No. 100598-9

WASHINGTON SUPREME COURT

ERASMUS BAXTER, ASIA FIELDS and
JULIA FURUKAWA,

Respondents,

v.

WESTERN WASHINGTON UNIVERSITY,

Respondent,

JOHN DOE 3 and JOHN DOE 4,

Intervenors-Petitioners.

ANSWER OF RESPONDENTS BAXTER ET AL. TO PETITION FOR REVIEW

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I. INTRODUCTION

Respondent Journalists Baxter, Fields and Furukawa (hereafter "Journalists") submit the following answer to the *Petition for Review* filed by Doe3 and Doe 4.

Because the Court of Appeals ruled that the records at issue were not exempt under the Public Records Act, Chap. 42.56.RCW (PRA), the respondent Journalists are not aggrieved parties for purposes of RAP 3.1, and do not seek further review by this Court. Journalists express no opinion on the question of whether Western Washington University (WWU) is a "public school" for purposes of RCW 42.56.230(1), but maintain that the student offense records at issue are not exempt under that exemption as interpreted by this Court in *Lindeman v. Kelso*, 162 Wn.2d 196, 172 P.3d 329 (2007).

Because the Court of Appeals reversed the trial court's ruling that the records were not exempt under RCW 42.56.230(1), if the Court grants review then the Court must also

address the Court of Appeals' interpretation of RCW 42.56.230(1) and *Lindeman*, *supra*.

The remaining issues raised in the *Petition*—regarding notice, vagueness, and the effect of various WAC regulations—are meritless, and were correctly rejected by both the trial court and the Court of Appeals. Even if the Court were to grant review on the question of the correct interpretation of RCW 42.56.230(1), the other issues raised by Does do not warrant further review.

II. RESPONSE TO STATEMENT OF THE CASE

A. The student offense records at issue, which involve both perpetrators and victims of violent crimes, were *not* in files maintained for any particular student. They are reports generated by software program that deals with student conduct.

WWU produced a table of student violent offenses and the discipline imposed for each offense, and another table of student sexual offenses and the discipline imposed. CP 261-265. WWU redacted the students' names from both tables. CP 261-265.

WWU's exemption log asserted that the names of the students were exempt under RCW 42.56.230(1). CP 266.

The resulting tables list numerous violent and/or sexual offenses by different students. Each such offense necessarily involved another person as the victim. These tables obviously are not part of any particular student's files. CP 261-265, 269-274. On the contrary, the tables are reports generated by a student conduct management program called Simplicity Advocate. CP 278. That software program deals with student conduct, not student educational records. CP 282-283.[1]

[1] Does erroneously suggest that the redacted tables of student offenses were new records that WWU was not required to "create" in response to a PRA request. *Petition* at 7 n.3. It is undisputed that the information contained in WWU's student conduct management database is a public record that must be produced to Journalists in one form or another. This issue was not addressed in the trial court, and is not properly before this Court under RAP 2.5(a). Furthermore, under RCW 42.56.540 the appellant Does only have standing to seek to enjoin the release of information or records that specifically pertain to the Does. *See* CP 29 (allowing Does to intervene to assert their rights under RCW 42.56.540. Does do ***not*** have any standing to object to the manner in which WWU produced public records to Journalists.

B. The Does were never promised that their offense records would remain confidential.

The Does' assertions that they were provided "assurances of confidentiality" by WWU or were "promised" that the outcome of these disciplinary proceedings would remain "confidential," Petition at 6, 8, 12, are simply false. The only evidence in the record shows that Doe 3 was specifically and explicitly warned that his or her disciplinary records could be released in response to a PRA request:

> 2. WWU shall not voluntarily or volitionally publicize or provide comment to third parties regarding said disciplinary action or its record [including a 20 U.S.C. 1232g(a)(6)(b) disclosure] and Mr. [redacted] agrees not to disparage the conduct or performance of WWU, its officers, employees or agents or initiate communication with or disparage the complainant in said disciplinary action; EXCEPT THAT nothing in this provision shall prevent either party, or an employee or agent of a party, from a) seeking legal or financial advice or assistance regarding meeting the terms or obligations of this agreement; or b) meeting any legal obligations arising under the Freedom of Information Act, 5 U.S.C. § 552, the Washington State Public Disclosure Act, RCW 42.56, or other lawful exercise of statutory or common law right of action, subpoena or court order.

