

No. 49120-6-II

**IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON, DIVISION II**

**ARTHUR WEST,
appellant,**

Vs.

**THE EVERGREEN
STATE COLLEGE,
respondent**

Review of decisions entered by
the Honorable Judges Price and Schaller

**APPELLANT'S
OPENING BRIEF**

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SUMMARY OF ARGUMENT

This case involves the question of how a federal statute, the Family Education Rights Protection Act, (FERPA) applies in relation to the Washington State Public Records Act concerning law enforcement related records on a State College campus.

At issue are records that TESC claims to be “education records” that are exempt under FERPA, but which are actually law enforcement records concerning the application of TESC's “Criminal Trespass Policy”, a policy that criminalizes what would otherwise be freedom of assembly on public lands of the TESC Campus.

Due to the unique nature of TESC's “Criminal Trespass Policy” all of the responsive records involve the enforcement of criminal law, via TESC's “Criminal” Trespass Policy, and thus should not be subject to withholding under FERPA to begin with.

The respondents maintain that, although FERPA is merely spending clause legislation which seeks to impose a broad policy of secrecy incompatible with the mandated narrow construction of exemptions to the PRA, FERPA constitutes an “other statute” that they must comply with to broadly withhold an outrageously wide swath of records under the overwhelming coercion of federal funding, which they represent to be essential to their continued existence.

However, an impartial analysis of the actual provisions of FERPA,

existing spending legislation precedent, the 10th Amendment, Lindeman, Zink, and Article I, section 12 of the Washington State Constitution results in the inevitable conclusion that FERPA does not prohibit disclosure, as it is merely an unconstitutionally coercive funding statute directed to the Department of Education and that it does not, and could not in accord with Sebelius, Dole, and the the Anti-commandeering Doctrine be seen to compel State actors to follow its commandeering directives to withhold public records as defined under State law, or grant special privileges and immunities to a favored class of campus criminals in violation of the Constitution of the State of Washington.

This case should be remanded back to the trial court for the exemptions to be weighed against the requirements of State Public Records Law.

ASSIGNMENTS OF ERROR

I. The Court erred in finding FERPA to be an “other statute” that expressly prohibited disclosure of specific records when FERPA is manifestly not a statute that expressly prohibits disclosure, but is, instead, spending clause legislation that fails to confer any enforceable rights and does not expressly prohibit anything.....

II. The Court erred in interpreting the spending clause provisions of FERPA as an unconstitutional economic “gun to the head” of State entities mandating “dragooned” intrusions into a traditional area of State concern in violation of the limits set by Dole, Sebelius, the 10th Amendment and Article I, section 12 of the Constitution of the State of Washington.....

III. The Court erred in relying upon the holdings in Ameriquest and Indiana Trustees when the GLBA at issue in Ameriquest and the Indiana public records statute in Indiana Trustees were significantly different from FERPA and the Washington State Public Records Act in this case

IV. The Court erred in finding FERPA to be an other statute and in overbroadly applying FERPA as a broad protean exemption to justify across the board withholding of broad classes of records not properly exempt in a manner at variance with Lindeman, Falvo, and the remedial public policy of the Public Records Act.....

V. The Court erred in approving exemptions under the Attorney-client privilege, and in failing to find a violation of the PRA in regard to the withheld FERPA records and the Attorney-client records the agency improperly withheld and/or disclosed following the filing of the suit...**43**

**ISSUES PERTAINING TO
ASSIGNMENTS OF ERROR**

I Did the Court err in finding FERPA to be an “other statute” that expressly prohibited disclosure of specific records when FERPA is manifestly not a statute that expressly prohibits disclosure, but is, instead, spending clause legislation that fails to confer any enforceable rights and does not expressly prohibit anything? Yes.....

II. Did the Court err in interpreting the spending clause provisions of FERPA as an unconstitutional economic “gun to the head” of State entities mandating “dragooned” intrusions into a traditional area of State concern in violation of the limits set by Dole, Sebelius, the 10th Amendment and Article I, section 12 of the Constitution of the State of Washington? Yes....

III. Did the Court err in relying upon the holdings in Ameriquest and Indiana Trustees when the GLBA at issue in Ameriquest and the Indiana public records statute in Indiana Trustees were significantly different from FERPA and the Washington State Public Records Act in this case? Yes.....

IV. Did the Court err in finding FERPA to be an other statute and in overbroadly applying FERPA as a broad protean exemption to justify across the board withholding of broad classes of records not properly exempt in a manner at variance with Lindeman, Falvo, and the remedial public policy of the Public Records Act? Yes.....

V. Did the Court err in approving exemptions under the Attorney-client privilege, and in failing to find a violation of the PRA in regard to the withheld FERPA records and the Attorney-client records the agency improperly withheld and/or disclosed following the filing of the suit? Yes..

