IN THE SUPREME COURT OF PENNSYLVANIA

NO. 16 MAL 2019

CENTRAL DAUPHIN SCHOOL DISTRICT,
Petitioner
v.
VALERIA HAWKINS, FOX 43 NEWS and the COMMONWEALTH OF PENNSYLVANIA OFFICE OF OPEN RECORDS
***Respondents*.**

BRIEF *AMICUS CURIAE* of THE BRECHNER CENTER FOR FREEDOM OF INFORMATION, STUDENT PRESS LAW CENTER, NATIONAL FREEDOM OF INFORMATION COALITION and SOCIETY OF PROFESSIONAL JOURNALISTS, in support of Respondents

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Response to Petition for Allowance of Appeal of the December 10, 2018, Order of the Commonwealth Court, Docket No. 1154 C.D. 2017

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INTEREST OF AMICI CURIAE

Amici Journalist Groups are organizations that regularly speak for the rights of journalists to gain access to the information they need to inform the public.

The Brechner Center for Freedom of Information is located at the University of Florida College of Journalism and Communications, where for 40 years the Center's legal staff has served as a source of research and expertise about the law of access to information. The Brechner Center regularly publishes scholarly research about the public's rights under open-government laws, responds to media inquiries about the workings of public-records statutes, and conducts educational programming to inform citizens about their access rights.

The Student Press Law Center is an IRS 501(c)(3) nonprofit headquartered in Washington, D.C., with a mission of supporting substantive, civic-minded journalism in schools and colleges nationwide. Since its founding in 1974, the SPLC has been the nation's only source of legal assistance dedicated to the needs of student journalists and journalism educators. Its legal staff regularly assists in resolving disputes about access to records and student privacy, and its attorneys have authored many authoritative articles addressing misconceptions about the breadth of FERPA confidentiality.

The National Freedom of Information Coalition (NFOIC) is a nonprofit organization that works to raise public awareness about the importance of

transparency and to protect the public's right to open government. The NFOIC awards grants to its affiliated state- and region-based freedom of information organizations for their work in fostering, educating, and advocating for open, transparent government. NFOIC also administers the Knight FOI Fund, a perpetual legal fund to assist litigants advocating for open government in important and meritorious legal cases.

The Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists, and protects First Amendment guarantees of freedom of speech and press.[1]

SUMMARY OF ARGUMENT

Effective oversight of the public education system is essential to assuring safety, honesty and public trust. Well-intentioned student privacy laws are

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[1] Chad Rutkowski, counsel for the Journalist Group *Amici*, pursuant to Pa.R.A.P. 531(b)(2) represents that neither party nor their counsel nor any other person or entity other than the Journalist Group Amici made a monetary contribution to fund the preparation or submission of this brief, nor did the parties nor their counsel nor any other person or entity other than the Journalist Group Amici and its counsel participate in the drafting of this brief.

susceptible to nonsensically overbroad misapplication that frustrates transparency and accountability. The trial and appellate courts below interpreted student privacy law sensibly, consistent with prevailing precedent and with congressional intent. There is no need to disturb these commonsense rulings.

The privacy interests involved in behavior aboard a school bus – a space that is scarcely "private" – are minimal compared with the overriding public interest in making sure that schools are safe and that school authorities discharge their safety duties properly. Concealing videos that shed light on the operations of schools disserves the public's interest in accountability and runs counter to well-established principles of Pennsylvania law that exceptions to the accessibility of public records must be narrowly construed.

Contrary to the School District's assertion, federal financial sanctions simply cannot be imposed for disclosure of the video sought by FOX 43 News. FERPA has never been enforced against any educational institution over its four-decade history, and by law it cannot be enforced for compliance with a judicial directive. Sanctions under such circumstances would be not just contrary to the statute itself, but plainly unconstitutional. The strained, illogical interpretation urged by the District would create a needless constitutional dilemma that the Commonwealth Court's interpretation sensibly avoids.