CP 182; **Appendix**. The other Does, who also bear the burden of proof under RCW 42.56.540, have failed to produce any evidence of any alleged promises of confidentiality by WWU. Consequently, it is an undisputed fact that the Does were ***not*** promised confidentiality.

C. Court of Appeals decision:

The Court of Appeals affirmed the trial court on different grounds. First, the Court of Appeals held, contrary to the narrow construction required by *Lindeman*, *supra*, that the student offense records were "in files maintained for students" for purposes of RCW 42.56.230(1). B*axter et al v. WWU*, __ Wn. App. ___, ___ P.3d ___ (December 27, 2021) ("*Opinion*") at 10. But the Court then held that WWU was not a "public school" for purposes of this exemption anyway, affirming the trial court's ruling that the records are not exempt. *Id.* at 16. It is unclear why the Court did not address the "public school" issue first, and its interpretation of *Lindeman* is arguably dicta.

The Court of Appeals correctly rejected the Does' arguments regarding notice, vagueness, and the effect of various WAC regulations. *Opinion* at 16-24.

III. ARGUMENT

A. Journalists take no position on whether or not Western Washington University is a "public school" for purposes of RCW 42.56.230(1).

The main legal issue in this case is whether the student offense records are exempt from disclosure under RCW 42.56.230(1). That section provides:

> The following personal information is exempt from public inspection and copying under this chapter:
>
> (1) Personal information ***in any files maintained for students*** in public schools, patients or clients of public institutions or public health agencies, or welfare recipients… (Emphasis added).

RCW 42.56.230(1). The trial court agreed with journalists that the student offense records were not exempt under RCW 42.56.230(1) because those records were not "in files maintained for students" as interpreted in *Lindeman v. Kelso*, 162 Wn.2d 196. RP (8/10/20) at 3-5; CP 338.

Respondent WWU also argued that WWU was not a "public school" for purposes of RCW 42.56.230(1). Journalists did not address that alternative argument, which the trial court

rejected. WWU raised the issue on appeal, and the Court of Appeals agreed with WWU, ruling that WWU was not a "public school." *Opinion* at 16.

Consistent with their position in the lower courts Journalists take no position on whether or not WWU is a "public school" for purposes of RCW 42.56.230(1).

B. The Court of Appeals failed to interpret RCW 42.56.230(1) narrowly as required by both the PRA and *Lindeman v. Kelso*, 162 Wn.2d 196, 172 P.3d 329 (2007).

The records at issue are reports of student offenses generated by a software program that deals with student conduct, not student educational records. CP 282-283. The trial court correctly concluded that these records are not exempt under RCW 42.56.230(1) because the records are ***not*** "in files maintained for students" for purposes of that exemption:

> The following personal information is exempt from public inspection and copying under this chapter:
>
> (1) Personal information **in any files maintained for students** in public schools, patients or clients of public institutions or public health agencies, or welfare recipients; (Emphasis added).

RCW 42.56.230(1).

The trial court's ruling was entirely consistent with this Court's decision in *Lindeman v. Kelso*, 162 Wn.2d 196, 172 P.3d 329 (2007). In that case parents of Kelso students sought disclosure of a surveillance videotape on a school bus that recorded an altercation between two students. The lower courts interpreted RCW 42.56.230(1) broadly, erroneously concluding that the videotape was exempt. Reversing in favor of the requestors, this Court held that, under the narrow construction required by the PRA, RCW 42.56.230(1) only applied to student files and not to other records in which students were mentioned:

> Mindful that the PDA requires exemptions to disclosure be construed narrowly, information peculiar or proper to private concerns constitutes personal information for purposes of the student file exemption, as are employee evaluations…
>
> The student file exemption does not exempt any and all personal information—it only exempts personal information "in any files maintained for students in public schools." Thus, we construe the student file exemption narrowly, in accordance with the directive of the PDA, by exempting information only when it is both "personal" and "maintained for students." (Citations omitted).

