STATE OF MICHIGAN

COURT OF APPEALS

KALAMAZOO TRANSPORTATION ASSOCIATION, MEA/NEA, and TIM RUSS,

Plaintiffs-Appellants,

v

KALAMAZOO PUBLIC SCHOOLS,

Defendant-Appellee.

UNPUBLISHED
December 17, 2019

No. 349031
Kalamazoo Circuit Court
LC No. 2018-000530-CZ

Before: METER, P.J., and O'BRIEN and TUKEL, JJ.

PER CURIAM.

In this action brought pursuant to Michigan's Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, plaintiffs Tim Russ and Kalamazoo Transportation Association, MEA/NEA (the requestors), appeal as of right from the trial court's order granting summary disposition to defendant Kalamazoo Public Schools (the school district). We remand for further proceedings consistent with this opinion.

I. BACKGROUND

The requestors represent an association of bus drivers. For the purposes of engaging in collective bargaining with the school district, the requestors submitted a FOIA request[1] to the school district seeking certain completed bus discipline-referral forms. The referral forms are completed by bus drivers to document student misconduct on the bus and sent to school

[1] The request referred to both the FOIA and the Public Employee Relations Act (PERA), MCL 423.201 *et seq.* In the trial court, the parties treated the request simply as a FOIA request, rather than as a request to remedy an unfair labor practice. Allegations of unfair labor practices are the sole jurisdiction of the Michigan Employee Relations Commission (MERC), not the trial court. See *Kent Co Deputy Sheriff's Ass'n v Kent Co Sheriff*, 463 Mich 353, 359; 616 NW2d 677 (2000). We consider this case solely as a FOIA dispute.

administrators to issue discipline as needed. The requestors alleged that the discipline-referral forms could be used as evidence of the drivers' job responsibilities and working conditions and stated that they would accept the school district's redaction of any personally identifying information included on the forms. The school district denied the request, concluding that it was precluded from disclosing the discipline-referral forms under the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 USC 1232g, because the forms constituted the private educational records of individual students. The school district refused to release redacted versions of the documents, averring that the entire document was protected from release by MCL 15.243(2) as an educational record under FERPA and that, in any event, the requestors "would know the identity of the student to whom the education record relates."

After the school district's superintendent denied the requestors' administrative appeal, the requestors filed the instant action, seeking an order compelling the school district to disclose the records. Eventually, the parties filed cross motions for summary disposition under MCR 2.116(C)(8) and (10). In an oral decision, the trial court held that the requested records constituted "educational records" under FERPA, which were exempted from disclosure under MCL 15.243(2). The trial court concluded that MCL 15.243(2) contained a strict, mandatory exemption that applied to the "entire document," and that redaction could not render the requested documents disclosable. Accordingly, the trial court granted the school district's motion for summary disposition. This appeal followed.

II. ANALYSIS

On appeal, the requestors argue that the trial court erred in both its conclusion that the bus discipline-referral forms were educational records under FERPA, and its conclusion that MCL 15.243(2) exempted the entire document from disclosure, regardless of redaction. "We review de novo a trial court's grant or denial of summary disposition." *Tomra of North America, Inc v Dep't of Treasury*, 325 Mich App 289, 293-294; 926 NW2d 259 (2018). "Summary disposition pursuant to MCR 2.116(C)(8) tests the legal basis of the claim and is granted if, considering the pleadings alone, the claim is so manifestly unenforceable as a matter of law that no factual progression could possibly support recovery." *PIC Maint, Inc v Dep't of Treasury*, 293 Mich App 403, 407; 809 NW2d 669 (2011) (internal quotation marks and citation omitted). "A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim, and is appropriately granted when, except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." *Tomra*, 325 Mich App at 294.

