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Sarah Pierce West
American University Washington College of Law

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They’ve Got Eyes in the Sky: How the Family Educational Rights and Privacy Act Governs Body Camera Use in Public Schools

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They've Got Eyes in the Sky: How the Family Educational Rights and Privacy Act Governs Body Camera Use in Public Schools

Sarah Pierce West*

The Family Educational Rights and Privacy Act (FERPA) is the premier federal law that protects student privacy rights in public schools. In the face of increasing technology, courts have struggled to determine what information qualifies as a student's "education record" protected under FERPA. Body cameras are being increasingly utilized throughout the country. School districts have contemplated using body cameras within schools, and some districts could soon allow school administrators to use them in disciplinary proceedings against students. This Comment argues that FERPA should govern the use of body camera footage within public schools, and that such footage should qualify as an education record due to its wealth of personally identifiable information and its use by school personnel. This Comment also discusses the incompatibility of certain state open records laws with FERPA and concludes that disclosure of the body camera education records will depend on individual jurisdictional interpretations of FERPA as binding law.

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* Note & Comment Editor, American University Law Review, Volume 66; J.D. Candidate, May 2017, American University Washington College of Law, B.A., 2009, The College of William and Mary. Thank you to the staff and editorial board of the American University Law Review, as well as my faculty advisor, Professor Stephen Wermiel, for all of the help and guidance I received throughout this process. I am particularly grateful to the interns, attorneys, and staff at the Alaska Public Defender Agency and the Colorado State Public Defender for continually inspiring me and providing much-needed support and understanding while I wrote and edited this piece.
Recently, in southeastern Iowa, the Burlington Community School District proposed new security measures to promote safety and accountability in schools and to ensure student interests were served. The new measures included one major proposal that sparked intense national debate: the use of body cameras on school officials, including principals and assistant principals. While police officers and other law enforcement agents have increasingly used body cameras, school administrators have not used them until now. Burlington School District officials planned to use the cameras to protect “both sides” during interactions between students and
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administrators, but the district eventually dismissed the plan after determining there were numerous unanswered questions about how such a program would function. Primarily, the use of body cameras raises serious concerns about student privacy. Some critics point out that students should have a reasonable expectation of privacy in their schools and even more so in their interactions with school officials. The district intended to use the cameras primarily in student disciplinary proceedings to hold principals accountable and ensure appropriate interactions with students, meaning that the video would often capture audio and visual input of just the principal and the student. The videos could therefore have documented extremely private student information, making disclosure of the video to outside parties a pertinent concern.

4. Ryan, Making Their Way into Iowa Schools, supra note 1 (reporting that the district’s Superintendent framed the issue in terms of improving professional accountability and compared it to the cameras on soldiers’ helmets during his service in the Army National Guard, where “[i]t wasn’t so much about catching the other guy, but collecting how we did on the operation and how can we do it better”). But see Conor Friedersdorf, Keep Body Cameras Off Public-School Educators, ATLANTIC (July 10, 2015), http://www.theatlantic.com/education/archive/2015/07/keep-body-cameras-off-public-school-educators/398030 (arguing that body cameras might be appropriate for soldiers and police officers but not for school administrators, where the benefits do not outweigh the costs of surveillance).


6. See, e.g., Jessica Huseman, An Iowa School District Is Putting Body Cameras on Principals. Its Reasons Are Completely Wrong., SLATE: Schooled (July 23, 2015, 8:30 AM), http://www.slate.com/blogs/schooled/2015/07/23/body_cameras_for_principals_in_burlington_iowa_schools_why_a_police_accountability.html (cautioning that students might be discouraged from sharing important information if they know the conversation will be recorded).

7. See Body Cameras in Schools Invade Student Privacy, ACLU IOWA (Sept. 2015), http://www.aclu-ia.org/2015/09/15/body-cameras-in-schools-invade-student-privacy (arguing that body cameras are “especially problematic” because they allow recording “at an increasingly intimate level—different than the overall monitoring of more open spaces”).

8. See Andrew Phillips, School Body Cameras Can Address False Accusations, Officials Say, GAZETTE (Sept. 20, 2015, 11:00 AM), http://www.thegazette.com/subject/news/education/school-body-cameras-can-address-false-accusations-officials-say-20150920 (noting that school officials believed the use of body cameras, primarily in disciplinary proceedings, would help “address biases in discipline and serve as a training tool”).

9. See, e.g., Evie Blad, Body Cameras on School Police Spark Student Privacy Concerns, EDUC. Wk. (Mar. 3, 2015), http://www.edweek.org/ew/articles/2015/03/04/body-cameras-on-school-police-spark-student.html (citing steps taken by Isle of Wight County, Virginia, where in-school sheriff’s deputies limit student exposure to privacy issues by blurring faces and providing copies of the recordings to school officials).
Critics have wondered how, if at all, videos created from the body cameras would be protected.10

One potential avenue for protecting this information is the Family Educational Rights and Privacy Act (FERPA),11 the primary federal law that protects student privacy rights; however, FERPA only protects information that falls within its definition of a "student education record."12 FERPA defines a student education record as information maintained by the student's educational institution, or an individual acting on behalf of the institution, that is directly related to the student.13 Student information may include such widely varying information as a student's name, schools attended, courses taken, or participation in individualized education programs.14 Further, FERPA education records can include various forms of media, including video recordings.15 Thus, school districts and jurisdictions have debated the point at which video recordings turn into protected education records.16 Courts have not definitively established surveillance video, perhaps the closest medium to body camera videos, as an education record, and the U.S. Department of Education has provided sparse guidance on the subject.17 Because

10. See, e.g., Aaron Martinez, School Districts’ Use of Police Body Cameras Requires a Delicate Balance, GOV’T TECH. (Apr. 25, 2016), http://www.govtech.com/education/School-District-Police-Body-Cameras-ReQUIRES-Delicate-Balance.html (observing that some parents and privacy experts have noted that there is a “delicate balance” between the privacy concerns and the benefits of the cameras).
12. § 1232g(b)(1).
13. § 1232g(a)(4)(A); see, e.g., Protecting the Privacy of Student Education Records, NAT’L CTR. EDUC. STATS. (Mar. 1997), https://nces.ed.gov/pubs97/web/97859.asp (illustrating that student health records, test scores, and attendance documentation are education records when they are maintained by an educational institution because they relate directly to the student). But see § 1232g(a)(4)(B) (providing specific exemptions to this definition, including those records maintained by a law enforcement unit of the institution or records about a student who is at least eighteen years old).
17. See id. (noting that many jurisdictions and educational institutions define education records differently); Amy M. Steketee, The Legal Implications of Surveillance Cameras, DISTRICT ADMIN. MAG. (Feb. 2012), http://www.districtadministration.com/
the issue has only surfaced recently, there is no precedent addressing whether FERPA governs body camera videos.

Another central issue that affects how FERPA controls disclosure of education records is how FERPA interacts with conflicting state laws that might otherwise compel disclosure.\textsuperscript{18} State open records laws often require disclosure of information that belongs to government agencies and that is understood to be public or newsworthy; in the context of educational institutions, this particularly applies to disciplinary records.\textsuperscript{19} These laws frequently mandate disclosure even when the record contains personal information that identifies an individual student.\textsuperscript{20} In Burlington, the school district would have needed to determine if FERPA applied to body camera videos created by the school principals. It also would have had to examine whether Iowa’s state open records law comported with FERPA’s requirements. After the School Board of the Burlington Community School District discussed and debated the issue of body cameras in schools, the Board ultimately decided to abandon the pilot program scheduled for the spring of 2016. The Director of Human Resources for the district cited administrative issues and FERPA concerns in implementing the new policies as the primary reasons for abandoning the program.\textsuperscript{21}

This Comment discusses when FERPA governs student information and argues that body camera footage in schools, in Iowa and elsewhere, is an education record and should therefore fall under the protection of FERPA. This Comment concludes that state open records laws and individual jurisdictions’ interpretations of FERPA will guide the disclosure of body camera videos. Part I explores the goals and history of FERPA, as well as how it has evolved over time to address current concerns. Part I also discusses how various courts and states have interpreted FERPA and have attempted to fit the law within the State’s own statutory framework. Section II.A argues that body camera footage, if used in the way contemplated by the Burlington Community School District, should qualify as an

\textsuperscript{18} See Steketee, \textit{supra} note 17 (noting that all states maintain open records laws similar to the federal Freedom of Information Act).

