ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE, *ex rel.* ESPN, INC. **ESPN Plaza** **Bristol, Connecticut 06010** Petitioner, vs. **THE OHIO STATE UNIVERSITY,** **Enarson Hall** **154 West 12th Avenue** **Columbus, Ohio 43210** Respondent.	:	**Case No.** **11-1177**

MEMORANDUM IN SUPPORT OF COMPLAINT FOR WRIT OF MANDAMUS

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vs.	:	**MEMORANDUM IN SUPPORT OF COMPLAINT FOR WRIT OF MANDAMUS**
THE OHIO STATE UNIVERSITY **Enarson Hall** **154 West 12th Avenue** **Columbus, Ohio 43210**	:	

I. INTRODUCTION

For the last century, the Ohio State University football team has been a state and national institution. Autumn Saturdays in Columbus and beyond are dominated by Buckeye football. Ohio State coaches – Paul Brown, Woody Hayes and Jim Tressel – are as well known as the Governor. Players such as Archie Griffin, Kirk Herbstreit and Terrelle Pryor are equally as well known. The players and coaches are part of an enormous operation that generates revenue and interest in the university. And Ohio State consistently promotes and markets its coaches and players as part of that operation.

The official Web site of Ohio State football http://bit.ly/jDunRO provides detailed biographical information of its coaches and players. On a visit to the site, readers can learn the hometown, major, class year and other information for every player on the roster. The site also touts players' individual accomplishments. Thus, for example, the site notes that Terrelle Pryor was All Academic Big Ten in 2009. In short, when times are good, Ohio State lets the world know. When times are bad, however, not so much.

II. STATEMENT OF FACTS

At a press conference on March 8, 2011, then Ohio State football coach Jim Tressel disclosed that in April, 2010, he'd received e-mails alerting him to the fact that certain OSU football players had connections with Eddie Rife, owner of Fine Line Ink, a Columbus tattoo parlor. Rife was the subject of a federal law enforcement investigation. The e-mails went on to tell Tressel that federal authorities had raided Rife's house and found $70,000 in cash and "a lot of Ohio State memorabilia." The e-mails also alerted Coach Tressel that players had exchanged signed memorabilia for tattoos.

Tressel did not forward the e-mails to his superiors at Ohio State or to the NCAA. That decision ultimately led to his resignation and an NCAA investigation. Tressel did, however, forward the e-mails to a Pennsylvania businessman named Ted Sarniak. Sarniak is not employed by Ohio State, does not hold a position with the NCAA, nor is he a law enforcement officer. According to information supplied to the Columbus Dispatch by Doug Archie, OSU's director of compliance, "Mr. Sarniak is someone who [former OSU player Terrelle Pryor] had reached out to for advice and guidance throughout his high-school and collegiate career."

Given the prominence of Ohio State football within and without Ohio, the public's interest in these events has been understandably intense. ESPN,[1] along with dozens of other media outlets, has requested and received a large volume of records relating to the events surrounding Coach Tressel's conduct. Unfortunately, the University has not been completely forthcoming. On April 20, 2011, Justine Gubar, an ESPN producer, made a written request ("the Request") for the following records:

1 ESPN is a global sports entertainment company which provides sports-related news and content through a variety of multimedia outlets including television, radio, print-magazines and Internet.

> **"All emails, letters and memos to and from Jim Tressel, Gordon Gee, Doug Archie and /or Gene Smith with key word Sarniak since March 15, 2007."**

On May 27, Jim Lynch, Ohio State's Director of Media Relations, responded:

> **Justine – Do [sic] to FERPA, we will not be releasing e-mails from Jim Tressel, Doug Archie or Gene Smith related to Ted Saryniak.**
>
> **Here is what our Office of Legal Affairs has told me:**
>
> **Unless specifically permitted, the University has a legal responsibility to ensure that personally identifiable information of a student is not released without the student's specific consent. The high-profile nature of certain of our students, coupled with the analysis set forth by FERPA for determining whether student information is "personally identifiable" (and thus protected from disclosure) requires the University to consider the facts and circumstances attendant to each particular request. Seemingly innocuous information that may constitute "directory" information in certain contexts may be combined with other readily available information in other settings so as to be identifiable to a particular student.**
>
> **Under FERPA, the University is prohibited from releasing information that can be reasonably linked to an individual by a member of the university community with no special knowledge as well as information requested by an individual that the school reasonably knows could be individually identified because of the requester's special knowledge of the situation. FERPA refers to these types of request for information as "targeted requests." That is, the requestor has direct, personal knowledge of the subject of the case and FERPA holds that university may not release the records even in redacted form because the circumstances indicate that the requester has made a targeted request.**

