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October 26, 2012

Arthur Leed, Esq.
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Lustrat House
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Athens, GA 30602

RE: *Openness of student disciplinary hearings at the University of Georgia.*

Dear Mr. Leed:

You have asked for advice regarding whether Georgia's revised Open Meetings and Open Records Acts, O.C.G.A. § 50-14-1 *et seq.* (2012) (collectively, the "Act"), justify the closure of student disciplinary hearings at the University of Georgia ("UGA"). Let me begin by noting that under House Bill 397 (Act No. 605, eff. April 17, 2012), it is now clear that postsecondary student disciplinary records are protected from disclosure by the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, *et seq.* ("FERPA") and, therefore, are exempt from Georgia's Open Records law. Georgia's Open Meetings law permits the closure of a student disciplinary hearing to the extent that any portion of a hearing would reveal the "personally identifiable information" of the student, as defined in 34 C.F.R. § 99.3 (2009), including, among other things, a student's name or the charges against him or her.

As you are aware, earlier this year, through H.B. 397, Georgia's open government laws were significantly revised to clarify certain provisions, codify recent case law, and increase financial penalties against public bodies and officials who violate the law. H.B. 397 was signed into law by Governor Deal on April 17, 2012, and subsequently codified at O.C.G.A. § 50-14-1 *et seq.* and § 50-18-70 *et seq.* Code subsection 50-18-72(a)(37) is one of the new provisions in the law. It provides that records are exempt from disclosure if doing so would jeopardize receipt of FERPA funding "under 20 U.S.C. § 1232g or its implementing regulations." Therefore, O.C.G.A. § 50-18-72(37) makes clear that an applicable "agency," such as the Board of Regents, should not disclose any document to the extent doing so would contravene FERPA.

FERPA provides that "[n]o funds shall be made available . . . to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . . .) of students without the written consent of their parents . . . ." 20 U.S.C. § 1232g(b)(1). Thus, FERPA broadly defines "education records," as:

> those records, files, documents, and other materials which:
>
> (i) contain information directly related to a student; and
>
> (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(i) and (ii). *See also* 34 CFR § 99.3.[1]

In 1998 the Higher Education Amendments ("HEA") were made to FERPA, and since that time jurisdictions that have considered the question have consistently found that student disciplinary records are protected "education records" subject to FERPA. *See, e.g., U.S. v. Miami Univ.*, 294 F.3d 797 (6th Cir. 2002); *Press-Citizen Co., Inc. v. Univ. of Iowa*, 817 N.W.2d 480, 492 (Ia. Sup. Ct. 2012); *WFTV, Inc. v. School Bd. of Seminole,* 874 So.2d (Fla. 5th DCA 2004).[2] Among other things, the HEA created an exception authorizing postsecondary institutions to disclose final results of any disciplinary proceeding for a crime of violence (as defined in the statute) or nonforcible sex offense to anyone, including members of the general public, if the institution determines that that the student committed a violation of its rules or policies with respect to the crime. *See* 20 U.S.C. § 1232g(b)(6)(A); 34 C.F.R. § 99.39. That the law "excepts" certain disciplinary records, therefore, clearly presumes that disciplinary records are generally protected under FERPA, in the first instance. *See id.*

Subsequently, in 2009, the Department of Education implemented regulations defining the protected "personally identifiable information" within education records as:[3]

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[1] Excluded from the definition of "education records" are records of the law enforcement unit of an educational agency or institution, but only under the conditions described in § 99.8 of the FERPA regulations. Specifically, the "law enforcement unit" must include "commissioned police officers or non-commissioned security guards" who are "officially authorized" to "[e]nforce any local, State, or Federal law . . . ," while the records at issue must be "created for a law enforcement purpose." 34 C.F.R. § 99.8 (a)-(b). Records created and maintained by a law enforcement unit solely for a non-law enforcement purpose (*e.g.*, a disciplinary action) are not encompassed by this exclusion. 34 C.F.R. § 99.8(b)(2).

[2] While *WFTV* involved a disciplinary records request made of a school board and not a postsecondary institution, the court's analysis of FERPA and Florida's open records act is still instructive.

[3] This clarified the previous definition of "information that would make the students' identities easily traceable" (34 C.F.R. § 99.3(f) (2008)) because that language "lacked specificity and clarity. We were also concerned that the 'easily traceable' standard suggested that a fairly low standard applied in protecting education records." 73 Fed. Reg. 74,806.74831 (December 9, 2008). The DOE approved the regulations as a final rule on December 9, 2008, and they became effective on January 9, 2009. *See* Family Educational Rights and Privacy, 73 Fed. Reg. 74,806. 74,831 (December 9, 2008) (codified at 34 CFR pt. 99).

- The student's name;
- The name of the student's parent or other family member;
- The student's address;
- A personal identifier, such as the student's social security number, student number, or biometric record;
- Other indirect identifiers such as the student's date of birth, place of birth, and mother's maiden name;
- Other 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 knowledge of the relevant circumstances, to identify the student with a reasonable certainty; and
- Information requested by a person who the education agency or institution reasonably believes knows the identity of the student to whom the education record relates.

See 34 C.F.R. § 99.3 (2009). The regulations prohibit the disclosure of this information unless the student's written consent is obtained.