\textsuperscript{19} Id.

\textsuperscript{20} See, e.g., SPLC \textbf{WHITE PAPER}, \textit{supra} note 16, at 2 (discussing a Florida case in which the court found that FERPA did not protect recordings of Student Senate meetings, even when those recordings included the names and voices of students).

\textsuperscript{21} Telephone Interview with Jeremy Tabor, \textit{supra} note 5.
education record under FERPA. Section II.B considers the difficulty of redacting body camera footage due to the abundance and depth of student information contained therein. Section II.C considers the policy concerns surrounding classification of body cameras as education records. Finally, Part III recommends that school districts establish clear policies regarding the use of the body cameras and discusses how the footage, as an education record, can fit into a state’s statutory framework.

I. EVOLUTION OF FERPA AND RECORD DISCLOSURE

The Family Educational Rights and Privacy Act was enacted to promote and defend student privacy by limiting disclosure of student education records. However, the lack of guidance as to what constitutes an education record has created confusion and inconsistency across jurisdictions. With enhanced technology and surveillance, as well as state laws requiring disclosure of public records, it is unclear when and how schools are permitted to disclose student information.

A. FERPA’s History and Legislative Goals

In 1974, Senator James Buckley and Senator Claiborne Pell sought to provide greater protection to students in the face of what they saw as “the growing evidence of the abuse of student records across the nation.” To achieve this goal, the two Senators proposed FERPA, otherwise known as “the Buckley Amendment.” The Senators initially offered the Amendment as an addition to the General Education Provisions Act (GEPA), which means that the legislative history of FERPA is limited. However, the intent behind the

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23. Compare Red & Black Publ’g Co. v. Bd. of Regents, 427 S.E.2d 257, 261 (Ga. 1993) (holding that student disciplinary records at the University of Georgia were not protected by FERPA), with DTH Publ’g v. Univ. of N.C., 496 S.E.2d 8, 13 (N.C. Ct. App. 1998) (holding that student disciplinary records at the University of North Carolina were education records protected by FERPA).
25. Id.
27. EPIC on FERPA, supra note 24 ("Congress offered no opportunity to those affected by FERPA to be heard prior to its enactment. There was no legislative committee study and review nor any public hearings to receive testimony from institutions or individuals.")
Buckley Amendment and GEPA was to augment the reach of the Elementary and Secondary Education Act of 1965 (ESEA).\textsuperscript{28} ESEA's primary goal focused on providing greater access to education and generally improving the quality of educational programs.\textsuperscript{29} While many called for the expansion of educational rights, others, such as Senator Buckley, also saw the need to limit a school's ability to control its students' records and to release them on its own volition.\textsuperscript{30} In the midst of amending FERPA just a month after it was signed by President Gerald Ford and went into effect in 1974, Senators Buckley and Pell released a joint statement regarding the amendment to "remedy certain omissions in the provisions of existing law and to clarify other portions of the Act which have been the subject of extensive questioning and concern."\textsuperscript{31} The statement, serving as legislative history for interpretation of the amendment,\textsuperscript{32} specifically noted that one of the primary goals of FERPA was to "protect such individuals' rights to privacy by limiting the transferability of their records without their consent."\textsuperscript{33}

\textsuperscript{28} Id.
\textsuperscript{29} See Eloise Pasachoff, Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law, 62 AM. U. L. REV. 577, 613 (2013) (stating that the ESEA's scope was significant, "almost immediately providing funding to nearly every school district around the country").
\textsuperscript{31} 120 CONG. REC. 39,862 (1974) (Joint Statement in Explanation of Buckley/Pell Amendment).
\textsuperscript{32} 120 CONG. REC. 39,864 (statement of Sen. Claiborne Pell) (“The Senator has introduced into the RECORD an agreed upon explanation of the amendments we have prepared[,] which will serve as legislative history in interpreting the language of the amendments.”).
\textsuperscript{33} 120 CONG. REC. 39,862.
Ultimately, FERPA sought to uphold student and parental privacy rights over education records. Now considered to be "the main federal law that deals with privacy in schools," FERPA governs the collection, maintenance, and disclosure of student educational data. The Act also protects the rights of parents to inspect and review their child's records.

Congress enacted FERPA under its Spending Clause authority and conditioned federal funds to educational institutions upon compliance with FERPA's provisions. One such provision stipulates as follows: "No 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 . . . ." Under Department of Education regulations implementing FERPA, disclosure of education records occurs when the educational institution permits "access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means."

The Department of Education also enforces FERPA through the Family Policy Compliance Office (FPCO), which it formed to investigate alleged violations and to bring the violating party into compliance with the Act. Parents and students claiming FERPA violations must file a written complaint with FPCO within 180 days of the violation or when they should have reasonably known that a violation occurred. The complaint must contain "specific allegations of fact giving reasonable cause to believe that a violation of the Act or this part has occurred." FPCO subsequently launches an investigation into the educational institution to determine if there

37. See U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts . . . .").
38. 20 U.S.C. § 1232g(b)(1).
39. Id.
41. § 99.60.
42. § 99.64(c).
43. § 99.64(a).
has been a violation.\textsuperscript{44} If FPCO finds that a violation has occurred, it must issue a written statement telling the institution how to come into compliance with FERPA and allow a reasonable amount of time to comply.\textsuperscript{45} If the educational institution fails to acquiesce to the statement, FPCO may pursue several avenues of enforcement, including withholding all federal funds to the school;\textsuperscript{46} however, FPCO has never employed this remedy.\textsuperscript{47}

FERPA provides a list of limited exceptions to the non-disclosure provision. Generally, a school may disclose a student's education record to other school officials within the institution who have "legitimate educational interests."\textsuperscript{48} Legitimate educational interests might be to provide services to the student or to perform tasks that are required by a school official's position.\textsuperscript{49} Individual schools have significant discretion to determine the limits of legitimate educational interests and may identify interests on a case-by-case basis.\textsuperscript{50}

\section*{B. Defining "Education Records"}

\begin{enumerate}
\item \textbf{Interpretations of education records under FERPA}

One of the troubling aspects of FERPA is the lack of guidance regarding what constitutes an "education record." Similar to the

