

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION AT COVINGTON
CASE NO. 2:16-CV-00028-WOB-JGW
-Electronically Filed-

JANE DOE

PLAINTIFF

v.

**NORTHERN KENTUCKY UNIVERSITY'S RESPONSE
TO PLAINTIFF'S MOTION FOR SANCTIONS**

NORTHERN KENTUCKY UNIVERSITY, *et al.*

DEFENDANTS

This matter is before the court on Plaintiff's request for judgment in her favor and a trial on damages only as a sanction against Northern Kentucky University as a result of late production of discovery. As NKU did not act willfully or in bad faith and Plaintiff has suffered no prejudice as a result of late disclosure of documents, the motion should be denied.

INTRODUCTION

While Plaintiff's motion raises a variety of issues that arose between the parties throughout discovery, its focus is on two primary issues: (1) why did NKU not produce a copy of the Advocate software database containing student conduct files earlier in litigation; and, (2) why is NKU still producing documents after discovery ended? NKU understands the Court may ask a more significant question first: what type of search did NKU conduct in making its document production? In answering each of these questions, NKU will explain the process it employed in responding to Plaintiff's discovery requests and the Court's production Order, which clearly exhibits its good faith efforts in discovery. Moreover, NKU will demonstrate that Plaintiff has suffered no prejudice by the delayed production of these documents.

SUMMARY OF THE ARGUMENT

As disused herein in detail, NKU has acted in good faith and with due diligence to respond to all discovery requests and related orders. Moreover, none of the late produced documents prejudice Plaintiff from her case. Many of the documents produced late contain information that was provided in earlier productions, were in Plaintiff's possession before litigation commenced, were publically available online or otherwise, were cumulative in nature (as in the case of a few additional "other incident" files) or not of substance to Plaintiff's theory of the case.

The case before this Court is whether NKU was deliberately indifferent in responding to Plaintiff's claims of sexual misconduct. The guidance issued by the Office of Civil Rights to institutions of higher education provides the response to claims under Title IX has always been one of "reasonableness." The simple fact is Plaintiff's claims are largely time-barred and she cannot meet her prima facie burden. Recognizing these facts, Plaintiff has engaged in extensive discovery of matters unrelated to her claims. Despite having provided nearly 5,000 pages of initial discovery to Plaintiff concerning her claims of sexual misconduct and NKU's policies and procedures, NKU engaged in due diligence to identify and produce thousands more documents concerning non-party claims of sexual misconduct. The Court permitted discovery of other claims of sexual misconduct upon Plaintiff's assertion of alleged pattern-or-practice, but as addressed in NKU's Memorandum in Support of Summary Judgment and will be further addressed in the forthcoming motion in limine, the records establish those claims are markedly different and have absolutely no bearing on whether NKU was deliberately indifferent to Plaintiff.

Production of records involved extensive review of records involving numerous offices on campus with various degrees of involvement in claims of sexual misconduct, and which involved not only student-on-student misconduct claims such as Plaintiff's, but claims involving faculty and staff as well. The documents, once collected, were sorted by incident in order to assist all parties and counsel in the use of these documents. Throughout this process NKU has engaged in review and confirmation of records in an effort to ensure full and complete production of records that were not maintained, nor required to be maintained, in any single repository.

Despite having produced records concerning over 64 other alleged incidents of sexual misconduct, Plaintiff has only questioned witnesses in this matter as to a handful of specific incidents of alleged misconduct, representing less than 300 of the over 3,000 pages of non-party record production. At least two of the incidents referenced by Plaintiff in discovery did not even fall within Plaintiff's requested discovery. Counsel for NKU identified such fact and Plaintiff identified those incidents with particularity for inclusion in this Court's order of October 27, 2016. Despite this fact, Plaintiff did not request or disclose to NKU (or examine any witness about) an incident which NKU did not consider sexual misconduct until supplementation of her Rule 26 disclosures on January 16, 2016. Yet Plaintiff now complains of non-production, despite the fact the record clearly reflects that NKU has promptly investigated and responded to any inquiry by Plaintiff as to matters of deficient discovery production.

As discussed herein Plaintiff's argument that NKU's late production is an effort to conceal a lack of compliance with the Clery reporting requirements is factually and legally inaccurate. NKU was subject only to a "good faith" effort to report the various forms of sexual misconduct identified by the Violence Against Women Reauthorization Act of 2013 prior to the

July 1, 2015 effective date for the new regulations issued as a result. Even then, Clery does not alter or enhance any duty allegedly owed Plaintiff and the University's Clery compliance is entirely irrelevant of the issue whether the University was deliberately indifferent in its implementation of the sanctions issued against Plaintiff's attacker.

ARGUMENT

1. NKU conducted a good faith thorough and diligent search for records.

a. NKU's initial discovery responses.

On January 27, 2016, detailed litigation hold letters were provided to the individual Defendants and a number of NKU officials who might have reasonably possessed records or information related to Plaintiff's claims. *See* Exhibit 1, Affidavit of Sara Kelley at ¶2; *see also* Exhibit 2, Litigation Hold letter. The recipients also received an explanatory letter and were instructed to telephone counsel to affirmatively state their understanding and given opportunities to ask any questions. *Id.* In initial discovery, Plaintiff served 20 Interrogatories which included 36 subparts and 28 Request for Production of Documents. NKU responded on May 2, 2016 to Plaintiff's opening requests and produced approximately 3,500 pages of documents.

In order to respond to the initial discovery requests, NKU assigned its associate general counsel Sara Kelley to oversee the collection of potentially responsive materials and to be available to instruct the various NKU officials concerning retrieval of documents responsive to discovery requests. Ex. 1 at ¶4. Kelley met with Ann James, Deputy Title IX Coordinator and Associate Dean of Students, who assigned her Coordinator, Julie Bridewell, to take the lead on document production for student conduct records as she was the primary custodian of records for the Student Conduct office. *Id.*, at ¶5. Kelley and Bridewell met to review the discovery requests and discussed the information that needed to be retrieved. *Id.* Bridewell then gathered

documents related to all cases of sexual harassment, assault and unwanted touching for past five years¹ from the “K: drive,” Advocate, and department emails. *Id.*, at ¶6. The “K: drive” is the primary area within the Dean of Student’s office where student misconduct files are maintained electronically. *Id.*, at ¶7. Advocate, as explained in more detail below, was one tool used by NKU student affairs staff to document student issues related to housing, conduct, and personal wellness. It functioned as an electronic records management database. *Id.*, at ¶8. Bridewell ran a query in Advocate for charges that were related to Title IX matters, (except for stalking, dating violence or domestic violence). That query resulted in an electronic list of cases responsive to discovery. Using that list Bridewell pulled the documents related to each case from the K: drive. *Id.*, at ¶9. To check her Advocate query, Bridewell performed a ‘terms’ search in both Advocate and the K:drive. She searched both locations in an attempt to ensure she located all subject files. Bridewell also sought assistance from the Advocate helpdesk. *Id.*, at ¶10.

For that initial retrieval of documents, Kelley also met with Gabby Dralle at the Norse Violence Prevention Center (“NVP”), NKU Title IX Coordinator Kathleen Roberts, Chief of Police Les Kachurek, and Tammy Knochelmann and Katie Herschede (both of whom are the President’s staff) regarding discovery and what was inclusive to the requests. *Id.*, at ¶11. Kelley followed up via email and phone calls with numerous others who might have been in possession of relevant documents. *Id.*, at ¶12.

As records were received by NKU’s legal office they were reviewed with support from General Counsel and a law clerk. When a question arose regarding records, Kelley followed up with the custodian of the record and/or consulted with in-house or outside counsel in an effort to ensure discovery was complete. *Id.*, at ¶13. The legal office uploaded documents to an electronic

¹ This initial search for documents predated the Court’s discovery Order and thus was not identical to the terms required by the Court.

password protected portal made available to outside counsel which NKU had created for confidential and privileged document sharing with counsel, but compatibility conflicts arose between the systems and NKU discontinued that process. Documents were then provided by other means including email, hard copy and external portable hard-drives. *Id.*, at ¶14-18.

Related to initial discovery responses, NKU sought to address production of student education records consistent with NKU's Family Education Rights and Privacy Act (FERPA) obligations at the time of initial Rule 26 disclosures and discovery responses.² Plaintiff consistently objected to the applications of FERPA. While NKU was entitled to rely upon Plaintiff's education records in defending themselves against her claims, NKU expressed it would honor Plaintiff's wish, as expressed through her choice to proceed under pseudonym, to avoid public disclosure of her identity and produce her records subject to redaction of personally identifying information.

However, many of the requested records related to Plaintiff also constituted education records of other non-party students, such as Student M (as Plaintiff's assailant has been identified throughout filings and discovery), and others. NKU was legally obligated to ensure FERPA compliance in the production of those records, and requested Plaintiff agree to entry of an Agreed Order addressing such production. Dispute as to the production of these records and FERPA compliance was ultimately taken to Magistrate Smith who directed entry of an Agreed Order consistent with NKU's FERPA notice requirements. NKU never refused to provide these documents but objection was made to ensure compliance with FERPA. *See* Doc #: 23 (Order of July 13, 2016). Non-party students associated with the events involving Plaintiff were provided notice of production and some filed objection with the Court, which objections were ruled upon

² Communications with counsel and the Court concerning these initial FERPA discovery issues are attached here as Exhibit 3.

and NKU made timely and appropriate production in response and accordance with each ruling, as well as supplementation of its initial production, of 788 additional pages of documents. In total, NKU made a supplemental production of approximately 1,200 documents between June 24, 2016 and September 9, 2016. Within that production, NKU produced approximately 950 pages of documents concerning the Plaintiff and Student M as well as Student M's girlfriend and two other students involved.³

b. NKU's production of non-party records.

Plaintiff further sought records concerning alleged sexual misconduct matters involving non-parties having no relationship to Plaintiff's claims. NKU objected to such production as overly broad and burdensome and not likely to lead to the discovery of relevant information. NKU further objected on FERPA grounds. The Court ruled in favor of production and entered its October 27, 2016 Order concerning the production of documents "relating to any allegations of sexual assault, sexual misconduct, rape, and/or unwanted advances that occurred on campus and in offsite living quarter quarters in the last seven years..." in compliance with FERPA. This Order gave NKU five days to identify any students and provide notice to them that materials concerning their involvement in allegations of sexual misconduct, or unwanted advances would be disclosed to Plaintiff and produced in this matter. The Court provided the students ten calendar days from the date of the notice to seek protective action with the Court. For those students who made no objection, NKU was given five business days to complete the document production.

³ Plaintiff later issued five additional Interrogatories including 10 subparts and 11 additional requests for production of documents which were timely answered January 17, 2017.

To comply with the Court's October 27, 2016 Order, Kelley again met with key individuals such as James, Dralle, Bridewell and Roberts to discuss the documents produced to date and to review how the Court's Order differed from the original requests.⁴ *Id.*, at ¶19. The Order included a longer time frame (7 years), a broader scope (includes stalking and dating/domestic violence) and excluded off-campus incidents except for the specifically referenced matters regarding two incidents involving basketball players.⁵ Kelley explained that NKU was operating under a very short deadline and gave Bridewell and Dralle a deadline of November 3 in order to produce the items because FERPA notice letters had to be mailed in five business days. *Id.*, at ¶26. Kelley also met with Rachel Green, Deputy Title IX Coordinator for employees and EEO Officer during the same time period and provided Green with the same information and informed her supervisor as well in order to ensure that any employee files that would fall within the scope of the Court's Order were also collected for production. *Id.*, at 23.

NKU provided FERPA notice letters to 85 students which included victims and accused where applicable.⁶ Copies of these letters were provided to Plaintiff on November 3 and 4, and sent again on November 15. *See* Exhibit 4. A total of 64 other incidents were initially determined to fall within the scope of the Court's Order.

Because NKU collected file materials from multiple sources, NKU, through counsel, organized the files for production by incident. After having recanvassed their campus records to ensure compliance with the Court's October 27 Order, NKU transmitted those responsive documents to counsel via external hard drive. Upon receipt, counsel printed hard copies of all

⁴ Kelley confirmed that Plaintiff's and Student M's files had already been produced. *Id.*, at ¶20.

⁵ In fact, the Plaintiff's discovery requests were worded in such a way that they did not include the 2016 basketball player incident. Plaintiff was alerted to that fact and the incident was specifically included in the Court's Order since it otherwise fell outside the scope of the Court's Order as it occurred off-campus.

⁶ Originally, notice was only provided to 85 students, one was later identified and received notice as well.

incident files and three attorneys and the case paralegal then conducted a secondary review of those files. Any questions concerning possible additional documentation were transmitted to NKU, who engaged in further review of hard files and electronic records to either provide further supplementation or confirm that all known records had been provided. The original “other incident” files were then produced on November 21, 2016. *See Exhibit 5.*

During this time counsel was further required to segregate the files of those students whom Magistrate Wehrman verbally identified at the settlement conference as having filed production objections with the Court, as those records could not be produced under the terms of the Order until such time as the Court ruled on those objections. Those records were produced on December 7, 2016 after Judge Wehrman overruled the students’ objections. *See Exhibit 6.*⁷ Altogether, NKU produced 64 “other incident” files totaling 2,632 pages. A summary of all of NKU’s production of documents is attached as Exhibit 9.

Included in documents produced were a number of documents that relate to services provided to the students after their report of an allegation of sexual misconduct, such as ongoing follow-up texts between NVP support representatives and the victim, or NVP communications with professors on behalf of students to request an excuse from class. Those documents do not necessarily “relate” to reporting an allegation of sexual assault or adjudicating any student disciplinary matter, but NKU produced those items to assure compliance with the Court’s Order. NKU’s efforts to respond to the discovery requests and the Court’s Order detail the good faith actions of the University.

⁷ File materials were also produced on December 1 where objection had been made but not in accordance with the Court’s Order and for one additional file. *See Exhibit 7.* On January 4, 2017, the remaining incident file was produced whose FERPA noticed had been delayed. *See Exhibit 8.*

2. Why did NKU produce documents at the end – and after – the discovery deadline?

Even though NKU acted in good faith and with due diligence throughout discovery, the document collection and production was discovered to have been imperfect. While some documents were not originally discovered, and some were inadvertently omitted from production, none of those actions were taken in bad faith. As discovery continued and depositions were taken, Plaintiff identified documents she thought should have been produced. At times, Plaintiff's assumption was not accurate and an explanation was provided. At other times, where investigation determined accurate, NKU promptly responded to the requests for those specific documents or information. When making diligent inquiry into these requests, other responsive documents were in some instances identified and promptly produced. Later, in preparing motions and briefing for the Court, a student incident file was discovered to have been originally omitted and was promptly produced. As a result, NKU and counsel conducted further due diligence and searched again for responsive documents. A comprehensive comparison of documents between those gathered by NKU and those produced to Plaintiff was conducted. All other documents then identified were produced on March 17, 2017. A detailed description follows to demonstrate none of the actions or omissions were made in bad faith.

a. The February 1, 2017 production

One issue that Plaintiff focuses on in attempting to prove her claim of deliberate indifference against NKU is that the University did not enforce the sanctions against her assailant because on occasion it allowed him permission to be in an area of campus where he was alleged to be prohibited. NKU specifically addressed this allegation at length in its Memorandum in Support of Motion for Summary Judgment on pages 21 – 22. (Doc #165-1, page ID #3655-3656). As detailed there, on eight occasions, Student M was granted permission, upon written

request, to attend University events or intramural activities in the Norse Commons area and the adjacent intramural fields or sand volleyball court. Concerning the denials of Student M's request, the University originally produced denials relating to a request of August 31, 2016 (APO Supp-000468-469 attached to NKU's Memorandum in Support of Motion for Summary Judgment at Exhibit 52 separately tendered pursuant to a Motion to File Under Seal with the Court). Documents concerning that denial of Student M's request were produced to Plaintiff via email of September 9, 2016 which Plaintiff has attached to her Memorandum in Support of Motion for Sanctions as Exhibit 3. (Doc #163-4 page ID #3515). On December 9, 2016, Plaintiff took the discovery deposition of Anne James, the Associate Dean of Students and former Title IX Coordinator for NKU. At her deposition, Plaintiff questioned James at length about the various considerations for Student M's request concerning his sanctions. On January 19, 2017, Plaintiff's counsel emailed counsel for NKU as follows:

On page 21 of her deposition, Anne James said that Steve Meier *granted* a written waiver to Doe's attacker. We do not see that in the documents, even though she said it was done in writing. Would you provide that, please? Certainly that came under our document requests.

See Exhibit 10 (emphasis added). In reviewing the deposition transcript however, James did *not* testify a waiver was *granted* but rather that one was *denied*. James Depo., at p. 21. When that fact was reported to counsel, Plaintiff then clarified that she was looking for any denials or permission granted by Meier. That email from Meier was immediately retrieved and provided to Plaintiff on January 20, 2017. *See* Exhibit 11.

In searching for this Meier email, counsel discovered that it was contained within documents which NKU had uploaded to the electronic portal made available to counsel for

which difficulties arose due to a lack of connectivity and compatibility between two offices.⁸ As counsel and NKU were attempting to discover why this email was not earlier produced, it was discovered that one batch of documents was not identified to counsel as being available and was not retrieved. This February 2016 email from Steve Meier to Student M was within that batch of documents. All documents within that batch were then produced on February 1, 2017 and included approximately 17 pages of emails responsive to Request for Production No. 3, a 57 page document entitled the Campus Climate Survey and other documents which were responsive to requests for NKU responses to Open Records Request made by media representatives included under Request for Production of Document No. 27. These items will be more thoroughly addressed below to demonstrate that the nature of their contents created no prejudice for Plaintiff.

b. The February 10 and 17, 2017 productions: why did NKU not previously produce a copy of the database?

On January 24, 2017, Plaintiff took the deposition of NKU's former Dean of Students, Jeffrey Waple. As the Dean of Students, Waple was the official who issued the disciplinary action in student misconduct affairs and who issued sanctions against Student M. During his deposition, Waple referenced a student conduct database maintained by NKU.⁹ In follow-up, counsel emailed on January 31, 2017 asking for an explanation about the database and why it

⁸ To comply with the Court's Order of October 27, 2016, NKU provided counsel all student file materials on an external hard drive versus through the electronic portal.

⁹ Contrary to Plaintiff's assumptions, NKU does not maintain a Clery report form that Student Conduct uses. As Dean Waple testified: "Q. Would it have been your office that would have been required to submit the Clery Act form to the NKU police? A. It would have been our office for filling out the Clery Act, yes, report that's due. I'm sorry, Kevin, you keep saying form. I'm not aware of form. I'm aware of the report that we're required to do. Q. What I mean by form is we were given Clery Act -- I guess it's a called Clery Act report form. A. It's a big document, yeah, we didn't -- Q. It's a document which you filled in. A. Yeah, we didn't get individual forms for each incident. We got that big form and we plug in the numbers. Does that make sense? Q. No, this one was different. Gabby filled out a form on a particular incident, particular day, and have you seen something like that before? A. I can't recall that I have. Depo of J. Waple, at p. 96 -97., attached as Exhibit 12.

was not previously produced in discovery. *See* Exhibit 13. NKU counsel retrieved information from campus and responded the next day, February 1, 2017, offering to speak by telephone to answer counsel's inquiry. *See* Exhibit 14. After having received no response, on February 8, 2017, counsel again emailed Plaintiff's counsel offering to confer regarding the information requested about the NKU database. Plaintiff's counsel responded by declining a telephone conference and requesting a written response. *See* Exhibit 15. As requested, counsel provided a written detail about the use of the databases by NKU, which stated in pertinent part:

Symplicity is a vendor which supplies a case management system called Advocate. Advocate is a tool that can be used to log and track incidents from individual files. NKU previously had a license to use Advocate. Advocate related entry items were contained in some of the documents produced during discovery. For example, Document FERPA-070000 shows what a document that was printed from the Advocate system would look like. Maxient, however, is a different program altogether. In the Summer of 2016, NKU discontinued the use of Advocate and began using Maxient.

...The University reports that before the transition to Maxient student misconduct files were stored on a separate intranet drive on campus referred to as the "k: drive." In addition to the materials and information stored on the k: drive, the University reports that in 2010 it purchased the license for the Advocate case management system from Symplicity. At that time, Advocate was used only by Housing in order to track a variety of incidents, such as the cleanliness of dorm rooms and roommate conflicts. Therefore, Advocate was not solely limited to student misconduct (or sexual misconduct). It is my understanding that initially Advocate was not used for sexual misconduct at all.

When the University used Advocate, it was a tool for certain data entry points. However, records were also stored on the k: drive. Because the University transitioned from Advocate to Maxient, the University exported a complete record of the information entered into Advocate in the form of a Microsoft Excel spreadsheet. Attached with this correspondence, are those spreadsheet entries that I have been provided by the University which correspond to the other incidents that had been previously produced in discovery...

See Exhibit 16. Counsel further offered to make available for supplemental deposition Ann James to speak as to the use of these database systems, at the University's cost. *Id.*

As explained in this correspondence, NKU provided Advocate entries for 23 of those student-related incidents previously produced.¹⁰ In total, the Advocate database contains several hundred entries for each year of its use. While some student sexual misconduct cases are listed in the Advocate database, not all are present as it was not an exclusive system, nor did it contain incidents involving faculty and staff. In addition, hundreds of other entries appear for other student issues such as vandalism to property or other non-misconduct related items such as a water leak in a bathroom.¹¹ In fact, the Advocate system was so cumbersome and unhelpful that Meier and Dean Waple primarily used only the k: drive for information related to misconduct matters. To produce the entire list of Advocate entries, thousands of FERPA notices or other redactions would have been required. Moreover, because the Advocate data was largely a restatement of information contained elsewhere in other documents separately maintained, the information was superfluous.

Plaintiff's motion infers that NKU must have had some ulterior motive for switching student conduct databases in the midst of this litigation. However, the change in software was due to NKU electing a more efficient use of its systems. Student Conduct originally purchased Advocate software license in June 2010 (well before the 2011 Dear Colleague letter from the Department of Education that resulted in such enhanced measures by universities throughout the country). Advocate does not solely focus on student conduct. Instead, it is a more generic product available to higher education, business and governmental entities. Maxient on the other hand is a dedicated higher education student conduct tool, more robust and user friendly. Maxient allows for greater customization; NKU's license with Advocate expired in June 2016 so

¹⁰ As explained below, NKU actually included one additional file listed assuming it had been earlier produced.

¹¹ NKU will provide the unredacted Advocate database for the Court's *in camera review* if needed by forwarding the Excel Spreadsheets containing the data.

NKU needed to decide whether to renew with Advocate for another three year term or transition to another system. In early 2016, the Student Conduct office met to begin the process of making that decision. Because of the improvements Maxient offered, Student Conduct elected to purchase that software license. *See* Exhibit 1 at ¶¶ 33-35. Julie Bridewell within the Student Conduct office had numerous conversations with Maxient technicians about how the transition would take place. Student Conduct never considered the move from Advocate to Maxient as destroying any data or information because she was informed that the old Advocate data would be preserved. *Id.*, at ¶¶ 36-37. And in fact the Advocate data was preserved when the data was exported into Microsoft Excel spreadsheets.

As explained to Plaintiff's counsel, the Advocate database was not a sole source housing the University sexual misconduct files. *Id.*, at ¶ 38. Rather, those documents were also saved to what the University calls the K: Drive, which is part of its internal computer information system accessible within the Dean of Students' office as well as maintained by Human Resources at NVP. *Id.* It was all of these sources which were searched in order to provide documents responsive to Plaintiff's discovery requests and the Court's October 27, 2016 Order. Upon review by counsel of the Advocate database Excel spreadsheets, there were two additional incidents that were identified as being likely within the scope of the Court's Order. These two incidents were identified to the Plaintiff in this February 10, 2017 disclosure as well as its supporting documents. The actual Advocate database entries for these three matters were then produced in redacted format on February 17, 2017. *See* Exhibit 17.

c. The March 2017 production of documents

Contemporaneous to preparing the Motion for Summary Judgment on behalf of NKU, counsel also was in the process of drafting a Motion in Limine. In part, the Motion in Limine

will focus on the limitation and exclusion from trial of the vast majority, if not all, of these other incidents as they do not involve either Doe or her assailant and lack any element of commonality to Doe's case. The Court's Order of October 27, 2016, specifically reserved the right of either party to object to the admissibility into evidence of any of these incidents.

In the process of preparing for that Motion in Limine, counsel discovered that one incident of vandalism/stalking had not been previously produced. By way of telephone call and then subsequent email of March 3, 2017, counsel disclosed this incident to Plaintiff's counsel which involves an ex-boyfriend spray-painting the vehicle of a female student. Documents concerning the incident were produced to Plaintiff as of that date. *See* Exhibit 18. Because NKU's counsel was under the impression the documents from this file were previously produced, this incident was included in the list of 24 files whose Advocate listings were provided on February 10, 2017. Plaintiff never raised any issue about this incident after receiving Advocate listings on February 10.

Because that incident was not produced as intended in the FERPA production of documents, counsel and NKU jointly conducted a comprehensive review in order to assure that all documents had been produced to Plaintiff. Unfortunately, this analysis revealed further documents which were not provided to counsel. Those documents were produced on March 17, 2017 as detailed in the attached correspondence (the names of the identifying students have been redacted for privacy purposes with this filing). *See* Exhibit 19. Many of the documents are transmittal emails. In these situations the attached document has been previously produced, but the transmittal email may not have been. In many other instances, the emails contained general perfunctory statements passing along information or scheduling meetings.

However, in conducting this re-evaluation of documents, counsel did discover three other anonymous complaints which were not previously produced as well as documents concerning four other matters. Again, there does not appear to be any commonality between these other matters and the Plaintiff's situation. Certainly, none of these other matters involve the Plaintiff's assailant. However, NKU acknowledges that these documents were included within the scope of the discovery and should have been earlier produced despite the diligent search previously performed.

4. Applicable law concerning the sanction of striking an answer requires the party's conduct to have been made willfully or in bad faith and resulted in prejudice to the Plaintiff.

Plaintiff requests the Court sanction NKU by granting judgment in her favor and proceed to trial on damages only. She bases her request on Federal Rule of Civil Procedure 37(b)(2)(A). Numerous cases recognize that this most severe sanction – whether it be rendering a default judgment (against a defendant) or dismissing the action (against a plaintiff) – are sanctions “of last resort that may be imposed only if the court concludes that a party's failure to cooperate in discovery is due to willfulness, bad faith, or fault.” *See e.g., Stamtec, Inc. v. Anson*, 195 Fed. Appx. 473 (6th Cir. 2006), quoting *Patton v. Aerojet Ordnance Company*, 765 F.2d 604 (6th Cir. 1985); *Bank One of Cleveland, N.A. v. Abbe*, 916 F.2d 1067 (6th Cir. 1990).

In reviewing the propriety of dismissals and default judgments under Rule 37, the Sixth Circuit considers four factors: (1) whether the failure to cooperate in discovery is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the failure to cooperate in discovery; (3) whether the sanctioned party was warned that failure to cooperate could lead to dismissal or default judgment; and (4) whether less dramatic sanctions were imposed or considered before dismissal or default judgment was ordered. *Regional Refuse*

Systems, Inc. v. Inland Reclamation Co., 842 F.2d 150 (6th Cir. 1988) *superseded by statute on other grounds, as recognized in Vance, by and Through Hammons v. United States*, 182 F.3d 920 (6th Cir. 1999). The Court has consistently recognized that “[j]udgment by default is a drastic step which should be resorted to only in the most extreme cases.” *United Coin Meter Co. v. Seaboard Coastline Railroad*, 705 F.2d 839, 845 (6th Cir.1983). “Trials on the merits are favored in federal courts and a ‘glaring abuse’ of discretion is not required for reversal of a court’s refusal to relieve a party of the harsh sanction of default.” *Id.* at 846; *see also Dassault Systemes, SA v. Childress*, 663 F.3d 832 (6th Cir. 2011).

None of the *Regional Refuse* factors are outcome-dispositive, but a case should be terminated only “where there is a clear record of delay or contumacious conduct.” *Knoll v. AT&T*, 176 F.3d 359, 363 (6th Cir. 1999). “Contumacious” is defined as “perverse in resisting authority” and “stubbornly disobedient.” *Schafer v. City of Defiance Police Dep’t*, 529 F.3d 731, 737 (6th Cir. 2008).

A recent case demonstrates why striking the Answer and entering default judgment is not warranted here. In *Phipps v. Accredo Health Grp., Inc.*, 2017 WL 685579 (W.D. Tenn. Feb. 21, 2017), the defendant disclosed electronically stored information (ESI) a very short time before the deadline for supplementation of discovery, and continued to produce newly discovered ESI after that deadline and *after* the parties had fully briefed a motion for summary judgment. Thus in *Phipps*, the defendant produced documents later than NKU has supplemented its materials here. The *Phipps* defendant claimed the late disclosure was inadvertent rather than the product of willfulness, bad faith or fault. The district court ruled that the conduct did not justify default judgment, even though the plaintiff was unquestionably prejudiced (which Plaintiff has not been here). *Id.*, at 5.

The *Phipps* Court applied the four factor test employed by the Sixth Circuit, holding “[w]illfulness or bad faith ‘requires a clear record of delay or contumacious conduct.’ Contumacious conduct means ‘behavior that is perverse in resisting authority and stubbornly disobedient.’ The Court has no basis to conclude from the record currently before it that Defendant ‘display[ed] either an intent to thwart judicial proceedings or a reckless disregard for the effect of [its] conduct on those proceedings.’” *Id.*, at 4, citing *Carpenter v. City of Flint*, 723 F.3d 700, 704 (6th Cir. 2013). While noting the defendant had not shown an inability to produce the emails in the course of the regular discovery period but claimed failure as the result of “innocent oversight.” *Id.* In that regard, the Sixth Circuit has previously addressed the element of human error:

specifically ‘the excuse of bad memory,’ as a reason for a party's inability to comply with discovery orders and observed as follows in the context of Rule 37(b)(2) sanctions: ‘While it is true that one is not obligated to provide perfect responses to discovery requests, and that district courts must make room for some lapses of memory, plaintiffs must do as much as they can, and certainly more than they did here, to provide defendants with all relevant discoverable information.’ The Sixth Circuit’s *dicta* aptly describes the situation the Court now confronts. While Defendant’s late disclosures are by no means excusable, Defendant’s failure to produce the Bruhn emails and Thompson emails within the deadline for supplementation was apparently a matter of negligence, and not willfulness or bad faith. The Court concludes then that while the first factor weighs in favor of some sanction, it weighs against the sanction of default judgment.

Id., at 4-5 quoting *Bryant v. U.S., ex rel. U.S. Postal Serv.*, 166 Fed.Appx. 207, 210–11 (6th Cir. 2006). Ultimately, the *Phipps* Court imposed alternative sanctions, including a second re-opening of discovery, additional briefing, and an award of attorney's fees and expenses related to the preparation and filing of Plaintiff's Motions for Sanctions, the additional discovery necessitated by Defendant's late disclosures, and the supplemental summary judgment briefing. *Id.*, at 6.

Here, the complained of conduct cannot be considered to be have been a “clear record of delay.” *Knoll*, 176 F.3d at 363. NKU has repeatedly conferred with Plaintiff and addressed with the Court concern over the application of FERPA, particularly as it applies to students in the other incidents. Exhibit 20 demonstrates efforts made by counsel, and involvement with the Court in order to ensure NKU did not run afoul of FERPA. *See also* Doc #23 (Order of July 13, 2016). Furthermore, NKU’s review and timely production of 64 incidents (all of which Plaintiff wanted and claims is relevant to prove her claim of deliberate indifference) is not behavior that is “perverse in resisting authority” and “stubbornly disobedient.” *Schafer*, 529 F.3d at 737. At worst, timely identifying and producing 64 incidents rather than 71 incidents was “innocent oversight,” *Phipps*, 2017 WL 685579 at 4, and in any event falls far short of “either an intent to thwart judicial proceedings or a reckless disregard for the effect of [its] conduct on those proceedings.” *Carpenter*, 723 F.3d 704.

Plaintiff may point to prior incidents in the case where the Court has ruled against NKU as evidence of a history of prior bad conduct. However, in many instances, the Magistrate Judges overseeing the discovery disputes initially ruled in NKU’s favor or attempted to forge workable agreements by all parties. *See* Doc #39 (Order of July 28, 2016); Doc #128 (Order of December 1, 2016); Doc #130 (Transcript). While the District Court’s opinion certainly is controlling, when NKU first obtains favorable intervention by the Magistrate Judge it undermines any finding of having acted willfully or in bad faith.

Another recent case, *Brown v. Tellermate Holdings Ltd.*, 2015 WL 4742686 (S.D.Ohio August 11, 2015), is also instructive and presents a factual pattern far beyond anything that occurred in NKU’s case. In *Brown*, the plaintiffs were two terminated sales employees who filed suit accusing the defendants of age discrimination. The Court described the case as “an

appalling example of discovery run amok” and that “the parties repeatedly clashed over discovery matters, necessitating the Magistrate Judge’s frequent intervention.” *Id.*, at 1. In the motion for sanctions, plaintiff accused defendants of various acts intended to thwart discovery including the lack of preservation and production of software records and records concerning another former employee’s age discrimination lawsuit, and the company’s production of 50,000 pages of employee performance-related documents. *Id.*, at 2.¹² Regarding the other employee’s discrimination complaint, the Magistrate Judge’s review and recommendation noted “[t]he short summary of the saga of the Mecka documents is that they keep turning up, and that Defendants, at least through prior counsel, made a number of representations about how many of them there were, all of which turned out to be wrong. First there were two; then there were four; then seven; then thirty; now, an indeterminate number much higher than thirty.” *Brown v. Tellermate Holdings Ltd.*, 2015 WL 1468796 at 2 (S.D. Ohio March 30, 2015).

The Magistrate was clearly troubled by the defendants’ conduct, but still refused to grant default judgment. The Court noted that while the “the continued expansion of the universe of [the other employee complaint] documents is problematic...[and] [t]he efforts to locate and produce all of the [those] documents after this Court overruled the claims of privilege were not optimal, [] it now appears they have all been produced, and the Court accepts the Defendants’ statements that most of the previously-unproduced documents are not substantive in nature.” *Id.* The Magistrate further concluded that prejudice was minimal to the plaintiff. *Id.*, at 6 (“[t]here has been no clear showing how the struggle to get the Mecka documents identified and produced

¹² Compare that listing to what Plaintiff’s complains of here. NKU produced a listing from Advocate of data which was in large part, but in a different format, previously provided in discovery. NKU identified and produced 64 files of other incidents concerning rape, sexual assault misconduct or unwarranted advances but identified and produced seven more incidents late. NKU has produced over 9,000 pages of documents and Plaintiff claims that each of them are relevant (as opposed to the 50,000 pages produced by defendant in *Brown* which the Court labeled a “document dump” consisting of mostly “irrelevant and nonresponsive” documents). *Id.*, at 3.

has affected the Browns apart from the time and expense they have incurred to force Defendants to comply with their requests and the Court's orders"). Affirming the Magistrate's recommendation, the Court declined to enter default. 2015 WL 4742686. While NKU's production has not been "optimal," its efforts clearly do not reflect bad faith or willfulness.

Similarly, in *Peltz v. Moretti*, 292 Fed. Appx. 475, 479 (6th Cir. 2008), the Sixth Circuit reversed a decision granting default judgment as a discovery sanction against one defendant because, its conduct, while sanctionable, was only "contumacious" for a relatively short period of time. In addition, since the opposing party had access to the documents it had requested in discovery through alternate means, the Court determined the opposing party was not prejudiced. *Id.*, at 480. As demonstrated elsewhere, Plaintiff has had much of the information contained in the late disclosed documents through other documents produced in this litigation or which was already in her possession or otherwise publically available. The remaining information is cumulative to matters earlier produced in discovery. *See also, Geig v. March Co.*, 59 F.3d 170, 1995 WL 376717, 3-4 (6th Cir. 1995) (vacating the sanction of default judgment and holding that the delay caused by the defendant's conduct was not sufficient – in the absence of tangible harm such as lost evidence, discovery problems, or the opportunity for fraud – to justify such a harsh sanction); *General Envtl. Science Corp. v. Horsfall*, 25 F.3d 1048, 1994 WL 228256, 10 (6th Cir. 1984) (TABLE) (vacating the sanction of default judgment and holding "a certain amount of resistance and wrangling during the discovery process is the norm rather than the exception" and whether defendant's "actions can be attributed to willfulness, bad faith, or fault we feel is too close a question to justify a default judgment"). Correspondence among counsel reveal that this case has not had either party blocking depositions. *See e.g., Exhibit 21. See also Smith v. E & L Transport Co.*, 856 F.2d 196 (6th Cir. 1988) (affirming the district court's "refus[al] to grant the

drastic sanction of default judgment. The record before this court contains no evidence of willful, egregious misconduct on appellee's part. Clearly, the district court committed no abuse of discretion in refusing to impose such a drastic sanction in the instant case”).

5. In addition to acting in good faith, NKU's late productions have not prejudiced Plaintiff.

The Sixth Circuit has instructed the second factor to consider is whether Plaintiff was prejudiced by late production of documents. *Regional Refuse*, 842 F.2d at 155. Plaintiff has suffered no prejudice to her case to warrant the imposition of a default judgment as the documents produced late were elsewhere provided in earlier productions, she had them before litigation commenced, they were publically available, were cumulative in nature or not of substance to Plaintiff's theory of the case. To demonstrate the lack of prejudice, an examination the various issues raised by Plaintiff is necessary.

a. The entries in the Advocate database

Plaintiff's case has not been prejudiced by the late production of the Advocate database materials because the substantive data included therein was previously produced. In essence, Advocate was a listing of information that was also housed elsewhere and earlier produced. Advocate lists the date, time and location of the incident, the individuals involved, whether police were called, if alcohol was involved, a narrative description of the incident, the case's status, the staff assignment, any administrative classification of the event (i.e., arson, hate crime, bias/incident type, Clery reporting, Clery charges), the existence and result of any administrative charges, and the type of documents and notes. For this sample, the detail in Advocate for Plaintiff, contained on the sheet titled 2013, at line 14, provides no new information not already provided Plaintiff. For privacy reasons, NKU will not restate the entirety of the information here, but will tender the Advocate data from 2013 under seal to the Court. *See Exhibit 22.* (The

exhibit may need to be reviewed by zooming in). Because Plaintiff already had the detail *included* in the database, her case has suffered no prejudice by having it restated in database form.

Plaintiff argues that that her case was prejudiced because she did not know how the University classified a particular matter for Clery purposes. But her case is not about NKU's Clery reporting. Instead, her case is about whether NKU was deliberately indifferent to her allegation about sexual assault – or at best – whether NKU was deliberately indifferent to other persons' allegations of sexual assault. The relevant inquiry is what NKU did in response to those students, staff and faculty complaints, not what label NKU gave to the complaints. Regardless, NKU did not use the 'Clery Column' in Advocate to track incidents for Clery reporting. The Student Conduct Office contacted the University Police at the time a Clery reportable offense occurred and worked closely with University Housing and University Police to conduct a year's end review to ensure accurate reporting.