Lindeman, 162 Wn.2d at 202. This Court further clarified that such records are ***not*** exempt under RCW 42.56.230(1) regardless of where the record is actually kept:

> Here, the surveillance camera serves as a means of maintaining security and safety on the school buses. The videotape from the surveillance camera differs significantly from the type of record that schools maintain in students' personal files. Merely placing the videotape in a location designated as a student's file does not transform the videotape into a record maintained for students.

Lindeman, 1162 Wn.2d at 203. Under *Lindeman*, RCW 42.56.230(1) the student offense tables are neither "personal" nor "in files maintained for students."

The Court of Appeals reached the opposite result by failing to interpret RCW 42.56.230(1) narrowly. The Court of Appeals mischaracterized records of violent offenses involving victims as only a "disciplinary record" of a student, and assumed, without any factual basis in the record, that such disciplinary records must be in the same student files as student academic records. *Opinion* at 10.

If this Court grants review then the Court should reverse the Court of Appeals and reinstate the trial court's ruling that the student offense records are not exempt under RCW 42.56.230(1).

C. Alleged lack of actual notice to Does that their disciplinary offenses might be disclosed does not violate "due process" or make the names of the Does exempt from disclosure.

The confidentiality of student offense records is specifically addressed in the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (FERPA). This statute generally prohibits institutions that receive federal funds from disclosing certain records without the consent of the student.[2]

However, since 1998 this statute has explicitly permitted certain records of violent or sexual offenses to be released to anyone:

[2] Technically this section does not prohibit the disclosure of anything. Instead, FERPA prohibits federal funding to institutions that do not comply with the restrictions of the section. 20 U.S.C. § 1232g(b)(1). Nonetheless, Washington courts have held that FERPA is an "other statute" exemption incorporated into the PRA under RCW 42.56.070(1). *West v. Evergreen State College*, 3 Wn. App. 2d 112, 124, 414 P.3d 614 (2018).

> (6)(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), 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.

20 USC § 1232g(b)(6); Pub. L. 105-244 § 951 (1998). This exception for certain information about certain student offenses shows that the Congress has already weighed the competing public policies and determined which information and records may be produced:

> Congress also determined that, if the institution determines that an alleged perpetrator violated the institution's rules with respect to any crime of violence or nonforcible sex offense, then **the alleged perpetrator's privacy interests are trumped by the public's right to know about such violations.** In so doing, Congress acknowledged that student disciplinary records are protected from disclosure but, based on competing public interests, carefully permitted schools to release bits of that information while retaining a protected status for the remainder.

United States v. Miami Univ., 294 F.3d 797, 813 (6th Cir. 2002).

The records requested by the Journalists fall squarely within the exception created by 20 U.S.C. § 1232g(b)(1) (FERPA). CP 144. WWU determined that the Does' offenses were within the FERPA exception for sexual crimes and crimes of violence. CP 240. There is no contrary evidence, and none of the Does ever attempted to show otherwise. *Opinion* at 5.

Despite the fact that FERPA, 20 U.S.C. § 1232g(b)(1), unambiguously permits WWU to release the student offense records, the Does argue that their due process right to notice was violated because they were promised confidentiality. *Petition* at 13-16. **This argument fails, first and foremost, because it is factually false.** As explained in section II(B) (above), Doe 3 was specifically and explicitly warned that his or her disciplinary records could be released in response to a PRA request. CP 182; **Appendix**. Doe 4, who bears the burden of proof under RCW 42.56.540, has failed to produce any evidence of any alleged promises of confidentiality by WWU. Consequently, it is an

undisputed fact that the Does were ***not*** promised confidentiality by WWU.

