NO. 100598-9

WASHINGTON STATE SUPREME COURT

ERASMUS BAXTER, ASIA FIELDS AND JULIA FURUKAWA,

Respondents,

v.

WESTERN WASHINGTON UNIVERSITY, an agency of the State of Washington,

Respondent,

DOE 3 and DOE 4,

Intervenors-Petitioners.

ANSWER OF RESPONDENT WESTERN WASHINGTON UNIVERSITY

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I. INTRODUCTION

This petition arises from the application of settled legal definitions and exemptions under the Public Records Act (PRA), chapter 42.56 RCW, to the names of two students found to have committed severe student conduct violations at Western Washington University (WWU). The Court of Appeals correctly determined that the records were not exempt from public disclosure under RCW 42.56.230(1), the "student records" exemption, or RCW 42.56.070, the "other statutes" exemption. Sound principles of statutory interpretation, including reference to dictionary definitions, establish that WWU is not a "public school" for purposes of RCW 42.56.230(1). The "other statutes" exemption does not apply to WWU's stand-alone WAC regulations where there is no corresponding and related statutory provision exempting the records from disclosure.

The Family Educational Rights and Privacy Act of 1974 (FERPA), typically protects the confidentiality of student records, but an exception enacted in 1998, the "final results"

exception, allows the release of student names and final results from student disciplinary proceedings tied to findings of crimes of violence or non-forcible sexual offenses under 20 U.S.C. § 1232g(b)(6), 34 C.F.R. § 99.31(a)(14) and 34 C.F.R. § 99.39. FERPA and WWU's WACs provided the students with notice that their records could be released without consent. The "final results" exception is not void for vagueness.

Contrary to the Petitioners' suggestion, neither the law, nor the record in this case supports the notion that the Court of Appeals decision opens the door for the public to acquire the names of any student who has been disciplined by a public university and create a registry of student offenders. The Petitioners have failed to establish either a significant question of constitutional law or an issue of substantial public interest warranting review under RAP 13.4(b)(3) and (4). This Court should deny review.

II. RESTATEMENT OF THE ISSUES

1. Well-settled law and sound principles of statutory construction establish that postsecondary institutions of higher education are not considered "public schools" for the purposes of the PRA exemption in RCW 42.56.230(1). Did the Court of Appeals properly apply this law to hold that student disciplinary records of two university students who committed crimes of violence were not exempt from public disclosure?

2. Did the Court of Appeals correctly hold that stand-alone regulations addressing student conduct and student records do not constitute an "other statute" authorizing an exemption from disclosure under the Public Records Act?

3. Did the Court of Appeals correctly hold that both the Family Educational Rights and Privacy Act of 1974 (FERPA) and WWU's Student Code of Conduct notify students that their student records can be released to the public in some circumstances?

4. Did the Court of Appeals accurately determine that FERPA and its regulations provided fair warning of the types of offenses that if committed, could be disclosed to the public, and thus is not unconstitutionally vague?

III. STATEMENT OF THE CASE

A. Facts and Procedural History

On October 10, 2018, the Western Washington University (WWU) Public Records Office received a public records request from Respondents, student journalists Baxter, Fields, and Furukawa. The request sought "final results, including the student's names, of disciplinary proceedings where [WWU] has determined a student was responsible for a crime of violence or non-forcible sexual offense in the past five years." CP 219.

As an initial response, on November 8, 2018, the Public Records Office sent responsive documents with the names of students redacted. The included exemption log cited RCW 42.56.230, referencing "personal information in any files maintained for students in public schools." CP 219, 222-30. On

May 15, 2019, the journalists filed a complaint in Whatcom County Superior Court alleging that WWU violated the PRA by redacting information that was not exempt from disclosure. CP 1-3.

WWU subsequently determined that RCW 42.56.230(1) did not apply to the requested record and concluded the student names should be released. The Public Records Office notified the affected students of their right to seek injunctive relief pursuant to RCW 42.56.540. CP 220. Seven students responded and WWU and the journalists stipulated to their intervention as John/Jane Does 1 through 7 (Does 1-7) in the PRA lawsuit. CP 200-02. All parties stipulated that WWU would not release the Does 1-7 results without redacting their names until the superior court ruled on whether the names were exempt. CP 200-01.