STATEMENT OF THE CASE

This case involves a public records request of October 28, 2014, plaintiff submitted a request under the Public Records Act to TESC for records relating to the TESC Trespass Policy as well as any records related to conditions for the receipt of federal funds or grants. (CP 6)

May 12, 2015 the Complaint was filed. (CP 4-29)

On October 23, 2015 a hearing was held on defendant's Motion for Summary Judgment. (CP 54-56)

The issues were defined in a Scheduling Order of January 22 to include 1, Whether the defendants violated the PRA by improperly applying FERPA redactions... and 2. and whether the defendants improperly withheld records under the Attorney-client privilege (CP 290-291)

Plaintiff repeatedly requested in camera review (CP 260, 280-281, Transcript of Oct. 23, Page 7, lines 10-11, Page 8, lines 14-15, Page 15, lines 11-12) Plaintiff identified specific records and groups of records that were improperly redacted (Transcript of October 23, Page 9 line 10 through Page 10, line 14)

At that time the Court ruled that FERPA qualified as an other statute under the PRA. (CP 54-56)

On May 27, 2016, a further hearing was held on cross motions for Summary Judgment. (CP 99-100)

The defendants argued that FERPA provides students with broad protection of their education records (CP 303, lines 18-19) and that the redacted records fell within “FERPA's broad definition of education records” (CP 304, line 18-19)

The defendants also certified that “Federal funding is a significant funding source for the college and essential to its financial viability and stability” and that the college was required to abide by FERPA in order to remain eligible for such funds. (approximately \$64,000,000 in fiscal year 2015 (CP 261-262)

Plaintiff argued that...If you're looking at criminal trespass notices, if you're looking at police reports, if you're looking at disciplinary files shared with law enforcement, they are used as a basis for applying the criminal law. Those aren't held in a central repository. They're not educational records. They're not maintained for an educational purpose.
Transcript of page12, lines 14-21

Defendant argued that...in FERPA, education records are “broadly defined” (Transcript, page 16-17, CP 293-296), that...”the narrow construction that he is urging is not found. It's not even consistent in the context of the plain language of FERPA”(Transcript, page 16, lines 4-6), and that...”were the courts in Washington to conclude that FERPA could not be complied with... – all public institutions in Washington would be unable to function because federal money is so significant in the context

of education.” Transcript, page 17-18)

The Court ruled that despite the circumstance that all of the records concerned the enforcement of the Criminal Trespass Laws, and were related to law enforcement, the redactions resulting from the extremely broad provisions of FERPA were in accord with the PRA. (CP 99-101)

On June 27, 2016, Plaintiff filed a timely notice of appeal (CP 105-111)

STANDARD OF REVIEW

This Court reviews questions of law and statutory construction de novo. Likewise, judicial review of all agency actions under the Public Records Act chapter is de novo, as is the question of construction and interpretation of statutes. RCW 42.56.550(3); State ex rel. Humiston v. Meyers, 61 Wn.2d 772, 777, 380 P.2d 735 (1963). This Court should review all issues de novo.

ORDERS ON APPEAL

Appellant seeks review of the Order of Dismissal of May 27, 2016 (CP 99-101) Appellant also seeks review of the Court's November 20, 2015 Order holding FERPA was an “Other Statute” under the Public Records Act (CP 54-56)

ARGUMENT

I. The Court erred in finding FERPA to be an “other statute” that expressly prohibited disclosure of specific records when FERPA is manifestly not a statute that expressly prohibits disclosure, but is, instead, spending clause legislation that fails to confer any enforceable rights and does not expressly prohibit anything.....

In the first place, FERPA simply does not qualify as an “Other Statute” as it completely lacks any form of the requisite “explicitly clear” directive that “specific” records must be withheld from a request under the PRA.

FERPA is not a law which prohibits disclosure of educational records. It is, instead, spending clause¹ legislation that fails to clearly or expressly require anything, fails to address any specific records altogether, and which has been found not to convey any enforceable rights.

In the *Ameriquist* case, the Supreme Court ruled that the Gramm–Leach–Bliley Act (GLBA) was an “other statute” that expressly prohibited disclosure...

Thus, the PRA makes room for an "other statute" that **expressly prohibits** redactions or disclosures of entire records. See *Ameriquist*, 170 Wash.2d 418, 241 P.3d 1245 (2010) (emphasis added)

However, if the actual language of FERPA is examined, it differs in many significant respects from the provisions of the GBLA that were

¹The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States....U. S. Constitution, *Article I, Section 8, Clause 1*

seen to justify its status as an “other statute”.

In particular the GLBA contains an explicit prohibition and a statement of preemptive intent. (See 15 U.S.C. § 6807(a) These elements are notably absent in FERPA , making any comparison between the two acts dubious at best.

Unlike the Gramm–Leach–Bliley Act, FERPA is not an “other statute” that specifically prohibits disclosure of educational records. Instead, it is a provision adopted under the spending authority of Congress which imposes a hypothetical and illusory economic penalty for the disclosure of educational records.

An illustrative case is *Student Bar Ass'n v. Byrd*, 293 N.C. 594, 239 S.E.2d 415, 419 (N.C.1977) where the North Carolina Court stated that the Buckley amendment (FERPA) does not forbid disclosure of information concerning a student. FERPA provides for the withholding of federal funds otherwise available to an educational institution which has a policy or practice of permitting the release of educational records...

In *WFTV, Inc. v. Sch. Bd. of Seminole*, 874 So. 2d 48, 57 (Fla. Dist. Ct. App. 2004) the florida court ruled that...“FERPA does not prohibit the disclosure of any educational records. FERPA only operates to deprive an educational agency or institution of its eligibility for applicable federal funding based on their policies and practices regarding public access to educational records if they have any policies or practices that run

afoul of the rights of access and disclosural privacy protected by FERPA.” See also *Chicago Tribune Co. v. University of Illinois Board of Trustees*, 781 F. Supp. 2d at 676–77.

Far from prohibiting disclosure, FERPA, and its implementing regulations, by their very terms, contemplate that FERPA records may be disclosed, and far from applying any form of actual legal penalty has a provision for the DOE to attempt to secure “voluntary compliance” before considering imposing any form of spending clause sanction.