"[T]he proper interpretation and application of FOIA is a question of law that we review de novo." *Rataj v Romulus*, 306 Mich App 735, 747; 858 NW2d 116 (2014). "In construing the provisions of the act, we keep in mind that the FOIA is intended primarily as a prodisclosure statute and the exemptions to disclosure are to be narrowly construed." *Swickard v Wayne Co Med Examiner*, 438 Mich 536, 544; 475 NW2d 304 (1991). "Simply put, the core purpose of FOIA is disclosure of public records in order to ensure the accountability of public officials." *Practical Political Consulting v Secretary of State*, 287 Mich App 434, 465; 789 NW2d 178 (2010). "A FOIA request must be fulfilled unless MCL 15.243 lists an applicable specific exemption." *Coblentz v Novi*, 475 Mich 558, 573; 719 NW2d 73 (2006). "Because FOIA is a

prodisclosure act, the public agency bears the burden of proving that an exemption applies." *Id*. at 574; MCL 15.240(4).

"Congress enacted FERPA under its spending power to condition the receipt of federal funds on certain requirements relating to the access and disclosure of student educational records." *Gonzaga Univ v Doe*, 536 US 273, 278; 122 S Ct 2268; 153 L Ed 2d 309 (2002). "The Act directs the Secretary of Education to withhold federal funds from any public or private 'educational agency or institution' that fails to comply with these conditions." *Id*. "The Act states that federal funds are to be withheld from school districts that have 'a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of their parents.' " *Owasso Indep Sch Dist No I-011 v Falvo*, 534 US 426, 428-429; 122 S Ct 934; 151 L Ed 2d 896 (2002), quoting 20 USC 1232g(b)(1) (alteration in original). In turn, our FOIA directs a public body to "exempt from disclosure information that, if released, would prevent the public body from complying with 20 USC 1232g" of FERPA. MCL 15.243(2).

"The phrase 'education records' is defined, under [FERPA], as 'records, files, documents, and other materials' containing information directly related to a student, which 'are maintained by an educational agency or institution or by a person acting for such agency or institution.' " *Owasso Independent School Dist*, 534 US at 429, quoting 20 USC 1232g(a)(4)(A). The requestors argue that the requested records are not educational records because they "merely involve" and do not "directly relate" to students. We disagree. "When interpreting a federal statute, our task is to give effect to the will of Congress." *Walters v Nadell*, 481 Mich 377, 381; 751 NW2d 431 (2008) (quotation marks, citation, and alterations omitted). "[U]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *Id*. (quotation marks and citation omitted). The Merriam-Webster's Collegiate Dictionary defines "direct" as "characterized by close logical, causal, or consequential relationship," and "relate" as "connected by reason of an established or discoverable relation." *Merriam-Webster's Collegiate Dictionary* (11th ed).

In support of its position, the requestors cite two unpublished cases from other jurisdictions in which the court concluded that disciplinary records did not directly relate to a student: *Wallace v Cranbrook Ed Community*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued September 27, 2006 (Docket No. 05-73446), and *Boston Sch Comm v Boston Teachers' Union*, unpublished opinion of the Superior Court of Massachusetts, issued November 30, 2006 (Docket No. 05-3525-H). These cases, however, relate to records of discipline against teachers, in which the students were merely witnesses to impropriety. Accordingly the teachers, not the students, were the subject of the records and any mention of the students was only incidental. Here, however, the bus discipline-referral forms relate to *student* discipline. The forms document a student's discipline-warranting behavior and the school district's corresponding action. Because the subject of the forms at issue is an individual student, there can be no question that the forms directly relate to individual students. Accordingly, the trial court correctly concluded that the discipline-referral forms qualified as

education records under FERPA, which are generally exempt from disclosure under MCL 15.243(2).[2]

The trial court erred, however, by concluding that the exemption in MCL 15.243(2) applied to the entire record as opposed to only those parts containing sensitive educational information directly related to a student. "If a public record contains material which is not exempt under [MCL 15.243], as well as material which is exempt from disclosure under [MCL 15.243], the public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying." MCL 15.244(1). Our Supreme Court has held that MCL 15.244 "applies without exception to every public record." *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 482; 719 NW2d 19 (2006). Indeed, by its unambiguous terms, the stated exemption purports only to exempt "*information* that, if released, would prevent the public body from complying with" FERPA, not the entire record. MCL 15.243(2) (emphasis added). Accordingly, the school district was "assigned the responsibility, 'to the extent practicable, [to] facilitate a separation of exempt from nonexempt information.' " *Herald Co*, 475 Mich at 482, quoting MCL 15.244 (alteration in original).

