalent and long-standing approach of the federal courts

> is to reject secret proceedings. There are very few exceptions to this rule. The principle of openness in the conduct of the business of public institutions is all the more important here, where the subject matter of the litigation is a challenge to the administrative disciplinary process of a state university.

Doe v. Univ. of Mont., No. CV 12-77-M-DLC, 2012 U.S. Dist. LEXIS 88519, at *11 (D. Mont. June 26, 2012). I agree, and believe the people of the state simply must be able to learn about and know—in some degree—a decision made by the Commissioner of Higher Education about a University matter, including a matter involving a student. This itself is an important fact: at issue is not a personnel matter before a human resource officer in a small unit of government, but, rather, a contested case before a high official in the state government, exercising statewide authority. As noted by the U.S. District Court, people must be able to learn what their institutions are "up to," and that the government is not engaged in inappropriate conduct. Did the Commissioner make a decision on appropriate legal grounds? Did he exhibit favoritism? Was he subject to outside influence? Doe's enhanced privacy right must be weighed and balanced against the vital, democratic function of the public's right to know these answers. "[T]ransparency is crucial to the legitimacy of a public institution." *Doe v. Univ. of Mont.*, at *11.

¶ 55 Troubling to me about the outcome here is that it reaches an all-or-nothing result, largely turning upon the wording of Krakauer's request for the records. The Court recognizes that a nonspecific request for general information that did not name Doe would have

rendered redaction a viable option, and the Commissioner "could have responded by supplying the appropriate records with each student's personally identifying information redacted[.]" Opinion, ¶ 35. But the Court concludes that the wording of the request sinks the request entirely, and no records whatsoever can be released. In light of the critical importance of the right to know, I believe that conclusion is error.

¶ 56 While we tend to think of the issue as a yes-or-no, all-or-nothing decision, I don't believe the balancing test must lead to that result, either here or in other cases. While it is true that the request here may have made redactions about Doe futile, the request should nonetheless be honored to the extent it can be—that is, with a limited release of information that discloses the decision the Commissioner made and the grounds upon which he made it. Review of the record convinces me that the public's right to know the basis for the Commissioner's decision outweighs even the enhanced right to privacy in this case. The Commissioner's decision makes clear that it is premised on matters of process in the University's handling of the matter, and includes very little discussion of the underlying facts. Redactions may be viable within that document to ensure protection of any private information, such as information provided by or about, or the identity of, other parties, or of the nature of specific evidence. I would remand for the District Court to further consider any appropriate redactions.

¶ 57 Such a result is consistent with the process under FERPA. As we noted in *Krakauer I*, FERPA authorizes the limited release of information about the final results of a student disciplinary proceeding for certain crimes if the student is found to have com-

mitted a violation. *Krakauer I*, ¶ 26. FERPA additionally authorizes release of information in compliance with a judicial order. Indeed, the cases cited by the Court lend authority for such limited, student-specific releases of documentation. Opinion, ¶ 45.

¶ 58 The Court emphasizes that it does not foreclose the release of student records in future cases, and that it will "depend on the facts of each case." Opinion, ¶ 44. I agree with the necessity of case-by-case review, but I would hold that, under the facts of this case, a limited release of information is required to satisfy the constitutional right to know, and is authorized under FERPA as necessary in response to a court order. I would thus reverse in part the order of the District Court and order a more limited release of information setting forth the Commissioner's decision and the grounds on which he made it.

/s/ Jim Rice

Chief Justice Mike McGrath and Justice Beth Baker join in the concurring and dissenting Opinion of Justice Rice.

/s/ Mike McGrath

/s/ Beth Baker

ORDER ON MOTION FOR RELEASE OF RECORDS BY THE MONTANA FIRST JUDICIAL DISTRICT COURT (OCTOBER 19, 2017)

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

JON KRAKAUER,

Petitioner,

v.

STATE OF MONTANA, by and through its COMMISSIONER OF HIGHER EDUCATION, CLAYTON CHRISTIAN,

Respondent.

Cause No. ADV-2014-117

Before: Mike MENAHAN, District Court Judge.

ORDER ON MOTION FOR RELEASE OF RECORDS

This case is before this Court on remand from the Montana Supreme Court, which issued its opinion in *Krakauer v. State*, 2016 MT 230, 384 Mont. 527, 381 P.3d 524, on October 5, 2016. Vivian V. Hammill and Helen C. Thigpen represent Respondent State of Montana, by and through the Office of the Commissioner of Higher Education (Commissioner). Peter Michael

Meloy represents Petitioner Jon Krakauer. David R. Paoli represents intervenor John Doe.

Statement of Facts

A more complete factual and procedural background of the case is set forth in *Krakauer*, ¶¶ 2-8. It is useful, however, to recite several relevant points of recent procedural history. Krakauer's filed his petition in the Montana First Judicial District Court on February 12, 2014, and the case was assigned to Judge Kathy Seeley. On September 25, 2014, Judge Seeley issued a memorandum and order granting summary judgment for Krakauer and ordering the Commissioner to release all the documents he requested, with all student names, birth dates, social security numbers, addresses, and telephone numbers redacted. (Memo. & Order Cross-Mots. S.J. (Sept. 25, 2014).) Judge Seeley subsequently stayed her order pending the parties' appeals to the Montana Supreme Court.

Following extensive motion practice and appeals, the Montana Supreme Court published its opinion in *Krakauer v. State*, 2016 MT 230, 384 Mont. 527, 381 P.3d 524, wherein it remanded the case back to the District Court with instructions for the Court to perform an in camera review of the requested documents prior to ruling on Krakauer's petition.

Upon remand, the Commissioner filed a motion to substitute Judge Seeley. The Honorable James P. Reynolds assumed jurisdiction over the case on October 19, 2016. On November 17, 2016, Doe filed a motion to intervene and a motion to substitute Judge Reynolds. In a February 8, 2017 Order, Judge Reynolds granted Doe's motions. On March 3, 2016, the Honorable Michael F. McMahon assumed jurisdiction over the

case. On April 11, 2017, Krakauer moved to substitute Judge McMahon. The undersigned assumed jurisdiction of the case on April 11, 2017. This Court granted Krakauer's motion for an in camera review on August 3, 2017. The Commissioner provided the requested documents to the Court on August 31, 2017.

Principles of Law

In *Krakauer,* the Supreme Court addressed the following issues:

1. Did Krakauer have standing to petition the Commissioner for a release of documents pursuant to Article II, section 9, the right-to-know provision of the Montana Constitution?
2. Is the Commissioner prohibited from releasing the requested documents by the Family Educational Rights and Privacy Act of 1974, as amended (FERPA), 20 U.S.C.S. § 1232g, or by Montana Code Annotated § 20-25-515?
3. How does the right-to-know provision of the Montana Constitution apply to Krakauer's request to release documents?

The Supreme Court first concluded Krakauer does have standing to pursue his request. *Krakauer*, ¶ 16.

The Supreme Court next considered the application of FERPA, which broadly prohibits universities from releasing "Personally Identifiable Information" about students. The Supreme Court determined the documents at issue could contain personally identifiable information, and that FERPA would therefore bar the Commissioner from releasing those records. *Krakauer*,

¶ 19-24. However, the Supreme Court noted that FERPA contains an exception which allows the release of documents containing personally identifiable information when the documents are released pursuant to a valid court order, as was issued in this case. Thus, the majority concluded that, given a valid order from a district court, the Commissioner may release personally identifiable information about a student without running afoul of FERPA. *Krakauer*, ¶ 25-27.

The Supreme Court then considered the application of Montana Code Annotated § 20-25-515, which provides:

> A university or college shall release a student's academic record only when requested by the student or by a subpoena issued by a court or tribunal of competent jurisdiction. A student's written permission must be obtained before the university or college may release any other kind of record unless such record shall have been subpoenaed by a court or tribunal of competent jurisdiction. The majority concluded the exceptions in the rule for "subpoenaed" records were satisfied by a valid court order releasing them.

Krakauer, ¶¶ 28-30.

Finally, the Supreme Court considered Article II, section 9, of the Montana Constitution, which provides: "[n]o person shall be deprived of the right to examine documents . . . of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."

The Supreme Court recognized that although Montana law places significant emphasis on the public's right to know, the right is not absolute. Rather, the public's right to know is balanced by the right to individual privacy, also expressly preserved in the Montana Constitution. The Supreme Court remanded the case to the District Court with instructions to conduct an *in camera* review of the documents and to reapply the constitutional test balancing an individual right to privacy with the public's right to know.

Analysis

Balancing Privacy and Transparency

Article II, section 9, of the Montana Constitution presumes that all records of public institutions shall be available to the public, unless a compelling privacy interest dictates otherwise. The Montana Supreme Court has adopted a two-part analysis to determine whether an individual privacy interest exists. A court must determine (1) the individual involved had a subjective or actual expectation of privacy, and (2) which society is willing to recognize as reasonable. *Great Falls Tribune Co. v. Day*, 1998 MT 133, ¶ 20, 289 Mont. 155, 959 P.2d 508. If both parts of this test are satisfied, a court must then balance that individual privacy interest against the public's right to know, and so determine whether any documents should be released to the public.

In remanding this matter to the District Court, the Supreme Court identified several "unique interests at issue in this case," and directed this Court to reconduct the constitutional balancing test "[a]fter giving due consideration" to these interests. *Krakauer,* ¶ 42. The unique interests identified by the Court are:

(1) the enhanced privacy interests of student records; and (2) the potential futility of redaction. Having taken these interests into consideration, and after conducting an in camera analysis of the documents at issue here, this Court essentially concurs with Judge Seeley's Order, though with narrower parameters on the documents to be released.

Doe's Expectation of Privacy

The Supreme Court recognized that student records are subject to an "enhanced privacy interest," which this Court must consider when weighing the student's privacy interest against the public's right to know. *Krakauer*, ¶¶ 37-38. In the present matter, however, even when accounting for Doe's enhanced expectation of privacy, this Court concludes Doe does not have a subjective or actual expectation of privacy in the records at issue here.

Krakauer's request for documents is not aimed at gathering information about Doe's alleged behavior, but rather seeks information about the actions and decisions of the Commissioner and university officials regarding the disciplinary proceedings against Doe. The Court acknowledges these records may still contain information in which Doe retains a privacy interest. However, having conducted an in camera review, this Court concludes the personal information contained therein has already been made substantially available to the public through unsealed court records and significant national media coverage of a public criminal trial. In this circumstance, this Court concludes, under the first prong of the *Great Falls Tribune* test, Doe does not have an actual or subjective expectation of privacy. Even where public policy ascribes an enhanced

privacy interest, there is no expectation of privacy for information that has already been made public, such as Doe's alleged conduct which led to the university's disciplinary proceedings.[1]

Futility of Redaction

Because Krakauer directed his records request regarding a specifically named individual student, the Supreme Court considered the possibility that "redaction of records provided in response to a request about a particular student may well be completely futile," thus affecting the balancing test. *Krakauer*, ¶ 38. Because this Court concludes that Doe does not have an actual or subjective privacy interest in the records to be released, the question whether redaction would be futile is moot.

However, although redacting Doe's name from the records may be futile, this Court will order the Commissioner to redact from any record to be released, all personally identifying student information, including Doe's. There are two reasons for doing so—first, Krakauer has repeatedly stated he is willing to accept records with personally identifying student information

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[1] The Court reiterates this conclusion is made only with respect to the documents to be released pending this Order. Some of the records provided by the Commissioner for review, *e.g.*, the transcript of the University Court hearing, contain private information that was not made publicly available through other means, and would implicate Doe's enhanced privacy interest and the privacy interests of other individuals who participated in the hearing. In the event this Court directed the Commissioner to release a transcript of the disciplinary hearing, a thorough constitutional balancing test analysis, weighing Doe's enhanced privacy interest against the merits of disclosure, would be warranted.

redacted and, second, redacting the records at issue here case can do no harm. It as the Supreme Court suggests, redaction is futile, then there are no practical differences between releasing redacted and unredacted documents. To the extent redacting the records may not be entirely futile, stripping the documents of personally identifying student information will serve to tailor the document production to the document request —the stated aim of which is to reveal the disciplinary procedures of the University system. As the United States District Court for the District of Montana explained in *John Doe v. University of Montana*, 2012 U.S. Dist. LEXIS 88519, 2012 WL 2416481:

> The University of Montana is a public institution, and while there may be good reasons to keep secret the names of students involved in a University disciplinary proceeding, the Court can conceive of no compelling justification to keep secret the manner in which the University deals with those students.
>
> Thus, despite the possibility that redaction as a means of protecting Doe's identity may be futile, this Court will order all personally identifying student information, including Doe's, redacted from the released documents.

Balancing Test

As set forth herein, this Court concludes that previous public disclosure of the details of Doe's behavior preclude him from any expectation the details of the activity would remain private. Nonetheless, the Court will apply the constitutional analysis weighing the public's right to know and Doe's expectation of privacy.

When performing this balancing test, the district court "must consider all of the relevant facts of each case." *Krakauer*, ¶ 40. The Supreme Court identified a non-comprehensive list of factors to weigh, including:

> the publicity that has followed this case, the source of the original request, the reasons behind the request, the named student's status as an athlete at a publicly-funded university, and the prior litigation, all of which may be considered and weighted by the District Court when conducting the balancing test.

Krakauer, ¶ 40.

Here, weighing favorably in Doe's right to privacy is his enhanced privacy interest in his student records. On the other hand, a variety of factors weigh against Doe's right to privacy and in favor of the public's right to know. First, Doe's status as a high-profile student athlete weighs against his right to privacy. Prior to the commencement of disciplinary proceedings and criminal litigation against him, Doe was a well-known individual in Montana and enjoyed a position of prominence and popularity by virtue of his athletic position. Second, the University of Montana is a public institution, and Doe, while not a paid athlete, receives valuable consideration for his skills in the form of an athletic scholarship. Although he is not a public official or university employee, Doe is a public representative of the University of Montana. Third, the details of Doe's alleged bad acts have been publicly aired through national and local media coverage, a publicly held criminal trial, and a nationally bestselling book. Fourth, the public has a compelling interest in

understanding the disciplinary procedures employed by a state university, especially where the student in question is a prominent and popular campus figure whose education is paid for in part by public funds.

When taking these factors into consideration, this Court cannot conclude that Doe's privacy interest "clearly exceeds the merits of public disclosure," as contemplated by Article II, section 9, of the Montana Constitution.

ORDER

IT IS HEREBY ORDERED:

1. The Commissioner is directed to redact all personally identifying student information from the following documents:

From the disc entitled "OCHE Record":

- All files in folder #4 "Exhibits to Appeal Before Commissioner."
- All files in folder #5 "Submissions of Parties on Appeal before Commissioner"
- All files in folder #6 "Counsel's Responses to Questions Posed by Commissioner"
- All files in folder #7 "Commissioner's Decision on Appeal.

From the disc entitled "Remand Record":

- All files on disc.

This Court emphasizes that, when redacting information in these records, "[e]very precaution should be taken to protect the personal information of third party students." *Krakauer*, ¶ 39.

2. After preparing the files, the Commissioner is directed to deliver the files to the Court for a final review before release.

Furthermore, as the Supreme Court noted, "the exception to FERPA that allows for release of documents pursuant to a court order requires advance notice to the affected student or parents, and a district court must comply with this directive before releasing protected information." *Krakauer*, ¶ 42. Following the Court's review of the redacted documents, but prior to their release, the Commissioner is directed to comply with the requirements of 20 U.S.C.S. § 1232g(b)(2)(B), and provide notice of this order to Doe and Doe's parents.

DATED this 19th day of October 2017.

/s/ Mike Menahan
District Court Judge

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OPINION OF THE MONTANA SUPREME COURT
***KRAKAUER V. STATE*, 384 MONT. 527,**
381 P.3D 524 (2016) (*KRAKAUER I*)

SUPREME COURT OF MONTANA

JON KRAKAUER,

Petitioner
and Appellee,

v.

STATE OF MONTANA, by and through its COMMISSIONER OF HIGHER EDUCATION, CLAYTON CHRISTIAN,

Respondent
and Appellant,

No. DA-15-0502

Appeal from the District Court of the First Judicial District, in and for the County of Lewis and Clark, Cause No. CDV-2014-117
Honorable Kathy Seeley, Presiding Judge

Before: Jim RICE, Mike McGRATH, Beth BAKER, James JEREMIAH SHEA, Michael E. WHEAT, Justices., John C. BROWN, District Court Judge Sitting for Justice Patricia COTTER.

Opinion by: JIM RICE

¶ 1 The Commissioner of Higher Education, Clayton Christian (Commissioner), challenges the summary judgment order entered by the First Judicial District Court, Lewis and Clark County, in favor of Petitioner Jon *Krakauer* (*Krakauer*), which ordered the release/inspection of certain student disciplinary records. We affirm in part, reverse in part, and remand for further proceedings. The Commissioner raises several issues, which we restate as follows:

1. Does Krakauer, a Colorado resident, have standing to avail himself of the right to know granted under Article II, Section 9 of the Montana Constitution?
2. Is the release of records responsive to Krakauer's request prohibited by the Family Educational Rights and Privacy Act of 1974 (FERPA), as amended, and/or by § 20-25-515, MCA?
3. How does Article II, Section 9 of the Montana Constitution apply to the request for release of the subject student records?
4. Did the District Court abuse its discretion when it awarded attorney fees and costs to *Krakauer*?

Because we remand for further proceedings, we do not address the merits of the attorney fee issue. We vacate the fee award so that the matter may be reconsidered upon conclusion of the proceeding.

Procedural and Factual Background

¶ 2 This is a dispute over release of student records related to allegations of sexual assault occurring

near the Missoula campus of the University of Montana (University). The underlying allegations of the case were part of a broader campus cultural concern that garnered local and national media attention. *Krakauer*, a journalist and resident of Colorado, conducted an investigation and published a book chronicling instances of alleged sexual misconduct on or near the University campus. This case involves one of those instances. When *Krakauer*'s request for release of certain student records related to the matter was denied by the Commissioner, *Krakauer* initiated this action by filing a petition in the First Judicial District Court.