In short, Ohio State is asserting that FERPA, a federal statute designed to protect the privacy of **student education** records, prohibits the release of records that shed light on the **non-academic** improprieties of the University's football **coach**. FERPA has no application here, and this court should not permit it to be used in a manner that is equal parts cynical and hypocritical.

In addition to wrongfully denying ESPN's request for records pursuant to FERPA, Ohio State summarily denied related requests without reference to any legal basis at all. ESPN submitted a written request for "[a]ll documents and emails, letters and memos related to NCAA investigations prepared for and/or forwarded to the NCAA since 1/1/2010 related to an investigation of Jim Tressel."[2] Ohio State refused to provide the requested records. The University responded simply, "[w]e will not release anything on the pending investigation."[3] The University cited no legal authority to support this denial.

Finally, Ohio State denied two of ESPN's requests as overbroad. ESPN requested "[a]ny and all emails or documents listing people officially barred from student-athlete pass lists (game tickets) since January 1, 2007" and "[a]ny report, email or other correspondence between the NCAA and Doug Archie or any other Ohio State athletic department official related to any violation (including secondary violation) of NCAA rules involving the football program, since January 1, 2005."[4] Ohio State did not provide these records. The University instead responded, "[w]e would deem this to be overly broad per Ohio's public record laws."[5] Despite the fact that ESPN specified the dates, parties, and subject matter of the records being sought, Ohio State labeled the requests as overbroad. Aside from this very vague reference to "Ohio's public record laws," the University cited no legal authority, reasoning or information on the maintenance of these records to support their denial.

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2 See Exhibit A to Affidavit of Tom Farrey.
3 See Exhibit B to Affidavit of Tom Farrey.
4 See Exhibit C to Affidavit of Tom Farrey.
5 See Exhibit D to Affidavit of Tom Farrey.

III. ARGUMENT

A. FERPA Does Not Prohibit the Release of the Requested Records.

Ohio State does not deny that it is a public body, subject to the Public Records Act, R.C. 149.43 ("PRA"). Its sole excuse for not complying with part of the Request is its aggressive (and misguided) interpretation of the Family Educational Rights and Privacy Act, 20 USC 1232g ("FERPA"). By asserting that FERPA prohibits the release of the Sarniak e-mails ("the Records"), Ohio State is actually asserting the exemption provided under the PRA by R.C. 149.43(A)(1)(v). That provision exempts from disclosure pursuant to the PRA "[r]ecords the release of which is prohibited by state or federal law." However, FERPA does not, in fact, prohibit the release of the Records at issue here (nor does it even apply to the Records), so this exemption is inapplicable.

Thus, Ohio State's reliance is misplaced: even if FERPA applied to the Records (and it doesn't), it would not prohibit their release. By its express terms (and as numerous courts have concluded), FERPA does not **prohibit** the release of covered records. Rather, it merely sets conditions on the receipt of federal funds. FERPA provides in pertinent part: "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents...." 20 U.S.C. 1232g(b)(1).

Thus, Ohio State cannot assert the exemption provided by R.C. 149(A)(1)(v), which, in essence, is designed to prevent a public body from being compelled to break some other law in

order to comply with its legal obligations under the PRA. By definition, this exemption simply does not apply with respect to FERPA.

This court, in *State ex rel. The Miami Student v. Miami University*[6] cited with approval the case of *Red & Black Publishing Co. v. Bd. of Regents of Univ. Sys. of Georgia*,[7] for the contention that "FERPA ... does not actually prohibit the disclosure of records, but simply penalizes those educational institutions that engage in a policy or practice of disclosing such records by withdrawing that institution's federal funding."