\begin{itemize}
\item \textsuperscript{44} § 99.64(b) (permitting the FPCO to determine, in the course of its investigation, whether the violation was the result of a single infraction or an incompatible institutional policy).
\item \textsuperscript{45} § 99.66(c).
\item \textsuperscript{46} § 99.67(a) ("[T]he Secretary may take any legally available enforcement action in accordance with the Act").
\item \textsuperscript{47} SPLC WHITE PAPER, supra note 16, at 7 (stating that, even after more than 150 notices from the Department informing schools about potential violations as of 2010, the remedy of withholding federal funds "has never been used in the 36-year history of FERPA" and is only proper "if the school cannot be brought into voluntary compliance with the law").
\item \textsuperscript{48} 20 U.S.C. § 1232g(b)(1)(A) (2012); see also Jennifer C. Wasson, FERPA in the Age of Computer Logging: School Discretion at the Cost of Student Privacy?, 81 N.C. L. REV. 1348, 1362 (2003) (noting that, due to the lack of regulation and sparse case law, defining "legitimate educational interest" has largely been left to institutional discretion).
\item \textsuperscript{49} \textit{What Is Considered a "Legitimate Educational Interest"?}, OFF. REGISTRAR, UNIV. NORTHERN IOWA, https://www.uni.edu/registrar/node/4118 (last visited Aug. 19, 2016).
\item \textsuperscript{50} See Defining "Legitimate Educational Interests", NAT'L CTR. EDUC. STATS., https://nces.ed.gov/pubs2004/privacy/section_4b.asp (last visited Aug. 19, 2016) (noting that FERPA allows individuals with legitimate educational interests to access education records, but "does not say specifically who those persons are, nor does it stipulate how to determine the limits of a legitimate educational interest, although the U.S. Department of Education could rule... that a school official did not have [a] 'legitimate education interest'").
\end{itemize}
definition of "legitimate educational interests," individual institutions have primarily defined the term "education records." The Code of Federal Regulations defines education records as "those records that are: (1) directly related to a student; and (2) maintained by an educational agency or institution or by a party acting for the agency or institution." The records may include student discipline files, grades, standardized testing results, or other records in written, video, electronic form, or other forms of media. However, education records are not necessarily academic in nature—they usually also encompass immunization records, photographs, or student employment information. The individual maintaining the records may be a teacher, the school registrar, a school administrator, the school nurse, or other school personnel acting within his or her authority to create and keep the records. Because the school may designate specific individuals to be custodians of education records,
there are many variations of who could fill the role of custodian of an education record. The Supreme Court of the United States has also been unhelpful in defining what qualifies as an education record under FERPA. Since FERPA's enactment, the Supreme Court has only ruled on two cases addressing the scope of the Act. Both of these cases narrowed FERPA's reach and frustrated the overarching legislative goals of the Buckley Amendment to prevent government overreach.

In *Owasso Independent School District No. I-011 v. Falvo*, the Supreme Court held that peer-graded papers do not constitute “education records” and would not be protected under FERPA. The Court acknowledged the difficulties in defining what records constitute “education records” for FERPA purposes, particularly in the classroom context, where most records concern the student's educational career. The Court grappled with the issue of record “maintenance” and who might possess these records according to the second requirement of FERPA. However, noting the burden on teachers to maintain all possible records concerning every student in each classroom, the Court found that Congress did not intend to extend FERPA so broadly.

In its ruling, the Court noted that an official charged with maintaining education records suggested some sort of “single central custodian, such as a registrar, not individual assignments handled by

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56. See id. (mentioning the registrar, deans, and faculty members as custodians of education records).


58. In *Gonzaga*, the Court rejected the notion that students may bring lawsuits against educational institutions that violate FERPA by releasing education records without the students' consent. 536 U.S. at 276. The Court did not attempt to define what kind of information would actually constitute an education record, but Justice Breyer noted in his concurrence that FERPA's text "is broad and nonspecific," which "leaves schools uncertain as to just when they can, or cannot, reveal various kinds of information." *Id.* at 292 (Breyer, J., concurring).

59. 534 U.S. 426 (2002) (holding that students are not agents acting on behalf of the school and that student-graded papers do not constitute education records when they are not yet kept or "maintained" by the teacher).

60. *Id.* at 430.

61. *Id.* at 431–35.

62. *Id.* (citing 42 U.S.C. § 1232g(a) (4)(A) (ii) (1994)).

63. *Id.* at 435 (positing that defining "education records" broadly would create consequences that "are all but unbounded," requiring teachers to adjust all classroom activities to accommodate the inclusive definition).
many student graders in their separate classrooms." The Court’s ruling implies that individual teachers are not responsible for maintaining any student assignments or work that contributes to the student’s ultimate grade, even though the work presumably has personally identifiable information and pertains directly to the student, fitting within the plain meaning of FERPA.

2. Law enforcement unit records versus education records

Although FERPA covers education records collected and maintained by school officials, it does not cover those records collected by law enforcement purposes. "Records of the law enforcement unit of an educational agency or institution" are explicitly excluded from FERPA and the Department of Education’s definition of education records, "subject to the provisions of [34 C.F.R.] § 99.8." Law enforcement units include security personnel, student resource officers, police commissioned to patrol the school, and any entity whose purpose is school safety and security. As a result, law enforcement records, as opposed to education records, may be disclosed to third parties, including agents of the juvenile justice system, without the student’s consent. However, an important caveat to this exception is 34 C.F.R. § 99.8(b)(2)(ii), which states that a record of law enforcement does not include “[r]ecords created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution.” Thus, what constitutes an education record

64. Id.
65. See 34 C.F.R. § 99.8 (2013) ("Law enforcement unit means any individual, office, department, division, or other component of an educational agency or institution, such as a unit of commissioned police officers or non-commissioned security guards, that is officially authorized or designated by that agency or institution to—(i) Enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself; or (ii) Maintain the physical security and safety of the agency or institution.").
66. § 99.3.
69. 34 C.F.R. § 99.8(b)(2)(ii) (emphasis added).
is primarily based on why the information is collected and who creates and maintains the record. For example, if a police officer is permanently stationed at a school to patrol the hallways, to protect students, and to ensure safety, the records the officer creates for those purposes are law enforcement records, not education records, because the officer kept such records for both a law-enforcement and a non-law-enforcement purpose.

With the growing number of police officers stationed in schools and the potential confusion between law enforcement records and legitimate education records, schools have created ways around the non-disclosure provision. For example, schools that do not have a clear law enforcement unit, such as police officers stationed in the school or student resource officers, may simply designate a single school employee or a group of employees to act as the law enforcement unit.\(^{70}\) This designation would allow the employee, acting within the scope of his position as the law enforcement unit, to maintain law enforcement records and disclose information gathered within the school.\(^{71}\) Any records created from the school employee in his position as the law enforcement unit would not qualify as education records, making them releasable. While students may understandably mistake a school employee working as a "law enforcement unit" for a "school official," the FPCO has stated that the school must indicate this designation to parents.\(^{72}\)

To further complicate the issue, designated law enforcement personnel may also perform other school-related functions.\(^{73}\) In 1995, the Secretary of the Department of Education used FERPA regulation amendments to clarify the role of the law enforcement unit in creating records: it noted that records can still qualify as law enforcement records even when they are not exclusively law enforcement-related, and that FERPA would therefore not govern such records.\(^{74}\) To combat the problem of providing reasonable notice to students and parents concerning school security and education records, FPCO suggests that school districts describe in the

\(^{70}\) COLLEGE BROCHURE, supra note 53.

\(^{71}\) Id.

\(^{72}\) Id. (balancing the need for schools to have flexibility to ensure school safety with the need to keep parents informed of the privacy rights of their children).

\(^{73}\) 34 C.F.R. § 99.8(a)(2).

\(^{74}\) Family Educational Rights and Privacy, 60 Fed. Reg. 3464, 3467 (Jan. 17, 1995) (codified at 34 C.F.R. pt. 99) ("[W]here a law enforcement unit also performs non-law enforcement functions, the records created and maintained by that unit are considered law enforcement unit records, even where those records were created for dual purposes (e.g., for both law enforcement and disciplinary purposes).").
individual school policy manual or the notification of student and parent rights precisely which school employee will have the law enforcement unit designation. This procedure would provide some measure of notice to students. However, the original, overarching goals of FERPA suggest a greater concern for student privacy over institutional convenience.

3. Redacting "personally identifiable information"

FERPA specifically withholds funds from public institutions that allow the release of "personally identifiable information in education records." Therefore, the FPCO has permitted institutions to release education records once a sufficient amount of personally identifiable information has been removed. To tackle the question of personally identifiable information in records, FPCO released guidance concerning how to redact records enough to remove any personally identifiable information that would allow disclosure of the education record. In a letter written to a Texas school district seeking clarification on forbidden disclosures, the Director of FPCO noted that "disclosure” only refers to the “transferring, releasing, or permitting access to” the personally identifiable information contained within an education record. Thus, if all of the identifying information in an education record is redacted, the school may


76. Id.


79. See Letter from LeRoy S. Rooker, FPCO Director, to Texas School District (Apr. 6, 2006) [hereinafter Texas Letter], http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/texas040606.html. However, redaction is not explicitly permitted within FERPA's text as an exception and some have argued that the FPCO guidance allowing disclosure after redaction is an incorrect interpretation of the law. For the most part, courts have upheld the notion that redaction is permitted. SPLC WHITE PAPER, supra note 16, at 4.