Recent amendments to the Clery Act require institutions like the University to collect and report information about incidents of sexual assault and other forms of sexual misconduct, and to disclose statistics of such incidents in their Annual Security Reports. *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4 at § 304; 20 U.S.C. § 1092(f). Plaintiff alleges the University failed to adequately comply with these requirements, thus resulting in an underreporting of sexual misconduct that led students like Plaintiff to believe they were safer on campus than they really were. According to Plaintiff, the University's problem in timely producing documents about such incidents was actually an effort to conceal a lack of compliance with the Clery reporting requirements outlined above. Plaintiff's argument is factually inaccurate but, moreover, it is also misplaced as a matter of law.

The conduct allegedly experienced by Doe primarily occurred between the Fall 2013 and Fall 2015 semesters. *See* Plaintiff's Amended Complaint (DE #36) at 10-19. The Violence Against Women Reauthorization ("VAWA") was signed into effect on March 7, 2013. *See* Pub. L. No. 113-4. Among other things, VAWA amended Clery to address the reporting requirements on which Plaintiff relies. *Id.*; 20 U.S.C. § 1092(f). In turn, the United States Department of Education ("Department") had to promulgate regulations to implement the amendments to Clery. *See* May 29, 2013 Memorandum on Implementation of Changes Made to the Clery Act by the Violence Against Women Reauthorization Act of 2013, available online at <https://ifap.ed.gov/eannouncements/052913ImplementofChangesMade2CleryActViolenceAgainstWomenReauthorizationAct2013.html> (last visited March 20, 2017). The Department provided that, until the regulations were issued, universities would be expected simply "to make a good faith effort" to comply with the changes to Clery. *Id.*

The Department published its regulations on October 14, 2014. *See* Final Rule on Violence Against Women Act, Fed. Reg. 79, 202 (October 20, 2014). In doing so, the Department repeatedly stated the regulations would not be effective until July 1, 2015, such as to allow universities sufficient time to come into compliance. *Id.* Even after those regulations took effect, the Department made it clear:

[T]he changes made to the Clery Act by VAWA did *not* affect in any way Title IX of the Education Amendments of 1972 (Title IX), its implementing regulations, or associated guidance issued by the Department's Office for Civil Rights (OCR). *Nothing in the Clery Act, as amended by VAWA, alters or changes an institution's obligations or duties under Title IX as interpreted by OCR.*

See Department of Education's July 22, 2015 "Dear Colleague Letter" on Implementation of the VAWA Final Regulations, available online at <https://ifap.ed.gov/dpcletters/GEN1515.html> (emphasis added). Thus, Clery did not and does not in any way alter or enhance any duty

allegedly owed by the University under Title IX to Plaintiff or any other student. Further, the University's compliance with Clery reporting requirements is entirely irrelevant to whether the University was deliberately indifferent in its implementation of the sanctions issued against Doe's attacker. Accordingly, Plaintiff's Clery arguments are immaterial and should be rejected.

b. The Maxient database

Plaintiff's Memorandum also complains that NKU has not produced any information from the Maxient database. Plaintiff's Memorandum, Doc #:163-1, Page ID# 3483 ("[e]qually troublesome is the fact that NKU has not produced any documents from its new database, Maxient."). That simply is not true. Although the Maxient database was only in existence on campus beginning in August 2016, in its FERPA production, NKU produced a number of documents from Maxient. For example, NKU produced pages numbered FERPA 49000-49004, FERPA 71000-71009 which will be tendered under seal with the Court. *See* Exhibit 23. The documentation is plainly labeled "Maxient."

c. The Meier email denial.

This email was produced on January 20, 2017 and details that on February 9, 2016 Meier would not permit Student M to attend a student organization function in Norse Commons scheduled the next day. In earlier document production, Plaintiff had already been provided documentation that Student M had been denied permission to attend events in Norse Commons area or the adjacent student recreations volleyball pavilion. *See* Exhibit 24, tendered under seal, APO SUPP 000468-000469, produced in discovery on September 9, 2016. Plaintiff herself was alerted when Student M was permitted to attend certain University events in the area. *See* Plaintiff Depo., at p. 110. To the extent Plaintiff argues that the document was somehow intentionally withheld for nefarious reasons that it somehow harmed the University's defense,

her argument misses the mark. Plaintiff complains of permission *granted*, not *denials*. First, *another* denial of Student M's request only further proves NKU did not simply grant all requests. She knew that fact earlier in discovery, if not before suit was even filed. So no prejudice can result from Plaintiff not being provided this email before January 20, 2017.

Plaintiff also cannot claim surprise or prejudice that James was no longer making decision about Student M's requests because (1) James testified to that in her December 9, 2016 deposition and (2) Plaintiff knew at least as early as September 9, 2016 when NKU produced Exhibit 24. Why was James no longer reviewing Student M's requests in 2016? Plaintiff's original Complaint filed on January 20, 2016 named James as an individual defendant and NKU determined that prudence required removing James and others so deeply involved in the matter from having further interaction with Plaintiff or Student M. Plaintiff and her counsel were advised that her Title IX contact and NVP advocate changed at the time as well. *See* Exhibit 25. There is no prejudice to Plaintiff in the production of this email on January 20, 2017.

d. The Feast for Finals email

Plaintiff further complains that she was unduly prejudiced because NKU produced an email on the last day of discovery from December 2015 from Ann James concerning the on-campus event known as the Feast for Finals. Feast for Finals is an event held in the evening hours in the Norse Commons cafeteria during finals providing students with snacks and activities. The late production of this single email did not hinder Plaintiff's case in any way. The email at issue was between James *and Plaintiff*. Plaintiff cannot have been prejudiced from receiving an email late in discovery when she was the original participant in the email communication over a year prior. In addition, Plaintiff questioned James at length in her

deposition about this event and her interaction with plaintiff and Student M. Because Plaintiff already had the Feast for Finals email and this information, she can demonstrate no prejudice.

e. The Campus Climate Survey

The data included in the Campus Climate Survey produced on February 1, 2017 is publically available on the internet: <http://inclusive.nku.edu/2015-campus-climate-presentation-.html> (last visited March 20, 2017) in substantially similar format. Because most of the information is available online, the details of the document are available to the public at large and have been available to Plaintiff throughout the pendency of discovery. The Campus Climate Survey is an anonymous, voluntary survey that received an approximate 9% student response rate. *Id.* The survey was not a tool to determine how NKU responded to any individual case. The survey was written by NKU committee to gather perception of campus climate, where “campus climate” was defined as individuals' perceptions of safety, prejudice, discrimination, equal opportunities, etc. at NKU. *See* <http://inclusive.nku.edu/2015-campus-climate-presentation-/survey-questions.html>. (last visited March 20, 2017). The survey asked was directed to diversity but did inquire of students about their experience with types of sexual assault, bullying and harassment. *Id.*

NKU produced this item in response to Plaintiff's request for production of documents No. 4 which sought all University “policies, handbooks, guidance, and/or procedures” and “seminars and/or presentations made by university personnel and/or outside agency” about sexual assault, sexual violence, rape, or unwanted touching. In response to that request, the University produced documents concerning its policies, handbooks, guidance and procedures concerning sexual assault, training documents for staff, its annual security and safety reports, and

its “Ten Minute” training materials. In all, NKU produced approximately 750 pages of materials responsive to this request.

As for this document, the Campus Climate Survey was a report published online and offered via presentation that was open to the public. The *Northern Kentucky Tribune* reported on the presentation. See <http://www.nkytribune.com/2015/11/nku-faculty-staff-cite-culture-of-fear-at-the-university-in-responses-to-campus-climate-study/> (last visited March 20, 2017). NKU identified this PowerPoint for production in May 2016. Unfortunately, as explained above, counsel did not recognize that NKU had provided the survey (along with the other items produced on February 1, 2017) when the original document production was made. The oversight in this production was not made in bad faith and was solely inadvertent. Counsel corrected the computer compatibility issues in order to ensure accurate retrieval of all documents but was unaware that this document (and those accompanying the 2/1/17 production had been omitted).

f. Student Athlete Code of Conduct

The late production of the Student Athlete Code of Conduct is similar to the Campus Climate Survey. This document was provided to the *Northern Kentucky Tribune* in response to an open records request. It was designated for production but was inadvertently not recognized at the time. The Student Athlete Code of Conduct is also publically available on the internet: http://nkunorse.com/documents/2015/8/13/SA_Handbook_2015_16.pdf. In fact, a Google search of “NKU student athlete handbook 2015” easily locates the document. Further, Athletic Director Bothof testified to the existence of an athletic student conduct policy at his August 25, 2016 deposition. Doc #74 at pp. 49, 64. Therefore, its existence was not unknown to Plaintiff. Neither Plaintiff nor her assailant would have been subject to this handbook. None of the other student incident files concerned discipline under this Code of Conduct (instead they proceeded

under the NKU Student Misconduct policy or a faculty/staff policy). Plaintiff's case then was not hampered by not having this publically available document until after the depositions.

g. Trespass letters

NKU has produced two trespass letters after the close of discovery. A trespass letter is correspondence directed to a non-student who has no affiliation with NKU and bars them from campus. Trespass letters are commonly used where the University has no jurisdiction to impose any discipline on the recipient. Relevant here, trespass letters were issued to non-students accused of misconduct. NKU produced eight trespass letters not including those produced with other incident files in timely document production as well as lists of persons who had received a trespass letter. For these two incidents, the names of "T.P." and "L.C." were included on the trespass lists produced on November 11, 2016. *See* Exhibit 26 pages NKU SUPP 303, 311, 318, 326, 335, 343, 349, 358, 365, and 373 (Papania) and NKU SUPP 302, 310, 316, 324, 333, 341, 347, 356, 363, 371 (Claybrook). Unfortunately, counsel believed that the actual letters for Papania and Claybrook were included in the larger production. When counsel discovered those letters were not previously provided, they were produced on February 10, 2017 and March 17, 2017 respectively. Plaintiff experienced no prejudice with the late production of these two letters since she was alerted in November 2016 that these two men had been issued a trespass letter.

h. Later identified incidents.

After the close of discovery, NKU reported to Plaintiff the identity of seven additional FERPA files. None share any commonality to Plaintiff's allegations and three involved allegations against non-students. Two incidents were disclosed on February 10, 2017. The first incident was originally identified as potentially responsive the Court's Order but, upon review,

the University determined the allegations related to an incident that occurred at Florence Mall and a private home. Because the incident occurred off-campus, the file was deemed not within the scope of the Court's Order. Upon second review by counsel, it was discovered that the records also contained a complaint from a female student that the male student made sexually suggestive, lewd and unwelcomed comments to her. This did relate to on-campus activity so those items were identified and produced. In her motion, Plaintiff complains that a police report for Incident #1 (NKU # 2012-00217) has never been provided in discovery. But that police report was provided at the time of the disclosure. *See* Exhibit 27.

The second incident identified on February 10, 2017 concerns allegations against a non-student. Because NKU does not institute internal administrative procedures against non-students (who are not otherwise University personnel), very little material is able to be produced. And Plaintiff is aware of this fact as a result of the various other files earlier produced involving non-students. Moreover, this non-student at issue (a male named "S.M.") was included on multiple iterations of the Trespass List produced to Plaintiff on November 11, 2017. In her motion, Plaintiff alleges that no background information was provided concerning the S.M. incident explaining what earlier incident had led to him being trespassed from campus. But actually that information was provided to Plaintiff with the production. *See* Exhibit 28. The information detailed that the male non-student:

wrapped his arms around her, kissed her neck and touched her with his hands while both were standing. [XXX] said these actions were not welcomed. [XXX] said she told him "No" and to "stop" and he continued the same acts several times. She stated she repeated herself and communicated disapproval, additionally she said she would grab his hands and pull them down off of her. [XXX] said she left the room because she was uncomfortable and also to see if someone else was in there. There was no one, she went back to the room and suggested they get breakfast to be in public. [YYY] agreed.

Id. As a non-student, he was "trespassed" from campus.

Similarly, the vandalism incident produced to Plaintiff on March 3, 2017 and mentioned above works no prejudice to Plaintiff. Although inadvertently not timely produced, the incident involves a female student whose ex-boyfriend spray-painted her car just before finals week. She had not previously reported any behavior. The perpetrator was arrested and charged with multiple felony offenses. NKU was proceeding with student disciplinary matters and he dropped out of school.

Concerning the four incidents identified on March 17, 2017, none of these matters share any similarity to Plaintiff and thus she was not prejudiced by the delayed disclosure. In fact, none of these complainants chose to pursue formal complaints after initial services were offered by the NKU. As such, while these incidents did involve claims of sexual misconduct under the University definition, the claims never moved far beyond the allegation stage due to the victim's unwillingness to proceed. Two of these three incidents were also reported by a third party and do not give a clear picture of the complainant's actual concern over the incident.

In detail, one incident was reported by a student when interviewed by a Hall Director in a separate investigation of the complainant regarding her violation of dorm rules by failing to have house-broken her dog. The alleged incident had occurred when the complainant had invited the respondent back to her room to stay the night after a date. Ann James reached out to the complainant numerous times but ultimately the complainant declined to file a complaint or to seek services from NVP in reference to this incident. The accused was not a NKU student.

A second incident arose when a tutor reported that another student in the complainant's class had been stalking her and was making her uncomfortable. The tutor reported to NVP and was told, as a mandatory reporter, he must disclose the incident to student conduct as well. Ann James and Rachel Marcum, of NVP, reached out to the complainant. The case was deemed

closed when the complainant disclosed to James that she did not wish to pursue a formal complaint and was satisfied with the services she was receiving from NVP.

A third incident concerned a group of female students who were formerly friends with a male student but wished to end their friendship with him when he began to pursue a relationship with one of the female students. The students described the respondent as “weird and creepy” and “stalkish.” When this matter was originally reviewed with documents then available, the matter was thought to not be responsive since the matter involved conduct which did not fit within the definition of sexual assault, misconduct, rape or unwanted advances. In fact, it concerned a group of girls in the dorm throwing candy at the male student. To explain why all the documentation was not available, consider that the incident occurred and was being addressed at the same time that incident files were being collected to respond to the Court’s Order of October 27, 2016. In fact, the meeting with the male student concerning his conduct occurred on October 28, 2016 and his no-contact letter issued the same day. Further documentation later clarified the incident was within the scope of the Court’s Order.

The fourth incident came to NKU as the female student desired to check out of her campus dormitory. In explaining her desire for leaving the dorm room, she reported that her roommate’s boyfriend had made unwelcome advances toward her and threatened to sexually assault her. She refused to report the matter to the police or to identify or make further accusations against her assailant. Without such cooperation, NKU could take no further action. The extent of documents in the matter concern emails among NKU personnel attempting to arrange and offer services for the female student. Because there was no documentation from the female student, and no information to pursue any action against the non-student, little information existed which would have even identified this matter as needing to be produced.

The issue was only alerted when conducting a review of all miscellaneous files provided by Dralle.

Additionally, Plaintiff suffered no prejudice with the production of these incidents after discovery. Although she desires to prove that NKU was deliberately indifferent to her complaint of sexual assault by attempting to use evidence of NKU's handling of allegations of sexual assault made by other students, faculty and staff made against different perpetrators, she has been given 64 different avenues to do so. Among all of those, Plaintiff's deposition questioning has focused on mostly two incidents: the ones involving basketball players. Plaintiff has devoted some time at depositions to questioning about two other incidents which were not within the scope of the Court's Order as they occurred off campus or were not considered sexual misconduct. Furthermore, as the Court has made clear in its inquiry at status conferences concerning the length of this trial, and as demonstrated by the Plaintiff's disclosures in this case, Plaintiff does not intend to utilize all 64 incidents to prove her case. Instead, she will pick those which share the most in common to her case. Neither of these seven late disclosed incidents fit any of that criteria.

i. Non-identified incidents

Plaintiff's brief also complains about NKU's not identifying or producing documents concerning a female student whose unlocked dorm room was walked into by a drunken male dorm-mate and he urinated in her roommate's trash can. Quite simply, this incident was not treated by NKU as a matter of sexual misconduct. Since it did not involve a matter within the scope of the Court's Order (rape or sexual assault, misconduct or unwanted advances) NKU never interpreted this incident as germane to the Court's Order. Documents concerning the matter can be tendered *in camera* to the Court.

The University never received any information that indicated this matter was one of a sexual nature. The initial reports that the female student made to the police include comments such as “he’s not responding...he just walked in and he’s like peeing in the floor.” *See* Exhibit 29, audio recording of student’s call to NKU police (to be separate filed with the Court). She described him as unresponsive, sitting with his head down, and having urinated in her roommate’s trash can. *Id.* Responding officers requested an ambulance and transported the male student to the hospital for suspected alcohol poisoning.

Various conversations occurred between NKU officers, the female student and her father and members of the Campbell County Attorney’s office. To the best information available to NKU Police, the female student declined to prosecute any charges against the male student and this was not the type of charge that could be prosecuted without her. Exhibit 1, at ¶39. NKU police and the County Attorney’s office debated a range of potential charges but were under the distinct impression the female student declined to do so. *Id.* The female student then requested to terminate her housing contract for the Summer, which NKU agreed to do at no charge. *Id.* at ¶40. After she resided in campus housing for the Fall 2016 semester, she then requested to cancel her Spring 2017 semester housing contract which again NKU agreed to do at no charge. *Id.* Simply put, NKU had no knowledge of a sexual misconduct allegation and therefore this record was not responsive.

Although Plaintiff was plainly aware of this incident, she never requested any information from the University about it as she had done with the 2016 incident involving basketball players. When counsel explained that the Plaintiff’s requested terms of the Court’s Order would have omitted that basketball matter, Plaintiff requested records concerning that specific file. *See* Exhibit 30. Plaintiff has referred to an “exposure” case. NKU inquired as to

what “exposure” case it had failed to produce and offered to search for and produce such materials. *See* Exhibit 31. Plaintiff never responded. If Plaintiff truly believed that NKU was intentionally withholding this student’s file material, why not make a specific request for it as was done on other occasions (i.e., the Meier email, the Advocate database, etc.)?

Similarly, Plaintiff complains about the lack of production of other incidents. In her brief, she complains that no information was produced on a “D.S.” other than his sanctions letter. *See* Doc #:163-1, Page ID # 3487. The “D.S.” incident occurred off-campus and therefore was not responsive to the Court’s October 27, 2017 Order. NKU recognizes that the letter states the incident occurred on campus. However, the incident file plainly demonstrates the matter occurred off-campus and NKU can tender such relevant documentation to the Court to demonstrate such. *See* Exhibit 32. Throughout discovery, Plaintiff also has made reference in discovery to an incident concerning a softball player. That incident too occurred off-campus (in downtown Cincinnati) and thus was not responsive to the Court’s Order. Plaintiff was told as much but never pursued discovery of that file material. *See* Exhibit 31. Plaintiff should not be permitted to benefit from such a drastic sanction as default judgment against NKU when knowing NKU never classified these specific incidents as within the scope of the Court’s Order because they either did not involve an allegation of sexual misconduct or occurred off-campus. The better approach would have been for Plaintiff to inquire with NKU, as was done on other occasions, and allow counsel to confer and resolve the issue, rather than to wait and move for sanctions. Merely posing questions in deposition and then never reacting when told those incidents were not responsive to the Court’s Order is not sufficient.

j. Email correspondence produced on March 17.

After discovery of the vandalism incident file materials and their production on March 3, 2017, counsel elected to conduct a comprehensive review in order to ensure that all responsive documents had been collected and produced. To do so required NKU officials to re-examine their email and for counsel to review each of the nearly 9,000 documents produced. In doing so, a variety of other documents, mostly emails, were identified that had not been produced to Plaintiff. But again, the production of these documents is not prejudicial to Plaintiff. Many of the emails produced are from Gabby Dralle, or her staff, and concern items such as ongoing text messages with students long after the conclusion of a matter, emails to professors seeking an excuse from class, or emails scheduling appointment to meet. Many other emails are merely transmittal email attaching documents where the attachment at issue was previously provided in discovery. Other emails as well were previously produced in discovery but the newly discovered email may simply state an agreement to the original email or be forwarded to another recipient. NKU is acutely aware that the mere fact so many documents are produced in the face of a pending motion for sanctions has some “shock value” to Plaintiff and the Court. But the letter summarizing what the production entails explains how the items do not impact Plaintiff or her case. Similarly, NKU never relied upon any of these documents in support of its defense in this matter, or its motion for summary judgment.

Plaintiff will argue that she has been prejudiced by these productions of documents as she could have inquired at depositions about these documents, could have sought additional depositions from other persons, would have had her expert review these items and will not have sufficient time to address NKU’s summary judgment Motion. But none of those issues are actually prejudicial to Plaintiff’s case.

First, concerning the depositions Plaintiff has taken of NKU officials, her questioning about other incidents has primarily focused on the two matters concerning the basketball incidents. Plaintiff has not engaged in any wholesale review of each of the 64+ incidents disclosed at depositions. Furthermore, as Plaintiff will surely admit, the inquiry is not truly the details of what happened in the underlying incidents and allegations. Instead, the question in this case for Plaintiff is what NKU's response was to the receipt of an allegation. Nothing in the newly identified seven incidents is markedly different than among the 64+ previously disclosed incidents. Second, there are no "new" witnesses identified in any of these items that Plaintiff was not previously aware of. Plaintiff has known the NKU universe of persons involved in addressing complaints of sexual harassment and these documents reveal nothing new. Additionally, NKU offered to eliminate any prejudice believed she may have suffered by allowing Plaintiff to conduct any depositions she thought was necessary after the disclosure of these documents. *See* Exhibits 15 and 18 (correspondence of February 10, 2017 and March 17, 2017). Plaintiff has not pursued that option.

Third, Plaintiff's expert was not prejudiced by not having this information before completing her review. A copy of the Plaintiff's expert report is attached as Exhibit 33. In her report, she details that she was asked to express opinions relating to compliance with the Clery Act, the actions and inactions of NKU before and after the Plaintiff's hearing, and the harm NKU did to Jane Doe. She was also identified to testify about research regarding the harm to sexual violence victims, and the past, current and foreseeable harm to Jane Doe resulting from the conduct of NKU and its employees. None of the late produced documents provide any new information concerning Plaintiff, the history of her matter, the oversight of Student M's

sanctions or the alleged harm done to Plaintiff by NKU. And certainly NKU produced no delayed information concerning the expert's research into harm to sexual violence victims.

At best, Plaintiff may claim that these newly produced documents relate to the expert's opinions concerning best practices for campus officials in administering Title IX allegations. But again, no new information was provided late that the expert did not already now about. A review of her report underscores this point. For example, the expert opines that "it appears there was no clear policy or protocol at NKU to determine who was actually responsible for properly reporting alleged sexual misconduct to the NKU police for proper reporting under the Clery Act." *See* Exhibit 33 at p. 2. She further opines that a university should put each allegation in writing and create a reporting form for Clery Act tracking purposes. *Id.* Noting in NKU's late production addresses these issues. Again, if anything, the late produced documentation is only cumulative of that previously produced. The expert was seemingly easily able to reach her opinion in this matter critical of NKU. These late produced items have no bearing on her opinions.

Fourth, NKU did not rely on any of these documents in support of its motion for summary judgment. As explained therein, no other incident shares any commonality with Plaintiff's matter and NKU's brief focuses on its action taken in regard to the *Plaintiff's* complaint and the services it provided to the *Plaintiff*. But in any event, NKU offered to agree to allow Plaintiff an extension of time as needed in order to respond to the motion for summary judgment. *See* Exhibit 18.

CONCLUSION

Because NKU did not act in bad faith or with any willful intent to violate the Court's order and Plaintiff has suffered no prejudice from NKU's late disclosure of documents, the

Plaintiff's Motion for Sanctions should be denied. Alternatively, NKU is agreeable to an extension of time if Plaintiff so desires to respond to its motion for summary judgment and/or will make its witness available again for renewed supplemental depositions to explore the contents of the newly disclosed documents. Finally, NKU requests a hearing on this matter to explain to the Court its actions taken in good faith in discovery.

Respectfully submitted,

/s/ Katherine M. Coleman

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of March, 2017 I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing, if applicable, to the following:

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Steven A. Taylor, Esq.
Murphy Landen Jones PLLC
2400 Chamber Center Drive, Suite 200
P.O. Box 17534
Ft. Mitchell, KY 41017-0534
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COUNSEL FOR DEFENDANT
KACHUREK

/s/ Katherine M. Coleman

COUNSEL FOR DEFENDANT
NORTHERN KENTUCKY UNIVERSITY

AFFIDAVIT

Comes now the Affiant, having been duly sworn, and states as follows:

1. I am Sara B. Kelley. I am the Associate General Counsel for Northern Kentucky University. I have personal knowledge of all matters asserted herein.

2. Litigation hold letters were delivered on January 27, 2016 to Ben Anderson, Christina Chambers, Adam Dralle, Jeff Girton, Katie Herschede, Ann James, Leslie Kachurek, Jaime McCauley, Geoffrey Mearns, Gabby Molony (now Dralle), Kathleen Roberts, Frank Robinson, Victoria Suttmiller, Kim Turner, Jeff Waple, and Kristy Webb.

3. A copy of the form used is attached.

4. In order to respond to the initial discovery requests, and under the direction of General Counsel, I was assigned to oversee the collection of materials and to be available to instruct the various NKU officials concerning retrieval of documents responsive to discovery requests.

5. I met with Ann James who assigned her Coordinator Julie Bridewell to take the lead on document production for student conduct records. Bridewell is the primary custodian of records for the Student Conduct office.

6. I met with Bridewell to review the discovery requests and discussed the information that was needed to be retrieved. Based on that discussion I determined that Bridewell had a sufficient understanding of what needed to be collected from the "K: drive," Advocate, and department emails and had the capability to effect the necessary searches.

7. The "K: drive" is the primary area within the Dean of Student's office where student misconduct files are maintained electronically.

8. Advocate was one tool previously used by NKU student affairs staff to document student issues related to housing, conduct, and personal wellness and functioned as an electronic records management database.

9. In April 2016, Bridewell ran a query in Advocate for charges that were related to Title IX matters, except for stalking, dating violence or domestic violence. That query resulted in an electronic list of cases responsive to discovery. Using that list Bridewell pulled the documents related to each case from the K: drive.

10. Additionally, and as a 'check' on her Advocate query, Bridewell performed a 'terms' search in both Advocate and the K: drive. She searched both locations in an attempt to ensure she located all subject files. Bridewell also sought assistance from the Advocate helpdesk.

11. At that time I also met with Gabby Dralle at the Norse Violence Prevention Center ("NVP"), NKU Title IX Coordinator Kathleen Roberts, Chief of Police Les Kachurek, and Tammy Knochelmann and Katie Herschede (both of whom are the President's staff) regarding discovery and what was inclusive to the requests.

12. I followed up via email and phone calls with numerous others who might have been in possession of relevant documents.

13. As responsive records were requested and received I reviewed them with support from General Counsel and the legal office's law clerk at the time. When I had a question regarding records, I followed up with the custodian of the record and/or consulted with General Counsel or outside counsel in an effort to ensure discovery was complete.

14. Because of the volume and size of the records received, I requested that a NKU Information Technology (IT) technician create a secure means to share confidential and privileged documents with outside counsel.

15. IT created an electronic portal that was encrypted and password protected. This ensured that counsel could share records in real time despite the physical distance between their offices.

16. After initial review by NKU's legal office I uploaded the records to the electronic portal for use by outside counsel.

17. The firm had difficulty in accessing the Virtual Private Network (VPN) set up by NKU. IT technicians from both NKU and the Firm attempted to resolve the access issues to no avail.

18. I met with outside counsel at their office on 5/12/16 to review the records that had been provided to outside counsel by way of the portal. Concerned that the portal was not working to its intended capacity, counsel agreed to discontinue using the portal to deliver documents to the firm. Documents were then provided by other means including email, hard copy, and external portable hard-drives.

19. As communication occurred concerning a subsequent Agreed Protective Order concerning student file materials about incidents other than that involving Jane Doe, I again handled NKU's retrieval of documents. I again communicated with key individuals such as James, Dralle, Bridewell and Roberts to discuss the documents produced to date and to review how the Court's Order differed from the original requests.

20. I confirmed with outside counsel that Plaintiff's and Student M's files had already been produced.

21. I met with Dralle on October 20, in anticipation of the Court's Order and again on November 1 after receiving the Court's Order to review the details of the production.

22. I met with Bridewell on October 27 to explain the details of the Court's most recent order. I followed up with James, Bridewell's supervisor, so she had the same knowledge and was aware of how much work needed to be done in a short time frame.

23. I also met with Rachel Green, Deputy Title IX Coordinator for employees and EEO Officer during the same time period and provided Green with the same information and informed her supervisor as well in order to ensure that any employee files that were within the scope of the Court's Order would be collected for production.

24. I provided Bridewell, Dralle, and Green with a copy of the Court's Order.

25. I explained to Bridewell and Dralle that the records requested were different from what I previously asked them to collect because it included a longer time frame (7 years), a broader scope (includes stalking and dating/domestic violence) and excluded off-campus incidents except for the specifically referenced matters regarding two incidents involving basketball players.

26. I explained that NKU was operating under a very short deadline and gave Bridewell and Dralle a deadline of November 3 in order to produce the items because FERPA notice letters had to be mailed in five business days. I asked Green to have Human Resource files to me as early as possible on November 4th.

27. Dralle conducted a search of the relevant records within the Norse Violence Prevention Office and provided me with the names of students identified on or about November 2, 2016. I reviewed those names with Dralle so that FERPA Notice letters were sent as instructed by the Court's Order.

28. Bridewell conducted a search of the relevant records within the Student Conduct Office and provided me with the names of students identified on or about November 3, 2016. I

reviewed those names with Bridewell so that FERPA Notice letters were sent as instructed by the Court's Order.

29. Green conducted a search of the relevant records within the Human Resources Office and provided me with responsive employee files on November 4, 2016. I reviewed those files and identified involved students so that FERPA Notice letters were sent as instructed by the Court's Order.

30. The Student Conduct Office, Norse Violence Prevention, and Human Resources also delivered responsive records to the legal office by email and flash drives.

31. To comply with the Court's Order of October 27, 2016, I conducted a cursory review of the voluminous records received. I then uploaded the responsive records from my computer to an external hard drive instead of the previously used electronic portal.

32. Outside counsel arranged for delivery of the external hard drive.

33. I have also examined the factual circumstances surrounding NKU's use of software in Student Conduct.

34. NKU's Student Affairs department previously utilized software called Advocate produced by Symplicity. That office originally purchased Advocate software license in June 2010. Advocate is a product available to higher education, business and governmental entities.

35. Maxient is a different software system that is a dedicated higher education student conduct tool, more robust and user friendly.

36. Maxient allows for greater customization; Advocate required a separate purchase of "add-ons" to meet NKU's operational needs. Student Affairs saw Maxient occupying a much larger market presence with use by institutions across the county.

37. NKU's license with Advocate expired in June 2016. In early 2016, the Student Affairs staff met to begin the process of making a decision about renewal. Because of the improvements Maxient offered, Student Affairs elected to purchase Maxient's software license.

38. Julie Bridewell within the Student Conduct office had numerous conversations with Maxient technicians about how the transition would take place. Student Conduct never considered the move from Advocate to Maxient as destroying any data or information because the old Advocate data would be preserved.

39. The Advocate database list was not a sole source housing the University sexual misconduct files. The University uses the K: Drive, which is part of its internal computer information system accessible within the Dean of Students' office, for that purpose.

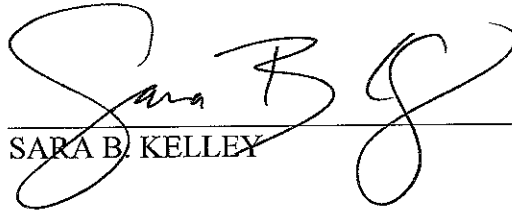
40. I am also aware of the University's response to the Lemme incident. To the best information available to NKU Police, the female student declined to prosecute any charges against the male student and this was not the type of charge that could be prosecuted without her. I am aware that NKU police and the County Attorney's office debated a range of potential charges but were under the distinct impression the female student declined to participate in prosecution.

41. The female student then requested to terminate her housing contract for the Summer, which NKU agreed to do at no charge. After she resided in campus housing for the Fall 2016 semester, she then requested to cancel her Spring 2017 semester housing contract which again NKU agreed to do at no charge.

42. All actions of NKU and its officials have been taken in good faith. I have devoted a substantial number of hours to retrieving documents responsive to the Plaintiff's requests and the Court's Order.

43. No NKU representative has taken any action in an attempt to avoid documents being produced in response to the Court's Order or otherwise in discovery.

I affirm that the above statements are true and accurate to the best of my knowledge.


SARA B. KELLEY

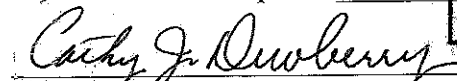
NOTARY CERTIFICATE

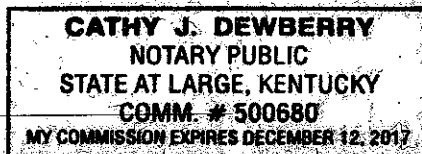
COMMONWEALTH OF KENTUCKY

COUNTY OF CAMPBELL

Subscribed, acknowledged and sworn to before me by SARA B. KELLEY on this 20th day of March, 2017.

My commission expires: _____


NOTARY PUBLIC, STATE AT LARGE
KENTUCKY





Office of the Vice President for
Legal Affairs and General Counsel
Lucas Administrative Center 824
Nunn Drive
Highland Heights, Kentucky 41099
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**NORTHERN KENTUCKY UNIVERSITY
OFFICE FOR LEGAL AFFAIRS AND GENERAL COUNSEL**

PRIVILEGED COMMUNICATION: ATTORNEY-CLIENT PRIVILEGED

EXHIBIT 2

NORTHERN KENTUCKY UNIVERSITY
OFFICE FOR LEGAL AFFAIRS AND GENERAL COUNSEL

PRIVILEGED COMMUNICATION: ATTORNEY-CLIENT PRIVILEGED
MEMORANDUM

Date: January 27, 2016

To:

From: Sara Sidebottom, Vice President for Legal Affairs and General Counsel

Subject: LITIGATION HOLD
NKU's Duty to Preserve Data and Documents

Attachment: Electronic Discovery and Data Preservation, Frequently Asked Questions

PLEASE READ AND REPLY

Litigation has been filed against Northern Kentucky University. This litigation creates a **legal duty to preserve all data and documents in the university's possession** that would be potentially relevant to this matter. The data and documents contained in NKU's files and computer systems will also be critical to our investigation into this matter and may be important sources of evidence. For these reasons, we require your assistance in preserving **all data and all documents** which you maintain or have access to that relate to this matter, as described below:

- **All data and documents related to:**
 - the complaint of sexual misconduct made by [REDACTED] against [REDACTED]
 - the investigation of the complaint
 - the student conduct hearing on this complaint, including the findings and sanctions
 - the enforcement and oversight of the sanctions imposed
 - any campus protests regarding sexual assault
- **All communications received and sent regarding the complaint and its resolution**
- **All communications received and sent regarding the enforcement and oversight of the sanctions imposed**
- **All communications received and sent regarding any campus protests regarding sexual assault**

Directive Regarding Preservation of Data

Effective immediately, please preserve and protect from deletion all data and documents—hard-copy and electronic—that pertain or relate in any way to the above. Destruction, alteration, deletion, and modification of such documents and data are strictly prohibited.

Failure to preserve relevant documents and data could result in significant penalties against NKU.

(continued on back)

This Preservation Directive applies to paper documents as well as any electronic or magnetically stored data. When you are identifying and preserving electronic data, please keep in mind that "electronic data" includes, but is not limited to, the following:

1. All text files (including word processing documents, spreadsheets, and presentations)
2. Email
3. Files on shared servers
4. Files on email servers
5. Files on smartphones and hand-held devices (e.g. iPads)
6. Databases
7. Calendar entries
8. Computer system activity logs
9. Internet usage files
10. Backup tapes (if used for purposes other than disaster recovery)
11. Intranet or other internal network applications
12. Text messages and other mobile tablet data

At your individual work station, this directive requires you to preserve and retain all potentially relevant files stored on your hard drive and any system drives to which you have access. You must also preserve and retain all potentially relevant data on any laptop, home computer, handheld device, diskette, CD, DVD, "flash" drive, voice mail, backup tape, videotape, or any other data storage medium.

To comply with this directive, you must immediately disable any functions that automatically delete or overwrite emails or other electronic data. Until further notice, NKU is suspending the sections of its regular record retention policy that require deletion or destruction of data. Please continue to retain these documents until further notice. **It is important to note that retaliation against any employee or student for filing an internal or external complaint is prohibited under University policy and Title VII of the Civil Rights Act of 1964, as amended.** It would also be helpful if you can forward the names of any other individuals whom you believe should receive a copy of this notice. You will be advised when this preservation directive is no longer in effect.

PLEASE CONTACT SARA KELLEY IN THE OFFICE OF LEGAL AFFAIRS AT 859-572-6080 TO VERIFY THAT YOU RECEIVED, READ, AND UNDERSTAND THIS DIRECTIVE. SHE WILL ALSO ANSWER ANY QUESTIONS AND PROVIDE YOU WITH ASSISTANCE TO COMPLY WITH THIS DIRECTIVE.

Thank you for your prompt and full compliance with this preservation directive.

Electronic Discovery and Data Preservation Frequently Asked Questions

1. What do “electronic discovery” and “data preservation” mean?

“Discovery” is the process by which relevant information is exchanged between parties in a lawsuit. It is conducted via production of documents and the taking of depositions. Federal and state courts have long recognized that electronic data is subject to the same discovery rules as other evidence relevant to a lawsuit. The issue has received substantial national attention because of a series of court rulings resulting in the imposition of huge sanctions on parties for their failure to preserve electronic data and because of amendments to the Federal Rules of Civil Procedure that took effect on December 1, 2006.

2. What data needs to be preserved?

Federal rules require a party to suspend routine or intentional purging, overwriting, re-using, deleting, or any other destruction of electronic information potentially relevant to a lawsuit, including electronic information wherever it is stored – at a University work station, on a laptop, or at an employee’s home. It includes all forms of electronic communications – e.g., e-mail, word processing, calendars, voice messages, instant messages, spreadsheets, videos, photographs, information in smartphones, and data in any other locations where electronic information may be stored. This electronic information must be preserved so that it can be retrieved – if necessary – at a later time. The information must be preserved in its original electronic form, so that all information contained within it, whether visible or not, is also available for inspection – i.e., it is not sufficient to make a hard copy, or an extra electronic copy, of electronic data.