¶ 3 In support of his petition, *Krakauer* submitted documents that the United States District Court for the District of Montana had previously unsealed and released. *Doe v. Univ. of Mont.*, No. CV 12-77-M-DLC, 2012 U.S. Dist. LEXIS 88519 (D. Mont. June 26, 2012), available at https://perma.cc/3RRE-ETXB.[1] There, a student (Doe) initiated the action under seal, seeking a preliminary injunction halting the University's disciplinary proceedings against him. The documents, now part of the record here, indicate that after a female student made an allegation that Doe had raped her in an off-campus apartment, the University initiated an investigation into a possible violation of the Student Conduct Code. Dean of Students Charles Couture determined that Doe committed sexual intercourse without consent, and as sanctions, recommended Doe's immediate expulsion from the

[1] The United States District Court ordered that the documents, including the letters and findings of the Dean, the University Court, and University President Royce Engstrom, would have students' names, personal information, and pertinent dates redacted.

University and restriction from all University property and University-sponsored events. Doe, represented by counsel, appealed the Dean's determination to the University Court, a body made up of faculty, staff, and students appointed to hear disciplinary matters.

¶ 4 The University Court conducted a hearing and concluded by a 5-2 vote that Doe had committed sexual intercourse without consent, and further concluded by a unanimous vote of 7-0 that he should be sanctioned by expulsion from the University. Pursuant to the Student Conduct Code, Doe requested that the University Court's determination be reviewed by President Engstrom. President Engstrom's review considered whether the evidence provided a reasonable basis for the findings and disciplinary sanction, and whether procedural errors were so substantial as to deny a fair hearing to either party. President Engstrom upheld the University Court's findings and proposed sanction, and found no procedural error that denied a fair hearing.

¶ 5 As the final step in the disciplinary appeal process, Doe appealed President Engstrom's decision to the Commissioner, whose office acknowledged receipt of the appeal. This is the last step in the process documented in the records released by the U.S. District Court in *Doe*. Nothing more is documented there or in the record here about the Commissioner's subsequent actions in the case.

¶ 6 Krakauer filed a request with the Commissioner's office on January 17, 2014, naming a particular student and asking for "the opportunity to inspect or obtain copies of public records that concern the actions of the Office of the Commissioner of Higher

Education in July and August 2012 regarding the ruling by the University Court of the University of Montana in which student . . . was found guilty of rape and was ordered expelled from the University." *Krakauer* asserted factual connections between the federal *Doe* case and a highly-publicized state criminal proceeding that had been initiated against the then-starting quarterback of the University's football team. He maintained that the student Doe and the quarterback were the same person, and his request to the Commissioner named the student specifically. *Krakauer* postulated that the Commissioner must have overturned the University Court's and President Engstrom's decision and sanction of expulsion, noting that the student had "remained in school and continued to participate as the Grizzly quarterback."

¶ 7 The Commissioner refused to acknowledge that such records existed, and further refused to permit inspection or release of any such documents, asserting that federal and state law prevent him from doing so. Krakauer initiated this action on February 12, 2014, citing the right to know under the Montana Constitution. Upon cross-motions for summary judgment, and after holding a hearing, the District Court granted summary judgment to *Krakauer*, and ordered the Commissioner to "make available for inspection and/or copying within 21 days" the requested records, with students' names, birthdates, social security numbers, and other identifying information redacted.

¶ 8 The Commissioner appealed and we initially dismissed the case without prejudice, as the District Court had not yet entered an order addressing the attorney fee issue. The District Court awarded fees to

Krakauer on June 19, 2015, and the Commissioner again undertook an appeal.

Standards of Review

¶ 9 "We conduct de novo review of summary-judgment orders, performing the same analysis as does a district court pursuant to Rule 56 of the Montana Rules of Civil Procedure." *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 36, 345 Mont. 12, 192 P.3d 186 (citing *LaTray v. City of Havre*, 2000 MT 119, ¶ 14, 299 Mont. 449, 999 P.2d 1010).

¶ 10 Substantively, Krakauer's Petition was based upon the constitutional right to know, and the Commissioner likewise raises constitutional issues. "Our review of questions involving constitutional law is plenary. A district court's resolution of an issue involving a question of constitutional law is a conclusion of law which we review to determine whether the conclusion is correct." *Bryan v. Yellowstone Cnty. Elementary Sch. Dist. No. 2*, 2002 MT 264, ¶ 16, 312 Mont. 257, 60 P.3d 381 (internal citation omitted) (citing *Schuff v. A.T. Klemens & Son*, 2000 MT 357, ¶ 28, 303 Mont. 274, 16 P.3d 1002).

Discussion

¶ 11 1. Does Krakauer, a Colorado resident, have standing to avail himself of the right to know granted under Article II, Section 9 of the Montana Constitution?

¶ 12 The Commissioner argues that Krakauer, as a resident of Colorado, does not have standing to pursue his Petition, because he is not a party intended to benefit from the Montana Constitutional right to

know provision, and related statutes. The Commissioner argues this privilege was created and enacted for the sole benefit of Montana citizens, to allow them access to the workings of their own government.

¶ 13 In *Schoof v. Nesbit*, 2014 MT 6, 373 Mont. 226, 316 P.3d 831, we clarified the standing requirements, and more specifically the required showing for injury, under Article II, Section 9 of the Montana Constitution. After doing so for purposes of that case, we noted, "It is not appropriate in this case to address the parameters of standing for right to know and right of participation claims that may arise in other contexts." *Schoof*, ¶ 25. Later the same year, we addressed another standing argument related to Article II, Section 9 of the Montana Constitution, in *Shockley v. Cascade Cnty.*, 2014 MT 281, 376 Mont. 493, 336 P.3d 375. There, we held that the Montana Constitution does not prohibit a citizen of one Montana county from requesting public documents from a public body in another county. *Shockley*, ¶ 22. We declined to address "the question of whether standing extends beyond Montana citizens[.]" *Shockley*, ¶ 23. That question arises here.

¶ 14 Article II, Section 9 of the Montana Constitution is short and clear. "No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." The Commissioner asks this Court to consider that, while the actual constitutional language uses the word "person," the enabling statutes use the word "citizen" in describing

the persons having the right to inspect public documents. *Compare* § 2-6-102, MCA (2013) ("Every citizen has a right to inspect and take a copy of any public writings of this state. . . . ") (repealed 2015), *and* 2015 Mont. Laws 1484, 1486 (effective date Oct. 1, 2015) ("Except as provided in subsections (2) and (3), every person has a right to examine and obtain a copy of any public information of this state."). The Commissioner also cites to the use of the word "citizen" in transcripts of debates about the issue during the Montana Constitutional Convention.

¶ 15 As we have previously stated, Article II, Section 9 of the Montana Constitution is "unambiguous and capable of interpretation from the language of the provision alone." *Great Falls Tribune Co. v. Day*, 1998 MT 133, ¶ 30, 289 Mont. 155, 959 P.2d 508 (citing *Great Falls Tribune v. District Court of Eighth Judicial Dist.*, 186 Mont. 433, 437, 608 P.2d 116, 119 (1980)). We have also stated that the provision is "unique, clear and unequivocal," and that "[w]e are precluded, by general principles of constitutional construction, from resorting to extrinsic methods of interpretation."[2]

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[2] The Commissioner correctly points out that we noted the language of the Constitutional Convention in *Shockley*, ¶ 20. However, we cited to the Verbatim Transcript in order to illustrate the general goal of Article II, Section 9 of the Montana Constitution—namely, government transparency and accountability. While the quotes we cited were illustrative of the general purpose of the provision, resorting to these extrinsic sources was unnecessary for interpretation. Because the constitutional convention delegates ultimately used the word "person" when describing the right to know, and in light of the amended wording of the open record statutory scheme (referenced above), which now also uses the term "person," we are not persuaded by the Commissioner's argument.

Associated Press v. Bd. of Pub. Educ., 246 Mont. 386, 391, 804 P.2d 376, 379 (1991). We thus rely on the language of the provision itself, which expressly provides that "no person" shall be deprived of the right to examine documents or observe the deliberations of public bodies, except when required by the demands of individual privacy.

¶ 16 "Since the alleged injury is premised on the violation of constitutional and statutory rights, standing depends on 'whether the constitutional or statutory provision . . . can be understood as granting persons in the plaintiff's position a right to judicial relief.'" *Schoof*, ¶ 21 (citing *Warth v. Seldin*, 422 U.S. 490, 500, 95 S. Ct. 2197, 2206 (1975)). Therefore, under the plain language of the provision, we hold that *Krakauer*, though an out-of-state resident, has standing to invoke the right to know guarantees under Article II, Section 9 of the Montana Constitution.[3]

¶ 17 2. Is the release of records responsive to Krakauer's request prohibited by the Family Educational Rights and Privacy Act of 1974 (FERPA), as amended, and/or by § 20-25-515, MCA?

¶ 18 The Commissioner contends that because Krakauer's records request referenced a student by name, FERPA prohibits his office from releasing any records responsive to Krakauer's request. The Com-

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[3] The standing of an out-of-state resident has not previously been presented to the Court as a contested legal issue, but, as a practical matter, out-of-state corporate residents have often availed themselves of the rights under Article II, Section 9 of the Montana Constitution. *See, e.g.*, *Associated Press, Inc., a New York not-for-profit corporation registered to do business in Montana v. Mont. Dep't of Revenue*, 2000 MT 160, 300 Mont. 233, 4 P.3d 5.

missioner argues that § 20-25-515, MCA, likewise prohibits him from releasing the requested records. Krakauer responds that FERPA is essentially spending clause legislation that does not actually prohibit the University or the Commissioner from releasing records, that one of the explicit exceptions to FERPA's general prohibition on the release of student records applies in this context, and that § 20-25-515, MCA, actually permits the release of the requested records.

a. General Applicability of FERPA

¶ 19 *Krakauer* argues that FERPA "simply does not prohibit anything"; it merely conditions federal funding on confidentiality compliance. He cites to *Bd. of Trs. v. Cut Bank Pioneer Press*, 2007 MT 115, ¶ 24, 337 Mont. 229, 160 P.3d 482, where we stated that FERPA has been described as "spending legislation." *Krakauer* contends that the Commissioner's fear of losing federal funding is "wholly speculative," and points out that, in its amicus brief, the United States has conspicuously refrained from "any claim or assertion that . . . the [Montana University System] will suffer any penalty" if it releases the requested documents. *Krakauer* asserts that "FERPA's spending legislation merely sets conditions on the receipt of federal funds and cannot forbid or prohibit any state action."

¶ 20 Congress enacted FERPA to "protect the privacy of students and their parents." *Pioneer Press*, ¶ 24; *see also* 34 C.F.R. § 99.2 ("The purpose of this part is to set out requirements for the protection of privacy of parents and students. . . . "). FERPA prohibits educational institutions and agencies from having a policy or practice of releasing education records or personally identifiable information contained in edu-

cation records, and conditions receipt of federal monies on those institutions' compliance with its directives. *See* 20 U.S.C. § 1232g. The University, as a recipient of federal funds, agreed in its Program Participation Agreement to comply with "The Family Educational Rights and Privacy Act of 1974 and the implementing regulations . . . [,]" and thereby assumed the risk the Secretary of Education would withhold future funds in the event of substantial non-compliance. *See* 20 U.S.C. § 1234c(a)(1).

¶ 21 *Krakauer* is seeking records related to a specific student's disciplinary proceedings, and the Commissioner argues that *Krakauer*'s particular request fell squarely under FERPA's prohibitions. The Commissioner offers that another kind of request would have been handled differently by his office: "If *Krakauer* had wanted an understanding of how the Commissioner's office handles appeals related to student conduct code complaints . . . , he could have requested all decisions resolving complaints for some appropriate specified period of time, and he would have received the Commissioner's decisions for a variety of cases with the names, dates and any other personally identifiable information redacted."

¶ 22 Title 20, Section 1232g(a)(4)(A) of U.S. Code provides: "For the purposes of this section, the term 'education records' means, . . . , 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." (Emphasis added.) In *Pioneer Press*, ¶ 27, we noted that several jurisdictions had interpreted the term "education records" to exclude disciplinary records.

However, since that decision, as the Commissioner and amicus United States point out, not only have FERPA regulations been broadened, but courts have recognized that disciplinary records constitute "education records" under FERPA. *See State ex rel. ESPN, Inc. v. Ohio State Univ.*, 970 N.E.2d 939, 946-47 (Ohio 2012) ("we agree with the Sixth Circuit and hold that the [student disciplinary] records here generally constitute 'education records' subject to FERPA . . . . The records here—insofar as they contain information identifying student-athletes—are directly related to the students").[4] FERPA regulations also now confirm that disciplinary records fall within the purview of the Act, authorizing limited, non-consensual release of student disciplinary records in certain circumstances. *See, e.g.*, 34 C.F.R. § 99.31(a)(13) & (14). Based upon the understanding that the term "education records" encompasses disciplinary records, the Commissioner correctly asserted that the records at issue here fall under the application of FERPA.

¶ 23 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

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[4] We distinguished such holdings in *Pioneer Press* on the ground that releasing records with all personally identifiable information redacted would not violate FERPA. *Pioneer Press*, ¶ 31. However, Krakauer's request listed a specific student by name, thus requiring the Commissioner's office to necessarily release personally identifying information regarding the student. *See* 34 C.F.R. § 99.3 (*see* "Personally Identifiable Information" at (g)).

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. *See United States v. Miami Univ.*, 294 F.3d 797, 808 (6th Cir. 2002) ("Even in the absence of statutory authority, the United States has the inherent power to sue to enforce conditions imposed on the recipients of federal grants. 'Legislation enacted pursuant to the spending power [, like the FERPA,] is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.'") (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 101 S. Ct. 1531 (1981)). 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."

b. Applicability of FERPA to the Subject Documents

¶ 24 FERPA prohibits institutions from having a "'policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of the students or their parents.'" *Miami Univ.*, 294 F.3d at 806 (internal brackets omitted) (citing 20 U.S.C. § 1232g(b)(1)). The regulation defines "Personally Identifiable Information" to include information such as a student's name, family names, date of birth, or "other information that, alone or in combination, is linked or linkable to a specific student

that would allow a reasonable person . . . to identify the student with reasonable certainty[.]" 34 C.F.R. § 99.3 (*see* "Personally Identifiable Information" at (a)–(f)). Since our decision in *Pioneer Press*, this definition has been expanded to include "[i]nformation requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates." 34 C.F.R. § 99.3 (*see* "Personally Identifiable Information" at (g)). The records in question facially fall within the restrictions of FERPA, and the Commissioner rightly considered FERPA's requirements in determining whether to release them. As noted by amicus United States, "[W]here a request targets education records relating to a particular student, identified by name, FERPA's protections unquestionably apply." Under these provisions, had the Commissioner released the documents that *Krakauer* originally requested, using the specific student's name, he would have violated the statute. FERPA and its accompanying regulatory scheme, including its expanded definition of "Personally Identifiable Information," prohibited the unilateral release of the requested documents by the Commissioner, as *Krakauer* clearly knew the identity of the student that he named specifically in his request.

c. Exceptions Permitting Release Under FERPA

¶ 25 While FERPA generally prohibits the release of student educational records and personally identifiable information in those records, the records do not necessarily recede into the recesses of Chateau d'If, never to see the light of day. FERPA contains several non-consensual exceptions that permit an institution to release educational records. *See, e.g.*, 20 U.S.C. § 1232g(b)(1)(c); 20 U.S.C. § 1232g(b)(3).

¶ 26 *Krakauer* argues that the requested records must be made available under the exception that provides for release of the final results of a disciplinary proceeding "if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense." 20 U.S.C. § 1232g(b)(6)(B).[5] He argues that the exception "explicitly authorizes disclosure of records related to the Commissioner's decision since it is, undisputedly, the 'final result' of the [MUS]'s disciplinary proceeding against [the named student]." The information permitted to be released under this exception is limited, as "final results" include "only the name of the student, the violation committed, and any sanction imposed by the institution on that student[,]" and other information, including "the name of any other student, such as a victim or witness," can only be released upon the written consent of those other persons. 20 U.S.C. § 1232g(b)(6)(C)(i)-(ii). As noted by the Commissioner, this narrow exception permits release of limited information about "a violation" of certain University rules, and the sanction imposed. Thus, if no violation was found to have occurred, this exception, by its own terms, would not apply. The record before us here does not indicate whether the Commissioner ultimately held that a violation occurred, and thus, we are unable to now determine whether this exception authorized release of limited information related to *Krakauer*'s request. However, upon remand and after conducting an in camera review of the records, the District Court may consider the

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[5] The District Court did not rule on the applicability of this exception.

applicability of this exception along with the other considerations set forth below.

¶ 27 Additionally, FERPA authorizes release of personally identifiable information in education records when "such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified[6] of all such orders or subpoenas. . . . " 20 U.S.C. § 1232g(b)(2)(B); 34 C.F.R. § 99.31(a)(9)(i). This exception broadly permits release of personally identifiable information pursuant to a "judicial order, or pursuant to any lawfully issued subpoena," neither restricting the orders to those issued by particular, such as federal, courts nor limiting the legal basis or grounds for release of the records. 20 U.S.C. § 1232g (b)(2)(B) FERPA thus generally authorizes the release of records upon orders from courts acting properly within their jurisdiction. *Krakauer*'s petition sought an order pursuant to this exception.

d. Section 20-25-515, MCA

¶ 28 Notably, Montana law operates similarly to FERPA. Chapter 357, Laws of Montana (1973), was entitled "An Act Requiring Montana Colleges

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6 The federal statute and corresponding regulation both require that such notice would be given to the student or parent in advance of the issuance of any subpoena or court order that might release such documents. Even if, as in this case, the subject student is not a party to the lawsuit, an opportunity is provided for the student (or parents) to be heard before such records are released. "The educational agency or institution may disclose information . . . only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action. . . . " 34 C.F.R. § 99.31(a)(9)(ii).

and Universities to Develop Procedures to Protect a Student's Right to Privacy Concerning . . . His College or University Records," and stated it was "the legislature's intent that an institution of the university system of Montana is obligated to respect a student's right to privacy" in the student's records. 1973 Mont. Laws 706. As codified from that 1973 Act, § 20-25-515, MCA, states:

> A university or college shall release a student's academic record only when requested by the student or by a subpoena issued by a court or tribunal of competent jurisdiction. A student's written permission must be obtained before the university or college may release any other kind of record unless such record shall have been subpoenaed by a court or tribunal of competent jurisdiction.[7]

State law thus also prohibits disclosure of student records, but, similar to FERPA, permits release when "subpoenaed by a court or tribunal of competent jurisdiction." Section 2025-515, MCA.

