COMMONWEALTH OF KENTUCKY
WARREN CIRCUIT COURT
DIVISION NO. I
CASE NO. 17-CI-00233

WESTERN KENTUCKY UNIVERSITY — PLAINTIFF/APPELLANT/ INTERVENING DEFENDANT

V. **BRIEF ON BEHALF OF WESTERN KENTUCKY UNIVERSITY**

COLLEGE HEIGHTS HERALD — DEFENDANT/APPELLEE
AND

THE KERNEL PRESS, INC.
D/B/A THE KENTUCKY KERNEL — DEFENDANT/APPELLEE
AND

COMMONWEALTH OF KENTUCKY *ex rel*
ANDY BESHEAR, ATTORNEY GENERAL — INTERVENING PLAINTIFF

Pursuant to the Scheduling Order, entered on November 21, 2017, Plaintiff/Appellant/Intervening Defendant, Western Kentucky University ("WKU"), by and through counsel, and for its brief in support of its Complaint and Appeal of the Kentucky Attorney General's ("AG") Open Records Decision in *In re: Matthew Smith and Nicole Ares/Western Kentucky University,* 17-ORD-014 (January 26, 2017) (A. Beshear, A.G.) (the "AG Decision") states as follows:

INTRODUCTION

This matter concerns the scope of the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g and its relationship with the Kentucky Open Records Act. The College Heights Herald ("Herald"), the Kernel Press, Inc. d/b/a the Kentucky Kernel ("Kentucky Kernel") and the Commonwealth of Kentucky *ex el* Andy Beshear, Attorney General ("the AG")

seek access to confidential and highly personal Title IX[1] sexual misconduct and adjudication records ("Title IX investigative records"). Because of the importance and delicateness of these matters, WKU takes these investigations very seriously and promptly investigates any and all reports of sexual misconduct, assault, and violence[2]. This process largely depends on the trust and confidence students and victims have in the WKU Title IX Reporting Process and their willingness to share deeply sensitive, personal, and oftentimes difficult information. However, the Herald, the Kernel, and the AG demand access, for the sake of transparency and accountability, to these records regardless of whether the victim or student consents – and could readily be identified by and traumatized – by the release of these records. In support of their position, they rely upon the Kentucky Open Records Act to force WKU to release the Title IX investigative records, while ignoring the likelihood of harm that breaching the confidentiality of WKU's Title IX process would provoke and ignoring the implications of such a breach for the reporting parties, potential reporting parties who are sexual misconduct or assault victims, and witnesses. Moreover, FERPA requires universities to keep certain records confidential, specifically in this case, records that compromise Title IX complaints and sexual misconduct/assault investigations.

[1] Title IX of the Education Amendments of 1972 ("Title IX") provides that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance … ." In order to comply with Title IX, colleges and universities must promptly investigate reports of sexual harassment, including sexual violence, and take steps to resolve and prevent the recurrence of sexual harassment and sexual violence.

[2] WKU's Policies and Procedures Regarding Title IX investigations can be found at the following links:
https://www.wku.edu/policies/docs/251.pdf
https://www.wku.edu/eoo/documents/titleix/titleixbrochure.pdf
https://www.wku.edu/eoo/documents/titleix/wkutitleixpolicyandgrievanceprocedure.pdf

The newspapers' and the Attorney General's professed interests in transparency and accountability pale in comparison to interests at stake for the University. These include the substantial privacy rights of reporting parties who are sexual misconduct/assault victims; the significant risk of identifying reporting parties contrary to their express wishes for their name and information about their experiences to remain private; the potential for jeopardizing the safety of students who were involved in the Title IX process; the chilling effect of media exposure; the potential refusal of witnesses to participate in WKU's Title IX process absent confidentiality; the likely impact on responding parties' willingness to accept responsibility; and the inability of WKU to identify any pattern or trends necessary to prevent any future sexual misconduct or assault, if students are unwilling to come forward.

WKU strongly believes that release of these records would be detrimental to WKU's students and its Title IX process and jeopardizes the trust and confidence these students have in the process. Confidentiality of private information is the hallmark of effective Title IX investigation. Accordingly, WKU respectfully requests that this Court reverse the AG Decision and find that WKU has met its burden of proof in denying access of these Title IX investigative records to the Herald, the Kernel, and the Attorney General, because these Title IX investigative records are protected in their entirety from disclosure, under FERPA.