ARGUMENT

I. ACCESS TO RECORDS OF EDUCATIONAL INSTITUTIONS IS CRITICAL FOR SCHOOL SAFETY.

This case is about the ability of journalists to gain access to records that Pennsylvania law entitles the public to inspect (here, a video that is believed to have captured a physical altercation between a student and a parent of some community prominence), the type of records on which journalists rely every day. Tragic recent events remind us of the important role that access to school surveillance videos can play in helping parents, policymakers and community members discharge their oversight responsibilities. At Broward County's Marjorie Stoneman Douglas High School, scene of America's most catastrophic school shooting, access to the footage from surveillance cameras helped journalists piece together the lapses on the part of public officials that enabled a teenage gunman to take 17 lives before his belated apprehension.[2] As in this case, journalists in Broward County were forced to go to court to obtain records that the school district and law enforcement agencies preferred to keep under wraps. The appellate court's words in that case are instructive here: "Parents have such a high stake in the ultimate decisions that they must have access to camera video footage here at issue

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[2] *See* South Florida Sun-Sentinel, *Unprepared and Overwhelmed*, Dec. 28, 2018 (concluding, based on examination of hours of footage released under court order, that "failures by the Broward County Sheriff's Office and school district cost children their lives").

and not blindly rely on school board experts to make decisions for them." *State Atty's Ofc. v. Cable News Network, Inc.*, 251 So.2d 205 (Fla. 4th DCA 2018). The petitioners here ask the parents of the Central Dauphin school community – and all parents throughout Pennsylvania – to "blindly rely" on school authorities in matters of student welfare.

Regrettably, FERPA is regularly misapplied to frustrate public accountability, whether a result of good-faith misunderstanding of the (admittedly poorly drafted) statute or a product of purposeful concealment. Northern Kentucky University recently was sanctioned by a federal district court for frivolously invoking FERPA to obstruct the deposition of a basketball coach being asked for his recollections about a sexual-assault complaint lodged against three of his players.[3] Oklahoma State University invoked FERPA to justify allowing a known serial sex offender to roam loose on the campus without notifying even the university's own police.[4] There is a manifest public interest in interpreting FERPA in a sensibly narrow manner to avoid such abuses.

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[3] *Doe v. Northern Kentucky Univ.*, No. 2:16-CV-28, 2016 WL 6237510 (N.D. Ky. Oct. 24, 2016).

[4] Tyler Kingkade, Nathan Cochran Pleads Guilty to Sexual Battery at OSU, But Won't Face Prison, Huffington Post, Sept. 23, 2013, *available at* http://www.huffingtonpost.com/2013/09/23/nathan-cochransexual-battery_n_3975964.html.

Perhaps most cruelly, FERPA has been invoked to obstruct requests from grieving family members who want to know how their children were injured or killed at school. In Arkansas, the family of a 7-year-old boy who suffered life-threatening injuries on a school playground was forced to sue to obtain a video that the child's doctors urgently needed to understand the nature of his injuries; the school claimed that release of the video would violate FERPA, and put adherence to FERPA ahead of the child's need for medical care.[5] A Valdosta, Ga., family had to go to court to obtain access to a security video helping them understand their child's mysterious death in a high-school gymnasium.[6] When a Buffalo high school football player died on the practice field and his parents sought a copy of the school's video, the school district invoked FERPA and told the family: Sue us.[7] If the Court countenances the School District's irrationally broad interpretation of FERPA here, more such abuses will proliferate.

Access to security videos is especially important because those videos are often the public's only way of effectively keeping watch over increasingly heavily

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[5] Kitty L. Cone & Richard J. Peltz-Steele, *FERPA Close-Up: When Video Captures Violence and Injury*, 70 OKLA. L. REV. 839, 841 (2018).

[6] Jeff Black, Video released in mysterious death of Georgia teen Kendrick Johnson leaves questions unanswered," NBC News, Oct. 30, 2013, *available at* https://www.nbcnews.com/news/other/video-released-mysterious-death-georgia-teen-kendrick-johnson-leaves-questions-f8C11502245.

