UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

VANDERBILT GRADUATE WORKERS UNITED, **Petitioner,** **and** **VANDERBILT UNIVERSITY,** **Respondent.**	**Case No. 10-RC-351808**

RESPONDENT VANDERBILT UNIVERSITY'S MOTION TO POSTPONE SUBPOENA COMPLIANCE, SUBMISSION OF STATEMENT OF POSITION, AND HEARING UNTIL RESOLUTION OF STUDENT INTERVENTION AND FERPA DISCLOSURE OBJECTIONS TO OCTOBER 7, 2024 SUBPOENA

I. BACKGROUND AND SUMMARY OF REQUEST FOR RELIEF

Under Board Rules §§ 102.65(a) and 102.66(f), 29 CFR §§ 102.65(a) and 102.66(f), Vanderbilt University ("Vanderbilt") seeks a necessary temporary further postponement of the deadlines to comply with the subpoena issued to it, submit its Statement of Position, and appear for a representation hearing currently scheduled to commence on October 21, 2024.[1] This relief is necessary because two Vanderbilt students filed a formal request today to intervene to present legal objections to the disclosure, in response to the Region's October 7, 2024 subpoena duces tecum, of FERPA-protected personal identifying information in education records maintained by Vanderbilt – information which Vanderbilt is required to provide in its Statement of Position, which is currently due to be filed with the Region no later than 12:00 pm Central Time on October

[1] Although Vanderbilt moves in part under Board Rule 102.66(f), it does not seek the complete revocation of the Region's October 7, 2024 Subpoena. Rather, as explained herein, Vanderbilt merely seeks the indefinite postponement of the Subpoena's compliance deadline to allow the motion to intervene and FERPA objections to disclosure to be fully adjudicated before disclosure is compelled by the Subpoena.

18, 2024 and comply with the subpoena on the same date. These formal legal objections are in addition to at least 28 additional statements of opposition to the disclosure that Vanderbilt graduate students have emailed to Region staff since October 8, 2024.

Given the strong federal privacy interests that university students have in personally identifying information in their education records under the federal Family Educational Rights and Privacy Act, 20 USC §§ 1232g et seq. ("FERPA"), the Regional Director should temporarily postpone and reschedule the Subpoena compliance deadline, submission of Vanderbilt's Statement of Position, and appearance at the representation hearing untill all students' FERPA objections have been fully adjudicated and resolved.

As background, on October 7, 2024, the Regional Director granted Vanderbilt's October 3, 2024 Motion to Postpone Submission of Statement of Position and Hearing by (i) resetting the deadline to submit Vanderbilt's Statement of Position to October 18, 2024 and (ii) rescheduling the representation hearing to commence on October 21, 2024. *See Exhibit 1 hereto*. At the same time, the Regional Director issued a Subpoena Duces Tecum (No. B-1-1MPGP9D; hereafter "the Subpoena") to direct that Vanderbilt provide, with the submission of its Statement of Position on October 18, 2024, personal information about potential voters who should or should not be included in the proposed unit as required by 29 CFR § 102.63(b)(1)(i)(C), specifically to include "full names, work locations, shifts, and job classifications of all individuals in the petitioned-for bargaining unit," as well as the same information for individuals Vanderbilt believes should be included or excluded if different than the petitioned-for unit. *See Exhibit 2 hereto, Subpoena Duces Tecum (No. B-1-1MPGP9D), Requests No. 1-3*.

It is undisputed that the information requested in the Subpoena is maintained in Vanderbilt's students' education records and thus FERPA-protected. It is further undisputed (as

discussed further below) that this information cannot be lawfully disclosed unless (i) the students consent or (ii) a lawfully issued subpoena compels the disclosure *and* students have the opportunity to seek protective legal action to prevent the disclosure. The latter situation is at issue here.

On October 8, 2024, as required by 34 CFR § 99.31(a)(9)(ii), Vanderbilt notified its graduate students about the Subpoena in advance of the October 18, 2024 compliance deadline so that its students would have the opportunity, required by FERPA, to "seek protective action" against the Subpoena and Vanderbilt's anticipated compliance. Notably, today two students filed a request to intervene directly and a motion to stay enforcement of the Subpoena in order to have time to present specific objections to the disclosure of their FERPA-protected information. *See Exhibit 3 hereto*. In addition, through the time of filing this motion, 28 other Vanderbilt students have notified Vanderbilt, the Union's counsel, and Region staff that they object to the disclosure of information from their education records that is sought by the Subpoena for inclusion in Vanderbilt's forthcoming Statement of Position. As such, if Vanderbilt were to fully comply with the Subpoena and provide all requested information in its Statement of Position currently due by noon (Central Time) on October 18, 2024, it would violate the FERPA privacy rights of these 30 objecting students. Conversely, if Vanderbilt, without leave or relief from the Region to do so, withholds the information requested by the Subpoena for the objecting students, or for all students potentially subject to the Union's petition, pending resolution of the objecting students' legal privacy challenges, it risks the punitive provisions of 29 CFR § 102.66(d), which prevent Vanderbilt from contesting the appropriateness of the petitioned-for unit and related eligibility issues if it does not provide all of the information required by 29 CFR § 102.63(b)(1)(i)(C) in its Statement of Position.

These circumstances constitute the requisite "extraordinary circumstances" to warrant further postponing the deadlines for these events. Vanderbilt therefore requests an indefinite extension of time to allow for the adjudication of these important FERPA objections before it complies with the Subpoena, files its Statement of Position with the FERPA-protected information sought by the Subpoena, and appears for the hearing. *See* 29 CFR § 102.63(b)(1) ("The Regional Director may postpone the time for filing and serving the Statement of Position for more than 2 business days upon request of a party showing extraordinary circumstances."); and § 102.63(a)(1) ("The Regional Director may postpone the opening of the hearing for more than 2 business days upon request of a party showing extraordinary circumstances.").

II. DISCUSSION

A. FERPA Provides Vanderbilt's Students with a Congressionally-Mandated Right to Privacy in Their Education Records that Trumps the Federal Government's General Interest in Obtaining Information about Students for Other Purposes

Congress enacted FERPA "'to protect [parents' and students'] rights to privacy by limiting the transferability of their records without their consent.'" *U.S. v. Miami University*, 294 F.3d 797, 806 (6th Cir. 2002) (quoting Joint Statement, 120 Cong. Rec. 39858, 39862 (1974)). Pursuant to its constitutional spending power, Congress conditioned the provision of federal funds to higher education institutions on those institutions not having a "policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the [students'] written consent …" *Id.* (citing 20 USC § 1232g(b)(1)); *see also* 20 USC § 1232g(b)(2). Indeed, in *Miami University* the Sixth Circuit noted that, based upon the substantial privacy interests protected by FERPA, Congress provided that higher education institutions may even withhold from the federal government itself certain personal data about students and their families. *See* 20 U.S.C. § 1232i. In other words, the Sixth Circuit found, Congress placed the

federal FERPA privacy interests of students in their educational records above the federal government's general interest in obtaining necessary data and records for other purposes. *Miami University*, 294 F.3d at 806-07.

