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Four Easy Pieces to Balance Privacy and Accountability in Public Higher Education: A Response to Wrongdoing Ranging from Petty Corruption to the Sandusky and Penn State Tragedy

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**FOUR EASY PIECES TO BALANCE
PRIVACY AND ACCOUNTABILITY
IN PUBLIC HIGHER EDUCATION:
A RESPONSE TO WRONGDOING
RANGING FROM PETTY CORRUPTION TO
THE SANDUSKY AND PENN STATE TRAGEDY**

*Robert Steinbuch**

This Article offers four legislative solutions—four easy pieces—to properly balance confidentiality and accountability in publicly financed higher education. It presents (1) a fix to the Federal Student Privacy Act that will prevent it from being misapplied as a defense to proper freedom of information act requests, (2) a bill to require the affirmative disclosure of admission practices at public schools receiving federal funding, (3) a bill that imposes direct costs, through the bankruptcy code, on schools that misrepresent their data regarding graduation and post-graduation opportunities, and (4) a revision of the federal freedom of information act to have it apply to those public schools that receive federal funding.

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I. INTRODUCTION

“The worst scandal in the history of college athletics, involving charges of serial child rape and systemic covering up,”¹ might not have reached the compounding calamity that it has had Penn State been subject to the proper—and elsewhere commonplace—open government laws.

As is now well known, the former defensive coach for Penn State’s football team, Jerry Sandusky, has been convicted of sexually abusing ten boys.² Gary Schultz, Penn State’s senior vice president for finance and business, and Tim Curley, its athletic director, were also charged with perjury and failure to report the allegations to authorities.³ At the time of the initial exposure of the allegations against Sandusky, Penn State’s then-president, Graham B. Spanier, said that he stood behind these two officials.⁴ Shortly thereafter, the university fired him, as well as its renowned head football coach, Joe Paterno.⁵

Much of the fallout from the Sandusky affair resulted from the fact that for nine years the allegations of child rape against Sandusky, and the university’s tepid response thereto, remained shielded from public scrutiny. Many properly asked how this could be. The unfortunate answer is that

[t]he public’s right to know how the university dealt with the allegations . . . [was] restricted by a [specific] provision in [Pennsylvania’s] [freedom of information] law that was strongly supported by the same university officials who ignored all [the] danger signs in the Sandusky case. . . . [In fact,] the former president of Penn State[,] who was dismissed earlier this month, argued aggressively for the exemption [to the state’s new law] back in 2007, declaring

1. Michael Bérubé, Op-Ed., *At Penn State, a Bitter Reckoning*, N.Y. TIMES, Nov. 18, 2011, <http://www.nytimes.com/2011/11/18/opinion/at-penn-state-a-bitter-reckoning.html>.

2. Tim Rohan, *Sandusky Gets 30 to 60 Years For Sex Abuse*, N.Y. TIMES, Oct. 10, 2012, at A1.

3. *Id.*

4. *Id.* at 4.

5. Mark Viera, *Paterno Ousted with President by Penn State*, N.Y. TIMES, Nov. 10, 2011, at A1.

[that the school] *needed* to protect donor information, intellectual property rights and deals that the university struck with companies it spins off.⁶

Unfortunately, serving the asserted “*need*[] to protect donor information, intellectual property rights and deals that the university struck with companies it spins off”⁷ also brought about the all-too-predictable—indeed, the likely intended—result of protecting the institution’s “good name,” and, sure enough, that of its administrators, by refusing to come clean with the embarrassing details of school-related wrongdoing.

Indeed, details since disclosed suggest documentation that would be subject to freedom of information act requests in states with more rigorous openness laws could have been revealed far earlier in Pennsylvania had it embraced a greater fidelity to true transparency:

The university’s much maligned handling of the 2001 assault began when Mike McQueary, a graduate assistant in Paterno’s football program, told Paterno that he had seen Sandusky assaulting a boy of about 10 in the football building showers. McQueary has testified several times that he made clear to Paterno, and later to university officials, that what he had seen Sandusky doing to the child was terrible and explicitly sexual in nature.

To date, the public understanding of Paterno’s subsequent actions has been that he relayed McQueary’s account to the university’s athletic director and then had no further involvement in the matter.

But the e-mails uncovered by investigators working for Louis J. Freeh, the former F.B.I. director leading an independent investigation ordered by the university’s board of trustees, suggest that the question of what to do about McQueary’s report was extensively debated by university officials. Those officials, the e-mails show, included the university’s president, Graham B. Spanier; the athletic

6. Editorial, *Open the Records at Penn State*, N.Y. TIMES, Nov. 17, 2011, <http://www.nytimes.com/2011/11/17/opinion/open-the-records-at-penn-state.html> (emphasis added).

7. *Id.* (emphasis added).

director, Tim Curley; the official in charge of the campus police, Gary Schultz; and Paterno.⁸

In affirmatively advocating against having the open-government law cover his own institution, Graham B. Spanier said, “Nobody would argue the point that the public has a right to know how public funds are spent, . . . [b]ut these proposals [of applying openness laws to Penn State] will fundamentally change the way we operate, the way our trustees govern, and the way the university administers [its] policies.”⁹ Spanier was correct in his assessment that Penn State would have to operate differently under a regime of open government, but his implied conclusion that open-government law should not apply to Penn State was utterly misguided. Thus, in a spectacular display of academic hypocrisy, this university administrator supported public access to governmental records *for others* but refused to effectuate this laudable goal at his own institution. Indeed, this ingrained sense of secrecy, even in the face of these appalling events, seems hard to shed: “[Although current] President Rodney A. Erickson of Pennsylvania State University told an alumni crowd . . . that ‘openness and communication’ would be the guiding principles of his tenure . . . his measured responses to audience questions . . . made clear that *candidness has its limits . . .*”¹⁰

President Spanier’s hypocrisy turned to irony when, during the investigation surrounding the Sandusky affair, Spanier sued his former institution to obtain his old e-mails, which, *inter alia*, were being used in the investigation.¹¹ Spanier, however, did not sue under Pennsylvania’s freedom of information act, even though such material would be routinely accessible under many state freedom of

8. Jo Becker, *E-Mails Suggest Paterno Role in Silence on Sandusky*, N.Y. TIMES, July 1, 2012, http://www.nytimes.com/2012/07/01/sports/ncaafotball/paterno-may-have-influenced-decision-not-to-report-sandusky-e-mails-indicate.html?_r=1.

9. *Pennsylvania’s New Right to Know Law, Act 3 of 2008: Hearing Before the House State Gov’t Comm.*, 2007–2008 Sess. (Pa. 2007) (written testimony of Graham B. Spanier, President, Pa. State Univ.), available at http://www.legis.state.pa.us/cfdocs/legis/TR/transcripts/2007_0189_0011_TSTMNY.pdf.

10. Don Troop, *Few Revelations at Pittsburgh Meeting With Penn State’s President*, CHRON. HIGHER EDUC., (Jan. 12, 2012), <http://chronicle.com/article/Few-Revelations-at-Pittsburgh/130297> (emphasis added).

11. Complaint, *Spanier v. Pa. State Univ.*, No. 2012-2065 (Pa. Ct. Com. Pl. filed May 24, 2012), available at <http://www.co.centre.pa.us/media/upload/SPANIER%20Complaint.pdf>.

information laws.¹² Rather, Spanier sued under far less applicable theories of replevin and mandamus.¹³ The sublime turned to the ridiculous when Penn State, in its response to Spanier, averred that Spanier should seek the documents pursuant to Pennsylvania's Right-to-Know Law, i.e., its freedom of information act.¹⁴

Examples such as this show that, absent legal compulsion, school administrators are too often wont to disclose bad news concerning their institutions or its officials—notwithstanding oft-stated claims of fidelity to openness.

“The university completely abdicated its role as an educational institution committed to the public good in order to protect its corporate brand, image, and market value,” said Michael D. Giardina, an assistant professor of sport management and associate director of the Center for Physical Cultural Studies at Florida State University. “The outrage over this case is certainly justified, and we should encourage greater degrees of transparency and accountability in our institutions.

12. *Id.*

13. *Id.* at 5–7.

14. Preliminary Objections of Defendant at 6–8, *Spanier v. Pa. State Univ.*, No. 2012-2065 (Pa. Ct. Com. Pl. filed May 24, 2012), available at <http://www.co.centre.pa.us/media/upload/SPANIER%20defendants%20pos.pdf>. For discussions of similar issues, see Robert Steinbuch, *Looking Through the Class and What Alice Found There: A Frustrated Analysis of Law School Admissions Policies and Practices*, 14 SCHOLAR 61, 68 (2011). Other university administrators, such as John Miller, president of Central Connecticut State University, have adopted positions similar to Spanier's. See *id.* at 105 n.5. Perhaps unsurprisingly, Mr. Miller previously faced criticism from the Foundation for Individual Rights in Higher Education (FIRE) in 2007:

FIRE is concerned about the threat to free speech posed by your announcement on September 14, 2007, urging “oversight boards” to “look further into making substantive, constructive changes” to the CCSU student paper, the *Recorder*, and suggesting the possibility of instituting a mandatory “cultural awareness” requirement. Also, we are aware that some members of the campus community are urging CCSU to sanction—and even suspend—the *Recorder*'s staff because of a controversial cartoon published in the paper on September 12. Before the university takes further action against the students or the paper, FIRE would like to warn CCSU about the university's constitutional obligation to protect students' First Amendment rights. As Carolyn A. Magnan, Counsel to the President, correctly stated, “the First Amendment to the United States Constitution protects most student speech in *The Recorder* from interference by the University.”

Letter from FIRE to John Miller, President, Cent. Conn. State Univ. (Sept. 20, 2007), <http://thefire.org/article/8420.html>.

“At the same time,” he continued, “we shouldn’t overlook or forget that the corporate university of today makes ethically suspect decisions all the time.”¹⁵

Even with statutory mandates, compliance is far from guaranteed. For further example of the ethically suspect decisions, in responding to what was ultimately adjudged by the Public Access Counselor of the Illinois Attorney General as a valid Freedom of Information Act (FOIA) request by the *Chicago Tribune*, Chicago State University officials readily admitted that they were refusing to turn over (public) documents because, *inter alia*,

[given] the number of hostile and negative articles that [the *Chicago Tribune* reporter] has written about Chicago State University, its students, faculty and administrators, the University asserts that it would be an unwarranted invasion of personal privacy to release any of the names of individuals requested by the *Tribune*. * * * A reasonable person would find the use of his or her name published in association with one of the *Tribune*’s negative articles highly objectionable.¹⁶

In other words, school officials expressly conceded that they refused to respond to a valid FOIA request because they did not like the newspaper’s coverage of their university.

Such institutional duplicity affects all Americans—both morally and financially—because all public institutions of higher education, like Penn State, receive significant federal funding.¹⁷ For example, “Pennsylvania students received \$3.5 billion in federal direct student loans in 2010, more than doubling 1.5 billion received in 2009.”¹⁸

15. Brad Wolverton, *Penn State’s Culture of Reverence Led to ‘Total Disregard’ for Children’s Safety*, CHRON. HIGHER EDUC. (July 12, 2012), http://chronicle.com/article/Penn-States-Culture-of/132853/?cid=wb&utm_source=wb&utm_medium=en.

16. *In re* FOIA, Ill. Public Access Opinion No. 12-003 (Jan. 18, 2012) (alteration in original) (quoting Letter from Patrick B. Cage, Gen. Counsel, Chi. State Univ., to Sarah Pratt, Acting Pub. Access Counselor, Office of the Ill. Attorney Gen. (Aug. 23, 2011)), *available at* <http://foia.ilattorneygeneral.net/pdf/opinions/2012/12-003.pdf>.

17. *See* Pete Kasperowicz, *In Wake of Penn State Scandal, Bill Would Suspend Federal Funds*, THE HILL’S FLOOR ACTION BLOG, (Nov. 14, 2011, 8:37 PM), <http://thehill.com/blogs/floor-action/house/193557-dem-responds-to-penn-state-with-bill-to-cut-federal-funds?page=3>.

18. PA. STATE DATA CTR., RESEARCH BRIEF: PENNSYLVANIA RECEIVES \$145.9 BILLION IN FEDERAL FUNDS, 5TH HIGHEST IN NATION (2011), *available at* http://pasdc.hbg.psu.edu/sdc/pasdc_files/researchbriefs/CFFR%202010_RB.pdf.

[And around \$17 billion of federal money] flows to private institutions, and has since World War II. . . . Federal student aid is spread even farther afield, following students wherever they go, to public and private nonprofits, from Berkeley to Harvard, as well as to private for-profits like the University of Phoenix and DeVry University, where by law up to 90 percent of their revenues may derive from student aid. Which is to say that while the combination of funds differs at different institutions, the bottom line doesn't change: American higher education is still publicly supported, even at supposedly "private" institutions, and most of the country's 4,400 colleges and 18 million students could not survive without it.¹⁹

While bad state laws, confusion about the law, and institutional intransigence and concealment have dramatically impeded sunshine-in-government efforts, these are not the only problems faced by citizens seeking more information from public institutions of higher learning. The intersection of state FOIAs and federal law has provided additional roadblocks to open government.

For example, in May 2009, the *Chicago Tribune* began a series about admission practices at the University of Illinois, which discussed the university's preferential admission of relatives of influential people.²⁰ The *Tribune* sought to determine "whether the admissions policies of the publicly supported University of Illinois are infected by political influence."²¹ The *Tribune* aptly noted that this inquiry is the archetype of "a matter of obvious public interest. It bears on the power and purse of the State and the duties of public servants. The public has a right to 'know[] how its tax dollars are being spent.'"²² This argument gains further momentum when viewed in light of the knowledge that "80% of the country's

19. Christopher P. Loss, Commentary, *Why the Morrill Land-Grant Colleges Act Still Matters*, CHRON. HIGHER EDUC. (July 16, 2012), http://chronicle.com/article/Why-the-Morrill-Act-Still/132877/?cid=wb&utm_source=wb&utm_medium=en.

20. *Chi. Tribune Co. v. Univ. of Ill. Bd. of Trs.*, 781 F. Supp. 2d 672, 673 (N.D. Ill. 2011), *vacated on other grounds*, 680 F.3d 1001 (7th Cir. 2012).