As part of his due diligence after the lawsuit was filed, the Assistant Dean of Students again reviewed each student's responsive record to re-verify that their behavior fell within the definition of a "crime of violence" or "non-forcible sexual offense"

under the FERPA regulations, 34 CFR § 99.39, and Appendix A thereto. CP 240.

On August 12, 2019, WWU released the names of the students in the responsive record, except for Does 1-7. CP 221. Does 1-7 filed motions for injunctive relief pursuant to RCW 42.56.540, and the journalists filed a cross motion for partial summary judgment. CP 241-46.

On October 22, 2020, the trial court entered an order denying the Intervenor Does 1-7s' motions and granting the journalists' cross motion for partial summary judgment. CP 336-39. The court found that the student names were not exempt under the PRA or FERPA. CP 338. The court prohibited WWU from releasing the un-redacted Does 1-7 information until thirty days after any appeal. CP 338.

The Court of Appeals affirmed in a published opinion, finding that that disciplinary results were not exempt from disclosure under RCW 42.56.230(1) because postsecondary educational institutions are not "public schools" as contemplated

by the statute. *Baxter v. Western Washington University, John Does 2,3,4 and 6*, ___ Wn. App. ___, 501 P.3d 581 (2021).[1] The decision further held that since FERPA allows disclosure of the disciplinary results, FERPA was not applicable as an "other statute" under RCW 42.56.070 of the PRA to exempt the records in this case. Only Doe 3 and Doe 4 now seek review by this Court.

B. Application of FERPA

The Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (FERPA), is the primary law that protects personally identifiable information contained in education records, including student disciplinary records. FERPA imposes requirements on postsecondary institutions nationwide that establish the limits of confidentiality relating to student records.

FERPA generally prohibits educational institutions that receive federal funding from disclosing education records or personally identifiable information within education records

[1] Does 2-6 originally sought direct review in this Court pursuant to RAP 4.2(a)(4). The Court denied direct review.

without the written consent of the student(s)[2] to whom the records pertain. 20 U.S.C. § 1232g; 34 C.F.R. Part 99 (implementing regulations). FERPA's implementing regulations explicitly state that FERPA's focus is "the protection of privacy of parents and students." 34 C.F.R. § 99.2. Universities appropriately rely on FERPA as an "other statute" under RCW 42.56.070(1) when evaluating whether student records can be released pursuant to PRA and other requests without student consent. *See West v. TESC Bd. of Trustees,* 3 Wn. App. 2d 112, 120, 414 P.3d 614 (2018). Apart from stated exceptions, almost all education records are expressly exempt from public disclosure by FERPA. *See generally* 20 U.S.C. § 1232g and 34 C.F.R. § 99.31. However, FERPA's "final results" exception in 20 U.S.C. § 1232g(b)(6) is one of the few types of education records that is not exempt from public disclosure.

[2] FERPA applies to K-12 and higher education institutions.

The Higher Education Amendments Act of 1998 amended FERPA, giving higher education institutions the authority to disclose to anyone the final results of a disciplinary proceeding conducted against a student who is alleged to have committed a crime of violence or non-forcible sex offense and has been determined to have violated the institution's rules pertaining to such offenses. 20 U.S.C. § 1232g(b)(6)(B) and (C). The 1998 amendment does not mandate release of "final results," but it removed a prohibition on release. "Final results" is limited by definition however, to the name of the student, the violation committed, and any sanction imposed by the institution on the student. 20 U.S.C. § 1232g(b)(6)(B) and (C).