FACTUAL BACKGROUND REGARDING OPEN RECORDS REQUESTS

1. The Kentucky Kernel Open Records Request

On October 18, 2016, the Kernel, through Reporter, Matthew Smith, made an Open Records Request to WKU "to obtain all investigative records from all Title IX investigations into sexual misconduct allegations levied against university employees in the past five years. Sexual

misconduct includes but is not limited to sexual assault, sexual harassment, sexual exploitation, and/or stalking."

WKU denied the Kernel's Request on October 28, 2016, and provided the following reasons:

> In reviewing the information you requested and using your definition of sexual misconduct from 2013 (the first year WKU began investigating sex and gender based discrimination complaints under Title IX) to the present, WKU conducted 20 investigation [sic] with WKU employees as the responding party. Nine of those investigations were of WKU faculty and eleven investigations were of WKU staff. Of the twenty total investigations conducted, six of the investigations resulted in a finding of a WKU policy violation. All six employees of those employees resigned from their respective positions prior to any final action by the University.
>
> Kentucky Revised Statute 68.878 (1) (i) provides that preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency is exempted from inspection. In addition, KRS 68.878 (1) (j) provides that preliminary recommendations and preliminary memorandum in which opinions are expressed or policies formulated or recommended is likewise exempt from public disclosure.
>
> The information you requested falls within the two above referenced exceptions to disclosure under the Kentucky Open Records Act. The University is denying your request for the electronic mail records on the basis that these are exempt under KRS 61.878(j) in that the records do not pertain to any final agency action, nor were they adopted as part of a final agency action.

The Kernel then appealed WKU's denial to the Office of the Attorney General, in a letter dated November 1, 2016.

WKU responded to the Kernel's appeal by letter to the Office of the Attorney General, dated November 21, 2016. In its response, WKU explained that pursuant to KRS 61.878(1) (i) and (j), it was not required to disclose investigative or preliminary files. WKU also asserted that production of the requested records violates the personal privacy and federal law exemptions to the Open Records Act in KRS 61.878(1) (a) and (k). WKU maintained that disclosure of

investigative materials would significantly stifle complainants from reporting sex and/or gender based discrimination and witness cooperation in the investigative process. Lastly, **WKU argued that FERPA and its implementing regulations protect student records contained within many of the files requested from the Herald from disclosure** (emphasis added).

By letter dated November 29, 2016, the Attorney General requested that WKU produce all investigative files, to which the Kernel was denied access, for an *in camera* inspection and additional information about WKU's investigative process for sexual misconduct complaints.

WKU responded to the Attorney General's request in a letter dated December 21, 2016. WKU again denied disclosure of the requested investigative files and maintained that FERPA prohibits production of the requested records for an *in camera* inspection. Further, WKU asserted that Title IX prohibits the disclosure of all investigative files. WKU explained in great detail the obligations to investigate and address allegations of sexual misconduct and provided copies of its policies and procedures with regard to same.

2. <u>The College Heights Herald Open Records Request</u>

By letter dated November 1, 2016, the Herald, through Assistant News Editor, Nicole Ares, requested virtually identical information as the Kernel, including as follows: "all investigative records for all Title IX investigations into all sexual misconduct allegations including: sexual assault, sexual harassment, sexual exploitation, and/or stalking levied against Western Kentucky University employees in the last five years."

By letter dated November 2, 2016, WKU denied the Herald's Request and explained as follows:

> In reviewing the information you requested and using your definition of sexual misconduct from 2013 (the first year WKU began investigating sex and gender based discrimination complaints under Title IX) to the present, WKU conducted 20 investigation [sic] with WKU employees as the responding party. Nine of

> those investigations were of WKU faculty and eleven investigations were of WKU staff. Of the twenty total investigations conducted, six of the investigations resulted in a finding of a WKU policy violation. All six employees of those employees resigned from their respective positions prior to any final action by the University.
>
> Kentucky Revised Statute 68.878 (1) (i) provides that preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency is exempted from inspection. In addition, KRS 68.878 (1) (j) provides that preliminary recommendations and preliminary memorandum in which opinions are expressed or policies formulated or recommended is likewise exempt from public disclosure.
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> The information you requested falls within the two above referenced exceptions to disclosure under the Kentucky Open Records Act. The University is denying your request for the electronic mail records on the basis that these are exempt under KRS 61.878(j) in that the records do not pertain to any final agency action, nor were they adopted as part of a final agency action.

The Herald then appealed WKU's denial to the Office of the Attorney General, in a letter dated November 21, 2016.