21. *Id.*

22. Plaintiff's Memorandum in Support of Motion for Summary Judgment at 3, *Chi. Tribune Co. v. Univ. of Ill. Bd. of Trs.*, 781 F. Supp. 2d 672 (N.D. Ill. 2011) (No. 10 C 0568), 2010 WL 3354327, at *1 (alteration in original) (quoting *Family Life League v. Dep't of Pub. Aid*, 493 N.E.2d 1054, 1058 (Ill. 1986)).

college-age students attend[] public universities,” and, in 2008, for example, states spent over \$80 billion on higher education.²³

The *Tribune* sought these public records under Illinois’s Freedom of Information Act.²⁴ “In refusing the Request, the University invoked FERPA [the Family Educational Rights and Privacy Act] and asserted a FOIA exemption for information ‘specifically prohibited from disclosure’ under state or federal law.”²⁵ FERPA ties federal educational funding to those schools that have policies for maintaining student privacy.²⁶ FERPA also provides that student records may be released to the public if students’ personally identifying information is removed.²⁷

FERPA is neither an access statute like the FOIA nor a bar to them, but as the *Tribune* case shows, schools have used it as the latter. As the *Tribune* stated (and as discussed below),

By its own terms, nothing in FERPA prohibits disclosure of the public records *Tribune* seeks. FERPA was not intended to shroud in secrecy public records that have nothing to do with the academic and educationally-related information that the statute was intended to protect, and everything to do with political favors and official privilege.²⁸

Indeed, the excessively reflexive opposition to requests for public information from taxpayer-funded educational institutions has been noted by a state attorney general in the very jurisdiction housing those often-intransigent school officials.²⁹ For example, in

23. Alison Damast, *State Universities Brace for Another Brutal Year*, BLOOMBERG BUSINESSWEEK, Feb. 11, 2010, at 2, available at http://www.businessweek.com/bschools/content/feb2010/bs20100211_635552.htm.

24. 5 ILL. COMP. STAT. 140/1 (2005).

25. Plaintiff’s Memorandum in Support of Motion for Summary Judgment, *supra* note 22.

26. 20 U.S.C. § 1232g (2006); Steinbuch, *supra* note 14, at 65.

27. 20 U.S.C. § 1232g(b)(1); 34 C.F.R. § 99 (2012); Letter from LeRoy S. Rooker, Dir., FPCO, to Matthew J. Pepper, Policy Analyst, Tenn. Dep’t of Educ. (Nov. 18, 2004), available at http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/nashville_tn2004.html; Steinbuch, *supra* note 14, at 65.

28. Plaintiff’s Memorandum in Support of Motion for Summary Judgment, *supra* note 22, at 3–4.

29. A related device by public universities for attempting to avoid FOIA application has been the funneling of funds through foundations. These foundations are private entities that collect funds on behalf of public educational entities. Schools with foundations often have attempted to thread the needle of FOIA applicability by claiming that the nominally private nature of the foundations should protect them from public scrutiny. This argument has met mixed results. See *N. Cent. Ass’n of Colls. & Sch. v. Troutt Bros., Inc.*, 548 S.W.2d 825, 826–27 (Ark.

an Illinois case different than the one discussed above, a spokesperson for the Illinois Attorney General lamented the culture of secrecy embodied in the University of Illinois–Springfield’s FERPA-based resistance to a request for public information: “Prior to the enactment of the new FOIA laws . . . this information would never have been made public.”³⁰ Notwithstanding this apt criticism, the almost instinctive reference to FERPA by many educational administrators in response to FOIA requests is perhaps somewhat foreseeable from a psychological perspective: because FERPA undoubtedly has a legitimate purpose of protecting student privacy, administrators sometimes see their actions as motivated by this goal, rather than their own personal interests.³¹

1977) (holding that a private foundation was subject to the FOIA where its chairman was employed by the Arkansas Department of Education, the chairman’s secretary performed certain services for the foundation, over 90 percent of the school-provided funding was public money, and the foundation was on public property); Cal. State Univ. v. Superior Court, 108 Cal. Rptr. 2d 870, 883 (Cal. Ct. App. 2001) (holding that a nongovernmental auxiliary organization is not a “state agency” for purposes of the FOIA and interpreting the California Public Records Act, which is the state law modeled after the FOIA); State *ex rel.* Guste v. Nicholls Coll. Found., 592 So. 2d 419, 424 (La. Ct. App. 1992) (finding that a university foundation’s use of public funds alone did not make it subject to Louisiana’s public records law, La. Rev. Stat. Ann. § 44:1 (2012)); Jackson v. E. Mich. Univ. Found., 544 N.W.2d 737, 740 (Mich. Ct. App. 1996) (rejecting school’s claim that foundation is not a public body as defined by the FOIA because it is primarily funded by the school); State *ex rel.* Toledo Blade Co. v. Univ. of Toledo Found., 602 N.E.2d 1159, 1165 (Ohio 1992) (holding that a private nonprofit corporation that acts as a major gift-receiving and soliciting arm of a public university and receives support from public taxation is subject to the FOIA, and stating that “[t]he record shows that the foundation is not a mere supplementary benefactor of the university. It is a major gift-receiving and soliciting entity of the university, and its transaction records do document its activities”); Weston v. Carolina Research and Dev. Found., 401 S.E.2d 161, 164 (S.C. 1991) (holding that “the unambiguous language of the FOIA mandates that the receipt of support in whole or in part from public funds brings a corporation within the definition of a public body”); 4-H Rd. Cmty. Ass’n v. W. Va. Univ. Found., 388 S.E.2d 308, 312 (W. Va. 1989) (affirming that the private, not-for-profit foundation corporation created for the purpose of assisting the university, primarily through fundraising, is not a “public body” subject to the FOIA).

30. Bruce Rushton, *UIS Continues to Resist Disclosure of Coaches’ Conduct*, ST. J.-REG., Mar. 17, 2011, at 1 (omission in original) (quoting Natalie Bauer, Communications Director for the Illinois Attorney General), available at <http://www.sj-r.com/top-stories/x1777814658/UIS-continues-to-resist-disclosure-of-coaches-conduct>.

31. See RONALD C. NASO, HYPOCRISY UNMASKED: DISSOCIATION, SHAME, AND THE ETHICS OF INAUTENTICITY 26 (2010) (“[W]hen behavior conflicts with moral standards, it is the latter rather than the former that are likely to change. This finding is completely consistent with almost fifty years of research on cognitive dissonance. Rather than changing their behavior, participants reinterpreted their self-interests as moral.”).

In this article, I offer four legislative solutions—four easy pieces³²—to “restore” (or, more likely, create) the proper balance between confidentiality and accountability in publicly financed higher education. In fact, this article began as a response to a request from the office of a United States Senator—aware of my previous research in this field³³—for draft legislation on these issues. I present (1) a FERPA fix; (2) a bill to require the affirmative disclosure of admission practices at public schools receiving federal funding; (3) a bill that imposes direct costs, through the bankruptcy code, on schools that misrepresent their data regarding graduation and postgraduation opportunities; and (4) a revision of the federal FOIA to have it apply to those public schools that receive federal funding.

These legislative solutions will not only allow academics and others to pursue important research while properly protecting individual privacy, but more importantly, these four easy pieces will provide for greater public oversight of taxpayer-funded institutions.

II. DISCUSSION

A. *Metropolis’s Savior: State Freedom of Information Acts*

At its core, participatory democracy decries locked files and closed doors. Good citizens study their governors, challenge the decisions they make and petition or vote for change when change is needed. But no citizen can carry out these responsibilities when government is secret Some public officials in state and local governments work hard to achieve and enforce open government laws But such official disposition toward openness is exceptional. Hardly a day goes by when we don’t hear that a state or local

32. Cf. RICHARD FEYNMAN, *SIX EASY PIECES: ESSENTIALS OF PHYSICS EXPLAINED BY ITS MOST BRILLIANT TEACHER* (1995) (showing how matters far more complex than positive law can be tackled with relative ease). No aspect of the subtitle of Feynman’s seminal text should be construed as applying here through my mimicking of his primary title. See also Roger Ebert, *Five Easy Pieces*, CHI. SUN TIMES, (Jan. 1, 1970), available at <http://rogerebert.suntimes.com/apps/pbcs.dll/article?AID=/19700101/REVIEWS/1010309/1023> (discussing the eponymous movie’s reference to a book of piano exercises for a child).

33. Steinbuch, *supra* note 14, at 86.

government is trying to restrict access to records that have traditionally been public³⁴

State freedom of information acts are the superlaws of public scrutiny—allowing citizens insight into, and indirect oversight of, government activity.³⁵ They have helped, albeit haltingly, to move governments away from cronyism and corruption and toward better serving the public they represent. While all state FOIAs differ in some way, at their core they all pursue one goal: more openness to the very citizens who fund government and to whom government is responsible and should be accountable. Of course, FOIAs have not come anywhere close to successfully achieving this goal. Moreover, their efficacy varies depending on the specific state statute and interpretation of it by courts. Although they are not the only weapon available in the public's arsenal, they remain the single best, albeit flawed, extant statutory tool for citizen checks on government abuse.³⁶

34. *Open Government Guide Introductory Note*, REPS. COMMITTEE FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/browse-media-law-resources/guides/open-government-guide/introduction> (last visited Dec. 9, 2011).

35. See, e.g., *id.*; ALA. CODE § 36-12-40 (1975); ALASKA STAT. § 40.25.110 (2011); ARIZ. REV. STAT. ANN. § 39-121 (1956); ARK. CODE ANN. § 25-19-105 (2008); CAL. GOV'T CODE § 6250 (West 1968); COLO. REV. STAT. § 24-72-201 (1963); CONN. GEN. STAT. § 1-210 (2012); DEL. CODE ANN. tit. 29, § 10001 (2012); FLA. STAT. § 119.01 (2008); GA. CODE ANN. § 50-18-70 (2012); HAW. REV. STAT. § 92F-11 (1988); IDAHO CODE ANN. § 9-338 (2010); 5 ILL. COMP. STAT. 140 (2012); IND. CODE § 5-14-3-3 (1983); IOWA CODE § 22.2 (2010); KAN. STAT. ANN. § 45-218 (2000); KY. REV. STAT. ANN. § 61.872 (West 2004); LA. REV. STAT. ANN. § 44:31 (2007); ME. REV. STAT. ANN. tit. 1, § 408-A (2011); MD. CODE ANN., STATE GOV'T § 10-612 (West 2009); MASS. GEN. LAWS ch. 66, § 10(a) (West 2011); MICH. COMP. LAWS ANN. § 15.233 (Lexis 2009); MINN. STAT. § 13.03 (2011); MISS. CODE ANN. § 25-61-5 (1972); MO. REV. STAT. § 610.011.2 (1987); MONT. CODE ANN. § 2-6-102 (2011); NEB. REV. STAT. § 84-712 (2012); NEV. REV. STAT. § 179A.100 (1979); N.H. REV. STAT. ANN. § 91-A (2012); N.J. STAT. ANN. § 47:1A (West 2012); N.M. STAT. ANN. § 14-2-4 (1978); N.Y. PUB. OFF. LAW § 84 (McKinney 1977); N.C. GEN. STAT. § 132-6 (2011); N.D. CONST. art. XI, § 6 (1978); OHIO REV. CODE ANN. § 149.43 (Lexis Nexis 2007); OKLA. STAT. tit. 51, § 24A.2 (1985); OR. REV. STAT. § 192.420 (2011); 65 PA. STAT. ANN. § 66.1 (West 2012); R.I. GEN. LAWS § 38-2-3 (1956); S.C. CODE ANN. § 30-4-30 (1976); S.D. CODIFIED LAWS § 1-27-1 (2003); TENN. CODE ANN. § 10-7-301 (1999); TEX. GOV'T CODE ANN. § 552.001 (Vernon 1993); UTAH CODE ANN. § 63G-2-201(1) (2011); VT. STAT. ANN. tit. 1 § 315 (1975); VA. CODE ANN. § 2.2-3704 (2011); WASH. REV. CODE. § 42.56.080 (1972); W. VA. CODE § 29B-1-2 (2012); WIS. STAT. § 19.35 (1981); WYO. STAT. ANN. § 16-4-203 (2011).

36. Adriana S. Cordis & Patrick L. Warren, *Sunshine as Disinfectant: The Effect of State Freedom of Information Act Laws on Public Corruption*, at 2 n.3 (Apr. 4, 2012), available at <http://ssrn.com/abstract=1922859> ("In addition to the anecdotal evidence, there is a growing body of literature that addresses the role of the media in promoting government accountability. Some recent examples include Djankov et al. (2003), who find that state ownership of the media is

FOIA-type statutes date back to the early 1900s, and common law equivalents go back even further.³⁷ These efforts were exceedingly modest until the 1970s.³⁸ Since then, most states have updated their statutes “in an effort to strengthen the laws, often to clarify or broaden their scope in response to changing technology, judicial decisions or Attorneys General’s opinions.”³⁹ But still, some states have done better than others and, as discussed above, Pennsylvania is one now-infamous example of a state that has simply gotten it wrong.⁴⁰

In addition to state FOIAs, perhaps obviously, the federal government has its own, quite powerful, FOIA.⁴¹ Currently, notwithstanding that courts have interpreted the federal FOIA (based on its explicit legislative history) broadly to serve the public’s interest in open government,⁴² courts have routinely (and accurately) held that the act was not initially designed to apply to state public schools. Courts have so held despite the fact that so many of these institutions of higher education now receive enormous amounts of federal funding⁴³ and the federal government has a significant amount of say over how some of these federal funds are allocated.⁴⁴ “For example, Massachusetts cut \$62 million out of its higher

associated with a number of undesirable characteristics (less press freedom, fewer political rights, inferior governance, underdeveloped capital markets, inferior health outcomes, etc.), Besley and Prat (2006), who develop a model that predicts that media capture by the government increases the likelihood that elected politicians engage in corruption and/or rent extraction and reduces the likelihood that bad politicians are identified and replaced, and Snyder and Strömberg (2010), who find that more active media coverage of U.S. House representatives leads to better informed voters, which increases monitoring, makes the representatives work harder, and results in better policies from the constituents’ perspective.”)

37. *Id.* at 9.

38. *See id.*

39. *Id.*

40. *See Open Government Guide Introductory Note, supra* note 34.

41. *See* 5 U.S.C. § 552 (2011).

42. *Rocap v. Indiek*, 539 F.2d 174, 180 (D.C. Cir. 1976).

43. *See, e.g., St. Michael's Convalescent Hosp. v. California*, 643 F.2d 1369, 1374 (9th Cir. 1981) (“[T]he Medicaid program in California . . . is a state-administered program which receives federal financial support and which is also highly regulated by the federal government. However, . . . the federal government [does not] exercise[] the ‘extensive, detailed and virtually day-to-day supervision’ over the program that is needed to characterize the state bodies as federal agencies.”); *Mamarella v. Cnty. of Westchester*, 898 F. Supp. 236, 237 (S.D.N.Y. 1995).

44. *See* Goldie Blumenstyk, *College Officials Welcome Obama's Focus on Higher-Education Costs, but Raise Some Concerns*, CHRON. HIGHER EDUC. (Jan. 30, 2012), http://chronicle.com/article/Obama-Puts-College-Costs-Front/130503/?sid=wb&utm_source=wb&utm_medium=en.

education budget this fall . . . [that] was replaced by federal stimulus funding [N]early \$40 billion was provided to states [for higher education] by the federal government through the State Fiscal Stabilization Fund”⁴⁵ Moreover, “[i]n 2010 Congress passed the Student Aid and Fiscal Responsibility Act, . . . which ended federally guaranteed student loans and replaced them with direct loans made through the Education Department.”⁴⁶ And, the “combination of high [student-loan] debt and moderate income [upon graduation] makes this all-too-typical law graduate eligible for the federal government’s income-based repayment program.”⁴⁷

*B. FOIA’s Unwitting and
Unintended Kryptonite: FERPA*

FERPA both ties federal educational funding to a requirement that schools maintain policies for student privacy and provides that student records may be released to the public if schools remove students’ personally identifying information.⁴⁸

FERPA is a seemingly innocuous law that serves wholly legitimate goals. Unfortunately, however, it has often been used by state education institutions to foil valid FOIA requests.⁴⁹ If FOIAs are the superlaws, then FERPA has unintentionally (from the legislators’ and public’s perspectives) become their kryptonite.