¶ 29 *Krakauer* argues that § 20-25-515, MCA, "does not condition a university's disclosure of student records on a court order. It merely requires a subpoena, which in Montana can be effectuated at any time by an issuing party's counsel of record." The Commissioner replies that, under *Krakauer*'s interpretation, the statute would have no meaning because "a party would only need to file a lawsuit and request the records through subpoena," and, in any event, the District Court did not issue a subpoena here.

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[7] Section 20-25-516(1), MCA, also requires that academic records "be kept separate from disciplinary and all other records."

¶ 30 The District Court ordered the records be made available for inspection in its Memorandum and Order, not by a subpoena. Answering the Commissioner's argument, a reading of the statute as enacted in 1973 makes it clear that the Legislature intended student records would be subject to release following legal process conducted "by a court or tribunal of competent jurisdiction," and did not intend to restrict that legal process exclusively to the issuance of a "subpoena," the purpose of which is to compel a person's attendance in a court or proceeding. *See* § 26-2-102, MCA. The statute is satisfied by the issuance of a court order upon completion of that legal process. Answering *Krakauer*'s argument, merely filing a lawsuit and requesting a records subpoena without a court's consideration of a student's privacy interests would fail to satisfy the statute's requirements that student privacy be protected and that release of records be prohibited until a court or tribunal conducts that legal process. In Montana, the law regarding a student's privacy is governed by the Montana Constitution, by which a student's right to privacy in his or her records is balanced against the public's right to know and obtain the records. That process must be completed before requested records can be released pursuant to the applicable judicial exceptions in FERPA and § 20-25-515, MCA.

¶ 31 3. How does Article II, Section 9 of the Montana Constitution apply to the request for release of the subject student records?

¶ 32 The Commissioner challenges the District Court's determination that the student records at issue should be released, arguing that the court "incorrectly shifted the balance between the right to

privacy and the right to know in favor of *Krakauer* and his book deal and against the well-established privacy rights of the student named in his request[.]" In response, *Krakauer* argues that the public's right to know outweighs the privacy expectation in the records here because the specific student at issue has a diminished expectation of privacy, which the District Court correctly determined.

¶ 33 The District Court emphasized the public exposure of the events in question, noting that "the entire incident, from the initial administrative investigation to the conclusion of the criminal trial, is a matter of public record. The only aspect of the lengthy process that is not a matter of public record is the action taken by the Commissioner." Citing approvingly of the U.S. District Court's reasoning in *Doe* that "while there may be good reasons to keep secret the names of students involved in a University disciplinary proceeding, the Court can conceive of no compelling justification to keep secret the manner in which the University deals with those students," the District Court determined that the subject student "does not have a reasonable expectation of privacy regarding the redacted records of the Commissioner," and therefore ruled that the merits of public disclosure outweighed "the individual privacy rights of the student in this case." The court did not conduct an in camera review of the records, but broadly ordered the Commissioner "to make available for inspection and/or copying" to *Krakauer* the records responsive to his request, subject to redaction of student identification information, presumably to be accomplished by the Commissioner.

¶ 34 Our concerns over the principles applied by the District Court in the constitutional balancing process, as well as the unique considerations under the federal and state law applicable to student records, compel us to reverse the District Court's order and to remand this matter with instructions to the District Court to conduct an in camera review of the requested records, and to re-apply the constitutional balancing test to those records in accordance with the following analysis of the interests here at issue.

¶ 35 Article II, Section 9 of the Montana Constitution provides that "[n]o person shall be deprived of the right to examine documents . . . of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." As we have explained, "[t]his constitutional provision generally requires information regarding state government to be disclosed to the public, except in cases where the demand of individual privacy clearly exceeds the merits of public disclosure." *Associated Press, Inc.*, ¶ 24. Indeed, "our constitution gives a high priority to the public's right to know." *Lence v. Hagadone Inv. Co.*, 258 Mont. 433, 447, 853 P.2d 1230, 1239 (1993), *overruled on separate grounds by Sacco v. High Country Indep. Press*, 271 Mont. 209, 896 P.2d 411 (1995). Krakauer asserts an interest in the process that the Commissioner employed in reviewing the student's appeal and points out: "It cannot be denied that the entire rape culture at the University, and universities in general, has become one of increasing public import and concern[,]" and "The University's compliance with its Title IX obligations is also one of public import and interest." We acknowledge that

Krakauer's interest in the MUS' policies in responding to and handling complaints of alleged sexual assault are important matters of concern to the public.

¶ 36 However, as the District Court correctly noted, "[T]he right to know is not absolute. It requires a balancing of the competing constitutional interests in the context of the facts of each case, to determine whether the demands of individual privacy clearly exceed the merits of public disclosure." *Associated Press, Inc.*, ¶ 24 (bold in original) (citations and internal quotation marks omitted). Pursuant to the Montana Constitution, we have established a two-part test in order to strike a balance between the needs for government transparency and individual privacy: (1) "whether the person involved had a subjective or actual expectation of privacy[,]" and (2) "whether society is willing to recognize that expectation as reasonable." *Great Falls Tribune Co. v. Day*, 1998 MT 133, ¶ 20, 289 Mont. 155, 959 P.2d 508 (citation omitted).

¶ 37 In the context of this particular case, as discussed above, the national and state legislatures have taken the affirmative action of enacting legislation establishing the privacy interests of students in their records, as a matter of law. This action sets this case apart from others involving general privacy interests, and courts must honor the unique privacy protection legislatively cloaked around the subject records by factoring that enhanced privacy interest into the balancing test.[8] We have implicitly recognized this

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[8] We have previously recognized enhanced or reduced privacy interests as part of the determination of whether society would recognize the privacy interest as reasonable, depending on the circumstances. *See Great Falls Tribune Co. v. Cascade Cnty. Sheriff*, 238 Mont. 103, 107, 775 P.2d 1267, 1269 (1989) ("[L]aw

interest in the past, *Pioneer Press*, ¶ 36, and since then, as noted above, stricter FERPA regulations have been adopted. We cite, merely for illustrative purposes because it does not contemplate Montana law, the phrasing of the increased burden that must be shown by a petitioner in order to access protected student records, provided by the United States District Court for the Middle District of Pennsylvania:

> When a third-party seeks disclosure of education records covered by FERPA, the trial judge, in exercise of discretion, must conduct a balancing test in which the privacy interests of the students are weighed against the genuine need of the party requesting the information. While FERPA does not create a privilege, it does represent the strong public policy of protecting the privacy of student records. Courts balance the potential harm to the privacy interests of students with the importance and relevance of the sought information to resolving the claims before the court.

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enforcement officers occupy positions of great public trust. Whatever privacy interest the officers have in the release of their names as having been disciplined, it is not one which society recognizes as a strong right."); *Billings Gazette v. City of Billings*, 2013 MT 334, ¶ 49, 372 Mont. 409, 313 P.3d 129 ("Where the status of the employee necessitates a high level of public trust, such as an elected official or high level employee, the expectation of privacy in misconduct may be found to be significantly lower than for an administrative employee. Similarly, an employee may have a lower expectation of privacy in misconduct related to a duty of public trust, such as responsibility for spending public money or educating children.").

Moeck v. Pleasant Valley Sch. Dist., No. 3:13-CV-1305, 2014 U.S. Dist. LEXIS 142431, at *6-7 (M.D. Pa. Oct. 7, 2014) (internal citations omitted) (emphasis added). This enhanced privacy interest must be considered and factored into the constitutional balancing test on remand.

¶ 38 The District Court should not have concluded, without noting the unique facts here, that the student at issue "does not have a reasonable expectation of privacy regarding the redacted records of the Commissioner," in reliance on *Doe*. The U.S. District Court in *Doe* was not presented, as here, with a records request explicitly identifying a particular student. Rather, the *Doe* case involved an unnamed litigant. While redaction may have served to protect the privacy interest of the unnamed litigant in *Doe*, and may well provide a privacy safety net in many situations, redaction of records provided in response to a request about a particular student may well be completely futile. As amicus United States points out, "when an educational institution is asked to disclose education records about a particular person, then no amount of redaction in [the] records themselves will protect the person's identity, because the requestor knows exactly whom the records are about." Obviously, records provided in response to a request naming a particular student will be about that student, whether redacted or not, and thus, there is more of machination than of cooperation in *Krakauer*'s offer, repeated at oral argument, to accept redacted records in response to his request. Consequently, on remand, the District Court must consider whether the futility of redaction affects the privacy analysis and the ultimate determination about what records can be released, if any.

¶ 39 We have recognized the efficacy of an in camera review of requested records by a district court to ensure that privacy interests are protected. *Billings Gazette*, ¶ 42; *Jefferson Cnty. v. Mont. Standard*, 2003 MT 304, ¶ 19, 318 Mont. 173, 79 P.3d 805 ("it is proper for a district court to conduct such an in camera inspection in order to balance the privacy rights of all of the individuals involved in the case against the public's right to know."). As these cases note, in camera review is particularly appropriate when the interests of third parties are involved. As the Commissioner stated at oral argument, the requested records could also include information pertaining to student members of the University Court, the victim, and other University students who acted as witnesses in the multiple-step process, and counsel hinted that the records are extensive. On remand, the District Court should review the requested documents in camera, and in the event it determines to release any document after conducting the balancing test, every precaution should be taken to protect the personal information about other persons contained in the documents.

¶ 40. We have stated that, when conducting the balancing test, a district court must consider all of the relevant facts of each case. *See Associated Press, Inc.*, ¶ 24 ("It requires a balancing of the competing constitutional interests in the context of the facts of each case, to determine whether the demands of individual privacy clearly exceed the merits of public disclosure."). Both parties argue at great length about various factors at issue here, such as the publicity that has followed this case, the source of the original request, the reasons behind the request, the named

student's status as an athlete at a publicly-funded university, and the prior litigation, all of which may be considered and weighted by the District Court when conducting the balancing test. We decline to address these issues individually in favor of the District Court's application of the balancing test on remand.

¶ 41 Finally, the Commissioner argues that an order by the District Court requiring release of documents pursuant to *Krakauer*'s request would "create binding precedent" establishing a "policy or practice" of the MUS to release personally identifiable information, in violation of FERPA. However, we disagree. As noted in *Miami University*, "Once the conditions and the funds are accepted, the school is indeed prohibited from systematically releasing education records without consent." 294 F.3d at 809 (emphasis added). A court order for release entered in one case does not require MUS to commence systematically releasing student records. Each case turns on its individual facts and circumstances, assessed and weighed through the balancing test. While court decisions do set precedent, MUS will nonetheless still evaluate each request on the basis of its individual facts, assessing the request in light of the precedent that has been created by litigation. This review is not a systematic policy or practice of releasing student records in violation of FERPA, which provides an exception for the release of such information "in compliance with judicial order, or pursuant to any lawfully issued subpoena[.]" 20 U.S.C. § 1232g(b)(2)(B). If the MUS believes a request cannot be fulfilled without violating FERPA and state protections, that decision can be reviewed by the courts following the filing of a petition by either MUS or the requestor.

Conclusion

¶ 42 Having concluded that the records in question in this case appear to fall under the "Personally Identifiable Information" protection granted by FERPA, and also having concluded that FERPA and state statute provide an exception for release of information pursuant to a lawfully issued court order, we remand this case to the District Court for an in camera review of the documents in question. After giving due consideration to the unique interests at issue in this case, as discussed herein, the District Court will re-conduct the constitutional balancing test and determine what, if any, documents may be released and what redactions may be appropriate. As noted above, the exception to FERPA that allows for release of documents pursuant to a court order requires advance notice to the affected student or parents, and a district court must comply with this directive before releasing protected information. *See Opinion*, ¶ 27 n. 6. Because we remand this case for further proceedings, the award of attorney fees is vacated.

¶ 43 Reversed and remanded for further proceedings consistent with this Opinion.

/s/ Jim Rice

We concur:

/s/ Mike McGrath

/s/ Beth Baker

/s/ James Jeremiah Shea

/s/ Michael E. Wheat

/s/ John C. Brown

District Court Judge John C. Brown sitting for Justice Patricia Cotter

DISSENTING OPINION OF JUSTICE LAURIE MCKINNON

Justice Laurie McKinnon dissenting.

¶ 44 Preliminarily, I disagree with the Court's resolution of two smaller issues: our decision to remand for an in camera review to determine if an exception to nondisclosure applies pursuant to 20 U.S.C. § 1232g(b)(6)(B) and our failure to rule on the Commissioner's request regarding attorney fees.

¶ 45 With respect to these issues, I agree with the Court that had the Commissioner released documents pursuant to *Krakauer*'s request for a specific student's records, the Commissioner would have violated FERPA and its accompanying regulatory scheme. Opinion, ¶ 24. I depart from the Court, however, in our decision to remand for a determination of whether 20 U.S.C. § 1232g(b)(6)(B) applies, which is part of FERPA and the regulatory scheme. Pursuant to this provision of FERPA, a university may disclose to the public the final results of disciplinary proceedings against an alleged perpetrator of a crime of violence or nonforcible sex offense, but only if the university determines that the student violated the university's rules or policies with respect to the offense. The Commissioner has stated on several occasions that this provision is inapplicable. As the Court states, "if no violation was found to have occurred, this exception, by its own terms, would not apply." Opinion, ¶ 26. I therefore would not remand for the District Court to consider the applicability of this exception when counsel for the Commissioner has represented, following acknowledgment of the specific exception, the inapplicability of the subsection. Indeed, it is apparent

that the reason Krakauer is interested in obtaining all of the student's records is that the Commissioner found no violation. Further, as the Court properly notes, this narrow exception would only permit release of limited information related to the name of the student, the violation committed, and any sanction imposed by the institution. Opinion, ¶ 26. The record already establishes that no sanctions were imposed; the Commissioner has represented, through counsel, that the specific exception is inapplicable; and *Krakauer*'s request identifies the student by name. It is therefore pointless to remand for an in camera review to determine whether the exception applies.

¶ 46 Montana law also prohibits the Commissioner from releasing the student's academic records in response to *Krakauer*'s request. Section 20-25-515, MCA, prohibits the release of a student's records absent consent of the student or "subpoena [issued] by a court or tribunal of competent jurisdiction." At the time the Commissioner denied *Krakauer*'s request, the student had not consented to the release of his records and a subpoena or court order had not issued. Therefore, the Commissioner correctly refused to disclose the student's academic records in response to *Krakauer*'s request. The Court nonetheless fails to find that the Commissioner's actions in following both federal and state law within the context of a discretionary award of attorney fees pursuant to § 2-3-221, MCA, does not warrant a conclusion that *Krakauer* be responsible for his own fees and costs. Given the conclusion reached by the Court—that the Commissioner was required to follow FERPA and § 20-25-515, MCA—I would hold that the Commissioner is not responsible for *Krakauer*'s fees and costs since

Krakauer has pursued an exception to FERPA and Montana law. Given the context of FERPA, the federal regulatory scheme, and Montana law, it would be unreasonable to conclude that the Commissioner should be held responsible for *Krakauer*'s fees and costs.

¶ 47 A larger concern, however, is the Court's decision to remand these proceedings for an in camera review by the District Court and our abbreviated analysis of the balancing test to be employed.[1] In the context of this particular case, we have left unanswered many of the questions raised by the parties which, in my opinion, were incorrectly resolved as a matter of law by the District Court. Our guidance to the District Court is essentially that, "[t]his enhanced privacy interest must be considered and factored into the constitutional balancing test on remand." Opinion, ¶ 37. In an attempt to describe "this enhanced privacy interest," we cite "phrasing" from another jurisdiction, "merely for illustrative purposes," but are unwilling to a set forth a standard, rule, or appropriate analysis regarding a statutorily protected enhanced privacy interest. In my opinion, we have failed to address the parties' arguments. If correct legal principles and analyses are applied by this Court while considering the specificity of *Krakauer*'s request, it is not necessary to remand these proceedings to the District Court for an in camera review and balancing of privacy interests and the right to know.

¶ 48 When considering the disclosure of confidential information, the constitutional right to know

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[1] Krakauer arguably foreclosed his opportunity for an in camera review of the records when he represented to the District Court and this Court that an in camera review was not necessary.

granted by Article II, Section 9 of the Montana Constitution, must be balanced with the constitutional right of privacy granted by Article II, Section 10 of the Montana Constitution. We have stated that when balancing these competing interests, a court must perform a two-part test: (1) whether the individual has a subjective or actual expectation of privacy; and (2) whether society is willing to recognize that expectation as reasonable. *Bozeman Daily Chronicle v. City of Bozeman Police Dep't.*, 260 Mont 218, 225, 859 P.2d 435, 439 (1993). We have on many occasions determined that society is not willing to recognize as reasonable the privacy interest of individuals who hold positions of public trust when the information sought bears on that individual's ability to perform public duties. *See Great Falls Tribune v. Cascade Cnty. Sheriff*, 238 Mont. 103, 107, 775 P.2d 1267, 1269 (1989) (the public's right to know outweighed the privacy interests of three disciplined police officers in the public release of their names because police officers hold positions of "great public trust"); *Bozeman Daily Chronicle*, 260 Mont. at 227, 859 P.2d at 440–41 (investigative documents associated with allegations of sexual intercourse without consent by an off-duty police officer were proper matters for public scrutiny because "such alleged misconduct went directly to the police officer's breach of his position of public trust . . . "); *Svaldi v. Anaconda-Deer Lodge Cnty.*, 2005 MT 17, ¶ 31, 325 Mont. 365, 106 P.3d 548, (a public school teacher entrusted with the care and instruction of children held a position of public trust and therefore the public had a right to view records from an investigation into the teacher's abuse of students); and *Billings Gazette v. City of Billings*, 2013 MT 334, ¶ 49, 372 Mont. 409, 313 P.3d 129 ("an employee may

have a lower expectation of privacy in misconduct related to a duty of public trust, such as responsibility for spending public money or educating children.").