WKU responded to the Herald's appeal by letter to the Office of the Attorney General, dated November 30, 2016. In its response, WKU explained that pursuant to KRS 61.878(1)(i) and (j), it was not required to disclose investigative or preliminary files. WKU also asserted that production of the requested records violates the personal privacy and federal law exemptions to the Open Records Act in KRS 61.878(1)(a) and (k). WKU maintained that disclosure of investigative materials would significantly stifle complainants from reporting sex and/or gender based discrimination and witness cooperation in the investigative process. Lastly, WKU argued that FERPA and its implementing regulations protect student records contained within many of the files requested from the Herald from disclosure.

The Attorney General, by letter dated December 7, 2016, advised WKU that it would not request a separate copy of the records based on the Herald's request because it was virtually identical to the Kernel's Open Records Request.

3. Attorney General Opinion

On January 26, 2017, the AG issued the AG Decision, subject of the Complaint and Appeal in this case. In the AG Decision, the Attorney General erroneously held as follows:

> a. WKU failed to meet its burden of proof in denying the requests of the Kernel and Herald; and
>
> b. WKU must make immediate provision for them to inspect and copy the disputed records with the exception of the names and personal identifiers of the complaint and witnesses per KRS 61.878(1)(a) as construed in 99-ORD-39 and 02-ORD-231.

As a result, WKU filed the Complaint and Notice of Appeal in this action on February 24, 2017, arguing that the AG Decision is contrary to state and federal law, including but not limited to the Kentucky Open Records Act, FERPA, and other relevant privacy laws and/or statutes; prior decisions of the Attorney General, including *In re Kentucky Kernel/University of Kentucky*, 12-ORD-220 (2012) (Conway, A.G.) and *In re Kentucky Kernel/University of Kentucky*, 08-ORD-052 (2008) (Conway, A.G.); proper application of attorney-client privilege and work-product privilege; the limits of the Attorney General's authority to conduct *in camera* reviews; and the significant privacy interests of victims, witnesses, and students involved in the Title IX sexual misconduct investigations.

PROCEDURAL HISTORY OF APPEAL

On February 24, 2017, WKU filed a Complaint against the College Heights Herald and the Kentucky Kernel, appealing the AG Decision. In April 2017, this Court granted the AG's Motion to Intervene in this matter. On April 20, 2017, WKU filed a Motion to Stay this Action pending resolution of all the issues in Commonwealth of Kentucky, ex rel. Andy Beshear,

Attorney General v. University of Kentucky, Fayette Circuit Court, Division 8, Case No. 16-CI-3229 ("UK case") and any subsequent appeals following from the UK case. WKU argued that the UK case is identical to the case at hand, as it involves two threshold questions[3], which this Court must also address and as a result, staying this case would promote judicial economy and efficient resolution of the issue. Following a hearing on May 15, 2017, the Court entered an Order directed WKU to provide to this Court for an *in camera* review: (1) unredacted copies of the Title IX investigative documents; (2) copies of the Title IX investigative documents redacted to remove specific information that WKU believes is exempt from disclosure; and (3) an index setting forth general and specific reasons for the non-disclosure of the subject records. On August 14, 2017, WKU produced all of the requested documentation and information, complying with this Court's Order. This Court has access to all of the Title IX Investigative Records, in unredacted form, which it can use to determine whether these records are protected by FERPA, for the reasons set forth in this Brief.

On November 6, 2017, the Court held a status hearing and indicated that it first planned to address issues related to the FERPA, including the question of whether the records responsive to Defendants' Open Records Request may be withheld in their entirety under FERPA. Then, on November 21, 2017, the Court entered the Agreed Scheduling Order tendered by the parties. In light of the Scheduling Order, the parties engaged in a brief period of discovery, during which the Herald propounded some discovery requests upon WKU. On December 20, 2017, WKU provided full and complete responses to the Herald's discovery requests. Subsequently, the

[3] The two threshold questions include: (1) Whether Title IX sexual misconduct investigation records are protected under FERPA, and thereby, not subject to disclosure under the Kentucky Open Records Act; and (2) Whether the Attorney General is entitled to an *in camera* review of the requested records prior to rendering his/her decision regarding disclosure under the Kentucky Open Records Act.

Herald filed a Motion to Compel WKU to provide sufficient discovery responses; however, the Court denied the Herald's motion.

This matter is now ripe for briefing.