When state schools invoke the alleged risk of student identification to implicate FERPA in an effort to evade legitimate FOIA requests,⁵⁰ they typically rely on a provision in their state FOIA that exempts from disclosure matters that are prohibited from release by “other laws.” For example, the Illinois FOIA exempts

45. Damast, *supra* note 23.

46. William D. Henderson & Rachel M. Zahorsky, *The Law School Bubble: Federal Loans Inflate College Budgets, but How Long Will That Last if Law Grads Can’t Pay Their Bills?*, 98 A.B.A. J. 30, 33 (2012).

47. *Id.* at 34.

48. 20 U.S.C. § 1232g (2006); 34 C.F.R. § 99 (2011); Steinbuch, *supra* note 14, at 65; Letter from LeRoy S. Rooker, Dir., Family Policy Compliance Office, to Matthew J. Pepper, Policy Analyst, Tenn. Dep’t of Educ. (Nov. 18, 2004), http://www.ed.gov/policy/gen/guid/fpcopl/ferpa/library/nashville_tn2004.html.

49. *See generally* Steinbuch, *supra* note 14, at 65 (discussing state education institution’s attempts to foil valid FOIA requests).

50. 20 U.S.C. § 1232g; 34 C.F.R. § 99.3; Steinbuch, *supra* note 14, at 65 (discussing general principal that public institutions receiving federal funding will not release information reasonably certain to identify a specific student).

from mandatory release information specifically prohibited from disclosure by federal or state law or rules.⁵¹ And, like other government entities, the University of Illinois has claimed that this provision exempts disclosure for FERPA-related material.⁵²

State courts have largely rejected this argument, even when disclosure of student identity is likely.⁵³ As one state supreme court noted,

The [FERPA] *does not forbid such disclosure* of information concerning a student and, therefore, does not forbid opening to the public a faculty meeting at which such matters are discussed. The [FERPA] simply cuts off Federal funds, otherwise available to an educational institution which has a policy or practice of permitting the release of such information. Thus, if the [public access] Law applies to a meeting of the faculty of the School of Law at which such matters are discussed, the right of [public access] . . . would continue. Only the availability of Federal funds in aid of the institution would be affected. Of course, a violation of the [FERPA] could well result, not only in termination of any otherwise available Federal financial aid to the School of Law but also in the termination of any such aid to the entire University.⁵⁴

Recently a federal court ruled in accord.⁵⁵ In *Chicago Tribune Co. v. University of Illinois Board of Trustees*,⁵⁶ the *Tribune*

51. 5 ILL. COMP. STAT. 140/7-1(a) (2005).

52. *Chi. Tribune Co. v. Univ. of Ill. Bd. Of Trs.*, 781 F. Supp. 2d 672, 674 (N.D. Ill. 2011), *vacated on other grounds*, 680 F.3d 1001 (7th Cir. 2012).

53. *See* *Tombrello v. USX Corp.*, 763 F. Supp. 541, 545 (N.D. Ala. 1991); *Bauer v. Kincaid*, 759 F. Supp. 575, 589 (W.D. Mo. 1991); *Red & Black Publ'g Co. v. Bd. of Regents*, 427 S.E.2d 257, 260–61 (Ga. 1993); *Student Bar Ass'n Bd. of Governors v. Byrd*, 239 S.E.2d 415, 419 (N.C. 1977). *But see* *United States v. Miami Univ.*, 294 F.3d 797, 809 (6th Cir. 2002).

54. *Student Bar Ass'n*, 239 S.E.2d at 419 (emphasis added).

55. *Chicago Tribune*, 781 F. Supp. 2d at 676. The Seventh Circuit subsequently vacated the district court's opinion and ordered the case dismissed for lack of subject matter jurisdiction because the *Tribune's* request for documents arose solely under Illinois state law. *Chi. Tribune Co. v. Bd. of Trs. of Univ. of Ill.*, 680 F.3d 1001, 1004, 1006 (7th Cir. 2012). The appellate court declined to "express any opinion on whether the information the *Tribune* seeks relates to student records within the meaning of the 1974 Act and the implementing regulations." *Id.* at 1006. Numerous district courts have adopted rationales similar to the district court in the *Tribune's* case. *See, e.g., Tombrello*, 763 F. Supp. at 545 ("The statute addresses the conditions under which an institution becomes ineligible for funds. It does not prohibit a request for or release of student records."); *Bauer*, 759 F. Supp. at 589 ("FERPA is not a law which prohibits disclosure of

requested, under Illinois's FOIA, information from the University of Illinois regarding students who were admitted as a function of cronyism.⁵⁷ In 2009, the *Tribune* began a series about the University of Illinois's flagship campus that detailed how the relatives of various influential individuals received admissions preferences.⁵⁸ "The series received a great deal of attention, and the Governor of Illinois convened a commission to study the admissions process."⁵⁹ In furtherance of the series and the newspaper's efforts to discover the nature and extent of the cronyism present at the University of Illinois, the *Tribune* made the following FOIA request to the university seeking records regarding students who were

admitted to the University of Illinois and subsequently attended the University of Illinois: the names of the applicants' parents and the parents' addresses, and the identity of the individuals who made a request or otherwise became involved in such applicants' applications. . . . [A]ny records about the identity of the University official to whom the request was made, any other university officials to whom the request was forwarded, and any documents which reflect any changes in the status of the application as a result of that request.⁶⁰

educational records. It is a provision which imposes a penalty for the disclosure of educational records."); *Red & Black Publ'g*, 427 S.E.2d at 261 (elucidating that the court had "serious questions whether [FERPA] even applies to the exemptions argued by the defendants since [FERPA] does not prohibit disclosure of records. Rather, as noted by the trial court, [FERPA] provides for the withholding of federal funds for institutions that have a policy or practice of permitting the release of educational records," and reiterating that FERPA allows for the dissemination of such information); Steinbuch, *supra* note 14, at 84.

56. 781 F. Supp. 2d 672 (N.D. Ill. 2011).

57. *Id.* at 673; see also Cordis & Warren, *supra* note 36, at 2 ("Brett Blackledge, a reporter for *The Birmingham News*, won the 2007 Pulitzer Prize for Investigative Reporting for a series of articles that '[exposed] cronyism and corruption in [Alabama's] two-year college system, resulting in the dismissal of the chancellor and other corrective action.' Central to his investigation was the collection of reams of financial records, contracts, and disclosure forms. Blackledge used this information to piece together a compelling story about state legislators and their associates receiving kickbacks and cushy jobs from various members of the school system administration. Many of the financial records that he relied upon were uncovered in accordance with Alabama's public records law.").

58. *Chicago Tribune*, 781 F. Supp. 2d at 673.

59. *Id.*

60. *Id.* at 674.

The University of Illinois sought to closet its questionable behavior by invoking FERPA.⁶¹ The federal district court, however, rejected this proffered defense.⁶² The court reasoned, rather simply, that

FERPA, enacted pursuant to Congress' power under the Spending Clause, does *not* forbid [state] officials from taking any action. Rather, FERPA sets conditions on the receipt of federal funds, and it imposes requirements on the Secretary of Education to enforce the spending conditions by withholding funds in appropriate situations. Under the Spending Clause, Congress can set conditions on expenditures, even though it might be powerless to compel a state to comply under the enumerated powers in Article I. [A state] could choose to reject federal education money, and the conditions of FERPA along with it, *so it cannot be said that FERPA prevents [a state] from doing anything.*⁶³

However, even assuming for argument's sake that FERPA does serve to fall into the "other law" exemption in many FOIAs, that would still not result in a blanket exemption for state schools. Indeed, the United States Department of Education has enacted regulations that provide for the redaction of personally identifiable information from materials otherwise subject to FERPA.⁶⁴ Once that occurs, the remaining elements of the documents are no longer covered by FERPA at all.⁶⁵ The remaining material would no longer be prohibited by "other laws" if, *arguendo*, the above FERPA analysis did not apply. Perhaps unsurprisingly, schools often fail to consider that such redactions alter their misstated claims to an exemption from the disclosure requirement.⁶⁶

Indeed, almost this very issue presents itself in Arkansas, because Arkansas's FOIA *expressly* references FERPA material.⁶⁷

61. *Id.* at 674.

62. *Id.* at 675.

63. *Id.* (emphasis added) (citations omitted).

64. Richard Peltz, *From the Ivory Tower to the Glass House: Access to 'De-Identified' Public University Admission Records to Study Affirmative Action*, 25 HARV. BLACKLETTER L.J. 181, 193 (2009).

65. *Id.*

66. *See id.* at 196.

67. *See* ARK. CODE ANN. § 25-19-105(b) (2008).

That exemption applies until the school affirmatively redacts the identity-disclosing material pursuant to the Department of Education regulations.⁶⁸

Additionally, when a requestor is a school official, the faculty member must meet a lower burden of “legitimate educational interest.”⁶⁹ The U.S. Department of Education interprets the term “school official” to include “professors; instructors; administrators; health staff; counselors; attorneys; clerical staff; trustees; members of committees and disciplinary boards; and a contractor, volunteer or other party to whom the school has outsourced institutional services or functions.”⁷⁰ A school official generally has a legitimate educational interest if he needs to review educational records to fulfill his professional responsibility.⁷¹ In fact, a “legitimate educational interest” need not be academic, per se. “Anything relevant to a school official’s job may be a legitimate educational interest.”⁷² Thus, for example, teachers have a legitimate educational

68. *See id.*

69. Steinbuch, *supra* note 14, at 65–66; *Family Educational Rights and Privacy Act (FERPA)*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html> (last modified Oct. 2, 2012).

70. UNITED STATES DEP’T OF EDUC., THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT: GUIDANCE FOR ELIGIBLE STUDENTS 1, 3 (Feb. 2011), *available at* <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/for-eligible-students.pdf>; *see also* *Aufox v. Bd. of Educ.*, 588 N.E.2d 316, 319 (Ill. App. Ct. 1992) (holding that the school attorney allowed access as “legitimate educational interest”).

71. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, SHARING INFORMATION: A GUIDE TO THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT AND PARTICIPATION IN JUVENILE JUSTICE PROGRAMS, 4 (1997), *available at* <http://www.ncjrs.gov/pdffiles/163705.pdf>; THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT: GUIDANCE FOR ELIGIBLE STUDENTS, *supra* note 70, at 3; FAMILY POLICY COMPLIANCE OFFICE, U.S. DEP’T OF EDUC., MODEL NOTIFICATION OF RIGHTS UNDER FERPA FOR POSTSECONDARY INSTITUTIONS, <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/ps-officials.html> (last visited Aug. 21, 2012); FAMILY POLICY COMPLIANCE OFFICE, U.S. DEP’T OF EDUC., MODEL NOTIFICATION OF RIGHTS FOR ELEMENTARY AND SECONDARY SCHOOLS, <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/lea-officials.html>; *see also* MASS. CLE INC., 4 COLLEGE AND UNIVERSITY LAW MANUAL § 4.4.1(d) (2009) (citing Letter from LeRoy S. Rooker, Dir., Family Policy Compliance Office, U.S. Dep’t of Educ., to Dr. Peter Likens, President, Univ. of Ariz. (Mar. 11, 1999) (“A ‘legitimate educational interest’ can be broadly defined to include any circumstances in which the school ‘official’ needs the information in order to do his or her job on the school’s behalf.”)).

72. Daniel Silverman, *Student Privacy Versus Human Rights*, 35 HUM. RTS. 9, 10 (2008); *see also* Dixie Snow Huefner & Lynn M. Daggett, *FERPA Update, Balancing Access to and Privacy of Student Records*, 152 WEST’S EDUC. L. REP. 469, 477–78 (2001) (discussing that a teacher concerned with class performance or interested in disciplinary actions for safety reasons may examine students’ records, but that a teacher interested in which students have high IQs

interest in reviewing student disciplinary records.⁷³ To be sure, the scope of a legitimate educational interest has limits. For example, a school official has no legitimate educational interest in disclosing to students that another student has HIV.⁷⁴

Some public-school administrators have further asserted that they alone decide what constitutes a legitimate educational interest. One court hearing this argument reasoned:⁷⁵

The Board argues, “[Plaintiff]’s efforts [regarding] the permissive educator access provisions of FERPA . . . do[] indeed raise the prospect of the undermining of the executive authority of the school administration by way of judicial override of such authority.” We note that a school superintendent has the power to exercise general supervision over the schools in his district. However, the outcome of this case does not turn on the superintendent’s authority. It is instead a matter of statutory interpretation, a task clearly within the province of this Court. Our elucidation of the statute in question in no way usurps the authority of [the superintendent] or the . . . Board of Education. Therefore, the Board’s argument is flawed.⁷⁶

The public, through the actions of individuals, academic researchers, and the press, has exercised its legitimate interest in understanding the inner workings of taxpayer-funded education. It seeks, *inter alia*, to expose misdeeds at, and misinformation by,

would not likely have a legitimate educational interest); Louis N. Schulze, Jr., *Balancing Law Student Privacy Interests and Progressive Pedagogy: Dispelling the Myth that FERPA Prohibits Cutting-Edge Academic Support Methodologies*, 19 WIDENER L.J. 215, 256–61 (2009) (discussing legitimate educational interest in the release of educational records to law school academic support personnel); Nancy Tribbensee, *Privacy and Confidentiality: Balancing Student Rights and Campus Safety*, 34 J.C. & U.L. 393, 400 (2008) (“A legitimate educational interest is not strictly limited to academic or educational matters, and permitted disclosures are not limited to those that may address the student’s interest or that may be to the benefit of the student.”).

73. See *Achman v. Chi. Lakes Indep. Sch. Dist.* No. 2144, 45 F. Supp. 2d 664, 669 (D. Minn. 1999); *Linson v. Trus. of Univ. of Pa.*, No. CIV. A. 95-3681, 1996 WL 637810, at *8 (E.D. Pa. Nov. 4, 1996); *E. Conn. State Univ. v. Freedom of Info. Comm.*, No. CV 960556097, 1996 WL 580966, at *3 (Conn. Super. Ct. Sept. 30, 1996).

74. Jennifer C. Wasson, *FERPA in the Age of Computer Logging: School Discretion at the Cost of Student Privacy?*, 81 N.C. L. REV. 1348, 1369 (2003) (citation omitted); *accord* *Medley v. Bd. of Educ. of Shelby Cnty.*, 168 S.W.3d 398 (Ky. Ct. App. 2004).

75. *Medley*, 168 S.W.3d at 398 (Ky. Ct. App. 2004).

76. *Id.* at 406 (footnote omitted).

public institutions; to examine the stewardship of the public fisc; to obtain data for analyses of admissions systems; and to determine whether schools are presenting accurate data regarding, *inter alia*, students' probability of graduating and graduates' likelihood of obtaining gainful postgraduation employment—a highly contentious issue at law schools right now.⁷⁷ The tool for such endeavors has very often been state FOIAs.