More recently, the United States District Court for the Northern District of Illinois explicitly held that the University of Illinois could not rely on FERPA to deny a records request made under the Illinois Freedom of Information Act ("FOIA").[8] The Illinois FOIA contains an exemption virtually identical to Ohio's RC 149.43(A)(1)(v). At section 7(1)(a), the Illinois FOIA prohibits the release of "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or state law." In its ruling rejecting the University's reliance on that exemption, the District Court made this common sense observation: "Section 7(1)(a) of FOIA applies only when a federal or state law 'specifically prohibit[s]' a certain disclosure. The ordinary meaning of 'prohibit' is 'to forbid by authority' or 'to prevent from doing something.' Webster's Ninth New Collegiate Dictionary 940 (1985). But FERPA, enacted pursuant to Congress' power under the Spending Clause, does not forbid Illinois officials from taking any action. Rather, FERPA sets conditions on the receipt of federal funds, and it imposes requirements on the Secretary of Education to enforce the spending conditions by withholding funds in appropriate situations. *Gonzaga University v. Does*, 536 U.S. 273, 278-79

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6 *State ex rel. The Miami Student v. Miami University*, (1997) 79 Ohio St.3d 168, 680 N.E.2d 956.

7 *Red & Black Publishing Co. v. Bd. of Regents of Univ. Sys. of Georgia* (1993), 262 Ga. 848, 427 S.E.2d 257.

8 *Chicago Tribune Co. v. University of Illinois Bd. Of Trustees* (N.D.Ill. March 7, 2011), __ F.Supp.2d __, 2011 WL 982531.

(2002). Under the Spending Clause, Congress can set conditions on expenditures, even though it might be powerless to compel a state to comply under the enumerated powers in Article I. *South Dakota v. Dole*, 483 U.S. 203, 206-07 (1987). Illinois could choose to reject federal education money, and the conditions of FERPA along with it, so it cannot be said that FERPA prevents Illinois from doing anything."[9]

The District Court noted that "[i]n *United States v. Miami University*, 294 F.3d 797 (6th Cir. 2002), the Sixth Circuit held that the federal government was entitled to an injunction preventing Miami University from releasing certain education records pursuant to a request under Ohio's Freedom of Information Act. The Ohio FOIA contained a[n] exemption, similar to Illinois', for information, 'the release of which is prohibited by state or federal law.' The Sixth Circuit analogized Spending Clause conditions to contracts between the states and the federal government. Under this theory, the federal government has a right to enforce the state's promise to abide by the conditions of FERPA once it has accepted federal education funds. *Id.* at 809. Even if this court were to accept the Sixth Circuit's reasoning, however, the opinion in *Miami University* included an important caveat: 'We limit this conclusion, that the FERPA imposes a binding obligation on schools that accept federal funds, **to federal government action** to enforce FERPA.' *Id.* at 809 n.11."[10] Thus, even the Sixth Circuit's reasoning would not grant Ohio State the ability to avoid its PRA obligations by virtue of FERPA.

In *State ex rel. Miami Student*, this court noted, "we are mindful that inherent in R.C. 149.43 is the fundamental policy of promoting open government, not restricting it. Thus, the exceptions to disclosure are strictly construed against the custodian of public records in order to promote this public policy. *State ex rel. James v. Ohio State Univ.* (1994), 70 Ohio St.3d 168,

9 *Id.* at 3.
10 *Id.* at 3 (emphasis added).

169, 637 N.E.2d 911, 912. Any doubt of whether to disclose public records is to be resolved in favor of providing access to such records. *State ex rel. The Warren Newspapers, Inc. v. Hutson* (1994), 70 Ohio St.3d 619, 621, 640 N.E.2d 174, 177."[11]

Given the fact that FERPA does not prohibit disclosure, coupled with this court's obligation to construe exceptions to the PRA against the records custodian, this court should adopt the reasoning of the Northern Illinois District Court and hold that FERPA does not provide adequate grounds for an exception to the PRA.