3. What will I have to do?

You will be notified of the duty to preserve electronically stored information through a notice called a “litigation hold”. You will then be asked to cooperate with the Office of Legal Affairs and the IT department to ensure that we identify and preserve all potential sources of electronically stored information in your possession or under your control. You must be particularly careful not to delete, destroy, purge, overwrite, or otherwise modify existing electronic data.

4. For how long will this go on?

University counsel will notify you when you and the University are no longer obligated to retain the preserved data. Generally, this will be when any legal claim and all appeals have been concluded. When the duty to preserve evidence ends, any archived data collected will be returned to you or destroyed, at your option.

5. Do I need to also preserve data on my home computer?

The same rules apply to any device that stores information potentially relevant to a lawsuit. Thus, for example, if you use your home computer for University-related business (including e-mail on your University e-mail account or on a personal account, etc.), you must preserve the data on that computer.

6. Can I take personal or sensitive material that isn't relevant to the case off my computer?

You may remove data from your computer (or segregate it from the data that will be preserved) if you are absolutely certain that it is unrelated to the claim (e.g., correspondence entirely unrelated to University employees or University business, income tax returns, your music library, etc.). However, we often find that it is difficult at the beginning of a lawsuit to be certain about what might later turn out to be relevant. So, you should examine each and every file you are considering deleting – i.e., do not make wholesale deletions of data, but rather err on the side of inclusion. You may be questioned under oath at a later date by an attorney representing the opposing party about what data you may have discarded.

7. What if I am involved in an ongoing matter relating to the person who is suing the University?

You must also preserve any new electronic information that is generated after receipt of a litigation hold that may be *relevant to the dispute* (such as an employment claim by a current employee where relevant new documents may be created during the ongoing employment relationship). The Legal and IT offices will work with you to ensure the preservation of new data.

8. Who will be looking at my data?

Initially, no one will likely review your data. If and when a discovery request is made, you may be asked to conduct a search of the data or Legal/IT personnel will conduct the search. All preserved data will be centrally stored. On occasion, before a discovery request is made, University Counsel may want to review electronically stored information to assist in answering the lawsuit or to comply with initial discovery obligations.

9. Who decides what data will be turned over to the opposing party?

The same rules of relevance that apply to “paper” discovery also apply to the discovery of electronically stored information. Before any data is turned over to the opposing party, the Office of Legal Affairs and General Counsel will review it for relevance and determine that it is not otherwise protected or privileged.

10. What if I don't want to disclose my data?

The University and its employees have a legal duty to preserve, and subject to the rules governing discovery, turn over electronically stored information. In short, the law does not offer us a choice. Failure to abide by the law may result in judicially imposed monetary sanctions and adverse findings in the litigation. We will take steps to protect your privacy and to ensure that protected/privileged information is not disclosed, but ultimately the court will be the arbiter of whether sensitive information must be disclosed.

11. What should I do with my electronic data if I leave the University?

If you plan to leave your employment with the University during the pendency of a lawsuit for which you have received a preservation hold, you should confer with Legal Affairs before relinquishing control of your computer.

12. What if I have additional questions?

Contact the Office of Legal Affairs and General Counsel at 859-572-5588.



Email Address:
kcoleman@sturgillturner.com

April 14, 2016

Kevin L. Murphy
Kevin L. Murphy PLLC
2400 Chamber Center Drive, Suite 301
P.O. Box 17534
Ft. Mitchell, KY 41017-0534
KLMurphy@kevinlmurphyllaw.com

RE: *Jane Doe v. Northern Kentucky University, et al.*
U.S. District Court, E.D., Ky., Case No. 2:16-cv-00028-WOB-CJS
STBM File No. 64764.0005

Dear Kevin:

I am writing in response to your email communication of April 11, 2016. Therein you requested a copy of the insurance policy identified in Defendant's Rule 26 Disclosures, a copy of which is enclosed.

In addition, you request the ability to review the documents listed in our Rule 26 Disclosures. I believe that all documents identified in our Rule 26 Disclosures are also appropriately responsive to your Requests for Production of Documents. As we have discussed at some length previously, we have no objection to the ultimate production, a significant portion of the documents identified and responsive to your requests constitute "education records" pursuant to Family Educational Rights and Privacy Act ("FERPA") as well as confidential documents pursuant to the Violence Against Women Act ("VAWA"). As such, Defendants must assure compliance before those documents may be produced or made available for review.

Given our impasse in this matter and in accordance with the Court's Order, I have today, with copy to you, requested a discovery conference of Magistrate Smith to address this discovery conflict. I will be in Court tomorrow but have general availability next week, so hope that your schedule as well as the Court's will allow us to schedule a discovery conference to address these outstanding issues in a timely manner.



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PHONE: 859.255.8581 ♦ FAX: 859.231.0851 ♦ WWW.STURGILLTURNER.COM

EXHIBIT 3



April 14, 2016
Page 2

We are willing to make those documents not subject to FERPA or VAWA compliance available to you for review and/or produce in response to your requests. There will, however, be required redaction that must be made to your client's education records which are subject to production.

As such, while I am in the process of working with my clients to gather all responsive documents, additional time may be needed to ensure proper redaction.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Katherine M. Coleman'.

Katherine M. Coleman (Kacey)

KMC/tjm

Enclosures

cc: Sara Sidebottom, Esq.
Sara Kelley, Esq.
Joshua M. Salsburey, Esq.

X:\WDOX\CLIENTS\64764\0005\CORR\00688595.DOCX



E-Mail Address:
kcoleman@sturgillturner.com

April 14, 2016

Honorable Candace J. Smith, Magistrate Judge
U.S. Courthouse
35 W. 5th Street, Room 375
Covington, KY 41011-1401
VIA EMAIL TO smith_chambers@kyed.uscourts.gov

RE: Jane Doe v. Northern Kentucky University
USDC, EDKY-Covington, CASE NO. 2:16-CV-00028-WOB-CJS
STBM File No. 64764.0005

Dear Magistrate Judge Smith:

This action concerns claims by Plaintiff, Jane Doe, relating to her report of sexual misconduct by another Northern Kentucky University (NKU) student and the University's response to such report. As such, it is unavoidable and necessary that Plaintiff's and other NKU students' education records will play a significant role in this lawsuit, commencing with Rule 26 initial disclosures and continuing with discovery in this matter. Defendants are constrained from producing or relying upon such records absent compliance with federal law. Defendants have unsuccessfully attempted in good faith to resolve these issues and to agree to a protective order governing the use of such records in this action. Primary dispute between the parties relates to Defendants compliance obligations with the Family Educational Rights and Privacy Act and the Violence Against Women Act. Despite multiple communications and proposed orders by each party no agreement has been reached, as evidenced by the communications enclosed. Accordingly, a discovery conference is requested to address and resolve this issue.

As the federal compliance issues are unique to higher education, please allow me to set forth the applicable law and regulation with which Defendants must comply for the benefit of the court. As an institution of higher education receiving federal financial assistance, Defendant NKU's and its Defendant employees' use of student education records is governed by the Family Educational Rights and Privacy Act (FERPA) and its implementing regulations, 20 U.S.C. § 1232g and 34 CFR Part 99. FERPA defines and addresses the use and disclosure of "education records" which are broadly defined as records that are maintained by a covered educational institution such as NKU, or someone acting for the institution such as NKU's employees, which directly relate to a student who was or is in attendance at the institution. 20 U.S.C. § 1232g(a)(4), 34 CFR 99.3.

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Page 2

As a general rule, FERPA provides that the institution may not disclose education records without the student's consent. *See* 20 U.S.C. § 1232g(b)(1) and 34 CFR 99.30. "Disclosure" means "to permit access to or the release, transfer, or other communication of personally identifiable information contained in the education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record." 34 CFR 99.3. "Personally identifiable information" includes but is not limited to a student's name, names of family members, address, social security number and "other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty," as well "information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates." *Id.* Valid consent requires prior written consent from the student(s) at issue that (1) specifies the records authorized to be disclosed, (2) states the purpose of the disclosure, and (3) identifies to whom the disclosure would be made. 34 CFR 99.30.

There are limited circumstances in which prior consent is not required. One such exception is that student records may be disclosed pursuant to a court order or lawfully issued subpoena. However, prior to such production the institution is required to provide the affected student(s) with notice of the order and a reasonable opportunity to file objections with the court. 34 CFR 99.31(a)(9). FERPA also provides an exception permitting an institution to disclose a student's education records to the court in the course of defending itself against a lawsuit initiated by that student. *Id.* Thus, Defendants may produce *Plaintiff's* education records in the course of this litigation, with or without her consent. Notwithstanding this fact, Defendants acknowledge Plaintiff's desire, as expressed through her election to proceed in this action under pseudonym, to avoid public disclosure of her identity. Accordingly, while Defendants may rely upon Plaintiff's education records in their defense, they are willing, consistent with rules of procedure and standing court orders, to redact Plaintiff's name and the following personally identifying information before producing records in the course of this litigation: social security number, student i.d. number, email addresses, home address, phone numbers, and names of family members. NKU will continue to otherwise protect Plaintiff's education records and decline to disclose them to third parties not a party to this action unless authorized in accordance with FERPA by either Plaintiff's written consent or exception provided by law such as the federal confidentiality requirements found in the Violence Against Women Act (VAWA). *See* 20 USC 1232g, 20 USC 1092(f)(8)(B)(v), 34 CFR Part 99, 34 CFR 668.46(b)(11)(iii), 42 U.S.C. 13925(b)(2).

While Defendants may produce Plaintiff's education records, the fact remains that both Defendants and Plaintiff may also not to rely upon the education records of non-party students whose education records are entwined with the claims asserted herein. However, Defendants remain prohibited by FERPA and VAWA from simply disclosing the education records of these non-party students. Unfortunately, this is not easily addressed through the issuance of an order or subpoena. As noted above, before those records may be produced or relied upon even upon the



April 14, 2016
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entry of an appropriate protective order, Defendants are required to first make a reasonable effort to notify any student whose records are at issue about the order (or subpoena) *in advance of compliance*, so as to allow the student a reasonable opportunity to seek protective action with the court. 34 CFR 99.31(a)(9); 42 USC 40002(b)(2)(B) and (C).

Further, although it is believed that that the other students who have involvement in Plaintiff's claims are known to her and to Defendants, that does not mean those students' identities should be disclosed to the public and the VAWA requires that Defendants act to protect their identities. *See* 42 U.S.C. 13925(b)(2). Those students have not voluntarily placed themselves before the court and have a reasonable and statutorily protected right of privacy as to their education records. Additionally, the entry of a protective order may reduce delay resulting from non-party student efforts to seek protective measures from the Court.

Thus, in accordance with the Orders of the Court, Defendants request a discovery conference for the purpose of addressing the production of records and discovery in this matter as it relates to education records and submits for consideration by Plaintiff and the Court the enclosed revised proposed Protective Order.

Respectfully,

A handwritten signature in blue ink, appearing to read 'Katherine M. Coleman', written over a horizontal line.

Katherine M. Coleman

KMC/

cc: Kevin Murphy, Esq. via email at
klmurphy@kevinlmurphy.com

FILED ELECTRONICALLY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION
CASE NO. 2:16-CV-00028-WOB-CJS

JANE DOE

PLAINTIFF

v.

PROTECTIVE ORDER

NORTHERN KENTUCKY
UNIVERSITY, et. al.

DEFENDANTS

In accordance with Federal Rule of Civil Procedure 26(a) and (b), as well as discovery in this matter, Northern Kentucky University, Geoffrey S. Mearns, Les Kachurek, Kathleen Roberts, and Ann James (collectively "Defendants") anticipate the production of materials subject to the Family Educational Rights and Privacy Act (FERPA), the Clery Act, the Violence Against Women Act, and implementing regulations, appropriately subject to court order against unauthorized disclosure. The Court being otherwise sufficiently advised, IT IS HEREBY ORDERED as follows:

1. This Protective Order shall govern all documents, information and material subject to confidentiality pursuant to the Family Educational Rights and Privacy Act (FERPA), the Violence Against Women Act (VAWA), and/or their implementing regulations. *See* 20 USC 1232g, 20 USC 1092(f)(8)(B)(v), 34 CFR Part 99, 34 CFR 668.46(b)(11)(iii), 42 U.S.C. 13925(b)(2).
2. Defendants are prohibited by FERPA from disclosing the education records of any student who was or is in attendance at NKU without the student's prior, written consent. *See* 20 U.S.C. § 1232g(b)(1) and 34 CFR 99.30. Defendants are entitled to rely upon Plaintiff's education records as it relates to their defense of the claims asserted herein, including

submission of Plaintiff's education records to the court, with or without Plaintiff's consent. 34 CFR 99.31(a)(9). Plaintiff has elected to proceed under pseudonym in this action to avoid public disclosure of her identity. Accordingly, while Defendants may rely upon Plaintiff's education records in the course of their defense, they will, consistent with rules of procedure and standing court orders, redact Plaintiff's name and the following personally identifying information before producing records in the course of this litigation: social security number, student i.d. number, email addresses, home address, phone numbers, and names of family members. Production and/or reliance on Plaintiff's education records by Defendants in the course of defending themselves in this lawsuit does not constitute waiver of the protection that FERPA and other laws afford Plaintiff from disclosure of her education records in response to requests made by third parties not party to this action.

3. To the extent the education records of any current or former student(s) not a party to this action are requested, relied upon, or implicated by the production of Plaintiff's education records, regardless whether those student identities are likely known to Plaintiff and Defendants, Defendants must comply with their obligations pursuant to FERPA and VAWA related to such records. Any education record which "directly relates" to a non-party current or former student shall be produced in accordance with FERPA and VAWA, including but not limited to redaction of such students' personally identifiable information and FERPA's "notice/objection" provisions. Accordingly, Defendants shall be provided seven (7) calendar days from the date of this order or the identification/request for any education record which directly relates to a non-party current or former student(s), whichever is later, to make reasonable effort to send notice to such student(s) using the form letter attached hereto as Exhibit A. The affected student(s) shall have twenty-one (21) days from the date of this

order or identification of the records in which to seek protective action with the court, *in advance of Defendant's production*. 34 CFR 99.31(a)(9).

4. Nothing in this Order shall be deemed to preclude Plaintiff from challenging whether any document is subject to FERPA or VAWA.
5. This Order does not grant permission to either party to discover material that is not properly discoverable under applicable law, the Federal Rules of Evidence or the Federal Rules of Civil Procedure, and does not constitute a waiver of any objection a party may have on those grounds. Likewise, no party waives any objections to admissibility that they might otherwise have. Nothing about this Order or any document production made pursuant to this Order shall be construed as a waiver of any party's rights or obligations to decline disclosure of material to third parties under federal or state law.
6. Any education records provided shall be used by counsel solely for use in this litigation and shall be copied only as necessary for these purposes. Counsel shall secure any such records or information in a manner sufficient to prevent any unauthorized viewing or use of the records or information, consistent with all applicable law and this order.
7. Except with prior consent of this court, no information or document provided pursuant to this order may be disclosed to anyone other than: (1) parties to this action; (2) employees of counsel, assigned to and necessary to assist counsel in the preparation of this action, but only to the extent necessary to assist and participate in preparation of the litigation; (3) consultants and experts retained by the parties or their counsel for the purpose of assisting in the preparation of this action; and (4) this court.
8. Upon termination of this litigation, the originals and all copies of any documents provided to parties or counsel containing education records shall be returned to their source or destroyed,

with their destruction being certified in writing to the source, if requested. The return or destruction of documents is not required of court personnel and does not relate to documents in the court's record.

This ___ day of _____, 2016.

CANDACE J. SMITH, MAGISTRATE

\\00686618.docx

COMMUNICATIONS BETWEEN COUNSEL

Kacey Coleman

From: Kacey Coleman
Sent: Tuesday, March 08, 2016 2:09 PM
To: 'Kevin Murphy'
Subject: RE: Jane Doe v. NKU, et al.
Attachments: Draft Protective Order (00673104xA9D25).docx; Rule 26 Proposed Scheduling Order (00674259xA9D25).docx

Attached please find my suggested revisions to the Rule 26 report as well as a proposed Agreed Protective Order to address the protection of the records and materials at issue. If these meet with your approval we can submit them today so that they may be addressed tomorrow at the docket call.

Very truly yours,

Katherine M. Coleman

Katherine M. Coleman (Kacey)



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333 WEST VINE STREET, STE 1500 ~ LEXINGTON, KENTUCKY 40507

TELEPHONE: (859) 255-8581 ~ FACSIMILE: (859) 231-0851

From: Kevin Murphy [<mailto:KLMurphy@kevinlmurphy.com>]
Sent: Friday, March 04, 2016 4:40 PM
To: Kacey Coleman
Subject: Jane Doe v. NKU, et al.

Attached please find a draft. Let me know if it is okay to file.

K. L. Murphy

KEVIN L. MURPHY PLLC

Kevin L. Murphy, Esq.

Attorney

2400 Chamber Center Drive

Suite 301

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FILED ELECTRONICALLY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION
CASE NO. 2:16-CV-00028-WOB-CJS

JANE DOE

PLAINTIFF

v.

AGREED PROTECTIVE ORDER

NORTHERN KENTUCKY
UNIVERSITY, et. al.

DEFENDANTS

In accordance with Federal Rule of Civil Procedure 26(a) and (b) Northern Kentucky University, Geoffrey S. Mearns, Les Kachurek, Kathleen Roberts, and Ann James (collectively “Defendants”) anticipate the production of materials subject to the Family Educational Rights and Privacy Act (FERPA), the Clery Act, the Violence Against Women Act, and implementing regulations, appropriately subject to court order against unauthorized disclosure.

The parties having agreed, and the Court being otherwise sufficiently advised, IT IS HEREBY ORDERED as follows:

1. This Agreed Protective Order shall govern all documents, information and material subject to confidentiality pursuant to the Family Educational Rights and Privacy Act (FERPA), the Clery Act, the Violence Against Women Act, and their implementing regulations (“material”) produced by Defendants and designated by them as “Confidential,” whether or not such material is informally produced or produced in response to a formal discovery request in this case. Defendants may designate its answers to interrogatories, responses to discovery requests and deposition transcripts and exhibits as “Confidential” and protected by this Order.

2. If a party files a motion, memorandum, brief or similar document containing or discussing “Confidential” material, then the party shall redact “Confidential” material from said filing unless redaction would make portions of the filing unusable to the reader. In the event redaction makes it impossible to read the motion, memorandum, brief, or similar document, then it shall be filed under seal in accordance with the Court’s procedures for filing under seal. Although entire transcripts containing “Confidential” testimony shall be marked as “Confidential,” only such testimony as has been designated as “Confidential” shall be subject to the protections of this Order.
3. All “Confidential” material shall be used by the parties exclusively for the purposes of this litigation and for no other purpose. Only the following persons shall be permitted access to protected material in the course of this litigation:
 - a. parties in this action;
 - b. counsel of record for the parties in this action;
 - c. their experts or consultants retained by the parties for purposes of assisting in the prosecution or defense of this case;
 - d. the Court, its officers and employees;
 - e. jurors and Court personnel at trial of this action; and
 - f. any other person so ordered by the Court.
4. With the exception of persons identified and subparts d. and e. of paragraph 3, no person entitled access to protected material under this Order shall be provided with the protected material unless such individual has (a) read the Order of the court and (b) completed and signed the affidavit provided. No person entitled to access protected material shall discuss the contents of any such materials with any other individual, except those individuals who are permitted to view, inspect or examine the materials protected herein. Each person who reviews or inspects “Confidential” material subject to this Order shall be brought within the personal jurisdiction of this Court, including its contempt power by signing a copy of the

attached affidavit signifying agreement to the provisions of this Order. Plaintiff's counsel shall maintain a list of the names of all persons, including all experts expected to testify at trial, who inspect, review or receive copies of "Confidential" material produced by Defendants pursuant to this Order.

5. Nothing about this Order shall prevent any party from using "Confidential" material, or seeking further protection with respect to the use of "Confidential" material, in connection with any trial, hearing, deposition or other public proceeding in this case. Further, nothing about this Order shall be construed to restrict the parties' counsel from making inquiry of witnesses or potential witnesses regarding the subject matter of the "Confidential" material. If "Confidential" material is disclosed in proceedings, hearings, or at trial before this Court, the material is no longer considered "Confidential" as defined herein. However, a party seeking to maintain the confidentiality of "Confidential" material disclosed in proceedings, hearings, or at trial before this Court must ensure that the material previously has been so marked, shall identify to the Court the material the party seeks to maintain as "Confidential," and shall make a particularized showing to the Court that articulates grounds for why it should remain "Confidential." The Court will consider any objections to maintaining confidentiality. Only after the Court decides that the material disclosed in proceedings, hearings or at trial should remain "Confidential" shall it be so maintained.
6. Nothing in this Order shall be deemed to preclude Plaintiff from challenging the validity of the confidentiality of any materials so designated. If Plaintiff elects to challenge the designation of "Confidential" of any materials pursuant to this Order, Plaintiff shall notify Defendants of her challenge, in writing, within 15 days of receipt of the challenged document or information. No challenge to the confidentiality of any materials so designated shall

thereafter be permitted. Within 15 days of the receipt of such written notice, Defendants will either voluntarily remove the “Confidential” designation or inform Plaintiff that they will not remove the “Confidential” designation. Thereafter, Plaintiff may move the Court for an order removing the protections established by this Order. All materials designated by Defendants as “Confidential,” however, shall retain their “Confidential” status until such time as the parties’ contentions regarding the confidentiality of the materials so designated are fully and finally adjudicated, including any appeal(s) thereof.

7. This Order does not grant permission to either party to discover “Confidential” material that is not properly discoverable under applicable law, the Federal Rules of Evidence or the Federal Rules of Civil Procedure, and does not constitute a waiver of any objection a party may have on those grounds. Likewise, no party waives any objections to admissibility that they might otherwise have.
8. Within ninety (90) calendar days after the final determination of this action, including exhaustion of all appeal rights, counsel for Plaintiff shall return all protected material produced under this Order, and all known copies thereof, to counsel for Defendants. Alternatively, counsel for Plaintiff may destroy protected material and certify the same in writing to counsel for Defendants. Notwithstanding the above, counsel for Plaintiff may keep any pleading, brief or document submitted to the Court, deposition or trial transcripts and exhibits thereto and correspondence subject to this Order.
9. The terms of this Order shall remain fully effective as to all such protected material unless and until modified or released either by Court Order or by written consent of the parties.

This __ day of _____, 2016.

Stipulated and Agreed to by:

/s/ Katherine M. Coleman

Katherine M. Coleman (KBA #84089)

Joshua M. Salsburey (KBA #89038)

STURGILL, TURNER, BARKER

& MOLONEY, PLLC

333 West Vine Street, Suite 1500

Lexington, KY 40507

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kcoleman@sturgillturner.com

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Counsel for Defendants

/s/ Kevin L. Murphy

Kevin L. Murphy (KBA #50646)

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Telephone: (859) 578-3060

Fax: (859) 578-3061

klmurphy@kevinlmurphylaw.com

Counsel for Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION AT COVINGTON
CASE NO. 2:16-CV-00028-WOB-CJS

JANE DOE

PLAINTIFF

v.

AFFIDAVIT

NORTHERN KENTUCKY
UNIVERSITY, et. al.

DEFENDANTS

_____ being first duly sworn, upon his or her oath, deposes and
says:

1. I have been provided copies of, or access to, confidential documents, materials, and information that are subject to an Agreed Protective Order in the above-captioned action (hereinafter "Confidential Materials").
2. I have read and complied with all of the provisions of the Order regarding the Confidential Materials.
3. I have made no copies of the Confidential Material provided pursuant to the Order, other than those that have been returned to Plaintiff's counsel.

_____, Affiant

Sworn, acknowledged and subscribed to before me by _____ this ____ day
of _____, 2016.

NOTARY PUBLIC, STATE-AT-LARGE
KENTUCKY

My Commission Expires: _____

Commission No.: _____

Kacey Coleman

From: Kacey Coleman
Sent: Tuesday, March 08, 2016 4:47 PM
To: Kevin Murphy
Subject: Re: Jane Doe v. NKU, et al.

Kevin

The proposed order clearly permits the use of documents in deposition.

Further, contrary to your assertions there has never been any assertion to make "public" your clients records - only the statement that we are entitled, pursuant to FERPA, to present her educational records in our defense.

I suggest we take these matters up with the court tomorrow.

Sent from my iPhone
Please excuse any typing errors

Very truly yours,
Katherine M. Coleman
Katherine M. Coleman (Kacey)



333 West Vine Street, Suite 1500, Lexington, KY 40507

p 859.255.8581 f 859 231 0851 www.sturgillturner.com

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On Mar 8, 2016, at 4:37 PM, Kevin Murphy <KLMurphy@kevinlmurphyllaw.com> wrote:

Here are the changes to the Scheduling Order that I will agree to. I will not agree to your draconian Protective Order. If I signed it, I might as well dismiss the suit because I would be unable to show a document to any deponent. Do you really think any lawyer would sign this?

This document also contradicts the letter you wrote a few months ago, when you threatened to compromise my client's rights if she filed suit by throwing confidentiality to the wind.

If you want to draft something reasonable and standard, I will entertain it. See you tomorrow. I will be the guy on crutches.

K. L. Murphy

KEVIN L. MURPHY PLLC
Kevin L. Murphy, Esq.

Attorney

2400 Chamber Center Drive	859.578.3060 Direct
Suite 212	859.578.3061 Fax
P.O. Box 17534-0534	
Ft. Mitchell, KY 41017	KL.Murphy@kevinlmurphyllaw.com

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<DRAFT Proposed Scheduling Order.docx>

Kacey Coleman

From: Kevin Murphy <KLMurphy@kevinlmurphyllaw.com>
Sent: Thursday, March 17, 2016 2:55 PM
To: Kacey Coleman
Subject: Jane Doe v. NKU, et al.
Attachments: DRAFT Agreed Protective Order.docx

Here is a protective order that protects yours clients, and is standard in federal court. I am sending this to you pursuant to Judge Smith's recent order.

In 35 years, I have never seen any protective order as egregious as the one you sent me. This one protects your clients, as well as any students.

I ask that you agree to this protective order so we can move on with the case.

K. L. Murphy

KEVIN L. MURPHY PLLC

Kevin L. Murphy, Esq.

Attorney

2400 Chamber Center Drive | 859.578.3060 Direct

Suite 212 | 859.578.3061 Fax

P.O. Box 17534-0534

Ft. Mitchell, KY 41017

KLMurphy@kevinlmurphyllaw.com

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION

JANE DOE	:	Case No. 2:16-CV-00028-WOB-CJS
	:	
Plaintiff,	:	AGREED PROTECTIVE ORDER
	:	
v.	:	
	:	
NORTHERN KENTUCKY UNIVERSITY, et al.:	:	
	:	
Defendants.	:	

By agreement of the parties, IT IS ORDERED AS FOLLOWS:

1. When used in this Order, the word "document" means all written, recorded or graphic matter including, but not limited to, discovery responses or physical items produced by any party or non-party whether pursuant to subpoena, court order, or by agreement, deposition transcripts and exhibits, and any portions of any filings which quote from these materials.

2. Any and all documents produced by the parties, as well as any documents produced by any third parties pursuant to an enforceable subpoena issued herein, subject to the following terms and conditions, may be designated by any party as confidential (and information contained therein) (the "Confidential Material"). However, such designation shall only be made with a good faith reason for doing so. In other words, no party can designate all documents as confidential.

3. The designation of any document as Confidential Material pursuant to the operation of the Agreed Protective Order shall not constitute any agreement that the document or information is actually confidential. In the event that any party to this lawsuit objects at any point in these proceedings to the designation of any document or information as Confidential Material, the party shall state the grounds for the objection. The parties shall thereafter try to resolve such dispute in good faith on an informal basis. If the dispute cannot be resolved, the objecting party shall notify

the producing party in writing, and the objecting party may seek appropriate relief from this Court, including an order that the documents should not be treated as Confidential Material or that specified provisions of this Order shall not apply to the document or information. Pending a court ruling, the documents must be treated as Confidential Material pursuant to the terms herein.

4. Confidential Material shall be kept confidential by the receiving party, shall be used solely for the prosecution and defense of this case, and shall otherwise be disclosed only to:

- (a) the parties or representatives of parties' law firms necessary for the prosecution or defense of this action;
- (b) attorneys and employees of the attorneys who are actively engaged in this action;
- (c) witnesses, such as deponents and persons testifying at trial;
- (d) outside consultants, technical advisors and expert witnesses (whether designated as trial witnesses or not) employed or retained by the parties or counsel; or,
- (e) any other person or entity whom the Court directs shall have access to such information.

In the event that Confidential Materials are provided to nonparties pursuant to subsection (c), the recipient shall be asked to review a copy of this Agreed Protective Order and to abide by its terms.

5. If, at any time, a party or non-party discovers that it produced or disclosed protected information by mistake without designation, it may promptly notify the receiving party and identify with particularity the information to be designated (the claw-back notification). Those documents will then be treated as if they were originally designated confidential.

6. In the event that a document protected by the attorney-client privilege, the attorney work product doctrine or other applicable privilege or protection is unintentionally produced by

any party to this proceeding, the producing party may request that the document be returned. In the event that such a request is made, all parties to the litigation and their counsel shall promptly return all copies of the document in their possession, custody, or control to the producing party and shall not retain or make any copies of the document or any documents derived from such document. The producing party shall promptly identify the returned document on a privilege log so the receiving party can challenge the designation. The unintentional disclosure of a privileged or otherwise protected document shall not constitute a waiver of the privilege or protection with respect to that document or any other documents involving the same or similar subject matter.

7. All documents, deposition testimony or other material subject to this Order, and all confidential information derived from that material, shall not be used, directly or indirectly, by any party for any business, commercial or competitive purpose or for any purpose whatsoever other than the preparation and trial of this action or any related settlement negotiations, in accordance with the provisions of this Order.

8. If a party wishes to file a document that has been marked Confidential with the Court, the party will follow all rules and practices followed by the Court regarding filing a document under seal.

9. Neither the taking of, nor the failure to take, any action to enforce the provisions of this Order, nor the failure to object to any designation, will constitute a waiver of any party's claim or defense in this action or any other action or proceeding, including but not limited to a claim or defense that any designated information is or is not confidential, is or is not entitled to particular protection, or embodies or does not embody information protectable by law.

10. Upon request of the producing party and within sixty (60) days after the final disposition of all claims and defenses, by settlement or expiration of time to appeal, all

Confidential Material, including any reproductions of such documents, must be returned to the producing party or its counsel or destroyed. Each party shall absorb its own costs of returning or destroying those documents.

ENTERED: _____

JUDGE CANDACE J. SMITH

/s/ Katherine M Coleman
Katherine M. Coleman (KBA #84089)
Joshua M. Salsburey (KBA #89038)
STURGILL, TURNER, BARKER
& MOLONEY, PLLC
333 West Vine Street, Suite 1500
Lexington, KY 40507
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Counsel for Defendants

/s/ Kevin L. Murphy
Kevin L. Murphy (KBA #50646)
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Fort Mitchell, KY 41017-0534
Telephone: (859) 578-3060
Fax: (859) 578-3061
klmurphy@kevinlmurphyllaw.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on March ___, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all parties of record.

/s/ Kevin L. Murphy
Kevin L. Murphy



Email Address:
kcomeman@sturgillturner.com

March 14, 2016

Kevin L. Murphy
Kevin L. Murphy PLLC
2400 Chamber Center Drive, Suite 301
P.O. Box 17534
Ft. Mitchell, KY 41017-0534
KLMurphy@kevinlmurphyllaw.com

RE: Jane Doe v. Northern Kentucky University
STBM File No. 64764.0005

Dear Mr. Murphy:

Before we conference with the Magistrate Judge on the issue of our Rule 26 disclosures and discovery in this matter I thought is best to provide you with the legal context and authority which constrains NKU and its Defendant employees as it is unavoidable that Ms. Doe and other NKU students' education records will play a significant role in this lawsuit. Obviously, this begins with our Rule 26 initial disclosures and will continue with discovery in this matter.

As an institution of higher education receiving federal financial assistance, NKU's use of such records is governed by the Family Educational Rights and Privacy Act (FERPA) and its implementing regulations, 20 U.S.C. § 1232g and 34 CFR Part 99. To help clarify expectations, I am hereby providing an outline FERPA's implications for the use of education records in Defendants' possession as they pertain to this litigation, and in particular as they pertain to any agreed protective order governing their use.

FERPA provisions Defendants must follow in this litigation: FERPA broadly defines "education records" as records that are maintained by a covered educational institution such as NKU, or someone acting for the institution such as NKU's employees, which directly relate to a student who was or is in attendance at the institution. 20 U.S.C. § 1232g(a)(4), 34 CFR 99.3. As a general rule, FERPA provides that the institution may not disclose education records without the student's consent. See 20 U.S.C. § 1232g(b)(1) and 34 CFR 99.30. "Disclosure" means "to permit access to or the release, transfer, or other communication of personally identifiable information contained in the education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record." 34 CFR 99.3. "Personally identifiable information" includes but is not limited to a student's name, names of family members, address, social security number and "other



March 14, 2016
Page 2

information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty,” as well “information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.” *Id.* Valid consent requires prior written consent from the student(s) at issue that (1) specifies the records authorized to be disclosed, (2) states the purpose of the disclosure, and (3) identifies to whom the disclosure would be made. 34 CFR 99.30.

There are limited circumstances in which prior consent is not required. One such exception is that student records may be disclosed pursuant to a court order or lawfully issued subpoena, subject to the institution providing the affected student(s) with notice of the order and a reasonable opportunity to file objections with the court. 34 CFR 99.31(a)(9). But even without a court order or subpoena, another FERPA exception provides that the institution may disclose a student’s education records to the court in the course of defending itself against a lawsuit initiated by that student. *Id.*

What this means for Ms. Doe: As they always have, NKU and its employees will protect Ms. Doe’s education records and decline to disclose them unless authorized by either Ms. Doe’s written consent or an exception such as those cited above. This means that NKU will, as it recently did with the Enquirer, decline media requests for Ms. Doe’s records made under the Kentucky Open Records Act based on enumerated exceptions to the Act, FERPA, and federal confidentiality expectations found in the Violence Against Women Act and the Clery Act. *See* KRS 61.878(1)(a) and (k), 20 USC 1232g, 20 USC 1092(f)(8)(B)(v), 34 CFR Part 99, 34 CFR 668.46(b)(11)(iii). This also means, however, that Defendants are entitled to rely upon Ms. Doe’s education records in defending themselves against the claims Ms. Doe has asserted in this lawsuit, including submission of Ms. Doe’s education records to the court as NKU reasonably deems necessary via pleadings, exhibits, and the like. 34 CFR 99.31(a)(9). This FERPA-affirmed right is what has been referred to in prior communications to you regarding Ms. Doe’s education records.

Notwithstanding the rights afforded to them by FERPA, Defendants will honor Ms. Doe’s wish, as expressed through her choice to proceed under pseudonym, to avoid public disclosure of her identity. Accordingly, while Defendants may rely upon Ms. Doe’s education records in the course of their defense, they will, consistent with rules of procedure and standing court orders, redact Ms. Doe’s name and the following personally identifying information before producing records in the course of this litigation: social security number, student i.d. number, email addresses, home address, phone numbers, and names of family members. If there is other data you request be redacted from any production related to Ms. Doe you are asked to identify it for recitation in any agreed protective order.



March 14, 2016
Page 3

Of course, by relying on Ms. Doe's education records in the course of defending themselves in this lawsuit, Defendants have not and will not waive the protection that FERPA and other laws afford Ms. Doe from disclosure of her education records in response to requests made by third parties, like the media, under laws such as the Kentucky Open Records Act. We anticipate Ms. Doe agrees, but to avoid third parties construing Defendants' FERPA-authorized use of Ms. Doe's education records as a waiver of the right to withhold records from production under the Open Records Act, we believe any agreed protective order should be clear about this point.

What this means for other NKU students: While Defendants may rely upon Ms. Doe's education records in their defense against Ms. Doe's claims, they remain prohibited by FERPA from disclosing the education records of other students whose records are entwined with your client's in this litigation. Unfortunately, this is not easily addressed through the issuance of an order or subpoena. Before NKU can respond to any such order or subpoena for other students' education records, it must first make a reasonable effort to notify any student whose records are sought about the order or subpoena *in advance of compliance*, so as to allow the student a reasonable opportunity to seek protective action with the court. 34 CFR 99.31(a)(9). It is our belief that other students who have involvement in Ms. Doe's claims are known to her and to Defendants. However, that does not mean those students' identities should be disclosed to the public. As such, we believe the parties should seek an order allowing NKU to produce education records that reference other students directly involved in Ms. Doe's claims subject to redaction of information which "alone or in combination, is linked or linkable" to any of those students such that it "would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty." See 34 CFR §99.3.

With the various issues laid out above in mind, an updated version of the proposed Agreed Protective Order previously sent to you is enclosed. I am generally available this week to schedule a conference call with Magistrate Judge. Please advise as to your availability.

Sincerely,

Katherine M. Coleman (Kacey)

KMC/

\\00676952.DOCX

FILED ELECTRONICALLY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION
CASE NO. 2:16-CV-00028-WOB-CJS

JANE DOE

PLAINTIFF

v.

AGREED PROTECTIVE ORDER

NORTHERN KENTUCKY
UNIVERSITY, et. al.

DEFENDANTS

In accordance with Federal Rule of Civil Procedure 26(a) and (b), Northern Kentucky University, Geoffrey S. Mearns, Les Kachurek, Kathleen Roberts, and Ann James (collectively “Defendants”) anticipate the production of materials subject to the Family Educational Rights and Privacy Act (FERPA), the Clery Act, the Violence Against Women Act, and implementing regulations, appropriately subject to court order against unauthorized disclosure.

The parties having agreed, and the Court being otherwise sufficiently advised, IT IS HEREBY ORDERED as follows:

1. This Agreed Protective Order shall govern all documents, information and material subject to confidentiality pursuant to the Family Educational Rights and Privacy Act (FERPA) and its implementing regulations, 20 U.S.C. § 1232g and 34 CFR Part 99, produced by Defendants whether or not such material is informally produced or produced in response to a formal discovery request in this case.
2. Defendants are prohibited by FERPA from disclosing the education records of any student who was or is in attendance at NKU without the student’s prior, written consent. *See* 20 U.S.C. § 1232g(b)(1) and 34 CFR 99.30. Defendants are entitled to rely upon Plaintiff’s education records as it relates to their defense of the claims asserted herein, including

submission of Plaintiff's education records to the court. 34 CFR 99.31(a)(9). Plaintiff has elected to proceed under pseudonym in this action to avoid public disclosure of her identity. Accordingly, while Defendants may rely upon Plaintiff's education records in the course of their defense, they will, consistent with rules of procedure and standing court orders, redact Plaintiff's name and the following personally identifying information before producing records in the course of this litigation: social security number, student i.d. number, email addresses, home address, phone numbers, and names of family members. Production and/or reliance on Plaintiff's education records by Defendants in the course of defending themselves in this lawsuit does not constitute waiver of the protection that FERPA and other laws afford Plaintiff from disclosure of her education records in response to requests made by third parties not party to this action.