Considering the heightened federal statutory privacy interests students have in their education records, and in personally identifiable information contained in them, the Regional Director here, considering both the objecting students' request to intervene to present formal legal challenges to the Subpoena, as well as Vanderbilt's present motion, should err on the side of taking additional steps to protect the privacy interests manifested by the objecting students and the dozens of additional Vanderbilt students who communicated opposition or objection to Vanderbilt's compliance with the Region's October 7, 2024 Subpoena.

B. FERPA Permits the Disclosure of Personally Identifiable Information from a Student's Educational Records in Response to a Lawfully Issued Subpoena Only if the Student Has a Meaningful Opportunity to Object to the Subpoena

It is undisputed that all records and personally identifiable information maintained by Vanderbilt about its students who are the subject of the Union's petition for representation are "education records" protected by FERPA, 20 USC §§1232g et seq.[2] FERPA provides that, absent a court order or lawfully issued subpoena, most information contained in a student's education records cannot be disclosed even to the federal government without advance consent from that student. *See* 20 USC § 1232g(b)(1) and (b)(2)(A); and 34 CFR §§ 99.30, 99.31(a)(9)(i). This includes a student's employment records when the student is employed as a result of his or her status as a student, which is the case with Vanderbilt's graduate students here. *See* 34 CFR § 99.3(b)(3)(ii) (including within the definition of "education records" those "[r]ecords relating to

[2] A student's "education record" is essentially any record related to the student that is maintained in any form by Vanderbilt that personally identifies the student. (34 CFR § 99.3, "education records," (a)(1-2)).

an individual in attendance at the [university] who is employed as a result of his or her status as a student ..."); *see also September 17, 1999 Compliance Letter to The Regents of the University of California, U.S. Dep't of Ed Family Policy Compliance Office, at 2 (attached as Exhibit 4)*.

At issue here is the Region's October 7, 2024 Subpoena (*Exhibit 2*). Vanderbilt does not contest that the Subpoena was lawfully issued for the purposes of permitting Vanderbilt to disclose, under 34 CFR § 99.31(a)(9)(i), only the subpoenaed information from its graduate students' educational records. *See id. at 3 (Exhibit 4)*. But more than a subpoena is required before Vanderbilt may lawfully comply with the Subpoena to disclose non-directory information from a student's education records – 34 CFR § 99.31(a)(9)(ii) also requires that *students must have a meaningful opportunity, after notice and in advance of compliance, to "seek protective action" against the disclosure*.

C. The Regional Director Should Temporarily Postpone or Indefinitely Stay Further Representation Proceedings Until the Motion to Intervene and Objections to the October 7, 2024 Subpoena Filed by Vanderbilt Students are Adjudicated and Resolved

Given the significant privacy interests students have in their educational records, *Miami University, supra*, including the interest to not have personally identifying information disclosed from their records in response to a subpoena until they have an opportunity to object, *it stands to reason that, when objections are actually filed, no disclosure of FERPA-protected information should be compelled until all such objections are actually adjudicated to resolution*.

The case of *Browning v. University of Findlay Board of Trustees*, 2016 WL 4079128 (N.D. Ohio, 2016) (*attached as Exhibit 5*), provides a clear example of how the Region here should respond to allow for meaningful legal consideration and resolution of the objections submitted by Vanderbilt students to the production and disclosure of FERPA-protected information from their education records. In *Browning*, the plaintiffs sought FERPA-protected education records in

discovery. The Court granted a motion to compel that ordered the defendant university to produce FERPA-protected records to the plaintiffs. Because the Court's order was treated the same under FERPA as a lawfully issued subpoena,[3] the university sent notice to the affected students of the planned production of their FERPA-protected records so they had an opportunity to object to the production before it occurred. *Browning*, 2016 WL 4079128 at *1.

The *Browning* Court set a deadline for students to register objections with the university, after which the university sent all the objections it received to the court for *ex parte* review and adjudication. Importantly, the university was not required to produce records in compliance with the *Browning* Court's order *until after the court received, considered, and ruled on all of the student objections*. *Id.* at 2-3.

The *Browning* Court order discussed above offers a balanced approach that respects the student educational privacy interests at stake. And given the heightened federal privacy interests students have in their education records, recognized in *Miami University, supra*, the Regional Director here should exercise her discretionary authority to temporarily stay further representation proceedings and compliance with the subpoena to permit whatever additional time is necessary to fully adjudicate and resolve the motion to intervene and objections filed by Vanderbilt students in response to the Region's October 7, 2024 Subpoena.

Vanderbilt is willing to make itself available through counsel for a status conference with the Regional Director and and/or assigned staff and the Union to discuss new dates that, given the interests involved in this matter, do not unreasonably delay the proceedings.

[3] The requirements of 34 CFR § 99.31(a)(9)(i) and (ii) – including, in (ii), the requirement to notify the student of the judicial order in advance of compliance so the student "may seek protective action" – are the same for both a "judicial order" and a "lawfully issued subpoena."

Dated: October 15, 2024

Respectfully submitted,

LITTLER MENDELSON, P.C.

/s/ Brooke E. Niedecken

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CERTIFICATE OF SERVICE

I certify that Respondent Vanderbilt University's Motion to Postpone Subpoena Compliance, Submission of Statement of Position, and Hearing Until Resolution of Student Intervention and FERPA Disclosure Objections to October 7, 2024 Subpoena in Case No. 10-RC-351808 was electronically filed on October 15, 2024, through the Board's website and also served via email on the following:

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/s/ Brooke E. Niedecken
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Exhibit One

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

THE VANDERBILT UNIVERSITY

Employer

and **Case 10-RC-351808**

VANDERBILT GRADUATE WORKERS UNITED - INTERNATIONAL UNION, UAW (VGWU-UAW)

Petitioner

ORDER RESCHEDULING HEARING AND STATEMENT OF POSITION

On October 2, 2024, the Regional Director issued a Notice of Hearing in this matter scheduling a hearing for October 10, 2024. On October 3, 2024, the Employer raised issues implicating the Family Educational Rights and Privacy Act (FERPA) and filed a Motion to Postpone Submission of Statement of Position and Hearing.