B. The Records are Not Education Records As Defined by FERPA.

Even if FERPA were found to be sufficient under the exemption provided by R.C. 149(A)(1)(v) to prohibit the release of FERPA-covered records, the Records here fall outside the ambit of "education records" covered by FERPA. The Records at issue here are e-mail messages sent from certain Ohio State employees that concern a Pennsylvania businessman. There is no evidence to suggest that Mr. Sarniak is a parent or legal guardian of any Ohio State student (nor would such a fact necessarily convert the emails at issue into "education records" for purposes of FERPA). Nor has Ohio State made any contention that any of the Records discuss grades, financial aid or the type of information to which FERPA actually applies. That the public is aware of Mr. Sarniak's ties to Terrelle Pryor is due as much as anything to information already provided by Ohio State in its efforts at damage control. In any event, the mere fact that a student's name may be discerned from a document does not automatically make that document an "education record." It is impossible to imagine that Congress had **any** interest in restricting the flow of information about shady deals at a tattoo parlor when it passed FERPA in 1974.

In *State ex rel. Miami Student*, this court did **not** ultimately base its decision on the inapplicability of RC 149.43(A)(1)(v). Rather, it found that student disciplinary records do not

11 *State ex rel. The Miami Student, supra* at fn. 2, 79 Ohio St.3d at 171.

constitute "education records" as envisioned by FERPA. It supported its ruling with this observation: "[a]t Miami University, the University Disciplinary Board adjudicates cases involving infractions of student rules and regulations, such as underage drinking, but may also hear criminal matters, including physical and sexual assault offenses, which may or may not be turned over to local law enforcement agencies. Thus, the UDB proceedings are non-academic in nature. The UDB records, therefore, do not contain educationally related information, such as grades or other academic data, and are unrelated to academic performance, financial aid, or scholastic performance. Consequently, we adopt the reasoning of the *Red & Black* decision, *supra*, and hold that university disciplinary records are not 'education records' as defined in FERPA."[12]

That observation applies with even more force here. The Records are e-mails involving a Pennsylvania businessman without official affiliation to either Ohio State or any student. They are not records that directly involve an Ohio State student, much less grades, academic data, financial aid or scholastic performance. They are not, by any fair reading of FERPA, "education records." This court should adhere to the reasoning underlying the *State ex rel. Miami Student* case, and find that the Records are not subject to FERPA by their very nature.

Other courts have adopted this Court's reasoning in cases where colleges have tried to use FERPA to shield institutional misconduct. In *Kirwan v. The Diamondback*, the Maryland Court of Appeals, citing *State ex rel. Miami Student* rejected a FERPA defense in a case similar to this one.[13] In *Kirwan*, the University of Maryland notified the National Collegiate Athletic Association (NCAA) that a student-athlete accepted money from a former coach to pay the student-athlete's parking tickets. The student-athlete was suspended for three games as a result.

12 *Id.* at 171-172.
13 *Kirwan v. The Diamondback* (Md. 1991), 721 A.2d 196.

The Diamondback began investigating this incident and other alleged incidents involving the men's basketball team. The investigation was in response to allegations that certain members of the men's basketball team were parking illegally on campus and were receiving preferential treatment from the University with respect to the parking violation fines imposed. On several occasions, *The Diamondback* requested documents pursuant to the Maryland Public Information Act. The documents requested included: (1) copies of all correspondence between the University and the NCAA involving the student-athlete who was suspended and any other related correspondence during February 1996; and (2) records relating to campus parking violations committed by other members of the men's basketball team.[14]

The University of Maryland denied the request, on the ground that the documents relating to the student athletes were education records covered by FERPA. In rejecting this assertion, the Maryland Court held that "[t]he legislative history of the Family Educational Rights and Privacy Act indicates that the statute was not intended to preclude the release of any record simply because the record contained the name of the 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. Nevertheless, in addition to protecting the privacy of students, Congress intended to prevent educational institutions from operating in secrecy. Prohibiting disclosure of any document containing a student's name would allow universities to operate in secret, which would be contrary to one of the policies behind the Family Educational Rights and Privacy Act. Universities could refuse to release information about criminal activity on campus if students were involved, claiming that this information constituted education records, thus keeping very important information from other students, their parents, public officials, and the

14 *Id.*

public."[15] This court similarly should reject Ohio State's attempt to operate in the shadows of a federal statue that has no application to the facts here.