ARGUMENT

1. Standard of Review

When the Attorney General renders a decision with respect to an Open Records Act request, a movant has thirty (30) days to bring an action in the Circuit Court or the county where the public record is maintained, pursuant to KRS 61.882(3). WKU complied with this provision when it filed its Complaint and Appeal on February 24, 2017. Once an action has commenced, the **proceeding is treated as an original action and the Circuit Court is not bound by the Attorney General's decision**, "nor is it limited to the 'record' offered to the Attorney General" See City of Fort Thomas v. Cincinnati Enquirer, 406 S.W.3d 842, 849 (Ky. 2013) (emphasis added). Pursuant to KRS 61.882(3), this Court must "determine the matter de novo." Therefore, this Court shall not give any deference to the AG's Decision and consider the issues in this matter without any regard for the AG Decision as if it were considering the issues for the first time, after all briefs are submitted to this Court and the parties have had a chance to present their positions during oral argument on April 6, 2018.

2. WKU's Arguments

The subject of this brief only relates to the following two questions: (1) **whether the records at issue in this case are exempt from disclosure under Kentucky's Open Records Act because FERPA prohibits their release in whole or part**; and (2) **whether the Attorney General has authority to conduct *in camera* review pursuant to the Kentucky Open Records Act and FERPA**, as set forth in the Court's November 21, 2017 Order. However, as noted in that Order, this case raises issues aside from FERPA, including other exemptions under

the Kentucky Open Records Act, which the Court will address at a later date and schedule for briefing and discovery on those issues, if it becomes necessary.

In summary, WKU's arguments are as follows:

1) Title IX Investigative Documents are "education records" and, therefore, protected from disclosure under FERPA; and

2) FERPA takes precedence over the Kentucky Open Records Act and therefore, FERPA confirms WKU's right to restrict access to the Title IX Investigative Documents in their entirety, including to the Attorney General, for an *in camera* review.

WKU has already indicated, in its responses to the Herald's discovery requests, that four of the twenty investigations at issue are not education records as they do not directly relate to students, and those four investigative records will not be part of the discussion in this Brief. However, WKU reserves its right to object to the production of those investigative records pursuant to other exemptions/exceptions provided under the Kentucky Open Records Act, as noted in WKU's Complaint, the Privilege Log, and which may become the subject of subsequent briefing if it becomes necessary and if so ordered by this Court.

ARGUMENT NO. 1
TITLE IX INVESTIGATIVE DOCUMENTS ARE SHIELDED FROM DISCLOSURE UNDER FERPA

1. Kentucky Open Records Act

The Kentucky Open Records Act is animated by the General Assembly's legislative finding that the "free and open examination of public records is in the public interest." KRS 61.871. The Act provides that "all public records shall be open for inspection by any person, "except where a public record is specifically exempted from disclosure." KRS 61.872(1).

One of the most important exceptions to this general rule of open examination of public records is the privacy exception codified in KRS 61.878(1)(a), which exempts from disclosure "[p]ublic records containing information of a personal nature where the public disclosure thereof

would constitute a clearly unwarranted invasion of personal privacy." The privacy exception is the first among the twelve listed in KRS 61.878, leading the Supreme Court of Kentucky to call it "the foremost exception to the disclosure rule." Kentucky Board of Examiners of Psychologists v. Courier-Journal, 826 S.W.2d 324, 327 (1992) (personal privacy exemption extends to "fine details" of alleged sexual misconduct, which "are largely personal and are commonly treated circumspectly"). In Cape Publications Inc., v. Univ. of Louisville Found, Inc., 260 S.W.3d 818, 821 (Ky. 2008), the Supreme Court of Kentucky held that the personal privacy exemption reflects our society's recognition that privacy remains a basic right of the sovereign people and is deeply interwoven in our American jurisprudence. **Personal Privacy is a legitimate concern and worthy of protection from invasion by unwarranted public scrutiny.**

Closely related to the privacy exemptions are the exemptions in KRS 61.878(1)(k) and (l), which operate with statutory confidentiality provisions, or provisions limiting access to specified persons or entities, beyond the scope of the Open Records Act. All public records or information the disclosure of which is prohibited by federal law or regulation are exempt from disclosure pursuant to KRS 61.878(1)(k). Therefore, we must turn our attention to FERPA, a federally enacted law whose purpose is to protect the privacy rights of students and therefore, is incorporated into the Kentucky Open Records Act.