80. See Texas Letter, supra note 79 (stating that educational institutions, to release a requested record, “must either remove or redact all of the information in the education record that would make a student’s identity easily traceable”).

81. Id.

82. Id. (citing 34 C.F.R. § 99.3).
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disclose the education record without the student's consent. Conversely, if an education record, even with redaction, is "easily traceable" to the student, FERPA does not allow disclosure of that record. Though Department of Education regulations explicitly state that disclosure is not permitted when information can be linked to a student's identity with "reasonable certainty," FPCO seemingly extends that definition to information that permits mere "easy traceability" to the student.

Still, individual institutions have substantial discretion to interpret the term "personally identifiable information" and are not required to follow FPCO's guidance. The Utah Court of Appeals in Bryner v. Canyons School District held that a videotape depicting a fight between students counted as an education record for all of the students who participated in the fight on school grounds. In accordance with FERPA, the court held that even though the school did not maintain, review, or upload the videos, the videos contained sufficient "personally identifiable information" to be considered an education record. The court observed that the personally identifiable information could indicate, with reasonable certainty, which students were involved. In Connecticut, a school principal was accused of dragging students down the school hallway—an act

83. Id.
84. Id.; see also Gerard T. Leone Jr. et al., FERPA Confidentiality Requirements—Where Should the Line Be Drawn?, NIXON PEABODY LLP: HIGHER EDUC. L. ALERT (Jan. 21, 2015), http://www.nixonpeabody.com/files/173091_Higher_Education_Agent_21JAN2015.pdf (noting that the Department of Education amended FERPA regulations in 2008 "to make clear that even redacted records may include 'personally identifiable information' that would still be covered by FERPA; otherwise, redaction would be a "useless formality").
85. 34 C.F.R. § 99.3.
86. See Texas Letter, supra note 79 (advising that educational institutions are "in the best position to determine, at least at the outset, what information must be removed from education records").
88. Id. at 858, 861. But see Rome City Sch. Dist. Disciplinary Hearing v. Grifasi, 806 N.Y.S.2d 381, 383 (N.Y. Sup. Ct. 2005) (citing Culbert v. City of New York, 679 N.Y.S.2d 148, 150–51 (N.Y. App. Div. 1998)) (holding that FERPA was not intended to apply to videotape that was employed to uphold the physical security and safety of the educational institution and "which does not pertain to the educational performance of the students captured on this tape").
89. Bryner, 351 P.3d at 855. The Court noted that the students' faces, body shapes, and other distinguishing features could confirm their identities. Id.
90. Id. at 858–59.
recorded on camera.91 Because the videotape focused on the school principal's actions rather than the actions of the two students, and because the video was too blurry to accurately identify the students, the Connecticut Freedom of Information Commission found that the video did not qualify as an education record.92

However, the commission's interpretation of FERPA ignored discussion of the plain text of FERPA's implementing regulations: "personally identifiable information" includes "[o]ther information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty."90

Although the FOI Commission found that the identities of the students could not be discerned, it was nonetheless possible that another student in the school, more acquainted with the students in the video, would be able to identify them. The Commission failed to determine whether the video allowed easy traceability to the students depicted in the video in accordance with FPCO guidance.94

4. Expanding surveillance technology

FERPA, as it currently stands, presents many questions for the future of student privacy. With exponentially expanding technology and increasing forms of media, FERPA's definitions of educational data can be considered outdated,95 which could affect how broadly individual courts choose to interpret and define FERPA. For example, FERPA does not consider electronic, online data that is stored in a cloud service, such as Google Docs96 or iCloud,97 which are becoming

91. Frank LoMonte, Connecticut Joins Consensus that School Security Videos Are Not Confidential FERPA Records, STUDENT PRESS L. CTR. (Nov. 27, 2014, 12:59 PM), http://www.splc.org/blog/splc/2014/11/connecticut-school-security-video-ruled-exempt-from-ferpa. Although the plaintiff requested the release of the videotape under the Connecticut Freedom of Information Act, the school denied the request arguing that FERPA governed the disclosure of the tape. Id.
95. See Wasson, supra note 48, at 1358–60 (describing how FERPA and schools' privacy policies have not considered modern technological advances, particularly information associated with computers).
more common in both secondary and postsecondary environments.98 Such storage could make the service itself qualify as a "single central custodian" once it is uploaded by a school official, or it could also be managed by the single individual who uploads the material.99

Besides the issue of data maintenance, another problem is determining what type of substantive data or media could qualify as an education record. While FERPA explicitly allows coverage of video footage, questions arise when addressing the use of surveillance videos within schools. Although the Department of Education specifies that FERPA protects education records in video format, whether captured images and video would be considered "educational" for FERPA purposes remains problematic. For example, courts have disagreed on whether video footage recorded in school buses and in school hallways would qualify as an education record under FERPA.100

According to FPCO guidance, the way in which the video is used is the determinative factor in resolving this issue, rather than the individual who maintains the video.101 While FPCO has advised that tapes of students who are the primary or sole focus of the video constitute education records, the National Forum on Education Statistics has stated, "If the school's law enforcement unit controls the cameras/videos and it is doing the surveillance for safety reasons, the ensuing videos would be considered law enforcement, rather than...

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98. See, e.g., FERPA and Technology, Cornell U. Acad. Tech., http://acadtech.cit.cornell.edu/ferpa-and-technology (last visited Aug. 19, 2016) (instructing that "[u]ploading student information or student work to a non-approved cloud service such as Google Docs is not permitted and violates FERPA).

99. See supra text accompanying note 64 (discussing the Supreme Court's interpretation of how records should be managed).

100. Compare Rome City Sch. Dist. Disciplinary Hearing v. Grifasi, 806 N.Y.S.2d 381, 383 (N.Y. Sup. Ct. 2005) (establishing that the video was created for security purposes, not for an educational purpose, and thus not covered under FERPA), with Bryner v. Canyons Sch. Dist., 351 P.3d 852, 858 (Utah Ct. App. 2015) (holding that school security videos contain enough personally identifiable information about students to qualify as an education record under FERPA).

101. U.S. Dep’t of Educ., Balancing Student Privacy and School Safety: A Guide to the Family and Educational Rights and Privacy Act for Elementary and Secondary Schools (2007) [hereinafter Elementary & Secondary Brochure], http://www.ed.gov/policy/gen/guid/fpco/brochures/elsec.pdf (clarifying that the U.S. Department of Education policy protects student privacy, but allows disclosure of law enforcement unit records, security video, and even education records when they are used to "protect the health or safety of students or other individuals").
Importantly, if the school official uses them "for discipline purposes, however, the tapes become education records and are subject to FERPA requirements"—seemingly at odds with the role of the law enforcement unit as defined by the Secretary of the Department of Education.

C. Iowa Case Study: The Rise of Body Cameras

A recent issue that has further obfuscated the applicability of FERPA to video recordings is the availability of body cameras in the school context. In Iowa, the Burlington Community School District decided to implement the use of body cameras—not on law enforcement personnel within the school, but on school administrators. The Superintendent planned to launch a pilot program in the spring semester of 2016, pending school board approval and completion of a public comment period. However, the pilot program was ultimately shelved due to administrative difficulties and problems in implementation, despite the fact that the Superintendent did not receive any negative feedback from students or parents concerning the body cameras. Although the school district stated that the use of body cameras would keep principals accountable and ensure students' due process rights, the body cameras were initially suggested in response to a student falsely accusing a principal of inappropriate behavior; namely, kicking and injuring the student. Fear of school liability for administrator conduct seemingly motivated the use of body cameras in schools. When a parent might be naturally inclined to believe his or her child

103. Id.
104. While increasing numbers of body cameras are being utilized by police officers stationed in schools, this Comment only addresses body cameras used by school officials and administrators.
107. Telephone Interview with Jeremy Tabor, supra note 5.
109. Phillips, supra note 8. Because of the presence of the hallway surveillance, the allegations were proven false. Id.
and worry for the child’s safety, body cameras would provide an accurate representation of the incident.