A North Carolina court similarly rejected a university's overbroad interpretation of FERPA in *The News and Observer Publishing Co. v. Baddour.*[16] There, various media organizations sought records from the University of North Carolina relating to alleged misconduct by head football coach Butch Davis and other school administrators pursuant to the state Public Records Law. The requested records included parking tickets issued to eleven football players. The University argued that the parking tickets were FERPA protected education records because one potential sanction for repeated parking tickets is a disciplinary action before the school's honor court. The court, unconvinced, held that "the fact that an ultimate sanction might include academic or disciplinary ramifications does not convert the entire UNC-CH parking system into a disciplinary arm of the University. The parking tickets issued by UNC-CH public safety, if any, to 11 players are not education records protected by FERPA."[17] Indeed, the court's view in *Baddour* was summed up when the court stated, "FERPA does not provide a student with an invisible cloak so that the student can remain hidden from public view while enrolled at UNC-CH."[18]

In *NCAA v. Associated Press*, the Florida appellate court reached the same conclusion as the Maryland and North Carolina courts.[19] In *NCAA*, Florida State University became aware of allegations that a learning specialist and an academic tutor had provided improper assistance to a number of students, some of whom were participating in athletic programs. The University

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15 *Id.* at 204.

16 *The News and Observer Publishing Co. et al. v. Baddour et.al.* (N.C.Sup.Ct., Orange County, May, 12, 2011) Case No. 10 CVS 1941.

17 *Id.*

18 *Id.*

19 *National Collegiate Athletic Association v. Associated Press* (Fla. Dist. Ct. App. 2009), 18 So.3d 1201, *cert. denied*, (Fla. 2010), 37 So.3d 848.

engaged the services of a private firm to conduct an internal investigation on its behalf. On February 14, 2008, after the completion of a comprehensive self-investigation of academic misconduct, the University reported its findings to the NCAA. The Associated Press sought disclosure of documents in the NCAA disciplinary proceeding and appeal and, when the request was denied, filed suit under Chapter 119, Florida Statutes, against the NCAA, Florida State University, its President, and the GrayRobinson law firm.[20]

The defendants in the suit argued that FERPA barred the release of the records. The Florida appeals court rejected this claim because the records at issue were not "education records" under FERPA. The Florida court noted that education records are those which relate "directly" to a student.[21] But the records in the Florida case, as the court noted, "pertain to allegations of misconduct by the University Athletic Department, and only tangentially related to the students who benefitted from the misconduct."[22] That is exactly the case with the Records here. The issue is the nature and propriety of Ohio State's entanglement with Ted Sarniak. The argument that these Records are covered by FERPA is a desperate, albeit cynical, attempt to avoid legitimate public scrutiny. This court should not go along.

C. The Records Do Not Contain Personally Identifiable Information.

The public's interest in the Records does not directly concern any students. Rather, the public's interest is with the activities of Ohio State administrators and the football coach. Coach Tressel's failure to pass on information concerning potential NCAA violations through the proper channels, coupled with his forwarding the e-mail to a person with no official affiliation to Ohio State, raises questions about Coach Tressel's relationship with Sarniak and what knowledge Ohio State officials had concerning that relationship. Given that Ohio State is a

20 *Id.*
21 *Id.* at 1210.
22 *Id.* at 1211.

taxpayer supported institution, and one of the largest public employers in the state, the public has a right to seek answers to those questions. Any student involvement is tangential. For that reason, it is expected that student names will be redacted from the Records. But in any event, because the Records are related to the activities of the coach and Ohio State administrators, and only tangentially concern student activity, they are not subject to FERPA.

Ohio courts have consistently resisted attempts by school administrators to expand FERPA's coverage beyond its intended scope. Thus, in *Ellis v. Cleveland Mun. School Dist.*, the court held that information relating to allegations of physical abuse by teachers was not protected from discovery by FERPA, because the requested documents did not contain information directly relating to the student. [23] The court stated, "FERPA applies to the disclosure of student records, not teacher records. *Klein Independent Sch. Dist. v. Mattox,* 830 F.2d 576, 579 (5th Cir.1987). While it is clear that 'Congress made no content-based judgments with regard to its 'education records' definition,' *Miami University* 294 F.3d at 812, it is equally clear that Congress did not intend FERPA to cover records directly related to teachers and only tangentially related to students."[24]

In *Baker v. Mitchell-Waters*, the Ohio appellate court reached the same conclusion in a case involving records of alleged teacher abuse at an MRDD facility in an elementary school.[25] The Records here are records of administrative misconduct. Students are involved, if at all, and at most, tangentially. FERPA quite simply does not apply.