2. Family Education Rights and Privacy Act (FERPA)

A. Under FERPA, the interests of the students outweigh the interest of the government

Since 1974, FERPA has helped protect the privacy interests of students and their parents. In fact, Congress enacted the FERPA "to protect [parents' and students'] rights to privacy by limiting the transferability of their records without their consent." Joint Statement, 120 Cong. Rec. 39858, 39862 (1974); See also Owasso Independent School District v. Falvo, 534 U.S. 426

(2002). Pursuant to its constitutional spending power, Congress provides funds to educational institutions via the FERPA on the condition that, *inter alia*, such agencies or institutions do not have a "policy or practice of permitting the release of education records (or personally identifiable information contained therein …) of students without the written consent of [the students or] their parents[.]" 20 U.S.C. § 1232g(b)(1); see also Davis v. Monroe County Bd. of Educ. 526 U.S. 629 (1999) (quoting Pennhurst State School and Hospital, 451 U.S. 1 (1981)). The Act also provides that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records," except as permitted by the Act. 20 U.S.C. § 1232g(b)(2). Congress also recognizes that, based upon the privacy interests protected by FERPA, educational institutions may withhold from the federal government certain personal data on students and families. See 20 U.S.C. § 1232i. Because Congress holds student privacy interests in such high regard:

> the refusal of a[n] … educational agency or institution … to provide personally identifiable data on students or their families, as a part of any applicable program, to any Federal office, agency, department, or other third party, on the grounds that it constitutes a violation of the right to privacy and constitutionality of students or their parents, shall not constitute sufficient grounds for the suspension or termination of federal assistance.

In other words, Congress places the privacy interests of students and parents above the federal government's interest in obtaining necessary data and records.

B. Title IX Investigative Records are "Education Records" under FERPA

In order for records to be protected from disclosure under FERPA, these records have to be considered "education records." The Act broadly defines "education records" as "those records, files, documents, and other materials which (i) contain **information directly related to a student**; and (ii) are **maintained by an educational agency or institution** or by a person

acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A) (emphasis added). The Act, however, outlines exceptions for types of records that are not considered "education records." In relevant part, the statute reads as follows:

> (B) the term "education records" does not include –
> (i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible to revealed to any other person except a substitute;
> (ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;
> (iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or
> (iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

20. U.S.C. § 1232g(a)(4)(B).

Notably, Congress made no content-based judgments with regard to its "education records" definition. Additionally, the legislative history contains no statements suggesting that Congress intended to exclude student disciplinary records or Title IX investigative records from its definition of "education records," or that "education records" should be limited to records containing explicitly academic information only. Thus, there is simply nothing to contradict the plain meaning of FERPA's text.

Other principles of statutory construction also suggest that the term "education records" should be interpreted to include Title IX investigative records. "Under the principle of statutory

construction [*expressio unius est exclusio alterius*] the enumeration of specific exclusions from the operation of a statute is an indication that the statue should apply to all cases not specifically excluded." See U.S. v. Miami University, 91 F.Supp.2d 1132, 1150 (S.D. Ohio 2000) (citing United States v. Rocha, 916 F.2d 219, 243 (5th Cir. 1990)). Because Congress made no content-based judgments with regard to its "education records" definition, this Court shall not infer such a limitation. See, e.g. Honig v. Doe, 484 U.S. 305, 324-25 (1988) (declining to read an exception into a statute because the plain language of the statute evinced Congress's intent to omit such an exception and the court was not "at liberty to engraft onto the statute an exception Congress chose not to create."). Applying the principle of *expressio unius est exclusion alterius* to the instant case supports the conclusion that Title IX investigative records are records included within the definition of "education records."

To further elaborate on the plain language standard, Title IX investigative records are education records because (1) they **directly relate to a student** and (2) are **kept by that student's university**. See U.S. v. Miami Univ., 294 F.3d 797, 812 (6th Cir. 2001) (emphasis added) (the scope of the words "directly related" is quite broad); see also Rhea v. Dist. Bd. of Trustees of Santa Fe Coll., 109 So. 3d 851, 858 (Fla. Dist. Ct. App. 2013) (**a student's knowledge of, and connection to, the information conveyed in the [record] is not merely peripheral or tangential**) (emphasis added); see also University of Kentucky v. Kernel Press Inc., d/b/a The Kentucky Kernel, Fayette Circuit Court, Eight Division, No. 16-CI-329 (January 23, 2017) (**The Court held that a university's sexual misconduct investigation records are "education records" pursuant to FERPA**) (emphasis added). Records therefore directly relate to a student if "the matters addressed in the … records pertain to actions committed or allegedly

committed by or against" the student and contain information identifying the student. Miami Univ., 91 F.Supp.2d 1132, 1149 (S.D. Ohio 2000).