One concern yet to be addressed is whether FERPA will prevent disclosure of the body camera records to other third parties, such as law enforcement agencies. Because Burlington was one of the first school districts to consider employing body cameras to record students, there has been no case law or even explicit FPCO guidance on how to properly use them or how FERPA would govern them. Surveillance videos are perhaps the closest records to body camera videos, but the Iowa Supreme Court has yet to encounter a case addressing whether FERPA covers surveillance tapes.

Accordingly, the most recent case decided by the Iowa Supreme Court discerning the reach and limits of FERPA was Press-Citizen Co. v. University of Iowa, which addressed university documents containing information about a campus assault. The contested documents included the names of the two male students charged with the crime and correspondence between school officials concerning prior assault cases that had occurred on the campus. The court reaffirmed the notion that information that would allow another individual to identify the student in the record would be considered personally identifiable information under FERPA. In this way, the Iowa Supreme Court's ruling aligns with the U.S. Supreme Court’s interpretation, FPCO’s issued guidance, and with other state FERPA rulings. Additionally, the court took the further step of refusing to allow disclosure of even comprehensively redacted records due to the public nature of the case and the ease with which one could identify the students. The court’s decision on what constituted personally identifiable information comported with the “easily traceable” standard suggested by FPCO, as well as the standard of “reasonable certainty” outlined in the federal regulations. These principles

110. See Laura Isensee, All Houston School Police to Wear Body Cameras Next Year, HOUS. PUB. MEDIA (Feb. 3, 2015), http://www.houstonpublicmedia.org/articles/news/2015/02/03/55685/all-houston-school-police-to-wear-body-cameras-next-year (reporting that Houston’s school police officers would apply existing FERPA regulations to its new body camera program).
111. 817 N.W.2d 480 (Iowa 2012).
112. Id. at 482–83. The Iowa City news publication requested documents relating to assault investigations at the University of Iowa under the Iowa Open Records Act. Id.
113. Id. at 482–84.
114. Id. at 485–86.
115. Id. at 492.
116. Texas Letter, supra note 79.
govern any body camera footage from the Burlington Community School District that is determined to be an education record. Press-Citizen also confronted the tension between FERPA, requiring student privacy and control over education records, and state open records laws, requiring disclosure of certain records. Every state has some version of an open records law that allows its citizens access to documents maintained by government institutions, such as public schools. Individuals, as well as media outlets, may request the documents and then publicly disseminate the information. As a result, private student information in education records that would otherwise be protected from disclosure by FERPA may be released according to the state open records law.

Further, the newspaper in Press-Citizen claimed that the Iowa Open Records Act required the University to divulge the requested information concerning incidents of past campus sexual assault. The Iowa Open Records Act requires that state entities, such as state universities and public schools, make records publically available. The court noted that the goal of the Open Records Act was "to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act." The newspaper's argument relied on the principle that, because FERPA is merely a funding provision that threatens to withhold federal money from violating institutions, FERPA is not binding, positive law that must be followed at the expense of conflicting state law. However, instead of

118. Press-Citizen, 817 N.W.2d at 482.
121. See id. (reporting that open records laws vary by state and that there are always exceptions preventing student documents from being protected).
122. IOWA CODE § 22.2(1) (2015). The Iowa Open Records Act is also known as the Iowa Freedom of Information Act or the Examination of Public Records Act. Press-Citizen, 817 N.W.2d at 484.
123. Press-Citizen, 817 N.W.2d at 482–83.
124. § 22.2(1).
125. Press-Citizen, 817 N.W.2d at 482–83 (quoting Iowa Civil Rights Comm'n v. City of Des Moines, 313 N.W.2d 491, 495 (Iowa 1981)).
126. See id. at 486 (quoting Bauer v. Kincaid, 759 F. Supp. 575, 589 (W.D. Mo. 1991)) ("FERPA is not a law which prohibits disclosure of educational records. It is a provision which imposes a penalty for the disclosure of educational records.")
addressing the incompatibility of federal supremacy concerning FERPA and Iowa law, the Court used a relevant provision incorporated into the state Open Records Act that would prevent dissemination of information when federal funds are in jeopardy.\footnote{1} Because many—if not most—states have included provisions in their state laws that would account for discrepancies between open records laws and FERPA, many courts do not undertake the issue of federal supremacy.\footnote{2}

II. FERPA GOVERNS BODY CAMERA FOOTAGE AND DISCLOSURE IS DETERMINED BY STATE INTERPRETATION OF FERPA AS BINDING LAW

Body camera footage, as the Burlington Community School District intended to use it, qualifies as an education record under FERPA. It will presumably contain personally identifiable information about students and will be maintained by school officials, making it an education record according to FERPA's plain meaning.\footnote{129} As such, FERPA will prevent disclosure of the footage to third parties without parent or student consent. While the Act prohibits the release of personally identifiable information,\footnote{130} regulations allow for redaction and disclosure of education records when the school removes the personally identifiable information.\footnote{131} However, body cameras face a unique problem in that redaction of the footage will be a difficult, if not impossible, task due to the abundance of student information present in the videos.\footnote{132} A potential concern affecting disclosure of the records is the sometimes-incompatible state open records laws, which require release of the information to the public.\footnote{133} To determine whether records can be disclosed under state law,

\begin{itemize}
\item 127. Id. at 487; see § 22.9 ("If it is determined that any provision of this chapter would cause the denial of funds, services or essential information from the United States government which would otherwise definitively be available to an agency of this state, such provision shall be suspended as to such agency . . ."); see also State ex rel. ESPN v. Ohio State Univ., 970 N.E.2d 939, 946 (Ohio 2012) (holding that the Ohio open records law incorporated FERPA and prohibited disclosure of education records).
\item 130. § 1232g(b)(1).
\item 131. 34 C.F.R. § 99.31(b)(1) (2013).
\item 133. See State Public Records Laws, supra note 119 (charting the various state open records laws).
\end{itemize}
individual jurisdictions will have to examine their own laws and establish whether there is an incompatibility. In Burlington, the school district would have been prohibited from disclosing the records under Iowa state law as well as the controlling FERPA case law.

A. Body Camera Videos Are "Education Records" Under FERPA

Based on the substance and maintenance of body camera videos by school officials and the overall legislative goals that FERPA promotes, body camera videos are education records under FERPA and should be protected against disclosure as confidential. The novel body camera footage in Burlington, Iowa, would have easily qualified as education records under Press-Citizen, Owasso, and the plain meaning of FERPA and its applicable regulations.

Body cameras present unique challenges for educational institutions governed by FERPA, creating a critical need for protecting the privacy of the recorded footage. Though there has been some guidance issued by the Department of Education concerning surveillance videos, body camera videos present a much greater problem. Unlike surveillance tapes, body camera footage would include audio as well as visual feed focusing on the student and perhaps the student's parents. FERPA regulations explicitly provide for audio recordings, stating that an education record can include, but is not limited to, video or audiotape. However, very few FERPA cases have dealt with the release of audio recordings as they pertain to student discipline records. Additionally, there has been no FPCO guidance concerning what requirements FERPA

134. See supra Section I.C (discussing the Burlington Community School District's use of body cameras).
135. See, e.g., ELEMENTARY & SECONDARY BROCHURE, supra note 101 (explaining that videos maintained by law enforcement personnel are exempt from FERPA).
137. 34 C.F.R. § 99.3 (2013).
138. But see E. Conn. State Univ. v. Freedom of Info. Comm'n, No. CV 96056097, 1996 WL 580966, at *3 (Conn. Super. Ct. Sept. 30, 1996) (finding that an audio recording of a student disciplinary hearing was an education record but disclosure was not barred by FERPA). There have also been concerns that classroom recordings of student discussions violate FERPA, but there have not been any prominent cases considering the matter. See FERPA Faculty & Staff FAQs, RICE U. OFF. REGISTRAR, https://registrar.rice.edu/facstaff/ferpa_FAQs (last visited Aug. 19, 2016) (stating that recordings of classroom discussions that include students asking questions or making presentations would be protected under FERPA because it would be possible to identify the students).
would place on audio recordings in general, much less audio and video feed combined, as in the use of a personal recording device or body camera. Another important feature of body cameras is the greater potential for manipulation of the video as well as its failure to capture images objectively. For example, the visual feed from body cameras would be limited to images of the student, and would not capture the movements of the cameraman or subtler cues in interactions. Body cameras, unlike surveillance tapes, were created primarily to permit law enforcement to film suspects, not for principals to film students, so the focus will be on the student's actions rather than the principal's actions. In contrast, surveillance tapes film all of the activity occurring in a given area and no one individual is singled out for recording.