As recognized by the United States Supreme Court, FERPA only threatens the withholding of federal funds from school districts that have "a policy or practice[3] of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of their parents." *Owasso Indep Sch Dist*, 534 US at 428-429, quoting 20 USC 1232g(b)(1) (ellipsis in original). Again, FERPA defines "education records" as " 'records, files, documents, and other materials' containing information directly related to a student, which 'are maintained by an educational agency or institution or by a person acting for such agency or institution.' " *Id*. at 429, quoting 20 USC 1232g(a)(4)(A). Nothing in FERPA requires nondisclosure once the public agency redacts all "information directly related to a student" from a particular record. *Id*. At that point, the record no longer satisfies the definition of an education record under FERPA. See *Osborn v Bd of Regents of Univ of Wisconsin Sys*, 254 Wis 2d 266, 286 n 11; 2002 WI 83; 647 NW2d 158 (2002) (stating that "once personally identifiable information is deleted, by definition, a record is no longer an education record since

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[2] Before the trial court, the requestors also argued that the discipline-referral forms did not qualify as education records under FERPA because they did not pertain to the student's education. Under FERPA, however, the fact that a record does not pertain to education is not dispositive. Rather, a record is made "educational" when an educational institution holds it, and there is no doubt in this case that the holder of the requested records, the school district, is an educational institution. 20 USC 1232g(a)(4)(A). The information itself need only "directly relate" to a student, not necessarily a student's education. *Owasso Indep Sch Dist*, 534 US at 429.

[3] Although neither party discusses it, we note that "FERPA's nondisclosure provisions further speak only in terms of institutional policy and practice, not individual instances of disclosure." See *Gonzaga Univ*, 536 US at 288. Institutions receiving federal funds can avoid termination so long as they "comply substantially" with FERPA. See *id*.

it is no longer directly related to a student"). In turn, the release of an adequately redacted record would not bring the school district out of compliance with FERPA.[4]

The school district argues that, even after redaction, the requestors would still likely be able to know or identify the students about whom the records relate. See 34 CFR 99.3(g) (2011) (defining "Personally Identifiable Information" in pertinent part as that "[i]nformation requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates."). This argument, however, was not addressed by the trial court and we decline to address it for the first time on appeal. Accordingly, we remand this case for the trial court to consider the possibility of redaction in the first instance. If necessary, the trial court may conduct an *in camera* review of the records to determine if redaction consistent with MCL 15.243(2) is possible. See *Evening News Ass'n v Troy*, 417 Mich 481, 513-516; 339 NW2d 421 (1983).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Colleen A. O'Brien
/s/ Jonathan Tukel

[4] Our conclusion that a public body remains compliant with FERPA when it redacts personally identifiable information pursuant to an open records law is consistent with a vast number of other well-reasoned federal and state law decisions. See, e.g., *United States v Miami Univ*, 294 F3d 797, 824 (CA 6, 2002) ("Nothing in the FERPA would prevent the Universities from releasing properly redacted records."); *Bryner v Canyons Sch Dis*, 351 P3d 852, 860; 2015 UT App 131 (2015); *Unincorporated Operating Div of Indiana Newspapers, Inc v Trustees of Indiana Univ*, 787 NE2d 893, 908 (Ind App, 2003) ("Therefore, if a public record contains some information which qualifies under an exception to public disclosure, instead of denying access to the record as a whole, public agencies must redact or otherwise separate those portions of the record which would otherwise render it non-disclosable."); *State ex rel. ESPN v Ohio State Univ*, 132 Ohio St 3d 212, 220; 2012-Ohio-2690; 970 NE2d 939 (2012) ("With the personally identifiable information concerning the names of the student-athlete, parents, parents' addresses, and the other person involved redacted, FERPA would not protect the remainder of these records."); *Kernel Press, Inc v Univ of Kentucky*, ___ SW3d ___, ___ (Ky App, May 17, 2019) (Docket Nos. 2017-CA-000394-MR and 2017-CA-0001347-MR); slip op at 7 ("Even those records in the investigation file that directly relate to a student are not prohibited from disclosure if properly redacted.").