Further, information is directly related to a student if it has a **close connection to that student**. See *Merriam-Webster's Collegiate Dictionary* 354-54 (11th ed. 2004) (emphasis added) (defining "direct" in relevant part as "characterized by close, logical, causal, or consequential relationship"; defining "directly" as "in a direct manner"). As a result, "directly related" encompasses far more information than might be afforded privacy in other situations.

Here, the Title IX Investigative Records include records regarding a student's experiences, impressions, knowledge, and perceptions of the events subject of these Title IX Complaints. More specifically, these documents include the following classes of documents: (1) Harassment/Discrimination Complaint; (2) Memorandums; (3) Timeline/Case Sequence; (4) Witness Lists and contact information; (5) e-mails regarding the facts surrounding the Complaint; (6) Drafts/Notes of EEO/Title IX Coordinator from phone calls and meetings with the victim, accused, and other witnesses; and (7) resignation letters. See WKU's Privilege Log Produced to the Court. These documents are riddled with sensitive and personally identifiable information related to a student, such as survivor and witness name, initials, phone numbers, e-mail addresses, home addresses, travel plans, classes, research projects, photographs, diagrams, text messages, correspondence, medical information, information about the parties' personal lives, information regarding the relationships and interactions between affected parties and witnesses; and other student specific information, i.e. information directly related to a student. While it is true that some of these documents may contain information regarding employees, this does not jeopardize the classification of these records as directly relating to students. See University of Kentucky, No. 16-CO-3229. Also, any attempt by the Herald, the Kernel, or the

Attorney General to characterize these Title IX Investigative Records as teacher disciplinary records is misguided.

In order to meet the second prong of the "education records" requirement under FERPA, the records must be maintained by the University. Here, the records are maintained by the WKU Office of the Title IX Coordinator, the custodian of these records, where they are maintained all in paper form, while some records are additionally stored in electronic form. Internally, WKU refers to these records as "Title IX files" and only the Title IX Coordinator and/or General Counsel have access to these records. See WKU's Responses to the Herald's Discovery Requests. There is no requirement under FERPA that these records must maintained by a particular individual or within a specific department – they merely must be maintained by the University, which is the case here.

In light of the foregoing reasons, the Title IX investigative records are "education records" under FERPA and should be shielded from disclosure to any third party.

ARGUMENT NO. 2
THE ATTORNEY GENERAL IS NOT ENTITLED TO REVIEW THE TITLE IX INVESTIGATIVE DOCUMENTS BECAUSE FERPA PREEMPTS THE KENTUCKY OPEN RECORDS ACT

1. Supremacy Clause of the United States Constitution

The Supremacy Clause provides that the laws of the United States, the Constitution, and the treaties "shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Congress can preempt a state law through federal legislation either expressly or implicitly. E.g., Oneok, Inc. v. Learjet, Inc., 135 S.Ct. 1591, 1595 (2015). Implicit preemption can be accomplished through "conflict" or "field" preemption. Id. In either situation, federal law controls over state law. Here, the Kentucky Open Records Act must yield to federal law. To the extent the Kentucky

Open Records Act requires release of WKU's Title IX investigative records, Congress has preempted the Kentucky Open Records Act through field and conflict preemption.

Field preemption occurs when Congress "intended to foreclose any state regulation in the area, irrespective of whether state law is consistent or inconsistent with federal standards." Id. (internal quotes removed). "In such situations, Congress has forbidden the State to take action in the field that the federal statute pre-empts." Id. Field preemption occurs when the federal government either "completely occupies a given field or an identifiable portion of it." Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190 (1983). "The intent to displace state law altogether can be inferred from a framework of regulation so pervasive … that Congress left no room for the States to supplement it or where there is a federal interest … so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Arizona v. United States, 132 S.Ct. 2492, 2501 (2012) (internal quotations removed).

Here, FERPA occupies the field for student educational records for universities receiving federal funding. In fact, federal law as a whole occupies the field for Title IX records specifically through detailed requirements focused on the confidentiality of Title IX proceedings and federal reporting requirements. Where Congress adopts a "comprehensive plan" detailing specific "terms and conditions," Congress has "acted in such manner that its action should" preempt the field. Hines v. Davidowitz, 312 U.S. 52, 69 (1941). A comprehensive federal scheme, including FERPA, Title IX, and the Clery Act, regulates the privacy and confidentiality of Title IX sexual misconduct/assault investigations and related records. See Hines, 312 U.S. at 69. Therefore, any attempt by state law to add or to subtract from those confidentiality and privacy requirements is invalid, because Congress has occupied the field. Even if we assume for

the sake of argument that field preemption does not apply, FERPA still controls because of conflict preemption.