The Does erroneously assert that the Court of Appeals refused to follow *Krakauer v. State*, 296 Mon. 247, 396 P.3d 201 (2019). *Petition* at 15. In Krakauer, the Montana Supreme Court held that student records ***other than*** the records subject to 20 USC § 1232g(b)(6) (FERPA) were exempt from public disclosure under Montana law, in part because of a lack of notice to the students. The *Krakauer* court held that, under Montana law, the student had an expectation of privacy in his educational records because he had no notice that such records would be disclosed. 396 P.3d at 208.

However, the *Krakauer* court also noted that, in contrast to educational records, 20 USC § 1232g(b)(6) provides students with notice that limited information about student offenses may be disclosed under FERPA:

> [T]he 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…. 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." (Emphasis added; citations omitted).

396 P.3d at 207. As the *Krakauer* court noted, FERPA itself gives students notice that their disciplinary offenses may be disclosed under 20 USC § 1232g(b)(6). The Court of Appeals below correctly followed *Krakauer* in holding that the FERPA exception itself provides notice that student offense record may be released. *Opinion* at 24. The Court of Appeals also noted that various provisions of Chap. 516-26 WAC provide additional notice that there are exceptions under which student offense records may be released. *Id*.[3]

[3] The Does note that the 2015 version of WAC 516-21-310 did not include the language "or as required by law or court order," and that the Court of Appeals cited a more recent version of that regulation. *Opinion* at 15-16.

Finally, the Does have not provided any legal authority to support their underlying assumption that students have a due process right to actual notice that their disciplinary records might be disclosed. Nor have the Does provided any legal authority to support their unwarranted assumption that the remedy for a violation of due process by WWU would be to withhold public records from the Journalists. "Such naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970).

D. FERPA is not unconstitutionally vague.

The lower courts correctly rejected the Does' argument that the phrase "nonforcible sex offense" in 20 USC § 1232g(b)(6) is unconstitutionally vague. The Court of Appeals correctly concluded that FERPA provides "fair warning of the offenses that, if committed, could be disclosed." *Opinion* at 21.

This error is immaterial because, as noted in *Krakauer*, FERPA itself provides notice that some student offense records may be released.

The Does' vagueness argument fails for two additional reasons that the Court of Appeals did not address. First, as the Court of Appeals noted, the degree of vagueness that the Constitution tolerates, as well as the relative importance of fair notice and fair enforcement, depends in part on the nature of the enactment. *Opinion* at 19; *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 362 (1982) (rejecting vagueness challenge to regulation of sales of drug paraphernalia). The cases relied on by the Does all deal with vagueness challenges to (i) criminal prosecution, (ii) the severe sanction of deportation or (iii) restrictions on First Amendment rights.[4] The Does have no authority to support their erroneous

[4] *See Johnson v. United States*, 576 U.S. 591, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015) (criminal sentence); *Sessions v Dimaya*, __ U.S. __, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018) (deportation); *Alphonsus v. Holder*, 705 F.3d 1031 (9th Cir. 2012) (deportation); *Connally v. General Constr. Co.*, 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 2d 322 (1925) (criminal statue); *Jordan v. De George*, 341 U.S. 223, 71 S. Ct. 703, 95 L. Ed. 886 (1951) (deportation) ;*Greyned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) (picketing); *United States v. Davis*, __ U.S. __, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019) (criminal statute).

assumption that the same strict standards for vagueness also apply to whether or not WWU can release its own public records to a third party. Such unsupported constitutional arguments do not merit this Court's consideration. *Phillips*, 433 F.2d 1364.

Second, because the Does have not indicated what their particular disciplinary offenses actually were, the Does can make only a meritless ***facial*** challenge to 20 USC § 1232g(b)(6). Assuming, *arguendo*, that the Does have a due process right to make a facial challenge to the alleged vagueness of the statute, the Does' facial vagueness challenge fails because the phrase "nonforcible sex offense" is not impermissibly vague in all of its applications. *Hoffman Estates*, 455 U.S. at 497. The phrase "nonforcible sex offense" unambiguously applies to a number of sex offenses codified in Chap. 9A.44 RCW and/or WAC 516-21-180.