IT IS HEREBY ORDERED that the hearing in the above-entitled matter is rescheduled from Thursday, October 10, 2024, **to Monday, October 21, 2024, at 10:00 a.m.** by videoconference before a hearing officer of the National Labor Relations Board, Region 10.[1]

IT IS HEREBY ORDERED that the Statement of Position in this matter must be filed with the Regional Director and served on the parties listed on the petition by no later than **noon Central time on Friday, October 18, 2024.** The Statement of Position may be e-Filed but, unlike other e-Filed documents, must be filed by noon Central time on the due date in order to be timely. If an election agreement is signed by all parties and returned to the Regional Office before the due date of the Statement of Position, the Statement of Position is not required to be filed.

Dated: October 7, 2024

Lisa Y. Henderson
Regional Director
National Labor Relations Board
Region 10
401 W. Peachtree Street, NW
Suite 2201
Atlanta, GA 30308

[1] Details related to the videoconference hearing will be provided by the Hearing Officer in advance of the hearing.

Exhibit Two

FORM NLRB-31

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Keeper of Records, The Vanderbilt University

2301 Vanderbilt Place, Nashville, TN 37235

As requested by Lisa Y. Henderson, Regional Director, Region 10

whose address is 810 Broadway Ste 302, Nashville, TN 37203-3859
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE Jill C. Adkins-Simmons, Hearing Officer

of the National Labor Relations Board

at e-file at NLRB.gov or 810 Broadway, Suite 302

in the City of Nashville, TN

on Friday, October 18, 2024 at 12:00 p.m. (noon) or any adjourned

or rescheduled date to testify in The Vanderbilt University, Case 10-RC-351808
(Case Name and Number)

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

SEE ATTACHMENT

If you do not intend to comply with the subpoena, within 5 days (excluding intermediate Saturdays, Sundays, and holidays) after the date the subpoena is received, you must petition in writing to revoke the subpoena. Unless filed through the Board's E-Filing system, the petition to revoke must be received on or before the official closing time of the receiving office on the last day for filing. If filed through the Board's E-Filing system, it may be filed up to 11:59 pm in the local time zone of the receiving office on the last day for filing. Prior to a hearing, the petition to revoke should be filed with the Regional Director; during a hearing, it should be filed with the Hearing Officer or Administrative Law Judge conducting the hearing. See Board's Rules and Regulations, 29 C.F.R Section 102.31(b) (unfair labor practice proceedings) and/or 29 C.F.R. Section 102.66(f) (representation proceedings) and 29 C.F.R Section 102.2(a) and 102.2(b) (time computation and timeliness of filings). Failure to follow these rules may result in the loss of any ability to raise objections to the subpoena in court.

B-1-1MPGP9D

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is

Issued at Nashville, TN

Dated: October 07, 2024

Lauren McFerran

Lauren McFerran, Chairman

NOTICE TO WITNESS. Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq*. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is mandatory in that failure to supply the information may cause the NLRB to seek enforcement of the subpoena in federal court.

ATTACHMENT TO SUBPOENA DUCES TECUM
DEFINITIONS AND INSTRUCTIONS

1. “Vanderbilt University” or “the Employer” refers to The Vanderbilt University, which maintains an office and a place of business in Nashville, Tennessee, and to its owners, officers, accountants, attorneys, trustees, successors, assigns, managers, supervisors, employees, agents, officials, and/or representatives.

2. “Petitioner” refers to the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW).

3. “The petition” refers to the RC petition filed by the Petitioner with the National Labor Relations Board on October 2, 2024.

4. The terms “document” and "documents" include, but are not limited to, any written, recorded, or graphic material, or any matter existing on computer software or hardware, whether previously erased or not, including but not limited to: accounts receivable records; agreements, applications, appointment calendars, attendance calendars or records, audio or video recordings, billing slips, bills, bills of lading, bookkeeping entries, books, briefs, business records, charts, checks, check stubs, compilations, computer documents and files, computer printouts, contracts, correspondence, delivery records, diaries, digital recordings, electronic mail messages (“emails”), facsimile transmissions, files, financial statements, forms, graphs, interoffice communications, invoices, leaflets, ledgers, letters, lists, journals, memoranda, minutes, notebooks, notes of all types including "post-it" notes and marginal comments, pamphlets, payroll records, periodicals, photographs, postings or messages on the internet or any intranet, press releases, receipts, records, reports, schedules, speeches, statements, summaries, tax returns, telephone bills, telephone contacts, text messages, timecards or other timekeeping records, transcripts, videotapes or video recordings, voice mail messages (including transcriptions thereof), and work orders, as well as all material defined in Rule 34 of the Federal Rules of Civil Procedure, and are not limited to the specific examples listed above. We seek production of all requested documents within your possession, custody, or control without regard to who maintains physical possession of them, who prepared the documents, or where the documents are retained.

5. For any document withheld pursuant to a claim of privilege or pursuant to the work-product doctrine, identify the date, author(s), recipient(s), title, general nature, and privilege claimed.

6. If additional documents are discovered that fall within the terms of this subpoena request, these additional documents shall be produced immediately.

7. Documents should be organized and labeled to correspond with the identifying paragraph number. If there are no documents responsive to a particular paragraph, or if all responsive documents have previously been provided, please so indicate.

8. Whenever used in this subpoena, the singular includes the plural, and vice versa; the present tense includes the past tense, and vice versa; the masculine includes the feminine, and vice versa; the disjunctive (e.g., “or”) includes the conjunctive (e.g., “and”), and vice versa; and each of the words "each," "any," "every," and "all" includes each of the other words.

9. The term "person" means any natural person, corporation, partnership, proprietorship, association, organization, trust, joint venture, and/or group of natural persons or organizations.

10. The terms "copy" or "copies" shall refer to exact and complete copies of original documents.

11. Documents subpoenaed shall include all documents in The Vanderbilt University’s physical possession, custody, or control, or in the physical possession, custody, or control of present and/or former The Vanderbilt University’s owners, officers, accountants, attorneys, trustees, successors, assigns, managers, supervisors, employees, agents, and/or representatives, and/or any other person(s) and companies directly or indirectly employed by, or connected with, The Vanderbilt University’s.

12. If any document responsive to any request herein was, but no longer is, in your possession, custody or control, identify the document (stating its date, author, subject, recipients, and intended recipients); explain the circumstances by which the document ceased to be in your possession, custody, or control, and identify (stating the person's name, employer title, business address and telephone number, and home address and telephone number) all persons known or believed to have any such document in their possession, custody, or control.