Conflict preemption occurs in two circumstances: (1) "where compliance with both state and federal law is impossible" and (2) "where the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" Oneok, Inc., 135 S. Ct. at 1595. Thus, Courts have held that where a public records act conflicts with federal law by compelling disclosure of student records protected by FERPA, it is preempted. See Chi. Tribune Co. v. Bd. of Trs. Of Univ. of Ill., 680 F.3d 1001, 1005 (7th Cir. 2012) (to the extent that state law "command[s] the disclosure of particular information" protected by FERPA, "the Supremacy Clause means that federal law prevails."); Rim of the World Unified School District v. Superior Court, 104 Cal. App. 4th 1393, 1395 (2002) (FERPA preempted California's education act to preclude the release of school expulsion records).

2. FERPA preempts the Kentucky Open Records Act

The Attorney General will probably argue that the Kentucky Open Records Act favors transparency and consequently, the Attorney General shall have a right to review the Title IX investigative documents *in camera* in order to substantiate WKU's reasons for non-disclosure. In support of its position, the Attorney General will cite to KRS 61.880(2)(c), which provides as follows:

> … The burden of proof in sustaining the action shall rest with the agency and the **Attorney General may request additional documentation from the agency for substantiation.** The Attorney General may also request a copy of the records involved but they shall not be disclosed.

(emphasis added).

Analyzing this statutory provision without any regard to other statutes or regulations would most likely yield a result of allowing the AG to review the Title IX investigative

documents *in camera*. However, this statutory provision cannot stand alone without any reference to FERPA. As already discussed in great detail above, FERPA prohibits the disclosure of "education records" to any federal agencies, state departments, or third parties, without the consent of the students. Therefore, there is a conflict between FERPA, a federally enacted statute, and the Kentucky Open Records Act, a state law.

FERPA was enacted under Congress' spending power, Gonzaga Univ. v. Doe, 536 U.S. 273, 278 (2002), and the Supreme Court of the United States has specifically held that, "… under the Supremacy Clause, **federal Spending Clause legislation trumps conflicting state statutes or regulations**." Mo. Child Care Ass'n v. Cross, 294 F.3d 1034, 1041 (8th Cir. 2002) (emphasis added). Here, FERPA controls, because WKU has received federal funds. See State ex rel. ESPN, Inc. v. Ohio State University, 970 N.E.2d 939, 945-48 (Ohio 2012) (holding that "educational records" may be withheld in their entirety). Because WKU agreed to accept FERPA's conditions when it accepted federal funds, it is bound by those conditions. ESPN, 970 N.E. 2d at 945-46 (quoting Miami Univ., 294 F.3d at 809) ("Once the conditions and the funds are accepted, the school is indeed prohibited from systematically releasing education records without consent")).

The United States has inherent power to sue to enforce conditions imposed on the recipients of federal grants. Legislation enacted pursuant to the spending power, such as FERPA, is much in the nature of a contract: **in return for federal funds, the States agree to comply with federally imposed conditions**. Citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) (emphasis added)). More specifically, if WKU does not comply with FERPA, the Department of Education may take various enforcement actions against WKU, including but not limited to, a suit for an injunction, issuance of a cease and desist order; entry

into a compliance agreement; and if, compliance cannot be secured through voluntary means, actions to terminate federal financial assistance to the University. 20 U.S.C. § 1234c.

In a similar case, the Supreme Court of Montana explained the importance of a university's compliance with FERPA and that such compliance preempts any state law. In more detail, the Supreme Court of Montana reasoned as follows:

> It is also apparent to us that the Commissioner, as Chief Executive Officer of the Montana University System (MUS) was properly cognizant of the **heavy strings that FERPA attached to the MUS' federal funding**. Although FERPA has been characterized as "spending legislation," we find Krakauer's argument that it "prohibits" nothing delusive. **FERPA is more than mere words in the wind.** As outlined above, the University, a unit of the MUS, promised to abide by FERPA's directives in exchange for federal funding. By signing the Program Participation Agreement, the University acknowledged the potential consequences of loss of federal funding in the event that it violated FERPA. **Whether or not FERPA explicitly prohibits state action, the financial risk it imposes upon MUS for violation of the statute is a real one. As the Commissioner stated, "The MUS should not be put in the position of predicting what decisions might be made by the federal government."**

Krakauer v. Montana ex rel. Christian, 381 P.3d 524, 535-536 (Mont. 2016) (internal citations omitted) (emphasis added).