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals Applied Well-Established Law and Determined That the Records Were Not Exempt from Public Disclosure

As the Court of Appeals acknowledged, "Washington's Public Records Act (PRA) mandates broad public disclosure. Its exemptions are to be construed narrowly to ensure that the public

interest is fully protected." *Baxter v. Western Washington University,* 501 P.3d 581, 584 (2021). If there is a conflict between the PRA and other statutes, "the provisions of the PRA shall govern." RCW 42.56.030. *Wash. Public Emp. Ass'n v. Wash. State Center for Deafness & Hearing Loss*, 194 Wn.2d 484, 492, 450 P.3d 601 (2019) (*WPEA*) (quoting *Progressive Animal Welfare Soc'y v. Univ. of Wash.,* 125 Wn.2d 243, 261-262, 884 P.2d 592 (1994) (*PAWS*); RCW 42.56.030. The PRA requires agencies to disclose public records following a request unless a record falls within a specific, enumerated exemption or in reliance upon an "other statute which exempts or prohibits disclosure of specific information or records." RCW 42.56.070(1); *WPEA*, 194 Wn.2d at 493.

Two PRA exemptions were at issue below—RCW 42.56.230(1), which exempts "personal information in any files maintained for students in public schools", and the "other statutes" exemption, RCW 42.56.070(1). The Court of Appeals correctly held that neither exemption applied in this case.

B. WWU Is Not a "Public School" Under RCW 42.56.230(1)

The "public school" records exemption to the PRA cited by Petitioners does not apply here. RCW 42.56.230(1) exempts from public disclosure "[p]ersonal information in any files maintained for students in public schools." RCW 42.56.230(1). The Court of Appeals applied well-established rules of statutory interpretation and determined that RCW 42.56.230(1), the "student records exemption" does not apply to the records in this case because the term "public schools" as used in the exemption does not include postsecondary educational institutions such as WWU. *Baxter,* 501 P.3d at 584.

The Does continue to allege that the phrase "public school" as used in the statutory exemption includes universities such as WWU. The only disputed issue related to RCW 42.56.230(1) is whether WWU is a "public school."

The PRA does not define "public school." The Does, without citing legal authority, argue that the term "public school"

as used in RCW 42.56.230(1) should be given its "common (rather than technical) meaning when considering this section." Petition at 20. As the Court of Appeals noted, the Petitioners effectively dismember the statutory phrase, arguing for separate definitions of "school" and "public." *Baxter,* 501 P.3d at 588.

In the absence of a statutory definition, the Court of Appeals correctly looked to the plain and ordinary meaning of the term "public school" by reference to a standard dictionary. *Baxter,* 501 P.3d at 588; *Cornu-Labat v. Hosp. Dist. No 2 Grant County,* 177 Wn.2d 221, 231, 298 P.3d 741 (2013); *State v. Sullivan,* 143 Wn.2d 162, 174, 19 P.3d 1012 (2001). The Court applied standard rules of statutory construction and considered the ordinary meaning of words, basic grammar rules, the statutory context, and related statutory provisions. *Baxter,* 501 P.3d at 588, citing *Citizens Alliance for Property Rights Legal Fund v. San Juan County,* 184 Wn.2d 428, 435, 359 P.3d 753 (2015); *Cornu-Labat*, 177 Wn.2d at 231. Importantly, the Court noted, "individual words should not be read in isolation; the plain

meaning of two words used in sequence is sometimes more than the simplest and broadest meaning of those words when viewed individually." *Baxter,* 501 P.3d at 588, citing *State v. K.L.B.,* 180 Wn.2d 735, 742, 328 P.3d 886 (2014), and *State v. Roggenkamp,* 153 Wn.2d 614, 623, 106 P.3d 196 (2005). Further, "The plain and precise meaning of two words used in conjunction is part of the context recognized under the plain meaning rule." *Id.*

Applying these standard rules, the Court relied on the Webster's Third International Dictionary definition of "public school":

> [(1)(a)] any of various endowed secondary boarding schools in Great Britain offering a classical curriculum and preparing boys [especially] for the ancient universities or for public service. [(b)] a similar school for girls. [(2)(a)] a tax-supported school controlled by a local government authority; [specifically] an elementary or secondary school in the U.S. providing free education for the children of residents in a specific area [and (b)] the building housing a public school.

Webster's Third New International Dictionary 1836 (2002). *Baxter*, 501 P.3d at 589.