III. ADMISSIONS DATA

The experiences of various academics seeking information about admissions programs at public universities mirror that of the *Tribune* discussed above. In *some* of these cases, school officials rely on criteria for admissions that may be, *inter alia*, improper, illegal, impolitic, embarrassing to the school officials administering these admissions programs, or simply not made public.

Law professor Richard Peltz-Steele—who is a noted expert on state FOIAs⁷⁸—and I separately sought de-identified public-university data to examine law school admissions standards. De-identified admissions data is used, among other things, in research regarding the correlation between students' incoming credentials and subsequent bar passage rates.⁷⁹ Studies confirm that

77. See *Chi. Tribune Co. v. Univ. of Ill. Bd. of Trs.*, 781 F.Supp.2d 672, 673 (N.D. Ill. 2011), *vacated on other grounds*, 680 F.3d 1001 (7th Cir. 2012); ROBERT ZELNICK, BACKFIRE: A REPORTER'S LOOK AT AFFIRMATIVE ACTION 177 (1996); Peltz, *supra* note 64; Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 412 (2004); Steinbuch, *supra* note 14; Jane Yakowitz, *Tragedy of the Data Commons*, 25 HARV. J.L. & TECH. 1 (2011); Antonio Olivo, *Appeals Court Hears U. of I. Dispute with Tribune*, CHI. TRIB. (Sept. 30, 2011), http://articles.chicagotribune.com/2011-09-30/news/ct-met-u-of-i-1001-2011_1_appeals-court-federal-court-federal-issue; Richard Sander & Jane Yakowitz, *Reporting or Emoting?* 4, Project SEAPHE (Feb. 4, 2010), <http://www.seaphe.org/pdf/100204-nyt-response.pdf>.

78. See RICHARD J. PELTZ-STEELE, *THE LAW OF ACCESS TO GOVERNMENT: CASES AND MATERIALS* (2012); JOHN J. WATKINS & RICHARD J. PELTZ, *ARKANSAS FREEDOM OF INFORMATION ACT* (5th ed., 2009).

79. Steinbuch, *supra* note 14, at 68; see also RANKO SHIRAKI OLIVER, REPORT TO THE 2007–2008 ASSESSMENT COMMITTEE OF THE UALR (Mar. 27, 2009), *available at* <http://ualr.edu/law/files/2011/04/additional0809.pdf> [hereinafter OLIVER REPORT] (reporting on current student-assessment techniques and suggested changes); *Best Value Law Schools*, NAT'L JURIST (Oct. 16, 2009, 10:25 AM), <http://www.nationaljurist.com/content/best-value-law-schools> (discussing how the *National Law Journal* accounts for bar passage rates in assessing the value of a law school); AM. BAR ASS'N, 2010–2011 ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 17 (2010–2011 ed.) (discussing that the ABA evaluates the bar passage rate as part of its law school accreditation process).

low incoming scores directly correlate with poor bar performance—a factor relevant to the expenditure of limited taxpayer dollars.⁸⁰ Professor Peltz-Steele and I were each denied the requested data.⁸¹

Analysis of such data can be used to discuss whether admissions programs sometimes harm those students they are designed to help as well as the institutions adopting them.⁸² “A low *U.S. News* ranking

A study released in 1998 by the Law School Admission Council (LSAC) concluded that “[b]oth law school gradepoint average (LGPA) and Law School Admission Test (LSAT) score were the strongest predictors of bar examination passage for all groups studied.” A study conducted by the NCBE of applicants to the New York bar determined that “performance on the bar exam was strongly correlated with performance in law school, as measured by law school grade point average (LGPA)” A study conducted using data from all 2001–2005 graduates of the Saint Louis University School of Law who took the Missouri bar examination as their first bar examination “confirmed an association between bar examination passage and final law school class rank,” with 100 percent of those in the top quartile passing the bar examination on their first attempt and only 49.5 percent of those in the fourth quartile passing on their first attempt. Two studies conducted at the Bowen School of Law have confirmed a link between academic performance and bar passage. In a study conducted by Arkansas Bar Foundation Professor of Law Lynn Foster examining bar exam applications who took the Arkansas Bar Exam [in] July 1998 to February 2000, the “highest correlation” was “between number of hours below a C and failing the bar exam.” Another study, conducted by the 2004–2005 Long Range Planning Committee when chaired by Professor Richard J. Peltz, determined that first year GPA, GPA in bar courses, and number of hours below a C “each explains, or predicts, between twenty and twenty-five percent of bar performance.

OLIVER REPORT, at 24 n. 24 (citations omitted); see Steinbuch, *supra* note 14, at 68.

80. See Sander & Yakowitz, *supra* note 77; Steinbuch, *supra* note 14, at 68.

81. See Peltz, *supra* note 64; Steinbuch, *supra* note 14, at 67; Yakowitz, *supra* note 77.

82. See *Affirmative Action in American Law School*, U.S. COMM’N ON CIVIL RIGHTS (2007), available at <http://www.usccr.gov/pubs/AALSreport.pdf> (evaluating the effect that race-based admittance has on the academic performance of African-American law students). According to Richard Sander, a law professor at the University of California–Los Angeles, because low LSAT scores are high indicators of subsequent law school failure, affirmative action has an unintended, negative effect on students who are admitted based on racial preference. *Id.* Sander posits that academic mismatch, which often occurs when students with below average LSAT scores are admitted into law schools, plays a significant role in explaining the racial disparities in bar passage rates and academic performance. *Id.* In contrast, Richard O. Lempert, a professor at the University of Michigan Law School, asserts that LSAT scores are not indicative of a law student’s future success, income, or job satisfaction, regardless of race. *Id.*; Steinbuch, *supra* note 14, at 68. Another professor, who wished to remain anonymous, discussed the application of diversity in hiring in higher education:

So while the presidents, provosts, and deans pad their C.V.s with the successful “diversity initiatives” they have launched on their campuses to propel themselves to the next rung on the administrative ladder, we, the supposed benefactors of the “diversity initiative,” are left trying to survive in an environment where our colleagues see us as less worthy and less able. Has anybody stopped to consider what the constant and overwhelming emphasis on our “diversity” does to and for us? We constantly have to

may result in a vicious cycle of attracting less-well-credentialed students and diminishing employment opportunities for all upon graduation. Thus, an entire student body can pay for the decision to admit students who won't succeed."⁸³ And schools do students who ultimately fail no favors by admitting them beyond saddling them with debt and regret.

Recently, the University of Arkansas at Little Rock released a public report it commissioned regarding factors that correlate to bar passage.⁸⁴ The data in the report described that first-time bar passage is linked to Law School Admission Test (LSAT) scores and undergraduate and law school grades.⁸⁵ This is consistent with other studies. "While the LSAT is primarily designed to measure success in law school, it has long been known that law school success predicts bar exam success. As such, most law schools have bar exam pass rates that correlate to their incoming LSAT scores."⁸⁶ Since LSAT scores and undergraduate grade point averages (GPA) predict law school GPAs, these three factors obviously overlap. Indeed, their relationship to bar passage demonstrates the uncontroversial, broader

"come out" about our academic achievements, constantly have to prove to our colleagues that we do in fact deserve to be here.

It is not that I am opposed to colleges diversifying. Quite the contrary! Faculty of color wouldn't be seen as rare and exotic species if college campuses were more diversified and more integrated. It would also help minimize the circus sideshow during faculty orientation. What I am opposed to, however, is all the talk and emphasis that administrators put on our diversity to the detriment and outright neglect of everything else we bring to the table.

Anonymous, *Not Just a Diversity Number*, INSIDE HIGHER ED, (June 13, 2012, 3:00 AM), <http://www.insidehighered.com/advice/2012/06/13/essay-how-colleges-treat-diversity-hires#ixzz1y0wUDRQS>.

83. Steinbuch, *supra* note 14, at 71–72.

84. HANOVER REPORT, BAR PASSAGE CORRELATION STUDY (Feb. 2012). Given previous disagreements over the public nature of requested documents, I formally requested the report under Arkansas's Freedom of Information Act in order to confirm that the governmental unit holding the document (the university) itself also believes the report to be a public document. The Dean and University Counsel confirmed its public status. E-mail from Mandy Hull Abernathy, Univ. Counsel, William H. Bowen Sch. of Law, to John M.A. DiPippa, Dean, William H. Bowen Sch. of Law (Feb. 21, 2012, 16:45 CST), forwarded by John M.A. DiPippa, Dean, William H. Bowen Sch. of Law, to author (Feb. 22, 2012, 08:39 CST). ("[T]he report prepared by Hanover is a public document that is not exempt from disclosure under FOIA . . . [i]t is my understanding that you have already provided a copy of the report to Professor Steinbuch.")

85. HANOVER REPORT, *supra* note 84, at 9.

86. Rebecca Larsen, *Best Schools for Bar Exam Preparation*, NATIONAL JURIST Feb. 2012, at 28, 29, available at <http://www.nxtbook.com/nxtbooks/cypress/nationaljurist0212/index.php#/28>.

point that better students have a greater likelihood of passing the bar. Thus, LSAT scores and undergraduate GPAs are valid *preadmission* predictors of first-time bar passage.

But the data presented in the Arkansas report also revealed conclusions that are useful for many law schools following similar common admissions patterns. The report shows that during the period of February 2005 to July 2011, graduating white students passed the bar on their first attempt 79.6% of the time, and this cohort—by far the largest—had 624 members.⁸⁷ African American students passed 59% of the time.⁸⁸ There were fifty-six members of this cohort.⁸⁹ Hispanic students passed 81.8% of the time, multiracial students passed 71.4% of the time, Native Americans students passed 45.5% of the time, “other” students passed 100.0% of the time, and students whose race was “unknown” passed 60.0% of the time.⁹⁰ Each of these latter cohorts had eleven or fewer members.⁹¹ Also, regarding the academic success of different cohorts at the school, a FOIA-released memo described the asserted data “that of the nine first year law students who weren’t successful, four were African American, and one was Hispanic.”⁹² Moreover, “[t]he most striking difference between J.D.-holders and those who never pass the bar is the disproportionate number of minority never-passers. . . . black and Hispanic law school graduates are at least twice as likely as white graduates to become a never-passer.”⁹³

Since we can conclude that cohort membership in a particular group is *not* a causal factor for bar passage, we should analyze whether the higher failure rate for some cohorts is driven by, *inter alia*, admissions standards and academic-success programs.⁹⁴ Several

87. HANOVER REPORT, *supra* note 84, at 8, 4 (Feb. 2012).

88. *Id.* at 8.

89. *Id.* at 4.

90. *Id.* at 8.

91. *Id.* at 4–5, 8.

92. Meeting Notes from Andy Taylor, Assistant Dean for Academic Support, Univ. of Ark. at Little Rock, William H. Bowen Sch. of Law (Oct. 16, 2006) (on file with author) (summarizing meeting between Dean Taylor and Adjoa A. Aiyetoro, Assistant Professor of Law and Director, Institute on Race and Ethnicity).

93. Jane Yakowitz, *Marooned: An Empirical Investigation of Law School Graduates Who Fail the Bar Exam*, 60 J. LEGAL EDUC. 3, 19 (2010).

94. See HANOVER REPORT, *supra* note 84; Sander, *supra* note 77, at 411–18; Jane Yakowitz, *supra* note 93, at 20 (“I include this demographic data for purely descriptive purposes, not to suggest that race has a causal relationship with failing the bar examination. In fact, the bar

scholars have explored this issue,⁹⁵ and a letter from a previous school dean implicitly discusses the basis provided by the other scholars for what is known as an “admissions mismatch”:

[While] African Americans receive approximately nine percent of the bachelors degrees conferred in our country, [and] . . . African Americans make up approximately ten percent of the applicant pool to ABA-accredited law schools[,] [o]ur entering class of 2005 was [composed] of 13% African Americans . . . [and] this year’s entering class is 12% African American. . . . T[hus,] [t]his School has a greater percentage of African Americans in its entering class for 2005 and 2006 than [both] the percentage of African Americans earning bachelors degrees *and* the percentage of African Americans in the national law school pool.⁹⁶

Since a cohort is accepted at percentages above its presence in the relevant general population, these scholars suggest that some within these cohorts, therefore, have academic profiles below students in cohorts that more closely mirror relevant population percentages.⁹⁷ Indeed, this effect is likely amplified as one travels downward in school rankings if the process occurs systematically at all institutions due to the cumulative effect of the deficit caused by mismatching.

passage study data confirms what bar exam validation studies had found before: that race does not play a statistically significant role in bar passage when LSAT scores, undergraduate GPA, and law school GPA are controlled. Table 6-3 provides complete regression results. In other words, minority J.D.s are not more likely to become never-passers *because* they’re minorities; rather, they are more likely to become never-passers because their LSAT, undergraduate GPA, and law school grades are lower on average than those of white law school graduates.”)

95. See, e.g., Sander, *supra* note 77, at 412–18.

96. Letter from Charles W. Goldner, Jr., Dean and Professor of Law, Univ. of Ark. at Little Rock, William H. Bowen Sch. of Law, to Eric Spencer Buchanan, Esq., President, W. Harold Flowers Law Soc’y (Feb. 2, 2007) (emphasis added) (on file with author). Similar results are reflected in the overall percentages of college graduates. “Among Hispanics, the share of adults holding bachelor’s degrees grew [this year] from 11.1 percent in 2001 to 14.1 percent last year, and among blacks it climbed from 15.7 percent to 19.9 percent. But the distinction rose even faster among non-Hispanic whites, from 28.7 percent to 34 percent.” Richard Pérez-Peña, *U.S. Bachelor Degree Rate Passes Milestone*, N.Y. TIMES, Feb. 23, 2012, <http://www.nytimes.com/2012/02/24/education/census-finds-bachelors-degrees-at-record-level.html>.

97. See, e.g., Richard H. Sander, *Listening to the Debate on Reforming Law School Admissions Preferences*, 88 DENV. U. L. REV. 889, 937 (2011).

Moreover, the mismatch theory suggests that this problem is magnified for those groups with excessive downward deviation from the mean acceptance profile, since the members of these cohorts cluster at the bottom of the class, get lower grades, and learn less because the instruction is not targeted toward them.⁹⁸ In contrast, members of non-below-mean cohorts with similar score profiles tend to “go to much less elite schools, get better grades, learn more and, thus, do far better on the bar.”⁹⁹ I suspect the robustness of this effect, though, is diminished at a third-tier school, as when compared to a first tier school.

In order to further investigate these issues, I sought the underlying data given to the statistics firm (Hanover), so that I could perform additional analyses. The university refused my request to access these documents, claiming that “[t]he issue is that the cohort of students is so small in some years that the individuals can be identified.”¹⁰⁰ In an effort to address this concern, I revised my request to aggregate small cohorts.¹⁰¹ I received a response asserting that the requested data is exempt from disclosure regardless as to whether redaction would sufficiently remove the identity of any student referenced in the documents at issue.¹⁰²

This interpretation is inconsistent with Arkansas’s FOIA. Arkansas has a robust FOIA. In fact, one paper empirically classified Arkansas’s FOIA as “strong” based on a score above six points—out of a maximum of eleven points—on the authors’ metric for measuring the vigor of state FOIAs.¹⁰³ During 1986 to 1987 Arkansas’s FOIA scored seven points.¹⁰⁴ From 1988 to 2001,

98. *See id.*

99. *Id.*

100. E-mail from John DiPippa, Dean, Univ. of Ark. at Little Rock, William H. Bowen Sch. of Law, to author (Feb. 17, 2012) (on file with author).