Such a vague provision seeking voluntary compliance prior to the contemplated imposition of coercive economic deterrents does not a specific and explicitly clear directive make, especially since the only substantive penalty, that of the DOE withholding grant funding if it cannot secure voluntary compliance, has never once been applied, even in the many States that have required the institutions in their control to follow State laws instead of the nebulous directives of FERPA.

In fact, the implementing regulations for FERPA recognize the incompatibility of FERPA spending suggestions and substantive state law in a manner completely incompatible with an other statute exemption or preemption.. 34 CFR 99.61 - What responsibility does an educational agency or institution, a recipient of Department funds, or a third party outside of an educational agency or institution have concerning conflict with State or local laws? If an educational agency or institution

determines that it cannot comply with the Act or this part due to a conflict with State or local law, it must notify the Office within 45 days, giving the text and citation of the conflicting law.

If another recipient of Department funds under any program administered by the Secretary or a third party to which personally identifiable information from education records has been non-consensually disclosed determines that it cannot comply with the Act or this part due to a conflict with State or local law, it also must notify the Office within 45 days, giving the text and citation of the conflicting law

Most recently, the Washington State Supreme Court, in an April 7 decision in *Doe v. WSP and Donna Zink*, has reaffirmed the broad intent of the PRA and the limited scope of the “other statute” exemption and the ability of the judiciary to imply the type of broad and protean exemptions asserted by TESC to exist under under FERPA in this case.

In rejecting a broad reading of the PRA's injunction statute, former RCW 42.17.330 (2005) (now RCW 42.56.540), in PAWS II, we said that it did not make sense to imagine the legislature believed judges would be better custodians of open-ended exemptions because they lack the self-interest of agencies. The legislature's response to our opinion in *Rosier* makes clear that it does not want judges any more than agencies to be wielding broad and mal[li]eable exemptions. The legislature did not intend to entrust to ... judges the [power to imply] extremely broad and protean exemptions¹²⁵ Wn.2d at 259-60. Therefore, if the exemption is not found within the PRA itself, we will find an "other statute" exemption only when the legislature has made it explicitly clear that a specific record, or portions of it, is exempt or otherwise prohibited from production in response

to a public records request. *State ex Rel Doe v. Washington State Patrol*, 374 P.3d 63, 185 Wash.2d 363 (2016)

Even more problematic is the holding of the Supreme Court of the United States, in a Washington case, *Gonzaga University v. Doe*, 536 U.S. 273 (2002) that spending legislation like FERPA fails to confer any enforceable rights...

This Court has never held, and declines to do so here, that spending legislation drafted in terms resembling FERPA's can confer enforceable rights. FERPA directs the Secretary of Education to enforce its nondisclosure provisions and other spending conditions, §1232g(f), by establishing an office and review board to investigate, process, review, and adjudicate FERPA violations, §1232g(g), and to terminate funds only upon determining that a recipient school is failing to comply substantially with any FERPA requirement and that such compliance cannot be secured voluntarily, §§1234c(a), 1232g(f).

Significantly, FERPA's provisions speak only to the Secretary, directing that "[n]o funds shall be made available" to any "educational ... institution" which has a prohibited "policy or practice," §1232g(b)(1). This focus is two steps removed from the interests of individual students and parents... Furthermore, because FERPA's confidentiality provisions speak only in terms of institutional "policy or practice," not individual instances of disclosure, see §§1232g(b)(1)—(2), they have an "aggregate" focus,...

FERPA's nondisclosure provisions further speak only in terms of institutional policy and practice, not individual instances of disclosure. See 20 USC 1232g(b)(1)n(2) (prohibiting the funding of any educational agency or institution which has a policy or practice of permitting the release of education records (emphasis added)). Therefore, as in *Blessing*, they have an aggregate focus, 520 U. S., at 343, they are not concerned with 'whether the needs of any particular person have been satisfied,' *ibid.*, and they cannot 'give rise to individual rights,' *id.*, at 344. Recipient institutions can further avoid termination of funding so long as they 'comply substantially' with the Act's requirements. §1234c(a)...

Significantly...

FERPA's nondisclosure provisions contain no rights-creating language, they have an aggregate, not individual, focus, and they serve primarily to direct the Secretary of Education's distribution of public funds to educational institutions.

It should also be noted that, in the entire history of the law, there has never been an instance where funds were withheld under FERPA even in the numerous States that require disclosure of FERPA type records under their public records laws. As such, FERPA not only does not provide an exemption, there is no credible threat of enforcement by the DOE, especially since a State agency complying with State law would also be substantially complying with FERPA to the best of its legal abilities, and FERPA if viewed in such a manner would run afoul of both the Privileges and Immunities Clause of the State Constitution and the

Anti-Commandeering Doctrine stemming from the 10th Amendment and the Supreme Court's holdings in *Prinz*.

TESC has attempted to assert a variety of “other statute” and preemption arguments, but these may be seen to be foreclosed not only by the recent case of *Doe v. WSP and Zink* as set forth in the plaintiff's Motion, but also by the well reasoned and clear ruling of the Supreme Court in *Progressive Animal Welfare Society (“PAWS”) v. University of Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994).

In that case, the University of Washington attempted to make virtually the same arguments that TESC makes here as to the supremacy of federal law over the State PRA. Significantly, the PAWS Court rejected that educational institution's similar laundry list of preemption claims: under FOIA, the Bayh-Dole Act, “federal policy” and copyright law.