13. If any document(s) has been destroyed, discarded, or is otherwise disposed of for whatever reason(s), identify the document(s): explain the circumstances surrounding the destruction, discarding, or disposal of the document(s), including the timing of the destruction, identify all personnel who authorized the destruction, discarding, or disposal of the document(s), and identify all persons known or believed to have the document(s) or a copy thereof in their possession, custody, or control.

14. Any copies of original documents that are different in any way from the original, such as by interlineation, receipt stamp, notation, or indication of copies sent or received, are considered unique individual documents and must be produced separately from the originals.

15. For any document covered by this subpoena that uses a code, all documents explaining the code(s) used in the document must also be produced.

16. This subpoena request is continuing in nature and if additional responsive documents come to your attention after the date of production, such documents must be promptly produced.

17. Electronically stored information should be produced in the form or forms in which it is ordinarily maintained or in a reasonably useable form or forms.

18. Unless otherwise expressly stated, this subpoena does not supersede, revoke, or cancel any other subpoena(s) previously issued in this proceeding.

DOCUMENTS REQUESTED

1. A list containing the full names, work locations, shifts, and job classifications of all individuals in the petitioned-for bargaining unit below, as of the payroll period immediately preceding the filing of the petition, who remain employed as of the date of the filing of the petition.

Bargaining Unit:

Included: All graduate student employees enrolled at The Vanderbilt University who provide instructional services, research services, or administrative services, regardless of funding source including:

i. "Scholar" that provides service
ii. "Service Free Stipends" that provide service
iii. Department Stipends that provide service
iv. Graduate Stipend that provide service
v. Graduate Research Assistant
vi. Grad Student Research Assistant Monthly
vii. Graduate Student Research Assistant (Exempt)
viii. Graduate Student Teaching Assistant
ix. Graduate Student Teaching Assistant Monthly
x. Graduate Student Teaching Assistant (Exempt)
xi. International Graduate Student Stipend, 1042 Scholar and any other Stipend for an international graduate worker that requires service
xii. Instructor of Record
xiii. Graduate/Professional Student Worker
xiv. Graduate/Professional Student Worker (Exempt)
xv. Professional Student Worker (Exempt)
xvi. Professional Student Research Assistant (Exempt)
xvii. Graduate/Professional Student Teaching Assistant (Exempt)
xviii. Professional Student Teaching Assistant Monthly
xix. Professional Student Research Assistant Monthly
xx. FWS Grad Student Worker
xxi. FWS Graduate/Professional Student, Exempt
xxii. Graduate/Professional Assistant
xxiii. Graduate Assistant

Excluded: All undergraduate students employed by the employer, all other employees, guards, and supervisors as defined in the Act.

2. If the Employer contends that the proposed bargaining unit is inappropriate, it must provide a separate list containing the full names, work locations, shifts, and job

classifications of all individuals that it contends must be *included* in the proposed unit, if any, to make it an appropriate unit.

3. If the Employer contends that the proposed bargaining unit is inappropriate, it must provide a separate list containing the full names, work locations, shifts, and job classifications of any individuals it contends must be *excluded* from the proposed unit to make it an appropriate unit.

4. Provided that the Regional Director determines that there is a sufficient showing of interest by the Petitioner to proceed with the election, within two business days of the issuance of a Decision and Direction of Election or approval of a stipulated election agreement, the Employer will provide the Regional Director and the Petitioner a voter list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available personal home and cellular telephone numbers) of all eligible voters. The Employer must also include, in a separate section of that list, the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge. The list must be filed in common, everyday electronic file formats that can be searched. Unless otherwise agreed to by the parties, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. The font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. When feasible, the list must be filed electronically with the Regional Director and served electronically on the parties. The Employer must file with the Regional Director a certificate of service of the list on all parties.

Exhibit Three

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 10

THE VANDERBILT UNIVERSITY, **Employer**, **and** **VANDERBILT GRADUATE WORKERS UNITED-INTERNATIONAL UNION, UAW (VGWU-UAW),** **Union,** **JOHN DOE 1 and JOHN DOE 2,** **Proposed Intervenors.**	**Case No. 10-RC-351808**

GRADUATE STUDENTS' MOTION TO INTERVENE FOR PURPOSES OF THE SUBPOENA ISSUED TO VANDERBILT UNIVERSITY, AND MOTION TO STAY ENFORCEMENT OF SUBPOENA

Pursuant to Section 102.65 of the Board's Rules and Regulations, John Doe 1 and John Doe 2 (collectively, "Graduate Students")[1] move to intervene in the above-captioned case for the limited purpose of defending their privacy rights and the privacy rights of the other graduate students implicated by Region 10's subpoena directed to Vanderbilt University.

[1] John Doe 1 and John Doe 2 are two current graduate students at Vanderbilt, within the proposed bargaining unit at issue in this case, who have significant privacy concerns with the disclosure of their information protected by FERPA. They do not wish to undermine or waive any of those rights through the filing of this Motion, so their identities are being protected. Those two graduate students have retained the undersigned to file this Motion and help protect their rights. They have protectable interests under FERPA to ensure that Vanderbilt does not turn over information that could fall into the hands of a labor union of which they want no part. Should the Region desire further information regarding the identity of these two graduate students, the undersigned is prepared to disclose that information *in camera*, to the Region only.

The Graduate Students are students at Vanderbilt who are apparently within a bargaining unit proposed by Vanderbilt Graduate Workers United-International Union (VGWU-UAW) ("Union") in this case. The Graduate Students are aware that their personal information (and the information of all graduate students) is protected from dissemination by the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(g). On October 8, 2024, the Graduate Students received a communication from Vanderbilt informing them that a subpoena was issued by Region 10 to Vanderbilt seeking their information that would otherwise be protected under FERPA. Both Graduate Students submitted objections to the dissemination of their information to Vanderbilt and the Regional Director, but have not heard back from the Region regarding the status of their objection.

In effect, the Region's subpoena to Vanderbilt is an attempt to undercut FERPA's protections, privileging union interests over the graduate students whose rights the NLRB claims to protect. The Graduate Students seek to provide the Region legal arguments in support of their privacy interests, and against the Region's subpoena of Vanderbilt. FERPA's implementing regulations contemplate such an action, requiring Vanderbilt to notify the students subject to the subpoena so that the "eligible student may seek protective action." 34 C.F.R. § 99.31(a)(9)(ii).