101. E-mail from author to John DiPippa, Dean, William H. Bowen Sch. of Law, Univ. of Ark. at Little Rock, Univ. Counsel, Univ. of Ark. at Little Rock (Feb. 20, 2012) (on file with author).

102. E-mail from Mandy Abernathy, Assoc. Gen. Counsel, Univ. of Ark. at Little Rock, to author (Feb. 22, 2012 8:39 AM) (on file with author).

103. *See Cordis & Warren, supra* note 36, at 11 (Apr. 2, 2012).

104. *Id.* at 34.

Arkansas's FOIA scored eight points.¹⁰⁵ From 2002 to 2009 (the last year of the study), Arkansas's FOIA scored ten points.¹⁰⁶

Arkansas . . . enacted its FOIA law in 1967. Prior to this time the Arkansas code did little to provide for the inspection of public records. The FOIA law was passed as a result of a number of factors, including support from journalists, the results of a study by the Arkansas Legislative Council that looked at the laws of other states, and litigation by the state Republican Party that culminated in a state Supreme Court decision indicating a willingness on the part of the court to recognize an extensive right to access public records. The law has been amended several times since its enactment. The amendments address judicial decisions or issues not anticipated by the law when it was initially passed. For instance, it was amended in 2001 to address access to records stored in electronic form.¹⁰⁷

In response to the explanation for the denial of the request, I described that the exemption related to FERPA only applies until the identity-disclosing material is redacted pursuant to the Department of Education regulations.¹⁰⁸ This conclusion is based on three considerations: (1) the redaction requirement of most FOIAs, including Arkansas's; (2) the Arkansas and general legislative and judicial doctrines favoring disclosure and requiring construing FOIA exemptions narrowly; (3) the statutory language of those exemptions and the federal FERPA regulations.

First, the Arkansas FOIA requires maximum production through redaction. Arkansas Code Annotated sections 25-19-105(f)(1)–(3) provide:

(f)(1) No request to inspect, copy, or obtain copies of public records shall be denied on the ground that information exempt from disclosure is commingled with nonexempt information.

(2) Any reasonably segregable portion of a record shall be provided after deletion of the exempt information.

105. *Id.*

106. *Id.*

107. *Id.* at 9.

108. Peltz, *supra* note 64, at 192–96 (2009).

(3) The amount of information deleted shall be indicated on the released portion of the record and, if technically feasible, at the place in the record where the deletion was made.¹⁰⁹

Second, the Arkansas Supreme Court outlined that it “liberally interpret[s] the FOIA to accomplish its broad and laudable purpose that public business be performed in an open and public manner . . . and broadly construes the Act in favor of disclosure.”¹¹⁰

Third, the Arkansas FOIA only “exempts” FERPA-defined education records from disclosure “unless their disclosure is consistent with the provisions of [FERPA].”¹¹¹ Thus, it is not a “FERPA exemption,” per se. It merely dictates how FERPA-related material is to be handled before disclosure. And FERPA regulations, along with the aforementioned FOIA-redaction provisions, § 25-19-105(f)(1)–(3), provide the means to have disclosure consistent with the FERPA statute, as required by the statute.¹¹²

The federal regulation reads as follows:

(b)(1) *De-identified records and information.* An educational agency or institution, or a party that has received education records or information from education records under this part, may release the records or information without the consent required by § 99.30 after the removal of all personally identifiable information provided that the educational agency or institution or other party has made a reasonable determination that a student’s identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.¹¹³

Thus, while redaction under FERPA is discretionary, it is not under the Arkansas FOIA.¹¹⁴ If a public agency can find a way to produce the requested documents that is “consistent with the provisions of” FERPA, it must.¹¹⁵ Indeed, caselaw provides

109. ARK. CODE ANN. §§ 25-19-105(f)(1)–(3) (2002).

110. *Thomas v. Hall*, 2012 Ark. 66, 2012 WL 503879, at *4 (2012).

111. ARK. CODE ANN. § 25-19-105(b)(2).

112. 34 C.F.R. § 99.31(b)(1) (2012).

113. *Id.*

114. *See* ARK. CODE ANN. § 25-19-105(b)(2) (2011).

115. *Id.*

examples in which courts have held that the production of educational records under the FOIA is consistent with FERPA.¹¹⁶

Further, the only treatise on the Arkansas FOIA—which is extensively cited by the Arkansas Supreme Court—states that

[b]ecause FERPA does not bar disclosure of [identity-redacted educational records], it is *not* exempt under subsection (b)(2) and therefore must be disclosed pursuant to a FOIA request. . . . This approach is consistent with the Arkansas FOIA's requirement that records containing both exempt and non-exempt information be disclosed with the latter deleted.¹¹⁷

The same treatise presents the Wisconsin case of *Osborne v. Board of Regents*.¹¹⁸ There, Osborne made a FOIA request to the University of Wisconsin.¹¹⁹ He directed part of the request toward the law school.¹²⁰ He sought the following information about every person who applied to the law school from 1993 through 1997 (whether the applicant ultimately enrolled or not): (1) sex, (2) race, (3) first-year law school GPA, (4) undergraduate major, (5) LSAT score, (6) undergraduate class rank, and (7) undergraduate GPA.¹²¹ The university denied several of the requests, “including those for test scores, grade point averages, and class rank by race or sex,” asserting

116. *E.g.*, *United States v. Miami Univ.*, 294 F.3d 797, 824 (6th Cir. 2002) (“Nothing in the FERPA would prevent the Universities from releasing properly redacted records.”); *Naglak v. Pa. State Univ.*, 133 F.R.D. 18, 24 (M.D. Pa. 1990) (“Defendants contend that the information sought by plaintiff is protected from disclosure by the Educational Privacy Act. We agree that disclosure of names and addresses would violate the Act. However, that problem can be remedied by submitting the information requested in statistical, summary form, listing, e.g. the number of transferees, the exams which they took for transfer purposes, the schools which sponsored them, etc., but omitting the students' names and addresses. This will give plaintiff the data she seeks, but avoid any breach of confidentiality.”); *see also* *Bowie v. Evanston Cmty. Consol. Sch. Dist. No. 65*, 538 N.E.2d 557, 561–62 (Ill. 1989) (holding under state statute akin to FERPA that a school district was obliged to de-identify student records and produce them pursuant to FOIA request); *Op. Ark. Att’y Gen. No. 2001-046 n.1* (2001) (“[I]t should be noted that [FERPA] does contain certain exemptions A determination of whether this exemption from FERPA applies to the situation about which you have inquired would require that various questions of fact be answered.”).

117. WATKINS & PELTZ, *supra* note 78, at § 3.04(b)(4) (emphasis added).

118. 647 N.W.2d 158, 175 (Wis. 2002); *see* WATKINS & PELTZ, *supra* note 78, at § 3.04(b)(4).

119. *Osborne*, 647 N.W.2d at 160.

120. *Id.*

121. *Id.* at 163 n.6.

that these items were shielded from disclosure under FERPA.¹²² The Wisconsin Supreme Court unanimously rejected the university's claim and ordered it to produce the requested materials.¹²³

The high court ruled that the language of FERPA is simply not consistent with the claim that it prohibits the production of "all information in education records."¹²⁴ Indeed, the court stated that such a reading would render part of the statutory language "meaningless," violating the axiom that every word in a statute should be given operative effect.¹²⁵

The court then held that the requested materials did not constitute personally identifiable information.¹²⁶ First, the court explained that information is "personally identifiable" only if it "would make a student's identity traceable."¹²⁷ "[T]he plain language of the Act itself" required this conclusion.¹²⁸ Next, the court found that the data Osborne sought could not be linked to specific students: "The list of somewhat minimal information Osborne requests—grade point average, test scores, race, gender, and ethnicity (if recorded)—is not sufficient, by itself, to trace the identity of an applicant."¹²⁹ Accordingly, FERPA permits production of the information sought by Osborne (after redaction of anything else in the relevant education records).¹³⁰

The parallels between *Osborne* and the instant matter are striking. My requests for LSAT scores, undergraduate GPA, law school GPAs, race, and gender are exactly the same as the items approved of in *Osborne*. And the age data I requested is clearly analogous.

Two Arkansas Attorney General opinions also lead to the conclusion that FERPA material is subject to the redaction requirement articulated by the Arkansas FOIA and caselaw. The first Attorney General opinion stated:

122. *Id.* at 163–64.

123. *Id.* at 177.

124. *Id.* at 163–64.

125. *Id.*

126. *Id.* at 169–71.

127. *Id.* at 169.

128. *Id.*

129. *Id.* at 171.

130. *Id.*

[T]he student's name (and, to the extent it might identify the student, his mother's name) *should be redacted* pursuant to the following provision of A.C.A. § 25-19-105:

(b) It is the specific intent of this section that the following shall not be deemed to be made open to the public under the provisions of this chapter:

* * *

(2) . . . education records as defined in the Federal Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, unless their disclosure is consistent with the provisions of that act [.]¹³¹

Thus, the Arkansas Attorney General concluded that the Arkansas FOIA requires the disclosure of educational records, as defined by FERPA, once the personally identifying information is redacted.

The second Arkansas Attorney General Opinion, in which the Attorney General discussed compilations of information, addressed a situation quite similar to the one I faced. The Attorney General opined:

I am assuming that a compilation would not disclose the names of the various students' parents or guardians, instead merely summarizing the range of education among home school teachers. In the unlikely event a compilation would set forth such names, *I believe the records would be subject to disclosure only with the names redacted*, since any document setting forth the names of the parents or guardians who intend to educate a student qualifies as that student's "education records" and "personally identifiable information" exempt from unauthorized disclosure under FERPA.¹³²

Again, the Arkansas Attorney General concluded that the Arkansas FOIA requires the disclosure of educational records, as defined by FERPA, once the personally identifying information is redacted. Indeed, the Arkansas legislature so strongly favors

131. Op. Ark. Att'y Gen. 2007-061 (2007) (alterations in original) (emphasis added).

132. Op. Ark. Att'y Gen. 2004-018, 5 n.2 (2004) (emphasis added).

disclosure that in order to ensure compliance by public officials with the FOIA, it holds public officials criminally responsible.¹³³

A colleague of mine, law professor Joshua Silverstein, also made information requests at the same time I did. He is an expert in grading methods, and he studies, *inter alia*, curves, means, medians, and grade distributions. For both scholarly and academic-service purposes, he requested (1) the undergraduate and law school transcript of every student who started law school in the fall of 2006 and who completed at least the first semester with *everything* except the actual letter grades redacted, and (2) the law school class roster grading forms for fall 2011 that contain *only* the aggregate incoming class GPA of the students in each course.

The university initially denied both of Professor Silverstein's requests because it maintained "that documents covered by FERPA are exempt from disclosure under the FOIA" and that [r]edaction is only an issue when the document in question is covered by FOIA."¹³⁴ Thereafter, however, the university told Professor Silverstein that he would receive the material enumerated as (2) above.¹³⁵

In pursuing our FOIA requests, Professor Silverstein and I were presented with several roadblocks. First, we were told that we would need to get the approval of the Institutional Review Board (IRB).¹³⁶ "The role of the IRB is to review research protocols involving human subjects and to assure that the research project is carried out with due regard for the human participants in accordance with all federal, state, and local guidelines."¹³⁷ In order to pursue this instruction, I requested the IRB-related material that the school created relating to Hanover's extant work for the law school so that I could model my

133. ARK. CODE ANN. § 25-19-104 (2008).

134. E-mail from John DiPippa, Dean, William H. Bowen Sch. of Law, Univ. of Ark. at Little Rock, to Joshua Silverstein, Professor, William H. Bowen Sch. of Law, Univ. of Ark. at Little Rock (Feb. 27, 2012) (on file with author).

135. E-mail from John DiPippa, Dean, William H. Bowen Sch. of Law, Univ. of Ark. at Little Rock, to Joshua Silverstein, Professor, William H. Bowen Sch. of Law (Mar. 12, 2012) (on file with author).

136. E-mail from John DiPippa, Dean, William H. Bowen Sch. of Law, Univ. of Ark. at Little Rock, to author (Feb. 20, 2012, 2:23 PM) (on file with author).

137. *Institutional Review Board*, UNIV. OF ARK. AT LITTLE ROCK, <http://ualr.edu/irb/> (last visited May 23, 2012).

request thereon.¹³⁸ The response that I received stated that the school did not seek IRB approval for the Hanover study.¹³⁹ Nonetheless, I contacted the IRB. The IRB informed me that my research does not require IRB approval.¹⁴⁰

Thereafter, Professor Silverstein, in contacting the administration about these FOIA issues, was told that he was not being paid with summer research funding to work on the piece for which he was seeking public documents.¹⁴¹ The administration advised Professor Silverstein that his time and effort would be better spent working on matters other than grading practices.¹⁴²

While this discussion of access is very important, as it is the means to address the underlying substantive questions, the broader issue of the welfare of admitted students is paramount. Admissions programs are best when they serve productive ends and do not take unfair advantage of people by disproportionately setting them up for failure. The negative consequences of poorly designed programs are that (1) students admitted under flawed programs who ultimately fail suffer significantly both financially and emotionally;¹⁴³ and (2) taxpayer money will be spent on the subsidization of a higher rate of unsuccessful educational attempts.¹⁴⁴ Researchers seek to measure these costs through access to student data and then to compare them

138. E-mail from author to John DiPippa, Dean, William H. Bowen Sch. of Law, Univ. of Ark. at Little Rock (Feb. 20, 2012, 3:59 PM) (on file with author).

139. E-mail from John DiPippa, Dean, William H. Bowen Sch. of Law, Univ. of Ark. at Little Rock, to author (Feb. 20, 2012, 4:05 PM) (on file with author).

140. Memorandum from Dr. Elisabeth Sherwin, IRB Chair, Inst. Review Bd., to author (Mar. 7, 2012) (on file with author).

141. E-mail from John DiPippa, Dean, William H. Bowen Sch. of Law, Univ. of Ark. at Little Rock, to Professor Joshua Silverstein, Assoc. Professor, William H. Bowen Sch. of Law, Univ. of Ark. at Little Rock (May 14, 2012, 15:19 CST) (on file with author).

142. *Id.*

143. Steinbuch, *supra* note 14, at 99.

144. See Cheryl L. Auster, Comment, *Promising a Better Future but Delivering Debt: Understanding the Financial and Social Impact of For-Profit Colleges and the Effect of the New Program Integrity Rules*, 13 THE SCHOLAR 631, 667–68 (2011) (discussing for-profit colleges and their frequent use of federal funding).