Courts that have evaluated how to define education records have not assessed records containing the wealth of information that body cameras provide. As a practical matter, this suggests that courts will be more willing to classify body camera footage as an education record. Significant guidance on how to classify body camera footage comes from FERPA's plain meaning because such footage has not been explicitly classified as education records and contains such comprehensive information.

Use of body cameras in school disciplinary proceedings clearly meets the first prong of FERPA's "education record" definition: the record must "contain information directly related to the student." If used for discipline purposes, the meetings between principals and students will unequivocally relate directly to the student's conduct and, possibly, academic life. In determining whether the record directly relates to a student, courts have looked at various factors, such as whether the student is the focus of the video. In the case of

139. See 10 Limitations of Body Cams You Need to Know for Your Protection, FORCE SCI. INST. (Sept. 23, 2014), https://www.policeone.com/police-products/body-cameras/articles/7580663-10-limitations-of-body-cams-you-need-to-know-for-your-protection (describing the ways cameras may fail to properly protect officers and suspects in criminal interactions).
141. See, e.g., Bryner v. Canyons Sch. Dist., 351 P.3d 852, 857–58 (Utah Ct. App. 2015) ("Information is directly related to a student if it has a close connection to that student."), petition for cert. filed (U.S. May 2, 2016) (No. 15-9153); see also Lambeck v. Bd. of Educ., Bridgeport Pub. Schs., FIC 2013-677 (Conn. Freedom of Info. Comm. Oct. 22, 2014), http://www.ct.gov/foi/cwp/view.asp?a=4162&Q=555888 (investigating such factors as whether the student is the focus of the tape, how many other individuals are depicted in the tape, what information about the student is exposed, etc.).
body cameras, the student would presumably be the sole focus of the video due to the interrogative nature of disciplinary proceedings and the fact that body cameras would not capture images of the cameraman. During disciplinary proceedings, the student might be the only figure captured in the video and the video would contain both audio and video footage of the student’s statements. This spotlight on the student would clearly show that the footage directly related to him or her. However, body cameras in hallways, used as general monitoring devices, would be less focused on individual students and more focused on overall surveillance. Thus, using body cameras in disciplinary proceedings, as contemplated by the Burlington School District, would clearly present information directly related to students.

The use of body cameras also meets the second prong of the “education record” requirement described by FERPA: school officials are responsible for the maintenance of the record.142 The Burlington Superintendent expressly stated that principals and assistant principals would have operated the cameras during their interactions with students, although the school district never clearly determined how the videos would have been uploaded or maintained.143 However, the district planned on placing principals in charge of uploading the recordings and reviewing and distributing the videos later if any allegations were made.144 Presumably, when body cameras are utilized in schools and principals remain responsible for the uploading and maintaining the video, the videos meet the second prong of FERPA’s requirements defining education records. Therefore, under the plain meaning of FERPA’s text, FERPA clearly embraces body camera videos as education records.

Body camera footage would also be considered an education record according to the Supreme Court’s analysis in Owasso.145 If the pilot program had been accepted and enforced, the principals and assistant principals in Burlington who uploaded body camera footage clearly would have been school officials “acting for” the school as

142. § 1232g(a)(4)(A)(ii).
143. See Huseman, supra note 6 (stating that the first year will act as a test with policies changing as the district sees how it works). The director of human resources for the school district said that camera usage would be mostly left to the principals’ discretion, but the cameras were generally intended to record disciplinary meetings, which other surveillance cameras or witnesses might not observe. Id.
144. Ryan, New Arena, supra note 105.
145. See supra text accompanying notes 59–64 (detailing Owasso’s interpretation of FERPA).
their positions required.\textsuperscript{146} The administrator also would have maintained the footage electronically, and possibly have saved the record in the student’s academic or disciplinary file. This is exactly the kind of maintenance that the Supreme Court contemplated when it stated that education records are kept in or on “a permanent secure database” and may be added to “a student’s folder in a permanent file.”\textsuperscript{147} This is particularly true for disciplinary proceedings recorded by a body camera, which could become part of the student’s permanent record. The principal who uploads and maintains the video then becomes a “single central custodian” of the information and must protect the information in accordance with FERPA.\textsuperscript{148}

The plain text of FERPA also reinforces the concept that body camera footage is an education record, not a law enforcement record, and therefore, the law enforcement unit would be unable to disclose the footage.\textsuperscript{149} If the body camera videos are primarily to be used in disciplinary proceedings by the principals, as the Burlington Community School District intended, then the school could not then leave maintenance of the video to a law enforcement unit to circumvent FERPA’s nondisclosure requirements.\textsuperscript{150} There is clearly an educational purpose behind the use of the body cameras in disciplinary proceedings, even if someone other than the principals and administrators, such as officers stationed at the school, maintain them. In contrast, if the principal chooses to uses the body cameras in the hallways, which already contain surveillance cameras, the purpose of the tapes could be construed as simply upholding the security of the school. If the school is permitted to designate a school official, such as an assistant principal, as a law enforcement unit to patrol the hallways for the safety of the institution, the resulting body camera record could debatably be disclosed without the consent of the filmed students. Thus, for body cameras, the two primary questions determining maintenance of the record for the second prong of the education

\begin{footnotes}

\item 146. See Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 534 U.S. 426, 433 (2002) (stating that the phrase “acting for” is used to describe school officials, like teachers and administrators).
\item 147. Id. at 433.
\item 148. Id. at 435.
\item 149. See Maryland Letter, supra note 67 (citing 34 C.F.R. § 99.3) (“[W]hen a school’s law enforcement unit receives personally identifiable information from a student’s education records, that information must be protected under FERPA . . . .”).
\item 150. See supra Section I.B.2 (explaining that law enforcement records cannot include those that are maintained for non-law enforcement purposes, even if maintained by the law enforcement unit).
\end{footnotes}
record requirements are (1) whether the school official in charge of maintaining the body camera video was acting as an agent of the school, and (2) whether the school official taping the video was designated as a law enforcement unit that potentially falls under FERPA’s exception.\textsuperscript{151} In either case, the body camera videos—if used for disciplinary purposes—will become education records regardless of the law enforcement unit designation.

However, when body camera footage is used for non-disciplinary purposes, such as school safety, classification of the footage as an education record will depend largely on the individual operating and maintaining the footage. The Supreme Court has stated that students do not qualify as “agents” of the school, but it has not explicitly considered when school administrators, such as principals, act as school officials and when they act as designated law enforcement units.\textsuperscript{152} If Burlington or another district chooses to use body cameras to patrol the hallways and tape students disobeying school rules, the school will need to determine if the individual with the camera is a school official or a designated law enforcement unit. For example, if the district decides to assign an assistant school principal as the designated law enforcement unit to monitor the halls and classrooms with a body camera, the subsequent footage could conceivably be disclosed. The record created would fall under the law enforcement unit exception to FERPA\textsuperscript{153} and would not be protected material. Although the ability to designate a school official as a law enforcement unit is just a suggestion from the FPCO and is not required by the schools, it nonetheless gives schools the opportunity to create tense, complex systems of law enforcement and school policing with little to distinguish between the two.\textsuperscript{154} A school principal who uses the body camera in his office during a disciplinary proceeding would be required to follow FERPA, whereas a principal who uses the camera during routine supervisions would not be.