Thus, the Graduate Students seek a limited intervention in this case for purposes of addressing the serious privacy issues raised by the Region's subpoena. Given these privacy interests, which cannot be addressed after enforcement of the subpoena, the Graduate Students seek a short stay of the proceedings, during which their intervention and the privacy issues raised herein can be properly addressed.

ARGUMENT

A. Intervention

The Board lacks precise standards for granting or denying intervention motions. *See, e.g.*, *Veritas Health Serv., Inc. v. NLRB*, 895 F.3d 69, 89 (D.C. Cir. 2018) (Millett, J., concurring) (expressing "concerns about the Board's continued failure to establish any discernible, consistent standard for granting and denying intervention in agency proceedings."). Generally, ALJs and Regional Directors decide intervention issues on an ad hoc basis. Federal Rule of Civil Procedure 24, however, provides strong guidance for the Board, including defined standards and criteria to rule upon this Motion. It states:

> On timely motion, the court must permit anyone to intervene who. . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a).

Federal courts apply a four-part test to evaluate claims for intervention under this rule: (1) the motion must be timely; (2) the applicant must claim a "significantly protectable" interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the action's disposition may, as a practical matter, impair or impede his or her ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action. *See, e.g.*, *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003).

In applying those tests, Rule 24(a) is construed "broadly in favor of proposed intervenors," *City of Los Angeles*, 288 F.3d at 397, and in light of the liberal policies favoring intervention. *See also Camay Drilling Co.*, 239 NLRB 997 (1978) (intervention liberally granted to pension fund trustees). This four-part test is satisfied here.

1. The Motion to Intervene is timely**.**

The Graduate Students' Motion is timely. They filed this Motion in advance of the October 18, 2024 deadline for Vanderbilt University to comply with the Region's subpoena, as quickly as possible after they retained legal counsel. The Graduate Students became aware of this subpoena on October 8, 2024, and swiftly took steps to protect their rights and the rights of the other graduate students by: (1) objecting to the disclosure of their information to Vanderbilt and the Region; and (2) contacting and retaining counsel for purposes of filing this Motion, which was filed less than ten (10) days after the Graduate Students became aware of the subpoena. Thus, the Motion is timely.

2. The Graduate Students have significant legally protectable rights at stake in this case.

The Graduate Students' and their fellow students have rights under the Act and FERPA, and they have a significant legal interest in protecting them.

Both the Board and the United States Supreme Court have noted that the primary focus of the NLRA is the expansion and protection of *employees'* rights—not the rights of unions or employers. In fact, the NLRA confers rights *only on employees*, and any rights that a labor union enjoys are merely derivative of the employees' Section 7 rights. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992) (emphasis added); *see also, e.g.*, *New York New York, LLC*, 356 NLRB 907, 914 (2011); *Leslie Homes, Inc.*, 316 NLRB 123, 127 (1995). "If the rights of employees are being disregarded, it is important that those rights be restored by [the Board's] affirmative remedial action . . . . to effectuate the policies of the Act" *McCormick Constr.*, 126 NLRB 1246, 1259 (1960).

Here, FERPA protects the Graduate Students' information from disclosure, subject to certain exceptions. 20 U.S.C. § 1232g(b). The Regional Director issued a subpoena directing Vanderbilt to disclose FERPA-protected information, with the apparent intent of turning that information over

to the Union—a private entity which they oppose and with which they want nothing to do. The Graduate Students seek to protect their interests in this regard, consistent with FERPA's regulations, which require Vanderbilt to notify the students subject to the subpoena so the "eligible student may seek protective action." 34 C.F.R. § 99.31(a)(9)(ii). While the Graduate Students have lodged informal objections to the dissemination of their information with Vanderbilt and the Region, at this time, the Graduate Students have not been given *any* assurances that their objections will be considered valid by the Regional Director or will ultimately prevent Vanderbilt from being compelled to disclose their FERPA-protected information.

3. The failure to grant intervention will foreclose the Graduate Students' ability to protect their privacy interests.

The failure to grant intervention in this case could result in irreparable harm to the Graduate Students. If Vanderbilt complies with the subpoena in its entirety, the Graduate Students' information may be disclosed. There is no remedy adequate to rectify this disclosure after the fact. Thus the Graduate Students must be permitted to intervene in order to challenge the subpoena before, rather than after the deadline for Vanderbilt to disclose the FERPA-protected information.

4. No current party adequately represents the Graduate Students.

Finally, when deciding a motion to intervene the Region must consider whether any existing party will represent the intervenor's interests. An applicant in intervention need not show that the existing parties will engage in conduct detrimental to his interests. Instead, inadequacy of representation "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) (citation omitted).

Vanderbilt University cannot adequately protect the Graduate Students' privacy interests in these proceedings for at least two reasons. First, the Board and the federal courts have resoundingly

rejected the notion of an employer serving as the "vindicator of its employees' organizational freedom." *Corrections Corp. of Am.*, 347 NLRB 632, 655 n.3 (2006) (citing *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 792 (1996)). "The employer has its self-interest to watch over and those interests are not necessarily aligned with those of its employees." 347 NLRB at 655 n.3. "The Board is accordingly entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union . . . ." *Auciello Iron Works*, 517 U.S. at 790.

Second, given that Vanderbilt is the entity subject to the subpoena, it has its own legal obligations and institutional interests regarding how to respond to the subpoena. It is not Vanderbilt's information that is in danger of being disseminated, and its interests are quite different from that of the Graduate Students. Only the Graduate Students have a vested interest in protecting the information that is the subject of the subpoena.

Consequently, absent the Graduate Students' intervention, there is a real and substantial risk that Vanderbilt graduate students—the only individuals whose interests these proceedings are intended to protect—will be denied the opportunity to protect their federally-mandated privacy interests.

B. Request for a Stay

The Graduate Students request a stay of the enforcement of the subpoena issued by the Regional Director to Vanderbilt. At this time, the Regional Director ordered Vanderbilt to comply with the subpoena by October 18, 2024. This deadline does not provide adequate time for the Regional Director to receive briefing or consider the important privacy interests at stake in this matter. The undersigned was only recently retained by John Doe 1 and John Doe 2, on Friday, October 11, and Monday, October 14. Counsel requires a stay in order to research and brief the significant legal issues presented by this subpoena.

Finally, the Graduate Students recognize the extraordinary nature of this request for intervention and a stay. However, this Region has allowed intervention in other novel representation cases, where significant employee interests were at stake and neither party was going to fully protect them. *See, e.g.*, *Volkswagen Group of America, Inc.*, Case 10-RM-121704 (Regional Director Order Granting Intervention, March 10, 2014).