¶ 49 These cases, referred to by the Court in the Opinion, ¶ 37, n.8, are examples of a *reduced* expectation of privacy—reduced because the privacy interest is unreasonable and therefore not one that society is willing to recognize. They are examples of how a reduced expectation of privacy is balanced against the right of the public to know how its public monies are spent or its public institutions are managed. Undisputedly public employees have no statutory protection for their privacy rights when the information relates to the ability of the individual to perform his public duties. *Bozeman Daily Chronicle*, 260 Mont. at 226–27, 859 P.2d at 440–41. Here, in contrast, we are applying an enhanced privacy interest, with significant protections afforded that interest by the Montana Legislature in Title 20, Chapter 25. In addition to § 20-25-515, MCA, prohibiting the release of student records unless there is consent or a lawfully issued subpoena, universities are prohibited from requiring students to waive privacy rights, § 20-25-512, MCA; students must be given written notice before university officials may enter their rooms, § 20-25-513, MCA; and academic transcripts may only contain information of an academic nature, § 20-25-516, MCA. The existence of these student privacy protections and the absence of any applicable exception establish both the actual expectation of privacy and the reasonableness of that expectation. Accordingly, when the privacy rights of the student may not be protected by redacting "personally identifiable information" the student's right of privacy in school records outweighs the public's

right to know because that privacy interest has been statutorily determined to be reasonable. Once we have found an actual expectation of privacy that is reasonable, we must protect that privacy interest. *See Bozeman Daily Chronicle*, 260 Mont. at 228, 859 P.2d at 441. ("In this case . . . the victim of the alleged sexual assault and the witnesses involved in the investigation have a subjective or actual expectation of privacy which society is willing to recognize as reasonable. Accordingly, the privacy rights of the alleged victim and of the witnesses outweigh the public's right to know and must be accorded adequate protection in the release of any of the investigative documents at issue.") Thus, whenever we cannot adequately protect a recognized reasonable expectation of privacy, the records may not be disclosed. The Court has presented no authority to the contrary.

¶ 50 Montana law does not distinguish between types of students. The protected interest a student has in his education records is not diminished if the information is already public or if there has been publicity about an event involving the student. Information in a student disciplinary proceeding is broader than that presented in a criminal proceeding, where a defendant receives numerous constitutional and statutory protections. Student education records exist primarily to assist the university in the education of its students. The fact that information revealed through the evolution of a criminal proceeding may also be duplicated within the broader student disciplinary file is irrelevant to whether the student maintains his privacy rights in his education records. The occurrence of a criminal proceeding, which must be public, does not serve to strip a student's privacy

interests from his confidential education files. The purposes and objectives underlying these separate proceedings are distinct and we should articulate as much for the trial courts. The laws protecting a student's education records are neither limited nor lessened because a student has been charged with a criminal offense or is being scrutinized by the media. This remains true even though that student may be a star quarterback for a Montana university, a redshirt freshman from a small, rural Montana town, or any other student in whom the public may have a particular interest.

¶ 51 In agreeing with the Court that a student's education records enjoy "the unique privacy protection [that is] legislatively cloaked around the subject records," Opinion, ¶ 37, I do not contend that a student's privacy right is absolute. Many proceedings in other jurisdictions have balanced FERPA, state statutory provisions protecting the confidentiality of student records, and countervailing interests in disclosure *See Ragusa v. Malverne Union Free Sch. Dist.*, 549 F. Supp. 2d 288, 293–94 (E.D.N.Y. 2008) (ordering the production of relevant education records in a discrimination case); *Catrone v. Miles*, 160 P.3d 1204, 1210–12 (Ariz. Ct. App. 2007) (holding that education records could be ordered to be produced in a medical malpractice case and noting "the protections afforded to educational records by statute do not prohibit, but rather permit, disclosure pursuant to court order"); *Gaumond v. Trinity Repertory Co.*, 909 A.2d 512, 518 (R.I. 2006) (holding that FERPA does not bar the production of relevant education records pursuant to court order in a personal injury case). In many of these instances, the records were relevant to litiga-

tion that did not involve the records themselves. *See Gaumond*, 909 A.2d at 518 (distinguishing prior cases where public disclosure was sought by newspapers and was not granted).

¶ 52 In the context of *Krakauer*'s request for the specific student's records, the student's enhanced privacy interest would receive no protection. As the Court observes, "[o]bviously, records provided in response to a request naming a particular student will be about that student. . . . " Opinion, ¶ 38. Here, *Krakauer* requested a specific student's records by name, because he wanted the specific student's records. Had he been interested in the process by which the Commissioner handled complaints of sexual assault, his request would not have been specific as to the student. *Krakauer*'s request of the Commissioner was to "inspect or obtain copies of public records that concern the actions of the Office of the Commissioner of Higher Education in July and August 2012, regarding the ruling by the University Court of the University of Montana in which student [name redacted] was found guilty of rape and expelled from the University." With the exception of 20 U.S.C. § 1232g(b)(6)(B), which the Commissioner indicated was inapplicable, state and federal privacy laws clearly prohibited the Commissioner from disclosing the records based upon the specificity of the request. Significant to the resolution of these proceedings, *Krakauer* did not make his request in a manner which would allow the student's "unique" privacy right—cloaked with legislative protection, Opinion, ¶ 37—to receive any semblance of protection through, for example, redaction of personally identifiable information. If *Krakauer* had wanted an understanding of how the Commis-

sioner's office handles appeals related to the student conduct code and, in particular, sexual assaults, he could have requested all decisions resolving complaints for an appropriate specified period of time. Such an interest is substantial and appropriately protected by our constitutional and statutory provisions concerning the public's right to know. It is undisputed that the Commissioner would have responded to such a request by supplying the student education records with personally identifiable information redacted in a manner which would have also protected the student's substantial privacy interest in his education records. Thus, given the manner in which *Krakauer* has made his request, any "balancing" of interests that could include protection of the student's enhanced privacy interest is unobtainable. It is clear that what *Krakauer* sought were particular student records for the publication of his book. Although this Court has precedent for the disclosure of confidential records of a particular person, those cases exist in the context of a reduced expectation of privacy of public employees. The student here is not a public employee, but a student —and Montana law does not distinguish between types of students and their expectation of privacy. Their records are uniformly private. Disclosure here violates not just the federal protections provided by FERPA, but also our own law in Montana.

¶ 53 I would reverse the judgment of the District Court. I would conclusively decide the issue of attorney fees and costs in favor of the Commissioner. Remand for in camera review is not necessary given the manner in which the request for records was made and that, as a result, no protection can be accorded

the student's substantial and weighty privacy interests. I would affirm on issue one.

/s/ Laurie McKinnon

MEMORANDUM AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT *KRAKAUER V. STATE*, 2014 MONT. DIST. LEXIS 33 (SEPTEMBER 12, 2014)

FIRST JUDICIAL DISTRICT COURT OF MONTANA
LEWIS AND CLARK COUNTY

JON KRAKAUER,

Petitioner,

v.

STATE OF MONTANA, by and through its COMMISSIONER OF HIGHER EDUCATION, CLAYTON CHRISTIAN,

Respondent.

Cause No. CDV-2014-117

Before: Kathy SEELEY, District Court Judge.

MEMORANDUM AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Petitioner Jon Krakauer (Krakauer) filed this lawsuit to obtain release of documents or records held by the Office of the Commissioner of Higher Education (Commissioner) regarding actions taken in July and August 2012 in disciplinary proceedings conducted by

the University of Montana against a student identified in the parties' briefs as Jordan Johnson.

Krakauer, a writer, alleges he is seeking research information for a book dealing in part with the manner in which the University of Montana and the Commissioner of Higher Education handled a sexual assault complaint against the student. According to Krakauer he sought the information by letter to the Commissioner in January 2014, but the Commissioner refused to provide it. Krakauer then filed the instant action asserting a right of access pursuant to Article II, § 9 of the Montana Constitution and Mont. Code Ann. § 2-6-102. In his answer, the Commissioner avers that Krakauer does not have standing to bring his claim. He further contends that he is barred from releasing the requested documents by the provisions of the federal Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, and by Mont. Code Aim. 20-25-515, which provides strictures on the release of university student information. Finally, the Commissioner alleges Krakauer's claims are barred by Mont. Code Ann. § 2-9-103(1), which affords statutory protection from liability for government agents or employees acting in an official capacity.[1]

Both parties have filed motions for summary judgment which have been briefed and argued. Neither contends that there are genuine issues of material fact to be resolved. The Court concludes that Krakauer's motion should be granted and the Commissioner's motion denied.

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[1] The Commissioner asserted application of this statute as an affirmative defense in his answer, but argued in his briefing that it precluded an award of attorney fees.

Standard of Review

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Rule 56(c)(3), M. R. Civ. P. "All reasonable inferences that may be drawn from the evidence must be drawn in favor of the party opposing summary judgment." *Hopkins v. Super. Metal Workings Sys., LLC,* 2009 MT 48, ¶ 5, 349 Mont. 292, 203 P.3d 803 (citing *Schmidt v. Wash. Contractors Group, Inc.*, 1998 MT 194, ¶ 7, 290 Mont. 276, 964 P.2d 34).

Because the Court must consider cross-motions for summary judgment, it is required to evaluate each party's motion on its own merits. "[The fact that both parties moved for summary judgment does not establish the absence of genuine issues of material fact. We must evaluate each motion on its own merits and take care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Steadele v. Colony Ins. Co.,* 2011 MT 208, ¶ 14, 361 Mont. 459, 260 P.3d 145 (other citations omitted).

Discussion

1. Standing

The Commissioner contends that because Krakauer is a resident of Colorado and not a Montana citizen, he has no standing to bring the instant action. He cites Mont. Code Ann. § 2-6-102, which states in part: "(1) Every citizen has a right to inspect and take a copy of any public writings of this state, except as provided in 22-1-1103, 22-3-807, or subsection (3)

of this section and as otherwise expressly provided by statute." He references Mont. Code Ann. § 1-1-402 as defining a citizen as one who resides in this state.

He also relies on the transcripts of the 1972 Montana Constitutional Convention relative to the adoption of Article II, § 9, citing to instances in which the term "citizen" is utilized. The Commissioner's perspective is that the drafters intended the provision to apply to Montana citizens only.

The express provisions of the Montana Constitution control and, as stated by the Montana Supreme Court in 2014:

> "Statutory language must be construed according to its plain meaning, and if the language is clear and unambiguous, no further interpretation is required." *Weber v. Interbel Tel. Coop., Inc.,* 2003 MT 320, ¶ 10, 318 Mont. 295, 80 P.3d 88. When resolving disputes of constitutional construction, we apply the rules of statutory construction and give a broad and liberal interpretation to the Constitution. The intent of the framers of the Constitution controls and is determined from the plain language of the words used. *Bryan [v. Yellowstone Co. Elem. Sch. Dist. No. 2,* 2002 MT 264,] ¶ 23 [312 Mont. 257, 60 P.3d 381] (citation omitted).

Willems v. State, 2014 MT 82,¶ 17, 374 Mont. 343, 325 P.3d 1204.

Although the term "citizen" is used in Mont. Code Aim. § 2-6-102, Article II, section 9 of the Montana Constitution utilizes broader language: "No <u>person</u> shall be deprived of the right to examine documents

or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."

The broad and plain language of the constitution makes Article § 9 applicable to persons, not only to citizens of Montana.

The Commissioner's reliance on the U.S. Supreme Court case of *McBurney v. Young*, 133 S. Ct. 1709 (Va. 2013), is of little assistance. *McBurney* affirmed the ruling of the Fourth Circuit Court of Appeals that Virginia's freedom of information act did not violate federal constitutional provisions by limiting information access to Virginia residents. The language of the Virginia statute specifically provided that "all public records shall be open to inspection and copying by any citizens of the Commonwealth." *Id.,* 133 S. Ct. at 1713. Thus, the Virginia statute specifically limited access to Virginia citizens. The *McBurney* court noted that there are other states limiting freedom of information laws to that state's citizens. *Id.,* 133 S. Ct. at 1714. However, *McBurney* does not discuss a state constitutional provision similar to Montana's.

The Court concludes that the scope of Article II, § 9 is broader than that urged by the Commissioner. Krakauer has standing to bring this action.

2. Family Educational Rights and Privacy Act

FERPA provides in relevant part that an educational institution is subject to loss of federal funds if it engages in "a policy or practice" of releasing educational records or other personally identifiable information of students without consent or exception. 20

U.S.C. § 1232(g)(b)(1) and (2). Section 34 C.F.R. § 99.3 defines "education records" as records: "(1) Directly related to a student; and (2) Maintained by an educational agency or institution or by a party acting for the agency or institution."

The Commissioner asserts that FERPA prevents him from even acknowledging that the requested records exist, and, if they do, he cannot release them without violating the provisions of the act and potentially incurring the loss of millions of dollars in federal funding. He cites *United States v. Miami Univ.,* 294 F.3d 797 (Ohio 6th Cir. 2002), which affirmed a district court decision holding that disciplinary records are educational records as defined in FERPA and as such cannot be released without consent. The circuit court stated: "Under FERPA, schools and educational agencies receiving federal financial assistance must comply with certain conditions. . . . Once the conditions and the funds are accepted, the school is indeed prohibited from systematically releasing education records without consent." *Id.,* 294 F.3d at 809.

In the Commissioner's view, the fact that Krakauer requested the records of the student by name made it impossible for him to release any records that did not contain identifying information. He argues that even if the information is available from an ancillary source, he is still prohibited from releasing it under the strictures of FERPA as interpreted by the federal office that administers FERPA compliance.

Krakauer disagrees with the Commissioner's interpretation of FERPA. Quoting *Board of Trustees v. Cut Bank Pioneer Press,* 2007 MT 115, ¶ 24, 337 Mont. 229, 160 P.3d 482, he argues that the law simply

imposes funding penalties if an educational institution engages in the practice of releasing educational records that contain personally identifying information.

In *Pioneer Press*, the supreme court reversed a district court decision that disallowed a local press request for student discipline records. Pioneer Press filed the suit to gain access to such records pursuant to Article II, § 9, the right to know provision of the Montana Constitution. *Id.*, ¶ 1. The district court determined that FERPA prohibited disclosure and trumped any state statute or constitutional provision relied on by the press to support its request.

The supreme court disagreed, holding that FERPA did not prohibit disclosure of redacted records. Pioneer Press was not seeking personal identifying information; instead it wanted information concerning the administrative action taken against disciplined students. *Id.*, ¶ 36.

Krakauer is likewise not seeking the name or names of students involved in the administrative process. He asserts that he is willing to accept redacted records that disguise all personally identifying information. In this regard, the supreme court in *Pioneer Press,* stated at ¶ 31: "Thus, regardless of whether disciplinary records constitute "education records" under FERPA, or whether redacted records remain "education records" under FERPA, the end result is clear: FERPA does not prevent the public release of redacted student disciplinary records, and the District Court erred in so concluding herein."

The Commissioner argues that the holding in *Pioneer Press* would likely be different if it had been decided after the amendment to 34 C.F.R. § 99.3 was

adopted in 2008. This addition to the regulation, codified as 34 C.F.R. § 99.3(g) prohibits release of "[i]nformation requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates." According to the Commissioner, even if redacted records were supplied, since Krakauer knows the student's identity, disclosure would be in violation of the act.

But the student's identity is not the focus of Krakauer's request. It is apparent from the briefs and arguments of counsel that his request is more in line with that in *Pioneer Press—Krakauer* seeks information about the processes occurring once the case reached the Commissioner's office. In *Pioneer Press* the court noted:

> It is clear that Pioneer is not requesting the identity of the students involved in the BB shooting incident; rather, it simply wants to know what disciplinary action the Board took. The discipline imposed by the Board on students of the school, particularly students involved in potentially injurious actions, is a matter of public concern.

Id., ¶ 36.

In construing the application of FERPA it is significant to note that 20 U.S.C. § 1232g(b)(1) and (b)(2) both predicate the funding strictures on educational institutions that have "a policy or practice" of releasing proscribed information. Moreover, in the case relied on by the Commissioner, *United States v. Miami Univ.*, the circuit court appears to recognize the fact that the intent of the act is broader than the

unique nature of the request in this case, stating that an educational institution accepting funds "is indeed prohibited from systematically releasing education records without consent." *Id.*, 294 F.3d at 809 (emphasis added).

The plain meaning of the language used in FERPA makes it clear that the purpose of the act is to discourage a system or practice allowing disclosure of personal student information. The Court concludes that FERPA does not preclude release of the records in the circumstances presented in this case.

3. Mont. Code Ann. § 20-25-515

This statute provides:

> A university or college shall release a student's academic record only when requested by the student or by a subpoena issued by a court or tribunal of competent jurisdiction. A student's written permission must be obtained before the university or college may release any other kind of record unless such record shall have been subpoenaed by a court or tribunal of competent jurisdiction.

According to Krakauer, his counsel could obtain the records by subpoena pursuant to the provisions of Rule 45, M. R. Civ. P., which allows an attorney to issue a subpoena as officer of a court in which the attorney is authorized to practice.

A subpoena is issued under the authority or auspices of a court compelling the presence of a witness and/or documents. It is the authority of the court that supports the process. (*See e.g.* Rule 45, M. R. Civ. P.; Mont. Code Ann. § 26-2-102). The subpoena power

is subsumed in the Court's jurisdiction and authority to rule in this case. In determining that the records should be made available, the Court's Order is not inconsistent with the provisions of 20-25-515.

4. Right to Know and Right of Privacy

Krakauer also asserts that the public right to know guaranteed by Article II, § 9 of the Constitution of Montana, overrides the statutory restrictions of 20-25-515. The Commissioner correctly points out that the right to know is not absolute; it must be balanced with the constitutional right of privacy provided in Article II, § 10.

Article II, § 9, of the Montana Constitution allows examination of documents of public bodies or agencies of state government "except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."

In *Great Falls Tribune v. Montana Public Service Commission*, 2003 MT 359, ¶ 54, 319 Mont. 38, 82 P.3d 876, the supreme court acknowledged a constitutional presumption that documents held by public officials are open to public inspection. But in *Lincoln County Commission v. Nixon, et al.*, 1998 MT 298, ¶¶ 15, 16, 292 Mont. 42, 968 P.2d 1141, the court noted the limitations of Article II, § 9:

> The "right to know" is not an absolute right. It is balanced by the "demand of individual privacy," a right which is also guaranteed by Montana's Constitution: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling

> state interest." Art. II, Sec. 10, Mont. Const. A constitutionally protected privacy interest exists when a person has a subjective or actual expectation of privacy which society is willing to recognize as reasonable.

(Citation omitted.)