E. The Does' names and offenses are not exempt under Chap. 516-21 WAC or Chap. 516-26 WAC.

The Does argue that the tables of student offenses are exempt under WAC 516-21-310(1) (conduct records) and WAC

516-26 070 (student records). *Petition* at 20-23. The Court of Appeals correctly concluded that neither provision prevents the disclosure of student offenses authorized by 20 USC § 1232g(b)(6).

1. WAC 516-21-310(1) permits the disclosure of student conduct records in response to a PRA request except as restricted by FERPA.

The plain language of WAC 516-21-310 shows that student offense records are ***not*** exempt from disclosure under the PRA:

> **Confidentiality of conduct proceedings and records.**
>
> (1) The confidentiality of all conduct proceedings and records will be maintained in compliance with the student records policy, as well as all applicable state and federal laws. Conduct records prepared by a conduct officer, the appeals board, and/or the dean of students: …
>
> (b) Will not be shared with any member of the public, except upon the informed written consent of the student(s) involved or as stated in the student records policy, ***or as required by law*** or court order. (Emphasis added).

WAC 516-21-310. The exception for disclosures "required by law" recognizes that student disciplinary records are public records subject to disclosure under the PRA. *See* RCW 42.56.030 (PRA supersedes conflicting statutes).

The settlement agreement between Doe 3 and WWU proves this point: Doe 3 was explicitly warned that records could still be released to the public under the PRA. CP 182; **Appendix**. Contrary to the Does arguments, WAC 516-21-310(1) merely restricts WWU's ability to voluntarily release student conduct records; it does ***not*** relieve WWU of its obligations to comply with the PRA. That is why the Does have ***no evidence*** of any promise by WWU that these records would not be released in response to a PRA request.

The Does note that the phrase "or as required by law" was added to WAC after 2015. *Petition* at 22. That is irrelevant for two reasons. First, as the Court of Appeals correctly held, WWU has no legal authority to create "other statute" exemptions under the PRA. *Opinion* at 23 (citing *White v. Clark County*, 188 Wn.

App. 622, 635-36, 354 P.3d 38 (2015)). Even if WAC 516-21-310(1) purports to create a PRA exemption that WAC provision is *ultra vires*. Second, it is undisputed that Doe 3 was warned that his or her disciplinary records could be released in response to a PRA request. CP 182; **Appendix**. There is no evidence to suggest that Doe 4 was not given the same warning.

2. WAC 516-26-070 only applies to "education records" as defined in WAC 516-26-020(a). Any broader interpretation of WAC 516-26-070 would be *ultra vires*.

The Does' reliance on WAC 516-26-70 fails for the same reason as WAC 516-21-310(1): WWU has no authority to create "other statute" exemptions by promulgating a WAC regulation. *Opinion* at 23 (citing *White*, *supra*).

Additionally, the Does erroneously assume that any WWU record that mentions any student by name is an "education record" for purposes of WAC 516-26-070. *Petition* at 21. Chapter 516-26 WAC addresses the confidentiality of student "education records," ***not*** student conduct records:

> The university shall not permit access to or release of a student's ***education records*** or personally identifiable information contained therein to any person without the written consent of the student, except as provided in WAC 516-26-080, 516-26-085, or 516-26-090. (Emphasis added).

WAC 516-26-070. The phrase "education records" is narrowly defined as follows:

> (2)(a)(i) "***Education records***" shall refer to those records, files, documents and other materials maintained by Western Washington University or by a person acting for Western Washington University which contain ***information directly related to a student***. (Emphasis added).

WAC 516-26-020. Records of sexual assault and crimes of violence, which necessarily involve a victim, are not education records.

Interpreting "education record" to include any WWU record that mentions a student renders the emphasized language of the regulation meaningless and also conflicts with WAC 516-26-020(b), which identifies several categories of records that are excluded from the definition of "education records." The Does have failed to address the actual definition of "education records"

because that definition shows that WAC 516-26-070 is ***not*** applicable to the tables of student offenses.