CONCLUSION

The Regional Director should grant this Motion, permit the Graduate Students to intervene in order to defend their privacy interests, and grant a stay of the subpoena so that all parties will have the opportunity to submit positions regarding the subpoena.

Dated: October 15, 2024

Respectfully submitted,

/s/ Alyssa K. Hazelwood
Alyssa K. Hazelwood
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Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion was filed using the NLRB's e-filing system, and was served via e-mail on the following this 15th day of October 2024:

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/s/ Alyssa K. Hazelwood
Alyssa K. Hazelwood

Exhibit Four

September 17, 1999

Mr. Edward M. Opton, Jr.
University Counsel
The Regents of the University of California
Office of General Counsel
1111 Franklin Street, 8th Floor
Oakland, California 94607-5200

Dear Mr. Opton:

This is in response to your March 15, 1999, letter to this Office requesting our guidance on the University of California's (University) response under the Family Educational Rights and Privacy Act (FERPA) to a subpoena duces tecum that may be issued for certain students' education records. Specifically, the California Public Employment Relations Board (PERB) has served (or will serve) a subpoena duces tecum for "directory information" about the University's teaching assistants. You ask for our advice on the following:

1. Whether the University would violate FERPA by complying with a subpoena that may be issued by the PERB.
2. Whether there is any other provision contained in FERPA that would allow the University to lawfully provide education records to PERB.
3. Whether FERPA allows notice of a court order or subpoena to be made by publication in campus newspapers or on campus bulletin boards, or would individual letters be required.
4. What is the purpose of § 99.61 of the FERPA regulations?

This Office administers FERPA is responsible for providing technical assistance to educational agencies and institutions regarding issues related to education records.
As you are aware, FERPA is a Federal law that affords parents and eligible students the right to have access to education records, the right to seek to have the records amended, and the right to have some control over the disclosure of information from the records. See 20 U.S.C. § 1232g and 34 CFR Part 99. When a student turns 18 years of age or attends an institution of postsecondary education, the student becomes an "eligible student" and all FERPA rights transfer to the student. As explained more fully below, records of teaching assistants are education records under FERPA and may not be disclosed without written consent of the student or unless the disclosure meets one of the exceptions to the prior consent rule under FERPA. Each of your questions is addressed below.

Can the University lawfully comply with a subpoena that may be issued by the PERB?
In your March 15, 1999, letter you state that the PERB may issue a subpoena duces tecum to the University for "the names, departments where employed, and home addresses for several thousand students who are employed in various campus positions, chiefly as teaching assistants". You specifically ask if the University can provide this information under a subpoena for those students who have exercised their right to opt out of the disclosure of "directory information." The PERB wants the information "because it is planning representation elections this Spring at most of the University's nine campuses to determine whether the student employees wish to be exclusively represented by a labor union in their employment relationship with the University."

You indicated in your letter that you are concerned that "compliance with the subpoena duces tecum may violate FERPA." It appears you believe that if the PERB issues the University a subpoena duces tecum, it would not be valid or considered "lawfully issued" because, in your opinion, the PERB may not have the authority under its enabling statute to issue a subpoena for

the teaching assistant's education records. The enabling statute, according to your letter, states that the PERB shall have the authority:

> To hold hearings, subpoena witnesses, administers oaths, take the testimony or deposition of any person, and, in connection therewith, to issue subpoenas duces tecum to require the production and examination of, any employer's or employee organization's records, books, or paper confidential under statute.

Cal. Gov't Code § 3563 (g).

In your letter, you also state that it "does not appear that FERPA conflicts with state or local law under the facts that I have described—instead, the conflict is between FERPA and a directive (and potentially a subpoena duces tecum) issued by a state agency."
As you aware, Ms. Margo A. Feinberg, counsel to the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, also sent a letter to this Office regarding the potential subpoena duces tecum. In her letter, dated March 19, 1999, she makes the following statements:

> The UAW has filed representation petitions to represent academic student employees in such titles as Teaching Assistants, Readers and Tutors at the University of California campuses. . . . PERB has held several lengthy hearings as to the status of these positions and has determined that they are employees as defined by the Higher Education Employment Relations Act (HEERA) (California Government Code Section 3560, et seq.), and as such have a right to representation.
> It is our position first and foremost that any interpretation of HEERA rests with PERB and in certain circumstances the California courts. Therefore, it is not for the Department of Education to evaluate whether PERB's subpoena is legitimate.
> We, however, share PERB's view that it has legitimate subpoena power.

As you are aware, FERPA broadly defines the term "education records" as those records that contain information that is directly related to a student and that are maintained by an educational agency or institution or a party acting for the agency or institution. FERPA specifically includes in the term, *those records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student.* 34 CFR § 99.3 (b)(3)(ii). You indicated in your letter that teaching assistants are students in attendance at the University and one cannot be a teaching assistant unless one is a student. Therefore, it is our determination that records maintained by the University regarding teaching assistants are "education records" under FERPA.

This Office is not addressing the question of whether the records of readers and tutors are subject to FERPA because sufficient facts were not presented in either your letter or Ms. Feinberg's letter to enable us to determine whether the readers and tutors are students in attendance at the University. However, to the extent a University employs readers and tutors and their employment is contingent upon their being students in attendance at the University, then the same conclusion as teaching assistants would apply and their records would be considered "education records."

With regard to the disclosure of education records, FERPA generally provides that an educational agency or institution may only disclose a student's education record to a third party if the eligible student has given appropriate written consent. 20 U.S.C. § 1232g(b)(1) and (b)(2)(A); 34 CFR § 99.30. However, FERPA does permit the nonconsensual disclosure of education records in certain limited circumstances, such as when the disclosure is made in compliance with a lawfully issued subpoena or court order. CFR § 99.31(a)(9). A student's decision to be excluded from the disclosure of "directory information" has no bearing on the institution's compliance with a lawfully issued subpoena or court order. That is, an institution may disclose personally identifiable information from education records in compliance with a lawfully issued subpoena or court order regardless whether a student has opted out of the disclosure of directory information (see below).

While FERPA does not specifically define what constitutes a "lawfully issued subpoena," this Office has consistently advised that institutions, in consultation with their counsel, are best able to determine whether a subpoena has been lawfully issued because what would be considered a "lawfully issued subpoena" varies from State to State. In short, we have concluded previously that if a subpoena is issued in compliance with State law, it is "lawfully issued."