[7] Matthew Spina, *Parents of High School Football Player Who Died File Claim*, The Buffalo News, Jan. 27, 2014.

policed schools, where students regrettably have been injured by overzealous security tactics. To cite one recent example, a 13-year-old Columbus, Ga., student was gravely injured, leading to amputation of his leg, after a school contractor put him in a restraining hold described by witnesses as a "body slam."[8] The school claimed that the student was able to walk and showed no signs of distress, but a blogger obtained a leaked copy of school surveillance video – video that the school had been withholding on FERPA grounds – showing the student being picked up and carried to his school bus, belying the school's official account.[9] In Connecticut, access to surveillance video from a school hallway – released to journalists under the state public-records act – helped expose that a school employee was the aggressor in an altercation that injured a student, contrary to the employee's description.[10] These are the type of vital stories that will go untold if security videos are taken off the public record. This case exemplifies why it is important for the public and press to have access to school security videos in places where no reasonable expectation of privacy exists: Because those videos can

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[8] Richard Hyatt, *Surveillance Video Shows Student Being Carried Out*, AllonGeorgia.com, Oct. 23, 2016, *available at* http://muscogee.allongeorgia.com/exclusive-surveillance-video-shows-student-being-carried-out/.

[9] *See id.*

[10] Christopher Peak, *Schools: Youth Worker 'Provoked' Fight*, The New Haven Independent, Oct. 4, 2018, *available at* https://www.newhavenindependent.org/index.php/archives/entry/investigation_frank_redente_provoked_fight/

shed light on the mistreatment of students by adults (or debunk unfounded accusations of mistreatment and vindicate the innocent).

A. FERPA is a Narrow Statute That Applies Only to Educational Records Centrally Maintained in a File Corresponding to the Student

Any discussion of the FERPA status of documents must begin and end with the Supreme Court's authoritative word in *Owasso Independent School Dist. No. I-011 v. Falvo*, 534 U.S. 426 (2002). In *Owasso*, the Supreme Court – with the *amicus* support of the U.S. Department of Education, which has exclusive authority to interpret and enforce FERPA – rejected a broad reading of the phrase "education records." The justices held that disclosing the scores on peer-graded quizzes did not violate FERPA, because the statute applies only to records that are "maintained" by the school, and these papers had not been filed in a central repository so as to be retrievable as part of each student's permanent record. *Id.* at 433.

That the Supreme Court did not find a federally protected privacy right even in student grades is noteworthy. If "education records" means anything, it means "grades" – far more than it means "pictures of people's faces." Yet even grades, the Court decided, did not qualify for FERPA protection unless memorialized in a central repository and retrievable by the name of the corresponding student. In the case at hand, it is established that video recordings are kept in two locations –

normally, in the district's Transportation office (not in student-by-student files), and if a Right-to-Know dispute arises, in a safe belonging to the District's records custodian (again, not in student-by-student files).

The Court's *Owasso* holding was rooted in, and consistent with, the legislative intent behind FERPA, which was never to create a subclass of invisible people. Congress enacted FERPA with a specific concern in mind: That schools were maintaining secret files containing potentially damaging observations that might be erroneous and might be shared with police, employers or graduate schools without a chance for the family to correct the errors.[11] In other words, FERPA applies to the file that a school would pull if an employer or a graduate school were to say, "Give me John Smith's file," or that a parent would receive if she asked to see her own child's file.

If the Central Dauphin School District is right, and FERPA applies to all records in all formats pertaining to students regardless of whether they are kept with the student's permanent file, imagine the chaos when a parent says, "I want my child's FERPA records, to include every record in which he is identifiable, regardless of where it is held." And imagine – since FERPA applies equally to colleges as well as K-12 schools – that a student at Penn State University makes

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[11] *See* Zach Greenberg & Adam Goldstein, *Baking Common Sense into the FERPA Cake: How to Meaningfully Protect Student Rights and the Public Interest*, 44 J. LEGIS. 22, 26 (2017).

the same request. Penn State has 2,000 security cameras[12] and 17,000 employees.[13] If the School District's understanding of FERPA is right, then Penn State will be forced to search thousands of email baskets to gather any records in which the student is identifiable, and to examine the footage from 2,000 surveillance cameras for images of the student's face – all within FERPA's statutory deadline of 45 days.