Finally, the Records are not FERPA-protected education records because they were not "maintained" as such by Ohio State. FERPA protects student records which "are maintained by

23 *Ellis v. Cleveland Mun. School Dist.*, (N.D. Ohio 2004), 309 F.Supp. 2d 1019, 1023-24.
24 *Id.* at 1022.
25 *Baker v. Mitchell-Waters*, 2d Dist., 160 Ohio App.3d 250, 2005-Ohio-1572, 826 N.E.2d 894.

an educational agency or institution."[26] In *Owasso Indep. Sch. Dist. v. Falvo*, the U.S. Supreme Court determined that, for the purposes of FERPA, "maintain" means "to keep in existence or continuance; preserve; retain."[27] With that definition in mind, the Court posited that "FERPA records will be kept in a filing cabinet...or on a permanent secure database...in the same way the registrar maintains a student's folder in a permanent file."[28]

Relying on *Owasso*, an Arizona court held that "documents scattered throughout a database, only located via a key-word search, are not 'maintained' under FERPA."[29] In *Phoenix Newspapers v. Pima Community College*, an Arizona newspaper issued a public records request for documents and email records relating to a former student of Pima Community College, Jared Lee Loughner. Loughner allegedly killed six people and wounded 13 others, including Representative Gabrielle Giffords when he opened fire at a Tucson political gathering. The requested records were locatable by executing a database search using the keyword "Loughner."[30] The college denied the request, citing FERPA. The court held that "[d]ocuments are not 'maintained' by an educational institution under FERPA unless the institution has control over the access and retention of the record. Simply because emails exist on a central server and in inboxes at some point does not classify those documents as education records...'FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar,' not individual assignments or emails."[31] The court ultimately ordered the school to disclose the records pursuant to the newspaper's request, holding that "[a] keyword search that returns an unknown quantity and quality of documents, does not comport by the idea of records

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26 20 U.S.C. 1232g(a)(4)(A).
27 *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426, 433 (2002) *citing* Random House Dictionary.
28 *Id.* at 433.
29 *Phoenix Newspapers Inc. v. Pima Community College* (AZ Sup. Ct., Pima County, May. 17, 2011) Case No. C20111954.
30 *Id.*
31 *Id.* citing *Owasso Indep. Sch. Dist, supra* at fn. 27.

kept by a central custodian or records kept in a central location or database, and does not conform to the idea of records kept in a filing cabinet in the records room."[32]

As in *Phoenix Newspapers*, ESPN's request for "all emails, letters and memos to and from Jim Tressel, Gordon Gee, Doug Archie and /or Gene Smith with key word Sarniak since March 15, 2007" does not seek institutionally maintained education records. The request articulates a keyword search nearly identical to that in *Phoenix Newspapers*, the results of which were ordered to be disclosed. The Records requested by ESPN are not of the kind kept in the permanent files of Ohio State students or stored in the filing cabinets of the school's registrar as contemplated by FERPA. Instead, they are "scattered throughout a database" and only peripherally related to the students' academic life. Therefore, the Records were not "maintained" as education records for the purposes of FERPA.

D. Production of Specific Records Pursuant to the Ohio Public Records Act Does Not Constitute a "Policy or Practice."

It is important to focus on the precise words of the FERPA statute. FERPA denies federal funding only to institutions that have a **"policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents."** This case involves a unique set of events that concern non-academic matters. Given these unique circumstance, Ohio State's production of the Records would in no way constitute a "policy or practice" in violation of FERPA. Even if the Records were somehow determined to be education records within the scope of FERPA, the release of Records in one instance would not establish a "policy or practice," which is required for a violation of FERPA.