3. To the extent the education records of students not a party to this action are implicated by the production of Plaintiff's education records, the parties acknowledge that those student identities are likely known to Plaintiff and Defendants, but may not be lawfully disclosed to non-parties or the public. Any education record relating to students other than Plaintiff shall be produced subject to redaction of information which "alone or in combination, is linked or linkable" to any of those students such that it "would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty." 34 CFR §99.3. Nothing in this Order shall be deemed to preclude Plaintiff from challenging the validity of any redacted information and Plaintiff may so move the Court. Should the Court issue any order compelling production of the education records of any current or former student containing personally identifying information under FERPA, or should Plaintiff seek to subpoena such records, in accordance

with FERPA: (1) Defendants shall be provided seven (7) calendar days from the date of such order or subpoena to make reasonable effort to send notice to such student(s); and, (2) the student(s) shall have twenty-one (21) days from the date of the order or subpoena in which to seek protective action with the court, *in advance of compliance*. 34 CFR 99.31(a)(9).

4. This Order does not grant permission to either party to discover material that is not properly discoverable under applicable law, the Federal Rules of Evidence or the Federal Rules of Civil Procedure, and does not constitute a waiver of any objection a party may have on those grounds. Likewise, no party waives any objections to admissibility that they might otherwise have. Nothing about this Order or any document production made pursuant to this Order shall be construed as a waiver of any party's rights or obligations to decline disclosure of material to third parties under federal or state law.
5. Any education records provided shall be used by counsel solely for use in this litigation and shall be copied only as necessary for these purposes. Counsel shall secure any such records or information in a manner sufficient to prevent any unauthorized viewing or use of the records or information, consistent with all applicable law and this order.
6. Except with prior consent of this court, no information or document provided pursuant to this order may be disclosed to anyone other than: (1) parties to this action; (2) employees of counsel, assigned to and necessary to assist counsel in the preparation of this action, but only to the extent necessary to assist and participate in preparation of the litigation; (3) consultants and experts retained by the parties or their counsel for the purpose of assisting in the preparation of this action; and (4) this court.
7. Upon termination of this litigation, the originals and all copies of any documents provided to parties or counsel containing education records shall be returned to their source or destroyed,

with their destruction being certified in writing to the source, if requested. The return or destruction of documents is not required of court personnel and does not relate to documents in the court's record.

This ___ day of _____, 2016.

Stipulated and Agreed to by:

/s/ Katherine M. Coleman

Katherine M. Coleman (KBA #84089)

Joshua M. Salsburey (KBA #89038)

STURGILL, TURNER, BARKER

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Lexington, KY 40507

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kcoleman@sturgillturner.com

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Counsel for Defendants

/s/ Kevin L. Murphy

Kevin L. Murphy (KBA #50646)

KEVIN L. MURPHY PLLC

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P.O. Box 17534

Fort Mitchell, KY 41017-0534

Telephone: (859) 578-3060

Fax: (859) 578-3061

klmurphy@kevinlmurphyllaw.com

Counsel for Plaintiff

W00676936.docx

Kacey Coleman

From: Kacey Coleman
Sent: Thursday, March 17, 2016 3:43 PM
To: 'Kevin Murphy'
Cc: Joshua Salsburey
Subject: RE: Jane Doe v. NKU, et al.
Attachments: Murphy Ltr 3-14-16 (00676957xA9D25).pdf

Kevin:

I believe your proposed order is substantially similar to the one I provided to you via email on Monday, March 14, 2016 in an effort to resolve this dispute, with the exception that it does not address NKU's FERPA obligations. NKU simply cannot ignore its federal compliance obligations. I realize that FERPA has some onerous requirements, but NKU must adhere to those nonetheless. Frankly, I would love to never have to deal with FERPA, but such is not the case.

As I noted in my letter accompanying the revised order, FERPA is clear that an order of the court does not override NKU's FERPA obligations. Accordingly, while a generic order could be entered, we would still be compelled to comply. It is surely in the interests of judicial economy to address the FERPA compliance now versus having to address these issues at each stage of discovery.

My original order, as well as the revised order, with the exception of the FERPA language, track in great part as well typical orders in federal court. In fact, orders approved by Magistrate Smith in other matters before her. I believe you can see that, based on your representations to the court at the Docket Call, we are quite willing, and authorized under FERPA, to provide Ms. Doe's records to you subject only to required redaction of personally identifying information. However, we must address our specific FERPA mandate as to the education records of any other student impacted. I would encourage you to review again the revised order I forwarded to you Monday, which is attached again here for your convenience.

Kacey

From: Kevin Murphy [<mailto:KLMurphy@kevinlmurphyllaw.com>]
Sent: Thursday, March 17, 2016 2:55 PM
To: Kacey Coleman
Subject: Jane Doe v. NKU, et al.

Here is a protective order that protects your clients, and is standard in federal court. I am sending this to you pursuant to Judge Smith's recent order.

In 35 years, I have never seen any protective order as egregious as the one you sent me. This one protects your clients, as well as any students.

I ask that you agree to this protective order so we can move on with the case.

K. L. Murphy

KEVIN L. MURPHY PLLC

Kevin L. Murphy, Esq.
Attorney

2400 Chamber Center Drive | 859.578.3060 Direct
Suite 212 | 859.578.3061 Fax

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KLMurphy@kevinlmurphyllaw.com

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Kacey Coleman

From: Kacey Coleman
Sent: Monday, March 21, 2016 4:47 PM
To: 'Kevin Murphy'
Cc: Joshua Salsburey
Subject: RE: Jane Doe v. NKU, et al.

Please see below

Very truly yours,

Katherine M. Coleman

Katherine M. Coleman (Kacey)



A Member Of The Employment Law Alliance



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333 WEST VINE STREET, STE 1500 ~ LEXINGTON, KENTUCKY 40507

TELEPHONE: (859) 255-8581 ~ FACSIMILE: (859) 231-0851

From: Kevin Murphy [mailto:KLMurphy@kevinlmurphyllaw.com]
Sent: Monday, March 21, 2016 2:57 PM
To: Kacey Coleman
Subject: RE: Jane Doe v. NKU, et al.

Where in your revised protective order does it state that confidential documents can be shown to deponents, especially non-party deponents? Again, I just ask—are you doing this intentionally, or is it just a mistake on your part? First, I personally believe that while parties to litigation may not get along, the counsel involved should be able to practice with a level of decorum. I am a big girl – and despite your comments, well versed and practiced in this area of the law – and I can take whatever you want to dish out. However, effort to work and communicate in a respectful and positive manner can only help to serve the interests of our clients and the

progress of this litigation. Second – as to the order, the order reaches ONLY to “education records” as those records are defined under FERPA. As my letter of March 14th sought to lay out, given your representations concerning your client’s education records, we are happy to produce those subject to the redaction enumerated. However, NKU must assure FERPA compliance as to the education records of any other student. Once records are produced in accordance with FERPA the order they can be used for any purpose.

You drafted this as if every document produced is going to be a student record. Again – the order ONLY reaches to “education records” it does not apply to any records which do not constitute an education record under FERPA. That is not going to be the case. If there is an e-mail from one NKU employee to another about an assault, if the victim's name is in the e-mail, that name can be redacted, and the document produced without the need for anyone's permission. As my letter of March 14th and its citation to the provisions of FERPA explained, such a record will qualify as an “education record” under FERPA; however, IF the record can be redacted such that it does not reflect information therein which “alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty,” it may be subject to production. If there is an e-mail about NKU policy or policies, that is not a student record. Agreed – and the Order in no way prohibits or restricts production of such a record.

I hope you agree that you cannot hide behind these laws to prevent me from finding out how many assaults there were in the last several years, how they were handled, what kind of sanctions were issued, what NKU employees were involved, the end results, etc. The number of sexual assaults is readily available to you on the NKU website as, in accordance with the Clery Act, NKU publishes its campus crime statistics. You are quite correct that FERPA will prohibit production of any “education records” concerning assaults without FERPA compliance. At a minimum that requires, as set out in the order and mandated by FERPA, that NKU provide notice to the affected students and that the affected students have a reasonable period of time in which to appear before the court to object. Of course, I think you can also assume that NKU will raise the issue of relevance in the event you seek such records.

As I have noted previously, I have availability tomorrow and Wednesday to conduct a conference call with the Magistrate. I have little availability Thursday and will be out of the office beginning the 25th until April 4th. My partner, Josh Salsburey, may have availability on Thursday, but like me, will be traveling for the Fayette County Spring Break. Alternatively, I am happy to brief this issue for the Magistrate to allow her the opportunity to familiarize herself with FERPA in the event she has not worked with it previously and conduct the call upon my return.

K. L. Murphy

From: Kacey Coleman [<mailto:KColeman@sturgillturner.com>]
Sent: Thursday, March 17, 2016 3:43 PM
To: Kevin Murphy <KLMurphy@kevinlmurphy.com>
Cc: Joshua Salsburey <JSalsburey@sturgillturner.com>
Subject: RE: Jane Doe v. NKU, et al.

Kevin:

I believe your proposed order is substantially similar to the one I provided to you via email on Monday, March 14, 2016 in an effort to resolve this dispute, with the exception that it does not address NKU’s FERPA obligations. NKU simply cannot ignore its federal compliance obligations. I realize that FERPA has some onerous requirements, but NKU must adhere to those nonetheless. Frankly, I would love to never have to deal with FERPA, but such is not the case.

As I noted in my letter accompanying the revised order, FERPA is clear that an order of the court does not override NKU's FERPA obligations. Accordingly, while a generic order could be entered, we would still be compelled to comply. It is surely in the interests of judicial economy to address the FERPA compliance now versus having to address these issues at each stage of discovery.

My original order, as well as the revised order, with the exception of the FERPA language, track in great part as well typical orders in federal court. In fact, orders approved by Magistrate Smith in other matters before her. I believe you can see that, based on your representations to the court at the Docket Call, we are quite willing, and authorized under FERPA, to provide Ms. Doe's records to you subject only to required redaction of personally identifying information. However, we must address our specific FERPA mandate as to the education records of any other student impacted. I would encourage you to review again the revised order I forwarded to you Monday, which is attached again here for your convenience.

Kacey

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Sent: Thursday, March 17, 2016 2:55 PM
To: Kacey Coleman
Subject: Jane Doe v. NKU, et al.

Here is a protective order that protects yours clients, and is standard in federal court. I am sending this to you pursuant to Judge Smith's recent order.

In 35 years, I have never seen any protective order as egregious as the one you sent me. This one protects your clients, as well as any students.

I ask that you agree to this protective order so we can move on with the case.

K. L. Murphy

KEVIN L. MURPHY PLLC

Kevin L. Murphy, Esq.

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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT COVINGTON**

CIVIL ACTION NO. 16-28-WOB-CJS

JANE DOE

PLAINTIFF

v.

MINUTE ENTRY / ORDER

NORTHERN KENTUCKY UNIVERSITY, ET AL.

DEFENDANTS

* * * * *

On April 22, 2016, an informal telephone conference was held in this matter to discuss a discovery dispute between the parties concerning the entry of a protective order as to certain education records contemplated to be a part of the discovery in this case. Attorneys participating in the phone conference were Kevin L. Murphy on behalf of Plaintiff and Joshua Michael Salsburey and Katherine M. Coleman on behalf of Defendants. This proceeding was informal, with no courtroom deputy present and the call was not recorded.

The Court first outlined to the parties how discovery disputes will be handled going forward. The parties were referred to the Court's previous Order establishing a three-tiered process for bringing discovery disputes before the Court. (*See* R. 8). As this was the first discovery dispute brought to the undersigned's attention in this new case filing, the intended scope and operation of the Court's three-tiered process for discovery disputes was discussed. The undersigned clarified that if further discovery impasses occur in this case, counsel will be expected to contact Chambers by telephone (859-392-7903) and request that a discovery impasse telephone conference be scheduled,

at which point counsel will be given further instructions by Chambers. With this clarification, both sides expressed they understood the Court's instructions on applying the three-step process for resolving discovery disputes moving forward.

In relation to the current discovery dispute, the Court referenced two recent filings in this case: Plaintiff's Motion to Strike Defendants' April 14, 2016, Letter to the Court and for Fees (R. 10) and Plaintiff's Response to Defendants' Various Proposed Protective Orders (R. 12). The Motion to Strike will be denied as moot, defense counsel's letter having not been filed in the record but rather was considered by the undersigned as Defendants' informal submission on the discovery impasse. Plaintiff's filed "Response to Defendants' Various Proposed Protective Orders" was also sent to Chambers by email attachment, is considered by the undersigned as Plaintiff's informal submission on the current discovery dispute, and therefore the filed Response will be ordered stricken from the formal record.

The phone conference discussion then turned to the substance of the parties' current dispute over the content of a protective order to govern certain discovery information in this case; namely, education records for Plaintiff and other students. The Court discussed generally with counsel the provisions of the Family Educational Rights and Privacy Act (FERPA) and offered some guidance on how to go about crafting a protective order that addresses the concerns of both sides in this case. But with defense counsel's confirmation that the draft protective order provided with Defendants' informal submission has not previously been presented to nor discussed with Plaintiff's counsel, the Court explained that any further, more detailed discussion with counsel of the current dispute is not appropriate. This is because the parties have not sufficiently completed step 1 of the required process, requiring they confer directly to try and resolve between them the current discovery dispute

before the undersigned will conduct an informal step 2 telephone conference directed to any specifically focused points of discovery disagreement identified at the conclusion of their direct dialogue. Counsel acknowledged the need to further communicate directly with each other on this issue of drawing up a proposed protective order that deals with their various concerns and is also acceptable to the Court. They were instructed to call Chambers with particularized points of dispute for further informal phone conference with the undersigned in the event they are unable to agree upon a complete proposed protective order.

Accordingly, **IT IS ORDERED** as follows:

1. Plaintiff's Motion to Strike Defendants' April 14, 2016, Letter to the Court and for Fees (R. 10) is **denied**.
2. Plaintiff's Response to Defendants' Various Proposed Protective Orders (R. 12) shall be **stricken from the record**.

Dated this 25th day of April, 2016.



Signed By:

Candace J. Smith 

United States Magistrate Judge

TIC: 50 min.

J:\DATA\Orders\civil cov\2016\16-28 ph conf mins & order 4-22-16.wpd



Email Address:
kcoleman@sturgillturner.com

April 27, 2016

Kevin L. Murphy
Kevin L. Murphy PLLC
2400 Chamber Center Drive, Suite 301
P.O. Box 17534
Ft. Mitchell, KY 41017-0534
KLMurphy@kevinlmurphyllaw.com

RE: *Jane Doe v. Northern Kentucky University, et al.*
U.S. District Court, E.D., Ky., Case No. 2:16-cv-00028-WOB-CJS
STBM File No. 64764.0005

Dear Kevin:

I am in receipt of your email communication of today's date and proposed protective order. In accordance with the directives of the Magistrate we have prepared the attached Agreed Protective Order for your review.

Please allow me to respond to each of your comments concerning the order provided to Magistrate Smith:

I cannot agree to your introduction. There is going to be lots of relevant documents that are not included under FERPA or any of those other Acts. So there is no need to list those, and I ask you to use the introduction that I have in my draft order.

As noted during our discovery conference, there is no dispute that many of the documents you have requested are not "education records" as that term is defined under the Family Education Rights and Privacy Act (FERPA). At no time has any representation been made that no documents will be produced. Only those records which are education records of non-party current and former students of NKU are at issue. It is apparent that we can argue at length as to what constitutes an "education record" under FERPA. I have referred you to the language of the statute and its implementing regulations as well as the Sixth Circuit's ruling in *U.S. v. Miami University*, 294 F.3d 797 (6th Cir., 2002) for guidance on this matter. Any education record that falls in the noted exceptions discussed in that opinion will be produced without the need for further action.



April 27, 2016
Page 2

I further see no benefit to continued argument whether an education record is or is not subject to production under FERPA. This is a moot point as there is no intention not to produce a record the only objection to which is FERPA compliance. Whether you agree with NKU's obligations under FERPA or not, the protective order seeks to provide the mechanisms NKU believes it must have in place before it can make production. Those mechanisms are (1) an order of the court, and (2) notice to the affected student with an opportunity for objection. Once there is an order and the student has been provided notice and the opportunity to respond, if there is no objection, we will produce the education record. In the event there is objection to the court that is matter for the individual, not Defendants, to address with the Court and Defendants will comply with any order of the court related to such records.

On number 1, you seem to imply that all documents will fall under this umbrella. Again, that is not the case. A protective order is not a document that is supposed to be a recitation of what your defenses are or what federal law is. It is simply a tool to state how we are going to handle the disclosure of documents. So, there is no need to recite statutes and code sections.

As stated above and in the order now proposed, the order applies only to those records with constitute education records under FERPA. We believe the law is clear and well settled as to what constitutes an "education record" under FERPA and Defendants' related statutory obligations. However, in the interest of bring this dispute to closure and so that we may proceed with discovery in this matter we have revised the language of the proposed order in an effort to recognize your disagreement with our position on the law.

Number 2 is not language found in every day protective orders, and even cases like this. Respectfully, it reads like a professor giving a lecture at the university, not a lawyer looking to protect documents. Plus, you are indeed permitted by FERPA to disclose certain records of students without the student's prior written consent, so the first sentence is not accurate. Also, judges do not make legal rulings in protective orders.

The order does nothing more than recite the law as it exists at this time. Again, in the interests of bring this dispute to closure we have revised the language of the enclosed proposed order in an effort to recognize your disagreement with our position on the law. It should further be noted that the language proposed in this section, both in the order presented to the court and attached here, is intended to provide continued protection to your client from the production of her education records to third parties.

You are stating in number 2 affirmatively that the Defendants are entitled to rely on Plaintiff's education records as it relates to the defense of their case. As you know, I carefully crafted this Complaint to make it specifically tailored to a timeline. Also, your threat in your letter is part of our cause of action, and a protective order is not the proper means to try to back door a summary judgment ruling on those claims. Thus, paragraph 2 as written is way beyond the standard protective order. Again, you have no right to state what defenses you can and cannot utilize. This is not a summary judgment ruling.



April 27, 2016
Page 3

Dismissing the fact that you continue to mischaracterize my FRE 408 communication which references the current provisions of FERPA, once again, in an effort to bring this to conclusion we have restated this provision.

I cannot agree to number 3. Once again, you are misconstruing the law, and you do not have a right to state that you need to send this letter on every document or record that may relate to the student. I understand why you want to do this—it would be a great way to try to prevent the disclosure of key documents. But, that is once again misconstruing the law.

This is obviously a point of disagreement on which it may well be that we cannot agree absent a ruling of the court. We firmly assert that NKU may only produce the education records of a current or former student who is not a party to this action either upon their written consent or pursuant to an order of the court following notice and opportunity to object. Again, there is no intention to object to production of student education records on FERPA grounds if these conditions are met. As such, it seems that continued objection is simply further forestalling possible production.

As I stated to you previously, number 5 is unnecessary and this language is not found in protective orders. The Federal Rules of Evidence and the Federal Rules of Civil Procedure speak for themselves. And as to number 7, we have been over this ad nauseam. Until you recognize that I am allowed to use these documents in depositions of non-defendants and non-experts, we will never have an agreement.

In the proposed order provided this provision has been removed and replaced with language in accordance with the directives of the Magistrate.

The enclosed order makes no effort to designate any document produced pursuant to its terms “confidential” unless either party makes appropriate motion to the court to do so. As such, any documents produced pursuant to the order may be used for all purposes unless further protection is sought by one of the parties or a student who receives notice. This would appear to be a less restrictive order than that which you propose. Defendants cannot, however, agree to the production of any document which constitutes an “education record” under FERPA without order of the court and notice to the affected student, an obligation I believe Magistrate Smith at a minimum indicated she has addressed in past matters.



April 27, 2016
Page 4

As your proposed order does not provide for notice to affected non-party students please advise if you will be willing to agree to such notice. If we are at an impasse on that point then I suggest that we notify Magistrate Smith.

Sincerely,

Katherine M. Coleman (Kacey)

KMC/

Enclosures

cc: Sara Sidebottom, Esq.
Sara Kelley, Esq.
Joshua M. Salsburey, Esq.

\\00691601.docx

FILED ELECTRONICALLY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION
CASE NO. 2:16-CV-00028-WOB-CJS

JANE DOE

PLAINTIFF

v.

AGREED PROTECTIVE ORDER

NORTHERN KENTUCKY
UNIVERSITY, et. al.

DEFENDANTS

By agreement of the parties, IT IS ORDERED as follows:

1. This Agreed Protective Order shall govern production only of those student “education records,” as that term is defined under FERPA, which Defendants assert they are prohibited producing without the prior, written consent of the current or former student to whom such records relate.
2. Defendants will, consistent with rules of procedure and standing court orders, redact Plaintiff’s name and the following personally identifying information before producing her education records in the course of this litigation: social security number, student i.d. number, email addresses, home address, phone numbers, and names of family members. Production and/or reliance on Plaintiff’s education records by Defendants in the course of defending themselves in this lawsuit does not constitute waiver of the protection that FERPA and other laws afford Plaintiff from disclosure of her education records in response to requests made by third parties not party to this action.
3. Any education record which “directly relates” to a non-party current or former student of Northern Kentucky University which is requested, relied upon, or implicated by the production of Plaintiff’s education records herein shall be produced, in accordance with

Defendant's asserted FERPA obligations, the rules of procedure and the standing orders of the court, subject to redaction of such student's personally identifiable information and the following "notice/objection" period:

- a. Defendants shall be provided five (5) business days from the date of entry of this Agreed Protective Order or the identification/request for any education record which directly relates to a non-party current or former student(s), whichever is later, to make reasonable effort to send notice to such student(s) using the form letter attached hereto as Exhibit A.
 - b. The affected student(s) shall have ten (10) calendar days from the date of such notice in which to seek protective action with the court in advance of Defendant's production. In the event the tenth day falls on a Saturday, Sunday or federal holiday, the affected student shall have until the next calendar day when the court is open in which to file any objection.
4. Nothing in this Order shall be deemed to preclude Plaintiff from challenging whether any document is subject to FERPA.
5. This Order does not grant permission to either party to discover material that is not properly discoverable under applicable law, the Federal Rules of Evidence or the Federal Rules of Civil Procedure, and does not constitute a waiver of any objection a party may have on those grounds. Likewise, no party waives any objections to admissibility that they might otherwise have. Nothing about this Order or any document production made pursuant to this Order shall be construed as a waiver of any party's rights or obligations to decline disclosure of material to third parties under federal or state law.

6. Any education records provided shall be used by counsel solely for use in this litigation and shall be copied only as necessary for these purposes. Counsel shall secure any such records or information in a manner sufficient to prevent any unauthorized viewing or use of the records or information, consistent with all applicable law and this order.
7. Nothing about this Order shall prevent any party from using documents produced pursuant to the Agreed Protective Order in connection with any trial, hearing, deposition or other public proceeding in this case. Further, nothing about this Order shall be construed to restrict the parties' counsel from making inquiry of witnesses or potential witnesses regarding the subject matter of the documents produced.
8. A party seeking to maintain the confidentiality of document(s) produced pursuant to this Agreed Protective Order which may be disclosed in proceedings, hearings, or at trial shall follow all rules and practices established by the Court regarding the filing of documents under seal.
9. Upon termination of this litigation, the originals and all copies of any education records provided to parties or counsel shall be destroyed, with their destruction being certified in writing to the source, if requested. The destruction of documents is not required of court personnel and does not relate to documents in the court's record.

This __ day of _____, 2016.

CANDACE J. SMITH, MAGISTRATE

Stipulated and Agreed to by:

/s/ Katherine M. Coleman

Katherine M. Coleman (KBA #84089)

Joshua M. Salsburey (KBA #89038)

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Counsel for Defendants

/s/ Kevin L. Murphy

Kevin L. Murphy (KBA #50646)

KEVIN L. MURPHY PLLC

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Fort Mitchell, KY 41017-0534

Telephone: (859) 578-3060

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klmurphy@kevinlmurphyllaw.com

Counsel for Plaintiff

V00691530.docx

Exhibit A

[LETTERHEAD]

[DATE]

[STUDENT NAME]

[ADDRESS]

Dear [STUDENT NAME]:

In the legal action styled *Jane Doe v. Northern Kentucky University, et. al.*, in the U.S. District Court at Covington, Case No. 2:16-CV-00028-WOB-CJS, pursuant to Northern Kentucky University's Rule 26 disclosures, discovery requests by Ms. Doe and a related Agreed Protective Order entered by the Court [DATE] (copies of which are enclosed), Northern Kentucky University is required to produce records related to you that otherwise may be protected by the federal Family Education Rights and Privacy Act ("FERPA"). The following records related to you have been identified for production: _____.

Pursuant to FERPA this letter is to provide you notice of this production. Under FERPA you have the right to raise an objection regarding the disclosure of your education records. To raise an objection, you must file your objection with the U.S. District Court in Covington, Kentucky, before which this action is pending. The following is contact information for the Court:

U.S. District Court
35 W. 5th Street
Covington, KY 41011-1401
Phone: (859) 392 - 7925

Please direct any objection to Magistrate Judge Candace J. Smith.

If you do not object to the Court on or before the close of business on _____ (10 calendar days from the date of this notice), the University will produce the records that have been identified or requested in the University's possession.

Sincerely,

Counsel for Defendants

Enclosures

\00686636.doc

E-Mail Address:
jsalsburey@sturgillturner.com

June 2, 2016

Honorable Candace J. Smith, Magistrate Judge
U.S. Courthouse
35 W. 5th Street, Room 375
Covington, KY 41011-1401
VIA EMAIL TO smith_chambers@kyed.uscourts.gov

RE: *Jane Doe v. Northern Kentucky University*
USDC, EDKY-Covington, CASE NO. 2:16-CV-00028-WOB-CJS
STBM File No. 64764.0005

Dear Magistrate Judge Smith:

ISSUE AND BACKGROUND

This matter is before the Court on the continuing dispute as to the terms of a proposed agreed protective order (APO) governing the anticipated production of student education records in this matter. As of counsels' last communication there was agreement as to the language of the APO, but there is continuing dispute about language to be contained in the notice of production provided to students and Defendants' production obligations when objection is made by a student.

Consistent with the law outlined below and the APO, upon entry of the APO NKU will send notice to students whose records may be produced. This notice informs students of their right to file objections to production with the Court. If no objection is made, the records will be produced without redaction (other than required of all records by standing orders of the Court). Defendants' position is that if objections are filed, production by Defendants must wait and be made in compliance with, the Court's ruling on those objections. Plaintiff, however, contends that if a student objects, Defendants redaction of the student's "personally identifiable information" permits production without awaiting the Court's decision.

Plaintiff's position presents two material problems. First, under the law outlined below, redaction of "personally identifiable information" alone often is not enough to sufficiently "de-identify" a student record. Second, the nature and extent of a student's objections and the amount of protection to which a student may be entitled, must be determined on a case-by-case basis by the Court, not prior agreement of the parties.

DEFENDANTS' POSITION AND FEDERAL LAW

The use of student education records by NKU and its employees is governed by the Family Educational Rights and Privacy Act (FERPA) and its implementing regulations, 20 U.S.C. § 1232g and 34 CFR Part 99. FERPA controls the use and disclosure of "education records," which are broadly defined as records that are maintained by a covered educational institution, or someone

acting for the institution, which directly relate to a student who was or is in attendance at the institution. 20 U.S.C. § 1232g(a)(4), 34 CFR 99.3.

As a general rule, FERPA provides that the institution may not disclose education records without the student's prior consent. *See* 20 U.S.C. § 1232g(b)(1) and 34 CFR 99.30. "Disclosure" means "to permit access to or the release, transfer, or other communication of personally identifiable information contained in the education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record." 34 CFR 99.3. "Personally identifiable information" is broadly defined and includes, but is not limited to, a student's name, names of family members, address, social security number, "*other indirect identifiers*"—even handwriting—as well as "other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty." *Id.* The term also includes "information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates." *Id.* It is reasonably believed that Plaintiff already knows the identities and other information about at least some of the students whose records Plaintiff seeks.

FERPA does provide limited circumstances where production may be made without a student's prior consent. Defendants may produce education records without prior consent pursuant to a court order and the related requirement that, prior to such production, the institution must make a reasonable effort to notify any student whose records are at issue about the order (or subpoena) *in advance of compliance*, so as to give the student a reasonable opportunity to seek "protective action." *See* 34 CFR 99.31(a)(9); 42 USC 40002(b)(2)(B) and (C). Students who object are entitled to a ruling from the Court on the matter. Counsel cannot disregard or circumvent this mandated process. In the event of objection, Defendants will comply with the ruling of the Court in response to any objection that may be filed.

Defendants must comply with the notice requirements of FERPA and as a result are currently prevented from producing records to which they have no objection on other grounds¹ while awaiting the entry of an order pursuant to which notice of production may be made. Resolution of this matter will speed the discovery process.

Respectfully,

Joshua M. Salsburey

cc: Katherine M. Coleman
\\00700736.docx

¹ Defendants expressly reserve the right to object to production of education records on grounds other than FERPA compliance, such as discoverability.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION
CASE NO. 2:16-CV-00028-WOB-CJS

JANE DOE

PLAINTIFF

v.

AGREED PROTECTIVE ORDER

NORTHERN KENTUCKY
UNIVERSITY, et. al.

DEFENDANTS

By agreement of the parties, IT IS ORDERED as follows:

1. This Agreed Protective Order shall govern production only of those student "education records," as that term is defined under the Family Educational Rights and Privacy Act (FERPA), which Defendants assert they are prohibited producing without the prior, written consent of the current or former student to whom such records relate. Nothing herein shall prevent Plaintiff from challenging the status of any documents requested as "education records" under FERPA.
2. If necessary, Defendants will, consistent with rules of procedure and standing court orders, redact Plaintiff's name and the following personally identifying information before producing her education records in the course of this litigation: social security number, student i.d. number, email addresses, home address, phone numbers, and names of family members. Production and/or reliance on Plaintiff's education records by Defendants in the course of defending themselves in this lawsuit does not constitute waiver of the protection that FERPA and other laws afford Plaintiff from disclosure of her education records in response to requests made by third parties not party to this action.

3. If any education record “directly relates” to a non-party current or former student of Northern Kentucky University which is requested, relied upon, or implicated by the production of Plaintiff’s education records herein, Defendants shall notify Plaintiff of this assertion and the basis for same. Plaintiff shall have seven (7) business days to agree or object, unless the documents identified are voluminous, in which case Plaintiff shall be provided a reasonable period of time in which to agree or object. Failure to respond within seven (7) business days is not to be construed as an acceptance of Defendants’ designation and in no way waives Plaintiff’s right to challenge such designation.
4. In the event Plaintiff agrees Defendants shall produce such records, subject to redaction of such student[s]’ personally identifiable information and subject to the following “notice/objection” period:
 - a. Defendants shall be provided five (5) business days from the date of entry of this Agreed Protective Order or the identification/request for any education record which directly relates to a non-party current or former student(s), whichever is later, to make reasonable effort to send notice to such student(s) using the form letter attached hereto as Exhibit A.
 - b. A copy of the notice letter, with the name and address of the non-party current or former student redacted, shall be provided to counsel for Plaintiff.
 - c. The affected student(s) shall have ten (10) calendar days from the date of such notice in which to seek protective action with the court in advance of Defendant’s production. In the event the tenth day falls on a Saturday, Sunday or federal holiday, the affected student shall have until the next calendar day when the court is open in which to file any objection.

- d. In the event no objection is made Defendants shall produce the subject records unredacted within five (5) business days following the expiration of such notice period. Nothing about this paragraph prohibits Defendants from redacting information per the General Orders 04-01 and 08-01 of this Court.
 - e. In the event objection is made, Defendants shall produce the subject records in accordance with the ruling of the court within five (5) business days following the date of court ruling.
- 5. If Plaintiff does not agree to Defendants' designation, the parties agree to submit the determination to the Magistrate. Until such determination no notice will be sent by Defendants to any non-party current or former student.
 - 6. This Order does not constitute a waiver of any other objection a party may have on grounds of relevance or other applicable law. Likewise, no party waives any objections to admissibility that they might otherwise have. Nothing about this Order or any document production made pursuant to this Order shall be construed as a waiver of any party's rights or obligations to decline disclosure of material to third parties under federal or state law.
 - 7. Any education records provided shall be used by counsel solely for use in this litigation and shall be copied only as necessary for these purposes. Counsel shall secure any such records or information in a manner sufficient to prevent any unauthorized viewing or use of the records or information, consistent with all applicable law and this order.
 - 8. Nothing about this Order shall prevent any party from using documents produced pursuant to the Agreed Protective Order in connection with any trial, hearing, deposition or other public proceeding in this case. Further, nothing about this Order shall be construed to restrict the

parties' counsel from making inquiry of witnesses or potential witnesses regarding the subject matter of the documents produced.

9. A party seeking to maintain the confidentiality of document(s) produced pursuant to this Agreed Protective Order which may be disclosed in proceedings, hearings, or at trial shall follow all rules and practices established by the Court regarding the filing of documents under seal.

10. Upon termination of this litigation, the originals and all copies of any education records provided to parties or counsel shall be destroyed, with their destruction being certified in writing to the source, if requested. The destruction of documents is not required of court personnel and does not relate to documents in the court's record.

IT IS SO ORDERED this 8th day of June 2016.

Stipulated and Agreed to by:

/s/ Katherine M. Coleman

Katherine M. Coleman (KBA #84089)
Joshua M. Salsburey (KBA #89038)
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/s/ Kevin L. Murphy

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Counsel for Plaintiff



Signed By:

Candace J. Smith

United States Magistrate Judge

Exhibit A

[LETTERHEAD]

[DATE]

[STUDENT NAME]

[ADDRESS]

Dear [STUDENT NAME]:

In the legal action styled *Jane Doe v. Northern Kentucky University, et. al.*, in the U.S. District Court at Covington, Case No. 2:16-CV-00028-WOB-CJS, pursuant to an Agreed Protective Order entered by the Court [DATE] (a copy of which is enclosed), Northern Kentucky University is required to produce records related to you that otherwise may be protected by the federal Family Education Rights and Privacy Act ("FERPA"). The following records related to you have been identified for production: _____.

Pursuant to FERPA this letter is to provide you notice of this production. Under FERPA you have the right to raise an objection regarding the disclosure of your education records. To raise an objection, you must file your objection with the U.S. District Court in Covington, Kentucky, before which this action is pending. The following is contact information for the Court:

U.S. District Court
35 W. 5th Street
Covington, KY 41011-1401
Phone: (859) 392 - 7925

Please direct any objection to Magistrate Judge Candace J. Smith.

If you do not object to the Court on or before the close of business on _____ (10 calendar days from the date of this notice), the University will produce the records that have been identified or requested in the University's possession.

Sincerely,

Counsel for Northern Kentucky University

Enclosures



Email Address:
kcoleman@sturgillturner.com

June 24, 2016

Kevin L. Murphy
Kevin L. Murphy PLLC
2400 Chamber Center Drive, Suite 301
P.O. Box 17534
Ft. Mitchell, KY 41017-0534
KLMurphy@kevinlmurphyllaw.com

RE: *Jane Doe v. Northern Kentucky University, et al.*
U.S. District Court, E.D., Ky., Case No. 2:16-cv-00028-WOB-CJS
STBM File No. 64764.0005

Dear Kevin:

I am writing in response to your letter of May 25, 2016, wherein you set forth potential deficiencies in Defendants' Responses to Plaintiff's First Set of Request for Production of Documents. As you are aware, the majority of the issues raised in your letter directly relate to the dispute between the parties as to the production of "education records" in accordance with FERPA. As the Agreed Protective Order (APO) concerning the production of education records was entered June 8, 2016 and the FERPA notice letters to students mailed June 13, 2016 (redacted copies of which were provided to you), there is production, barring protest to the court, which will be made by June 30, 2016 in accordance with the terms of the APO which is largely responsive to the issues you have raised. Given this fact, please see our response to each enumerated request below.

Request No. 1: You state that "it does not appear that all documents responsive to this request have been produced." That is correct. This request sought "all documents evidencing any sexual assault, rape, and/or unwanted advances that occurred on campus and an offsite living quarters in the last seven years." Defendants objected to the production of all documents responsive to this request on the following basis: (1) as overly broad and not likely to lead the discovery of admissible evidence, specifically, whether Defendants acted with deliberate indifference as to Plaintiff's sexual misconduct complaints; and (2) as documents responsive to this request are not subject to production pursuant to Defendants obligations pursuant to FERPA, the Cleary Act, the Violence Against Women Act and their implementing regulations. However, in accordance with FERPA, Defendants provided Plaintiff's responsive education records in response to Request No. 3. In addition, Defendants agreed to the production of the education records of any current or former student to the extent those records were directly involved with Plaintiff's claims of sexual misconduct following entry of an agreed protective order addressing such production to ensure compliance with Defendants' statutory obligations pursuant to

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June 24, 2016
Page 2

FERPA. The parties reached agreement on the terms of such order and an Agreed Protective Order (APO) was entered on June 8, 2016. Notices have been sent pursuant to that APO, copies of which were provided to you via email on June 13, 2016. In accordance with the terms of the APO, and there being no objection made to the court by the notified students, those records will be provided no later than June 30, 2016.

You note production of a discipline letter produced relating to “another student at NKU unrelated to Ms. Doe.” While FERPA generally prevents the production of “education records,” FERPA and the Violence Against Women Act do permit the production of any final disciplinary action against a student involving a finding of responsibility for sexual misconduct, subject to redaction of the complaining party’s name and other personally identifying information. You correctly note that we did not provide documentation relating to student claims of sexual misconduct as to faculty or staff. To address this point, we are now providing you with copies of final disciplinary action concerning student sexual misconduct claims concerning faculty/staff as well as documentation concerning such complaints to the extent that such documentation can be sufficiently “de-identified” through redaction such that personally identifiable information contained therein cannot, “alone or in combination, [be] linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty.” 34 CFR 99.3. Such records are provided here as Bates Nos. NKU SUPP 000001 thru NKU SUPP 000014.

Related to this supplemental production, Defendants also provide supplemental production in response to Request No. 27, which sought “documents produced by the university to any media organization in the last two years regarding sexual assaults, rape, and Jane Doe’s matter.” Subsequent to Defendants’ production on May 2, 2016 those documents provided and marked as Bates No. NKU SUPP 000060 thru NKU SUPP 000300 were provided to the media in response to Open Records Requests.