It defies common sense and basic principles of statutory construction to define a video of an event visible to passersby as a "private" education record. By the District's logic, a school that disseminates video footage from a football game, a school play, or a choir performance would be a FERPA violator. Congress plainly intended that FERPA apply to records disclosing information that is actually confidential and not publicly known or knowable. *See, e.g.*, *Bracco v. Machen*, No. 01-2009-CA-4444 (Fla. Cir. Ct. Jan. 10, 2011) (videos of Student Senate meetings are not protected by FERPA because there is no privacy interest in speaking at a meeting that a member of the public could observe). *Amici* from the Pennsylvania School Boards Association make much of the fact that the bus ride at issue involved an "away" basketball game, so that the identities of the riders are

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[12] Cate Hansberry, "'We're being watched': 2,000 cameras monitor Penn State campus, more on the way," CENTRE DAILY TIMES, April 20, 2014.
[13] Employee head count is presented on the Penn State University Human Resources page, https://ohr.psu.edu/prospective-employee.

knowable to the public – but that is the point. A basketball fan would be free to shoot video of the players as they board the bus, as they disembark at the stadium, as they play the game, as they reenter the bus for the ride home, and as they arrive back at the school. Nothing about a bus trip to a basketball tournament is a confidential educational matter. As a North Carolina judge pithily observed in denying FERPA protection to records of athletes' cellphone numbers and parking tickets, "FERPA does not provide a student with an invisible cloak so that the student can remain hidden from public view." *News & Observer Publ'g Co. v. Baddour*, No. 10-CVS-1941, slip op. at 2 (N.C. Super. Ct. Apr. 19, 2011) (memorandum opinion).

Every state's public-records law, including Pennsylvania's, begins with the premise that exceptions to access are to be narrowly construed and that close judgment calls are to be made in favor of the public's right to be informed. *Office of Gov. v. Scolforo*, 65 A.3d 1095, 1100 (Pa. Commonw. 2013). There is ample precedent elsewhere for disclosing the same records that Central Dauphin is withholding here, including on-point rulings in Louisiana (*State v. Mart*, 697 So.2d 1055 (La. Ct. App. 1997), New York (*In Matter of Rome City School Dist. v. Grifasi*, 10 Misc. 3d 1034 (NY Sup. Ct. 2005) and Washington (*Lindeman v. Kelso Sch. Dist.*, 172 P.3d 329 (Wash. 2007)), so it clearly is possible to construe FERPA narrowly in a way that does not defeat the public's right of access. Since it is not

just possible but eminently logical to interpret FERPA in a way that avoids the nonsensical expansion of "student educational privacy" to cover records that are neither educational nor private, the Right-to-Know-Law requires adopting that interpretation.

II. THERE IS NO POSSIBILITY OF FERPA FINANCIAL PENALTIES FOR DISCLOSURE OF THE VIDEO AT ISSUE.

A. Even when documents do constitute "education records," federal statutes and regulations foreclose sanctions for a single disclosure

It is a legal and a factual impossibility for the Department of Education to impose FERPA sanctions on a school district for the act of releasing a security video in compliance with a judicial directive. Nothing of the sort has ever happened, and there is no basis to believe that it ever will.

The FERPA statute explicitly provides that disclosure in compliance with a court order does not constitute a legally prohibited release. *See* 20 U.S.C. § 1232g (b)(2)(B) ("compliance with judicial order" recognized as an exception to the prohibited "policy or practice" of releasing education records). In addition to the recently released video from Marjorie Stoneman Douglas High School in Florida, it is documented that schools have released video in compliance with court orders in Louisiana (*Mart*, *supra*), New York (*Grifasi*, *supra*) and Washington (*Lindeman*, *supra*), as well as to parents in Arkansas and Georgia and to journalists in Connecticut in cases discussed *supra*, and yet none of those schools has been de-

funded. The Court should decline to do violence to the public's right-to-know based on a farfetched scenario belied by decades of experience.

The sole enforcer of FERPA is the Department of Education, and the Department's regulations set forth a multi-step enforcement process under which a "first offense" *cannot* result in sanctions. *See* 34 C.F.R. § 99.66. If the Department receives a FERPA complaint, the Department investigates to determine, first, whether a nonconsensual release of education records occurred, and if so, whether that release was pursuant to a "policy or practice" of releases. *Id.* If a finding of a "policy or practice" is made, then the Department may: (1) issue a corrective plan and (2) provide a reasonable time for voluntary compliance. *Id.,* § 99.66(c)(1)-(2). Only if the school district is placed under a corrective plan and fails to comply with the plan may the Department initiate proceedings to withhold funding – but even then, sanctions are discretionary and not mandatory. 34 C.F.R. § 99.67. This is far from satisfying Pennsylvania's statutory exemption for a release of records that "will" result in the loss of federal funding. So many contingencies would have to be triggered – contingencies that have never happened in the 45-year history of FERPA[14] – as to make the loss of federal funding a practical impossibility.