The Attorney General will likely argue that the purpose of the Attorney General's *in camera* review is to ensure transparency in government and verify the government's compliance with applicable laws and procedures. The Attorney General has already on numerous occasions exclaimed that he was critical of WKU, stating it expects the public to "trust" that it will investigate and resolve Title IX complaints. What the Attorney General, however, fails to realize is that by placing legal responsibility for Title IX complaints squarely on the universities, the federal government has entrusted universities, not branches of the state government, with the trust and confidence to investigate and resolve Title IX complaints.

Furthermore, it isn't WKU's obligation to provide the the newspapers or the Attorney General with these Title IV investigative records – the right to privacy belongs solely to the victims and accountability for protecting these rights lies with WKU, not the newspapers or the Attorney General. If a student, who has filed a Title IX Complaint, wishes to release information and/or documentation related to the investigation, then he or she may do so on his or her own volition. However, none of the sixteen students who have filed Title IX Complaints, and whose Title IX investigative records are the subject of this Appeal, have presented to WKU a request to disclose these records. Because these students have not consented to release of their FERPA-protected education records, WKU will continue to keep these Title IX investigative records confidential, unless otherwise ordered by this Court.

Lastly, the Attorney General will probably argue that the public has a right to know about WKU's Title IX process and whether the process is fair, accurate, and meaningful. However, the public's right to know such information is diminished by the student's right to privacy and freedom from scrutiny and exposure of the events surrounding the Title IX Complaint. Moreover, if a student has been subjected to any sexual misconduct or violence and is dissatisfied with the Title IX process or the outcome of the process, then that student has the right to file a Complaint against the University. This litigation process will then act as the gatekeeper of accountability and transparency of these types of investigations. To date, no such Complaints have been filed. An important consideration for this Court to remember is that FERPA applies regardless of public interest in education records. As the Department of Education informed schools when it promulgated amendments to the regulations that implement FERPA:

> The only parties who have a right to obtain access to education records under FERPA are parents and eligible students. **Journalist, researches, and other**

> **members of the public have no right under FERPA to gain access to education records for school accountability or other matters of public interest…**

73 Fed. Reg. 74,806, 74,831 (December 9, 2008) (emphasis added). "The fact that information is a matter of general public interest does not give an educational [ ] institution permission to release the same or related information from education records without consent." Id. This Court must give deference to the Department of Education's opinion.

Overall, it is obvious that the Kentucky Open Records Act is an obstacle to accomplishing Congress's purposes and objectives in enacting FERPA. Therefore, FERPA preempts the Kentucky Open Records Act and prevents WKU from disclosing the Title IX investigative records to any third party, regardless of that party's interest in the records.

CONCLUSION

In sum, WKU's Title IX investigative records are protected from disclosure in their entirety, under FERPA and therefore, this Court should not grant access of these records to the Herald, the Kernel, or the Attorney General.

This 1st day of March, 2018.

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CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing was placed in the U. S. Mail addressed on the 1st day of March, 2018, as follows:

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COMMONWEALTH OF KENTUCKY
WARREN CIRCUIT COURT
DIVISION NO. I
CASE NO. 17-CI-00233

WESTERN KENTUCKY UNIVERSITY — PLAINTIFF/APPELLANT/ INTERVENING DEFENDANT

V.

ORDER

COLLEGE HEIGHTS HERALD — DEFENDANT/APPELLEE
AND

THE KERNEL PRESS, INC.
D/B/A THE KENTUCKY KERNEL — DEFENDANT/APPELLEE
AND

COMMONWEALTH OF KENTUCKY *ex rel*
ANDY BESHEAR, ATTORNEY GENERAL — INTERVENING PLAINTIFF

The matter having been fully briefed to the Court, and the Court having considered the arguments of the parties, and being otherwise sufficiently advised does hereby:

ORDER, ADJUDGE and DECREE that the College Heights Herald, The Kernel Press, and Attorney General of the Commonwealth of Kentucky shall not have access to Western Kentucky University's Title IX investigative records as same are protected from disclosure, in their entirety, under the Family Educational Rights and Privacy Act ("FERPA").

This is a final and appealable order and there is no just cause for delay.

This the ___ day of _____, 2018.

_____
Steve A. Wilson, Judge
Warren Circuit Court, Division No. I

Tendered by:

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