As the Court in PAWS noted, preemption has 3 basic forms:

Congress may preempt state law in three basic manners: express preemption, field preemption, and conflict preemption. See *Department of Ecology v. PUD 1*, 121 Wn.2d 179, 192-99, 849 P.2d 646 (1993), *aff'd*, 114 S. Ct. 1900 (1994).

The Supreme Court summarized the circumstances required for each of the 3 forms of preemption:

Federal preemption of state law may occur if Congress passes a statute that expressly preempts state law, if Congress preempts state law by occupation of the entire field of regulation or if the

state law conflicts with federal law due to impossibility of compliance with state and federal law or when state law acts as an obstacle to the accomplishment of the federal purpose. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 326, 858 P.2d 1054 (1993) (citing *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 604-05, 115 L. Ed. 2d 532, 111 S. Ct. 2476, 2481-82 (1991)).

The Washington State Supreme Court was emphatic in rejecting the University's arguments that the Public Records Act was preempted by federal law, noting that they had repeatedly emphasized that...

[T]here is a strong presumption against finding preemption in an ambiguous case and the burden of proof is on the party claiming preemption. . . . State laws are not superseded by federal law unless that is the clear and manifest purpose of Congress.

Recently, in *Wyeth v. Levine*, 129 S.Ct. 1187 (2009) the Supreme Court of the United States also explained that this presumption against preemption stems from the basic “governing principle” of respect for states as “independent sovereigns in our federal system.” This fundamental principle of federalism is apparently lacking from TESC's political philosophy and curriculum.

The State Supreme Court in PAWS also expressly held that federal law in the form of the federal Freedom of Information Act (FOIA) did not preempt the State Public Records Act.

The Court in Paws also rejected the argument that federal regulations preempted the PRA for compelling reasons that apply to the circumstances of the present claims made by TESC...

While we have recognized some cases where federal regulations preempt state statutes, those cases involve express preemption. See *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 327 n.41, 858 P.2d 1054 (1993). **The regulations cited by the FOIA officer contain no express preemption provisions.** Moreover, given FOIA's definition of "agency", any federal agency which promulgated regulations purporting to bind state agencies would be acting ultra vires.

In addition, the PAWS Court rejected the University's claims of preemption under the Bayh-Doyle Act...

The sound reasoning of the Supreme Court in PAWS is consistent with the overwhelming weight of of preemption precedent involving State Public Disclosure Laws. See *Abbott v. Texas Dept. of Mental Health and Mental Retardation*, 212 S.W.2d 648 (Tex. App. 2006) (holding that federal Health Insurance Portability and Accountability Act (HIPAA) and implementing regulations did not preempt state open records law); *Newsday, Inc. v. State Dept. of Trans.*, 10 A.D.3d 201 (N.Y.A.D. 2004) (holding that 23 U.S.C. § 409 did not preempt state open records law with respect to reports about hazardous intersections), *Kerr v. United States Dist. Ct. For N. Dist.*, 511 F.2d 192 (9th Cir.1975), *aff'd*, 426 U.S. 394, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976). See also, *Wallace v. Guzman*, 687 So.

2d 1351 (Fla. 3d DCA 1997); *Exemptions from disclosure in Federal Freedom of Information Act apply to documents in the custody of federal agencies; the Act is not applicable to state agencies*).

This Court should rule in accord with PAWS and the overwhelming weight of precedent that rejects federal nullification of State disclosure Statutes.

Despite the PRA's presumption of openness and transparency, the legislature has made certain public records exempt from production...RCW 42.56.070(1) addresses exemptions contained elsewhere. In relevant part, it states that each agency "shall make available. for public inspection and copying all public records, unless the record falls within the specific exemptions of ... this chapter, or other statute which exempts or prohibits disclosure of specific information or records." RCW 42.56.070(1).

An "other statute" that exempts disclosure does not need to expressly address the PRA, but it must expressly prohibit or exempt the release of records. See, e.g., *Ameriquest Mortg. Co. v. Office of Att'y Gen.*, 170 Wn.2d 418, 439- 40, 241 P.3d 1245 (2010) (*Ameriquest I*) (federal Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801-6809, an "other statute" exempting covered information from PRA disclosure); *Hangartner v. City of Seattle*, 151 Wn.2d 439,453,90 P.3d 26 (2004) (attorney-client privilege is an "other statute" under what is now RCW 42.56.070(1)

(formerly RCW 42.17.260) (1997)).

The "other statute" exemption "applies only to those exemptions explicitly identified in other statutes; its language does not allow a court 'to imply exemptions but only allows specific exemptions to stand.'" *John Doe v. WSP*, citing *PAWS II*, 125 Wn.2d at 262 (quoting *Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 800,791 P.2d 526 (1990)).

II. The Court erred in interpreting the spending clause provisions of FERPA as an unconstitutional economic "gun to the head" of State entities mandating "dragooned" intrusions into a traditional area of State concern in violation of the limits set by *Dole*, *Sebelius* the 10th Amendment, and Article I, section 12 of the Constitution of the State of Washington.....

While Congress may condition the receipt of federal funds on accepting reasonable conditions under its Spending Clause authority, the financial penalty for noncompliance cannot be "so coercive as to pass the point at which pressure turns into compulsion." *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (internal quotes and citation omitted). In *Sebelius*, the Supreme Court determined that pressure had become compulsion where states were threatened with ineligibility for hundreds of millions of dollars in federal health funding if they rejected the Affordable Care Act's mandate to expand Medicaid eligibility.