Request No. 2: As set forth in Defendants’ Responses and above in discussion of Request No. 1, documentation regarding “all documents evidencing what NKU employee, agent and/or contractor was involved in any way” was provided to the extent permitted under FERPA, in the absence of an AP, at the time of Defendants’ original response to Request No. 3, which sought all documents that in any way mentioned Plaintiff and included documentation producible at that time concerning Plaintiff and her claims of sexual misconduct, which documentation identifies those NKU employees involved. To the extent you assert that documentation requested could be redacted to remove the documents from the purview of FERPA, Defendants set forth in their response and reiterate here that, in accordance with FERPA, those records could not be sufficiently de-identified by redaction because, alone or in combination, the records and the information contained therein are linked or linkable to specific students that likely would allow identification. *See* 34 CFR 99.3. Nevertheless, entry of the APO and production of non-party student education records in accordance with its terms should alleviate and address this production dispute.



June 24, 2016
Page 3

Request No. 5: NKU has recanvassed its records and identified the documents provided here marked as Bates Nos. NKY SUPP 000015 thru NKY SUPP 000021 as supplemental responses to the request for documents concerning “commentary given and received by the University and its employees regarding changes to policy.” There are no other known documents.

Request No. 7: Request No. 7 sought “all Documents *relating to* in any way to the email sent by Les Kachurek,” not the actual email. As Plaintiff’s pleadings in this matter have quoted directly this email communication it was assumed Plaintiff was already in possession of a copy. Nevertheless, a copy of Chief Kachurek’s email is provided here and marked as Bates No. NKU SUPP 000022. You further note that it does not appear that all emails by faculty, staff or administration concerning Chief Kachurek’s email have been produced. Defendants’ objections set forth in their response to request No. 7 are continuing, and Defendants further object that the request is overly broad in that it seeks “*any and all communication which may have occurred by or among employees of NKU with respect to the Kachurek email.*” However, without waiving such objections, Defendants have recanvassed their records and the additional communications marked as Bates Nos. NKU SUPP 000023 thru NKU SUPP 000028 are produced as supplemental responses.

Request No. 9: These documents are subject to the Agreed Protective Order, which documents will be produced in accordance with terms of that Order.

Request No. 11: These documents are subject to the Agreed Protective Order, which documents will be produced in accordance with terms of that Order.

Request No. 21: These documents are subject to the Agreed Protective Order, which documents will be produced in accordance with terms of that Order.

Request No. 24: See Response to Request No. 7.

Request No. 25: Defendants’ objections as set forth in their response to Request No. 25 are continuing. Without waiving such objections, and subject to redaction for attorney-client/attorney work product privilege, Defendants’ supplement production with the documents marked as Bates No. NKY SUPP 000029 thru NKY SUPP 000059, which documents constitute communications between counsel for Plaintiff and Defendants and therefore are in the custody of Plaintiff’s counsel, but for which Defendants specifically assert they do not waive any objection to admissibility.



June 24, 2016
Page 4

Sincerely,

A handwritten signature in blue ink, appearing to read 'Katherine M. Coleman'.

Katherine M. Coleman (Kacey)

KMC/tjm

Enclosures

cc: Sara Sidebottom, Esq.

Sara Kelley, Esq.

Joshua M. Salsburey, Esq.

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Email Address:
jsalsburev@sturgillturner.com

July 29, 2016

Kevin L. Murphy, Esq.
Kevin L. Murphy PLLC
2400 Chamber Center Drive, Suite 301
P.O. Box 17534
Ft. Mitchell, KY 41017-0534
KLMurphy@kevinlmurphyllaw.com

RE: *Jane Doe v. Northern Kentucky University, et al.*
U.S. District Court, E.D., Ky., Case No. 2:16-cv-00028-WOB-CJS
STBM File No. 64764.5

Dear Kevin:

I am writing to address a number of discovery issues including Ken Bothof's deposition, Plaintiff's deposition, and deficiencies in Plaintiff's July 7, 2016 discovery responses. I'll address each issue in turn.

Consistent with the Court's guidance at the July 28, 2016 telephonic conference in this case, NKU will produce Ken Bothof for deposition at a mutually agreeable date and time. We will ask about the witness's and parties' schedules on our end to facilitate that. Before Bothof is deposed, however, Plaintiff needs to make herself available for her own deposition. It is my understanding that Kacey previously has asked for dates for Plaintiff's deposition that have gone unanswered, but regardless, due process and fundamental fairness dictate that Defendants have the opportunity to depose Plaintiff and learn more about the substance and details of her claims and allegations before they continue to provide answers, documents, and witnesses to address the same. Relatedly, classes at NKU are scheduled to begin August 22nd and so to minimize disruption to the class schedules of Plaintiff and others we would like to depose Plaintiff before then. Accordingly, please provide dates and times between now and August 22nd on which Plaintiff might be deposed. Once Plaintiff's deposition is scheduled, we will promptly provide dates and times for Mr. Bothof's deposition.



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July 29, 2016
Page 2

Prior to her deposition, Plaintiff needs to supplement several of her July 7, 2016 discovery responses, specifically, Plaintiff's answer to Interrogatory No. 8 and her responses to Requests for Production Nos. 5 and 6. Interrogatory No. 8 asks Plaintiff to identify medical providers who treated Plaintiff for the mental injuries alleged in her complaint. Plaintiff has placed this information directly at issue in this case and her original answer stated this information was "to be provided," but to date we have not received it. This information will allow us to subpoena Plaintiff's records with those providers; although alternatively, Plaintiff can still sign and return the medical records authorization she objected to in response to Request for Production No. 8. As Plaintiff has placed her alleged mental health injuries directly at issue in this case, her objections on the basis of "physician-patient privilege" and other grounds are unfounded.

Second, Plaintiff needs to supplement her response to Request for Production No. 5 concerning social media. This request was reasonably limited to social media activity that referenced, referred to, or related to the allegations, claims, and damages asserted in Plaintiff's complaint. *Cf. EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430 (S.D. Ind., 2010). Further, as Plaintiff is well aware, there are a number of things on social media that are not publicly accessible but are well within Plaintiff's ability to access and produce. Accordingly, Plaintiff needs to produce the social media material sought in Request for Production No. 5.

Third, Plaintiff needs to supplement her response to Request for Production No. 8 to provide the text messages sought therein. It is implausible that Plaintiff only sent one text message responsive to that request. Further, as with the social media records addressed above, the scope of records sought in No. 8 is entirely reasonable and concerns only information placed directly at issue in this case by Plaintiff. As with the social media records, Defendants are entitled to the text messages sought in No. 8.

To the extent Plaintiff's concerns turn on a desire for a protective order limiting the use of records addressed above to the defense of this litigation, please confirm and we will prepare a proposed agreed protective order to that end. Otherwise, please provide the supplemental answers and responses sought above by no later than August 5, 2016.

Finally, please be advised that Les Kachurek is now being represented in this case by Attorney Barbara Kriz, whom I am copying on this message.



July 29, 2016
Page 3

Thank you for your prompt attention to these matters. I will be out of the office until August 2, 2016 but if there is an urgent need in my absence you may contact my law partner, Patsey Jacobs.

Sincerely,

A handwritten signature in blue ink, appearing to be 'JS' with a large loop, written over the printed name 'Josh Salsburey'.

Josh Salsburey

cc: Joan Gates, Esq.
Sara Kelley, Esq.
Kacey Coleman, Esq.
Patsey Jacobs, Esq.
Barbara Kriz, Esq.

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Email Address:
jsalsburey@sturgillturner.com

June 30, 2016

Kevin L. Murphy
Kevin L. Murphy PLLC
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P.O. Box 17534
Ft. Mitchell, KY 41017-0534
KLMurphy@kevinlmurphyllaw.com

RE: *Jane Doe v. Northern Kentucky University, et al.*
U.S. District Court, E.D., Ky., Case No. 2:16-cv-00028-WOB-CJS
STBM File No. 64764.0005

Dear Kevin:

I am writing with regard to document production under the agreed protective order entered June 9, 2016 (Docket Entry No. 18). By related order entered June 28, 2016 (Docket Entry No. 19), the Court advised that a student has objected to the release of records and therefore Defendants were not to release that student's records unless/until the Court ordered otherwise. Today, the Court's law clerk advised our office that there may be an objection from another student and therefore Defendants are likewise not to release that second student's records unless/until the Court orders otherwise.

Consistent with the above, and subject to Defendants' prior objections unrelated to FERPA, enclosed are additional records, marked as Bates No. 000001 through 000007, which we are producing in supplement to our original responses. At such time as the Court provides further direction on the two students mentioned above, Defendants will comply with the Court's directions at that time.

Sincerely,

Josh Salsburey

Enclosures

cc: Sara Kelley, Esq.
Kacey Coleman, Esq.

x:\wdox\clients\64764\0005\corr\00712310.docx

STURGILL, TURNER, BARKER & MOLONEY, PLLC
333 WEST VINE STREET ♦ SUITE 1500 ♦ LEXINGTON, KENTUCKY 40507
PHONE: 859.255.8581 ♦ FAX: 859.231.0851 ♦ WWW.STURGILLTURNER.COM

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT COVINGTON

CIVIL ACTION NO. 16-28-WOB-CJS

JANE DOE

PLAINTIFF

v.

ORDER

NORTHERN KENTUCKY
UNIVERSITY, et al.

DEFENDANTS

* * * * *

On June 28, 2016, the Court issued an Order requiring that the records of an individual who filed an objection letter not be released absent further order of the Court. (R. 19). On July 6, 2016, Defendants filed a Notice of Service of Answers to Interrogatories and Supplemental Document Production to Plaintiff. (R. 21). The Court finds that a telephone conference with counsel to discuss next steps with respect to this particular discovery would be appropriate.

Accordingly, **IT IS ORDERED** that a telephone conference will be held in this matter on **Wednesday, July 13, 2016, at 10:30 a.m.** Counsel for all parties shall connect to the conference five minutes before it is scheduled to begin. To connect to the call, dial **877-873-8017**. Then, when prompted to enter the participant access code, enter **7604592**.

Signed this 7th day of July, 2016.



Signed By:

Candace J. Smith

United States Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT COVINGTON

CIVIL ACTION NO. 16-28-WOB-CJS

JANE DOE

PLAINTIFF

v.

ORDER

NORTHERN KENTUCKY
UNIVERSITY, et al.

DEFENDANTS

* * * * *

An Agreed Protective Order was entered in this case on June 9, 2016. (*See* R. 18). The Clerk of Court on today's date received the attached **redacted letter** from an individual objecting to disclosure of records pursuant to paragraph four (4) of said Agreed Protective Order. The **unredacted letter** shall be filed by the Clerk **under seal**, with a copy thereof to be provided **only** to counsel for Defendants. Having reviewed the letter filing,

IT IS ORDERED that the letter in its **unredacted** form shall be **filed under seal** and a copy of said sealed filing provided only to counsel for Defendants.

IT IS FURTHER ORDERED that the records of the individual who wrote the attached redacted letter are ordered **not to be released** by Defendants, absent further order of the Court regarding same.

Dated this 28th day of June, 2016.



Signed By:

Candace J. Smith 

United States Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT COVINGTON

CIVIL ACTION NO. 16-28-WOB-CJS

JANE DOE

PLAINTIFF

v.

ORDER

NORTHERN KENTUCKY
UNIVERSITY, et al.

DEFENDANTS

* * * * *

On July 13, 2016, the Court held a telephone conference with counsel. (R. 23). During the conference, the Court established a July 22, 2016, deadline for Plaintiff to file a Motion to Compel the production of education records of a student who previously objected to the production of his records. (*Id.*). No such Motion to Compel was filed by this deadline, although Plaintiff did prematurely file a Motion to Compel NKU to produce its Athletic Director, Ken Bothof, for deposition. Plaintiff's counsel has since communicated with the Court and opposing counsel his misunderstanding as to the issue to which that motion filing due July 22 was supposed to be directed.

The confusion with respect to next steps concerning the objecting student's records having now been clarified, **IT IS ORDERED** that the deadline for Plaintiff to file a Motion to Compel the release of the objecting student's education records is extended to **Friday, July 29, 2016**.

Dated this 27th day of July, 2016.



Signed By:

Candace J. Smith 

United States Magistrate Judge

From: Joshua Salsburey
Sent: Friday, November 04, 2016 11:05 AM
To: 'kmurphy@mljfirm.com'
Cc: 'bkriz@kjpjlaw.com'; Kacey Coleman
Subject: Doe/NKU, STBM No. 64764.5
Attachments: FERPA Notices 3 (00754944xA9D25).pdf

Kevin,

Attached is an additional set of redacted notices, which also were sent out yesterday (11/3) in accordance with the Court's order. As noted in my emails yesterday, the attached copies do not include copies of the Court's order enclosed with each notice.

Josh Salsburey

From: Joshua Salsburey
Sent: Thursday, November 03, 2016 5:19 PM
To: 'kmurphy@mljfirm.com'
Cc: 'bkriz@kjpjlaw.com'; Kacey Coleman
Subject: Doe/NKU, STBM No. 64764.5

Part 2 of 2.

Josh Salsburey

From: Joshua Salsburey
Sent: Thursday, November 03, 2016 5:18 PM
To: 'kmurphy@mljfirm.com'
Cc: 'bkriz@kjpjlaw.com'; Kacey Coleman
Subject: FW: Doe/NKU, STBM No. 64764.5

Kevin,

Please see my previous message, below, which got returned to us due to the size of the original attachment. Accordingly, I am re-sending in two parts, with this email being part 1 of 2.

Josh Salsburey

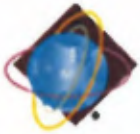
From: Joshua Salsburey
Sent: Thursday, November 03, 2016 5:00 PM
To: kmurphy@mljfirm.com (kmurphy@mljfirm.com)
Cc: bkriz@kjpjlaw.com; Kacey Coleman
Subject: Doe/NKU, STBM No. 64764.5

Kevin,

In accordance with the Court's order, attached please find redacted copies of the FERPA notices that were sent out today. Per the Court's order, a copy of the Court's order was provided to each student along with the letter.

PLEASE NOTE OUR SUITE NUMBER HAS CHANGED TO 1500

Josh Salsburey
Sturgill, Turner, Barker & Moloney, PLLC
333 West Vine Street, Suite 1500
Lexington, KY 40507
859-255-8581 (phone)
859-231-0851 (fax)
jsalsburey@sturgillturner.com



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From: Joshua Salsburey
Sent: Tuesday, November 15, 2016 2:23 PM
To: 'kmurphy@mljfirm.com'
Cc: Kacey Coleman; 'bkriz@kjpjlaw.com'; 'wehrman_chambers@kyed.uscourts.gov'
Subject: Doe/NKU, STBM No. 64764.5
Attachments: Email confirmations. Kevin Murphy (00759031xA9D25).pdf

Kevin,

It is my understanding that Plaintiff has suggested NKU did not provide copies of all the FERPA notices it recently sent to students. Review of our file shows that copies of all the notices NKU sent to students were forwarded to your attention over the course of four emails sent between November 3 and November 4, 2016. The attachments to those four emails contained a total of 85 notices. "Read receipts" for those four emails are attached.

Out of an abundance of caution, I have re-sent all four messages, with attachments, to your attention this afternoon.

Thanks,

PLEASE NOTE OUR SUITE NUMBER HAS CHANGED TO 1500

Josh Salsburey
Sturgill, Turner, Barker & Moloney, PLLC
333 West Vine Street, Suite 1500
Lexington, KY 40507
859-255-8581 (phone)
859-231-0851 (fax)
jsalsburey@sturgillturner.com



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Joshua Salsburey

From: Kevin Murphy <KMurphy@mljfirm.com>
To: Joshua Salsburey
Sent: Thursday, November 03, 2016 5:28 PM
Subject: Read: Doe/NKU, STBM No. 64764.5

Your message

To:
Subject: Read: Doe/NKU, STBM No. 64764.5
Sent: Thursday, November 03, 2016 5:27:59 PM (UTC-05:00) Eastern Time (US & Canada)

was read on Thursday, November 03, 2016 5:29:03 PM (UTC-05:00) Eastern Time (US & Canada).

Joshua Salsburey

From: Kevin Murphy <KMurphy@mljfirm.com>
To: Joshua Salsburey
Sent: Thursday, November 03, 2016 5:30 PM
Subject: Read: Doe/NKU, STBM No. 64764.5

Your message

To:
Subject: Read: Doe/NKU, STBM No. 64764.5
Sent: Thursday, November 03, 2016 5:29:49 PM (UTC-05:00) Eastern Time (US & Canada)

was read on Thursday, November 03, 2016 5:30:49 PM (UTC-05:00) Eastern Time (US & Canada).

Joshua Salsburey

From: Kevin Murphy <KMurphy@mljfirm.com>
To: Joshua Salsburey
Sent: Friday, November 04, 2016 11:46 AM
Subject: Read: Doe/NKU, STBM No. 64764.5

Your message

To:
Subject: Read: Doe/NKU, STBM No. 64764.5
Sent: Friday, November 04, 2016 11:45:59 AM (UTC-05:00) Eastern Time (US & Canada)

was read on Friday, November 04, 2016 11:47:02 AM (UTC-05:00) Eastern Time (US & Canada).

Joshua Salsburey

From: Kevin Murphy <KMurphy@mljfirm.com>
To: Joshua Salsburey
Sent: Friday, November 04, 2016 11:48 AM
Subject: Read: Doe/NKU, STBM No. 64764.5

Your message

To:
Subject: Read: Doe/NKU, STBM No. 64764.5
Sent: Friday, November 04, 2016 11:47:45 AM (UTC-05:00) Eastern Time (US & Canada)

was read on Friday, November 04, 2016 11:48:46 AM (UTC-05:00) Eastern Time (US & Canada).



November 21, 2016

Kevin L. Murphy, Esq.
Murphy Landen Jones PLLC
2400 Chamber Center Drive, Suite 200
P.O. Box 17534
Ft. Mitchell, KY 41017-0534
KLMurphy@kevinlmurphyllaw.com

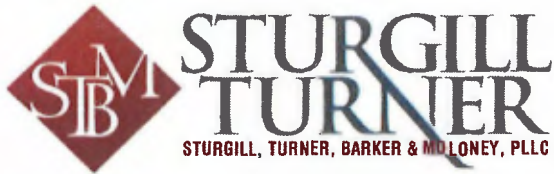
RE: *Jane Doe v. Northern Kentucky University, et al.*
U.S. District Court, E.D., Ky., Case No. 2:16-cv-00028-WOB-CJS
STBM File No. 64764.0005

Dear Kevin:

In accordance with the Court's Order of October 27, 2016 (D.E. # 112), we are producing those documents identified in numerical paragraph 5, exclusive of records related to those students identified to us by the Court as having submitted objection to the production of their records. Production will be made in accordance with the Court's ruling on those objections. In addition, upon review of records by our office following receipt from the client, we identified a student involved in a complaint of inappropriate language by a staff member who was not previously provided a FERPA notice. Notice has been forwarded to the subject student this date and those records (which constitute 19 pages) will be provided in accordance with the Court's Order.

To facilitate identification the incident files are subject to individual Bates numbering. The following Bates numbered documents are provided:

FERPA - 010000-010015
FERPA - 011000
FERPA - 012000-012001
FERPA - 013000-013036
FERPA - 014000-014035
FERPA - 015000-015059
FERPA - 016000-016071
FERPA - 017000-017262
FERPA - 018000-018024
FERPA - 019000-019012
FERPA - 020000-020377
FERPA - 021000-021056
FERPA - 022000-022033
FERPA - 023000-023001
FERPA - 024000-024085
FERPA - 025000-025048



November 21, 2016
Page 2

FERPA – 026000-026002
FERPA – 027000-027007
FERPA – 028000-028019
FERPA – 030000-030056
FERPA – 031000-031129
FERPA – 032000-032005
FERPA – 033000-033006
FERPA – 034000-034026
FERPA – 035000-035008
FERPA – 036000-036027
FERPA – 037000-037003
FERPA – 039000-039002
FERPA – 038000-038006
FERPA – 040000-040006
FERPA – 041000-041002
FERPA – 042000-042007
FERPA – 043000-043018
FERPA – 044000-044004
FERPA – 045000-045152
FERPA – 046000-046098
FERPA – 047000-047072
FERPA – 048000-048106
FERPA – 049000-049006
FERPA – 050000-050029
FERPA – 051000-051029
FERPA – 052000-052006
FERPA – 053000-053003
FERPA – 054000-054060
FERPA – 055000-055017
FERPA – 056000-056030
FERPA - 057000
FERPA – 058000-058026
FERPA – 059000-059016
FERPA – 060000-060007
FERPA – 061000-061002
FERPA – 062000-062014
FERPA – 063000-063041

We are forwarding these to you with this letter via email, but recognize that despite effort to reduce the size of the .pdf files such that they will transmit, transmission issues may nonetheless occur. The following .pdf files are being delivered in a series of five (5) emails:



November 21, 2016
Page 3

POD FERPA 10000-16070
POD FERPA 17000-20377
POD FERPA 21000-30056
POD FERPA 31000-38006
POD FERPA 39000-45124
POD FERPA 46000-47072
POD FERPA 48000-48106
POD FERPA 49000-54060
POD FERPA 55000-63041

Should you fail to receive any of these files please notify us. We wish you and your staff a very Happy Thanksgiving.

Sincerely,

Katherine M. Coleman (Kacey)

Enclosures

cc: Joan Gates, Esq.
Sara Kelley, Esq.

\\00762142.docx

From: Bryan Beauman
Sent: Wednesday, December 07, 2016 4:32 PM
To: Kevin Murphy <KMurphy@mljfirm.com> (KMurphy@mljfirm.com); Steven Taylor (STaylor@mljfirm.com)
Cc: Kacey Coleman
Subject: Doe v. NKU document production (1 of 2)
Attachments: POD FERPA-065078-068161 (00765866xA9D25).pdf

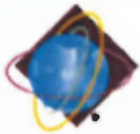
As a supplemental production of documents and in accordance with Judge Wehrman's Order of this afternoon, please see attached. This email is 1 of 2.

Bryan

Bryan H. Beauman
Attorney
bbeauman@sturgillturner.com



333 West Vine Street, Suite 1500, Lexington, KY 40507
p 859.255.8581 f 859.231.0851 www.sturgillturner.com



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EXHIBIT 6

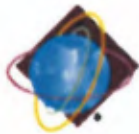
From: Bryan Beaman
Sent: Wednesday, December 07, 2016 4:32 PM
To: Kevin Murphy <KMurphy@mljfirm.com> (KMurphy@mljfirm.com); Steven Taylor (STaylor@mljfirm.com)
Cc: Kacey Coleman
Subject: Doe v. NKU document production (2 of 2)
Attachments: POD FERPA-069000-073050 (00765869xA9D25).pdf

As a supplemental production of documents and in accordance with Judge Wehrman's Order of this afternoon, please see attached. This email is 2 of 2.

Bryan H. Beaman
Attorney
bbeaman@sturgillturner.com



333 West Vine Street, Suite 1500, Lexington, KY 40507
p 859.255.8581 f 859.231.0851 www.sturgillturner.com



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To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this document is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties.

From: Bryan Beauman
Sent: Wednesday, December 07, 2016 4:44 PM
To: Kevin Murphy <KMurphy@mljfirm.com> (KMurphy@mljfirm.com); Steven Taylor (STaylor@mljfirm.com)
Cc: Kacey Coleman
Subject: Doe v. NKU document production

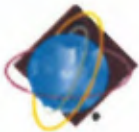
A few minutes ago I attempted to send additional documents. With my initial email, I was concerned in sending an 8 MB attachment and was not certain the message would go through. I made a second attempt to produce the documents via two emails and splitting the documents into two attachments that were smaller MB's. Hopefully, you have received the items. If not, please let me know.

Bryan

Bryan H. Beauman
Attorney
bbeauman@sturgillturner.com



333 West Vine Street, Suite 1500, Lexington, KY 40507
p 859.255.8581 f 859.231.0851 www.sturgillturner.com



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To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this document is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties.

From: Kacey Coleman
Sent: Thursday, December 01, 2016 11:37 AM
To: kmurphy mljfirm.com (kmurphy@mljfirm.com)
Cc: wehrman_chambers@kyed.uscourts.gov; Bryan Beauman
Subject: FERPA Documents
Attachments: POD FERPA-64000-65070 (00763797xA9D25).pdf

Tracking:	Recipient	Delivery
	kmurphy mljfirm.com (kmurphy@mljfirm.com)	
	wehrman_chambers@kyed.uscourts.gov	
	Bryan Beauman	Delivered: 12/1/2016 11:37 AM

Kevin:

We have reviewed the FERPA documents produced and have discovered that records relating to 2 students who provided objection to NKU (and were directed to the Court), but did not subsequently object to the Court, were not originally produced. Our office segregated records as we learned of objection to NKU in anticipation that objection would be made to the Court to ensure against inadvertent production. However, these files were inadvertently not pulled back in to the original production when no objection was received by the Court. They are provided here as Bates No. FERPA 064000 and FERPA 065000-065070, in supplementation for a total of 72 pages. This includes now the records related to the 2015 basketball incident so there should be no issue with examination as to that event. Counsel for [REDACTED], who is a student involved in that incident, had previously raised objection to production to the school, but did not file any objection with the Court.

Additionally, we have noted that records Bates numbered FERPA 016000-016071 (constituting 72 pages) concerning [REDACTED] were inadvertently produced to you, despite the fact that [REDACTED] has filed an objection with the Court. We therefore request that such documents be destroyed by your office pending the Court's ruling.

We apologize for these oversights. As you are aware this production involved over 1,600 pages of documents which still had to be reviewed for redaction of personally identifying information and to ensure that records related to students who had objected were not produced.

I have copied the Court here to ensure Judge Wehrman is aware of the inadvertent production of [REDACTED]'s records and in light of the fact that you have requested, and we concur, to take up the matter of the pending objections at our conference today.

Very truly yours,

Katherine M. Coleman
Katherine M. Coleman (Kacey)





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333 WEST VINE STREET, STE 1500 ~ LEXINGTON, KENTUCKY 40507

TELEPHONE: (859) 255-8581 ~ FACSIMILE: (859) 231-0851

From: Kacey Coleman
Sent: Wednesday, January 04, 2017 3:21 PM
To: kmurphy mljfirm.com (kmurphy@mljfirm.com)
Cc: Bryan Beauman; Kevin Henry
Subject: FERPA docs
Attachments: POD FERPA 74000-74017 (00762149xA9D25).pdf

Kevin:

Attached please find the records for the student whom we identified as not having received an initial FERPA notice and who was subsequently provided notice. As the Court has never indicated that any objection was made I directed these records to be provided along with those of the students who had filed objection. Our records indicate, however, that these were not provided, although they may have been appended to those records. To ensure production, I have attached them here.

Katherine M. Coleman
Of Counsel
kcoleman@sturgillturner.com

 STURGILL
TURNER

Sturgill, Turner, Barker & Moloney, PLLC
333 West Vine Street, Suite 1500
Lexington, KY 40507
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EXHIBIT 8

Date, method, and number of pages of production

Production	Bates Range	# of Pages
Responses to first Requests for Production 5/2/16	NKU-000001-003474	3474
Supplemental responses via 6/24/16 ltr	NKU SUPP-000001-000300	300
Supp. response via 9/9/16 DLG email to P	NKU SUPP-000301	1
Supp. response via 11/11/16 KMC ltr (DLG email)	NKU SUPP-000301-000712	411
Supp response via 2/1/17 BHB ltr (JWG email)	NKU SUPP-000713-001169	456
Supp. Response via 3/17/17 BHB ltr/email	NKU SUPP-001170-001181	12
Supp. response via 6/30/16 ltr, subj to APO	APO SUPP-000001-000007	7
Supp. response via 7/15/16 DLG email to KM, subj to APO	APO SUPP-000008-000059	51
Response to 2 nd set of RFP via PEJ email 8/30/16, subj to APO	APO SUPP-000060-000101	41
Supp. response via 9/9/16 DLG email, subj to APO	APO SUPP-000102-000447	345
	APO SUPP-000448-000467	19
	APO SUPP-000468-000469	2
	APO SUPP-000470-000476	6
	APO SUPP-000477	1
	APO SUPP-000478-000482	4
	APO SUPP-000488-000500	12
Supp. production via 11/11/16 KMC ltr (DLG email)	APO SUPP-000501-000502	2
Supp response via 2/1/17 BHB ltr (JWG email), subj to APO	APO SUPP-000503-000507	4
	Prod. Subtotal (w/o FERPA):	5148
FERPA Notice letters via 11/3 and 11/4 JMS emails, sent again 11/15/16 via JMS email	DE112-000001-000085	85
Student incident files pursuant to order via 11/21/16 KMC emails to KM	FERPA-010000-010015	16
	FERPA-011000	1
	FERPA 012000-012001	2
	FERPA 013000-013036	37
	FERPA 014000-014035	36
	FERPA 015000-015059	60
	FERPA 016000-016071	72
	FERPA 017000-017262	263
	FERPA 018000-018024	25
	FERPA 019000-019012	13
	FERPA 020000-020377	378
	FERPA 021000-021056	57
	FERPA 022000-022033	34
	FERPA 023000-023001	2
	FERPA 024000-024085	86
	FERPA 025000-025048	49
	FERPA 026000-026002	3
	FERPA 027000-027007	8
	FERPA 028000-028019	20
	FERPA 029000-029001	2
	FERPA 030000-030056	57
	FERPA 031000-031129	130
	FERPA 032000-032005	6

	FERPA 033000-033006	7
	FERPA 034000-034026	27
	FERPA 035000-035008	9
	FERPA 036000-036027	28
	FERPA 037000-037003	4
	FERPA 038000-038006	7
	FERPA 039000-039002	3
	FERPA 040000-040006	7
	FERPA 041000-041002	3
	FERPA 042000-042007	8
	FERPA 043000-043018	19
	FERPA 044000-044004	5
	FERPA 045000-045152	153
	FERPA 046000-046098	99
	FERPA 047000-047072	73
	FERPA 048000-048106	107
	FERPA 049000-049006	7
	FERPA 050000-050029	30
	FERPA 051000-051015	16
	FERPA 052000-052006	7
	FERPA 053000-053003	4
	FERPA 054000-054060	61
	FERPA 055000-055017	18
	FERPA 056000-056030	31
	FERPA 057000	1
	FERPA 058000-058026	27
	FERPA 059000-059016	17
	FERPA 060000-060007	8
	FERPA 061000-061002	3
	FERPA 062000-062014	15
	FERPA 063000-063041	42
Supp. student incident files via 12/1/16 KMC email to KM	FERPA 064000	1
	FERPA 065000-065070	71
Supp. student incident files via 12/7/16 BHB email to KM	FERPA 065078-065079	2
	FERPA 065080-065133	53
	FERPA 066000-066008	9
	FERPA 067000-067007	8
	FERPA 068000-068161	162
	FERPA 069000-069020	21
	FERPA 070000-070005	6
	FERPA 071000-071010	11
	FERPA 072000-072014	15
	FERPA 073000-073050	51
Sup. student incident file 1/4/17 via KMC email	FERPA 074000-074017	18
Sup. student incident files via 2/10/17 BHB ltr	FERPA 074000	1
	FERPA 075000-075010	11
	FERPA 076000-076030	31
	Advocate data excel sheet	6

Supp. redacted advocate data sheets via 2/17/16 BHB email	FERPA 075011-075012	2
	FERPA 076031-07603	2
Supp. student incident file via 3/3 BHB email	FERPA 077000-077020	21
Supp. student incident files and supplement to previously produced files via 3/17 BHB email	FERPA 010016-010017	2
	FERPA 012002-012042	41
	FERPA 013037-013037	43
	FERPA 014036-014039	4
	FERPA 015060-015068	9
	FERPA 016072-016076	5
	FERPA 020378-020435	58
	FERPA 021057	1
	FERPA 022034-022078	45
	FERPA 027008	1
	FERPA 028020-028023	4
	FERPA 029002-029016	15
	FERPA 030057-030078	22
	FERPA 031130-031187	57
	FERPA 036028-036045	18
	FERPA 041003-041007	5
	FERPA 043019-043033	15
	FERPA 045152-045194	43
	FERPA 046099-046107	9
	FERPA 047073-047131	59
	FERPA 049007-049016	10
	FERPA 050030-050034	5
	FERPA 053004-053008	5
	FERPA 054061	1
	FERPA 057001-057005	5
	FERPA 065134-065142	9
	FERPA 068162-068205	44
	FERPA 069021-069036	16
	FERPA 070006-070010	5
	FERPA 071011-071018	8
	FERPA 072015-072045	31
	FERPA 073051-073081	31
	FERPA 075013-075020	8
	FERPA 077021-077025	5
	FERPA 078000-078037	38
	FERPA 079000-079030	31
	FERPA 080000-080054	55
	FERPA 081000-081021	21
	FERPA 082000	1
	FERPA prod. Total:	3490
	Total:	8723

x:\wdox\clients\64764\0005\attnotes\00793206.docx

Bryan Beauman

From: Kevin Murphy <KMurphy@mljfirm.com>
Sent: Thursday, January 19, 2017 12:32 PM
To: Bryan Beauman
Subject: Jane Doe v. NKU, et al.

On page 21 of her deposition, Ann James said that Steve Meier granted a written waiver to Doe's attacker. We do not see that in the documents, even though she said it was done in writing. Would you provide that, please? Certainly that came under our document requests.

Thank you.

Kevin L. Murphy



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Ft. Mitchell, KY 41017
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Version: 2016.0.7996 / Virus Database: 4749/13796 - Release Date: 01/18/17

Bryan Beauman

From: Bryan Beauman
Sent: Friday, January 20, 2017 11:10 AM
To: 'Kevin Murphy'
Subject: RE: Jane Doe v. NKU, et al.

Kevin, I've been searching for the document you referenced below but I do not see a document where Meier granted a waiver for Student M. When I went and reviewed the transcript from Ms. James's deposition on page 21, she actually testified that Meier *denied* a waiver – not granted one.

Here's what I'm looking at on page 21 relating to this issue:

James, Ann, (Page 21:10 to 21:23)
21

10 Q. All right. Did you ever deny him a
11 waiver of the sanctions?
12 MR. HENRY: Same objection to form.
13 A. I did not. Steve Meier did.
14 Q. And did Mr. Meier ever do that in
15 writing, as you have done? And we'll show you when
16 we get to the documents. But did Mr. Meier do it in
17 writing like you did with emails?
18 A. He did.
19 Q. Yeah, okay.
20 A. Uh-huh.
21 Q. And did he ever contact my client by
22 email informing her of the waiver, as you did?
23 A. I don't know.

So as to your question below, were you looking for the granting or denial of a waiver by Steve Meier? I may have been looking for the wrong item for you. I can look for any denials if you need me to and you don't recall having it. And please let me know if I am not reading her depo right or if there is another part of the deposition you were thinking of that I'm not seeing.

Bryan

From: Kevin Murphy [<mailto:KMurphy@mljfirm.com>]
Sent: Thursday, January 19, 2017 12:32 PM
To: Bryan Beauman
Subject: Jane Doe v. NKU, et al.

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Kevin L. Murphy

EXHIBIT 11



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Version: 2016.0.7996 / Virus Database: 4749/13796 - Release Date: 01/18/17

Bryan Beauman

From: Bryan Beauman
Sent: Friday, January 20, 2017 4:34 PM
To: 'Kevin Murphy'
Subject: RE: Jane Doe v. NKU, et al.
Attachments: FW: Norse Commons

Kevin, I have performed some follow up searching and do see one document from Mr. Meier referring to the *denial* of a request for permission by the male student. It is attached. Perhaps this is the document Ann James was referring to but at this point I don't know for sure. I've inquired and learned she is out of town so I cannot confirm with her. I'm in the middle of getting a Sixth Circuit brief out the door today but we can discuss further in St. Louis if you like.

Bryan

From: Bryan Beauman
Sent: Friday, January 20, 2017 11:10 AM
To: 'Kevin Murphy'
Subject: RE: Jane Doe v. NKU, et al.

Kevin, I've been searching for the document you referenced below but I do not see a document where Meier granted a waiver for Student M. When I went and reviewed the transcript from Ms. James's deposition on page 21, she actually testified that Meier *denied* a waiver – not granted one.

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James, Ann, (Page 21:10 to 21:23)

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19 Q. Yeah, okay.
20 A. Uh-huh.
21 Q. And did he ever contact my client by
22 email informing her of the waiver, as you did?
23 A. I don't know.

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Bryan

From: Kevin Murphy [<mailto:KMurphy@mljfirm.com>]
Sent: Thursday, January 19, 2017 12:32 PM
To: Bryan Beauman
Subject: Jane Doe v. NKU, et al.

On page 21 of her deposition, Ann James said that Steve Meier granted a written waiver to Doe's attacker. We do not see that in the documents, even though she said it was done in writing. Would you provide that, please? Certainly that came under our document requests.

Thank you.

Kevin L. Murphy



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Version: 2016.0.7996 / Virus Database: 4749/13796 - Release Date: 01/18/17

Bryan Beauman

From: Stephen Meier <meiers@nku.edu>
Sent: Monday, May 02, 2016 11:51 AM
To: Julie Bridewell
Subject: FW: Norse Commons

FYI!

From: Stephen Meier
Sent: Tuesday, February 09, 2016 3:34 PM
To: [REDACTED]
Subject: RE: Norse Commons

James,

I am in receipt of your request to attend a program in Norse Commons on Wednesday, February 10 from 7-11 pm and I am responding on behalf of the Office of Student Conduct, Rights and Advocacy. You have two options regarding this program:

1. The organization can hold the event as scheduled in Norse Commons and **you are not permitted to attend.**
2. The organization can move the event to the UC Ballroom (space has already been secured) and you are permitted to attend.

In the future, please direct all requests to be present within the Booth Residential Village to me instead of Ann James. Please let me know if you have any questions.

Thank you!

Steve Meier
Associate to the Dean of Students
Office of Student Conduct, Rights and Advocacy
301 Student Union
859-572-5771
meiers@nku.edu

From: [REDACTED]
Sent: Monday, February 08, 2016 9:50 PM
To: Ann James
Subject: Norse Commons

Hello,
Just to let you know I have a program in Norse Commons from 7-11pm on Wed.

Respectfully,

[REDACTED]
Northern Kentucky University | '17
College of Informatics | Electronic Media & Broadcasting
Political Science|Minor

██████████ Fraternity, Inc. ██████████ President

Primary Email: ██████████@[nku.edu](#)

Alternative Email: ██████████@[gmail.com](#)

JEFFREY WAPLE 1/24/2017

Page 1

1 UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF KENTUCKY
3
4 JANE DOE, proceeding under)
5 a pseudonym,)
6 Plaintiff,) CIVIL ACTION NO.
7 vs.) 2:16-cv-00028-WOB-JGW
8 NORTHERN KENTUCKY)
9 UNIVERSITY, et al.,)
10 Defendant.)