In 1993 in *Red & Black Publ'ing Co., Inc. v. Bd. of Regents*, 262 Ga. 848 (1993), the Supreme Court of Georgia suggested that some disciplinary records of the student Organization Court may be open. The statements of the court to that effect – which were not, in any regard, its primary ruling – have been superseded by federal regulations and subsequent Georgia legislation. It is now clear under Georgia and federal law that the Board of Regents and its arms, such as UGA, are exempt from producing any disciplinary records that reveal the "personally identifiable information" described by FERPA. *See* O.C.G.A. § 50-18-72(37).[4]

The Open Meetings Act, as amended by H.B. 397, now permits closure of those parts of:

> meetings during which that portion of a record made exempt from public inspection or disclosure pursuant to Article 4 of Chapter 18 of this title is to be considered by an agency and there are no reasonable means by which the agency can consider the record without disclosing the exempt portions if the meeting were not closed.

O.C.G.A § 50-14-3(b)(4).

Although FERPA and the associated regulations are silent on whether postsecondary disciplinary hearings must remain closed, O.C.G.A § 50-14-3(b)(4) suggests that such hearings are properly

[4] Moreover, *Red & Black* addressed a hearing regarding the conduct of a student organization and not an individual student disciplinary hearing. It should be noted that the advice in this letter is directed toward the latter type of hearing, in particular.

closed when they would "disclose" the "exempt" portions of the disciplinary records being considered – *i.e.*, those revealing "personally identifiable information." *See* 34 CFR. § 99.3. Complete closure of such hearings is the approach other jurisdictions have taken toward disciplinary hearings. *See, e.g., Caledonian-Record Pub'ling Co., Inc. v. Vt. State Coll.*, 833 A.2d 1273, 1275-76 (Vt. 2003) (affirming lower court ruling that multi-member disciplinary panels proceedings must be kept confidential and closed under state's open records law); *DTH Publ'ing Co. v. Univ. of N.C., et al.,* 128 N.C. App. 534, 541 (1998) (affirming lower court ruling authorizing undergraduate disciplinary "court" hearings to remain closed where the parties had stipulated that " '[i]t is impossible to hold a student disciplinary hearing without divulging student records as defined under FERPA or personally identifiable information contained therein.' ").[5]

You have expressed concern that it may be difficult to avoid an entirely closed hearing given the broad definition of "personally identifiable information" under FERPA, as well as UGA's current disciplinary procedures. For example, nearly all students choose (but are not required) to appear at their disciplinary hearings, and a student's mere presence at the hearing would identify him or her. Moreover, you have stated that the hearing is based almost entirely on the (protected) documents contained in the disciplinary file. While, as a practical matter, such circumstances may mean that few disciplinary hearings can remain open, the Open Meetings Act does not authorize a blanket closure of all disciplinary hearings. It simply permits an agency to evaluate each hearing on a case-by-case basis and close it to the extent that "personally identifiable information" is revealed; in other words, in cases in which the student does not appear personally or in which unprotected file information is considered, those hearings must remain open, even if only in part.

Finally, let me reiterate that the Act does not overturn any individual case decided upon previous law, including but not limited to *Red & Black Publ'ing Co., Inc. v. Bd. of Regents*, 262 Ga. 848 (1993), which resulted in the opening of disciplinary hearings at Georgia's postsecondary educational institutions. In *Red & Black*, the Georgia Supreme Court interpreted FERPA and its associated regulations *as they existed at the time of the 1993 decision.* As discussed above, both FERPA and its implementing regulations have undergone at least two significant revisions – in 1998 and again in 2008-2009 – which make evident that disciplinary records are indeed subject to FERPA. Moreover, the Act's specification that hearings may be closed if they would "disclose" the contents of protected disciplinary records makes clear that UGA may – but is not required – to close any portion of a disciplinary hearing that does so, even if that means closing the entire hearing. *See* O.C.G.A. § 50-18-72(37). This position is also supported by the

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[5] Other institutions, such as the University of Florida and Florida State University, have recognized that, while student disciplinary hearings should generally remain closed, a student may keep the hearing open by written request. *See, e.g.,* Regulations of the University of Florida, 4042 § 7(c), *available at:* http://regulations.ufl.edu/wp-content/uploads/2012/09/4042.pdf; Florida State University Student Code of Conduct 6C2R-3.004(1)(g)(6)(g), *available at*: http://srr.fsu.edu/doc/conduct.pdf. This is consistent with FERPA's specification that a student may waive his FERPA-protected rights in educational records if he (or his parents if under 18) provides "written consent . . . specifying the records to be released, the reasons for such release, and to whom. . . ."
20 U.S.C. § 1232g(b)(2)(A); *see also* 34 CFR. § 99.3.

overwhelming weight of case law and disciplinary practices maintained by postsecondary institutions in other jurisdictions.

As discussed above, it is now clear that postsecondary student disciplinary records are protected from disclosure by FERPA and, therefore, are exempt from Georgia's Open Records law. Likewise, Georgia's Open Meetings law permits the closure of student disciplinary hearings to the extent that any portion of a hearing would reveal the "personally identifiable information" of the student.

I hope that this guidance has proven helpful. Please contact this office should you have any further questions.

Sincerely,

Kelly Campanella

KELLY E. CAMPANELLA
Assistant Attorney General

KEC:klj

cc: Burns Newsome, Esq.