Significantly, the Supreme Court views Spending Clause enactments with special skepticism where, as here, the condition purportedly being

imposed – exempting anything meeting FERPA’s description of an “education record” from disclosure, regardless of the privacy and disclosure interests at stake – does not relate to the actual grant program. *Id.* at 2604; *see also Agency for Int’l Dev. v. Alliance for Open Society Int’l, Inc.*, 133 S.Ct. 2321 (2013) (striking down as an “unconstitutional condition” a federal policy conditioning receipt of federal AIDS-education grants on an agreement to adopt federal “party line” condemning prostitution, which the Court found unrelated to the purpose of the grant program).

While courts at times have misinterpreted FERPA as a federal prohibition against honoring individual requests for public records, that interpretation is no longer tenable after *Sebelius*. If honoring a request for public records will put a university in violation of FERPA, and the result of being found in violation of FERPA is the “institutional death penalty” of disqualification from federal education funding, then FERPA fails the compulsion standard or “gun to the head” test of *Sebelius*. Indeed, educational institutions have themselves argued for decades that FERPA operates as *Sebelius*’ proverbial “gun to the head,” because refusing federal education funding would be such a ruinous choice as to be no choice at all.

Declaring legislative enactments unconstitutional is a disfavored “nuclear option,” and courts properly avoid doing so when a statute can be

giving a limiting construction salvaging it as constitutional. *See State v. Mathis*, 315 Mont. 378, 381 (Mont. 2003) (“It is the duty of courts, if possible, to construe statutes in a manner that avoids unconstitutional interpretation.”). As the Supreme Court has repeatedly instructed, “the elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” *Edward J. Bartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trade Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. Calif.*, 155 U.S. 648, 657 (1895)).

In this case FERPA could be readily harmonized with state open-records laws by giving it the limited understanding that its drafters intended – as a prohibition on a policy or practice of failing to secure centrally maintained education records containing limited and specific non-public information of the type (such as name, address, social security number) that could be used detrimentally against a student if disclosed.

In addition to seeking a broad and malleable interpretation of protean FERPA exemptions to undermine the PRA, TESC also appears to argue federal preemption on the “unpersuasive and implausible” (See , (Opinion by Stevens, J.P.) grounds: that federal law regarding the duties of the Secretary of Education completely preempts, by implication, the traditional local State interest in education and the open government requirements of the Washington State Public Records Act, RCW 42.56.

This argument lacks any persuasive basis in any accepted doctrine of preemption, or any actual provision of statute, and demonstrate the defendants' intent to supplant State interests in accountability and open government “deeply rooted in local feeling and responsibility” with “judicially manufactured policies” cobbled together from “freewheeling², extratextual, and broad evaluations of the ‘purposes and objectives’ embodied within federal law” (See e.g. *Wyeth v. Levine*, 129 S. Ct. 1187, 1211 (2009) (Thomas, J., concurring in judgment))

Significantly, while the federal Government may have powers under the spending clause to suggest policy options, it cannot act directly in the manner the State asserts has occurred in respect to FERPA. See *State Preemption of Federal Law: The Strange Case of College Student Disciplinary Records Under F.E.R.P.A.*, 149 *Educ. L. Rep.* 283, 297 n 57 (2001)

In addition, the view of federal powers the State seeks to pander to in order to evade disclosure is in direct contrast to the 10th Amendment and the principles recognized in the Anti-Commandeering Doctrine. As the Court in *Oswego* noted...

The Court of Appeals’ logic does not withstand scrutiny. Its interpretation, furthermore, would effect a drastic alteration of the existing allocation of

²

See also *Against Freewheeling, Extratextual Object Preemption*: Catherine Sharkey, *NYU Journal of Law & Liberty*, Vol. 5, No. 1, 2010

responsibilities between States and the National Government in the operation of the Nation's schools. We would hesitate before interpreting the statute to effect such a substantial change in the balance of federalism unless that is the manifest purpose of the legislation.

FERPA cannot be seen to commandeer State officers in their administration of the PRA as it applies to the uniquely State concerns of State college or university records in that, as James Madison asserted in *Federalist 45*, the powers of the federal government are "few and defined" actually extending into only a few spheres, with most power and authority was left to the states and the people.

Even within those areas that the federal government does exercise authority, it cannot force state or local governments to cooperate in enforcement or implementation. The federal Government must exercise its authority on their own, unless the state and local governments choose to assist. Simply put, the federal government cannot force state or local governments to act against their will.

The anti-commandeering doctrine, is well established in constitutional jurisprudence. Four Supreme Court opinions dating back to 1842 serve as the foundation for this legal doctrine.

In *Prigg v. Pennsylvania* (1842), Justice Joseph Story held that the federal government could not force states to implement or carry out the Fugitive Slave Act of 1793. He said that it was a federal law, and the

federal government ultimately had to enforce it.

The fundamental principle applicable to all cases of this sort, would seem to be, that where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is entrusted. The clause is found in the national Constitution, and not in that of any state. It does not point out any state functionaries, or any state action to carry its provisions into effect. The states cannot, therefore, be compelled to enforce them; and it might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted to them by the Constitution.