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32 *Id.*

The court in *Ellis v. Cleveland Mun. School District* addressed this very issue.[33] There, a student filed suit concerning a substitute teacher's use of corporeal punishment. The student sought records regarding incident reports related to altercations between substitute teachers and students, student witness statements and information regarding subsequent discipline, if any, imposed on substitute teachers. The school district refused to produce the records, citing FERPA. The court concluded that the requested records were not covered by FERPA. But it also noted that "[e]ven if the records at issue in this case were 'education records' as defined by FERPA that would not necessarily end the inquiry. FERPA is not a law which absolutely prohibits the disclosure of educational records; ... while FERPA was intended to prevent schools from adopting a policy or engaging in a practice of releasing educational records, it does not, by its express terms, prevent discovery of relevant school records under the Federal Rules of Civil Procedure."[34]

Ohio State's compliance with the Ohio Public Records Act in this circumstance would be similar to the Cleveland Municipal School District's compliance with the Federal Rules of Civil Procedure. Neither would constitute a "policy or practice" of disclosing confidential information. And thus, the release would not violate FERPA.

E. Ohio State's Responses to ESPN's Other Requests Did Not Comply With the Requirements of the PRA.

The PRA is specific in its requirements for the procedure and content of responses to public record requests. Ohio State clearly fell short of those requirements. R.C. §149.43(B)(3) provides that "[i]f a request is ultimately denied, in part or in whole, the public office or the person responsible for the requested public record shall provide the requester with an explanation, including legal authority, setting forth why the request was denied."

33 *Ellis*, *supra* at fn. 16.
34 *Id.* at 1023.

In response to ESPN's request for "[a]ll documents and emails, letters and memos related to NCAA investigations prepared for and/or forwarded to the NCAA since 1/1/2010 related to an investigation of Jim Tressel," Ohio State stated simply, "[w]e will not release anything on the pending investigation."[35] Without explanation or citation to legal authority, this denial flatly violates the PRA.[36]

Similarly, in response to ESPN's requests for "[a]ny and all emails or documents listing people officially barred from student-athlete pass lists (game tickets) since January 1, 2007" and "[a]ny report, email or other correspondence between the NCAA and Doug Archie or any other Ohio State athletic department official related to any violation (including secondary violation) of NCAA rules involving the football program, since January 1, 2005," Ohio State claimed, "[w]e would deem this to be overly broad per Ohio's public record laws."[37] While the University made vague reference to "Ohio's public record laws," it cited no specific legal authority to support this denial.

Moreover, R.C. §149.43(B)(2) requires that "[i]f a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records under this section such that the public office or the person responsible for the requested public record cannot reasonably identify what public records are being requested, the public office or the person responsible for the requested public record may deny the request but shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course

35 See Exhibits A and B to Affidavit of Tom Farrey.

36 See, e.g., *State ex rel. Doe v. Smith* (2009), 123 Ohio St.3d 44, 914 N.E.2d 159, 2009-Ohio-4149 ("Smith's response that there was 'no information available' to appellant's records request violated R.C. 149.43(B)(3) because he did not give appellant 'an explanation, including legal authority, setting forth why the request was denied'' at ¶43).

37 See Exhibits C and D to Affidavit of Tom Farrey.

of the public office's or person's duties." Therefore, Ohio State's response to the requests was deficient in two ways: 1) it failed to cite supportive legal authority and 2) it failed to aid ESPN in revising its request by providing the manner in which the records are maintained.

F. ESPN's Record Requests Were Not Overly Broad.

Ohio State wrongfully deemed ESPN's requests to be overbroad. While the University provided no legal authority other than "Ohio's public record laws" to support its position, it presumably relied on this Court's most recent analysis of the PRA's "overly broad" language in *State ex rel. Glasgow v. Jones*.[38] There, a retiree concerned about the effect of proposed legislation made a records request for all emails, text messages and written correspondence sent to or received by a state representative throughout the entire time she was in office, including but not limited to that relating to the proposed bill. When the representative provided only the correspondence relating to the bill, as opposed to any and all correspondence relating to any topic whatsoever in her official capacity, the requester brought a mandamus action. This Court held that the disputed requests "impermissibly sought what approximated a 'complete duplication' of [Representative] Jones' files."[39] This Court considered its own precedent and that of lower courts to conclude that the representative had properly limited the scope of her responses to the correspondence relating to the bill which was the main concern of the requester.[40]

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38 *State ex rel. Glasgow v. Jones* (2008), 119 Ohio St.3d 391, 894 N.E.2d 686, 2008-Ohio-4788.