11
12 DEPOSITION OF JEFFREY WAPLE
13 TAKEN ON BEHALF OF THE PLAINTIFF
14 JANUARY 24, 2017
15
16

17 (Starting time of the deposition: 9:18 a.m.)
18
19
20
21
22
23
24
25

JEFFREY WAPLE 1/24/2017

Page 96

1 all the coaches into the room, told them that if
2 there were any questions related to any incident on
3 the part of basketball players, they were simply to
4 refer any and all questions to the athletic director
5 and they weren't even given the names of the players
6 involved. Do you know why?

7 A I don't know why. No, sir.

8 Q The athletic director, also, according to
9 Kevin Schappell, kept this information on who the
10 players were away from Dave Bezold. Do you know
11 why?

12 MR. BEAUMAN: Object to the form.

13 A Yeah, I don't know the intercommunications
14 of the athletic department, what was said and not
15 said.

16 Q (By Mr. Murphy) Would it have been your
17 office that would have been required to submit the
18 Clery Act form to the NKU police?

19 A It would have been our office for filling
20 out the Clery Act, yes, report that's due. I'm
21 sorry, Kevin, you keep saying form. I'm not aware
22 of form. I'm aware of the report that we're
23 required to do.

24 Q What I mean by form is we were given Clery
25 Act -- I guess it's a called Clery Act report form.

JEFFREY WAPLE 1/24/2017

Page 97

1 A It's a big document, yeah, we didn't --

2 Q It's a document which you filled in.

3 A Yeah, we didn't get individual forms for
4 each incident. We got that big form and we plug in
5 the numbers. Does that make sense?

6 Q No, this one was different. Gabby filled
7 out a form on a particular incident, particular day,
8 and have you seen something like that before?

9 A I can't recall that I have.

10 Q All right. According to the testimony of
11 the police chief, no one reported this while this
12 was all going on to the NKU police. Do you know
13 why?

14 A I don't know why.

15 MS. KRIZ: Object to the form.

16 Q (By Mr. Murphy) From the time a woman
17 student submits a report that she had been sexually
18 violated, how long does it usually take to actually
19 notify the alleged perpetrator to charge them?

20 A It depends on the timeline and how fast we
21 can do an investigation, how fast we can inform,
22 who's around -- I mean, each case was different so
23 sometimes we had -- the allegations were pretty
24 upfront, some we had to do more investigation to
25 let them know exactly what they were being charged

Bryan Beuman

From: Bryan Beuman
Sent: Tuesday, January 31, 2017 3:17 PM
To: 'Kevin Murphy'
Cc: Steven Taylor
Subject: RE: Jane Doe v. NKU, et al.

Thanks for the page number. I had not looked that up yet. My recollection was that his testimony was Maxient was being used at his current school and that he stated Simplicity was used at NKU. Regardless, I will follow up with that on campus right now. Also, is the Agreed Order I sent yesterday acceptable to you or did you have any other suggested additions/revisions to it?

From: Kevin Murphy [<mailto:KMurphy@mljfirm.com>]
Sent: Tuesday, January 31, 2017 3:07 PM
To: Bryan Beuman
Cc: Steven Taylor
Subject: Jane Doe v. NKU, et al.

I have not heard from you regarding Waple's comments on page 78 of his deposition about the so-called database that tracks all conduct defenses. He calls it at first the Maxient System. Then he calls is Simplicity.

Please advise.

Kevin L. Murphy



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Bryan Beauman

From: Bryan Beauman
Sent: Wednesday, February 01, 2017 11:44 AM
To: 'Kevin Murphy'
Cc: Steven Taylor
Subject: RE: Jane Doe v. NKU, et al.

I have a handle on this issue. When is a good time to talk today? I have short calls with clients scheduled at 1 pm and 3 pm today but am otherwise free. I can update you further then.

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EXHIBIT 14

Bryan Beauman

From: Bryan Beauman
Sent: Wednesday, February 08, 2017 4:04 PM
To: 'Kevin Murphy'
Cc: 'Steven Taylor'
Subject: RE: Jane Doe v. NKU, et al.

Kevin, we never spoke in follow up to my email below. I know we were both dealing with other disclosures and filings last week and I am sure you were busy with those. I can provide you more details about the software. I need to leave the office now for a meeting and will be tied up most of tomorrow. I'll communicate with you on Friday but if you would like to speak tomorrow, please let me know.

Bryan

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Subject: RE: Jane Doe v. NKU, et al.

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Cc: Steven Taylor
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Bryan Beauman

From: Kevin Murphy <KMurphy@mljfirm.com>
Sent: Wednesday, February 08, 2017 5:16 PM
To: Bryan Beauman
Cc: Steven Taylor
Subject: RE: Jane Doe v. NKU, et al.

I am not trying to be rude, but we are long past meet and confers re discovery issues. Whatever you need to say you can email.

Kevin L. Murphy



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Ft. Mitchell, KY 41017
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From: Bryan Beauman [<mailto:BBeauman@sturgillturner.com>]
Sent: Wednesday, February 8, 2017 4:04 PM
To: Kevin Murphy <KMurphy@mljfirm.com>
Cc: Steven Taylor <STaylor@mljfirm.com>
Subject: RE: Jane Doe v. NKU, et al.

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Sent: Tuesday, January 31, 2017 3:07 PM
To: Bryan Beauman
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Sturgill, Turner, Barker & Moloney, PLLC
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Lexington, KY 40507
p: 859.255.8581 f: 859.231.0851
www.sturgillturner.com

Bryan H. Beauman
Member
bbeauman@sturgillturner.com

February 10, 2017

VIA ELECTRONIC MAIL: KLMurphy@kevinlmurphy.com

Kevin L. Murphy
Murphy Landen Jones PLLC
2400 Chamber Center Drive, Suite 200
P.O. Box 17534
Ft. Mitchell, KY 41017-0534

RE: *Jane Doe v. Northern Kentucky University, et al.*
U.S. District Court, E.D., Ky., Case No. 2:16-cv-00028-WOB-CJS
STBM File No. 64764.0005

Dear Kevin:

I am writing in follow up to our email exchange of February 8, 2017 and our prior conversations. Specifically, you inquired after the deposition of the University's former Dean of Students about the use of the Maxient and Symplicity case management systems. I am providing the following information from the University to supplement Dean Waple's testimony.

Symplicity is a vendor which supplies a case management system called Advocate. Advocate is a tool that can be used to log and track incidents from individual files. NKU previously had a license to use Advocate. Advocate related entry items were contained in some of the documents produced during discovery. For example, Document FERPA-070000 shows what a document that was printed from the Advocate system would look like. Maxient, however, is a different program altogether. In the Summer of 2016, NKU discontinued the use of Advocate and began using Maxient.

You were also concerned that you had not previously been provided all of the information from either Advocate (before mid-2016) or Maxient (after mid-2016). The University reports that before the transition to Maxient student misconduct files were stored on a separate intranet drive on campus referred to as the "k: drive." In addition to the materials and information stored on the k: drive, the University reports that in 2010 it purchased the license for the Advocate case management system from Symplicity. At that time, Advocate was used only by Housing in order to track a variety of incidents, such as the cleanliness of dorm rooms and roommate conflicts. Therefore, Advocate was not solely limited to student misconduct (or



February 10, 2017
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sexual misconduct). It is my understanding that initially Advocate was not used for sexual misconduct at all.

When the University used Advocate, it was a tool for certain data entry points. However, records were also stored on the k: drive. Because the University transitioned from Advocate to Maxient, the University exported a complete record of the information entered into Advocate in the form of a Microsoft Excel spreadsheet. Attached with this correspondence, are those spreadsheet entries that I have been provided by the University which correspond to the other incidents that had been previously produced in discovery. These items include the following incidents:

2011:	[REDACTED]
2012:	[REDACTED] (see below)
2013:	[REDACTED]
2014:	[REDACTED]
2015:	[REDACTED]
2016:	[REDACTED]

You will likely note (as I did) that there a number of other incidents that have been produced to you in discovery that are not listed in Advocate Excel spreadsheet. The University informs me that there are a number of reasons why incidents were not entered in Advocate. For instance, the incident involved an employee, was outside the time period when the University used Advocate, and/or due to the fact that Advocate was used as alongside the k: drive and not as the sole source of information.



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At the time of the document production to you, we were unaware of the possibility that data existed in the Advocate Excel spreadsheet that may not have been produced to you. I have requested that the entries for Advocate be reviewed in order to confirm that you have received all such information.

In addition, in our request for review of the Advocate data entries populated into the Excel spreadsheet entries, three other items have been brought to our attention as described below.

- [REDACTED]. A police report concerning this incident was previously produced in discovery to you located at document numbers APO SUPP-000065-000069. [REDACTED] was a non-student and received a trespass letter from the University. In searching the documents that we have produced, we see that the Police Report concerning this issue was provided to you; however, it does not appear that the trespass letter regarding [REDACTED] was produced. Please find it enclosed labeled FERPA-74000.
- *Additional Incidents 1 and 2.* In our inquiry to the University concerning these questions you raised, it was also reported to us two incidents that were not previously identified in discovery. I have requested that all of this information be provided to me so that I can produce it to you. Enclosed are the documents that we have received regarding these incidents. The first incident involves a non-student [REDACTED]. These documents are labeled FERPA 75000-75010. The second incident involves two students. These documents are labeled FERPA 76000-76030. I have redacted personal identifying information regarding the students from these materials so that we can produce those immediately. We can further discuss if you desire to have unredacted documents and what notice the University needs to provide to the students. Additionally, I will provide the Advocate data in Excel form relating to these two incidents once the student names have been redacted.

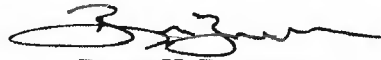
If the above does not adequately supplement Dean Waple's testimony and you have further questions, I offer you the opportunity to address these issues with Ann James who, as I understand it, can best speak for the University to the use of Advocate and the k: drive. If you wish, I will secure her availability in the next two weeks and will have her attend a supplemental deposition for you to inquire of these matters with her. The University will cover the cost of the court reporter. Since the discovery deadline has already passed, I am happy to discuss with you what type of an order we should tender to Judge Bertelsman to allow for the taking of this supplemental deposition.

STURGILL
TURNER

February 10, 2017
Page 4

Sincerely,

STURGILL, TURNER, BARKER & MOLONEY, PLLC



Bryan H. Beuman

cc: Barbara Kriz
Jeff Mando

Enclosures: Excel Spreadsheet
[REDACTED] Trespass Letter (74000)
Documents concerning additional incidents (75000-75010; 76000-76030)

x:\wdox\clients\64764\0005\corr\00786898.docx

Bryan Beauman

From: Bryan Beauman
Sent: Friday, February 17, 2017 4:14 PM
To: Kevin Murphy <KMurphy@mljfirm.com> (KMurphy@mljfirm.com); Steven Taylor (STaylor@mljfirm.com)
Cc: Kacey Coleman; jmando@ASWDLAW.COM
Subject: Doe v. NKU
Attachments: Advocate data supplemental POD 2-17-17 (00789314xA9D25).PDF

Tracking:	Recipient	Read
	Kevin Murphy <KMurphy@mljfirm.com> (KMurphy@mljfirm.com)	
	Steven Taylor (STaylor@mljfirm.com)	
	Kacey Coleman	Read: 2/17/2017 4:21 PM
	jmando@ASWDLAW.COM	

Kevin, in follow up to my email of last week, attached please find the additional Advocate data for the two incidents that were identified. I am providing these documents as a supplementation of the University's discovery responses. As I reported to you last week, no FERPA notices were sent to these students therefore the identifying information needed to be redacted. Redaction of the entries was not possible in Excel nor printable from Excel due to the size of some of the cell entries. We converted these Excel entries into pdf format and then redacted. The document in its electronic format is best readable by zooming.

Bryan

Bryan H. Beauman
Member
bbeauman@sturgillturner.com



Sturgill, Turner, Barker & Moloney, PLLC
333 West Vine Street, Suite 1500
Lexington, KY 40507
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Bryan Beauman

From: Bryan Beauman
Sent: Friday, March 03, 2017 4:20 PM
To: Steven Taylor (STaylor@mljfirm.com); Kevin Murphy <KMurphy@mljfirm.com> (KMurphy@mljfirm.com)
Cc: jmando@ASWDLAW.COM; bkriz@kjpjlaw.com
Subject: [REDACTED]
Attachments: FERPA0077000-FERPA0077020 (00794059xA9D25).pdf

In follow up to my telephone call of this afternoon with Steven, attached are the materials on the [REDACTED] matter numbered 77000-77020. The Advocate data on this incident was included in the Excel file (the 2013 page, row 12) that I previously sent on 2/13/17 and I also referred to this matter in my cover letter of that same date. I was under the impression then that the items concerning this incident were previously produced to your office. But when we were reviewing our other incident files, including this matter, we noticed that our copy of these items did not have any bates numbering. That lack of numbering concerned us that your office may not have received it. Based on our phone call, you confirmed that these materials were not previously received so I am providing it now.

Thanks,

Bryan

Bryan H. Beauman
Attorney
bbeauman@sturgillturner.com

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Bryan H. Beauman
Member
bbeauman@sturgillturner.com

March 17, 2017

VIA ELECTRONIC MAIL: KLMurphy@kevinlmurphylaw.com

Kevin L. Murphy
Murphy Landen Jones PLLC
2400 Chamber Center Drive, Suite 200
P.O. Box 17534
Ft. Mitchell, KY 41017-0534

RE: *Jane Doe v. Northern Kentucky University, et al.*
U.S. District Court, E.D., Ky., Case No. 2:16-cv-00028-WOB-CJS
STBM File No. 64764.0005

Dear Kevin:

I am writing to provide a supplemental production of documents in this matter. Please see the attached items. I also want to provide a brief summary and explanation of these items. Many of these records addressing other incidents (i.e., the FERPA production materials) concern interaction of Ms. Dralle and NVP personnel with complaining students or with others on their behalf. In those instances, the documents do not appear to us to relate to the complainant's allegations about a sexual assault or sexual misconduct but rather address services provided by NVP either by support to the victim or on their behalf with others. However, in order to be consistent with prior document production made to date and in order to avoid the possibility of any further dispute about these items, I am producing those to you. There are also a variety of emails from Ann James relating to several files. In providing this summary, I do not intend to give a comprehensive index of the documents attached. Rather, the descriptions below are meant to generally describe the categories of attached documents for your reference.

1. Attached as pages NKU SUPP 001170-001174 and NKU SUPP 001181 is a timely warning notice and a transmittal email that serve as a supplement to the production of documents responsive to Plaintiff's Request for Production of Documents No. 1. Similar timely warning notices were previously produced in the University's document production of May 2, 2016 at pages NKU 000471-000480.

2. Attached as pages NKU SUPP 001175-001180 are three emails and a text message that are a supplement to the production of documents responsive to Plaintiff's Request for Production of Documents No. 3. As you will note, the emails are part of a chain email.



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Portions of that chain were previously produced to you. For example, on the attached page NKU SUPP 001175, the email chain beginning with the email from Ann James of April 7, 2015 was previously produced in the University's document production of May 2, 2016 at page NKU 002172. In addition, in the attached page NKU SUPP 001177, the email chain ending at September 15, 2015 from your client to Dralle was previously produced at page NKU 002227.

3. [REDACTED]. As a supplemental production to FERPA 010000-010015, attached is an email chain between Ann James and the complainant concerning scheduling a meeting. These are numbered FERPA 010016-010017.

4. [REDACTED]. As a supplemental production to FERPA 012000-012001, attached are copies of texts between NVP and the complainant, and emails between Dralle and the complainant's professors regarding her absence from classes. These are numbered FERPA 012002-012042.

5. [REDACTED]. As a supplemental production to FERPA 013000-013036, attached are Ann James' email correspondences regarding scheduling meetings with the parties, transmitting No Contact Orders and other documents, emails between Ann James and the police department, emails regarding resources for the complainant, emails regarding the complainant's violation of the No Contact Order, emails regarding scheduling meetings, emails regarding housing decisions, and other emails related to the incident. These are numbered FERPA 013037-013079.

6. *Anonymous complaints.* As a supplemental production to FERPA 014000-014035, attached are three anonymous reports forms and one NVP student meeting note that does not include any names or other identifying information. The pages are numbered FERPA 014036-014039. These anonymous reports were only recently discovered when our office conducted a second comprehensive review of all documents provided to us in comparison to all documents produced to you. In doing so, we noted a few items that were inadvertently omitted from the document production in addition to the [REDACTED] file that I sent to you on March 3, 2017.

7. [REDACTED]. As a supplemental production to FERPA 015000-015059, attached are emails concerning scheduling meetings, emails regarding the complainant's statement, and other emails relating to the incident. These are numbered FERPA 015060-015068.

8. [REDACTED]. As a supplemental production to FERPA 016000-016071, attached are Ann James' email correspondence with Stephen Meier and the complainant relating to the incident. These are numbered FERPA 016072-016076.

9. [REDACTED]. As a supplement to the prior production concerning the [REDACTED] matter originally produced at FERPA 020000-020377, attached are additional emails between NVP and the complainant's professors; emails between the



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investigator and the respondent; emails between Ann James, the investigator, and the parties; other emails relating to the incident; and text messages between Dralle and the complainant which are numbered FERPA 020378-0203435. According to our review, the texts contained in the attached on page FERPA 020380 fit in the chronological order between pages FERPA 020148-020149, and the texts contained in the attached on page FERPA 020381 fit in the chronological order between pages FERPA 020153-020154. These documents were originally designated for production but through inadvertence not each of the pages were included when the stack of documents were processed through the scanner. Thus, the scanned version of the file production we provided to you omitted these two pages of texts.

10. [REDACTED]. As a supplemental production to FERPA 021000-021056, attached is an email between Ann James and the complainant regarding scheduling a time to meet. This is numbered FERPA 021057.

11. [REDACTED]. As a supplemental production to FERPA 022000-022033, attached are emails concerning scheduling meetings, emails transmitting emailed statements and documents, emails relaying information regarding the hearing process to the parties, and other emails relating to the matter. These are numbered FERPA 022034-022078.

12. [REDACTED]. As a supplemental production to FERPA 027000-027007, attached is an email between Ann James and the complainant regarding timing of the incident. This is numbered FERPA 027008.

13. [REDACTED]. As a supplement to documents produced at FERPA 028000-028019, attached are pages FERPA 028020-028023. Similar to what I detailed above, the email at page FERPA 028020 is part of a chain email, portions of which were previously produced to you. For this email, the information contained in the email from August 24, 2014 was previously produced in the University's earlier document production at page FERPA 028000.

14. [REDACTED]. As a supplemental production to FERPA 029000-029001, attached are emails mostly regarding scheduling time to meet with the complainant and the complainant's requested dorm room change. These are numbered FERPA 029002-029016.

15. [REDACTED]. In supplement to documents produced at FERPA 030000-030056, attached are pages FERPA 030057-030078. The email document at page FERPA 030057 is a transmittal email between Ann James and the complainant concerning the complainant's written statement. The statement from the complainant was previously produced at FERPA 030000-030018.

16. [REDACTED]. As a supplemental production to FERPA 031000-031129, attached are emails between the complainant, Stephen Meier, and Ann James and other emails relating to the incident. These are numbered FERPA 031130-031187.



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17. [REDACTED]. In supplement to documents produced at FERPA 036000-036027, attached are pages FERPA 036028-036045. These pages contain a police report and supplement, a signed search warrant, a criminal complaint, and a criminal court decision.

18. [REDACTED]. As a supplemental production to FERPA 041000-041002, attached are emails concerning meetings with the respondent. These are numbered FERPA 041003-041007.

19. [REDACTED]. As a supplemental production to FERPA 043000-043018, attached are emails regarding the appeals process and other emails related to the matter. These are numbered FERPA 043019-043033.

20. [REDACTED]. As a supplemental production to FERPA 045000-045080, attached are emails regarding meetings, emails transmitting documents, and other emails relating to the incident. These are numbered FERPA 045152-045194.

21. [REDACTED]. As a supplemental production to FERPA 046000-046098, attached are emails transmitting documents to the respondent, emails concerning meetings, emails regarding housing, and other emails relating to the incident. This is numbered FERPA 046099-046107.

22. [REDACTED]. As a supplemental production to FERPA 047000-047072, attached are emails regarding scheduling times to meet with the parties, complaint procedures, transmission of documents, and other emails relating to the incident. These are numbered FERPA 047073-047131.

23. [REDACTED]. As a supplemental production to FERPA 049000-049006, attached are emails concerning meetings, emails relating to reporting of the incident, and other emails related to the incident. These are numbered FERPA 049007-049016.

24. [REDACTED]. As a supplemental production to FERPA 050000-050029, attached are four emails concerning meetings, regarding reporting of the incident, and otherwise related to the incident. These are numbered FERPA 050030-050034.

25. [REDACTED]. As a supplement to the prior production concerning the [REDACTED] matter originally produced at FERPA 053000-053003, attached are: (1) a March 5, 2015 letter from an attorney representing one of the parties and (2) an email concerning the matter. The email chain also contained discussion about topics unrelated to the [REDACTED] matter and that material has been redacted. These pages are numbered FERPA 053004-053008.

26. [REDACTED]. As a supplement to our prior production included at FERPA 054000-054060, we have located one additional page that is another draft of a document and attached here as page number FERPA 054061. The initial draft was previously produced to



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you at FERPA 054032 and the final version of the document was previously produced to you as FERPA 054019. We had originally designated this document for production to you but based on our review, it does not appear it was provided. In our paper file copy, this document is the last document on this matter; thus it is on the “bottom of the stack.” While no one at my office can reconstruct what may have happened, given that it is located at the very bottom of this list of documents, we think that last page may have mis-fed in the scanner which explains why the page was not included in our documents to be scanned to you.

27. [REDACTED]. As a supplemental production to FERPA 057000, attached are emails concerning meetings with the complainant and respondent. These are numbered FERPA 057001-057005.

28. *The 2015 basketball incident.* In supplement to documents produced at FERPA 065000-065133, additional emails concerning meetings with the complainant, respondent, and witnesses; emails between Dralle and the complainant’s professors regarding her absence from classes; and other emails relating to the incident are attached at FERPA 065134-065142.

29. *The 2016 basketball incident.* In supplement to documents produced at FERPA 068000-068161, attached are documents labeled FERPA 068162-068177 that contain transmittal emails regarding the scheduling of the hearing, emails with professors of the complainant, transmittal emails of the complainant’s original email statement (the complainant’s original email was previously produced at FERPA 068000) and witness statements, emails regarding the hearing and hearing decision, emails with the respondent, other emails relating to the incident, texts between Dralle and the complainant, and a letter from Dralle to the complainant’s sorority.

30. [REDACTED]. In supplement to documents produced at FERPA 069000-069020, attached are documents FERPA 069021-069036 which include transmittal emails of police reports from NKUPD to NKU staff (the reports were previously attached at FERPA 069000-069003 and 069015-069018); texts between Dralle and the complainant; emails between Dralle and professors regarding complainant’s missing classes; and emails between Dralle and counselor regarding appointment scheduling.

31. [REDACTED]. As a supplemental production to FERPA 070000-070005, attached are two email chains transmitting information about the incident from the police department to the University. These are numbered FERPA 070006-070010.

32. [REDACTED]. As a supplemental production to FERPA 071000-071010, attached are emails relating to the incident and relaying information to the police department. These are numbered FERPA 071011-071018.



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33. [REDACTED]. As a supplemental production to FERPA 072000-072014, attached are an email with text message attachments regarding the respondent's communication with members of a sorority, emails concerning meetings with the parties, emails transmitting materials related to the investigation, and other emails relating to the incident. These are numbered FERPA 072015-0720045.

34. [REDACTED]. As a supplemental production to FERPA 073000-073050, attached are emails regarding resources offered to the complainant, emails transmitting student statements and complaint documents, emails regarding housing changes, emails concerning meetings with the parties, and other emails relating to the incident. These are numbered FERPA 073051-073081.

35. [REDACTED]. As a supplemental production to FERPA 075000-075012, attached are emails between Ann James and the complainant, emails regarding interviews with the complainant and the complainant's complaints to the police department, other emails relating to the incident, and a transmittal email of a housing decision letter. These are numbered FERPA 075013-075020.

36. [REDACTED]. As a supplemental production to FERPA 077000-077020, attached are transmittal emails of the respondent's Dean of Students Office Notification Letter and emails between Ann James and the complainant regarding her emailed statement and the status of the complaint. These are numbered FERPA 077021-077025.

37. After a comprehensive search and comparison of all documents, the University has located four additional incidents that are responsive to your requests and the Court's Order:

- a. [REDACTED]. Attached as pages number FERPA 078000-078037 are documents concerning a [REDACTED] incident. [REDACTED] is a non-student. Items from the Maxient system are included.
- b. [REDACTED]. Attached as pages FERPA 079000-079030 are materials concerning a [REDACTED] incident. Items from the Maxient system are included.
- c. [REDACTED]. Attached as pages FERPA 080000-080054 are materials concerning a [REDACTED] matter. Items from the Maxient system are included. When this matter was originally reviewed, the matter was thought to not be responsive since the matter involved conduct which did not fit within the definition of sexual assault, misconduct, rape or unwanted advances. The incident occurred and was being addressed at the same time that incident files were being collected to respond to the Court's Order of October 27, 2016. In fact, the meeting with [REDACTED] concerning his conduct occurred on October 28, 2016 and his no-contact letter issued



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the same day. As further information has become known, the [REDACTED] matter now does seem to be a responsive incident and documents concerning the matter according to the Court's Order are being produced.

- d. *Other female student.* Attached as pages FERPA 081000-081021 are documents concerning a student who desired to leave the University. In providing services to her and assisting with her request, she reported information which falls within the subject matter of the Court's Order for production. This student's name and identifying information have been redacted as well as that of her roommate. The University reports that because this female student did not wish to pursue any action and the male was not identified and was a non-student, no disciplinary action was taken.

38. Finally, attached as FERPA 082000 is a trespass letter issued to [REDACTED]. This situation is similar to that of [REDACTED] that I discussed with you in my correspondence of February 10, 2017. The police report concerning this matter was previously produced to you at NKU 02766-02775. [REDACTED] is listed on the trespass lists previously produced to you at pages NKU SUPP 000302, 000310, 000316, 000324, 000333, 000341, 000347, 000356, 000363, and 000371. It was assumed that [REDACTED]'s trespass letter was also included in that range of production but I have discovered even though the police report and his inclusion on the trespass list was previously provided, a copy of the trespass letter issued to [REDACTED] was not.

Again, my discussion here of these items was intended as a summary only and not meant to digest every document included. I also want to reiterate my prior offer to you I made in earlier correspondence. If you need additional information concerning these items or an explanation of their production, we will make University employees available for a deposition (or supplemental deposition) at no expense to you. In addition, if you believe these documents cause you to need additional time for responding to the motion for summary judgment, I'll be glad to discuss an extension with you to alleviate any prejudice. As you know, none of these documents have been utilized in support of NKU's motion or defense to your client's claims.

Sincerely,

STURGILL, TURNER, BARKER & MOLONEY, PLLC

Bryan H. Beaman

CC: Barbara Kriz
Jeff Mando

Enclosures

x:\wdox\clients\64764\0005\corr\00797820.docx

Meredith Reeves

From: Kacey Coleman
Sent: Wednesday, October 19, 2016 5:12 PM
To: kmurphy mljfirm.com (kmurphy@mljfirm.com)
Cc: 'Barbara Kriz'
Subject: Proposed Order and Depositions
Attachments: FERPA Notice Ltr 10-19-16 (00744581xA9D25).doc; DRAFT Agreed Order (00744559xA9D25).docx

Kevin:

In accordance with the Court's directive attached please find a proposed Order concerning the production of the Title IX /student disciplinary records which have been the subject of questioning in this matter.

Additionally, based upon your comments to the court that additional time would be necessary for discovery in this matter as depositions would await the production of these records, are we to understand that you do not intend to proceed with the depositions for which dates and times have been previously discussed, but no Notice issued? Confirmation of status is requested.

Very truly yours,

Katherine M. Coleman

Katherine M. Coleman (Kacey)



A Member Of The Employment Law Alliance



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333 WEST VINE STREET, STE 1500 ~ LEXINGTON, KENTUCKY 40507

TELEPHONE: (859) 255-8581 ~ FACSIMILE: (859) 231-0851

EXHIBIT 20

FILED ELECTRONICALLY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION
CASE NO. 2:16-CV-00028-WOB-CJS

JANE DOE

PLAINTIFF

v.

AGREED ORDER

NORTHERN KENTUCKY
UNIVERSITY, et. al.

DEFENDANTS

The Court having directed the production of certain non-party student education records in this matter, as set out herein, and having further directed the parties to agree upon the terms for such production, by agreement of the parties, IT IS ORDERED as follows:

1. This Agreed Order shall govern production of those student “education records,” as that term is defined under the Family Educational Rights and Privacy Act (FERPA), which Defendants assert they are prohibited producing without the prior, written consent of the current or former student to whom such records relate. Nothing herein shall prevent Plaintiff from challenging the status of any documents requested as “education records” under FERPA.
2. Plaintiff seeks Title IX sexual misconduct records related to (1) an alleged incident occurring in or about February 2015 involving members of the men’s basketball team; and (2) an alleged incident occurring in or about March 2016 involving a member of the men’s basketball team.
3. Defendants shall produce such records, consistent with rules of procedure and General Orders 04-01 and 08-01 of this Court, subject to the following “notice/objection” period in compliance with FERPA:

- a. Defendants shall be provided five (5) business days from the date of entry of this Agreed Order to make reasonable effort to send notice to such student(s) using the form letter attached hereto as Exhibit A.
 - b. A copy of the notice letter, with the name and address of the non-party current or former student redacted, shall be provided to counsel for Plaintiff.
 - c. The affected student(s) shall have ten (10) calendar days from the date of such notice in which to seek protective action with the court in advance of Defendant's production. In the event the tenth day falls on a Saturday, Sunday or federal holiday, the affected student shall have until the next calendar day when the court is open in which to file any objection.
 - d. In the event no objection is made Defendants shall produce the subject records within five (5) business days following the expiration of such notice period.
 - e. In the event objection is made, Defendants shall produce the subject records in accordance with the ruling of the court within five (5) business days following the date of court ruling.
4. This Order does not constitute a waiver of any other objection a party may have on grounds of relevance or other applicable law. Likewise, no party waives any objections to admissibility that they might otherwise have. Nothing about this Order or any document production made pursuant to this Order shall be construed as a waiver of any party's rights or obligations to decline disclosure of material to third parties under federal or state law.
5. Any education records provided shall be used by counsel solely for use in this litigation and shall be copied only as necessary for these purposes. Counsel shall secure any such records

or information in a manner sufficient to prevent any unauthorized viewing or use of the records or information, consistent with all applicable law and this order.

6. Nothing about this Order shall prevent any party from using documents produced pursuant to the Agreed Protective Order in connection with any trial, hearing, deposition or other public proceeding in this case. Further, nothing about this Order shall be construed to restrict the parties' counsel from making inquiry of witnesses or potential witnesses regarding the subject matter of the documents produced.
7. A party seeking to maintain the confidentiality of document(s) produced pursuant to this Agreed Protective Order which may be disclosed in proceedings, hearings, or at trial shall follow all rules and practices established by the Court regarding the filing of documents under seal.
8. Upon termination of this litigation, the originals and all copies of any education records provided to parties or counsel shall be destroyed, with their destruction being certified in writing to the source, if requested. The destruction of documents is not required of court personnel and does not relate to documents in the court's record.

This __ day of ____, 2016.

Stipulated and Agreed to by:

/s/ Katherine M. Coleman

Katherine M. Coleman (KBA #84089)

STURGILL, TURNER, BARKER

& MOLONEY, PLLC

333 West Vine Street, Suite 1500

Lexington, KY 40507

Telephone: (859) 255-8581

kcoleman@sturgillturner.com

Counsel for Defendants

/s/ Kevin L. Murphy

Kevin L. Murphy (KBA #50646)
MURPHY LANDEN JONES PLLC
2400 Chamber Center Drive, Suite 200
P.O. Box 17534
Ft. Mitchell, KY 41017-0534
KMurphy@MLJfirm.com
Counsel for Plaintiff

Meredith Reeves

From: Kevin Murphy <kmurphy@mljfirm.com>
Sent: Wednesday, October 19, 2016 6:05 PM
To: Kacey Coleman
Subject: Jane Doe v. NKU, et al.

Please begin the process of getting the records of the three basketball players and the records of the woman involved. We would also like the records of the basketball players involved in the 2016 incident.

We have one document from you that shows the result of an administrative hearing for any type of violence or crime. Certainly there has to be more in the last seven years. They have been requested previously and are relevant and material, and should be produced.

I am working on an agreed order for your review. But in the meantime, let's get the ball rolling on these other students mentioned above.

I am not going to take any depositions until I get these documents.

Kevin L. Murphy



2400 Chamber Center Drive, Suite 200
Ft. Mitchell, KY 41017
(P) 859.578.3060 | (F) 859.578.3061

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Meredith Reeves

From: Kacey Coleman
Sent: Wednesday, October 19, 2016 6:10 PM
To: 'Kevin Murphy'
Subject: RE: Jane Doe v. NKU, et al.

I believe there are two determinations on sexual assault you have been provided (aside from the staff/faculty records which you have referred to in the Amended Complaint), either in initial production or supplementation. I will recanvas our production records and forward those again to ensure you have them.

We will be prepared to provide the records as soon as the required notice provisions are met. We cannot send notice letters until the Order is entered.

Very truly yours,

Katherine M. Coleman

Katherine M. Coleman (Kacey)



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333 WEST VINE STREET, STE 1500 ~ LEXINGTON, KENTUCKY 40507

TELEPHONE: (859) 255-8581 ~ FACSIMILE: (859) 231-0851

From: Kevin Murphy [mailto:kmurphy@mljfirm.com]
Sent: Wednesday, October 19, 2016 6:05 PM
To: Kacey Coleman
Subject: Jane Doe v. NKU, et al.

Please begin the process of getting the records of the three basketball players and the records of the woman involved. We would also like the records of the basketball players involved in the 2016 incident.

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I am not going to take any depositions until I get these documents.

Kevin L. Murphy



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Meredith Reeves

From: Steven Taylor <STaylor@mljfirm.com>
Sent: Sunday, October 23, 2016 10:25 AM
To: Kacey Coleman; bkriz@kjpjlaw.com
Cc: Kevin Murphy
Subject: Jane Doe v. NKU, et al.
Attachments: DRAFT Agreed Order.docx

Please see an agreed order that we ask you to review and approve.

Thank you.

Steven

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION
CASE NO. 2:16-CV-00028-WOB-CJS

JANE DOE

PLAINTIFF

v.

AGREED ORDER

NORTHERN KENTUCKY
UNIVERSITY, et. al.

DEFENDANTS

The Court conducted a hearing on October 18, 2016 regarding the production of documents, which Defendants assert are education records governed by the Family Education Rights and Privacy Act ("FERPA"). Defendants further assert that they are prohibited from producing the documents without the prior, written consent of current or former students. Plaintiff alleges that throughout this case, Defendants have withheld information and invoked FERPA when it is not applicable to the information requested, including a deposition.

Plaintiff requested all student records that involve any aspect of a sexual nature, which would include NKU's Athletic Director Ken Bothof's definition of a sexual incident. Specifically, Plaintiff requested all documents evidencing any allegations of sexual assault, sexual misconduct, rape, and/or unwanted advances that occurred on campus and in offsite living quarters in the last seven years. To date, Plaintiff has only received one document, other than Doe's records, concerning the result of an administrative hearing pertaining to sexual misconduct.

The Court, having heard from the parties, and in all ways being sufficiently advised, HEREBY ORDERS AS FOLLOWS:

1. This Agreed Order shall govern both the production and withholding of education records, as that term is narrowly defined under FERPA, 20 U.S.C. 1232g(a)(4) and 34 CFR 99.3.

2. This Agreed Order shall also govern the conduct of the parties in any deposition conducted in this matter.
3. Information that a person obtained through personal knowledge or observation, or has heard orally from others, is not protected under FERPA. This remains applicable even if education records exist which contain that information.
4. Defendants shall produce all documents and education records relating to any allegations of sexual assault, sexual misconduct, rape, and/or unwanted advances that occurred on campus and in offsite living quarters in the last seven years, including, but not limited to, the following:
 - i. All documents relating to an incident occurring on or about February, 2015 involving members of the men's basketball team;
 - ii. All documents relating to an incident occurring on or about March, 2016 involving members of the men's basketball team;
 - iii. All documents constituting a transcript from any hearing relating to an incident of sexual misconduct and any disciplinary action taken as a result of that hearing, whether based on the Code of Student Conduct or any student athlete code of conduct, written or unwritten; and
 - iv. All documents relating to any instruction or guidance from Defendants, or anyone acting on their behalf, to any current or former student to forego an administrative hearing relating to an incident of sexual misconduct.
5. The term "document" includes documents of all types described or referenced in Fed. R. Civ. P. 34, including but not limited to any document or folder relating to electronic and/or hard copies of electronic mail (whether located on tapes, disks, or other storage

mechanisms) and including, but not limited to, messages or communications located on backups, individual PC hard drives, personal digital assistants (or PDA'S), smart phones (including text messages), laptop computers, or home computers linked into Defendant's e-mail system by modem or otherwise. The term document includes all emails and correspondence by and between employees and/or students, with names redacted. E-mails shall be produced in native format.

6. Defendants shall produce such documents, consistent with the Federal Rules of Civil Procedure and General Orders 04-01 and 08-01 of this Court, subject to the following "notice/objection" period in compliance with FERPA:

- a. Defendants shall be provided five (5) business days from the date of entry of this Agreed Order to make reasonable effort to send notice to such student(s) using the form letter attached hereto as Exhibit A.
- b. A copy of the notice letter, with the name and address of the non-party current or former student redacted, shall be provided to counsel for Plaintiff.
- c. The affected student(s) shall have ten (10) calendar days from the date of such notice in which to seek protective action with the court in advance of Defendant's production. In the event the tenth day falls on a Saturday, Sunday or federal holiday, the affected student shall have until the next calendar day when the court is open in which to file any objection.
- d. In the event no objection is made Defendants shall produce the subject records within five (5) business days following the expiration of such notice period.