In considering whether a privacy interest is constitutionally protected, the supreme court established a balancing test: "This Court has used a two-part test in determining whether a person has a constitutionally-protected privacy interest. First, we determine whether the person has a subjective or actual expectation of privacy. Next, we evaluate whether society is willing to recognize that expectation as reasonable." *Great Falls Tribune Co. v. Cascade County Sheriff,* 238 Mont. 103, 105, 775 P.2d 1267, 1268 (1989) (citation omitted). *Accord, Billings Gazette v. City of Billings,* 2011 MT 293, ¶ 21, 362 Mont. 522, 267 P.3d 11; *Yellowstone County v. Billings Gazette,* 2006 MT 218, ¶¶ 20-21, 333 Mont. 390, 143 P.3d 135.

Many Montana cases address the interplay between privacy interests and the right to know, covering myriad factual situations ranging from confidential criminal justice information to job evaluations. The Court in this case must likewise examine the situation based on the two-part test enunciated and adopted by the supreme court in this lengthy body of case law. Significantly, the analysis is unique to the facts of each case as recognized by the court in *Missoulian v. Board of Regents of Higher Education*, 207 Mont. 513, 529, 675 P.2d 962, 971 (1984):

> The more specific closure standard of the constitutional and statutory provisions

> requires this Court to balance the competing constitutional interests in the context of the facts of each case, to determine whether the demands of individual privacy clearly exceed the merits of public disclosure. Under this standard, the right to know may outweigh the right of individual privacy, depending on the facts.

The Commissioner argues that even though the student involved here was the subject of considerable public exposure, including legal proceedings that received state and national attention, those developments have no bearing on the student's privacy rights in his educational records under either FERPA or Mont. Code Ann. § 20-25-515. He contends the public's right to know is clearly outweighed by the privacy rights that have been afforded to students by FERPA, Mont. Code Ann. § 20-25-515, and the Montana Constitution.

The Court concludes otherwise. In the context of a privacy analysis, the Commissioner provides no support for his perspective that public exposure of the facts relating to Krakauer's request is separate and distinct from the administrative process. As Krakauer points out, and Exhibits 4 and 5 attached to his affidavit confirm, the entire incident, from the initial administrative investigation to the conclusion of the criminal trial, is a matter of public record. The only aspect of the lengthy process that is not a matter of public record is the action taken by the Commissioner.

In *John Doe v. University of Montana,* 2012 U.S. Dist. LEXIS 88519, federal district judge Christensen considered a challenge to the University disciplinary

proceedings involving the student whose records are at issue in this case. The student sought a preliminary injunction to prohibit the University from proceeding with the administrative process before the University Court. In the course of the proceeding, the court sealed the file initially, but subsequently determined that the file should be unsealed and the proceeding dismissed. Citing *In re McClatchy Newspapers, Inc. v. US. District Court for the Eastern District,* 288 F.3d 369, 374 (Cal. 9th Cir. 2002), the court reasoned: "The University of Montana is a public institution, and while there may be good reasons to keep secret the names of students involved in a University disciplinary proceeding, the Court can conceive of no compelling justification to keep secret the manner in which the University deals with those students." *Doe*, 2012 U.S. Dist. at 9.

Judge Christensen's determination focused on the process rather than related student information, and in reaching his conclusion, also ordered redaction of student identifying information.

The student does not have a reasonable expectation of privacy regarding the redacted records of the Commissioner. The Court concludes that the merits of public disclosure outweigh the individual privacy rights of the student in this case.

5. Mont. Code Ann. § 2-9-103(1)

This statute provides:

> If an officer, agent, or employee of a governmental entity acts in good faith, without malice or corruption, and under the authority of law and that law is subsequently declared

> invalid as in conflict with the constitution of Montana or the constitution of the United States, that officer, agent, or employee, any other officer, agent, or employee of the represented governmental entity, or the governmental entity is not civilly liable in any action in which the individuals or governmental entity would not have been liable if the law had been valid.

The Commissioner relies on Mont. Code Ann. § 2-9-103(1) in asserting that, should Krakauer prevail in this matter, he should not be awarded attorney fees and costs. He notes that while the case involves neither a challenge to the constitutionality of a statute nor a claim for damages, "the spirit of fairness embodied" in the statute should prevail.

The Court concludes that the statute has no application to the instant case and although Krakauer requests attorney fees in his petition, the Court is not in a position to rule on that request at this juncture. The Court will consider simultaneous briefs on the attorney fee issue filed within 30 days of the date of this Memorandum and Order.

Based on the foregoing,

IT IS HEREBY ORDERED that:

1. Krakauer's motion for summary judgment is GRANTED.

2. The Commissioner's motion for summary judgment is DENIED.

3. The Commissioner's office shall arrange to make available for inspection and/or copying within 21 days of the date of this Memorandum and Order

the records requested in pages four and five of Krakauer's petition subject to the following conditions:

Each and every reference to a student's name, birth date, social security number, address and/or telephone number must be redacted. This Order applies to any information in the file that is in any form, including hard copy or digital form. The Commissioner's office shall review all information to ensure compliance with this Memorandum and Order.

DATED this 12th day of September 2014.

/s/ Kathy Seeley
District Court Judge

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, MISSOULA DIVISION, *DOE V. UNIV. OF MONT.*, NO. CV-12-77-M-DLC (JUNE 26, 2012)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, MISSOULA DIVISION

JOHN DOE,

Plaintiff,

v.

THE UNIVERSITY OF MONTANA,

Defendant.

No. CV-12-77-M-DLC

Before: Dana L. CHRISTENSEN, United State District Judge.

Opinion by: DANA L. CHRISTENSEN

There have been at least five prosecutions alleging sexual assault under the Student Conduct Code of the University of Montana in the last five months; this case arises out of one of them. Plaintiff John Doe, a University student, challenges a disciplinary proceeding currently underway at the University, in which he is accused of violating the Student Conduct Code by sexually assaulting a fellow student at an off-campus

residence. Plaintiff Doe filed this action seeking a preliminary injunction prohibiting the University from going forward with a University Court proceeding against him. On May 10, 2012, this Court issued an Order denying Doe's request for a temporary restraining order, but granting Doe's motion to proceed anonymously and for a protective order sealing the case file. The University Court proceeding took place as scheduled and resulted in a 5-2 vote finding Doe guilty of violating the Student Conduct Code. The University Court voted 7-0 to impose the punishment of expulsion. In light of these events, this Court expressed doubts as to whether there remain viable claims to be adjudicated in this federal action, and as to the continued propriety of maintaining this case under seal. After hearing the arguments of the parties, this Court is convinced that neither this case, nor the secrecy surrounding it, can continue.

Plaintiff Doe's Complaint alleges three Counts: a violation of Doe's rights under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (Count I); a breach of contract claim (Count II); and a federal Equal Protection claim (Count III). Doe claims he was subject to a biased investigation and that the University imposed a lower standard of proof at his University Court proceeding than is called for under the Student Conduct Code in effect at the time of the alleged violation. The only relief sought in Doe's Complaint is an injunction prohibiting the University Court proceeding from going forward. That proceeding has now occurred, and a decision has been rendered. On the face of the Complaint as currently pled, no further relief is available for Doe in this Court. It was for this reason that the Court instructed the

parties to show cause why this action should not be dismissed as moot. "When the possibility of injury to the plaintiffs ceases, the case is rendered moot and [the court lacks] jurisdiction to decide it." *American Civil Liberties Union of Nevada v. Masto*, 670 F.3d 1046, 1062 (9th Cir. 2012).

Having been advised of the Court's concern that it no longer has subject matter jurisdiction over this action, Plaintiff Doe moved to dismiss the Complaint without prejudice in open court on June 22, 2012. The University did not oppose the motion. Accordingly, this action will be dismissed without prejudice pursuant to Fed. R. Civ. P. 41(a)(2).

There is one outstanding matter that must be addressed before this case is dismissed, and that is the status of the case file. The Court sealed the file in its May 10, 2012, Order, granting Plaintiff Doe's unopposed motion for a protective order. The Court gave the following explanation for granting the motion:

> At this stage, the Court finds that a protective order is justified because there is still an anonymous accuser in the underlying action, and because this federal case arises from a closed University disciplinary proceeding in which all parties are entitled to confidentiality. In light of the outcome on the motion for temporary restraining order, all that would be achieved by requiring Doe to proceed publicly at this stage would be the embarrassment of all parties involved. The protective order is issued based on the current posture of this case, and may be revisited and revised or withdrawn should this litigation proceed.

Doc. No. 11 at 11.

The next document filed in this case was a stipulated motion to modify the Court's protective order to allow Plaintiff Doe's counsel to provide a copy of the Court's May 10, 2012, Order to the Missoula County Attorney. Despite repeated requests from the Court for an explanation as to why such a selective modification of the protective order is warranted, the parties have offered no support for the request other than to indicate at the June 22, 2012, hearing that the Missoula County Attorney has requested the document. From the Court's perspective, it is impossible to consider the pending request for modification of the protective order without also re-examining the original basis for the protective order and whether the reasons for sealing this file remain persuasive.

Therefore, the Court now revisits its Order sealing the file. In addressing this issue, it is useful to begin with a brief summary of the state of the law on public access to federal court proceedings. The general public has a presumptive common-law right to inspect and copy judicial records and documents so as to satisfy "the citizen's desire to keep a watchful eye on the workings of public agencies[.]" *Nixon v. Warner Communications. Inc.*, 435 U.S. 589, 597 (1978). The public's right of access is not absolute, however, and may yield in certain instances where there is a clear risk that the contents of the court's file will be used for an improper purpose. *Id.* at 598. Protective orders have been upheld, for example, where public access would divulge information harmful to a litigant's competitive standing in business, expose minor victims of sex crimes to further trauma, jeopardize the privacy

of jurors,[1] facilitate abuse of the civil discovery process, or alert a criminal suspect to the existence of an unexecuted search warrant. *In re McClatchy Newspapers. Inc.*, 288 F.3d 369, 374 (9th Cir. 2002) (collecting cases). However, "injury to official reputation is an insufficient reason 'for repressing speech that would otherwise be free.'" *Id.* (quoting *Landmark Communications. Inc. v. Virginia*, 435 U.S. 829, 841-42 (1978)).

A party seeking a protective order must justify the request with a showing of "good cause." *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002); Fed. R. Civ. P. 26(c). The "good cause" standard requires the party seeking protection to show that "specific prejudice or harm will result if no protective order is granted." *Id.* at 1210-11. Whether a protective order is called for, and what degree of protection is necessary, are questions committed to the "broad discretion o[f] the trial court." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984).

Throughout this litigation the parties have failed to justify their request for secrecy with reference to the existing case law. Both sides have cited concern for the anonymity of the accuser in the Student Conduct Code proceeding, and Plaintiff Doe has forcefully argued that he too should be afforded the opportunity to proceed anonymously. For the reasons first articulated in the May 10, 2012, Order, the Court agrees that the confidential nature of the University's disciplinary proceeding justifies the protection of the privacy of the individual students involved, including the accuser, the accused, witnesses to the alleged

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[1] Court believes that the members of the University Court served in a capacity analogous to that of jurors.

events, and the members of the University Court. But the need for individual privacy does not justify sealing this entire case file. That greater degree of protection must be supported by a separate and compelling showing of good cause beyond the mere need to protect the students who are parties to a confidential proceeding from undue harassment or embarrassment. Neither party has satisfied this standard.

Plaintiff Doe argues this case should be kept sealed because if the contents of the file are made public, it may influence the decisionmaking of law enforcement officials with regard to any investigation or potential criminal prosecution of Plaintiff Doe. That is not a sufficient reason to seal this case under the good cause standard requiring a showing of specific prejudice or harm to the party seeking protection. The Missoula County Attorney, like all other prosecutors in Montana, is subject to a binding ethical responsibility to charge only those cases that are supported by probable cause. *See* Rule 3.8(a), Montana Rules of Professional Conduct. The determination whether to charge Plaintiff Doe with a crime must be made based on the investigative record available to the prosecutor, and without consideration for or reference to the outcome of a university administrative disciplinary proceeding, and certainly without regard for the contents of the case file in an ancillary federal civil case. Plaintiff Doe's argument requires the Court to assume that a prosecutor will breach his or her ethical obligations, and such speculation lacks the specificity of harm that is necessary for a showing of good cause. Moreover, Plaintiff Doe's identity remains protected, which should eliminate any risk that he

will suffer adverse criminal consequences if this case is unsealed.[2]

The University has likewise steadfastly argued that this case should be sealed, but has not offered a justification beyond concern for the privacy of the accuser. The Court is aware that the University's Student Code of Conduct mandates that all disciplinary proceedings remain confidential, but in the Court's judgment the only legitimate basis for such secrecy is to protect the privacy of the individual students involved. The University of Montana is a public institution, and while there may be good reasons to keep secret the names of students involved in a University disciplinary proceeding, the Court can conceive of no compelling justification to keep secret the manner in which the University deals with those students. Although the University has not explicitly argued that unsealing the file will do harm to the official reputation of any University personnel, such a concern is an insufficient legal basis to justify sealing this case in any event. *McClatchy Newspapers*, 288 F.3d at 374.

Reduced to its essence, the joint request to keep this case file sealed reflects a determination by the parties, based on their respective individual interests, that they will mutually benefit from maintaining the secrecy of this federal proceeding. This approach was evident at the June 22, 2012, hearing, when the discussion turned to the Missoula County Attorney's role in the pending motion to modify the protective order. Plaintiff Doe stated that the County Attorney

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[2] Left unanswered in this Order is the threshold question of whether the University Court proceedings would ever be relevant or admissible in any criminal prosecution.

has requested a copy of the Court's May 10, 2012, Order, and that Doe wishes to satisfy that request. Thus, in Doe's judgment, his interest in keeping this matter sealed yields to his superseding interest in satisfying the County Attorney. And the mere fact that the County Attorney is aware of this case means that somehow, someone has notified the County Attorney of the existence of this sealed proceeding, leading this Court to conclude that its original Order sealing this record may have been an exercise in futility.

During the same hearing, the University offered a guarded answer when asked by the Court if the University had supplied the County Attorney with documents related to the Student Conduct Code proceeding. This failure by the University to answer a relevant and important question left the Court with the impression that it, too, was being supplied with selective information.

In short, both parties want this case sealed to protect their privacy interests and reputations, but also want the case to be selectively unsealed when it will serve their interests for other reasons.

This is an approach that clearly favors the litigants, and the Court cannot fault the parties and their counsel for their zealous advocacy. But lost in all of this is the valid and compelling interest of the people in knowing what the University of Montana is up to. It has been established that the prevalent and long-standing approach of the federal courts is to reject secret proceedings. There are very few exceptions to this rule. The principle of openness in the conduct of the business of public institutions is all the more important here, where the subject matter of the liti-

gation is a challenge to the administrative disciplinary process of a state university.

This is an open forum to participants and observers alike, and must remain so, as transparency is crucial to the legitimacy of a public institution. The Court finds no good cause exists for a protective order continuing to seal this case, and therefore the file must be unsealed. With respect to the individual students involved in the Student Conduct Code proceeding, as well as the witnesses and University Court members involved in that proceeding, the Court finds that the interests of those individuals in avoiding undue embarrassment, harassment, and disclosure of sensitive private information outweigh the public's need to know their names. *See Does I-XXIII v. Advanced Textile Corp.*, 214 F.3d 1058. 1068-69 (9th Cir. 2000). Accordingly, any identifying information as to those individuals will be redacted in the unsealed case file.[3]

By unsealing this matter, the Court relinquishes control over the contents of the case file and with it the ability to insure that the information therein is not misused to "promote public scandal." *Nixon*, 435 U.S. at 598 (quoting *In re Caswell*, 18 R.I. 835, 836 (1893)). With regard to what is done with the contents of this file once it becomes public, it is worth noting the observations of the Ninth Circuit in *McClatchy Newspapers*:

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[3] These redactions include a handful of dates surrounding the underlying events, which if disclosed would possibly result in the identification of the individuals whose anonymity the Court seeks to protect.

> A decent newspaper will not publish [the witness'] accusations without also publishing the skepticism of [the witness'] credibility shared by the district judge and the office of the United States Attorney. If less scrupulous papers omit these significant doubts, these papers themselves will be of a character carrying little credibility.

288 F.3d at 374. The Court comes to this decision having given careful consideration to the United States Supreme Court's holding that a federal court need not "permit [its] files to serve as reservoirs of libelous statements for press consumption." *Nixon*, 435 U.S. at 598. This Court can only hope that the media will disseminate the contents of the Court file in a prudent and even-handed manner.

Based on the foregoing, IT IS HEREBY ORDERED:

1. The parties' stipulated motion to modify the protective order sealing this case (Doc. No. 12) is DENIED;

2. The parties' respective motions to substitute redacted documents (Doc. Nos. 18 and 19) are DENIED as moot in light of the Court's decision to unseal the case file;

3. Plaintiff Doe's unopposed motion to dismiss this action without prejudice is GRANTED, and this case is DISMISSED WITHOUT PREJUDICE pursuant to Fed. R. Civ. P. 41(a)(2);

4. The Clerk of Court is directed to make the entire case file available to the public as an attachment to this Order, subject to Court-imposed redactions to

preserve the anonymity of Plaintiff Doe, the accuser in the underlying proceeding, any witnesses in the underlying proceeding, and the members of the University Court.

DATED this 26th day of June, 2012.

/s/ Dana L. Christensen
United State District Judge

ORDER OF THE SUPREME COURT OF MONTANA DENYING PETITION FOR REHEARING (AUGUST 6, 2019)

IN THE SUPREME COURT OF THE STATE OF MONTANA

JON KRAKAUER,

Petitioner Appellee, and Cross-Appellant,

v.

STATE OF MONTANA, by and through its COMMISSIONER OF HIGHER EDUCATION, CLAYTON CHRISTIAN,

Respondent and Appellant,

v.

JOHN DOE,

Intervenor and Appellant.

No. DA-18-0374

Before: Laurie McKINNON, Dirk M. SANDEFUR, Ingrid GUSTAFSON, James JEREMIAH SHEA, Justices.