Consistent with established rules of statutory construction, the Court of Appeals acknowledged the Washington Legislature's recognition of the divide between higher education, governed by RCW 28B, and RCW 28A, governing elementary or secondary schools, grades K-12. RCW 28A.150.010 defines "public schools" to exclude universities from the definition:

> Public schools means the common schools as referred to in Article IX of the state Constitution, charter schools established under chapter 28A.710 RCW, and those schools and institutions of learning **having a curriculum below the college or university level** as now or may be established by law and maintained at public expense.

RCW 28A.150.010 (emphasis added). *Baxter,* 501 P.3d at 589. The statutes governing colleges and universities are in a separate title, RCW 28B. WWU is a "regional university" that is defined by statute as an "institution of higher education" and a "postsecondary institution." RCW 28B.10.016 (2), (4).

"The Legislature is presumed to have full knowledge of existing statutes affecting the matter upon which they are legislating." *State v. Conte,* 159 Wn.2d 797, 808, 154 P.3d 194

(2007) (applying the presumption to the voters who adopted I-276, the Public Disclosure Act) (citations omitted). Nothing in the plain language of RCW 42.56.230(1), relevant dictionary definitions, related education statutes or case law indicates that the term "public school" as used in RCW 42.56.230(1) was intended to contradict the definition in RCW 28A.150.010 or otherwise apply to postsecondary institutions.

The Court of Appeals correctly determined that the records were not exempt from public disclosure under RCW 42.56.230(1). Petitioners have failed to establish a basis for review.

C. *Lindeman v. Kelso* Does Not Apply to Education Records at a University

The Does and WWU agree that the student disciplinary records are "records in files maintained for students" for purposes of RCW 42.56.230(1). The journalists lack standing to seek review of this issue under RAP 3.1. Their invocation of *Lindeman v. Kelso,* 162 Wn.2d 196, 172 P.3d 329 (2007), is not

a compelling reason to review this case. Analysis of *Lindeman* is not required to resolve the issues before this Court; it is only relevant to cases involving "public schools".

Lindeman involved whether former RCW 42.17.310(1)(a), recodified as RCW 42.56.230(1), exempted a surveillance video from a public elementary school bus that captured two students in an altercation. *Lindeman,* 162 Wn.2d at 199. The parties did not dispute that the elementary school was a "public school" for purposes of RCW 42.56.230(1). The primary question was whether the video, filmed to provide security and safety on school buses, was a record maintained in a student's personal file. *Id.* at 203. The Court held that "the videotape was not, and could not have been legally withheld as a student file document under former RCW 42.17.310(1)(a)." *Id.* at 204.

The school bus videotape was the only record at issue in *Lindeman.* The case does not address whether individual student discipline records are part of each student's personal file. But within the bounds of FERPA, personally identifiable information

relating to students is protected no matter where it is held in the institution. As the Court of Appeals correctly noted: "Along with assessments, achievements and evaluations, a disciplinary record that a student committed a serious violation of the student code of conduct would logically and reasonably be located in student's permanent file." *Baxter,* 501 P.3d at 588. The journalists' arguments regarding *Lindeman* do not form a basis for review.

D. WWU WAC Regulations Are Not an "Other Statute" Under RCW 42.56.070(1).

The Does argue that WAC 516-21-310 and WAC 516-26-070, sections of WWU's student code of conduct and student records rules, qualify as an "other statute" that "exempts or prohibits disclosure of specific information or records" under the PRA, RCW 42.56.070(1). Petition at 20-22. The Court of Appeals correctly analyzed and applied existing case law, holding that WAC regulations alone do not constitute an "other statute" under RCW 42.56.070(1) when there is no

corresponding and related statutory provision exempting the records from disclosure. *Baxter,* 501 P.3d at 593.