- e. In the event objection is made, Defendants shall produce the subject records in accordance with the ruling of the court within five (5) business days following the date of court ruling.
7. Plaintiff reserves the right to challenge Defendants' characterization of documents as education records and may request that documents be produced in their unredacted form.
8. In the event that Defendants withhold documents on the basis that the documents are education records and protected under FERPA, Defendants shall provide to Plaintiff a FERPA log, describing the content of the documents being withheld with sufficient specificity to enable Plaintiff to challenge Defendants' characterization of the documents.
9. No party shall instruct a witness not to answer in any deposition on the basis of FERPA. In the event a party believes an objection is appropriate on the basis of FERPA, the party is instructed to follow the procedures outlined in Fed. R. Civ. P. 30(d)(3).
10. Nothing about this Order shall prevent any party from using documents produced pursuant to the Agreed Protective Order in connection with any trial, hearing, deposition or other public proceeding in this case. Further, nothing about this Order shall be construed to restrict the parties' counsel from making inquiry of witnesses or potential witnesses regarding the subject matter of the documents produced.
11. Nothing about this Order shall prevent Plaintiff from seeking the identity of a person whose name has been redacted so that Plaintiff can call such person as a witness at any trial in this matter.

This ___ day of _____, 2016.

Stipulated and Agreed to by:

/s/ Katherine M. Coleman

Katherine M. Coleman (KBA #84089)

STURGILL, TURNER, BARKER

& MOLONEY, PLLC

333 West Vine Street, Suite 1500

Lexington, KY 40507

Telephone: (859) 255-8581

kcoleman@sturgillturner.com

Counsel for Defendants

/s/ Kevin L. Murphy

Kevin L. Murphy (KBA #50646)

MURPHY LANDEN JONES PLLC

2400 Chamber Center Drive, Suite 200

P.O. Box 17534

Ft. Mitchell, KY 41017-0534

KMurphy@MLJfirm.com

Counsel for Plaintiff



Email Address:
kcoleman@sturgillturner.com

October 24, 2016

Kevin L. Murphy, Esq.
Murphy Landen Jones PLLC
2400 Chamber Center Drive, Suite 200
P.O. Box 17534
Ft. Mitchell, KY 41017-0534
KLMurphy@kevinlmurphyllaw.com

RE: *Jane Doe v. Northern Kentucky University, et al.*
U.S. District Court, E.D., Ky., Case No. 2:16-cv-00028-WOB-CJS
STBM File No. 64764.5

Dear Kevin:

Attached please find a revised proposed Agreed Order that we can agree which reflects elements of both parties' proposed orders. As to specific elements of the order proposed by Plaintiff we provide the following response:

We are agreeable to the recitation of the request for student education records as set forth in Plaintiff's discovery requests - "all documents evidencing any sexual assault, rape, and/or unwanted advances that occurred on campus and in offsite living quarters in the last seven years" - which is reflective of the language contained in Title IX and NKU policy governing sexual misconduct. However, we object to reference to vague requests for "student records that involve any aspect of a sexual nature."

For purposes of proper clarification – Defendants have produced copies of any *sanctions or disciplinary actions* which have resulted from a claim of sexual violence resulting in a finding of responsibility under University policy in accordance with the provisions of FERPA. This constitutes more than one document.

As we have previously noted, any email produced which is subject to redaction cannot be produced in native format. However, should there be any emails for which redaction is not necessary, we are agreeable to producing those in native format.



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PHONE: 859.255.8581 ♦ FAX: 859.231.0851 ♦ WWW.STURGILLTURNER.COM



October 24, 2016
Page 2

We have no objection to Plaintiff's right to seek the identity of any non-party student whose education records have been produced in accordance with this Order in redacted format; however, it must be clarified that Plaintiff may request the Court to order the identification of such individual.

Finally, it is our position that this Order should refrain from asserting contested positions of one particular party. To this end, we object to the following:

Proposed paragraph no. 3: There is no purpose to be gained from including the language "information that a person obtained through personal knowledge or observation, or has heard orally from others, is not protected under FERPA." As you are aware, it is the position of Defendants that FERPA clearly extends to information that an individual may have learned orally from others if that information is based on knowledge gathered or derived from an educational record. This obviously continues to be a point of contention between the parties that has not been ruled on by the Court.

Proposed paragraph no. 4.iv: We object to the inclusion of this subparagraph which seeks production of documents reflecting "instruction or guidance from Defendants" to "forgo an administrative hearing." Aside from the fact Defendants specifically deny the existence of any such documents, this Order directs, the production of *all* records related to claims of sexual misconduct, which includes any and all communications related to those claims. The inclusion of this language is nothing more than an attempt to publish further unfounded allegations against the Defendants.

Proposed paragraph no. 9: This further represents an attempt to publish Plaintiff's mere allegations in the record without foundation. We cannot agree that we will not instruct a witness to answer any deposition on the basis of FERPA. Obviously, if student education records have been properly produced in accordance with this Order, then they may be the subject of questioning in a deposition. However, to the extent Plaintiff seeks to question any witness concerning the student education records of a nonparty student whose records *have not* been produced in this matter, then Defendants remain statutorily bound by FERPA to object and instruct any named Defendant or NKU employee not to answer.

If the Agreed Order as proposed here is acceptable please so advise and we will submit it to the Court for entry.

Sincerely,

Katherine M. Coleman

KMC/tjm

Enclosures

cc: Joan Gates, Esq.
Sara Kelley, Esq.
Barbara Kriz, Esq.

FILED ELECTRONICALLY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION
CASE NO. 2:16-CV-00028-WOB-CJS

JANE DOE

PLAINTIFF

v.

AGREED ORDER

NORTHERN KENTUCKY
UNIVERSITY, et. al.

DEFENDANTS

The Court conducted a hearing on October 18, 2016 regarding the production of documents, which Defendants assert are education records governed by the Family Education Rights and Privacy Act ("FERPA"). Defendants further assert that they are prohibited from producing the documents without the prior, written consent of current or former students. Plaintiff alleges that throughout this case, Defendants have withheld information and invoked FERPA when it is not applicable to the information requested, including a deposition.

Plaintiff requested "all documents evidencing any sexual assault, rape, and/or unwanted advances that occurred on campus and in offsite living quarters in the last seven years" to which Defendants objected on the basis of FERPA. To date, Plaintiff has only received documents, other than Doe's records, which concern sanctions and/or discipline as a result of an administrative hearing pertaining to sexual misconduct.

The Court, having heard from the parties, and in all ways being sufficiently advised, HEREBY ORDERS AS FOLLOWS:

1. This Agreed Order shall govern both the production and withholding of "education records" as that term is defined under FERPA. Nothing herein shall prevent Plaintiff from challenging the status of any documents requested as "education records" under FERPA.

2. Plaintiff seeks “all documents evidencing any sexual assault, rape, and/or unwanted advances that occurred on campus and in offsite living quarters in the last seven years;” and the Court has ordered production of such documents.
3. Defendants shall produce all documents and education records relating to any allegations of sexual assault, sexual misconduct, rape, and/or unwanted advances that occurred on campus and in offsite living quarters in the last seven years, including, but not limited to, the following:
 - a. All documents relating to an incident occurring on or about February, 2015 involving members of the men’s basketball team;
 - b. All documents relating to an incident occurring on or about March, 2016 involving members of the men’s basketball team;
 - c. All documents constituting a transcript from any hearing relating to an incident of sexual misconduct and any disciplinary action taken as a result of that hearing, whether based on the Code of Student Conduct or any student athlete code of conduct, written or unwritten.
4. The term “document” includes documents of all types described or referenced in Fed. R. Civ. P. 34, including but not limited to any document or folder relating to electronic and/or hard copies of electronic mail (whether located on tapes, disks, or other storage mechanisms) and including, but not limited to, messages or communications located on backups, individual PC hard drives, personal digital assistants (or PDA’S), smart phones (including text messages), laptop computers, or home computers linked into Defendant’s e-mail system by modem or otherwise. The term document includes all emails and correspondence by and between

employees and/or students, with names redacted. Email will be produced in native format if not subject to redaction.

5. Defendants shall produce such records, subject to redaction of student[s]' personally identifiable information and consistent with rules of procedure and General Orders 04-01 and 08-01 of this Court, and subject to the following "notice/objection" period in compliance with FERPA:

- a. Defendants shall be provided five (5) business days from the date of entry of this Agreed Order to make reasonable effort to send notice to such student(s) using the form letter attached hereto as Exhibit A.
- b. A copy of the notice letter, with the name and address of the non-party current or former student redacted, shall be provided to counsel for Plaintiff.
- c. The affected student(s) shall have ten (10) calendar days from the date of such notice in which to seek protective action with the court in advance of Defendant's production. In the event the tenth day falls on a Saturday, Sunday or federal holiday, the affected student shall have until the next calendar day when the court is open in which to file any objection.
- d. In the event no objection is made Defendants shall produce the subject records within five (5) business days following the expiration of such notice period.
- e. In the event objection is made, Defendants shall produce the subject records in accordance with the ruling of the court within five (5) business days following the date of court ruling.

6. In the event that Defendants withhold documents on the basis that the documents are education records and protected under FERPA, Defendants shall provide to Plaintiff a

FERPA log, describing the content of the documents being withheld with sufficient specificity to enable Plaintiff to challenge Defendants' characterization of the documents.

7. This Order does not constitute a waiver of any other objection a party may have on grounds of relevance or other applicable law. Likewise, no party waives any objections to admissibility that they might otherwise have. Nothing about this Order or any document production made pursuant to this Order shall be construed as a waiver of any party's rights or obligations to decline disclosure of material to third parties under federal or state law.
8. Any education records provided shall be used by counsel for Plaintiff and Defendants solely for use in this litigation and shall be copied only as necessary for these purposes. Counsel shall secure any such records or information in a manner sufficient to prevent any unauthorized viewing or use of the records or information, consistent with all applicable law and this order.
9. Nothing about this Order shall prevent any party from using documents produced pursuant to the Agreed Order in connection with any trial, hearing, deposition or other public proceeding in this case. Further, nothing about this Order shall be construed to restrict the parties' counsel from making inquiry of witnesses or potential witnesses regarding the subject matter of the documents produced.
10. A party seeking to maintain the confidentiality of document(s) produced pursuant to this Agreed Protective Order which may be disclosed in proceedings, hearings, or at trial shall follow all rules and practices established by the Court regarding the filing of documents under seal.

11. Nothing about this Order shall prevent Plaintiff from seeking an Order of the Court to obtain the identity of a person whose name has been redacted so that Plaintiff can call such person as a witness at any trial in this matter.
12. Upon termination of this litigation, the originals and all copies of any education records provided to parties or counsel shall be destroyed, with their destruction being certified in writing to the source, if requested. The destruction of documents is not required of court personnel and does not relate to documents in the court's record.

This ___ day of _____, 2016.

Stipulated and Agreed to by:

/s/ Katherine M. Coleman

Katherine M. Coleman (KBA #84089)

STURGILL, TURNER, BARKER

& MOLONEY, PLLC

333 West Vine Street, Suite 1500

Lexington, KY 40507

Telephone: (859) 255-8581

kcoleman@sturgillturner.com

Counsel for Defendants

/s/ Kevin L. Murphy

Kevin L. Murphy (KBA #50646)

MURPHY LANDEN JONES PLLC

2400 Chamber Center Drive, Suite 200

P.O. Box 17534

Ft. Mitchell, KY 41017-0534

KMurphy@MLJfirm.com

Counsel for Plaintiff

Meredith Reeves

From: Steven Taylor <STaylor@mljfirm.com>
Sent: Monday, October 24, 2016 5:21 PM
To: Kacey Coleman; bkriz@kjpjlaw.com
Cc: Kevin Murphy
Subject: RE: Jane Doe v. NKU, et al.
Attachments: DRAFT Agreed Order (REVISED).docx

Kacey,

I was in the process of responding to your proposal when I saw that you filed your tendered order. However, I still wanted to reach out to with a revised Agreed Order (attached) with the hope we can agree. We incorporated your changes regarding the "copies of any sanctions or disciplinary actions." We also incorporated your change regarding the production of emails in native format. We also included your language regarding seeking an Order from the Court in order to obtain the identity of students for purposes of trial. Lastly, we deleted the language regarding depositions in light of the clarity of Judge Bertlesman's Order.

As for your proposed revision to paragraph no. 3, Judge Bertlesman's Order is clear that information obtained through personal knowledge or observation, or has heard orally from others is not protected under FERPA. Thus, we cannot agree to your proposed deletion of this paragraph.

As to your comments on proposed paragraph no. 4.iv, we have changed the language in that paragraph to alleviate your allegation that "it is nothing more than an attempt to publish unfounded allegations."

Please let me know if you agree with the order. If not, we will file a separate proposed order, including some of the provisions we have deleted as an accommodation to you.

From: Kacey Coleman [mailto:KColeman@sturgillturner.com]
Sent: Monday, October 24, 2016 1:43 PM
To: Steven Taylor <STaylor@mljfirm.com>; bkriz@kjpjlaw.com
Cc: Kevin Murphy <KMurphy@mljfirm.com>
Subject: RE: Jane Doe v. NKU, et al.

Counsel:

Please see attached

Very truly yours,

Katherine M. Coleman

Katherine M. Coleman (Kacey)



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TELEPHONE: (859) 255-8581 ~ FACSIMILE: (859) 231-0851

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Sent: Sunday, October 23, 2016 10:25 AM
To: Kacey Coleman; bkruz@kjpjlaw.com
Cc: Kevin Murphy
Subject: Jane Doe v. NKU, et al.

Please see an agreed order that we ask you to review and approve.

Thank you.

Steven

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION
CASE NO. 2:16-CV-00028-WOB-CJS

JANE DOE

PLAINTIFF

v.

AGREED ORDER

NORTHERN KENTUCKY
UNIVERSITY, et. al.

DEFENDANTS

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Plaintiff requested all student records that involve any aspect of a sexual nature, which would include NKU’s Athletic Director Ken Bothof’s definition of a sexual incident. Specifically, Plaintiff requested all documents evidencing any allegations of sexual assault, sexual misconduct, rape, and/or unwanted advances that occurred on campus and in offsite living quarters in the last seven years. To date, Plaintiff has only received documents relating to one other student, excluding Doe’s records, concerning the result of an administrative hearing pertaining to sexual misconduct.

The Court, having heard from the parties, and in all ways being sufficiently advised, HEREBY ORDERS AS FOLLOWS:

1. This Agreed Order shall govern both the production and withholding of “education records” as that term is defined under FERPA, 20 U.S.C. 1232g(a)(4) and 34 CFR 99.3.

Nothing herein shall prevent Plaintiff from challenging the status of any documents requested as “education records” under FERPA or seeking the production of such records in their unredacted form.

2. Information that a person obtained through personal knowledge or observation, or has heard orally from others, is not protected under FERPA. This remains applicable even if education records exist which contain that information.
3. Plaintiff seeks “all documents evidencing any sexual assault, rape, and/or unwanted advances that occurred on campus and in offsite living quarters in the last seven years,” and the Court has ordered production of such documents.
4. Defendants shall produce all documents and education records relating to any allegations of sexual assault, sexual misconduct, rape, and/or unwanted advances that occurred on campus and in offsite living quarters in the last seven years, including, but not limited to, the following:
 - i. All documents relating to an incident occurring on or about February, 2015 involving members of the men’s basketball team;
 - ii. All documents relating to an incident occurring on or about March, 2016 involving members of the men’s basketball team;
 - iii. All documents constituting a transcript from any hearing relating to an incident of sexual misconduct and any disciplinary action taken as a result of that hearing, whether based on the Code of Student Conduct or any student athlete code of conduct, written or unwritten; and
 - iv. All documents relating to any such allegations for which: (1) an administrative hearing was not conducted; or (2) an administrative panel

found that it was more likely than not that the former or current was not guilty of the charges.

5. The term “document” includes documents of all types described or referenced in Fed. R. Civ. P. 34, including but not limited to any document or folder relating to electronic and/or hard copies of electronic mail (whether located on tapes, disks, or other storage mechanisms) and including, but not limited to, messages or communications located on backups, individual PC hard drives, personal digital assistants (or PDA’S), smart phones (including text messages), laptop computers, or home computers linked into Defendant’s e-mail system by modem or otherwise. The term document includes all emails and correspondence by and between employees and/or students, with names redacted. E-mails will be produced in native format if not subject to redaction.
6. Defendants shall produce such documents, subject to redaction of student[s]’ personally identifiable information and consistent with the Federal Rules of Civil Procedure and General Orders 04-01 and 08-01 of this Court, subject to the following “notice/objection” period in compliance with FERPA:
 - a. Defendants shall be provided five (5) business days from the date of entry of this Agreed Order to make reasonable effort to send notice to such student(s) using the form letter attached hereto as Exhibit A.
 - b. A copy of the notice letter, with the name and address of the non-party current or former student redacted, shall be provided to counsel for Plaintiff.
 - c. The affected student(s) shall have ten (10) calendar days from the date of such notice in which to seek protective action with the court in advance of Defendant’s production. In the event the tenth day falls on a Saturday, Sunday or federal

holiday, the affected student shall have until the next calendar day when the court is open in which to file any objection.

- d. In the event no objection is made Defendants shall produce the subject records within five (5) business days following the expiration of such notice period.
 - e. In the event objection is made, Defendants shall produce the subject records in accordance with the ruling of the court within five (5) business days following the date of court ruling.
7. In the event that Defendants withhold documents on the basis that the documents are education records and protected under FERPA, Defendants shall provide to Plaintiff a FERPA log, describing the content of the documents being withheld with sufficient specificity to enable Plaintiff to challenge Defendants' characterization of the documents.
8. Nothing about this Order shall prevent any party from using documents produced pursuant to the Agreed Protective Order in connection with any trial, hearing, deposition or other public proceeding in this case. Further, nothing about this Order shall be construed to restrict the parties' counsel from making inquiry of witnesses or potential witnesses regarding the subject matter of the documents produced.
9. Nothing about this Order shall prevent Plaintiff from seeking an Order of the Court to obtain the identity of a person whose name has been redacted so that Plaintiff can call such person as a witness at any trial in this matter.

This ___ day of _____, 2016.

Stipulated and Agreed to by:

/s/ Katherine M. Coleman

Katherine M. Coleman (KBA #84089)
STURGILL, TURNER, BARKER
& MOLONEY, PLLC
333 West Vine Street, Suite 1500
Lexington, KY 40507
Telephone: (859) 255-8581
kcoleman@sturgillturner.com
Counsel for Defendants

/s/ Kevin L. Murphy

Kevin L. Murphy (KBA #50646)
MURPHY LANDEN JONES PLLC
2400 Chamber Center Drive, Suite 200
P.O. Box 17534
Ft. Mitchell, KY 41017-0534
KMurphy@MLJfirm.com
Counsel for Plaintiff

Meredith Reeves

From: Kacey Coleman
Sent: Monday, October 24, 2016 6:21 PM
To: Steven Taylor; bkritz@kjpjlaw.com
Cc: Kevin Murphy
Subject: RE: Jane Doe v. NKU, et al.

Steven:

I regret that you responded to my communication after 5:00. Although we now live in the age of electronic filing, I continue to take directives to file by a date certain to mean by the close of business. Having left the office shortly after 5:00 due to a personal obligation I did not see your 5:21 p.m. email until after 6:00. I was preparing my reply when you filed your Order. As there appear to be matters upon which we still did not agree, and which had not been included in your draft despite their existence in the original Agreed Protective Order, submission by the parties to the Court is likely best.

Very truly yours,

Katherine M. Coleman

Katherine M. Coleman (Kacey)



333 West Vine Street, Suite 1500, Lexington, KY 40507
p 859.255.8581 f 859.231.0851 www.sturgillturner.com

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From: Steven Taylor [mailto:STaylor@mljfirm.com]
Sent: Monday, October 24, 2016 5:21 PM
To: Kacey Coleman; bkritz@kjpjlaw.com
Cc: Kevin Murphy
Subject: RE: Jane Doe v. NKU, et al.

Kacey,

I was in the process of responding to your proposal when I saw that you filed your tendered order. However, I still wanted to reach out to with a revised Agreed Order (attached) with the hope we can agree. We incorporated your changes regarding the "copies of any sanctions or disciplinary actions." We also incorporated your change regarding the production of emails in native format. We also included your language regarding seeking an Order from the Court in

order to obtain the identity of students for purposes of trial. Lastly, we deleted the language regarding depositions in light of the clarity of Judge Bertlesman's Order.

As for your proposed revision to paragraph no. 3, Judge Bertlesman's Order is clear that information obtained through personal knowledge or observation, or has heard orally from others is not protected under FERPA. Thus, we cannot agree to your proposed deletion of this paragraph.

As to your comments on proposed paragraph no. 4.iv, we have changed the language in that paragraph to alleviate your allegation that "it is nothing more than an attempt to publish unfounded allegations."

Please let me know if you agree with the order. If not, we will file a separate proposed order, including some of the provisions we have deleted as an accommodation to you.

From: Kacey Coleman [<mailto:KColeman@sturgillturner.com>]
Sent: Monday, October 24, 2016 1:43 PM
To: Steven Taylor <STaylor@mljfirm.com>; bkriz@kjpilaw.com
Cc: Kevin Murphy <KMurphy@mljfirm.com>
Subject: RE: Jane Doe v. NKU, et al.

Counsel:

Please see attached

Very truly yours,

Katherine M. Coleman

Katherine M. Coleman (Kacey)



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333 WEST VINE STREET, STE 1500 ~ LEXINGTON, KENTUCKY 40507

TELEPHONE: (859) 255-8581 ~ FACSIMILE: (859) 231-0851

From: Steven Taylor [<mailto:STaylor@mljfirm.com>]
Sent: Sunday, October 23, 2016 10:25 AM
To: Kacey Coleman; bkriz@kjpjlaw.com
Cc: Kevin Murphy
Subject: Jane Doe v. NKU, et al.

Please see an agreed order that we ask you to review and approve.

Thank you.

Steven

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From: Kevin Murphy <kmurphy@mljfirm.com>
Sent: Monday, September 19, 2016 5:13 PM
To: Kacey Coleman
Subject: Jane Doe v. NKU, et al.

I would like to take Ann James on the 24th of October. I would like to take Roberts and Maloney on the 25th, and Mearns on the 26th.

Please advise.

K. L. Murphy



2400 Chamber Center Drive, Suite 200
Ft. Mitchell, KY 41017
(P) 859.578.3060 | (F) 859.578.3061

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From: Kacey Coleman
Sent: Wednesday, September 21, 2016 4:56 PM
To: Kevin Murphy
Cc: Barbara Kriz; Joshua Salsburey; Derrick Wright
Subject: RE: Jane Doe v. NKU, et al.

Kevin:

In response to the new dates you have provided please be advised as to the availability of the individuals:

Ms. James is available on 10/24 until 1pm.

Ms. Roberts is available on 10/25 after 11 am

Ms. Dralle is available at any time on 10/25

President Mearns is unavailable on 10/26. As you might expect, his availability will be the most difficult. If you would kindly provide a number of possible dates it would greatly assist in getting him scheduled.

Very truly yours,

Katherine M. Coleman

Katherine M. Coleman (Kacey)



333 West Vine Street, Suite 1500, Lexington, KY 40507

p 859.255.8581 f 859.231.0851 www.sturgillturner.com

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From: Kevin Murphy [mailto:kmurphy@mljfirm.com]
Sent: Monday, September 19, 2016 5:13 PM
To: Kacey Coleman
Subject: Jane Doe v. NKU, et al.

I would like to take Ann James on the 24th of October. I would like to take Roberts and Maloney on the 25th, and Mearns on the 26th.

Please advise.

K. L. Murphy



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From: Kevin Murphy <kmurphy@mljfirm.com>
Sent: Friday, September 23, 2016 5:48 PM
To: Kacey Coleman
Subject: Jane Doe v. NKU, et al.

If Ms. James is not available on the 24th, then let's schedule her for October 25th starting at 9. I am not going to limit the hours. I think it will not be more than four hours, but I do not want to limit myself. We can do Roberts on the 27th and Dralle right after Roberts, if she can be flexible.

Mr. Mearns is going to have to make himself available, busy or not busy. I can schedule him for November 2nd and November 3rd. Please advise.

Kevin L. Murphy



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Ft. Mitchell, KY 41017
(P) 859.578.3060 | (F) 859.578.3061

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From: Kevin Murphy <kmurphy@mljfirm.com>
Sent: Wednesday, September 28, 2016 10:19 AM
To: Kacey Coleman
Subject: Jane Doe v. NKU, et al.

As you know, I subpoenaed Kevin Schappell for a deposition. Just a couple of days later, there was an amazing article in the Cincinnati Enquirer about his father, who is dying from cancer.

Kevin is trying to maximize the time with his father, and told me that the best time for him to be deposed would be on a Friday afternoon. I am in Houston taking depositions. When I get back, I would like to ask you to look at your calendar and let's move the date if that is okay with you to a Friday. I do not anticipate deposing him for a very long period of time, so hopefully if we start it at 12:30 we can get the deposition in.

Does this sound okay with you? I will call you on Friday—I return from Houston late Thursday night.

Thank you.

Kevin L. Murphy



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From: Kacey Coleman
Sent: Wednesday, September 28, 2016 10:58 AM
To: Kevin Murphy
Cc: Joshua Salsburey
Subject: RE: Jane Doe v. NKU, et al.

Kevin:

We received the Notice of Intent, but were not aware that service had been accomplished. We have no objection to accommodating Mr. Schappell's needs. However, we do have objection to the production of any documents that may constitute "education records" of current or former students, as anticipated based on the documents sought in connection with the subpoena, or testimony concerning such education records without proper FERPA compliance. Aside from the fact that Mr. Schappell should not have in his possession "education records" for any NKU student, such records cannot be produced or discussed until such time as those students have been provided proper FERPA notice.

The court has ordered this issue (the production of nonparty student education records) to be addressed on October 18th. As such, we suggest that this issue and the deposition should await that hearing. I do have availability for deposition the following Friday, October 21st, although I have a hearing that morning here in Lexington and would not be available until 1:30/2:00. I am also available on Friday the 28th. I will be out of state in Chicago Friday, November 4th. I will, of course, need to confer with NKU counsel as to their availability as they will attend the deposition as well.

Safe travels -

Very truly yours,

Katherine M. Coleman
Katherine M Coleman (Kacey)



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333 WEST VINE STREET, STE 1500 ~ LEXINGTON, KENTUCKY 40507

TELEPHONE: (859) 255-8581 ~ FACSIMILE: (859) 231-0851

From: Kevin Murphy [mailto:kmurphy@mljfirm.com]

Sent: Wednesday, September 28, 2016 10:19 AM

To: Kacey Coleman

Subject: Jane Doe v. NKU, et al.

As you know, I subpoenaed Kevin Schappell for a deposition. Just a couple of days later, there was an amazing article in the Cincinnati Enquirer about his father, who is dying from cancer.

Kevin is trying to maximize the time with his father, and told me that the best time for him to be deposed would be on a Friday afternoon. I am in Houston taking depositions. When I get back, I would like to ask you to look at your calendar and let's move the date if that is okay with you to a Friday. I do not anticipate deposing him for a very long period of time, so hopefully if we start it at 12:30 we can get the deposition in.

Does this sound okay with you? I will call you on Friday—I return from Houston late Thursday night.

Thank you.

Kevin L. Murphy



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From: Kacey Coleman
Sent: Thursday, September 29, 2016 4:15 PM
To: 'Kevin Murphy'
Cc: 'Barbara Kriz'
Subject: RE: Jane Doe v. NKU, et al.

Kevin:

In response to the new dates proposed below please be advised as follows:

Ann James is available on Oct. 25th

Kathleen Roberts is available on October 27th and Gabby Dralle is available on Oct. 27th until 4 pm. I, however, have an Unemployment Hearing beginning at 1:00 on the 27th as the 27th was not a date originally proposed. We will work to try to address coverage for the afternoon, but we may not be able to address this conflict.

President Mearns is available in November 3rd

Very truly yours,

Katherine M. Coleman
Katherine M. Coleman (Kacey)



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TELEPHONE: (859) 255-8581 ~ FACSIMILE: (859) 231-0851

From: Kevin Murphy [mailto:kmurphy@mljfirm.com]
Sent: Friday, September 23, 2016 5:48 PM
To: Kacey Coleman
Subject: Jane Doe v. NKU, et al.

If Ms. James is not available on the 24th, then let's schedule her for October 25th starting at 9. I am not going to limit the hours. I think it will not be more than four hours, but I do not want to limit myself. We can do Roberts on the 27th and Dralle right after Roberts, if she can be flexible.

Mr. Mearns is going to have to make himself available, busy or not busy. I can schedule him for November 2nd and November 3rd. Please advise.

Kevin L. Murphy



2400 Chamber Center Drive, Suite 200
Ft. Mitchell, KY 41017
(P) 859.578.3060 | (F) 859.578.3061

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From: Kacey Coleman
Sent: Tuesday, October 04, 2016 11:11 AM
To: kmurphy mljfirm.com (kmurphy@mljfirm.com)
Subject: NKU/Doe

Kevin:

I did not hear from you Friday or yesterday with regard to the rescheduling of Mr. Schappell's deposition. As noted in my communication of September 29, 2016, we have no objection to accommodating Mr. Schappell's need to schedule his deposition on a Friday. However, we do have objection to the production of any documents that may constitute "education records" of current or former students, as anticipated based on the documents sought in connection with the subpoena, or testimony concerning such education records without proper FERPA compliance.

As hearing on the matter of production of nonparty student education records is set for October 18th, we have requested that Mr. Schappell's deposition be scheduled after such date as the issue of production and/or testimony concerning nonparty student education records will have been ruled upon by the court.

I previously noted that I had limited availability for deposition Friday, October 21st, but that date is now fully unavailable; however, I do continue to have availability Friday the 28th.

I am in and out of the office today, and at the moment we are having phone issues which appear to be affecting a large area of downtown Lexington and which preclude at least outgoing calls and we assume incoming as well (I love technology). Please advise if postponement pending hearing and ruling of the court is agreeable. Obviously, in the event we cannot agree we will need to address this dispute, as we have an obligation under the rules to timely raise this issue. I also recall that you are about to depart the country and will be out until just prior to the currently scheduled date and hoped to address this prior to your departure.

Very truly yours,

Katherine M. Coleman

Katherine M. Coleman (Kacey)



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TELEPHONE: (859) 255-8581 ~ FACSIMILE: (859) 231-0851

From: Jeff Landen <jlanden@MLJfirm.com>
Sent: Saturday, October 08, 2016 4:47 PM
To: Kacey Coleman
Cc: 'Kevin Murphy'
Subject: Jane Doe v. Northern Kentucky University et al.
Attachments: 100816 Ltr to Coleman.pdf

Please see the attached letter, which is transmitted to you on behalf of Kevin Murphy.

Jeff Landen
MURPHY LANDEN JONES PLLC
2400 Chamber Center Drive, Suite 200
Fort Mitchell, Kentucky 41017
859-609-4637



2400 Chamber Center Dr.
Suite 200
P.O. Box 17534
Ft. Mitchell, KY 41017-0534
859.578.3060 | 859.578.3061 (Fax)

Kevin L. Murphy
Direct: 859-578-3060
K.Murphy@MLJfirm.com

October 8, 2016

VIA E-MAIL (kcoleman@sturgillturner.com)

Katherine M. Coleman, Esq.
Sturgill, Turner, Barker
& Moloney, PLLC
333 West Vine Street, Suite 1500
Lexington, KY 40507

RE: *Jane Doe v. Northern Kentucky University, et al.*

Dear Ms. Coleman:

I am writing in response to your email dated October 4, 2016.

As you are aware, I had pre-existing plans to be out of the country, starting earlier this week. Yet, rather than conferring with me sufficiently in advance of my departure to afford me a reasonable time to respond, you sent your email and then proceeded with filing a Motion to Modify Subpoena Duces Tecum for Records and Testimony of Kevin Schappell the very next day.

If you had actually conferred with me, you would have learned the following. Mr. Schappell has informed me that he does not even have any documents responsive to the *duces tecum* portion of the subpoena. Thus, your concerns, though we do not consider them meritorious, are in any event moot.

Let me make this easy for you, for the deponent and for the Court. We are willing to modify the subpoena to Mr. Schappell to remove the *duces tecum* portion completely. Please respond by email before the close of business on Monday, October 10, 2016, to let me know if you are willing to consent to that modification. If so, I will have another attorney in my firm prepare an appropriate Agreed Order or other paper effectuating the modification to present to the Court.

Sincerely,

/s/ Kevin Murphy per authorization

Kevin L. Murphy

From: Tanya Mirilovich
Sent: Monday, October 10, 2016 3:15 PM
To: 'klmurphy@kevinlmurphyllaw.com'
Cc: 'kelleys2@nku.edu'; bkriz@kjpjlaw.com; gatesj4@nku.edu; Kacey Coleman
Subject: Jane Doe v. NKU - Message sent on behalf of Kacey Coleman
Attachments: Coleman 10-10-16 letter to Kevin Murphy re Schappell depo (00742072xA9D25).pdf

RE: *Jane Doe v. Northern Kentucky University, et al.*
U.S. District Court, E.D., Ky., Case No. 2:16-cv-00028-WOB-CJS
STBM File No. 64764.0005

Dear Mr. Murphy,
Kacey asked that I forward to you the attached document regarding the above-referenced matter. Should you have any questions, please do not hesitate to contact me.

Regards,

Tanya J. Mirilovich

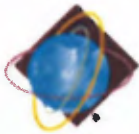
Tanya Mirilovich

Legal Assistant

tmirilovich@sturgillturner.com



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Email Address:
kcoleman@sturgillturner.com

October 10, 2016

Kevin L. Murphy, Esq.
Murphy Landen Jones PLLC
2400 Chamber Center Drive, Suite 200
P.O. Box 17534
Ft. Mitchell, KY 41017-0534
KLMurphy@kevinlmurphyllaw.com

RE: *Jane Doe v. Northern Kentucky University, et al.*
U.S. District Court, E.D., Ky., Case No. 2:16-cv-00028-WOB-CJS
STBM File No. 64764.5

Dear Kevin:

I am writing in your response to your letter of October 8, 2016. You are incorrect in your assertions, and misstate, my efforts to confer with you prior to your departure concerning the proposed deposition of Kevin Schappell.

On September 21, 2016 you provided Notice of Intent to Subpoena Mr. Schappell for deposition October 14, 2016. Your subsequent email of September 28th was the first notice of actual service to Mr. Schappell, no notice having been placed in the record. In response to your September 28 email, which requested consideration in rescheduling Mr. Schappell's deposition to another date, I noted that we were not aware that service had been accomplished, but had no objection to changing the date. I specifically stated our objection to the production of any documents in response to the subpoena *duces tecum* that may constitute "education records" of current or former students or testimony concerning such education records without proper FERPA compliance. I further stated, given the Court's Order of September 26, 2016 setting a hearing in this matter October 18 to address pending issues, including the production of non-party student education records, that the deposition should await the outcome of that hearing.

Your September 28 email indicated that you would contact me on Friday, September 30, to discuss this matter. On September 29 I received from your associate a Notice of Deposition for October 14, 2016 for Mr. Schappell to which I responded indicating my understanding the deposition was to be rescheduled. Mr. Taylor indicated that was the intention and reiterated you would be contacting me on Friday.



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October 10, 2016
Page 2

Having received no communication from you on Friday, September 30, or on Monday, October 3, I communicated with you via email on October 4. I again asserted our objection to the deposition in the absence of FERPA compliance concerning the production and/or testimony of non-party student education records. Despite the fact that you responded via email to Magistrate Wehrman concerning proposed dates for settlement conference, I received no communication from you, yet receipt of delivery and read notices indicate you did in fact receive my email. I did, however, subsequently receive communication from Mr. Taylor indicating that Mr. Schappell's deposition would proceed as scheduled on October 14th. Accordingly, on October 5th, given our obligation to timely seek modification, we filed our Motion to Modify Mr. Schappell's deposition to ensure FERPA compliance as to non-party student educational records.

While we are pleased to learn that Mr. Schappell does not have in his possession student educational records related to his tenure as an employee of Northern Kentucky University, given that Mr. Schappell, in his position with NKU, had no known involvement with Ms. Doe or the facts and circumstances surrounding Ms. Doe's situation, it must be anticipated that the sole purpose for the taking of Mr. Schappell's deposition is to engage in further examination concerning unrelated, alleged incidents of sexual misconduct involving members of the NKU basketball team. As we have repeatedly addressed, FERPA prohibits not only the production of, but also discussion or testimony concerning, student education records without proper FERPA compliance. As the entity charged with ensuring the preservation of the FERPA rights of its students, NKU is obligated to act to protect non-party student education records unless and until such time as FERPA compliance has been achieved.

Again, as the Court has indicated that it will take up the issue of production of non-party student educational records at the hearing on October 18th, it is our request that the deposition be set for a date following such hearing and in compliance any resulting orders of the Court. If this is agreeable, we are happy to enter an Agreed Order to that effect.

Sincerely,

Katherine M. Coleman

KMC/tjm

cc: Joan Gates, Esq.
Sara Kelley, Esq.
Barbara Kriz, Esq.

From: Barbara Kriz <bkriz@kjpjlaw.com>
Sent: Friday, October 14, 2016 1:01 PM
To: Kacey Coleman; Kevin Murphy
Subject: RE: Jane Doe v. NKU, et al.

Counselors,

I have a conflict on Oct 27 and cannot attend any depositions that day. I am available on Oct 25. I have a conflict the morning of Nov. 3 but can be available after 1:00 that day

Barbara A. Kriz
200 West Vine Street, Suite 710
P.O. Box 499
Lexington, KY 40588
859-255-6885, ext. 114
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From: Kacey Coleman [mailto:KColeman@sturgillturner.com]
Sent: Thursday, September 29, 2016 4:15 PM
To: Kevin Murphy
Cc: Barbara Kriz
Subject: RE: Jane Doe v. NKU, et al.

Kevin:

In response to the new dates proposed below please be advised as follows

Ann James is available on Oct. 25th

Kathleen Roberts is available on October 27th and Gabby Dralle is available on Oct. 27th until 4 pm. I, however, have an Unemployment Hearing beginning at 1:00 on the 27th as the 27th was not a date originally proposed. We will work to try to address coverage for the afternoon, but we may not be able to address this conflict

President Mearns is available in November 3rd

Very truly yours,

Katherine M. Coleman
Katherine M. Coleman (Kacey)



A Member Of The Employment Law Alliance



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333 WEST VINE STREET, STE 1500 ~ LEXINGTON, KENTUCKY 40507

TELEPHONE: (859) 255-8581 ~ FACSIMILE: (859) 231-0851

From: Kevin Murphy [<mailto:kmurphy@mljfirm.com>]
Sent: Friday, September 23, 2016 5:48 PM
To: Kacey Coleman
Subject: Jane Doe v. NKU, et al.

If Ms. James is not available on the 24th, then let's schedule her for October 25th starting at 9. I am not going to limit the hours. I think it will not be more than four hours, but I do not want to limit myself. We can do Roberts on the 27th and Dralle right after Roberts, if she can be flexible.