Petitioner, Appellee, and Cross-Appellant Jon Krakauer (Krakauer) filed a petition for rehearing of this Court's July 3, 2019, Opinion reversing the District Court's order requiring the Commissioner to disclose a student's disciplinary records and dismissing Krakauer's original petition with prejudice. *Krakauer v. State*, 2019 MT 153, 396 Mont. 247, ___ P.3d ___. Krakauer contends this Court relied on a previously-rejected right-to-know analysis and that the Opinion conflicts with other rules governing access to public records under Article II, Section 9, of the Montana Constitution. He specifically argues the Court (1) failed to address or reconcile this case with *T.L.S. v. Mont. Advocacy Program*, 2006 MT 262, 334 Mont. 146, 144 P.3d 818; (2) failed to correctly address, analyze, and reconcile FERPA's provisions with Montana's right-to-know case law; and (3) failed to address other arguments essential to the case's resolution. Respondent and Appellant, the Commissioner, objects to the petition.

This Court seldom grants petitions for rehearing. M. R. App. P. 20 provides that the Court will consider a petition for rehearing only on very limited grounds: (1) "That it overlooked some fact material to the decision"; (2) "That it overlooked some question presented by counsel that would have proven decisive to the case"; or (3) "That its decision conflicts with a statute or controlling decision not addressed. . . . "

Having fully considered Krakauer's petition and the Commissioner's response, the Court concludes rehearing is not warranted under M. R. App. P. 20 in this case. The Court did not overlook any fact material to decision or overlook any question presented by counsel that would have proven decisive to the case.

Further, the Court did not fail to address a statute or a controlling decision that conflicts with the Opinion.

IT IS THEREFORE ORDERED that the petition for rehearing is DENIED.

The Clerk is directed to provide copies of this Order to all parties and counsel of record.

Dated this 6th day of August, 2019.

/s/ Laurie McKinnon

/s/ Dirk M. Sandefur

/s/ Ingrid Gustafson

/s/ James Jeremiah Shea

STATUTORY PROVISION
FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA), 20 U.S.C. § 1232g

§ 1232g. Family educational and privacy rights

(a) Conditions for availability of funds to educational agencies or institutions; inspection and review of education records; specific information to be made available; procedure for access to education records; reasonableness of time for such access; hearings; written explanations by parents; definitions.

(1)

(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no

case more than forty—five days after the request has been made.

(B) No funds under any applicable program shall be made available to any State educational agency (whether or not that agency is an educational agency or institution under this section) that has a policy of denying, or effectively prevents, the parents of students the right to inspect and review the education records maintained by the State educational agency on their children who are or have been in attendance at any school of an educational agency or institution that is subject to the provisions of this section.

(C) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

(i) financial records of the parents of the student or any information contained therein;

(ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;

(iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (D), confidential recommendations—

(I) respecting admission to any educational agency or institution,

(II) respecting an application for employment, and

(III) respecting the receipt of an honor or honorary recognition.

(D) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (C), except that such waiver shall apply to recommendations only if (i) the student is, upon request, notified of the names of all persons making confidential recommendations and (ii) such recommendations are used solely for the purpose for which they were specifically intended. Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4)

(A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which—

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

(B) The term "education records" does not include—

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in

the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

(5)

(A) For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it

has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

(6) For the purposes of this section, the term "student" includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of Federally—supported education programs; recordkeeping.

(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 educational records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a)) of students without the written consent of their parents to any individual, agency, or organization, other than to the following—

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational

interests of the child for whom consent would otherwise be required;

(B) officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C) (i) authorized representatives of (I) the Comptroller General of the United States, (II) the Secretary, or (III) State educational authorities, under the conditions set forth in paragraph (3), or (ii) authorized representatives of the Attorney General for law enforcement purposes under the same conditions as apply to the Secretary under paragraph (3);

(D) in connection with a student's application for, or receipt of, financial aid;

(E) State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to State statute adopted—

(i) before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve the student whose records are released, or

(ii) after November 19, 1974, if—

(I) the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve,

prior to adjudication, the student whose records are released; and

(II) the officials and authorities to whom such information is disclosed certify in writing to the educational agency or institution that the information will not be disclosed to any other party except as provided under State law without the prior written consent of the parent of the student.[;]

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of the Internal Revenue Code of 1986 [26 USCS § 152];

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons;

(J)

(i) the entity or persons designated in a Federal grand jury subpoena, in which case the court shall order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished to the grand jury in response to the subpoena; and

(ii) the entity or persons designated in any other subpoena issued for a law enforcement purpose, in which case the court or other issuing agency may order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished in response to the subpoena;

(K) the Secretary of Agriculture, or authorized representative from the Food and Nutrition Service or contractors acting on behalf of the Food and Nutrition Service, for the purposes of conducting program monitoring, evaluations, and performance measurements of State and local educational and other agencies and institutions receiving funding or providing benefits of 1 or more programs authorized under the Richard B. Russell National School Lunch Act (42 U.S.C. 1751 et seq.) or the Child Nutrition Act of 1966 (42 U.S.C. 1771 et seq.) for which the results will

be reported in an aggregate form that does not identify any individual, on the conditions that—

(i) any data collected under this subparagraph shall be protected in a manner that will not permit the personal identification of students and their parents by other than the authorized representatives of the Secretary; and

(ii) any personally identifiable data shall be destroyed when the data are no longer needed for program monitoring, evaluations, and performance measurements; and

(L) an agency caseworker or other representative of a State or local child welfare agency, or tribal organization (as defined in section 4 of the Indian Self—Determination and Education Assistance Act (25 U.S.C. 450b)), who has the right to access a student's case plan, as defined and determined by the State or tribal organization, when such agency or organization is legally responsible, in accordance with State or tribal law, for the care and protection of the student, provided that the education records, or the personally identifiable information contained in such records, of the student will not be disclosed by such agency or organization, except to an individual or entity engaged in addressing the student's education needs and authorized by such agency or organization to receive such disclosure and such disclosure is consistent with the State or tribal laws applicable to protecting the confidentiality of a student's education records.

Nothing in subparagraph (E) of this paragraph shall prevent a State from further limiting the number or

type of State or local officials who will continue to have access thereunder.

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection unless—

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency, except when a parent is a party to a court proceeding involving child abuse and neglect (as defined in section 3 of the Child Abuse Prevention and Treatment Act (42 U.S.C. 5101 note)) or dependency matters, and the order is issued in the context of that proceeding, additional notice to the parent by the educational agency or institution is not required.

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, or

(C) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally—supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs: Provided, That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4)

(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A)

and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student. If a third party outside the educational agency or institution permits access to information in violation of paragraph (2)(A), or fails to destroy information in violation of paragraph (1)(F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years.

(5) Nothing in this section shall be construed to prohibit State and local educational officials from having access to student or other records which may be necessary in connection with the audit and evaluation of any federally or State supported education program or in connection with the enforcement of the Federal legal requirements which relate to any such program, subject to the conditions specified in the proviso in paragraph (3).

(6)

(A) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing, to an alleged victim of any crime of violence (as that term is defined in section 16 of title 18, United States Code [18 USCS § 16]), or a nonforcible sex offense, the final results of any disciplinary proceeding conducted

by such institution against the alleged perpetrator of such crime or offense with respect to such crime or offense.

(B) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence (as that term is defined in section 16 of title 18 [18 USCS § 16], United States Code), or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.

(C) For the purpose of this paragraph, the final results of any disciplinary proceeding—

(i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and

(ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student.

(7)

(A) Nothing in this section may be construed to prohibit an educational institution from disclosing information provided to the institution under section 170101 of the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C. 14071) concerning registered sex offenders who are required to register under such section.

(B) The Secretary shall take appropriate steps to notify educational institutions that disclosure of information described in subparagraph (A) is permitted.

(c) Surveys or data—gathering activities; regulations. Not later than 240 days after the date of enactment of the Improving America's Schools Act of 1994 [enacted Oct. 20, 1994], the Secretary shall adopt appropriate regulations or procedures, or identify existing regulations or procedures, which protect the rights of privacy of students and their families in connection with any surveys or data—gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data—gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

(d) Students' rather than parents' permission or consent. For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

(e) Informing parents or students of rights under this section. No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution effectively informs the parents of students, or the students, if they are eighteen years of age or older, or are

attending an institution of postsecondary education, of the rights accorded them by this section.

(f) Enforcement; termination of assistance. The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this Act, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.

(g) Office and review board; creation; functions. The Secretary shall establish or designate an office and review board within the Department for the purpose of investigating, processing, reviewing, and adjudicating violations of this section and complaints which may be filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

(h) Certain disciplinary action information allowable. Nothing in this section shall prohibit an educational agency or institution from—

(1) including appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety or well—being of that student, other students, or other members of the school community; or

(2) disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student.

(i) Drug and alcohol violation disclosures.

(1) In general. Nothing in this Act or the Higher Education Act of 1965 shall be construed to prohibit an institution of higher education from disclosing, to a parent or legal guardian of a student, information regarding any violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance, regardless of whether that information is contained in the student's education records, if—

(A) the student is under the age of 21; and

(B) the institution determines that the student has committed a disciplinary violation with respect to such use or possession.

(2) State law regarding disclosure. Nothing in paragraph (1) shall be construed to supersede any provision of State law that prohibits an institution of higher education from making the disclosure described in subsection (a).

(j) Investigation and prosecution of terrorism.

(1) In general. Notwithstanding subsections (a) through (i) or any provision of State law, the Attorney General (or any Federal officer or employee, in a position not lower than an Assistant Attorney General, designated by the Attorney General) may submit a written application to a court of competent jurisdiction for an ex parte order requiring an educational agency or institution to permit the Attorney General (or his designee) to—

(A) collect education records in the possession of the educational agency or institution that are relevant to an authorized investigation or prosecution of an offense listed in section 2332b(g)(5)(B) of title 18 United States Code [18 USCS § 232b (g)(5)(B)], or an act of domestic or international terrorism as defined in section 2331 of that title [18 USCS § 2331]; and

(B) for official purposes related to the investigation or prosecution of an offense described in paragraph (1)(A), retain, disseminate, and use (including as evidence at trial or in other administrative or judicial proceedings) such records, consistent with such guidelines as the Attorney General, after consultation with the Secretary, shall issue to protect confidentiality.

(2) Application and approval.

(A) In general. An application under paragraph (1) shall certify that there are specific and articulable facts giving reason to believe that the education records are likely to contain information described in paragraph (1)(A).

(B) The court shall issue an order described in paragraph (1) if the court finds that the application for the order includes the certification described in subparagraph (A).

(3) Protection of educational agency or institution. An educational agency or institution that, in good faith, produces education records in accordance with an order issued under this subsection shall not be liable to any person for that production.

(4) Record—keeping. Subsection (b)(4) does not apply to education records subject to a court order under this subsection.

REGULATORY PROVISIONS
34 C.F.R. PARTS A AND D

34 C.F.R. § 99.1

§ 99.1 To which educational agencies or institutions do these regulations apply?

(a) Except as otherwise noted in § 99.10, this part applies to an educational agency or institution to which funds have been made available under any program administered by the Secretary, if—

(1) The educational institution provides educational services or instruction, or both, to students; or

(2) The educational agency is authorized to direct and control public elementary or secondary, or postsecondary educational institutions.

(b) This part does not apply to an educational agency or institution solely because students attending that agency or institution receive non—monetary benefits under a program referenced in paragraph (a) of this section, if no funds under that program are made available to the agency or institution.

(c) The Secretary considers funds to be made available to an educational agency or institution of funds under one or more of the programs referenced in paragraph (a) of this section—

(1) Are provided to the agency or institution by grant, cooperative agreement, contract, subgrant, or subcontract; or

(2) Are provided to students attending the agency or institution and the funds may be paid to the agency or institution by those students for educational purposes, such as under the Pell Grant Program and the Guaranteed Student Loan Program (Titles IV—A—1 and IV—B, respectively, of the Higher Education Act of 1965, as amended).

(d) If an educational agency or institution receives funds under one or more of the programs covered by this section, the regulations in this part apply to the recipient as a whole, including each of its components (such as a department within a university).

34 C.F.R. § 99.2

§ 99.2 What is the purpose of these regulations?

The purpose of this part is to set out requirements for the protection of privacy of parents and students under section 444 of the General Education Provisions Act, as amended.

34 C.F.R. § 99.3

§ 99.3 What definitions apply to these regulations?

The following definitions apply to this part:

Act means the Family Educational Rights and Privacy Act of 1974, as amended, enacted as section 444 of the General Education Provisions Act.

(Authority: 20 U.S.C. 1232g)

Attendance includes, but is not limited to—

(a) Attendance in person or by paper correspondence, videoconference, satellite, Internet, or other electronic information and telecommunica-

tions technologies for students who are not physically present in the classroom; and

(b) The period during which a person is working under a work—study program.

(Authority: 20 U.S.C. 1232g)

Authorized representative means any entity or individual designated by a State or local educational authority or an agency headed by an official listed in § 99.31(a)(3) to conduct—with respect to Federal or State-supported education programs—any audit or evaluation, or any compliance or enforcement activity in connection with Federal legal requirements that relate to these programs.

(Authority: 20 U.S.C. 1232g(b)(1)(C), (b)(3), and (b)(5))

Biometric record, as used in the definition of personally identifiable information, means a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual. Examples include fingerprints; retina and iris patterns; voiceprints; DNA sequence; facial characteristics; and handwriting.

(Authority: 20 U.S.C. 1232g)

Dates of attendance.

(a) The term means the period of time during which a student attends or attended an educational agency or institution. Examples of dates of attendance include an academic year, a spring semester, or a first quarter.

(b) The term does not include specific daily records of a student's attendance at an educational agency or institution.

Directory information means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.

(a) Directory information includes, but is not limited to, the student's name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; enrollment status (*e.g.*, undergraduate or graduate, full—time or part—time); dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors, and awards received; and the most recent educational agency or institution attended.

(b) Directory information does not include a student's—

(1) Social security number; or

(2) Student identification (ID) number, except as provided in paragraph (c) of this definition.

(c) In accordance with paragraphs (a) and (b) of this definition, directory information includes—

(1) A student ID number, user ID, or other unique personal identifier used by a student for purposes of accessing or communicating in electronic systems, but only if the identifier cannot be used to gain access to education records except when used in conjunction

with one or more factors that authenticate the user's identity, such as a personal identification number (PIN), password or other factor known or possessed only by the authorized user; and

(2) A student ID number or other unique personal identifier that is displayed on a student ID badge, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, such as a PIN, password, or other factor known or possessed only by the authorized user.

(Authority: 20 U.S.C. 1232g(a)(5)(A))

Disciplinary action or proceeding means the investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students of the agency or institution.

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.

(Authority: 20 U.S.C. 1232g(b)(1) and (b)(2)) Early childhood education program means—

(a) A Head Start program or an Early Head Start program carried out under the Head Start Act (42 U.S.C. 9831 et seq.), including a migrant

or seasonal Head Start program, an Indian Head Start program, or a Head Start program or an Early Head Start program that also receives State funding;

(b) A State licensed or regulated child care program; or (c)A program that—

(1) Serves children from birth through age six that addresses the children's cognitive (including language, early literacy, and early mathematics), social, emotional, and physical development; and

(2) Is—

(i) A State prekindergarten program;

(ii) A program authorized under section 619 or part C of the Individuals with Disabilities Education Act; or

(iii) A program operated by a local educational agency.

Educational agency or institution means any public or private agency or institution to which this part applies under § 99.1(a).

Education program means any program that is principally engaged in the provision of education, including, but not limited to, early childhood education, elementary and secondary education, postsecondary education, special education, job training, career and technical education, and adult education, and any program that is administered by an educational agency or institution.

(Authority: 20 U.S.C. 1232g(b)(3), (b)(5))

Education records

(a) The term means those records that are:

(1) Directly related to a student; and

(2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include:

(1) Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.

(2) Records of the law enforcement unit of an educational agency or institution, subject to the provisions of § 99.8.

(3)

(i) Records relating to an individual who is employed by an educational agency or institution, that:

(A) Are made and maintained in the normal course of business;

(B) Relate exclusively to the individual in that individual's capacity as an employee; and

(C) Are not available for use for any other purpose.

(ii) Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education

records and not excepted under paragraph (b)(3)(i) of this definition.

(4) Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are:

(i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;

(ii) Made, maintained, or used only in connection with treatment of the student; and

(iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution; and

(5) Records created or received by an educational agency or institution after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student.

(6) Grades on peer—graded papers before they are collected and recorded by a teacher. (Authority: 20 U.S.C. 1232g(a)(4))

Eligible student means a student who has reached 18 years of age or is attending an institution of postsecondary education.

(Authority: 20 U.S.C. 1232g(d))

Institution of postsecondary education means an institution that provides education to students beyond the secondary school level; "secondary school level" means the educational level (not beyond grade 12) at which secondary education is provided as determined under State law.

(Authority: 20 U.S.C. 1232g(d))

Parent means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.

(Authority: 20 U.S.C. 1232g)

Party means an individual, agency, institution, or organization.

(Authority: 20 U.S.C. 1232g(b)(4)(A))

Personally Identifiable Information

The term includes, but is not limited to—

(a) The student's name;

(b) The name of the student's parent or other family members;

(c) The address of the student or student's family;

(d) A personal identifier, such as the student's social security number, student number, or biometric record;

(e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;

(f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or

(g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

34 C.F.R. § 99.4

§ 99.4 What are the rights of parents?

An educational agency or institution shall give full rights under the Act to either parent, unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights.

34 C.F.R. § 99.5

§ 99.5 What are the rights of students?

(a)

(1) When a student becomes an eligible student, the rights accorded to, and consent required of, parents under this part transfer from the parents to the student.

(2) Nothing in this section prevents an educational agency or institution from disclosing education records, or personally identifiable information from education records, to a

parent without the prior written consent of an eligible student if the disclosure meets the conditions in § 99.31(a)(8), § 99.31(a)(10), § 99.31(a)(15), or any other provision in § 99.31(a).

(b) The Act and this part do not prevent educational agencies or institutions from giving students rights in addition to those given to parents.

(c) An individual who is or has been a student at an educational institution and who applies for admission at another component of that institution does not have rights under this part with respect to records maintained by that other component, including records maintained in connection with the student's application for admission, unless the student is accepted and attends that other component of the institution.

34 C.F.R. § 99.7

§ 99.7 What must an educational agency or institution include in its annual notification?

(a)

(1) Each educational agency or institution shall annually notify parents of students currently in attendance, or eligible students currently in attendance, of their rights under the Act and this part.