High levels of student debt have been shown to impact the *student and the public* in three main ways. These are: (1) the financial burden on the individual; (2) the expense of loan subsidies to taxpayers; and (3) the negative effect of defaults on the individual and the taxpayer. Simply put, an individual facing the burden of a large debt does not have disposable income, and therefore, the individual is less likely to make purchases or save.

Id. (emphasis added) (citations omitted); Steinbuch, *supra* note 14, at 99.

to the benefit of advancing those whose admission scores do not truly reflect their abilities as a consequence of outside forces beyond their control.¹⁴⁵ This is a relatively new phenomenon:

The debate over affirmative action in higher education has entered a new era. For decades the argument was largely ideological, between those who thought racial preferences were intrinsically a betrayal of the color-blind ideals of the civil rights movement, and those who believed that a sudden shift from Jim Crow to official color-blindness would leave the upper reaches of America segregated and impervious to change. In sharp contrast, the emerging debate is empirical and pragmatic. Few proponents of affirmative action believe it should go on indefinitely; most proponents acknowledge that preferences carry with them some undesirable side-effects. Few of those who oppose racial preferences are really comfortable with the idea of minority numbers dwindling towards zero at any elite institution. These are circumstances in which it is possible for angry debate to evolve into discussion, where empirical findings matter and where policy alternatives can be candidly compared. Under such hopeful conditions, the premium on combat skills declines and the value of listening goes up.¹⁴⁶

Moreover, when the costs of admissions programs that result in increased failures are borne by students and taxpayers instead of institutional, governmental decision makers, the market is unable to aid in correcting any imbalance.¹⁴⁷ Since market forces will unlikely be the sole mechanism for such decisions, we should strive to facilitate disclosures that will improve such systems.

145. Steinbuch, *supra* note 14, at 77–78 (discussing the costs of overlooking scores in admission decisions, which include greater investment in academic support programs and loss of academic reputation). *See generally* Sander, *supra* note 97, at 889 (discussing the costs associated with mismatching student admissions).

146. Sander, *supra* note 145, at 889.

147. Steinbuch, *supra* note 14, at 99. (“We do no service for the taxpayers of a relatively poor state, with an unsatisfactory distribution of lawyers, by admitting students with an insufficient chance of becoming lawyers The needless expense and missed opportunities for both failing students and taxpayers are significant.”).

IV. FERPA REVISION

Since FERPA is often improperly invoked in response to valid FOIA requests by members of the public, as well as requests by school officials for legitimate educational interests, legislation endorsing and adopting the judicial opinions that hold that FERPA should not be interposed as a bar to complying with state or federal FOIA requests would aid in correcting this problem.

As discussed above, the “long history of well-documented excesses has led to calls for FERPA reform. . . . U.S. Sen. Sherrod Brown, D-Ohio, wrote to the Department of Education urging the agency to issue rules clarifying and *narrowing* the [proper] scope of FERPA secrecy.”¹⁴⁸ Senator Brown stated, “It is important that the public have confidence in the integrity of our higher education system. . . .”¹⁴⁹ Unfortunately, “[a]s of September 2011, neither the Department nor Congress has moved to narrow or clarify FERPA, and the abuses continue.”¹⁵⁰

As such, I propose that Congress revise FERPA to prevent (1) educational institutions that receive federal funding from improperly restricting access to relevant data by appropriate government officials and educators; and (2) the above-mentioned improper invocation of FERPA in response to FOIA requests. My proposal follows:

SECTION 1. SHORT TITLE.

This Act may be cited as the “FERPA Revision Act of 2013.”

SECTION 2. FINDINGS.

Congress finds that—

(1) Appropriate government officials and educators have legitimate oversight and educational interest in knowing how federally supported institutions of higher education operate. Nonetheless, institutions receiving federal funding have refused, and continue to refuse, to respond to

148. STUDENT PRESS LAW CENTER, *A Student Press Law Center White Paper: FERPA and Access to Public Records* 7 (2011), http://www.splc.org/pdf/ferpa_wp.pdf (emphasis added).

149. *Id.* (quoting U.S. Senator Sherrod Brown, D-Ohio, calling for FERPA reform).

150. *Id.*

legitimate requests from government officials and educators by improperly invoking FERPA.

(2) Various court opinions have established that FERPA, enacted pursuant to Congress' power under the Spending Clause, does not forbid government officials from taking any action. Rather, FERPA sets conditions on the receipt of federal funds, and it imposes requirements on the Secretary of Education to enforce the spending conditions by withholding funds in appropriate situations. As such, FERPA may not be interposed as preventing or prohibiting disclosure under any freedom of information act or similar request. *Chicago Tribune v. Univ. of Ill. Bd. of Trs.*, No. 10 C 0568, 2011 WL 982531, at *4 (N.D. Ill. Mar. 7, 2011); *Tombrello v. USX Corp.*, 763 F. Supp. 541, 545 (N.D. Ala. 1991); *Bauer v. Kincaid*, 759 F. Supp. 575, 589 (W.D. Mo. 1991); *Red & Black Publ'g Co., v. Bd. of Regents*, 427 S.E.2d 257, 261 (Ga. 1993); *Student Bar Ass'n v. Byrd*, 239 S.E.2d 415, 419 (N.C. 1977). Nonetheless, institutions receiving federal funding have improperly refused, and continue to improperly refuse, to comply with freedom of information act requests on the assertion that disclosure is prohibited by FERPA.

SECTION 3. PROMOTING THE INTEGRITY OF FEDERAL
FUNDING OF EDUCATIONAL INSTITUTIONS BY ASSURING
OVERSIGHT.

(1) Amendments to FERPA.

(a) 20 U.S.C. § 1232g(b)(1)(A) is amended by striking its language and replacing it with:

“(A) any other school official, including any teacher—other than adjunct or substitute faculty—within the agency or institution, unless the agency or institution can establish through an agency-initiated federal action by clear and convincing evidence that the other school official has no legitimate educational interest in the material. Any other school official has a presumptively legitimate educational interest in any material relating to admissions, scholarships, fundraising, financial aid, and

allocation of resources, regardless of whether the material sought addresses individual or collective decisions, practices, and/or policies. In addition, any other school official has legitimate educational interests in many other types of material, and the above should in no way be interpreted to suggest that any other school official's legitimate educational interest is somehow limited by the above presumption."

(b) 20 U.S.C. § 1232g(b)(1)(C) is amended by striking its language and replacing it with:

"(C) (i) authorized representatives of—

(I) the Comptroller General of the United States;

(II) the Attorney General of the United States;

(III) the Secretary of Education;

(IV) State educational authorities, under the conditions set forth in paragraph (3),

(V) State equivalents of (I)–(III) above, under the conditions set forth in paragraph (3);

(ii) authorized representatives of the Attorney General for law enforcement purposes under the same conditions as apply to the Secretary under paragraph (3); or

(iii) Any duly elected federal or State representative who has oversight of and/or budgetary authority over, or provides partial or total funding for, any part of the agency or institution, under the conditions set forth in paragraph (3)."

(c) 20 U.S.C. § 1232g(b)(1) is amended by adding a section (M) as follows:

"(M) Codification of caselaw. No educational agency or institution, or party that has received education records or information, may in response to a request made under any federal or State public access and/or freedom of information or similar law(s) properly assert that the Family Educational Rights and Privacy Act (FERPA), or Regulations promulgated thereto, prevent, prohibit, or limit the release of any records. FERPA, enacted pursuant to Congress' power under the Spending Clause, does not

forbid government officials from taking any action. Rather, FERPA sets conditions on the receipt of federal funds, and it imposes requirements on the Secretary of Education to enforce the spending conditions by withholding funds in appropriate situations. As such, FERPA does not prevent or prohibit disclosure under any freedom of information act or similar request. An educational agency or institution, or a party that has received education records or information, seeking to de-identify individual student records for the purposes of satisfying conditions on the receipt of federal funds shall do so pursuant to the federal regulations promulgated pursuant to FERPA. Any reasonable attempt to satisfy those regulations shall satisfy FERPA for the purposes of meeting the conditions on the receipt of federal funds. Any attempt to excessively de-identify records shall constitute a violation of FERPA, violating conditions on the receipt of federal funds.”

V. OPENNESS IN HIGHER EDUCATION ACT

Institutions of higher education that receive public funds have insufficient incentives to fully disclose accurate admissions data to the public and prospective students, which would enable both to make informed decisions about how to invest their limited resources. Rather, many institutions, while spending taxpayer funds, replace the judgments of the public they serve regarding broad allocation of resources with their own private views. Legislation mandating that higher-education schools that receive public funds affirmatively disclose critical data about their admissions programs would assist in addressing this problem.

Affirmative admissions programs alter the basic process for acceptance to higher-education institutions. The costs and benefits of these programs are difficult to measure and implicate serious, complex policy issues that should be open for public discussion and input—even though admissions standards are not (nor should not) be controlled by plebiscite. Unfortunately, schools are often hesitant to

disclose the nature of their admissions programs, even when they receive taxpayer funds.

Moreover, the admission of underqualified students not only serves as fraud on these admittees by setting them up for failure, but it also constitutes a type of financial fraud on able students:

[W]hile some scholarships are financed through law school endowments, most are cross-subsidies by incoming students: Student A pays full tuition—largely financed through loans—so that student B can receive a discount Because of this system of variable tuition, some students graduate with little or no debt. A much larger group graduates with considerable debt.¹⁵¹

Finally, these programs constitute a fraud on the taxpaying public that subsidizes these institutions because taxpayers believe that they are funding highly qualified admittees, which is not always the case.

As such, I propose that Congress require the disclosure of admissions statistics for institutions of higher education that receive federal funding¹⁵²:

SECTION 1. SHORT TITLE

This Act may be cited as the “Openness in Higher Education Act of 2013.”

SECTION 2. FINDINGS

Citizens and taxpayers have a right to know whether federally supported institutions of higher education are treating student applications differently depending on a student’s membership in particular cohorts or groups and, if so, the consequences to the student applicants of doing so.

SECTION 3. REPORT

(1) Institutions of higher education that receive federal support shall report as follows—

151. Henderson & Zahorsky, *supra*, at 46; *see* Sander, *supra* note 97, at 912–13 (discussing transparency of law school data regarding likelihood of graduation and employment opportunities upon graduation, if attained).

152. This proposal is based on a bill that was introduced in the Arkansas legislature. *See* H.B. 2216, 87th Gen. Assemb., Reg. Sess. (Ark. 2009), *available at* <http://www.arkleg.state.ar.us/assembly/2009/R/Bills/HB2216.pdf>.

Beginning October 1, 2013, and each year thereafter, each institution of higher education that receives federal support shall provide annually to the United States Department of Education, the Senate and House Committees on Education, and the public a report regarding its student admissions process that shall include:

- (A) A statement of whether legacy status, athletics, association with governmental (including school) officials, regional location, religion, race, color, ethnicity, national origin, gender, sexual orientation, or socioeconomic status are considered in the student admissions process; and
- (B) Which department or departments within the institution, if any, have separate admission processes that consider legacy status, association with governmental (including school) officials, regional location, religion, race, color, ethnicity, national origin, gender, sexual orientation, or socioeconomic status in the student admissions process.

If an institution of higher education or a department thereof considers legacy status, athletics, association with governmental (including school) officials, regional location, religion, race, color, ethnicity, national origin, gender, sexual orientation, or socioeconomic status in the student admission process, the institution of higher education shall provide in the report described in subdivision (1)(A) of this section the following information:

- (i) How such group membership is:
 - (a) Determined;
 - (b) Used to meet targets, goals, or quotas; and
 - (c) Weighted;
- (ii) Why such group membership is considered, including the determination of the critical mass level and relationship to the particular institution's education mission with respect to the diversity rationale;
- (iii) What consideration has been given to neutral alternatives as a means for achieving the same goals for which such group membership is considered;
- (iv) How frequently:

-
-
- (a) The need to consider such group membership is reassessed; and
 - (b) The reassessment is conducted;
- (v) Factors other than legacy status, association with governmental (including school) officials, regional location, religion, race, color, ethnicity, national origin, gender, sexual orientation, or socioeconomic status that are collected in the admissions process by institutions of higher education, including grades, class rank in previous degree-conferring institutions, standardized test scores, state residency, and other quantifiable criteria.
- (a) If such factors are collected, all raw admissions data for applicants regarding these factors with the legacy status, association with governmental (including school) officials, regional location, religion, race, color, ethnicity, national origin, gender, sexual orientation, or socioeconomic status, and the admissions decision made by the institution regarding that applicant, shall accompany the report in computer-readable form with the names of individual students redacted but with appropriate links so that it is possible to determine through statistical analysis the weight given to legacy status, association with governmental (including school) officials, regional location, religion, race, color, ethnicity, national origin, gender, sexual orientation, or socioeconomic status relative to other factors.
- (vi) Analysis, relative to other groups, of whether there is a correlation between any group membership and:
- (a) Likelihood of admission;
 - (b) Likelihood of enrollment in a remediation program;
 - (c) Likelihood of graduation; and
 - (d) Likelihood of defaulting on education loans.
- (2) The Secretary shall report to the appropriate committees of Congress each institution of higher education that the

Secretary determines is not in compliance with the reporting requirements of this subsection.

(3) Upon a determination that an institution of higher education is not in compliance with the reporting requirements of this subsection, has de-identified any data so as to remove any of the information required to be reported by this Act, and/or has misrepresented its data, the Secretary shall impose a civil penalty upon the institution as follows:

(A) The Secretary shall impose a civil penalty upon such institution of an amount not to exceed \$50,000 for each violation or misrepresentation.

(B) Any civil penalty may be compromised by the Secretary. In determining the amount agreed upon in compromise, the Secretary shall consider the appropriateness of the penalty to the size of the educational institution, the gravity of the violation, and any failure, omission, or misrepresentation. The amount agreed upon in compromise may be deducted from any sums owed by the United States to the institution charged.

(4) Any reasonable attempt to satisfy the requirements of this section shall also satisfy the Family Educational Rights and Privacy Act (FERPA) for the purposes of meeting the conditions on the receipt of federal funds pursuant thereto. Any attempt to de-identify records that results in a report that does not fully respond to the requirements of this Act shall constitute a violation of both this section and FERPA, subjecting the violator to the penalties set forth herein and the withholding of funds by the Secretary of Education pursuant to FERPA.

VI. JUDGING UNIVERSITY QUALITY AND VALUE

In addition to analyzing admissions data, the public—including potential paying students—seeks data regarding the value of obtaining a degree from any particular public institution of higher learning. Indeed, this issue has rocketed in importance among students considering how to invest their limited resources in this beleaguered economy.

For example, students and taxpayers rightly consider academic credentials of incoming classes and employment opportunities for graduating classes in deciding whether to contribute to those institutions—be it through tuition, donation, or public funds. Yet again, the University of Illinois—in events unrelated directly to the various above-mentioned events—caught the public’s attention:

The University of Illinois . . . launched an investigation into whether the school inflated test scores and grades when describing the profile of this fall’s incoming class.

The possible inaccuracies come two years after an admissions scandal over the university admitting subpar politically connected students over more qualified applicants. Some of the most egregious examples were in the College of Law.