In the early 90s, the state of New York sued the federal government asserting provisions in the Low-Level Radioactive Waste Policy Amendments Act of 1985 were coercive and violated its sovereignty under the Tenth Amendment. The Court majority in *New York v. United States* (1992) agreed, holding that

“because the Act’s take title provision offers the States a ‘choice’ between the two un-constitutionally coercive alternatives—either accepting ownership of waste or regulating according to Congress’ instructions—the provision lies outside Congress’ enumerated powers and is inconsistent with the Tenth Amendment.”

Sandra Day O’Connor wrote for the majority in the 6-3 decision.

As an initial matter, Congress may not simply “commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.”

She later expounded on this point.

While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.

O'Connor argued that standing alone, both options offered to the State of New York for dealing with radioactive waste in the act represented an unconstitutional overreach. Therefore, forcing the state to choose between the two would also be unconstitutional.

A choice between two unconstitutionally coercive regulatory techniques is no choice at all. Either way, "the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."

Printz v. United States (1997) serves as the lynchpin for the anti-commandeering doctrine. At issue was a provision in the Brady Gun Bill that required county law enforcement officers to administer part of the background check program. Sheriffs Jay Printz and Richard Mack sued, arguing these provisions unconstitutionally forced them to administer a federal program. Justice Antonin Scalia agreed, writing in the majority opinion "it is apparent that the Brady Act purports to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme."

Citing the *New York* case, the court majority declared this provision of the Brady Gun Bill unconstitutional, expanding the reach of the anti-commandeering doctrine.

We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States' officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case by case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

Finally, and most significantly in the FERPA context, the Court ruled that the federal government cannot force the states to act against their will by withholding funds in a coercive manner. In *National Federation of Independent Business v. Sebelius*, 567 U.S. ____ (2012), 183 L. Ed. 2d 450, 132 S.Ct. 2566 (2012), the Court held that the federal government can not compel states to expand Medicaid by threatening to withhold funding for Medicaid programs already in place. Justice Roberts argued that allowing Congress to essentially punish states that refused to go along violates constitutional separation of powers.

Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as

independent sovereigns in our federal system. That system “rests on what might at first seem a counterintuitive insight, that ‘freedom is enhanced by the creation of two governments, not one.’” *Bond*, 564 U. S., at ___ (slip op., at 8) (quoting *Alden v. Maine*, 527 U. S. 706, 758 (1999)).

For this reason, “the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.” *New York*, supra, at 162. Otherwise the two-government system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer.

Taken together, these Supreme Court cases firmly establish a legal doctrine holding that the federal government has no authority to force states to cooperate in implementing or enforcing its acts in the manner that the State asserts in respect to FERPA in the instant case.

As the Supreme Court recently reminded us, Congress must exercise its power so as to preserve “the Constitution’s distinction between national and local authority.” *United States v. Morrison*, 529 U.S. 598, 615 (2000). That distinction, in turn, was designed “so that the people’s rights would be secured by the division of power.” *Id.* at 616 n.7; see also *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (“The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political

capacities, one state and one federal, each protected from incursion by the other.”). Kosinski, Concurring in *Conant v. Walters*

Worse yet for TESC is the fact that Article 1, Section 12 of the State Constitution requires that an individual's enrollment at a state university should not entitle him or her to any greater privacy rights than members of the general public when the privacy interest relates to criminal investigation and incident reports.

Article I, section 12 of the Washington State Constitution prohibits special privileges and immunities. It provides: “No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.” (see generally, *Independence for Washington's Peivileges and Immunities Clause*, Andrew Rorholm Zellers, WLR 87, at 331-367, Gunwall)

In conformity with these principles, in *Bauer v. Kincaid*, 759 F.Supp. 575 (1991) the U.S. District Court for the Western District of Missouri ruled as follows:

Rios v. Read, 73 F.R.D. 589, 598 (E.D.N.Y.1977) stated that it is "obvious that the 1974 Act (FERPA) does not provide a privilege against disclosure of student records.... Rather by threatening financial institutions, it seeks to deter schools from adopting policies of releasing student records." *Id.*
FERPA is not a law which prohibits disclosure of educational records. It is a provision which

imposes a penalty for the disclosure of educational records. *Student Bar Ass'n v. Byrd*, 293 N.C. 594, 239 S.E.2d 415, 419 (N.C.1977) stated that the Buckley amendment (FERPA) does not forbid disclosure of information concerning a student. FERPA provides for the withholding of federal funds otherwise available to an educational institution which has a policy or practice of permitting the release of educational records...

The limited legislative history available demonstrates that FERPA seeks to deter schools from indiscriminately releasing student educational records. Nothing in the legislative history of FERPA refers to a policy or intent to protect campus law enforcement unit records which contain student names or other personally identifiable information....

Furthermore, an individual's enrollment at a state university should not entitle him or her to any greater privacy rights than members of the general public when the privacy interest relates to criminal investigation and incident reports. Nor could the federal government have reasonably intended to make university students a specially protected class of criminal suspects. This Court concludes that the records sought by plaintiff are not educational records

FERPA cannot be seen to have the effect argued by the State in this case without violating both the federal and State Constitutions in a manner at variance with the spending power, the entire system of dual sovereignty protected by the 10th Amendment, and equal protection of law as it is recognized in the Privileges and Immunities clause of the Constitution of this sovereign State.

III. The Court erred in relying upon the holdings in Ameriquest and Indiana Trustees when the GLBA at issue in Ameriquest and the Indiana public records statute in Indiana Trustees were significantly different from FERPA and the Washington State Public Records Act in this case

In the hearing on May 27, 2015 the Honorable Judge Price found that FERPA was an “other statute”, stating that..