(2) The notice must inform parents or eligible students that they have the right to—

(i) Inspect and review the student's education records;

(ii) Seek amendment of the student's education records that the parent or eligible student believes to be inaccurate, misleading, or otherwise in violation of the student's privacy rights;

(iii) Consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that the Act and § 99.31 authorize disclosure without consent; and

(iv) File with the Department a complaint under §§ 99.63 and 99.64 concerning alleged failures by the educational agency or institution to comply with the requirements of the Act and this part.

(3) The notice must include all of the following:

(i) The procedure for exercising the right to inspect and review education records.

(ii) The procedure for requesting amendment of records under § 99.20.

(iii) If the educational agency or institution has a policy of disclosing education records under § 99.31(a)(1), a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.

(b) An educational agency or institution may provide this notice by any means that are reasonably likely to inform the parents or eligible students of their rights.

(1) An educational agency or institution shall effectively notify parents or eligible students who are disabled.

(2) An agency or institution of elementary or secondary education shall effectively notify parents who have a primary or home language other than English.

34 C.F.R. § 99.8

§ 99.8 What provisions apply to records of a law enforcement unit?

(a)

(1) Law enforcement unit means any individual, office, department, division, or other component of an educational agency or institution, such as a unit of commissioned police officers or non—commissioned security guards, that is officially authorized or designated by that agency or institution to—

(i) Enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself; or

(ii) Maintain the physical security and safety of the agency or institution.

(2) A component of an educational agency or institution does not lose its status as a law enforcement unit if it also performs other, non—law enforcement functions for the agency or institution, including investigation of incidents

or conduct that constitutes or leads to a disciplinary action or proceedings against the student.

(b)

(1) Records of a law enforcement unit means those records, files, documents, and other materials that are—

(i) Created by a law enforcement unit;

(ii) Created for a law enforcement purpose; and (iii)Maintained by the law enforcement unit.

(2) Records of a law enforcement unit does not mean—

(i) Records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the educational agency or institution other than the law enforcement unit; or

(ii) Records created and maintained by a law enforcement unit exclusively for a non—law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution.

(c)

(1) Nothing in the Act prohibits an educational agency or institution from contacting its law enforcement unit, orally or in writing, for the purpose of asking that unit to investigate a possible violation of, or to enforce, any local, State, or Federal law.

(2) Education records, and personally identifiable information contained in education records, do not lose their status as education records and

remain subject to the Act, including the disclosure provisions of § 99.30, while in the possession of the law enforcement unit.

(d) The Act neither requires nor prohibits the disclosure by an educational agency or institution of its law enforcement unit records.

34 C.F.R. § 99.30

§ 99.30 Under what conditions is prior consent required to disclose information?

(a) The parent or eligible student shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records, except as provided in § 99.31.

(b) The written consent must:

(1) Specify the records that may be disclosed;

(2) State the purpose of the disclosure; and

(3) Identify the party or class of parties to whom the disclosure may be made.

(c) When a disclosure is made under paragraph (a) of this section:

(1) If a parent or eligible student so requests, the educational agency or institution shall provide him or her with a copy of the records disclosed; and

(2) If the parent of a student who is not an eligible student so requests, the agency or institution shall provide the student with a copy of the records disclosed.

(d) "Signed and dated written consent" under this part may include a record and signature in electronic form that—

(1) Identifies and authenticates a particular person as the source of the electronic consent; and (2)Indicates such person's approval of the information contained in the electronic consent.

34 C.F.R. § 99.31

§ 99.31 Under what conditions is prior consent not required to disclose information?

(a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:

(1)

(i)

(A) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.

(B) A contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a school official under this paragraph provided that the outside party—

(1) Performs an institutional service or function for which the agency or institution would otherwise use employees;

(2) Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and

(3) Is subject to the requirements of § 99.33(a) governing the use and redisclosure of personally identifiable information from education records.

(ii) An educational agency or institution must use reasonable methods to ensure that school officials obtain access to only those education records in which they have legitimate educational interests. An educational agency or institution that does not use physical or technological access controls must ensure that its administrative policy for controlling access to education records is effective and that it remains in compliance with the legitimate educational interest requirement in paragraph (a)(1)(i)(A) of this section.

(2) The disclosure is, subject to the requirements of § 99.34, to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll, or where the student is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer.

(3) The disclosure is, subject to the requirements of § 99.35, to authorized representatives of—

(i) The Comptroller General of the United States;

(ii) The Attorney General of the United States;

(iii) The Secretary; or

(iv) State and local educational authorities.

(4)

(i) The disclosure is in connection with financial aid for which the student has applied or which the student has received, if the information is necessary for such purposes as to:

(A) Determine eligibility for the aid;

(B) Determine the amount of the aid;

(C) Determine the conditions for the aid; or

(D) Enforce the terms and conditions of the aid.

(ii) As used in paragraph (a)(4)(i) of this section, financial aid means a payment of funds provided to an individual (or a payment in kind of tangible or intangible property to the individual) that is conditioned on the individual's attendance at an educational agency or institution.

(5)

(i) The disclosure is to State and local officials or authorities to whom this information is specifically—

(A) Allowed to be reported or disclosed pursuant to State statute adopted before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and the system's ability to effectively serve the student whose records are released; or

(B) Allowed to be reported or disclosed pursuant to State statute adopted after November 19, 1974, subject to the requirements of § 99.38.

(ii) Paragraph (a)(5)(i) of this section does not prevent a State from further limiting the number or type of State or local officials to whom disclosures may be made under that paragraph.

(6)

(i) The disclosure is to organizations conducting studies for, or on behalf of, educational agencies or institutions to:

(A) Develop, validate, or administer predictive tests;

(B) Administer student aid programs; or

(C) Improve instruction.

(ii) Nothing in the Act or this part prevents a State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section from entering into agreements with organizations conducting studies under paragraph (a)(6)(i) of this section and redisclosing personally identifiable information from education records on behalf of educational agencies and institutions that disclosed the information to the State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section in accordance with the requirements of § 99.33(b).

(iii) An educational agency or institution may disclose personally identifiable information under paragraph (a)(6)(i) of this section, and a State or local educational authority or agency headed by

an official listed in paragraph (a)(3) of this section may redisclose personally identifiable information under paragraph (a)(6)(i) and (a)(6)(ii) of this section, only if—

(A) The study is conducted in a manner that does not permit personal identification of parents and students by individuals other than representatives of the organization that have legitimate interests in the information;

(B) The information is destroyed when no longer needed for the purposes for which the study was conducted; and

(C) The educational agency or institution or the State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section enters into a written agreement with the organization that—

(1) Specifies the purpose, scope, and duration of the study or studies and the information to be disclosed;

(2) Requires the organization to use personally identifiable information from education records only to meet the purpose or purposes of the study as stated in the written agreement;

(3) Requires the organization to conduct the study in a manner that does not permit personal identification of parents and students, as defined in this part, by anyone other than representatives of the

organization with legitimate interests; and

(4) Requires the organization to destroy all personally identifiable information when the information is no longer needed for the purposes for which the study was conducted and specifies the time period in which the information must be destroyed.

(iv) An educational agency or institution or State or local educational authority or Federal agency headed by an official listed in paragraph (a)(3) of this section is not required to initiate a study or agree with or endorse the conclusions or results of the study.

(v) For the purposes of paragraph (a)(6) of this section, the term organization includes, but is not limited to, Federal, State, and local agencies, and independent organizations.

(7) The disclosure is to accrediting organizations to carry out their accrediting functions.

(8) The disclosure is to parents, as defined in § 99.3, of a dependent student, as defined in section 152 of the Internal Revenue Code of 1986.

(9)

(i) The disclosure is to comply with a judicial order or lawfully issued subpoena.

(ii) The educational agency or institution may disclose information under paragraph (a)(9)(i) of this section only if the agency or institution makes a reasonable effort to notify the parent or

eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action, unless the disclosure is in compliance with—

(A) A Federal grand jury subpoena and the court has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed;

(B) Any other subpoena issued for a law enforcement purpose and the court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed; or

(C) An ex parte court order obtained by the United States Attorney General (or designee not lower than an Assistant Attorney General) concerning investigations or prosecutions of an offense listed in 18 U.S.C. 2332b(g)(5)(B) or an act of domestic or international terrorism as defined in 18 U.S.C. 2331.

(iii)

(A) If an educational agency or institution initiates legal action against a parent or student, the educational agency or institution may disclose to the court, without a court order or subpoena, the education records of the student that are relevant for the educational agency or institution to proceed with the legal action as plaintiff.

(B) If a parent or eligible student initiates legal action against an educational agency or insti-

tution, the educational agency or institution may disclose to the court, without a court order or subpoena, the student's education records that are relevant for the educational agency or institution to defend itself.

(10) The disclosure is in connection with a health or safety emergency, under the conditions described in § 99.36.

(11) The disclosure is information the educational agency or institution has designated as "directory information", under the conditions described in § 99.37.

(12) The disclosure is to the parent of a student who is not an eligible student or to the student.

(13) The disclosure, subject to the requirements in § 99.39, is to a victim of an alleged perpetrator of a crime of violence or a non—forcible sex offense. The disclosure may only include the final results of the disciplinary proceeding conducted by the institution of postsecondary education with respect to that alleged crime or offense. The institution may disclose the final results of the disciplinary proceeding, regardless of whether the institution concluded a violation was committed.

(14)

(i) The disclosure, subject to the requirements in § 99.39, is in connection with a disciplinary proceeding at an institution of postsecondary education. The institution must not disclose the final results of the disciplinary proceeding unless it determines that—

(A) The student is an alleged perpetrator of a crime of violence or non—forcible sex offense; and

(B) With respect to the allegation made against him or her, the student has committed a violation of the institution's rules or policies.

(ii) The institution may not disclose the name of any other student, including a victim or witness, without the prior written consent of the other student.

(iii) This section applies only to disciplinary proceedings in which the final results were reached on or after October 7, 1998.

(15)

(i) The disclosure is to a parent of a student at an institution of postsecondary education regarding the student's violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance if—

(A) The institution determines that the student has committed a disciplinary violation with respect to that use or possession; and

(B) The student is under the age of 21 at the time of the disclosure to the parent.

(ii) Paragraph (a)(15) of this section does not supersede any provision of State law that prohibits an institution of postsecondary education from disclosing information.

(16) The disclosure concerns sex offenders and other individuals required to register under section

170101 of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 14071, and the information was provided to the educational agency or institution under 42 U.S.C. 14071 and applicable Federal guidelines.

(b)

(1) De—identified records and information. An educational agency or institution, or a party that has received education records or information from education records under this part, may release the records or information without the consent required by § 99.30 after the removal of all personally identifiable information provided that the educational agency or institution or other party has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.

(2) An educational agency or institution, or a party that has received education records or information from education records under this part, may release de—identified student level data from education records for the purpose of education research by attaching a code to each record that may allow the recipient to match information received from the same source, provided that—

(i) An educational agency or institution or other party that releases de—identified data under paragraph (b)(2) of this section does not disclose any information about how it generates and assigns a record code, or that would allow a recipient to identify a student based on a record code;

(ii) The record code is used for no purpose other than identifying a de—identified record for purposes of education research and cannot be used to ascertain personally identifiable information about a student; and

(iii) The record code is not based on a student's social security number or other personal information.

(c) An educational agency or institution must use reasonable methods to identify and authenticate the identity of parents, students, school officials, and any other parties to whom the agency or institution discloses personally identifiable information from education records.

(d) Paragraphs (a) and (b) of this section do not require an educational agency or institution or any other party to disclose education records or information from education records to any party, except for parties under paragraph (a)(12) of this section.

34 C.F.R. § 99.32

§ 99.32 What recordkeeping requirements exist concerning requests and disclosures?

(a)

(1) An educational agency or institution must maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student, as well as the names of State and local educational authorities and Federal officials and agencies listed in § 99.31(a)(3) that may make further disclosures of personally identifiable information

from the student's education records without consent under § 99.33(b).

(2) The agency or institution shall maintain the record with the education records of the student as long as the records are maintained.

(3) For each request or disclosure the record must include:

(i) The parties who have requested or received personally identifiable information from the education records; and

(ii) The legitimate interests the parties had in requesting or obtaining the information.

(4) An educational agency or institution must obtain a copy of the record of further disclosures maintained under paragraph (b)(2) of this section and make it available in response to a parent's or eligible student's request to review the record required under paragraph (a)(1) of this section.

(5) An educational agency or institution must record the following information when it discloses personally identifiable information from education records under the health or safety emergency exception in § 99.31(a)(10) and § 99.36:

(i) The articulable and significant threat to the health or safety of a student or other individuals that formed the basis for the disclosure; and

(ii) The parties to whom the agency or institution disclosed the information.

(b)

(1) Except as provided in paragraph (b)(2) of this section, if an educational agency or institution

discloses personally identifiable information from education records with the understanding authorized under § 99.33(b), the record of the disclosure required under this section must include:

(i) The names of the additional parties to which the receiving party may disclose the information on behalf of the educational agency or institution; and

(ii) The legitimate interests under § 99.31 which each of the additional parties has in requesting or obtaining the information.

(2)

(i) A State or local educational authority or Federal official or agency listed in § 99.31(a)(3) that makes further disclosures of information from education records under § 99.33(b) must record the names of the additional parties to which it discloses information on behalf of an educational agency or institution and their legitimate interests in the information under § 99.31 if the information was received from:

(A) An educational agency or institution that has not recorded the further disclosures under paragraph (b)(1) of this section; or

(B) Another State or local educational authority or Federal official or agency listed in § 99.31(a)(3).

(ii) A State or local educational authority or Federal official or agency that records further disclosures of information under paragraph (b)(2)(i) of this section may maintain the record by the student's class, school, district, or other appro-

priate grouping rather than by the name of the student.

(iii) Upon request of an educational agency or institution, a State or local educational authority or Federal official or agency listed in § 99.31 (a)(3) that maintains a record of further disclosures under paragraph (b)(2)(i) of this section must provide a copy of the record of further disclosures to the educational agency or institution within a reasonable period of time not to exceed 30 days.

(c) The following parties may inspect the record relating to each student:

(1) The parent or eligible student.

(2) The school official or his or her assistants who are responsible for the custody of the records.

(3) Those parties authorized in § 99.31(a) (1) and (3) for the purposes of auditing the recordkeeping procedures of the educational agency or institution.

(d) Paragraph (a) of this section does not apply if the request was from, or the disclosure was to:

(1) The parent or eligible student;

(2) A school official under § 99.31(a)(1);

(3) A party with written consent from the parent or eligible student;

(4) A party seeking directory information; or

(5) A party seeking or receiving records in accordance with § 99.31(a)(9)(ii)(A) through (C). (Approved

by the Office of Management and Budget under control number 1880—0508)

34 C.F.R. § 99.33

§ 99.33 What limitations apply to the redisclosure of information?

(a)

(1) An educational agency or institution may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student.

(2) The officers, employees, and agents of a party that receives information under paragraph (a)(1) of this section may use the information, but only for the purposes for which the disclosure was made.

(b)

(1) Paragraph (a) of this section does not prevent an educational agency or institution from disclosing personally identifiable information with the understanding that the party receiving the information may make further disclosures of the information on behalf of the educational agency or institution if—

(i) The disclosures meet the requirements of § 99.31; and

(ii)

(A) The educational agency or institution has complied with the requirements of § 99.32(b); or

(B) A State or local educational authority or Federal official or agency listed in § 99.31 (a)(3) has complied with the requirements of § 99.32(b)(2).

(2) A party that receives a court order or lawfully issued subpoena and rediscloses personally identifiable information from education records on behalf of an educational agency or institution in response to that order or subpoena under § 99.31(a)(9) must provide the notification required under § 99.31(a)(9)(ii).

(c) Paragraph (a) of this section does not apply to disclosures under §§ 99.31(a)(8), (9), (11), (12), (14), (15), and (16), and to information that postsecondary institutions are required to disclose under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. 1092(f) (Clery Act), to the accuser and accused regarding the outcome of any campus disciplinary proceeding brought alleging a sexual offense.

(d) An educational agency or institution must inform a party to whom disclosure is made of the requirements of paragraph (a) of this section except for disclosures made under §§ 99.31(a)(8), (9), (11), (12), (14), (15), and (16), and to information that postsecondary institutions are required to disclose under the Clery Act to the accuser and accused regarding the outcome of any campus disciplinary proceeding brought alleging a sexual offense.

34 C.F.R. § 99.34

§ 99.34 What conditions apply to disclosure of information to other educational agencies or institutions?

(a) An educational agency or institution that discloses an education record under § 99.31(a)(2) shall:

(1) Make a reasonable attempt to notify the parent or eligible student at the last known address of the parent or eligible student, unless:

(i) The disclosure is initiated by the parent or eligible student; or

(ii) The annual notification of the agency or institution under § 99.7 includes a notice that the agency or institution forwards education records to other agencies or institutions that have requested the records and in which the student seeks or intends to enroll or is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer;

(2) Give the parent or eligible student, upon request, a copy of the record that was disclosed; and

(3) Give the parent or eligible student, upon request, an opportunity for a hearing under Subpart C.

(b) An educational agency or institution may disclose an education record of a student in attendance to another educational agency or institution if:

(1) The student is enrolled in or receives services from the other agency or institution; and (2) The disclosure meets the requirements of paragraph (a) of this section.

34 C.F.R. § 99.35

§ 99.35 What conditions apply to disclosure of information for Federal or State program purposes?

(a)

(1) Authorized representatives of the officials or agencies headed by officials listed in § 99.31(a)(3) may have access to education records in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements that relate to those programs.

(2) The State or local educational authority or agency headed by an official listed in § 99.31(a)(3) is responsible for using reasonable methods to ensure to the greatest extent practicable that any entity or individual designated as its authorized representative—

(i) Uses personally identifiable information only to carry out an audit or evaluation of Federal—or State—supported education programs, or for the enforcement of or compliance with Federal legal requirements related to these programs;

(ii) Protects the personally identifiable information from further disclosures or other uses, except as authorized in paragraph (b)(1) of this section; and

(iii) Destroys the personally identifiable information in accordance with the requirements of paragraphs (b) and (c) of this section.