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[14] *See* Greenberg & Goldstein, *supra*, at 27; Rob Silverblatt, *Hiding Behind Ivory Towers: Penalizing Schools That Improperly Invoke Student Privacy to Suppress Open Records Requests*, 101 GEO. L.J. 493, 498 (2013) (noting that in the 40-plus year history of FERPA, no institution has ever lost funding).

Indeed, Department regulations *expressly recognize* that there may be times when compliance with FERPA is foreclosed by conflicting obligations under state or local law, and when those conflicts arise, educational agencies are required merely to give notice that a conflict exists. 34 C.F.R. § 99.61 In other words, the Department in no way requires or expects that educational institutions will violate state law in the name of avoiding a finding of FERPA noncompliance.

In *Gonzaga Univ. v. Doe*, the Supreme Court clarified the law regarding "education records" by noting that "FERPA's nondisclosure provisions further speak only in term of institutional policy and practice *not on individual instances of disclosure*." 536 U.S. 273, 288 (2002) (emphasis added). *See also* §§ 1232g(b)(1)-(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). The focus on disclosure thus is a holistic, or "aggregate" focus, and not on "whether the needs of any particular person have been satisfied." *Gonzaga*, 536 U.S. at 288 (quoting *Blessing v. Freestone*, 520 U.S. 329, 343 (2008)). Recipient institutions thus can avoid termination of funding so long as they "comply substantially" with FERPA's requirements. *Id*.

Multiple courts have agreed that an individual disclosure of information is not a "policy or practice" within the meaning of FERPA. *See Weixel v. Board of Educ. of City of New York*, 287 F.3d 138 (2d Cir. 2002) (school's alleged contact

with third parties to provide defamatory and inaccurate information about student did not constitute a "policy or practice" under FERPA); *Daniel S. v. Bd. of Educ. of York Cmty. High Sch.*, 152 F. Supp. 2d 949 (N.D. Ill. 2001) (teacher's disclosure to cross-country team that he had kicked two students out of his gym class did not involve "policy or practice" that violated provisions of FERPA); *see also Jensen v. Reeves,* 45 F.Supp.2d 1265, 1276 (D.Utah 1999) ("FERPA was adopted to address systematic, not individual, violations of students' privacy by unauthorized releases of sensitive information in their educational records.").

B. The Penalty Structure of FERPA Can Logically Apply Only to a Wholesale Policy of Failing to Safeguard Records

Congress provided only one remedy for a FERPA violation: complete disqualification from federal education funding. *See* 20 U.S.C. §1232g(b)(1) (providing that "no funds shall be made available" under any federal education program to an institution violating FERPA's prohibitions on disclosure.) Revoking the School District's federal funding would ruinous; according to its most recently published budget, the Central Dauphin School District derives $2.6 million a year in operating funds from federal sources.[15] To insist that Congress intended to

[15] Central Dauphin School District, Final General Fund Budget, Fiscal Year 2017-18, *available at* http://www.cdschools.org/cms/lib04/PA09000075/Centricity/Domain/18/2017-18CentralDauphinSDGeneralFundBudgetPDE-2028Version.pdf.

financially destroy an academic institution for fulfilling a public-records request is simply nonsense.

Realistically, Congress intended FERPA to penalize only the rare outlier institution that wantonly makes a practice of handling confidential student education records carelessly. Otherwise, Congress would have provided milder intermediate penalties for one-off disclosures of records, just as is true of comparable education funding statutes. *See* Dep't of Educ., Adjustment of Civil Monetary Penalties for Inflation, 77 Fed. Reg. 60047, 60049 (Oct. 2, 2012) (amending 34 CFR Part 36) (specifying a range of civil monetary penalties for violating statutes administered by the Department of Education, all but one of which is capped at $35,000 per violation).