\textsuperscript{151} See generally Lynn Daggett, \textit{FERPA in the Twenty-First Century: Failure to Effectively Regulate Privacy for All Students}, 58 CATH. U. L. REV. 59, 72 (2008) (arguing that the Supreme Court’s trivial reliance on the textbook definition of “maintained” as “preserved” or “retained” implies that records could simply be destroyed and the information contained therein subsequently released).

\textsuperscript{152} See \textit{Owasso}, 534 U.S. at 433–34 (holding that peer grading does not make students agents “acting for” the school).

\textsuperscript{153} 34 C.F.R. § 99.3 (2013).

\textsuperscript{154} See \textit{Elementary & Secondary Brochure}, supra note 101 (explaining the different factors for schools to consider when determining how to classify security personnel).
B. Problems with Redaction

Even if the footage garnered from body cameras were redacted to allow disclosure under FERPA, following the guidance the FPCO has given, the information would likely still be easily traceable, and the student could be identified with reasonable certainty. While certain documents, such as homework assignments or research and medical records, can be redacted by simply removing the student’s name from the education record, redaction of video recordings sufficient to allow disclosure would require significant time and effort. The school would have to invest in special equipment to blur images of the student to make him unrecognizable to other members of the school community. Erasing this identifiable information would be difficult, considering that body camera videos present clear, direct images of students, as opposed to regular surveillance tapes, which record from a greater distance. It would also need to edit and cut out any possible personally identifying information such as his name or parents’ names and any other statements that would make his identity easily traceable.

In Iowa specifically, the state supreme court has noted that even heavily redacted education records can allow others to identify the student, and in using a medium like body cameras, the release of the records without the student’s consent should be expressly

155. See Texas Letter, supra note 79 (establishing guidelines for school districts to follow when interpreting FERPA and redacting personally identifiable information from education records).

156. See Letter from LeRoy S. Rooker, FPCO Director, to Attorney for School District (Oct. 31, 2003), http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/1031.html (allowing disclosure of written student discipline records when the names and other identifying information have been redacted).


158. Under FERPA regulations, “personally identifiable information” includes “information that . . . is linked or linkable to a specific student that would allow a reasonable person in the school community . . . to identify the student with reasonable certainty.” 34 CFR § 99.3. Under FPCO guidelines, FERPA additionally prohibits disclosure of information that is “easily traceable” to the student’s identity. Texas Letter, supra note 79.
forbidden. If body cameras are employed in schools in the way that the Burlington Community School District envisioned, the education records resulting from the body camera video would be extremely difficult to redact, given the wealth of potentially identifiable information included in the videos. Moreover, in many student disciplinary proceedings, the school community often knows about the conduct or offense at issue. In such instances, the school must not disclose the body camera footage, even with redaction: disclosing redacted education records that do not fully remove the student's identity would violate *Press-Citizen.* As a result, disclosure of the records is unlikely to be permitted under *Press-Citizen,* even though Iowa's Open Records Act compels disclosure of certain documents created by public institutions, albeit subject to its many exceptions. Because body camera videos would be governed by FERPA in Iowa, the Iowa Open Records Act would not require disclosure of the footage. The Iowa Open Records Act does not operate when federal funds might be withheld due to a separate federal law, so it would not undermine FERPA's protections of education records created by body cameras. For states that have laws like Iowa's, the only relevant inquiry for protection or disclosure of body camera video is whether they actually constitute education records. Once the State has determined that body camera videos are education records, they are automatically protected and any information identifying the student must be completely redacted before the videos can be disclosed to third parties.

**C. Ramifications**

Advocates of body cameras in schools have lauded them for protecting both teachers and students, and call for more surveillance. The Iowa principal accused of dragging a student has noted that body cameras would keep administrators accountable,

159. *Press-Citizen* Co. v. Univ. of Iowa, 817 N.W.2d 480, 492 (Iowa 2012) ("[A]n entire record can be withheld where redaction would not be enough to protect the identity of a student.").

160. *Id.*


162. § 22.9.

163. *Press-Citizen,* 817 N.W.2d at 489.

164. *See supra* Section II.A (arguing that body camera footage is an education record).

holding the administrators to a level of basic professional conduct. Many have noticed the growing lack of trust parents place in schools and some posit that the use of cameras would hold administrators to a higher ethical standard if they knew parents could access the tapes in the event of a compromising situation. Taping students during disciplinary proceedings might also ensure that the students retain their due process rights. In December of 2011, the Department of Justice launched an investigation into multiple government agencies in Lauderdale County, Mississippi, for the systematic funneling of students into the juvenile justice system for minor school infractions. Because the criminalization of student conduct occurred at the discretion of the teachers and the law enforcement unit, the Department of Justice found that minorities, including African-American children and children with disabilities, were disproportionately affected. Teachers, school personnel, and law enforcement were not held accountable and the conduct went undiscovered by federal authorities for years until the DOJ investigation occurred. The use of body cameras might discourage such blatant disregard for student due process and would be


167. According to one survey, parent confidence in the public school system reached an all-time low in 2012, with only twenty-nine percent expressing "quite a lot" of confidence in schools, down several percentages from the preceding years. Jeffrey M. Jones, *Confidence in U.S. Public Schools at New Low*, GALLUP (June 20, 2012), http://www.gallup.com/poll/155258/confidence-public-schools-new-low.aspx.

168. See Phillips, *supra* note 8 (pointing out that declining trust and high parental suspicion may be remedied by constant accountability and transparency while also "address[ing] biases in discipline").


170. Id.

171. Id. The Department of Justice reached a settlement agreement in the class action lawsuit, and the police are now barred from arresting students whose conduct constitutes a minor offense of school policy and cannot interview students without a guardian or lawyer present. *SPLC: DOJ Settlement in School-to-Prison Pipeline Case Will Protect Mississippi Children*, S. POVERTY L. CRT. (June 19, 2015) https://www.splcenter.org/news/2015/06/19/splc-doj-settlement-school-prison-pipeline-case-will-protect-mississippi-children. *But see* Friedersdorf, *supra* note 4 (observing that most schools in America are not dangerous enough to take such a drastic measure when "the effect of transparency in their hallways and classrooms could more likely divide than unite the communities they serve").
immediately available for examination should accusations alleging administrator misconduct arise.

In contrast, there is an underlying fear that the use of body cameras gives school principals and administrators unfettered discretion to pick and choose which parts of the proceeding get taped, as he or she can just turn the camera off to conceal inappropriate behavior, unlike body cameras used by law enforcement. The footage then becomes incriminating against the student only, and the goals of the body camera are immediately defeated. While body cameras in other contexts are grounded in protecting the public from law enforcement manipulation and misconduct, the sudden call for body cameras in schools “is rooted in a desire to protect the officials in charge—adults who already wield considerable power over the young people in their care.” The body cameras, while supposedly protecting students from the poor conduct of school administrators, are more likely to serve as a convenient way to catch students breaking or admitting to breaking school rules. If FERPA does not govern disclosure of these records, they can be turned over to third parties, such as law enforcement agencies, and used against the student.

Proponents have noted that increased surveillance measures are helpful and that the use of body cameras can increase school security when students know their actions are being taped and can be easily disclosed. For instance, videos are being used more than ever in the wake of the recent increase in school violence. Increasing numbers

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172. Huseman, supra note 6 (remarking that “[t]he flexibility of the districts rules could undermine the very point of having cameras there in the first place”).

173. See id. (challenging the comparisons of body cameras when used by police officers and body cameras when they are used by school officials in the course of school activities).