I rely heavily on the Ameriquest Mortgage Company's decision in that regard -- that's 170 Wn.2d 418 -- as well as the discussion in a non-Washington case, the Unincorporated Operating Division of Indiana Newspapers versus the Trustees of Indiana University, 787 NE2d 893. Transcript of May 27, 2015 lines 10-15

The Honorable Judge Price erred in determining that FERPA was an “other Statute” based upon Ameriquest and Indiana Trustees

In the Ameriquest case, where the Supreme Court ruled that, in the context of the Gramm–Leach–Bliley Act (GLBA) it held...

Thus, the PRA makes room for an "other statute" that expressly prohibits redactions or disclosures of entire records. See Ameriquest, 170 Wash.2d 418, 241 P.3d 1245 (2010) (emphasis added)

However, if the actual language of the GLBA is examined, it differs from FERPA in that it contains an explicit prohibition and a statement of preemptive intent. (See 15 U.S.C. § 6807(a) These elements are notably absent in FERPA, making the comparison that the Honorable Judge Price drew between the two acts dubious at best.

Similarly, the provisions of the Indiana Public Records Act IC 5-14-3-4 (a) provides, in pertinent part...

The following public records... may not be disclosed by a public agency....(3) Those required to be kept confidential by federal law.

This differs significantly from the provisions of the Washington PRA...

Each agency, in accordance with published rules shall make available for public inspection and copying all public records, unless the record falls within...(an) other statute which exempts or prohibits disclosure of specific information or records. RCW 42.56.070(1)

IV. The Court erred in finding FERPA to be an other statute and in overbroadly applying FERPA as a broad protean exemption to justify across the board withholding of broad classes of records not properly exempt in a manner at variance with Lindeman, Falvo, and the remedial public policy of the Public Records Act.....

The clash between what privacy interests students may have and the public's right to newsworthy information about the workings of schools and colleges can be a frustrating one. Many of the arguments raised against disclosure of government records turn out to be based on myths and misunderstandings about what are – and are not – confidential student records. *See Tattoos, Tickets, and Other Tawdry Behavior: How Universities Use Federal Law to Hide Their Scandals*, 33 *Cardozo L. Rev.* 1555, 1556–57 (2012) (“The goal is nondisclosure. The chorus is student

privacy. The tool: the FERPA defense.”); Salzwedel & Ericson, *supra* note 12, at 1112 (“It is sadly ironic that institutions whose reason for being is to search for truth are home to at best a myth—at worst, a lie—shielded by the Buckley Amendment [FERPA].”).

The Family Educational Rights and Privacy Act (“FERPA”), contains a funding provision that creates no substantive rights, and encourages schools to enact and enforce policies to safeguard the confidentiality of students’ “education records.” Virtually every State with a records law similar to that of Washington that has been asked to define “education records” has applied a limited and common sense understanding of the term, like this definition by a Maryland appeals court:

[FERPA] was not intended to preclude the release of any record simply because the record contained the name of a student. The federal statute was obviously intended to keep private those aspects of a student’s educational life that relate to academic matters or status as a student. *Kirwan v. The Diamondback*, 721 A.2d 196, 204 (Md. Ct. App. 1998).

Or, as a North Carolina judge memorably declared in an April 2011 memorandum:

“FERPA does not provide a student with an invisible cloak so that the student can remain hidden from public view while enrolled at (college).” *News & Observer Publ’g Co. v. Baddour*, No. 10CVS1941, Memorandum Ruling

of Hon. Howard E. Manning, Jr. at 2 (N.C. Super. Ct. April 19, 2011)

Nevertheless, schools and colleges, (and TESC) persistently cite FERPA to deny requests for public records, even when the records have little relation to a student's "educational life,":

Significantly, Congress amended FERPA in 1992 expressly to remove privacy protection for records created by a police or campus security agency "for the purpose of law enforcement." As a result of this change, it is illegitimate for a police or public safety department to cite FERPA in refusing to release an arrest record, an incident report, or the identities of students named in those documents.

The Department of Education reemphasized in a June 2011 memo to educational institutions that FERPA does not prohibit the release of records gathered by a campus safety agency: "[S]chools that do not have specific law enforcement units may designate a particular office or school official to be responsible for referring potential or alleged violations of law to local police authorities. Some smaller school districts and colleges employ off-duty police officers to serve as school security officers. Investigative reports and other records created and maintained by these law enforcement units are not considered 'education records' subject to FERPA.

Accordingly, schools may disclose information from law

enforcement unit records to anyone ... without consent from parents or eligible students.” See U.S. Department of Education, “Addressing Emergencies on Campus” at 5 (June 2011), available at <http://www2.ed.gov/policy/gen/guid/fpco/pdf/emergency-guidance>.

In *Kirwan v. The Diamondback*, the Maryland Court of Appeals directly addressed – and rejected – the argument that FERPA prohibited a college from releasing copies of students’ parking tickets. The case was brought by the University of Maryland student newspaper, whose reporters had been tipped off that athletes and coaches were being granted special forgiveness for parking violations. The court stated that FERPA was “obviously intended to keep private those aspects of a student’s educational life that relate to academic matters,” and therefore did not cover parking tickets.