Please note that while a "lawfully issued subpoena" or court order may compel disclosure of information, *FERPA* does not require an educational institution to disclose information from a student's education record to anyone other than to the eligible student to whom the records relate. Rather, *FERPA* permits the disclosure of education records without prior written consent in certain limited situations, such as when the records are the subject of a subpoena or court order. In addition, unless the subpoena is a Federal grand jury subpoena or other subpoena issued for a law enforcement purpose, and the subpoena contains a provision that the eligible student must not be informed of the existence of the subpoena, the institution must make a reasonable effort to notify the eligible student in advance of compliance with the subpoena. This permits the eligible student to seek protective action from the court, such as limiting the scope of the subpoena.

Is there any other provision contained in FERPA that would allow the University to lawfully provide education records to PERB?

Absent prior written consent, no. As mentioned above, records containing information on teaching assistants are education records under FERPA. FERPA does provide that written consent is not needed if the disclosure concerns information the educational agency or institution has designated as "directory information," under the conditions described in 34 CFR § 99.37. See 34 CFR § 99.31(a)(11). The definition lists items that would not generally be considered harmful or an invasion of privacy if disclosed which includes, but is not limited to: a student's name; address; telephone listing; date and place of birth; major field of study; participation in officially recognized activities and sports; weight and height of members of athletic teams; dates of attendance; degrees and awards received; and the most previous educational agency or institution attended. 34 CFR § 99.3 ("Directory information"). Should a school disclose the names and addresses of its teaching assistants under FERPA's directory information exception, the school would also be disclosing, at the same time, the fact that those students are teaching assistants. Under FERPA, the fact that a student is a teaching assistant is not directory information.

Ms. Feinberg states in her letter, however, that the "University has previously released the names and addresses of teaching assistants in identical proceedings." She lists situations or mechanisms in which she states the names of the teaching assistants, tutors, or readers have previously been disclosed or made public. They include printing the names in the course catalog, posting them to the web page of the University, in the tutorial center, in the departments, on the office doors and mailboxes. She also states that the "individuals when voting in the election release their name as part of the process and obviously assume the University will have to release information to verify if they are currently employees in the bargaining unit." In addition she states: "The University already provides the names and addresses of these academic student employees to other state agencies that cover employment issues, such as the Franchise Tax Board and the Workers' Compensation Appeals Board, as well as to the health insurance providers."

Although Ms. Feinberg states that the University has previously released the names and address of teaching assistants, the nature and circumstances in the situations she describes differ from the disclosure of information to a specific third party, the PERB. Our advice does not relate to the publishing of a teaching assistant's name and address on-campus, action that an individual who is acting as a teaching assistant knows is inevitable as part of his or her teaching curriculum. However, in general, it is our understanding that in circumstances such as those described by Ms. Feinberg, an educational institution would ordinarily have obtained the student's permission to make his or her name and designation as a teaching assistant available to certain students and staff as part of the actual employment application process for teaching assistants.

Also, Ms. Feinberg states that "the University already provides the names and addresses of these academic student employees to other state agencies that cover employment issues, such as the Franchise Tax Board and the Workers' Compensation Appeals Board, as well as to the health insurance providers." We do not have enough information to consider how FERPA applies to these disclosures. For example, we would need to know whether at any point in the employment application process the individual signed a consent form for the release of his or her education records.

As noted previously, records containing a student's name, address, and status as a teaching assistant are considered "education records" because of the teaching assistants' status as students. As such, under the circumstances provided and assuming the absence of any other exception, such as a lawfully issued subpoena, the University would be required to obtain the consent of the teaching assistants prior to disclosing such information to the PERB.
No other provisions in FERPA are applicable to the particular circumstances you have presented. However, it appears from a subsequent communication that the University has taken action to overcome the problem of withholding the teaching assistants addresses for those who opted out. We are pleased that it appears you have resolved the issue. Although you did not elaborate on how the situation was resolved, we offer you the following two suggestions as possible solutions or actions the University may want to consider taking in the event it finds itself in a similar situation in the future.

1. The University could add a consent portion to the teaching assistant's application giving the teaching assistants the option of having their names and addresses released to the PERB for the purpose of elections.

OR

2. The University could volunteer to mail or deliver the literature that PERB presumably would like to have provided to the students via their mailing addresses. This would avoid any disclosures of education records to a third party.

Is notice of a court order or subpoena by publication in campus newspapers and on campus bulletin boards sufficient or are individual letters required?
This Office has consistently interpreted FERPA to require that students be notified in advance of the compliance with a court order or subpoena by individual notice. Notice on campus bulletin boards or in campus newspapers would not be adequate to meet this requirement. In contrast, the requirement in § 99.7 of the FERPA regulations that institutions must annually notify students of their FERPA rights may be provided by individual notice, publication in campus newspapers or on campus bulletin boards.

What is the purpose of § 99.61?
In your letter you ask whether the purpose of § 99.61 is to allow this Office to grant exceptions in appropriate cases to the restrictions that the FERPA places on the release of education records. If so, you then ask whether the University may be granted such an exception.

The purpose of § 99.61 is to require an educational agency or institution that determines that it cannot comply with FERPA, due to a conflict with a State law, to notify this Office regarding such conflict. Once notified, this Office reviews the law and any pertinent interpretations made by the State and provides guidance to the agency or institution regarding its applicability to FERPA. The Department has no authority to grant an exception or waiver to any of the provisions in FERPA. In sum, compliance with portions of a State law that conflict with FERPA may jeopardize an educational agency or institution's continued eligibility to receive Federal education funds. FERPA provides that the Department may not make funds available to any educational agency or institution that has a policy of denying parents or students their rights under FERPA. Thus, to the

extent that a conflict does exist between a State law and FERPA, and the agency or institution has a practice or policy of violating FERPA in order to comply with a State law, the agency or institution would be in jeopardy of losing Department of Education funds.

I trust that the above information is responsive to your inquiry. Should you have any further questions on FERPA, please feel free to contact this Office again.

Sincerely,
LeRoy S. Rooker
Director
Family Policy Compliance Office

Exhibit Five

2016 WL 4079128
Only the Westlaw citation is currently available.
United States District Court, N.D. Ohio, Western Division.

Justin BROWNING, et al., Plaintiffs,
v.
UNIVERSITY OF FINDLAY BOARD OF TRUSTEES, et al., Defendants.