174. See Jay Stanley, Body Cameras on Police in Schools, ACLU (Mar. 27, 2015) https://www.aclu.org/blog/free-future/body-cameras-police-schools (worrying that “body camera footage is just going to be whipped out left and right for the enforcement of petty rules and disciplinary disturbances”); see also Friedersdorf, supra note 4 (noting that many proponents of the body cameras have also suggested putting them in classrooms to catch students misbehaving).

175. See, e.g., Press Release, supra note 169 (describing instances in which school officials systematically arrested students for minor infractions while at school, such as dress code violations or defiance).

of school shootings within the last few years have encouraged educational institution representatives to reevaluate the efficacy of safety measures, focusing on the importance of transparency over privacy. However, these proponents do not take into account several measures designed to protect educational institutions even when education records cannot be disclosed without consent. First, FERPA includes an emergency exception that allows schools to release information when necessary to avert either a disaster or a health or safety emergency. In emergency situations, the school may determine, based on the totality of the circumstances, that “there is an articulable and significant threat to the health or safety of the student or other individuals and that a party needs personally identifiable information from education records” and then give that information without the student’s consent. The school discloses this information on a case-by-case basis and may only release the specific information necessary to address the emergency.

Furthermore, FERPA allows the disclosure of education records without consent when disclosure is required by a lawfully issued subpoena or judicial order. The school would only be required to give reasonable notice to the student whose information is sought. Thus, there would be no clear threat to student safety when body camera videos are considered education records due to the emergency exceptions built into FERPA. If a principal wearing a body camera sees an immediate emergency via his recorded video, he may turn the record over to the appropriate authorities without fear of reprisal.

Additionally, students do have a small expectation of privacy in their dealings at school. Though body camera advocates have posited that students have no expectation of privacy when they have already been filmed by surveillance cameras, being taped by a hallway

180. 34 C.F.R. § 99.36.
181. § 99.31 (a) (9).
recorder is vastly different from being filmed by a principal who is directly in front of the student, recording both video and audio. Moreover, although surveillance equipment has advanced and is now being commonly used in schools, many critique this approach on the basis that schools are not prisons and students are not prisoners. Alternatively, others still think that getting at the truth is worth the privacy risk, illustrating the “seductive power of mass surveillance.”

Filming these disciplinary discussions and hearings could hamper any meaningful conversation, with the student too scared or intimidated to speak freely with officials knowing he is being filmed. Not only would the sense of constant surveillance make the student nervous and cause him to lose his trust in his administrators, it would also prevent students generally from disclosing knowledge of more serious wrongdoing for fear that their words will be immortalized on video and possibly used against them.

III. RECOMMENDATIONS

To ensure that student privacy rights are upheld, principal body cameras must be considered education records, subject to the protections of FERPA. Policies must streamline the use of the cameras and classify them preemptively as education records under FERPA to give the student notice of what the cameras will be used for and the knowledge that he will not be harmed by the potential disclosure of his statements. The only way to combat fears of exposure and the subsequent lack of cooperation with school officials is to guarantee that student statements and discussions will be kept confidential, and allowing FERPA to govern the treatment of body camera video is the best way to provide confidentiality. Because the body camera videos align with the Department of Education’s definition of “education records” and its issued guidance, and the Supreme Court’s news/morning-mix/wp/2015/07/07/iowa-school-district-to-outfit-principals-and-assistant-principals-with-body-cameras (stating that surveillance cameras had been installed in Burlington schools in cafeterias, hallways, and stairwells more than ten years before the proposed use of body cameras).

184. See Huseman, supra note 6 (arguing that just because students have become desensitized to constant surveillance does not mean that using body cameras in schools is an appropriate response).

185. Friedersdorf, supra note 4.

186. See Ryan, New Arena, supra note 105 (suggesting the cameras could prevent schools officials from building trust with students).

187. See Ryan, Making Their Way into Iowa Schools, supra note 1 (emphasizing that student-administrator relationships built on trust are essential within schools).
interpretation in *Owasso*, school districts should face little contention with the designation of body camera videos as education records.

In addition, schools should develop and implement policies regarding body cameras that explicitly define how the cameras should be used. Instead of allowing an administrator to turn the camera on or off at his or her own discretion, there should be clear records indicating when the proceeding began and ended. Further, the student himself should be allowed to determine when the discussion becomes so personal that the cameras should be turned off. Giving the administrator the authority to choose which information is too personally identifiable gives him greater influence over the proceeding and prohibits the overall privacy goals FERPA was intended to protect. In developing internal policies, schools should proactively determine how the videos will be maintained and uploaded to ensure maximum protection of student information. Because FERPA stipulates that education records are those that are maintained by an agent of the school, the school will need to state explicitly that the principal, in his position as a school administrator, is an agent acting on behalf of the school when the videos are taped. Similarly, the principal or assistant principal, rather than a law enforcement unit, should be in charge of uploading and maintaining the material in order to avoid confusion concerning the “school agent” designation.

To preserve student due process, it is essential that the district determine, in advance, how state law might affect the disclosure of education records under FERPA. If the district is in a state with a competing open records law, it should seek direction from its relevant state case law as well as Department of Education guidance concerning how to tackle the problem of disclosure. While most states, such as Iowa, have compatible state open records laws and will not have to determine the issue of federal supremacy, the districts in states that require disclosure should develop ways to redact the videos. In doing so, they would comply with FERPA by removing all personally identifiable information while also meeting their obligations under state law.

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188. *See supra* text accompanying notes 145–48 (describing how body camera footage would be an education record under *Owasso*).


190. *See McGee-Tubb, supra* note 128, at 1063 (arguing that few jurisdictions have had to confront the problem of conflicting state and federal laws and federal supremacy, as most states have created caveats in their open records laws, allowing federal law to supersede the open records law if disclosure would affect the availability of federal funds).
CONCLUSION

According to the legislative goals of FERPA as well as its plain text and understanding, body camera footage should be understood as "education records" that fall within FERPA's protections. Many jurisdictions have debated whether surveillance videos, the form of media most similar to body camera footage, qualify as education records, but body camera videos more clearly encompass "education records." Not only do the videos clearly contain significantly more "personally identifiable information," but they are also uploaded and maintained by school principals—agents of the school. Body camera video therefore satisfies the two main criteria for establishing information as an education record because the subject and substance of the body camera video, and the individual responsible for the video, meet the standards of many jurisdictions.

Because FERPA would cover body camera videos as education records, disclosure of the videos without the consent of the student or parent would be prohibited unless narrow exceptions apply. Redaction of education records and subsequent third-party disclosure, permitted under FERPA at the discretion of the educational institution, would not be realistic for body camera footage. The wealth of information contained in the footage makes the redaction of all personally identifiable information nearly impossible.

State open records laws, often requiring the disclosure of information from public institutions such as schools, are frequently incompatible with FERPA's directives. Thus, the disclosure of private, student information would depend on the State's interpretation of FERPA as positive, binding law, or as a simple funding provision that does not compel the State to prevent disclosure of the records. In Iowa, where the use of body cameras in schools was debated—but ultimately rejected—in Burlington, the footage would not have been available for public disclosure, even with the Iowa Open Records Act, because the Iowa Supreme Court has said that those records governed by FERPA cannot be disclosed when funding would be withheld. Therefore, once Iowa determines that information is an education record, the Iowa Open Records Act does not require its disclosure.

This classification is vital given the often-publicized nature of well-known disciplinary proceedings and subsequent media coverage. To fully protect students, schools must take affirmative steps to alert students and parents to the use of body cameras in schools, and preemptively develop strategies to experience as little friction between state law and FERPA as possible in order to maintain
consistency with other jurisdictions. By defining body camera footage as education records at the offset, schools can better prepare administrators and students who will be the subjects of the footage. Further, they can determine how to implement use of the body cameras in a way that will not infringe upon the privacy rights of students in the school district. If student privacy rights are upheld in schools, in spite of contrary state laws that would require disclosure, then the overall legislative goals of FERPA as originally conceived have been defended.