Consistent with the Court of Appeals and contrary to the Does' argument, *White v. Clark County,* 188 Wn. App. 622, 354 P.3d 38 (2015), does not hold that a state agency regulation standing alone constitutes an "other statute" under RCW 42.56.070(1). *White* is factually unique and inapplicable to this case. The *White* court held that, in the context of pre-tabulated election ballots, the combination of article VI, § 6 of the Washington Constitution, specific sections of RCW Title 29A, and Secretary of State regulations together constitute an "other statute" exemption to the PRA under RCW 42.56.070(1). It concluded that the County did not violate the PRA by not disclosing the pre-tabulated ballot images. *White*, 188 Wn. App. at 636-37.

The Does reliance upon *Mills v. WWU,* 170 Wn.2d 903, 246 P.3d 1254 (2011) is also not instructive. *Mills* is not a public records case and has nothing to do with WAC regulations. The

Mills holding addressed the closure of a faculty disciplinary proceeding under the APA, RCW 34.05. *Mills*, 170 Wn.2d at 913.

The Court of Appeals correctly held that the WWU regulations standing alone do not constitute an "other statute" under RCW 42.56.070(1). The regulations are not supported by a corresponding or related statutory provision mandating that un-redacted disciplinary records are exempt from public disclosure.

E. The Doe Intervenors Fail to Raise an Actionable Due Process Claim

The Court of Appeals correctly determined that Does 3 and 4 failed to establish an actionable due process claim because the Does received adequate notice that the results of disciplinary proceedings could be disclosed to the public. A reviewing court should not decide a constitutional issue unless it is absolutely necessary to the determination of the case. *State v. Hall,* 95 Wn.2d 536, 539, 627 P.2d 101 (1981). A decision on constitutional issues is not required here.

In *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975) the United States Supreme Court held that within disciplinary hearings, students are only entitled to minimal due process protections. They are entitled to "some kind of notice" and "some kind of opportunity for a hearing." *Goss*, 419 U.S. at 574. The Petitioners have failed to cite to any authority indicating that they have a greater due process right to notice that the records resulting from such disciplinary hearings may be subject to disclosure in response to an appropriate PRA request.

As the Court of Appeals correctly found, the applicable regulations, WAC 516-26-070 (student records), the FERPA regulations, and WAC 516-21-310 (student conduct code) contain multiple provisions providing Does 3 and 4 with notice that the confidentiality of their conduct records was subject to the limitations of the law. WWU's WACs likewise implement and incorporate FERPA. *Baxter,* 501 P.3d at 594.

WAC 516-26-010 states that the purpose of WWU's student records policy "is to establish rules and procedures that

appropriately implement the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g." Under this WAC, the University is "committed to safeguarding appropriate access to student education records as well as maintaining individual student privacy." WAC 516-26-010. The Does argue that this WAC and the Student Conduct Code, WAC 516-21 provide them a promise of confidentiality and failed to notify them that their individual records might be released. Petition at 21-22. Based upon the plain language of the WACs and FERPA's numerous exceptions to nondisclosure of education records, this is simply incorrect. Further, the University lacks the authority to enact rules that guarantee such confidentiality. *Brouillet v. Cowles Publ'g. Co.,* 114 Wn.2d 788, 794, 791 P.2d 526 (1990)

FERPA, the law that WAC 516-26 implements, has included the "final results" exception since 1998. This exception allows WWU to release the name of the student, the violation committed, and any sanction imposed by the institution on the

student without student consent due to the extremely serious nature of the violations. 20 U.S.C. § 1232g(b)(6)(B) and (C); 34 C.F.R. § 99.31(a)(14)(i); 34 C.F.R. § 99.39. The PRA request in this case mirrored the language of the "final results" exception. CP 219. Even the Montana case cited by Petitioners recognized that FERPA exceptions can provide students with adequate notice that their records may be released to the public. *Krakauer v. State*, 396 Mont. 247, 256, 445 P.3d 201 (2019); *Baxter*, 501 P.3d at 594.