Case No. 3:15-cv-02687-JGC
|
Filed 07/30/2016

Attorneys and Law Firms

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ORDER

James G. Carr, Sr., U.S. District Judge

***1** As part of the discovery process in this lawsuit, Plaintiffs, Justin Browning and Alphonso Baity II, have requested that Defendants, University of Findlay, David W. Emsweller, Brandi Laurita, Matthew Bruskotter, Rachel Walter, Ken Walerius, and Breanna Ervin Miller a/k/a Breanna Jeanette ("Defendants"), produce certain information contained in the education records of current and former students of Defendant University of Findlay.

The Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g; 34 C.F.R. Part 99 ("FERPA"), requires that a university make a reasonable effort to provide notice to eligible students prior to disclosure of education records, including those that contain personal identifying information. The notice is required when disclosure is subject to a court order, as here. *See, e.g.*, 34 C.F.R. § 99.31(a)(9)(i), (ii). The notification requirement is enforced by linking compliance to eligibility to receive federal funding. 20 U.S.C. § 1232g(b)(1), (2); 34 C.F.R. § 99.31(a)(9); *U.S. v. Miami Univ.*, 294 F.3d 797, 806 (6th Cir. 2002).

Even though a university is required to make a reasonable effort to provide notice, with the opportunity to object, consent of those students affected is not required where, as here, disclosure is court-ordered and subject to a protective order. *Morton v. Bossier Parish Sch. Bd.*, 2014 WL 1814213, *4 (W.D. La.); *C.T. v. Liberal Sch. Dist.*, 2008 WL 394217, *4 (D. Kan.); *Rios v. Read*, 73 F.R.D. 589, 600-02 (E.D.N.Y. 1977).

Thus, as required by FERPA, before producing any student's "education record," Defendants shall either obtain the student's written consent or shall make reasonable efforts to provide notice to any affected student of the potential production pursuant to the procedure approved herein.

As reasonable efforts to provide notice to students pursuant to FERPA and this Order, the Court, through Defendants' counsel, shall provide notice to students currently enrolled at the University of Findlay by sending email correspondence to their assigned "Findlay.edu" email address. The Court, through Defendants' counsel, shall provide notice to former students by sending email correspondence to their assigned "Findlay.edu" email address, if any; by sending email correspondence to any other known email address(es) maintained in the University of Findlay's database; or by sending regular mail to the former student's last known address. This Court finds that these steps satisfy the "reasonable effort" requirement of 34 C.F.R. § 99.31(a)(9)(ii).

Each time Defendants provide notice to an affected student, Defendants shall provide a list to the Court, to be reviewed and maintained *in camera*, identifying those students.

The notice to be provided to the affected students shall be in a format substantially similar to that attached to this Order.

This Court finds that fourteen days from the date Defendants send the notice is a sufficient period of time to allow a student to state an objection to the production of his or her education record.

***2** At the expiration of the fourteen-day objection deadline, Defendants will produce a list to the Court and the parties of all students who did not send an objection to Defendants'

counsel. Within a reasonable time after providing this list, not to exceed thirty days after the initial notice period or fourteen days after subsequent notice periods, Defendants will produce the requested education records related to that student or students, in compliance with FERPA and subject to the Federal Rules of Civil Procedure and any applicable privilege or doctrines which may otherwise prevent discovery of the information contained within the education record.

In the event that a student provides a written consent to disclose personally identifiable information, the student's written consent shall be sent to Kohnen & Patton, LLP as counsel for Defendants, for collection. At the expiration of the fourteen-day notice period, Kohnen & Patton, LLP will forward all written consents received to the Court and the parties. Within a reasonable time after providing the written consents, not to exceed thirty days after the initial notice period or fourteen days after subsequent notice periods, Defendants will produce the requested education records related to that student or students, in compliance with FERPA and subject to the Federal Rules of Civil Procedure and any applicable privilege or doctrines which may otherwise prevent discovery of the information contained within the education record.

In the event that a student objects to production of his or her education record, the student may state that objection and the grounds for the same in his or her response to Defendants' notice. The students' responses shall be sent to Kohnen & Patton, LLP as counsel for Defendants, for collection. At the expiration of the fourteen-day notice period, Kohnen & Patton, LLP will forward any objections received to the Court along with copies of any documents containing personally identifiable information related to the objecting students, and the Court will consider and rule upon those objections. Absent circumstances that the Court, in its discretion, believes warrant comment from counsel for Plaintiffs or Defendants, the Court shall make an initial *ex parte* determination on whether a student's objections justify continuing to protect the privacy of the student's education record granted under FERPA.

If the Court determines that the student's objections are not well-taken, the Court shall issue a ruling regarding the same, and within a reasonable time after the Court's ruling, not to exceed thirty days after the initial notice period or fourteen days after subsequent notice periods, Defendants will produce the requested education records related to that student or students, in compliance with FERPA and subject to the Federal Rules of Civil Procedure and any applicable privilege or doctrines which may otherwise prevent discovery of the information contained within the education record.

If the Court determines that the student's objections are well-taken, the Court shall issue a ruling regarding the same and provide to the parties, under seal, the objections of said student(s) (with personally identifiable information redacted). Within seven (7) days of the Court's ruling sustaining a student's objection, a party shall have the right to contest the Court's ruling, including the ability to argue that the right to obtain the student's personally identifiable information in discovery outweighs the stated privacy objection. Under such circumstances, the party shall file a motion for reconsideration, under seal.

If, following the filing of a motion for reconsideration, the Court determines that the student's objections are outweighed by a party's right to discovery, the Court shall issue a ruling regarding the same and, within a reasonable time after the Court's ruling, not to exceed thirty days after the initial notice period or fourteen days after subsequent notice periods, Defendants will produce the requested education records related to that student or students, in compliance with FERPA and subject to the Federal Rules of Civil Procedure and any applicable privilege or doctrines which may otherwise prevent discovery of the information contained within the education record.

***3** If, following the filing of a motion for reconsideration, the Court determines that the student's objections continue to have merit, the Court shall issue a ruling regarding the same, and the student's education record, including the student's directory information and inclusion on the *in camera* notification list, shall remain private. Any such ruling by the Court does not entirely preclude Defendants from producing documents or other information containing said students' personally identifiable information. Instead, the Court's determination that a student's objections are well-taken simply means that the student's personally identifiable information shall be redacted in the form and method agreed to by the parties on any documents produced by Defendants in discovery.

Documents and information produced by Defendants pursuant to this Order or otherwise including student information shall be marked “Confidential” and subject to the Stipulated Protective Order [Doc. No. 26] in this case. Any confidential documents and information provided or acquired

in the course of this lawsuit may not be used outside of the context of this lawsuit and will not become part of the public record of this lawsuit.

So ordered.

All Citations

Not Reported in Fed. Supp., 2016 WL 4079128