It is nonsensical to take the position that, for example, the penalty for falsifying a crime report to mislead the public in violation of the federal Clery Act, 20 U.S.C. 1092(f), is an offense carrying a capped penalty of $35,000, while the penalty for granting a request for public records is $2.6 million (or, at a university as large as Penn State, in the hundreds of millions of dollars). For its penalty structure to make any sense, FERPA must penalize only a one-in-a-million decision to abandon confidentiality as a routine institutional practice. This explains why, in its 45 years of existence, FERPA has never resulted in sanctions against anyone.

C. To Interpret FERPA To Impose Crippling Financial Disqualification for Granting Requests for Public Records Would Render the Statute Unconstitutional

If FERPA did operate as the School District insists, it would be unconstitutional. The Supreme Court has held that Congress cannot extend to states "offers they can't refuse," by imposing coercive regulation at the threat of a financial "gun to the head." *NFIB v. Sebelius*, 567 U.S. 519, 581 (2012). The School District's interpretation of FERPA would render the statute unconstitutional as exceeding Congress' Spending Clause authority. This Court should avoid such an unconstitutional construction when the statute can be readily salvaged by a far more logical construction.

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 the *Sebelius* case, the Supreme Court determined that pressure had become compulsion where states that were threatened with ineligibility for hundreds of millions of dollars in federal Medicaid funding if they rejected the Affordable Care Act's mandate to expand Medicaid eligibility.

Significantly, the 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 – does not directly relate to the purpose of the grant program. *Sebelius*, 132 S.Ct. at 2604; *see also Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S.Ct. 2321 (2013). If honoring a public records request will put a school district in violation of FERPA, and the result of being found in violation of FERPA is disqualification from all federal funding, then FERPA fails the compulsion standard of *Sebelius*.

Interpreting statutes to be unconstitutional is a disfavored "nuclear option," and courts properly avoid doing so when a statute can be given a limiting and salvaging construction. *DePaul v. Commonwealth*, 600 Pa. 573, 589 (2009) ("[S]tatutes are to be construed whenever possible to uphold their constitutionality.") (quoting *In re William L.*, 477 Pa. 322 (1978)). As the U.S. 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 Cop. v. Fla. Gulf Coast Bldg. & Constr. Trade Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. Calif.*, 155 U.S. 648, 657 (1895)).

FERPA is 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 non-

public information of the type that could be used detrimentally against a student if disclosed.

Amici from the PSBA rely on a December 2017 advisory letter from the Department of Education to a different school district concerning the FERPA status of a school video, but that interpretation is of minimal value here. Courts properly defer to agency interpretations when they go through the rigors of formal notice-and-comment rulemaking, *see Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), but not when they issue informal guidance. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (refusing to defer to wage-and-hour-law interpretation in policy manual of National Labor Relations Board, because it did not go through rigors of rulemaking). Further, deference to the Department's view should be at its nadir because the Department is opining in an area outside of its expertise. *See Gonzales v. Oregon*, 546 U.S. 243 (2006) (no special deference to Justice Department's interpretive rule governing physician-assisted suicide because the Attorney General does not have any special expertise in making medical judgments). The status of records as public under state law is a matter beyond the knowledge of the Department of Education, which never even mentions the existence of state freedom-of-information laws in its FERPA regulations. The far more persuasive authority is history, and history shows that it is not, and never has been, the Department's practice to sanction

schools for releasing surveillance videos – especially not where release is required by a court order.

CONCLUSION

For the foregoing reasons, the Court should decline review of the opinion of the Commonwealth Court.

Respectfully submitted,

/s/ Chad A. Rutkowski
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CERTIFICATE OF COMPLIANCE

Pursuant to Pa. R.A.P. 1115(f) and (g), I certify that this Amicus Brief support of Petition for Allowance of Appeal does not exceed the 4,500-word limit based on the word count feature on Microsoft Word, which is the word processing system used to prepare this brief.

I hereby certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Date: January 23, 2019 **BAKER HOSTETLER LLP**

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CERTIFICATE OF SERVICE

I hereby certify that I am m on January 23, 2019 serving two copies of the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121 and 11123.

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