The latest concern is whether median law school test scores and grade-point averages of the most recent class “may have been inaccurately reported” on the school’s website and in promotional materials. . . . [U]niversity officials have not confirmed whether the information was inflated intentionally. . . . A report by the state’s Admissions Review Commission, appointed in the wake of the Tribune reports, criticized the Law school for leaving all decision-making authority to the admissions dean instead of including faculty in applicant reviews as it had done in the past.¹⁵³

Two scholars have gone so far as to suggest that several law schools, their deans, *U.S. News and World Report* (*U.S. News*), and its employees may have committed felonies by manipulating or even

153. Jodi S. Cohen, *U of I Law School Admission’s Dean on Leave as Test Scores Investigated*, CHI. TRIB. (Sept. 12, 2011), http://articles.chicagotribune.com/2011-09-12/news/chi-uof-i-law-school-admissions-dean-on-leave-as-test-scores-investigated-20110912_1_admissions-scandal-admissions-dean-admissions-irregularities; see also Morgan Cloud & George Shepherd, *Law Deans in Jail 4* (Emory Univ. Sch. of Law Legal Studies Research Paper Series, Paper No. 12-199, 2012), available at <http://ssrn.com/abstract=1990746> (“In 2011, for example, Villanova University and the University of Illinois both announced that for several years they had produced and submitted false information about their law students’ median undergraduate grade point averages (GPAs) and LSAT test scores, both important components of the U.S. News formula. Six years earlier, the Dean of the University of Illinois College of Law confessed publicly that for years the school had lied about the school’s expenditures. These all appear to be examples of falsehoods that could constitute mail and wire fraud.”).

falsifying data to improve their rankings.¹⁵⁴ “[O]ther schools appear to have constructed schemes designed to ‘game’ the U.S. News methodology by submitting information that arguably was ‘true’ but was so partial or incomplete that it created a deceptive picture of the institution, its students, and their job prospects after graduation.”¹⁵⁵

As a consequence of this alleged deception, several law school graduates from different schools have initiated legal challenges against their former educational institutions for misrepresenting their postgraduation employment opportunities.¹⁵⁶ For example, a 2008 honors graduate of Thomas Jefferson School of Law in California sued her former school claiming that the law school actively misrepresented her post-law school job prospects.¹⁵⁷

The number of lawsuits accusing law schools of “legerdemain” in their claims about post-graduate employment has quintupled. [In addition to] . . . Thomas M. Cooley Law School . . . , New York Law School and Thomas Jefferson School of Law . . . [graduates have sued] Albany Law, Brooklyn Law, Hofstra Law, Widener Law, Florida Coastal, Chicago-Kent, DePaul Law, John Marshall Law School, California Western, Southwestern, USF Law and Golden Gate. The lawsuits seek tuition refunds.¹⁵⁸

“Our goal is to sue 20 to 25 more schools every few months,” the plaintiffs’ attorney said.¹⁵⁹ And that project intends to pursue both public and private schools for any misrepresentations.¹⁶⁰

154. Cloud & Shepherd, *supra* note 153, at 4–7.

155. *Id.* at 4.

156. See *Chi. Tribune Co. v. Univ. of Ill. Bd. of Trs.*, 781 F. Supp. 2d 672 (N.D. Ill. 2011) *vacated on other grounds*, 680 F.3d 1001 (7th Cir. 2012); Karen Sloan, *Another 15 Law Schools Targeted over Jobs Data*, NAT’L L.J. (Oct. 5, 2011), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202517930210&slreturn=1>; Brian Tamanaha, *Prospective Students Deserve Straightforward Law School Data*, NAT’L JURIST (Sept. 28, 2010), <http://www.nationaljurist.com/content/prospective-students-deserve-straightforward-law-school-data>; see also Cohen, *supra* note 153; Steinbuch, *supra* note 14, at 104.

157. Steinbuch, *supra* note 14, at 104; Martha Neil, *Honors Grad Working as Doc Reviewer Sues Law School, Says She Was Misled by US News Stats*, A.B.A. J. (May 27, 2011), http://www.abajournal.com/news/article/honors_grad_working_as_doc_reviewer_sues_law_school_says_she_was_misled_by_/.

158. Joe Palazzolo, *A Dozen Law Schools Hit with Lawsuits over Jobs Data*, WALL ST. J. L. BLOG (Feb. 1, 2012, 2:28 PM), http://blogs.wsj.com/law/2012/02/01/a-dozen-law-schools-hit-with-lawsuits-over-jobs-data/?blog_id=14&post_id=41838.

159. *Id.* (quoting attorney David Anziska).

This alleged fraud, if real, has real consequences in the context of public education: wasted student money, missed student opportunities, squandered taxpayer funds, and the exploitation of students and citizens by educational institutions pursuing self-interest over public good.¹⁶¹

High levels of student debt have been shown to impact the *student and the public* in three main ways. These are: (1) the financial burden on the individual; (2) the expense of loan subsidies to taxpayers; and (3) the negative effect of defaults on the individual and the taxpayer. Simply put, an individual facing the burden of a large debt does not have disposable income, and therefore, the individual is less likely to make purchases or save.¹⁶²

In a dataset studied by one academic, only “52 percent of bar-failers were working full-time compared to 74 percent of first-time passers Results from a logistic regression indicate that failing the bar exam has an independent effect on full-time employment, even when controls for law school grades and other measures of ability are included.”¹⁶³ Of course, the costs of this fraud are largely borne by students, and loans are often made to students who are unable to repay them due to their own financial situations coupled with the too-often disguised, and unsatisfactory, value of the particular institution’s degree:

The Education Department does not make lending decisions based on credit scores Nor does it conduct a rigorous analysis on how graduation from particular

160. See Jack Crittenden, *12 More Law Schools Sued Over Employment Data*, NAT’L JURIST, May 2012, <http://www.nationaljurist.com/content/12-more-law-schools-sued-over-employment-data>.

161. See Auster, *supra* note 141, at 104 (discussing for-profit colleges and their frequent use of federal funding).

162. *Id.* (emphasis added) (citations omitted); see Steinbuch, *supra* note 14, at 99.

163. Yakowitz, *supra* note 93, at 28, 31 (“But after a protracted adjustment period (spanning ten years or more), never-passers seem to bounce back. Though they never catch up with lawyers, the average never-passer surpasses the trajectory of average college graduates their age. The recovery is encouraging news. After all, the average bar-failer would not necessarily live the life of an average lawyer if he *had* passed the bar exam, so the partial closing of the gap during the mid-career years suggests that the short-term costs of bar failure are much heftier than the long-term ones. But evidence that bar-failers are resilient is not the same as evidence that they avoided significant costs. Law students come from the ranks of the nation’s strongest college graduates. Any period of time spent struggling in the labor market warrants concern.”).

institutions affects an individual's income or earning power. The protections for the U.S. Treasury are largely on the back end: Changes to the federal bankruptcy code over the last 15 years have made it extremely difficult to discharge student debt.¹⁶⁴

One academic noted the effects of this phenomenon:

If we don't change the economics of legal education, not only will law schools continue to graduate streams of economic casualties each year, but we will also be erecting an enormous barrier to access to the legal profession: the next generation of American lawyers will consist of the offspring of wealthy families who have the freedom to pursue a variety of legal careers, while everyone else is forced to try to get a corporate law job—and those who fail will struggle under the burden of huge law school debt for decades.¹⁶⁵

And a story presented on the *Reader Supported News* website describes a former law student's realization of the consequences of this economic model:

As Brian Tamanaha, a law professor at Washington University Law in St. Louis, says, "My book vindicates the basic view of the scambloggers that attending law school is a highly risky proposition that turns out badly for many students, who end up with a huge debt and no law job"—or any job, for that matter, that generates enough income to manage the debt."

....

It isn't hard to find student debtors who feel like they've been crushed by the system. At 47, John Koch is still living with his elderly parents in Oyster Bay, Long Island. Although he has a law degree, Koch has earned a living as a house painter for many years.

....

164. Henderson & Zahorsky, *supra* note 46, at 33; Steinbuch, *supra* note 14, at 71–72, 99.

165. Brian Tamanaha, Op.-Ed., *How to Make Law School Affordable*, N.Y. TIMES, May 31, 2012, http://www.nytimes.com/2012/06/01/opinion/how-to-make-law-school-affordable.html?_r=3&hp.

Koch originally borrowed \$69,000 in 1997. The majority of that money was loans for law school, seemingly, he says, to “better myself.” After he graduated from Touro Law School, Koch struggled to find steady employment and eventually he defaulted on his loans. He was immediately slapped with \$50,000 in penalties. For years, he had been filling out deferment forms every six months to buy himself more time but in 2009, Sallie Mae declared him in default. At the time of this writing, Koch owes over \$320,000. That sounds staggering but it’s hardly unusual. Once a person defaults on a student loan, the balance grows exponentially, with interest compounding on interest, penalties and fees. By the time he “retires,” in 23 years, Koch figures he will owe close to \$1.9 million. He can’t get even subprime credit, he tells me, and it’s not like there’s any way out of his trap: student loan debt cannot be absolved through bankruptcy.

Koch struggles with suicidal thoughts and admits to self-destructive behavior, such as heavy drinking and cigarettes. Eventually he channeled those feelings into a blog that draws more readers each month. In January of 2012, though, the Suffolk County police paid his parents an unpleasant visit to inquire about their son’s suicidal comments and posts.

....

I spoke to Koch a few months ago while he walked his dog and smoked a cigarette. He described his life as pretty much over, and he echoed that sentiment a few weeks ago. “So much for achieving the American Dream.” These days, Koch watches as the interest piles up. He sighs when we hang up, and says, “I mean, why punish the debtor with greater debt?”¹⁶⁶

“[T]he available information suggests that, if law school bestowed a benefit to . . . never-passers at all, it didn’t begin to pay dividends until the later half of their careers, and likely couldn’t pay

166. C. Cryn Johanssen, *Student Loan Debt Suicides*, READER SUPPORTED NEWS (July 4, 2012), <http://readersupportednews.org/opinion2/279-82/12236-focus-student-loan-debt-suicides>.

back' the harms that the law school experience seemed to have caused during the first half."¹⁶⁷

The current approach to student loans creates a perverse incentive, wherein schools being paid through student loans have no skin in the game regarding their enticement of students to their schools. Having not made the student loans directly, the schools bear no cost for misrepresenting the likelihood that students will graduate and that those who do will get jobs. As such, the schools remain free from financial responsibility for admitting students who the schools know are unlikely to succeed therein or thereafter.¹⁶⁸

The assistant director for servicemember affairs at the new Consumer Financial Protection Bureau has railed against predatory

167. Yakowitz, *supra* note 93, at 39.

168. See Kevin Carey, *Here's a Diploma, With Ball and Chain Attached*, THE CHRON. HIGHER ED. (June 18, 2012), http://chronicle.com/article/Heres-a-Diploma-With-Ball/132309/?cid=wb&utm_source=wb&utm_medium=en (“[A] higher-education system that depends on hundreds of thousands of 18-year-olds making wise choices about money is a system designed to produce widespread financial catastrophe. Borrowing \$120,000 for a garden-variety bachelor's degree is folly, and colleges that allow or encourage students to make such choices are morally culpable for the consequences.”); Alex J. Pollock, *Fixing Student Loans: Let's Give Colleges Some 'Skin in the Game'*, THE AMERICAN (Jan. 26, 2012), <http://www.american.com/archive/2012/january/fixing-student-loans-lets-give-the-colleges-some-skin-in-the-game> (“Who are the most important parties to have ‘skin in the game’ in student loans? The colleges themselves, of course! They are the effective originators, the promoters, and the chief financial beneficiaries of student loans. It is their rising costs which result in ever more debt and more risk of default for student borrowers and for taxpayers.”); *Student Loan Experts Call for Increased Responsibility*, INSIDE HIGHER ED. (June 15, 2012, 3:00 AM), <http://www.insidehighered.com/quicktakes/2012/06/15/student-loan-experts-call-increased-responsibility#ixzz1y0pqqN9z> (“The refrain of the discussion—that higher education institutions need to have ‘skin in the game’ by paying a penalty when their students default on loans—is a familiar one in discussions of how to keep colleges from reaping all of the benefits and none of the costs of high tuition rates. [Richard] George [CEO of the Great Lakes Higher Education Corporation] also proposed that ‘vulnerable cohorts,’ students more likely to drop out of college and default on their student loans, should not be allowed to borrow until they have demonstrated academic persistence toward finishing a degree; until that point, colleges should carry the cost burden for students. He said if colleges participated in this campaign that their ‘skin in the game’ would carry less risk, as students more likely to default on their loans would have been weeded out before being allowed to borrow. [Former Secretary of Education William] Bennett said it’s time to subject higher education to the same level of scrutiny given to K-12 education: ‘It’s time to look at the whole enterprise of higher education,’ he said. ‘I expect resistance to that, but the questions are there, and more are coming.’”). Other scholars suggest cutting off federal funding of student loans when students are unable to repay their loans. See Tamanaha, *supra* note 156 (“To restore some economic rationality, the federal loan system needs to demand greater accountability from law schools: those with a high proportion of recent graduates in financial trouble should lose their eligibility to receive money from federal loans. (A similar requirement is currently applied to for-profit colleges.)”).

practices by for-profit educational institutions when perpetrated against military personnel: “[military] families are . . . under siege A number of these schools focus on members of the armed forces with aggressive and often misleading marketing, and then provide little academic, administrative or counseling support once the students are enrolled.”¹⁶⁹ In a related phenomenon, “[t]he Consumer Financial Protection Bureau is . . . scrutin[izing] . . . lenders to students at profit-making colleges . . . that have high rates of default The director . . . compared the practices of some parts of the student loan business to those of the subprime mortgage lending machine that contributed to the financial crisis.”¹⁷⁰ While this latter effort only addresses the supply of cheap capital, not the demand generated by misrepresentations of the institutions seeking that money, it serves as an additional tool to address the costs of improper inducement.

And President Obama recently signed an executive order forcing higher-education institutions to disclose more information regarding financial aid and graduation rates.¹⁷¹ The order applies to all colleges, though it seemingly focused on for-profit schools.¹⁷² The largest for-profit college association expressed disappointment over the executive order.¹⁷³

Regarding law schools in particular, “a new report by Law School Transparency, a non-profit organization, shows that 38 percent of law schools are ‘misleading’ prospective students on their websites when it comes to salary information, and a majority are

169. Hollister K. Petraeus, *For-Profit Colleges, Vulnerable G.I.'s*, N.Y. TIMES (Sept. 21, 2011), <http://www.nytimes.com/2011/09/22/opinion/for-profit-colleges-vulnerable-gis.html?scp=2&sq=holly%20petraeus&st=cse>; see also Carey, *supra* note 168 (“Who’s to blame? In Washington, much of the chatter has been about for-profit colleges that load students with debt in exchange for worthless degrees. And some for-profits, although not all, deserve blame and tighter regulation. But the entire for-profit industry enrolls only 10 percent of students. Most of that \$1-trillion was borrowed at traditional nonprofit colleges.”).

170. Edward Wyatt, *Some Lenders to Students Face Greater U.S. Scrutiny*, N.Y. TIMES (Jan. 12, 2012), http://www.nytimes.com/2012/01/13/business/consumer-agency-sees-problems-in-student-loan-business.html?_r=1.