The FERPA regulations also require institutions to provide students with an annual notification of rights. 34 C.F.R. § 99.7. WAC 516-26-100 is WWU's outward-facing implementation of this requirement. This rule requires the University to "annually notify students currently in attendance of their rights under this chapter and the Family Educational Rights and Privacy Act." WAC 516-26-100. These student rights include the right to review and inspect their education records, the right to request an amendment to correct their records, and

the right to "allow or deny disclosures of personally identifiable information contained in the student's education record, **except to the extent that these regulations and the regulations promulgated pursuant to the Family Educational Rights Act allow**." WAC 516-26-100(1)-(3) (emphasis added).

The plain language of WAC 516-26-100 provides students notice that the privacy of their records is subject to FERPA. Based upon the fact that the notification is required annually, and specifically incorporates the FERPA regulations, the students had notice that FERPA regulations imposed limitations to the protections of their records. The Court of Appeals correctly ruled that the Does failed to establish an actionable due process claim because they received adequate notice that the records at issue could be subject to public disclosure.

The Does also argue that Chapter 516-21 promises confidentiality of their records. Petition at 20, 27. But WAC 516-21-310 makes no such promise, rather, it specifies that the confidentiality of conduct records will be "maintained in

compliance with the student records policy [WAC 516-26-070]" and "all applicable state and federal laws." WAC 516-21-310(1). Applicable federal laws include FERPA. Applicable state laws include the PRA.

The Does argue that the Court of Appeals relied upon the wrong version of the WAC 516-21 in determining they had notice, but under either the 2011 version of the Student Conduct Code cited by the Does or the 2018 version cited by the Court of Appeals, WAC 516-21-310(1) provided the Does with notice that the confidentiality of their records was subject to limitations imposed by state and federal law. CP 151, *Baxter,* 501 P.3d 593. Both versions also refer back to the student records policy that explicitly notifies students that their ability to deny disclosures of personally identifiable information in their student records is limited by the FERPA regulations and state law. WAC 516-26-100(3). CP 163.

Finally, WWU has public records rules in Chapter 516-09. These rules state that the university complies with FERPA, and

"these rules will be interpreted in favor of disclosure." *See* WAC 516-09-010(3), -060(1)(b).

The Court of Appeals correctly determined that the Does had adequate notice that their records may be released to the public under some circumstances. The Does have failed to raise a significant question of constitutional issue as required by RAP 13.4(b)(3).

F. FERPA Is Not Void for Vagueness

The Petitioners have also failed to establish that the FERPA "final results" exception 20 U.S.C. § 1232g(b)(6)(B) is constitutionally void for vagueness. Petition at 23. The exception has been in effect since 1998 and remains constitutionally sound. The Fifth Amendment Due Process Clause prohibits the Government from "taking away someone's life, liberty or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or is so standardless that it involves arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595-596, 135 S. Ct. 2551, 192 L.

Ed. 2d 569 (2015). Petitioners raise only a facial challenge to the statute; their argument carries a high burden. "A facial challenge to a legislative Act is, of course the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Solerno,* 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). Statutes are presumed to be constitutional. *Neravetla v. Dep't of Health*, 198 Wn. App. 647, 662, 394 P.3d 1028 (2017) (citing *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 818 P.2d 1062 (1991)). A party wishing to challenge a statute's constitutionality on vagueness grounds has the burden to prove vagueness beyond a reasonable doubt. *Neravetla,* 98 Wn. App. at 647.

In the absence of any cases holding that the FERPA "final results" exception is void for vagueness, the Does rely on a federal criminal case and a federal removal case in support of their argument, *Johnson v. United States*, 576 U.S. at 595-596, and *Sessions v. Dimaya,* ___ U.S. ___, 138 S. Ct. 1204, 1213,

200 L. Ed. 2d 549 (2018). They also acknowledge that "[t]he degree of vagueness the Constitution tolerates . . . depends in part on the nature of the enactment." Petition at 24, *Baxter,* 501 P.3d at 592.