(3) The State or local educational authority or agency headed by an official listed in § 99.31(a)(3) must

use a written agreement to designate any authorized representative, other than an employee. The written agreement must—

(i) Designate the individual or entity as an authorized representative;

(ii) Specify—

(A) The personally identifiable information from education records to be disclosed;

(B) That the purpose for which the personally identifiable information from education records is disclosed to the authorized representative is to carry out an audit or evaluation of Federal—or State—supported education programs, or to enforce or to comply with Federal legal requirements that relate to those programs; and

(C) A description of the activity with sufficient specificity to make clear that the work falls within the exception of § 99.31(a)(3), including a description of how the personally identifiable information from education records will be used;

(iii) Require the authorized representative to destroy personally identifiable information from education records when the information is no longer needed for the purpose specified;

(iv) Specify the time period in which the information must be destroyed; and

(v) Establish policies and procedures, consistent with the Act and other Federal and State confidentiality and privacy provisions, to protect

personally identifiable information from education records from further disclosure (except back to the disclosing entity) and unauthorized use, including limiting use of personally identifiable information from education records to only authorized representatives with legitimate interests in the audit or evaluation of a Federal—or State—supported education program or for compliance or enforcement of Federal legal requirements related to these programs.

(b) Information that is collected under paragraph (a) of this section must—

(1) Be protected in a manner that does not permit personal identification of individuals by anyone other than the State or local educational authority or agency headed by an official listed in § 99.31(a)(3) and their authorized representatives, except that the State or local educational authority or agency headed by an official listed in § 99.31(a)(3) may make further disclosures of personally identifiable information from education records on behalf of the educational agency or institution in accordance with the requirements of § 99.33(b); and

(2) Be destroyed when no longer needed for the purposes listed in paragraph (a) of this section.

(c) Paragraph (b) of this section does not apply if:

(1) The parent or eligible student has given written consent for the disclosure under § 99.30; or

(2) The collection of personally identifiable information is specifically authorized by Federal law.

34 C.F.R. § 99.36

§ 99.36 What conditions apply to disclosure of information in health and safety emergencies?

(a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

(b) Nothing in this Act or this part shall prevent an educational agency or institution from—

(1) Including in the education records of a student appropriate information concerning disciplinary action taken against the student for conduct that posed a significant risk to the safety or well—being of that student, other students, or other members of the school community;

(2) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials within the agency or institution who the agency or institution has determined have legitimate educational interests in the behavior of the student; or

(3) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials in other schools who have been determined to have legitimate educational interests in the behavior of the student.

(c) In making a determination under paragraph (a) of this section, an educational agency or institution may take into account the totality of the circumstances

pertaining to a threat to the health or safety of a student or other individuals. If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.

34 C.F.R. § 99.37

§ 99.37 What conditions apply to disclosing directory information?

(a) An educational agency or institution may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance at the agency or institution of:

(1) The types of personally identifiable information that the agency or institution has designated as directory information;

(2) A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information; and

(3) The period of time within which a parent or eligible student has to notify the agency or institution in writing that he or she does not want any or all of those types of information

about the student designated as directory information.

(b) An educational agency or institution may disclose directory information about former students without complying with the notice and opt out conditions in paragraph (a) of this section. However, the agency or institution must continue to honor any valid request to opt out of the disclosure of directory information made while a student was in attendance unless the student rescinds the opt out request.

(c) A parent or eligible student may not use the right under paragraph (a)(2) of this section to opt out of directory information disclosures to—

(1) Prevent an educational agency or institution from disclosing or requiring a student to disclose the student's name, identifier, or institutional email address in a class in which the student is enrolled; or

(2) Prevent an educational agency or institution from requiring a student to wear, to display publicly, or to disclose a student ID card or badge that exhibits information that may be designated as directory information under § 99.3 and that has been properly designated by the educational agency or institution as directory information in the public notice provided under paragraph (a)(1) of this section.

(d) In its public notice to parents and eligible students in attendance at the agency or institution that is described in paragraph (a) of this section, an educational agency or institution may specify that disclosure of directory information will be limited to specific parties, for specific purposes, or both. When

an educational agency or institution specifies that disclosure of directory information will be limited to specific parties, for specific purposes, or both, the educational agency or institution must limit its directory information disclosures to those specified in its public notice that is described in paragraph (a) of this section.

(e) An educational agency or institution may not disclose or confirm directory information without meeting the written consent requirements in § 99.30 if a student's social security number or other non—directory information is used alone or combined with other data elements to identify or help identify the student or the student's records.

34 C.F.R. § 99.38

§ 99.38 What conditions apply to disclosure of information as permitted by State statute adopted after November 19, 1974, concerning the juvenile justice system?

(a) If reporting or disclosure allowed by State statute concerns the juvenile justice system and the system's ability to effectively serve, prior to adjudication, the student whose records are released, an educational agency or institution may disclose education records under § 99.31(a)(5)(i)(B).

(b) The officials and authorities to whom the records are disclosed shall certify in writing to the educational agency or institution that the information will not be disclosed to any other party, except as provided under State law, without the prior written consent of the parent of the student.

34 C.F.R. § 99.39

§ 99.39 What definitions apply to the nonconsensual disclosure of records by postsecondary educational institutions in connection with disciplinary proceedings concerning crimes of violence or non—forcible sex offenses?

As used in this part:

Alleged perpetrator of a crime of violence is a student who is alleged to have committed acts that would, if proven, constitute any of the following offenses or attempts to commit the following offenses that are defined in appendix A to this part:

Arson

Assault offenses

Burglary

Criminal homicide—manslaughter by negligence

Criminal homicide—murder and nonnegligent manslaughter

Destruction/damage/vandalism of property

Kidnapping/abduction

Robbery

Forcible sex offenses.

Alleged perpetrator of a nonforcible sex offense means a student who is alleged to have committed acts that, if proven, would constitute statutory rape or incest. These offenses are defined in appendix A to this part.

Final results means a decision or determination, made by an honor court or council, committee, commission, or other entity authorized to resolve disciplinary matters within the institution. The disclosure of final results must include only the name of the student, the violation committed, and any sanction imposed by the institution against the student.

Sanction imposed means a description of the disciplinary action taken by the institution, the date of its imposition, and its duration.

Violation committed means the institutional rules or code sections that were violated and any essential findings supporting the institution's conclusion that the violation was committed.

APPELLEE PETITION FOR REHEARING FILED IN *KRAKAUER II* (JULY 18, 2019)

IN THE SUPREME COURT OF THE STATE OF MONTANA

JON KRAKAUER,

Petitioner Appellee and Cross-Appellant,

v.

STATE OF MONTANA, by and through its COMMISSIONER OF HIGHER EDUCATION CLAYTON T. CHRISTIAN,

Respondent, Appellant and Cross-Appellee,

v.

JOHN DOE,

Appellant and Intervenor.

No. DA-18-0374

On Appeal from the Montana First Judicial District Court Lewis and Clark County, The Hon. Mike Menahan, Presiding.

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Comes now the Appellee in the captioned matter, Jon Krakauer, and pursuant to Rule 20, M. R. App. P., hereby petitions for rehearing of the Court's Opinion reversing the district court and denying access to the Commissioner's records detailing the reversal of the Doe's expulsion from the University of Montana. The majority relied on a right-to-know analysis previously rejected by this Court and the Opinion conflicts with well-established rules governing access to records under Article II, Section 9 of the Montana Constitution.

Statement of Case

Jon Krakauer (Krakauer) requested records from the Commissioner of Higher Education (Commissioner) related to a certain student disciplinary proceeding at the University of Montana. The Commissioner declined to comply with the request. Krakauer brought an action under Article II, Section 9 of the Montana Constitution asserting the right to examine the documents in question. The district court ordered disclosure of the records.

The Commissioner appealed the district court order and after briefing and oral argument, this Court in a 6-1 decision remanded the matter back to the district court for an *in-camera* inspection of the requested documents. Justice Laurie McKinnon dissented.

On remand, the Commissioner produced the records for the district court and after reviewing the records in-camera, the district court, again, ordered disclosure of the records.

The Commissioner appealed this second disclosure order and the matter was considered without oral argument on the briefs of the parties. Of the original Court, only Chief McGrath, and Justices Baker, Rice, Shea and McKinnon had participated in the oral argument in the first appeal.

On this second appeal, the Court reversed the district court relying upon the legal principles contained in the McKinnon dissenting opinion accompanying the first appeal. This second Opinion is flawed in three major respects. First, it relies upon decisions exalting the right to privacy over the right-to-know previously rejected by this Court. Second, its central lynchpin is based on a novel reading of federal law that naming a student in a records' request bars disclosure of student records because redaction is futile. Third, the Opinion's analysis contains glaring omissions related to arguments raised by Krakauer regarding the inapplicability of FERPA. These arguments are central to the resolution of the issue presented, yet never addressed or analyzed by the Court.

The rule announced in the Opinion guts Montanan's right-to-know and renders requests for student records immune from the constitutional guarantees of access under Article II, Section 9. This is so, because a requestor of records containing arguably private information about a student must establish that the student has no privacy interest, has waived that interest or society does not recognize that interest to be reasonable under the circumstances. If the requestor names the student in order to address the central existence of privacy issue under the balancing test, redaction becomes futile and, the majority ruling

precludes access. A person's actual or subjective expectation of privacy simply cannot be analyzed without identifying the person implicated. The majority opinion tacitly recognizes this dilemma when it cites to Doe's status as a prominent high-profile athlete and actually utilizes this fact in tis privacy analysis. The Court's Opinion presents the classic *circulus in probando* as its premise relies on the truth of its conclusion and is untenable.

Rule 20(1)(a)(ii) and (iii), M. R. App. P., authorize rehearing when the Court "overlooked some question presented by counsel that would have proven decisive" or when the "decision conflicts with a statute of controlling decision not addressed" by the Court.

Krakauer seeks rehearing on the basis that this Court's majority Opinion:

1) failed to address or reconcile its ruling and rationale with the Court's previous pronouncement in *T.L.S. v. Mont. Advocacy Program,* 2006 MT 262, 334 Mont. 146, 144 P.3d 818;

2) failed to correctly address, analyze, and reconcile FERPA's provisions with controlling Montana right-to-know jurisprudence;

3) failed to address arguments essential to the resolution of the case.

As argued below, any or all of these reasons justify this Court's rehearing of the majority opinion.

ARGUMENT

I. The Majority Relies on a Case Which Has Not Controlled Right-to-Know Jurisprudence Since 2006.

Writing for the majority, Justice McKinnon starts her analysis with citation to *Missoulian v. Bd of Regents*, 207 Mont. 513, 675 P.2d 962 (1984) for the proposition that in right-to-know cases the courts must balance the Article II, Section 10 constitutional right to privacy with the Article II, Section 9 guarantees of access to government records: "The rights exist in tension with one another and conflict when the public seeks to examine documents [in which] an individual asserts a privacy interest . . . [b]ecause neither right is absolute we must balance the competing constitutional rights when they conflict." (Majority Opinion, ¶ 11).

The *Missoulian* court relied heavily upon *Montana Human Rights Div. v. City of Billings,* 199 Mont. 434, 441-42, 649 P.2d 1283, 1287-88 (1982). In *Montana Human Rights Div.*, this Court determined the circumstances under which a subpoena for government employees personnel records were protected from disclosure under the right of privacy, Article II, Section 10. In resolving the case, the Court cited David Gorman's 1978 Law Review article, *Rights in Collision: The Individual Right of Privacy and the Public Right to Know,* 39 Mont. L. Rev. 249-267 (1978) and concluded that the subpoena could only be enforced if there was a compelling state interest as required by Article II, Section 10. The right to know guarantees of Article II section 9 were never discussed in the case, let alone balanced.

Unfortunately, the ruling in *Montana Human Rights Div.* served as the basis for the Court's *Missoulian* decision. In the *Missoulian* case, the *Missoulian* newspaper sued the Board of Regents to gain access to the periodic evaluations the Board performed of the various Presidents of the University system. The *Missoulian* wanted to observe these discussions to report to its readers how these public officials were performing. The *Missoulian* argued that university presidents can have no reasonable expectation of privacy except in the narrow areas of personal health and family which do not affect job performance.

The Court rejected this argument and reiterated its holding in *Montana Human Rights Division* "that a privacy interest will yield only to a compelling state interest." The Court then announced it would "balance the competing constitutional interests in the context of the facts of each case, to determine whether the demands of individual privacy clearly exceed the merits of public disclosure. Under this standard, the right to know *may* outweigh the right of individual privacy, depending on the facts." (This language is virtually identical to the McKinnon majority Opinion, ¶ 12.) By doubling down on the right of privacy with the compelling interest standard of Section 10, the Court concluded that the demands of individual privacy of the presidents clearly exceeded the merits of public disclosure.

In 2006, the Court recognized the fallacy of coupling Article II, Section 9, right-to-know reasoning with the compelling interest requirement of Section 10. In *T.L.S.*, the Court rejected the doubling-up standard by ruling "the constitutional

right to examine documents of public bodies is presumed in the absence of a showing of individual privacy rights sufficient to override that right. Thus, once it is determined that requested documents are documents of public bodies subject to public inspection pursuant to Article II, Section 9, it is incumbent upon the party asserting individual privacy rights to establish that the privacy interests clearly exceed the merits of public disclosure." *T.L.S.*, ¶ 28. The Court concluded that the district court erred in applying both the privacy provision of Section 9 and Section 10.

Yet, this rule is precisely what Justice McKinnon utilized to strike the balance in favor of the student's privacy. Although couched in the long-established Article II, Section 9 balancing language, the majority clearly imposed the Section 10 higher burden on disclosure than that contemplated by the right-to-know provision. While this Court in *Krakauer I* announced a heightened standard for students in the balancing test, the majority opinion went a step further and deferred to it. This was error and a basis for rehearing.

II. The Majority's Interpretation of FERPA'S Unnamed Student Standard Is Untenable and Conflicts with Well-Established Right-to-Know Jurisprudence.

In the majority Opinion, the Court faults Krakauer for identifying the student about whom the records pertain. Explaining that FERPA prohibits disclosure of personally identifiable information contained in the requested records, the majority posits that by naming the student the requestor has rendered

redaction futile. According to the majority Opinion, naming the student causes Doe's privacy to "receive no protection at all in the constitutional inquiry and balancing because redaction is futile." Opinion, ¶ 35. As stated earlier, such logic is circular.

Indeed, the flip side of the proposition is also accurate. If the requestor does not name the student, there is no way to establish that the student in question has either waived or has no protectable privacy interest in the records. The effect of this notion is to render all student records private, regardless of the public interest in disclosure.

Such a rule flies in the face of well-established and long-followed right-to know jurisprudence in Montana. FERPA is a federal statute, not a blanket trump card for the protections of Article II, section 9, Mont. Const. Indeed, FERPA has "been given limited scope where [it] conflict[s] with state freedom of information laws"). John E. Theuman, J.D., *Validity, Construction and Application of FERPA*, 112 ALR Fed 1 (West Group 2015).

Under this Court's analytical scheme, the inquiry must first be on whether the person involved had a subjective or actual expectation of privacy. If the person cannot be named there's no way for a requestor to establish: 1) the interest has been waived; 2) by the person's conduct the facts contained in the records have already been disclosed; or 3) what the nature of the privacy interest might be. The Court's ruling-that by naming the student in a records' request, redaction cannot be achieved and FERPA is violated—makes it impossible for a requestor to establish the first prong of the analysis. FERPA would always prevail over

Montana's right-to-know provision. Certainly, the Court did not intend this consequence of its ruling.

Accordingly, the rationale and analysis in the majority Opinion is based on faulty interpretation of FERPA and contradictory to Montana law. It should be revisited.

III. The Court Failed to Address Arguments Essential to the Resolution of the Case

A. The Court Fails to Reconcile its Ruling with FERPA's Court Order and State Law Exceptions

The Court's Opinion fails to address or consider FERPA's "court order" exception in § 1232g which applies regardless of the Act's "personal identifying information" restriction. The majority references this provision in ¶ 19, but does not discuss or reconcile it with its ultimate ruling, nor its previous opinion in *Krakauer I*, ¶ 27, where the Court acknowledged that this exception "broadly permits" the "release of personally identifiable information in education records" without limitation or restriction as to "the legal basis or grounds for release." Krakauer is entitled to a judicial ruling as to why this exception is inapplicable.

The Court also fails to rule on the applicability of § 1232g(b)(2), which explicitly provides that state law governing disclosure is not preempted:

> State law regarding disclosure
>
> Nothing in paragraph (1) shall be construed to supersede any provision of State law that prohibits an institution of higher education

> from making the disclosure described in subsection (a).

In other words, if Article II, Section 9 authorizes the disclosure of personally identifiable information, FERPA does not prohibit the same. Yet the Court does not address this provision, but assumes the applicability of FERPA.

B. The Court Has Failed to Address Krakauer's Threshold FERPA Arguments

In *Krakauer I*, ¶ 47, Justice McKinnon in her dissent faulted the Court for not reaching all of the issues presented to it, such as FERPA preemption and the preliminary question of whether the Act applies to Krakauer's request because there is no established "pattern or practice" at the University of Montana. Indeed, Krakauer has argued all along that the proscriptions in FERPA are triggered only by a systematic policy or practice of releasing student records not an individual instance of non-compliance. Yet, this Court has not explicitly addressed this issue despite noting previously in *Board of Trs. v. Cut Bank Pioneer Press,* 2007 MT 115, ¶ 24, 337 Mont. 229, 160 P.3d 482, that FERPA is merely "spending legislation" and does "not create individual rights" (citing *Gonzaga University v. Doe*, 536 U.S. 273, 279-81 (2002)). Krakauer is entitled to a ruling on these issues.

CONCLUSION

This case is not about Krakauer's desire to obtain Doe's student records and the Court misspoke when it presumed it was. *Opinion*, ¶ 46 ("Krakauer's assertion of his constitutional right to know must be

seen for what it is: Krakauer is only interested in Doe's educational records because Doe is a high-profile athlete. Krakauer wants to know if the Commissioner showed favoritism towards Doe in the handling of Doe's sexual assault investigation because of that status"). Rather, the case is about the state's highest educational tribunal's final decision to reverse a student's expulsion. The public is entitled to know the basis for such a decision, especially when the student involved was accused of rape on campus. As all of the student disciplinary documents have already been released by a federal judge, any cries of "privacy" have long ceased to exist. The only "private" matter kept secret is the Commissioner's decision, which has nothing to do with Doe's privacy interests.

Krakauer has satisfied the prerequisites for the Court's rehearing of this case under Rule 20, M. R. App. P., and respectfully requests the same on any or all of the aforementioned bases.

Dated this 17th day of July, 2019.

By: /s/ Peter Michael Meloy
Attorney for Petitioner