171. Libby A. Nelson, *GI Bill™*, INSIDE HIGHER ED. (Apr. 27, 2012), <http://www.insidehighered.com/news/2012/04/27/obama-issues-executive-order-veterans-recruiting>.

172. *Id.*

173. *Id.*

doing a substandard job with all employment data.”¹⁷⁴ The American Bar Association (ABA) has taken a timid first step to address some of these deficiencies as they relate to law schools. The ABA initially proposed new rules for accreditation that would require

law schools to post far more detailed consumer information on their websites than they are required to now, including bar passage rates and employment outcomes for graduates by job status and employment type. Law schools also would be required to disclose conditional scholarship retention data, including the number of students admitted under such scholarships over a three-year period and the number of students whose scholarships were subsequently reduced or eliminated.¹⁷⁵

However,

while [t]he ABA’s Council of the Section of Legal Education and Admission to the Bar . . . gave preliminary approval to a new accreditation standard that would require law schools to report additional details about their scholarship retention rates and the jobs that their graduates land the council rejected a recommendation that it require law schools to report school-specific salary data. Transparency advocates said the omission would leave prospective students without important information about their earnings prospects.¹⁷⁶

Even for law schools, this may not be enough. I propose an alternative approach that I believe will have the most effect and will apply to virtually all schools: force schools to assume financial responsibility for their actions and assertions.

Institutions of higher education rely on taxpayer funds, regardless of whether they are public or private. Virtually all veritable higher-education schools either receive direct government

174. Elizabeth Ewing, *Are Law Schools Failing When it Comes to Employment Transparency?*, 21 NAT’L JURIST, Mar. 2012, at 20–21, available at <http://www.nxtbook.com/nxtbooks/cypress/nationaljurist0312/#/20>.

175. Mark Hansen, *ABA Committee Approves New Law School Disclosure Requirements*, A.B.A. J. (Jan. 17, 2012, 5:19 PM), http://www.abajournal.com/news/article/aba_committee_recommends_new_law_school_disclosure_requirements/.

176. Karen Sloan, *ABA Backs Off Making Law Schools Report Graduates’ Salaries*, NAT’L J. (Mar. 19, 2012), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202546229913&slreturn=1>.

funding through grants and public financing or accept students whose tuition is supplemented with federally guaranteed student loans.

Notably, “[t]otal student debt outstanding topped \$1 trillion late last year. . . . That’s significantly more than what [Americans] owe on credit cards and car loans.”¹⁷⁷ And these loans are not dischargeable in bankruptcy.¹⁷⁸

Yet, some of these educational institutions benefitting from government-backed nondischargeable student loans either misrepresent or fail to disclose critical data about themselves—such as admission data and likelihood of finding postgraduation employment. As such, I propose that Congress revise the Bankruptcy Code to ensure that debtors and creditors are protected from the fraudulent actions of educational institutions that receive federal funds or loans guaranteed or funded, in part or whole, by a governmental unit:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Bankruptcy Code Revision Act of 2013.”

SECTION 2. FINDINGS.

(1) Educational institutions are harming students and the public when they admit students who are likely to fail, without disclosing that information to the students, while seeking and accepting their tuition and other financial payments;

(2) Educational institutions are harming students and the public when they admit students who are unlikely to obtain appropriate in-field employment upon graduation from, and/or completion of, the educational institution’s program, or thereafter, that would reasonably allow for the repayment of any loan, funds, scholarship, or stipend that the student is obligated to repay, without disclosing that information to the students, while seeking and accepting their tuition and other financial payments.

177. Melissa Korn, *The Burden of Student Loans*, WALL ST. J. JUGGLE BLOG, (Mar. 22, 2012, 12:31 PM ET), <http://blogs.wsj.com/juggle/2012/03/22/the-burden-of-student-loans/>.

178. 11 U.S.C. § 523 (2006).

SECTION 3. PROMOTING THE INTEGRITY OF
FEDERAL FUNDING OF EDUCATIONAL INSTITUTIONS
BY ASSURING OVERSIGHT.

(1) Amendments to 11 U.S.C. 523.

(A) 11 U.S.C. § 523(a)(8) is amended by striking its language and replacing it with:

“(8)(A) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor’s dependents, for—

(i)(a) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution;

(b) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(ii) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;

(B) An undue hardship on the debtor and the debtor’s dependents shall exist, inter alia, if the debtor’s obligation to repay any loan, funds, scholarship, or stipend referred to herein was induced, in part or whole, by the failure to disclose, or a negligent or fraudulent misrepresentation, by the educational institution that was the beneficiary of that loan, funds, scholarship, or stipend, the debtor’s likelihood of—

(i) graduating from, and/or completing, the educational institution’s program;

(ii) obtaining appropriate in-field employment upon graduation from, and/or completion of, the educational institution’s program, or thereafter; or

(iii) obtaining appropriate in-field employment upon graduation from, and/or completion of, the educational institution’s program, or thereafter, that would reasonably allow for the repayment of any loan, funds, scholarship, or stipend referred to herein.

(C) A finding of undue hardship under subsection (B) shall entitle the creditor whose debt is being discharged to seek damages from the educational institution that was the beneficiary of that loan, funds, scholarship, or stipend, for any State and/or federal claims that it and/or the debtor has, or would have, as a result of the omission, or negligent or fraudulent misrepresentation, by the educational institution referred to in subsection (B), including any claims established herein. Nothing in this subsection shall limit any State or federal rights possessed by the debtor or creditors.

(D) Subsection (B) shall not imply the absence in law of additional bases to establish undue hardship under subsection (A).”

VII. FUNDING DECISIONS AND SETTLEMENT PAYMENTS

The public also uses public-access laws to investigate whether taxpayer moneys are properly managed. This is exemplified by the scandal in the Penn State football program. Such programs receive public funds. Yet, they fall short of meeting the public’s expectations of propriety and openness. These types of hidden wrongdoings are often exposed through investigations into not the wrongdoing itself, but rather the expenditure of state funds to compensate victims of such misconduct. For this reason, *inter alia*, state laws typically encourage the disclosure of settlements.

For example, the Illinois FOIA provides that “[a]ll settlement agreements entered into by or on behalf of a public body are public records subject to inspection and copying by the public, provided that information exempt from disclosure under Section 7 of this Act may be redacted.”¹⁷⁹ Moreover, that FOIA requires that “[a]ll records relating to the obligation, receipt, and use of public funds of the State, units of local government, and school districts are public records subject to inspection and copying by the public.”¹⁸⁰

179. 5 ILL. COMP. STAT. ANN. 140/2.20 (2012).

180. 5 ILL. COMP. STAT. ANN. 140/2.5 (2012); accord 5 ILL. COMP. STAT. ANN. 140/2.10 (West 2012) (requiring that certified payroll records submitted to public bodies under the Prevailing Wage Act are open); *In re* FOIA, Ill. Public Access Opinion No. 11-004 (Apr. 15,

Likewise, state constitutions will sometimes makes clear that public funds—regardless of how they are packaged—are open: “Reports and records of the obligation, receipt and use of public funds of the . . . units of local government . . . are public records available for inspection by the public.”¹⁸¹

The University of Illinois–Springfield (UIS) did not internalize this legislative and constitutional requirement for openness. The *State Journal-Register* sought from UIS a name-redacted version of a “letter from an attorney who represented a student-athlete who was paid \$200,000 to settle allegations of inappropriate behavior by former coaches of the women’s softball team.”¹⁸² UIS refused and the *State Journal-Register* sought an opinion from the Illinois Attorney General (AG).¹⁸³ The AG agreed generally with the newspaper that the letter was a matter for the public to examine under the FOIA.¹⁸⁴ Thereafter, “[t]he university turned the letter over to the newspaper in January . . . but redacted the entire contents except for addressees, the date it was written and the title: ‘Sexual Assault and Battery by UIS Softball Coach.’”¹⁸⁵ This occurred notwithstanding that the newspaper “never sought the names of students” or took issue with the attorney general’s ruling that “the name of the student who received the money and any information, such as her year in school, that could identify her should not be released.”¹⁸⁶

The timeline of the UIS events provides a dramatic illustration of the problem of university obfuscation and obduracy: in March 2009, allegations of assault and impropriety by certain coaches of the women’s softball team prompted a university investigation; later in March, the UIS Chancellor asked for and received resignations from the coaches; in May 2009, the *State Journal-Register* requested the documents concerning these events; in June, UIS refused to comply; on September 8, 2009, the university paid \$200,000 to a member of

2011); *In re* FOIA, Ill. Public Access Opinion No. 10-004 (Dec. 29, 2010); see generally *In re* FOIA, Ill. Public Access Opinion No. 11-0045 (Apr. 18, 2011) (interpreting the Illinois FOIA).

181. ILL. CONST. art. VIII, § 1(c).

182. Rushton, *supra* note 30.

183. *Id.*

184. *Id.*

185. *Id.* (original emphasis omitted) (emphasis added).

186. *Id.*

the women's softball team to settle these claims; on January 4, 2010, the *State Journal-Register* filed another records request because Illinois's new Freedom of Information Act went into effect that day; on September 30, 2010, the Attorney General instructed UIS that the records are public; on October 1, 2010, UIS baldly refused to release the records despite the Attorney General's advisory opinion; that same day, the newspaper raised the university's decision with the Attorney General; on January 6, 2011, the AG instructed UIS that it must give the newspaper copies of the settlement agreement and the March 23, 2009 letter from the attorney of one of the players outlining the accusations against the coaches; on January 7, 2011, the newspaper requested the AG to order UIS to disclose the redacted portion of the 2009 letter; on March 8, 2011, the AG instructed UIS that the redactions are not allowed; nonetheless, the university did not make the letter public.¹⁸⁷

UIS's implacability was noted by the AG: its spokesperson said that UIS "steadfastly refuses to comply fully and completely with [Freedom of Information Act] laws and to supply the public with documents it knows are public"¹⁸⁸ Equally, "[s]he said the U. of I. is among the agencies that 'repeatedly disobey the law.'"¹⁸⁹ The public's outrage about the university's misdeeds and failure to disclose them are also reflected in the comment section on the *State Journal-Register's* webpage.¹⁹⁰ Illinois's relatively high-caliber press, new FOIA, and surprisingly intransigent public-education institutions result in the perfect storm of FOIA anecdotes.

A separate but related situation presents itself when universities enter into settlement agreements containing confidentiality clauses. Such clauses provide an understandable allure, since they allow universities to avoid disclosing details associated with alleged wrongdoing of school officials. However, confidential settlement

187. *Id.*

188. Jodi S. Cohen & David Kidwell, *Attorney General Aide: U. of I. Flouting Law*, CHI. TRIB. (Apr. 2, 2011), <http://www.chicagotribune.com/news/education/ct-met-foia-attorney-general-universi20110402,0,7461991.story> (alteration in original) (quoting Ann Spillane, Chief of Staff, Illinois Attorney General's Office).

189. *Id.* (emphasis added).

190. See Comments to *UIS Continues to Resist Disclosure of Coaches' Conduct*, ST. J. REG. (Mar. 17, 2011, 10:44 AM), <http://www.sj-r.com/top-stories/x1777814658/UIS-continues-to-resist-disclosure-of-coaches-conduct>.

agreements are also plainly inconsistent with the public's expectation of openness and transparency—if not the language of the state FOIAs designed to protect those expectations. For this reason, noted FOIA expert Richard Peltz-Steele, who was himself a party to a confidential settlement agreement with his former university employer—presumably at the university's request—lamented the use of confidential clauses by public institutions in Arkansas:

Not only do I think that Arkansas public institutions should not enter into settlement agreements that contain confidentiality clauses, as that frustrates the spirit, if not the language of, the FOIA, I believe that the purpose of the FOIA is best served by having *all* settlement agreements with Arkansas public institutions affirmatively made public even without a specific request from a citizen of Arkansas.¹⁹¹

Indeed, Professor Peltz-Steele's position is supported by existing law. The federal FOIA already mandates the disclosure of certain documents even absent any request.¹⁹² For example, the United States Department of Justice provides for a “proactive disclosure of . . . records [that] allows you to instantly access information which relates to the Department's day-to-day operations.”¹⁹³ These records include “policy statements, staff manuals and instructions, final opinions and orders, which are always available without making a FOIA request.”¹⁹⁴

To be clear, the fact that university administrators may seek the protection of confidentiality clauses does not mean that the underlying allegations against them were true. But, when public-school administrators use institutional resources to pay to resolve charges, such actions should be subject to the check of public scrutiny—a service typically provided by the judicial process, but supplanted through settlement. To be sure, that public accounting may very well result in *approval*, but such endorsement cannot be assumed *ex ante*.

191. Interview with Richard Peltz-Steele, Dartmouth, MA (Nov. 23, 2011).

192. 5 U.S.C. § 552 (2009).

193. Available Documents for OIP, U.S. DEP'T OF JUSTICE, http://www.justice.gov/oip/oip_foia1.htm (last visited Aug. 23, 2012).

194. *Id.*

Educational institutions that receive federal funds or loans, guaranteed or funded, in part or whole, by a governmental unit, are subjected to varying state FOIAs but generally not covered by the federal FOIA. As such, these schools owe inconsistent responsibilities to the national public, notwithstanding that they rely on federal funds. Some states, like Pennsylvania, maintain gaping holes in the applicability of their FOIAs to public institutions of higher education. Additionally, some state FOIAs only require public schools to respond to requests from citizens of their states notwithstanding that these schools might receive funding from taxpayers throughout the country. Similarly, schools in some states might be entitled to invoke exemptions to state FOIAs not permissible in other states, which results in different disclosure obligations for institutions receiving the same federal taxpayer funding. Legislation that subjects federally supported state schools to the federal FOIA will address this problem.

I propose that Congress revise the federal FOIA for the purpose of preventing educational institutions that receive federal funding from improperly restricting access to relevant data by the public:

SECTION 1. SHORT TITLE.

This Act may be cited as the “FOIA Revision Act of 2013.”

SECTION 2. FINDINGS.

The public has a right to know how federally supported institutions of higher education operate. Nonetheless, institutions receiving federal funding have refused, and continue to refuse, to respond to legitimate requests under state freedom of information acts.

SEC. 3. PROMOTING THE INTEGRITY OF FEDERAL FUNDING OF EDUCATIONAL INSTITUTIONS BY ASSURING OVERSIGHT.

(1). Amendments to FOIA.

(A) 5 USC § 551 is amended by inserting after “(1) ‘agency’ means each authority of the Government of the United States,” the following language:

“or any higher educational institution that accepts and/or receives direct federal funding in an amount in excess of \$100,000 annually,”

VIII. CONCLUSION

In this article, I have offered four easy pieces to correct the imbalance between confidentiality and accountability currently present in publicly financed higher education. These legislative solutions will not only allow scholars and others to pursue important research while properly protecting individual privacy; more importantly, these four easy pieces will provide for greater public oversight of taxpayer-funded institutions. However, while these solutions may be easy in terms of how they correct the described problems, I fear that self-interested politics may make the actual adoption of these changes not so simple.