Neither a criminal statute nor a removal statue is at issue here. The "final results" exception does not proscribe the Doe's behavior at all. Instead, 20 U.S.C. § 1232g(b)(6)(B) and (C) is part of a robust set of federal statutes directed at educational institutions. This section directs the behavior of postsecondary institutions regarding the release of certain disciplinary records in the absence of student consent. The Court of Appeals accurately pointed out that "unlike the statutes at issue under the facts of *Johnson* and *Dimaya*, the cases relied upon by Petitioners, FERPA and the PRA do not similarly require the court "to picture the criminal offenses that violate them." *Baxter*, 501 P.3d at 592. Relying on established case law, the Court held that it can consider both the statutory scheme and regulations implementing the FERPA "final results" exception. *Baxter,* 501

P.3d at 592, citing *King County Dep't of Adult and Juvenile Det. v. Parmalee,* 162 Wn. App. 337, 355, 254 P.3d 927 (2011), *West v. TESC Bd. of Trustees,* 3 Wn. App. 2d at 120, 123, 414 P.3d 614 (2018).

The Department of Education regulations specifically define non-forcible sexual offenses and crimes of violence, even listing specific crimes, for purposes of the "final results" exception. 34 C.F.R. § 99.31(a)(14), 34 C.F.R. § 99.39 and Appendix A. "Crimes of Violence" are specifically listed and include "forcible sex offenses." 34 C.F.R. § 99.39. Non-forcible sex offenses are acts which, if proven, would constitute statutory rape or incest. 34 C.F.R. § 99.39. Each of these offenses is further defined in Appendix A to 34 C.F.R. § 99.39.[3] The Court of Appeals correctly concluded that the "final results exception" to FERPA is not void for vagueness because it "provides fair

[3] *See* 65 Fed. Reg. 41,851, 41,854 (July 6, 2000).

warning of the offenses that, if committed, could be disclosed." *Baxter*, 501 P.3d at 593.

G. This Petition Fails to Raise an Issue of Substantial Public Interest

This petition does not raise an issue of substantial public interest. The Doe's argument that administrators at institutions of higher education need to rely on WAC regulations to support the expectations of student confidentiality in disciplinary proceedings fails.

Since 1974, FERPA has provided robust protection for student records and in the vast majority of student conduct cases, protects personally identifiable information, such as student names in education records, from public disclosure. However, FERPA allows the release of student names and final results in university conduct records tied to findings of crimes of violence or non-forcible sexual offenses under 20 U.S.C. § 1232g(b)(6), 34 C.F.R. § 99.31(a)(14) and 34 C.F.R. § 99.39. All students are on notice that if they commit certain acts, limited portions of their

records, including their names, may be subject to public disclosure.

The "final results" amendment evidences a balancing by Congress of student privacy in educational disciplinary records versus public interests in campus safety. *See United States v. Miami Univ.*, 294 F.3d 797, 813 (6th Cir. 2002). This Petition for Review fails to raise an issue of substantial public interest; the interests involved have been legislated and protected for decades.

Contrary to the Does assertions, they did not "agree to participate" in the student conduct proceedings based upon a promise of confidentiality. Petition at 3, 6. The Does have never challenged that they, along with all other students, are subject to the code of conduct and resulting proceedings for conduct violations by virtue of their enrollment at WWU. WAC 516-21-010.

At this phase in the case, all that is at issue is whether the names of Doe 3 and Doe 4—students who committed crimes of violence under the WWU student conduct code—can be released

to the Journalists. Neither the law, nor the record in this case support the Students' suggestion and fear that the Court of Appeals decision somehow will authorize the public to acquire the names of any student who has been disciplined by a public university and thereby create a registry of student offenders. Petition at 12. Neither does the law or the record support the contention that the Court of Appeals decision could result in hundreds or thousands of University students losing their expectations of confidentiality in student discipline processes. Petition at 13. This Petition fails to raise an issue of substantial public interest as required under RAP 13.4(b)(4).

V. CONCLUSION

The Petitioners have failed to establish a basis for review under RAP 13.4(b)(3) or (4). This Court should deny review.

This document contains 4,926 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 25th day of March, 2022.

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DATED this 25th day of March 2022.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Schhim

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March 25, 2022 - 3:28 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	100,598-9
Appellate Court Case Title:	Erasmus Baxter, et al. v. John Does 3 and 4
Superior Court Case Number:	19-2-00855-1

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