IV. CONCLUSION

If the Court grants review then the Court should reverse the Court of Appeals' interpretation of RCW 42.5.230(1) and *Lindeman*, *supra*, and remand this case to the trial court for further proceedings.

V. APPENDIX

Appendix Agreement between WWU and Doe #3 (CP 182)

This answer contains 3351 words, excluding the parts of the answer exempted from the word count by RAP 18.17.

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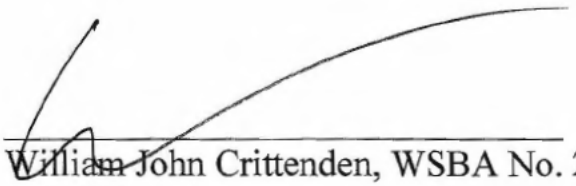
RESPECTFULLY SUBMITTED this 25th day of February, 2021.

By: 

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CERTIFICATE OF SERVICE
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Certificate of Service

I, the undersigned, certify that on the 25th day of February, 2022, I caused a true and correct copy of this pleading to be served, by the method(s) indicated below, to the following person(s):

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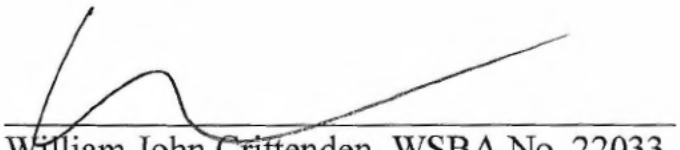

William John Crittenden, WSBA No. 22033

Agreement between Western Washington University and [redacted]

This is an agreement between Western Washington University (WWU), a Washington State public institution of higher education, and [redacted] a WWU alumnus.

WHEREAS, Mr. [redacted] has filed an appeal of a disciplinary action brought against him; and

WHEREAS, WWU is willing to extend to Mr. [redacted] certain assurances regarding the record of said disciplinary action; and

WHEREAS, the parties would like to come to a mutual resolution of these matters;

NOW, the parties agree as follows:

1. Mr. [redacted] agrees to withdraw his appeal of disciplinary action 00593-2017.
2. WWU shall not voluntarily or volitionally publicize or provide comment to third parties regarding said disciplinary action or its record [including a 20 U.S.C. 1232g(a)(6)(b) disclosure] and Mr. [redacted] agrees not to disparage the conduct or performance of WWU, its officers, employees or agents or initiate communication with or disparage the complainant in said disciplinary action; EXCEPT THAT nothing in this provision shall prevent either party, or an employee or agent of a party, from a) seeking legal or financial advice or assistance regarding meeting the terms or obligations of this agreement; or b) meeting any legal obligations arising under the Freedom of Information Act, 5 U.S.C. § 552, the Washington State Public Disclosure Act, RCW 42.56, or other lawful exercise of statutory or common law right of action, subpoena or court order.
3. WWU agrees to make no notation on the transcript of Mr. [redacted]'s educational record.
4. The parties agree that this agreement does not amount to an admission of any wrong doing on Mr. [redacted]'s part.
5. The parties agree that this agreement is entered into freely. Mr. [redacted] acknowledges that he has had the right to consult with private legal counsel prior to execution of this Agreement which right he has exercised to his full satisfaction.
6. This is the total agreement of the parties which shall be subject to the jurisdiction of the State of Washington with venue in Whatcom County, Washington. It may not be modified or amended unless agreed to in writing by the parties.
7. This Agreement may be signed in counterparts and shall be considered valid and fully enforceable.

[redacted]

[redacted]

10/27/17
Date

Theodore (Ted) Pratt,
Dean of Students

11/14/17
Date

APPROVED AS TO LEGAL FORM:

11/17/17
Rob Olson Date
Assistant Attorney General

WILLIAM JOHN CRITTENDEN

February 25, 2022 - 2:50 PM

Transmittal Information

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