More recently, a North Carolina state court followed the reasoning of *Kirwan* and granted media organizations’ requests for parking tickets issued to student athletes at the University of North Carolina- Chapel Hill, rejecting UNC’s argument that the tickets were “education records” just because disciplinary sanctions were among the possible punishments. (The court also ordered disclosure of coaches’ cell-phone records, finding that the phone numbers of student athletes also are not “education records.”)

Since all of the requested records involve, by definition the TESC

“Criminal” Trespass Policy, they are not “education records and should be disclosable under the Public Records Act, even if FERPA is interpreted in a manner, as the State argues, that would violate the 10th Amendment and the Anti-commandeering principles of *Prinz* that prohibit such heavy handed federal commandeering of State agents. (See *Printz v. United States*, 521 U.S. 898 (1997)).

The Supreme Court of the United States, in one of the few cases it has considered FERPA, adopted a very limited definition of “Education Records”

Also FERPA requires “a record” of access for each pupil. This single record must be kept “with the education records.” This suggests Congress contemplated that education records would be kept in one place with a single record of access. By describing a “school official” and “his assistants” as the personnel responsible for the custody of the records, FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar,...*Owasso Independent School District v. Falvo*, 534 U.S. 426 (2002)

This very limited scope of Education Records should be adopted by the Court if it finds that FERPA applies at all, in order to harmonize FERPA with the decision of the Supreme Court of the State of Washington in *Lindeman v. Kelso*.

As one commentator (Lynn M. Daggett, *FERPA in the Twenty-First Century: Failure to Effectively Regulate Privacy for All Students*, 58

Cath. U. L. Rev. 59 (2009), has noted...

Most complex is the situation where the state public records exemption for student records does not match up with FERPA, as illustrated by a recent Washington Supreme Court case. (*Lindeman v. Kelso School District*, 162 Wn.2d 196, 172 P.3d 329 (2007)) The relevant state public records statute exempted "[p]ersonal information in any files maintained for students in public schools. The court interpreted the public records exemption narrowly, equating it to "the protection of material in a... student's permanent file, such as a student's grades, standardized test results, assessments, psychological or physical evaluations, class schedule, address...

This case demonstrates the difficult situation that schools face when records are requested under state public records statutes, which are arguably not exempt under those state statutes. Schools that refuse such requests on the grounds that the records are protected by FERPA risk the consequences that befell the school in this case: defending, and losing, a claim under the state public records statute, with resulting responsibility for the claimant's attorney's fees and costs, as well as statutory penalties. To be blunt, this is a stiffer set of risks than those that loom under FERPA if the school hands over the records in violation of FERPA. After *Gonzaga*, there is no meaningful private remedy for the student whose records are disclosed; there may be an FPCO complaint, but as discussed above, the FPCO is on record as stating that FERPA does not preempt conflicting state law.

For the foregoing reasons TESC should be found to have violated the Public Records Act, and the Act should be seen to be no more broad than the actual exemption to disclosure recognized in *Lindeman* to be contained in the Public Records Act itself.

V. The Court erred in approving exemptions under the Attorney-client privilege, and in failing to find a violation of the PRA in regard to the withheld FERPA records and the Attorney-client records the agency improperly withheld and/or disclosed following the filing of the suit.

The court also erred in approving the withholding of records under the Attorney-client privilege, including communication between Ed Sorger and Wendy Endress that are claimed to be attorney-client privileged. Yet these documents were not to or from counsel, and can not be transformed into a privileged document merely by being forwarded to an attorney.

The unknown and un-described records making up pages 70-84 that are withheld under a claim of attorney-client privilege appear to be factual matters not a request for advice, and thus beyond the scope of the privilege.

In addition, the attorney-client privilege is not absolute and cannot be used to conceal relevant evidence or obscure the existence of a criminal conspiracy to perpetuate a policy of illegally arresting citizens for their exercise of 1st Amendment freedoms on public land. Thus the Attorney client privilege in this case has been waived, does not apply, or should be denied as effecting an improper

suppression of evidence of an illegal policy. See *Dike v. Dike*, 75 Wn.2d 1, (1968);

As the privilege may result in the exclusion of evidence which is otherwise relevant and material, contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts, the privilege cannot be treated as absolute; but rather, must be strictly limited to the purpose for which it exists.

It can be clearly seen that in many of the redacted records, the redactions are overbroadly employed to obscure far more than mere identifying information.

Thus, even if FERPA is seen as trumping the PRA the manifestly overbroad scope of the redactions for both FERPA and Attorney-client records was improper. See Hangartner, *supra*.

CONCLUSION AND RELIEF SOUGHT

As the Law Review article by Mary Penrose entitled "Tattoos, Tickets, and Other Tawdry Behavior: How Universities Use Federal Laws to Hide Their Scandals" notes, "The goal is nondisclosure, the chorus is student privacy, the tool, the FERPA defense." Again, Salzwedel and Ericson in their article note, "It is sadly ironic that institutions whose reason for being is a search for the truth are home to at best a myth, at worst a lie, shielded by the Buckley Amendment."

This Court should reverse the trial court's rulings in every respect and remand this matter back to the Superiour Court for the imposition of penalties and fees, or at the very least for the application of the State Public Records law to the disputed records.

Respectfully submitted this 23rd day of February, 2017.

s/Arthur West
ARTHUR WEST

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2017, I caused to be served a true and correct copy of the preceding document on the party listed below at their Tacoma Hilltop offices via:

Via Email
Attorneys for Respondent TESC

Aileen Miller
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s/Arthur West
ARTHUR WEST

CUSHMAN LAW OFFICES PS

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