39 *Id.* at ¶ 19.

40 The Court cited *State ex rel. Zauderer v. Joseph* (1989), 62 Ohio App.3d 752, 577 N.E.2d 444 for an illustration of an overly broad request. In *Zauderer*, a request sought "all traffic reports" from a police chief, county sheriff and highway patrol superintendent. The court found this request to be "unreasonable in scope and, second, if granted, would interfere with the sanctity of the recordkeeping process itself." This Court also cited *State ex rel. Dillery v. Icsman* (2001), 92 Ohio St.3d 312 in which a request sought "any and all records generated ***containing any reference whatsoever to Kelly Dillery." The court found this request to be overly broad in that it failed to identify that the requester only wanted incident reports. Both of these cases, along with *Glasgow*, are readily distinguishable from the present case where ESPN sought a specific and discrete set of identifiable records.

In contrast, ESPN's requests were specific as to dates, parties and subject matter of the records sought. The first request called for "[a]ny and all emails or documents listing people officially barred from student-athlete pass lists (game tickets) since January 1, 2007."[41] This request readily identifies a discrete set of records. Unlike a request for all emails, texts or written correspondence about anything work-related, ESPN's request would not amount to a "complete duplication" of Ohio State's files.

The second challenged request sought "[a]ny report, email or other correspondence between the NCAA and Doug Archie or any other Ohio State athletic department official related to any violation (including secondary violation) of NCAA rules involving the football program, since January 1, 2005."[42] Again, this request is specific as to the parties, dates and content of the records sought. It can aptly be compared to what this Court determined to be the appropriate scope of the request in *Glasgow* – correspondence related to the proposed bill that the requester was interested in. Here, ESPN is interested in NCAA violations within the Ohio State football program and seeks records related precisely to that topic.

G. ESPN Is Entitled To An Award Of Attorney Fees In This Matter.

R.C. 149.43(c)(1) permits this Court to award ESPN statutory damages, attorney's fees and costs associated with bringing this action. As an aggrieved party, ESPN is entitled to this relief.

This Court may reduce an award of statutory damages, attorney fees and costs only if it determines that: "(a) Based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in

41 See Exhibit C to Affidavit of Tom Farrey.
42 *Id.*

accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section; and (b) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct."[43]

Given this court's previous ruling in *State ex rel. Miami Student*, coupled with the *Kirwan* case and the *NCAA v. Associate Press* case – where the courts made it clear that records related to institutional wrongdoing are not covered by FERPA -- there is no way that a well informed records custodian would reasonably believe that FERPA covered these records.

Moreover, Ohio State's unsupported denials of ESPN's Requests and erroneous designation of other requests as overbroad clearly violated the PRA. In light of the specific requirements that the PRA imposes on public offices to respond to records requests and the clear failure of the University to adhere to those requirements, a well informed custodian could have no reasonable belief that the responses provided complied with the law.

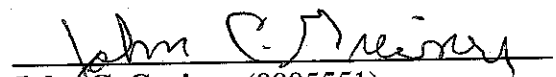
Shrouding the Records in secrecy allegedly provided by a statute that has no application in no way advances the public policy underlying the PRA. Nor is that policy advanced by allowing a public office to flout its obligation to respond to requests. ESPN is absolutely entitled to an award of attorney fees here.

IV. CONCLUSION

43 R.C. 149.43(c)(1).

The events surrounding the Ohio State football program in this past year should sadden not only football fans, but anyone concerned with collegiate sports, academic integrity and accountability. But that sadness does not mean that the events should be secret. This court should join with courts from around the country in sending an unmistakable message to collegiate athletic departments – do not attempt to cover up your misdeeds behind FERPA and honor your obligations under the PRA. And it should do so by granting ESPN's petition for a Writ of Mandamus.

Respectfully submitted,



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PRAECIPE FOR SERVICE

TO THE CLERK:

Please issue a copy of this Memorandum along with the Summons and Complaint to the Respondent identified in the caption on page one via Certified Mail, return receipt requested.

John C. Greiner (0005551)