Mr. Mearns is going to have to make himself available, busy or not busy. I can schedule him for November 2nd and November 3rd. Please advise.

Kevin L. Murphy



2400 Chamber Center Drive, Suite 200
Ft. Mitchell, KY 41017
(P) 859.578.3060 | (F) 859.578.3061

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From: Kevin Murphy <kmurphy@mljfirm.com>
Sent: Friday, October 14, 2016 5:45 PM
To: Kacey Coleman; Barbara A. Kriz
Subject: Jane Doe v. NKU, et al.

Looking at the back and forth on depositions, it seems that Kathleen Roberts is available on October 27th. I will take her deposition starting at 9:30. I will discuss the others with you on Tuesday. I need the records of the basketball players, and I hope the Judge rules so we can proceed accordingly.

Kevin L. Murphy



2400 Chamber Center Drive, Suite 200
Ft. Mitchell, KY 41017
(P) 859.578.3060 | (F) 859.578.3061

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From: Kacey Coleman
Sent: Friday, October 14, 2016 6:44 PM
To: Kevin Murphy
Cc: Barbara A. Kriz
Subject: Re: Jane Doe v. NKU, et al.
Attachments: image001.png

Based on our prior communications I currently have Ms James scheduled for the 25th, Ms Roberts and Ms. Dralle for the 27th and President Means on November 3.

As I understood Barbara's email from earlier today she has a conflict on the 27th and limited availability on November 3, but is available on the 25th.

Sent from my iPhone
Please excuse any typing errors

Very truly yours,
Katherine M. Coleman
Katherine M. Coleman (Kacey)



333 West Vine Street, Suite 1500, Lexington, KY 40507
p 859.255.8581 f 859.231.0851 www.sturgillturner.com

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On Oct 14, 2016, at 5:44 PM, Kevin Murphy <kmurphy@mljfirm.com> wrote:

Looking at the back and forth on depositions, it seems that Kathleen Roberts is available on October 27th. I will take her deposition starting at 9:30. I will discuss the others with you on Tuesday. I need the records of the basketball players, and I hope the Judge rules so we can proceed accordingly.

Kevin L. Murphy

<image001.png>

2400 Chamber Center Drive, Suite 200
Ft. Mitchell, KY 41017
(P) 859.578.3060 | (F) 859.578.3061

The preceding information is from the law firm of Murphy Landen Jones PLLC and may be protected by attorney/client privilege. If you believe it has been sent to you in error, do not read it. Please reply to the sender that you have received the message in error, then delete the message. Do not retain a copy. Thank you.



Email Address:
pjacobs@sturgillturner.com

June 29, 2016

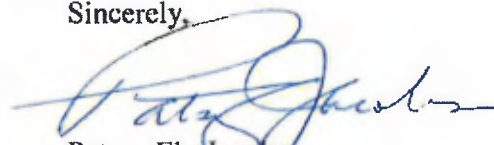
Kevin L. Murphy
Kevin L. Murphy PLLC
2400 Chamber Center Drive, Suite 301
P.O. Box 17534
Ft. Mitchell, KY 41017-0534
KLMurphy@kevinlmurphyllaw.com

RE: *Jane Doe v. Northern Kentucky University, et al.*
U.S. District Court, E.D., Ky., Case No. 2:16-cv-00028-WOB-CJS
STBM File No. 64764.0005

Dear Mr. Murphy:

I am assisting Kacey and Josh with this matter. We object to your request to take the deposition of NKU Athletics Director Ken Bothof, as his testimony is not likely to lead to the discovery of admissible evidence. In particular, as identified in your Rule 26 Disclosure, the only information he might have is with respect to an alleged assault by members of the basketball team, which has no relevance whatsoever to the issue in this case, specifically whether Defendants acted with deliberate indifference as to Plaintiff's sexual misconduct complaints.

Sincerely,



Patsey Ely Jacobs

PEJ/tjm

cc: Sara Sidebottom, Esq.
Sara Kelley, Esq.
Kacey M. Coleman, Esq.
Joshua M. Salsburey, Esq.



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STURGILL, TURNER, BARKER & MOLONEY, PLLC
333 WEST VINE STREET ♦ SUITE 1500 ♦ LEXINGTON, KENTUCKY 40507
PHONE: 859.255.8581 ♦ FAX: 859.231.0851 ♦ WWW.STURGILLTURNER.COM

KEVIN L. MURPHY PLLC

Kevin L. Murphy
Direct: 859-578-3060
klmurphy@kevinlmurphyllaw.com

June 30, 2016

VIA E-MAIL & U.S. MAIL

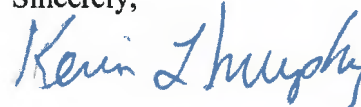
Patsey E. Jacobs, Esq.
Sturgill, Turner, Barker & Moloney, PLLC
333 West Vine Street, Suite 1500
Lexington, KY 40507

Dear Ms. Jacobs:

Enclosed please find a notice to take deposition. Since when can a party unilaterally decide what is relevant and what is not? Plus, there is a Kentucky Federal case right on point in this District which states that deliberate indifference can be proven by showing an official policy or custom of indifference through prior incidents. See 865 F.Supp.2d 795 (E.D.Ky. 2012). In that case, you will see that the court held that the "plaintiffs may seek additional discovery into whether the Board has a policy or custom of deliberate indifference to sexual abuse." In that case the plaintiffs were permitted to discover information relating not just to the named plaintiff but to other abuse claims.

I cite to this case so that you can immediately reconsider. The language of this case clearly shows your position is without merit, and any continued attempt to prevent this deposition will be frivolous conduct. This also is in compliance with the Rules in order to try to settle a discovery dispute.

Sincerely,



Kevin L. Murphy

KLM:cd
Enclosure

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION

JANE DOE

Plaintiff,

v.

NORTHERN KENTUCKY UNIVERSITY, *et al.*

Defendant.

Case No. 2:16-CV-00028-WOB-CJS

Judge William O. Bertelsman

Magistrate Candace J. Smith

NOTICE OF DEPOSITION
OF KEN BOTHOF

Pursuant to Federal Rule of Civil Procedure 30, Plaintiff, through counsel, will take the deposition of Ken Bothof on July 13, 2016 beginning at 9:00 a.m. local time at the offices of Graydon Head & Ritchey LLP, 2400 Chamber Center Drive, Suite 300, Fort Mitchell, Kentucky 41017. The deposition will continue from day to day until completed and will be recorded by video and/or stenographic means.

Respectfully submitted,



Kevin L. Murphy (KBA #50646)

KEVIN L. MURPHY PLLC

2400 Chamber Center Drive, Suite 212

P.O. Box 17534

Fort Mitchell, KY 41017-0534

Telephone: (859) 578-3060

Fax: (859) 578-3061

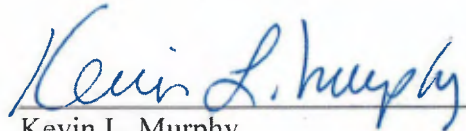
klmurphy@kevinlmurphyllaw.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following by mailing a true and correct copy thereof by regular U.S. Mail and e-mail, on this 30 day of June, 2016.

Katherine M. Coleman, Esq.
Joshua M. Salsburey, Esq.
STURGILL, TURNER, BARKER
& MOLONEY, PLLC
333 West Vine Street, Suite 1500
Lexington, KY 40507
Counsel for Defendants


Kevin L. Murphy



Email Address:
jsalsburey@sturgillturner.com

July 5, 2016

Kevin L. Murphy, Esq.
Kevin L. Murphy PLLC
2400 Chamber Center Drive, Suite 301
P.O. Box 17534
Ft. Mitchell, KY 41017-0534
KLMurphy@kevinlmurphyllaw.com

RE: *Jane Doe v. Northern Kentucky University, et al.*
U.S. District Court, E.D., Ky., Case No. 2:16-cv-00028-WOB-CJS
STBM File No. 64764.0005

Dear Kevin:

I am in receipt of your June 30, 2016 letter to my colleague, Patsey Jacobs, about the deposition of Ken Bothof that has been unilaterally noticed by Plaintiff for July 13, 2016. Since Patsey is currently out of the state and since I am uniquely familiar with the *C.K./Bell Co.* case cited in your letter, I am responding on Defendants' behalf. I will also address your July 1, 2016 email to Kacey Coleman about the production of documents on a male student becoming president of his fraternity. For the reasons below, Defendants (1) again respectfully decline to produce Mr. Bothof for deposition, and (2) respectfully maintain that they are not in a position to produce documents related to Plaintiff's fraternity inquiries.

Deposition of Ken Bothoff

Your June 30 letter includes a notice for the deposition of NKU's Athletics Director, Ken Bothoff.¹ You indicate that Mr. Bothof's deposition will be taken, not to gather testimony specific to Jane Doe, but to gather proof of "an official policy or custom of indifference through

¹ Even if it was appropriate to depose Mr. Bothof in this case, Plaintiff noticed Mr. Bothof's deposition without regard to whether he or any of the other named Defendants who might wish to attend are available on July 13. If the Court ultimately allows Plaintiff to depose Mr. Bothof notwithstanding the arguments and law addressed in this letter, at minimum Plaintiff should make reasonable efforts to select a date and time in cooperation with Defendants that is conducive to the schedules of Mr. Bothof, counsel, and those named parties who may wish to attend. Also, Mr. Bothof could not discuss any personally identifiable student information in his deposition without NKU first giving the students notice and an opportunity to object consistent with FERPA and the Agreed Protective Order entered June 9, 2016 (Docket Entry No. 18).



July 5, 2016
Page 2

prior incidents.” In support of your notice, you cite Judge Thapar’s decision in *C.K. v. Bell Co. BOE*, 865 F.Supp.2d 975 (E.D.Ky. 2012).

As you may be aware, I served as counsel for one of the individually named defendants in the *C.K.* case. The opinion you cite concerned an early motion for summary judgment filed by the Board of Education. The Court granted that motion in part, denied it in part, and allowed the plaintiff to pursue further discovery. It is true that, in ruling upon the Board’s motion, the Court stated the plaintiff in that case “may seek additional discovery into whether the Board has a policy or custom of deliberate indifference to sexual abuse.” *C.K.*, 865 F.Supp.2d at 801. Nevertheless, *C.K.* is distinguishable from and inapposite to Jane Doe’s situation.

The issue in *C.K.* was whether the defendants were deliberately indifferent toward alleged acts of sexual assault by a former teacher against a former elementary school student. Discovery involved, but was not primarily concerned with, questions about whether there were other instances of sexual assault separate and apart from the teacher and student in that case that the defendants knew about but chose to ignore.²

In contrast, the issue in Jane Doe’s case is not whether NKU wholly ignored her allegations of sexual misconduct such that she might prove her claims with evidence of other instances in which NKU allegedly chose to “look the other way.” Indeed, it is undisputed that once NKU learned of the alleged assault against Ms. Doe, it investigated the matter, adjudicated it, reaching a finding in Ms. Doe’s favor, and imposed sanctions against the accused male student. See Plaintiff’s Complaint at Paragraphs 18-24. The issue in Ms. Doe’s case is whether NKU’s sanctions against the accused male student, both in measure and enforcement, represented deliberate indifference on Defendants’ part. Such questions turn on the specific facts of—and therefore are unique to—*Ms. Doe’s* case. See *Doe v. Dallas Ind. Sch. Distr.*, 220 F.3d 380, 384 (5th Cir. 2000) (“determining what constitutes appropriate remedial actions for allegations of discrimination in Title IX cases ‘will necessarily depend on the particular facts of the case’”). Stated another way, discovery into other cases of alleged sexual misconduct have no bearing on whether the sanctions issued against the accused male, or NKU’s enforcement thereof, were adequate under the circumstances in Ms. Doe’s case.

Since *C.K.*, other district courts within the Sixth Circuit have declined to authorize fishing expeditions into unrelated incidents of campus sexual misconduct where, like here, proof of such other incidents appears to be irrelevant and therefore unnecessary toward proving how the plaintiff’s own particular case was handled. In *Dibbern v. Univ. of Mich.*, 2015 WL 1510411 at * 2-5 (E.D. Mich. 2015), a graduate student at the University of Michigan filed suit alleging

² Discovery in *C.K.* was primarily concerned with prior/similar acts by the teacher who allegedly assaulted the student in that case. Here, there is no allegation that the male respondent assaulted anyone but Jane Doe. Regardless, the male student in Ms. Doe’s case was not a collegiate athlete about whom Mr. Bothof would have discoverable information.



July 5, 2016
Page 3

sexual harassment and threats of sexual assault at the hands of male classmates. The plaintiff noticed the depositions of two university administrators. The defendants sought a protective order seeking to preclude questions about incidents involving students outside of the plaintiff's specific college. The court granted the defendants' motion. In support of its decision, the court explained:

Defendants maintain that Plaintiff's requested information is not relevant to her claims. Defendants also maintain that Plaintiff's interests in obtaining the records of other students cannot outweigh the significant privacy interests of those other students.

As Magistrate Judge Komives noted, the protective order does not prevent Plaintiff from propounding document requests for statistical data.³

Plaintiff also argues that the protective order will prevent her from gathering evidence to support her Title IX claims. This argument is also without merit.

In a case of student-on-student harassment, such as the instant case, Plaintiff will have to establish that ... [the University] was deliberately indifferent to the harassment.

It [therefore] appears that Plaintiff will only have to prove that the Defendants were deliberately indifferent to *her* reports of harassment, making discovery of others' reports of harassment *irrelevant* ... Plaintiff should not be permitted to elicit deposition testimony on irrelevant topics.

³ Defendants already have made non-identifiable information about other cases available to Plaintiff, as well as identifiable information about some cases, to the limited extent FERPA will allow. Defendants also have provided discovery about their policies and practices for handling cases of sexual misconduct.



July 5, 2016
Page 4

Id. (emphasis original in part/added in part, internal citations omitted). *Dibbern* is much more in line with Ms. Doe's case than *C.K.* and therefore presents the correct analysis for Ms. Doe's request to depose Mr. Bothof. Like *Dibbern*, the issue is whether Defendants were deliberately indifferent to *Jane Doe's* reports of sexual assault and, more specifically (and somewhat unique to her case), whether the sanctions against Ms. Doe's accused and NKU's enforcement thereof amounted to deliberate indifference. The answer to that question "necessarily depend[s] on the particular facts of the case." *Doe.*, 220 F.3d at 384. No amount of facts from cases involving other students, and therefore no information that Mr. Bothof could possibly offer, will answer that question.

Fraternity Records

In your July 1 email to Kacey Coleman, you contend that Defendants have "failed to produce any communications, e-mails, memos, etc. relating to Jane Doe's attacker becoming president of a fraternity." You further contend that "FERPA does not protect you there" and that "his name can simply be redacted from these emails and communications."

It must be noted that Defendants do not assert FERPA for their own protection. Rather, when Defendants assert FERPA, it is for the protection of the *students* whose privacy FERPA protects. While we understand that FERPA can cause frustrations in litigation at times, Defendants have always and only asserted FERPA in the interest of complying with federal law and protecting the privacy rights it affords to NKU students. And as Defendants have repeatedly explained, redaction of the particular records Ms. Doe seeks will not sufficiently "de-identify" the student consistent with FERPA's mandates because (1) it is reasonably understood that the requester (Plaintiff) already knows the identity of the student to whom the record relates; and/or (2) alone or in combination, the record and the information contained within are linked or linkable to a specific student that likely would allow a reasonable person in the school community without personal knowledge of the relevant circumstances to identify the student with reasonable certainty. *See* 34 CFR 99.3.

It also must be noted, as will be addressed in Defendants' forthcoming answers to interrogatories, that Defendants had no control over whether the student in question was elected president of his fraternity, nor are Defendants the custodians of the fraternity's records on that matter. Regardless, to the extent Defendants may have records of their own responsive to Plaintiff's request, they have not "failed" to produce anything. Rather, pursuant to the Court's order entered June 28, 2016 (Docket Entry No. 19), Defendants are precluded until further notice from releasing any of this particular student's records. If and when the Court authorizes release of this student's records, Defendants will comply.

I trust that this letter resolves your concerns about the fraternity records discussed above. I also trust that this letter resolves Plaintiff's request to take Mr. Bothof's deposition. If, however, it does not, it appears the parties will need to confer with Magistrate Judge Smith within the week pursuant to the orders entered March 14, 2016 (Docket Entry No. 8) and April



July 5, 2016
Page 5

22, 2016 (Docket Entry No. 13). For my part, I am available July 8 or July 11. Please let us know how you intend to proceed.

Sincerely,

A handwritten signature in blue ink, appearing to be 'JS' with a large loop, positioned above the name Josh Salsburey.

Josh Salsburey

cc: Sara Kelley, Esq.
Kacey Coleman, Esq.
x:\wdox\clients\64764\0005\corr\00712515.docx

KEVIN L. MURPHY PLLC

Kevin L. Murphy
Direct: 859-578-3060
klmurphy@kevinlmurphyllaw.com

July 7, 2016

VIA E-MAIL & U.S. MAIL

Josh Salsburey, Esq.
Sturgill, Turner, Barker & Moloney, PLLC
333 West Vine Street, Suite 1500
Lexington, KY 40507

Dear Mr. Salsburey:

This letter serves as a response to your letter dated July 5, 2016 and a final attempt to reach a resolution on outstanding discovery issues. First, in terms of Mr. Bothof's deposition, you assert that "Plaintiff should make reasonable efforts to select a date and time in cooperation with Defendants." However, that statement ignores the fact that I asked your office to make Mr. Bothof available for a deposition. That request was "unilaterally" denied by your colleague, Patsey Jacobs. Then, and only then, did I set a date for Mr. Bothof's deposition.

Second, your attempt to distinguish *C.K. v. Bell Cnty. Bd. of Educ.*, 865 F.Supp.2d 975 (E.D. Ky. 2012), is without merit. Despite your assertion to the contrary, it is apparent from Judge Thapar's decision that discovery was not "primarily concerned with prior/similar acts by the teacher who allegedly assaulted the student in that case." In *C.K.*, Judge Thapar cites to evidence relating to unrelated incidents of inappropriate sexual behavior between teachers and students in the school system on three separate occasions: "So far, the plaintiffs have uncovered evidence that there were at least five incidents of inappropriate sexual behavior between teachers and students in Bell County schools between 2004 and 2012." *Id.* at 799; "The plaintiffs point to the fact that Bell County teachers engaged in sexually inappropriate contact with students five times between 2004 and 2012." *Id.* at 800; "Discovery has also established that the Board was aware of at least five other incidents of sexual abuse in Bell County schools." *Id.* at 802. Judge Thapar's decision does not support your assertions regarding discovery, but rather supports the position that such facts are relevant.

Furthermore, you cannot unilaterally frame the issues in order to limit discovery as you see fit. Again, Judge Thapar's decision was clear in that a plaintiff can prove deliberate indifference by establishing whether there is a policy or custom of deliberate indifference to sexual abuse. *Id.* at 801. Discovery was permitted on that very issue and the case eventually resulted in a settlement, as you are likely aware.

The lone case upon which you rely to contradict *C.K.* is also meritless. *Dibber v. Univ. of Mich.*, No. 12-15632, 2015 WL 1510411 (E.D. Mich. Apr. 1, 2015) is not a published opinion and therefore does not have the precedential effect that a published case (like *C.K.*) does. More importantly, your letter misconstrues the holding of *Dibber*. In *Dibber*, the defendants sought a protective order to prevent questioning as to instances of sexual harassment outside the College of

Josh Salsburey, Esq.

July 7, 2016

Page 2

Engineering, the department which the plaintiff was currently enrolled pursuing her Ph.D. The court specifically held that the plaintiff could seek “oral discovery on issues related to Plaintiff **and** the College of Engineering.” *Id.* (**emphasis added**). Thus, the court did not limit the plaintiff to her reports of harassment, but rather permitted the plaintiff to seek discovery of all students in the same College of Engineering department as the plaintiff. The selective quotations provided in your letter do not accurately portray the court’s ultimate decision. Based on *C.K. and Dibber*, Mr. Bothof’s deposition testimony is relevant.

Lastly, your reliance on FERPA to shield the fraternity records of Doe’s attacker is troublesome. During discovery, you have produced documents relating to Doe’s attacker and documents which specifically mention him by name. For example, *see* NKU-002228 (notifying Doe that her attacker will be in Norse Commons Circle) and APO SUPP-000003-000007 (describing altercation in Norse Commons). Those documents were produced despite the fact that you could not “sufficiently ‘de-identify’ the student consistent with FERPA’s mandates...” Defendants cannot pick and choose which documents it will shield from discovery and which documents it will go ahead and produce.

Additionally, your argument that Defendants are not the custodians of the fraternity’s records is equally troubling. The fraternity is a student organization of the University. As such, those documents are within Defendants’ possession, custody or control. While you may not be the “custodian” of those records, they are subject to discovery in accordance with Fed. R. Civ. P. 34.

In light of the above, I expect to depose Mr. Bothof next week. If you do not produce him, we will seek sanctions.

Sincerely,

A handwritten signature in blue ink that reads "Kevin L. Murphy". The signature is fluid and cursive, with the first name "Kevin" being more prominent.

Kevin L. Murphy

KLM:cd



Email Address:
jsalsburey@sturgillturner.com

July 8, 2016

Kevin L. Murphy, Esq.
Kevin L. Murphy PLLC
2400 Chamber Center Drive, Suite 301
P.O. Box 17534
Ft. Mitchell, KY 41017-0534
KLMurphy@kevinlmurphyllaw.com

RE: *Jane Doe v. Northern Kentucky University, et al.*
U.S. District Court, E.D., Ky., Case No. 2:16-cv-00028-WOB-CJS
STBM File No. 64764.5

Dear Kevin:

I am in receipt of your July 7, 2016 letter in follow-up to correspondence over the last several days about the deposition of Athletic Director Ken Bothof and records concerning a male student's election as his fraternity's president. For the reasons explained below, Defendants maintain their position on both matters and further maintain that the deposition of Mr. Bothof and any motions related to it (including motions for sanctions) cannot go forward unless Plaintiff first seeks the Magistrate's assistance in resolving the parties' dispute.

It is clear the parties have different readings of the substance and application of the *C.K.* and *Dibber* decisions, but Defendants stand by their position on those cases. With respect to *C.K.*, the fact remains that Judge Thapar's written opinion was issued at an early stage of that case and does not fully reflect the ultimate course and scope of discovery therein. As for *Dibber*, Plaintiff should not dismiss the application and weight of that decision so easily. Though unpublished, the *Dibber* decision is still viable authority on the parties' current dispute. See FRAP 32.1. And even if *Dibber* does justify a broader scope of discovery than what Defendants maintain is appropriate, it does not support the deposition of an Athletic Director like Mr. Bothof who has no connection whatsoever to either Plaintiff, the male student involved in her case, or either of their respective programs of study at NKU. Plaintiff's insistence on pursuing discovery from Mr. Bothof is no different than the plaintiff's insistence in *Dibber* on deposing administrators about incidents outside of her own college of study at Michigan.

Defendants also disagree with Plaintiff's suggestion that Defendants have misconstrued the issues in this case or arbitrarily applied the provisions of FERPA that continue be the center of the parties' discussions. Defendants did not "unilaterally frame the issues" for discovery in this case. The issues are framed by the facts of this case and the pleadings, pertinent parts of which are cited in my July 5 letter with reference to Plaintiff's own complaint.

STURGILL, TURNER, BARKER & MOLONEY, PLLC
333 WEST VINE STREET ♦ SUITE 1500 ♦ LEXINGTON, KENTUCKY 40507
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July 8, 2016
Page 2

Likewise, Defendants have not arbitrarily or inconsistently applied FERPA. Plaintiff's accusations to the contrary appear to be based on an incomplete understanding of FERPA, a law which is not as simple as Plaintiff suggests. FERPA's application at times turns on specific definitions and exceptions set out in the statute and its implementing regulations. In this case, to the extent records have been produced that address or allude to the male student in Plaintiff's case in one way or another, it was either (1) done pursuant to a narrow exception in FERPA that allows NKU to disclose the final outcomes of cases in which a student was found responsible of sexual misconduct (*see* 20 USC 1232g(b)(6)); or (2) because records (such as the records on an incident in Norse Commons cited in your letter) "directly relate" to other students¹ and therefore for FERPA purposes were the "education records" of *those* students rather than the male student discussed in your letter (*see* 34 CFR 99.3). Importantly, the records produced regarding the Norse Commons incident contained redactions made pursuant to the Court's order of June 28, 2016 (Docket Entry No. 19) that are consistent with Defendants' position on FERPA as applied to records of the male student at issue.

With further respect to the Court's June 28, 2016 order, Defendants again note that at present it precludes them from releasing the records Plaintiff seeks about a male student's election as his fraternity's president, to the extent Defendants may be in possession of such records. Again, if and when the Court authorizes release of this student's records, Defendants will comply.

Finally, Plaintiff's threat of sanctions is unfounded for the reasons stated above and further because the Court's orders of March 14 and April 22, 2016 preclude Plaintiff from moving for sanctions without first seeking the Magistrate's assistance in resolving the parties' dispute. Indeed, notwithstanding Ms. Jacobs's letter of June 29, 2016, the question of whether Mr. Bothof may be deposed still should have been resolved through the process outlined in the Court's March 3 and April 22, 2014 orders (Docket Entry Nos. 8 and 13) before noticing his deposition, and thereafter only after conferring about mutually agreeable dates for the same. In short, if Plaintiff wants to depose Mr. Bothof, let alone seek sanctions, it is incumbent upon her to arrange for a conference with the Magistrate pursuant to the Court's orders. If Plaintiff seeks such a conference with the Magistrate, we will be glad to participate.

Sincerely,

Josh Salsburey

cc: Sara Kelley, Esq.
Kacey Coleman, Esq.

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¹ Those students did not object to the release of their records pursuant to the Court's APO. The male student at issue in your July 7 letter did.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION

JANE DOE

Plaintiff,

v.

NORTHERN KENTUCKY UNIVERSITY,
et al.

Defendant.

Case No. 2:16-CV-00028-WOB-CJS

Judge William O. Bertelsman

Magistrate Candace J. Smith

MOTION TO COMPEL

The Plaintiff, through counsel, respectfully moves the Court, pursuant to Fed. R. Civ. P. 37(a)(1), for an order compelling Defendant Northern Kentucky University to produce its Athletic Director, Ken Bothof, for a deposition. Mr. Bothof's testimony is relevant in order prove the deliberate indifference of Defendants.

Specifically, Mr. Bothof's testimony is expected to shed light on Defendants policy and/or custom of deliberate indifference as well as the inadequacy and ineffectiveness of the remedial action it takes in response to sexual assaults on NKU's campus. Both of these are proper methods by which to deliberate indifference. Accordingly, Plaintiff respectfully requests an order compelling the deposition of Mr. Bothof. Plaintiff also seeks her reasonable expenses, including attorneys' fees, incurred in bringing this Motion.

A memorandum in support of this motion and a proposed order are attached.

Respectfully submitted,

/s/ Kevin L. Murphy

Kevin L. Murphy (KBA #50646)

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Fort Mitchell, KY 41017-0534

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klmurphy@kevinlmurphyllaw.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of July, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all parties of record.

/s/ Kevin L. Murphy

Kevin L. Murphy

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION

JANE DOE

Plaintiff,

v.

NORTHERN KENTUCKY UNIVERSITY,
et al.

Defendant.

Case No. 2:16-CV-00028-WOB-CJS

Judge William O. Bertelsman

Magistrate Candace J. Smith

**MEMORANDUM IN SUPPORT OF
MOTION TO COMPEL**

The Plaintiff, through counsel, respectfully submits the following memorandum in support of her Motion for Compel.

I. INTRODUCTION

Plaintiff is bringing the foregoing Motion in order to compel the deposition of Defendant Northern Kentucky University's Athletic Director, Ken Bothof. Counsel for Defendants have made the unilateral determination that Mr. Bothof's testimony is not relevant to this case. However, Mr. Bothof's testimony is directly relevant to NKU's policy and/or custom of deliberate indifference as well as the inadequacy and ineffectiveness of the remedial action it takes in response to sexual assaults. These are both viable methods by which to prove deliberate indifference. Therefore, Mr. Bothof's testimony is relevant and his deposition is necessary.

II. FACTS

Doe was raped at NKU in the fall semester of 2013. NKU did next to nothing to protect her after she prevailed at on campus administrative hearing. Despite Defendants promises to the contrary, Doe was consistently coming into contact with her attacker and was being harassed by him and his friends as Defendants allowed him to roam free on campus. This action ensued.

Last month, the undersigned contacted Defendants' counsel and requested a mutually agreeable date for the deposition of Defendant Northern Kentucky University's Athletic Director, Ken Bothof. Counsel for Defendants unilaterally decided that Mr. Bothof's testimony "has no relevance whatsoever to the issue in this case, specifically whether Defendants acted with deliberate indifference to Plaintiff's sexual misconduct complaints." (See attached Exhibit A). Based on Defendants failure to provide any agreeable date, Plaintiff noticed the deposition of Mr. Bothof for July 13, 2016. Neither Mr. Bothof nor his counsel appeared on that date.

After Plaintiff noticed the deposition of Mr. Bothof, counsel for Plaintiff and Defendants exchanged numerous emails and letters arguing their positions as to why Mr. Bothof's testimony is and is not relevant. The parties did "meet and confer" by telephone conference. In any event, it has become clear that counsel has reached an impasse regarding the relevance of Mr. Bothof's deposition. Both parties retain their respective positions as to relevance. Thus, this Court's intervention is necessary.

III. ARGUMENT

A. Standard.

Fed. R. Civ. P. 37(a)(1) states "a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person failing to make disclosure or discovery in an effort to obtain it without court action." "The scope of civil discovery is set out in Rule 26(b)(1) of the Federal Rules of Civil Procedure." *Pogue v. The Nw. Mut. Life Ins. Co.*, No. 14-CV-00598 (W.D. Ky. May 6, 2016). Fed. R. Civ. P. 26(b)(1) states that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense..." "This language is broadly construed to include 'any matter that bears on, or that reasonably could lead to other matter[s] that

could bear on, any issue that is or may be in the case.” *Id.*; quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

B. Bothof’s testimony is relevant to Plaintiff’s claims.

As part of Plaintiff’s claims, Doe must prove deliberate indifference on behalf of Defendants. Defendants argue that Plaintiff can only prove deliberate indifference by showing “whether Defendants acted with deliberate indifference as to Plaintiff’s sexual misconduct complaints.” However, the law is abundantly clear that deliberate indifference can be proven in several ways, and Defendants have no right to unilaterally decide what is relevant, and what depositions Plaintiff can take.

One way to prove deliberate indifference is “to show evidence of prior instances of similarly unconstitutional conduct by [Defendants], thereby demonstrating that the [Defendants] knew that its policies were deficient and refused to act.” *C.K. v. Bell Cnty. Bd. of Educ.*, 865 F.Supp.2d 795, 799 (E.D. Ky. 2012). In *C.K.*, Judge Thapar held that the deliberate indifference standard under Title IX is similar to §1983’s requirement and a plaintiff can “show an official policy or custom of indifference to constitutional violations.” *Id.* at 801. Specifically, Judge Thapar allowed the plaintiffs to discover evidence of other “incidents of inappropriate sexual behavior between teachers and students in Bell County schools between 2004 and 2012.” *Id.* at 799. Those “incidents” were completely unrelated to the Plaintiff and the teacher who sexually assaulted him. Thus, other instances of sexual assault on NKU’s campus are directly relevant as to whether Defendants have a policy and/or custom of deliberate indifference and whether Defendants knew that its policies were deficient and refused to act.

The Sixth Circuit affirmed Judge Thapar’s ruling in *Patterson v. Hudson Areas Schools*, where the court held that a plaintiff “may demonstrate [a] defendant’s deliberate indifference to

discrimination only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." 551, F.3d 438, 446 (6th Cir. 2009) (internal citations and quotations omitted). "Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances." *Id.* (internal citation omitted). Again, based on this standard, Plaintiff is entitled to discovery as to other instances of sexual assault on NKU's campus.

Defendants attempt to limit Plaintiff's discovery to whether Defendants were deliberately indifferent to Plaintiff's sexual harassment is untenable and meritless in light of the case law. In fact, Plaintiff cited *C.K.* in a letter to Defendant's counsel in support of Plaintiff's position that Mr. Bothof's deposition is relevant. Defendants responded by citing to the unpublished opinion of *Dibber v. Univ. of Mich.*, No. 12-15632 (E.D. Mich. Apr. 1, 2015). However, even *Dibber* does not support Defendants position.

In *Dibber*, the defendants sought a protective order to prevent questioning as to instances of sexual harassment outside the College of Engineering, the department which the plaintiff was currently enrolled pursuing her Ph.D. The court specifically held that the plaintiff could seek "oral discovery on issues related to Plaintiff **and** the College of Engineering." *Id.* (**emphasis added**). Thus, the court did not limit the plaintiff to her reports of harassment, but rather permitted the plaintiff to seek discovery of all students in the same College of Engineering department as the plaintiff. Again, this supports Plaintiff's position that she is entitled to discover other incidents of sexual assault on NKU's campus, not just the manner in which Defendants handled Doe's complaint.

As cited in Defendants own letter, “the only information [Mr. Bothof] might have is with respect to an alleged assault by member of the basketball team...” Since Mr. Bothof potentially has knowledge with respect to another sexual assault on NKU’s campus, Plaintiff is entitled to discover such information. This is directly relevant to NKU’s policy and/or custom of deliberate indifference to sexual assaults on its campus as well as the inadequate and ineffective policies its continues to rely on. Accordingly, Mr. Bothof’s deposition is relevant to this litigation.

What is curious about the Defendants’ position is that Les Kachurek, the NKU police chief, testified at length about the allegations relating to basketball players and a sexual assault. He acknowledged that the NKU police has done an investigation. (Kachurek Depo. P. 115.) He acknowledged that the allegations took place just a few months ago. (Kachurek Depo. P. 116.) He also testified that at any time an incident occurs with an athlete, “it’s protocol that we contact the athletic director and then let him determine, you know, what coaches are notified or we will notify the athletic director that we need to interview coach so and so kind of thing, just out of a spirit of cooperation.” (Kachurek Depo. PP. 118-119.) He testified that this type of situation would have to be reported on the NKU Clary Act Report. (Kachurek Depo. PP. 118-119.) He further testified that the police have an active file on this matter. Defendants have a lot to hide.

Les Kachurek’s deposition also sheds light on Defendants’ inadequate and ineffective policies. For example, Kachurek testified as to the lack of information the campus police receive as it relates to violent crimes. (Kachurek Depo. PP. 27-28.) Kachurek also reached out to campus housing personnel, the Norse Violence Prevention Center and the Office of Student Conduct in order to change NKU’s inadequate policies. (Kachurek Depo. PP. 28-29.) However, he was met with resistance by housing personnel. (Kachurek Depo. P. 28.) Kachurek

further testified that the campus police do not receive enough capital resources, equipment, operational fiscal resources, payroll or staffing. (Kachurek Depo. P. 32.) He further acknowledged that the campus police could not provide as safe a campus as it could if it had the proper resources. (Kachurek Depo. P. 33.) Kachurek even informed the administration that safety was a concern in light of the inadequate resources. (Kachurek Depo. P. 35.)

Kachurek was not even aware of any policy or guidelines for perpetrators of rape or sexual assault. Specifically, Kachurek stated:

Q: Are there any guidelines that you're aware of that you've seen at NKU where, if a person is found more likely than not to have committed a sexual assault or rape, they are to be sanctioned X, Y, Z?

A: That I've physically seen and read?

Q: Right.

A. No.

(Kachurek Depo. P. 126.) Furthermore, prior to Kachurek's arrival at NKU, the police department did not have any type of tutorial on Title IX, the Clery Act and the Violence Against Women Act. Yet, it is the NKU police who are responsible for compiling the annual Clery Act report. Thus, Defendants' failed remedial efforts for victims of rape and its inadequate policies are highly relevant.

All of this information is relevant and material to deliberate indifference, because NKU does indeed have a policy and pattern of conduct, and that is to do next to nothing about the sexual violence that happens too often to its students.

C. FERPA does not preclude Mr. Bothof's deposition.

Defendants cannot rely on FERPA to prevent Plaintiff from taking Mr. Bothof's deposition. The U.S. Department of Education's guidance on issues relating to FERPA is noteworthy. The U.S. Department of Education has consistently held that information that an official obtained through personal knowledge or observation, or has orally heard from others, is

not protected under FERPA.¹ Thus, any information possessed by Mr. Bothof through personal knowledge, observation or orally from others is not protected from disclosure by FERPA.

Importantly, Plaintiff has no intention whatsoever of inquiring into the names or personally identifiable information of the students at issue. Rather, Plaintiff wants to bring to light NKU's policy of deliberate indifference as well as the inadequate and ineffective "policies" it relies on when dealing with sexual assaults. This is one of the means by which Plaintiff can prove deliberate indifference. Therefore, Defendants failure to produce Mr. Bothof for a deposition is precluding Plaintiff from proving her case.

D. Plaintiff is entitled to her reasonable expenses, including attorneys' fees, incurred in bringing this Motion.

Fed. R. Civ. P. 37(a)(5) provides "[i]f the motion is granted...the court must, after giving an opportunity to be heard, required the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." Thus, an award of expenses and attorneys' fees is mandatory if Plaintiff's Motion is granted unless the opposing party's nondisclosure, response, or objection was substantially justified or other circumstances make an award of expenses unjust. Fed R. Civ. P. 37(5)(A)(ii) and (iii).

Here, Defendants had absolutely no justification to unilaterally decide what Plaintiff can discover. Plaintiff provided Defendants with case law that clearly supports the relevance of other instances of sexual assaults on NKU's campus. Even the case law cited by Defendants supports this position. None of this can be construed as a substantial justification for Defendants' unilateral

¹ See U.S. Department of Education FERPA General Guidance for Students, located at: <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/students.html>.

decision to determine what they believe is relevant and Defendants failure to make Mr. Bothof available for a deposition.

Defendants' unilateral decision-making also fails to comport with the civil rules. Fed. R. Civ. P. 26(c) provides the method by which a party can prohibit discovery—a protective order. Rather than deciding what Defendants believe is relevant or not relevant, the appropriate course of action would have been to seek a protective order from this Court. Instead, the Defendants chose to ignore a validly issued deposition notice. If the Court permits this conduct, motions to compel will increase exponentially.

Lastly, Plaintiff is aware of no circumstances which would make an award of expenses unjust. As stated above, Defendants position as to Mr. Bothof's deposition is not supported by the law. Accordingly, the fact that Plaintiff has been forced to seek this Court's intervention under these circumstances makes an award of attorneys fees and costs proper.

IV. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court grant her Motion to Compel and that Plaintiff be entitled to her reasonable expenses incurred in making the Motion, including attorneys' fees.

Respectfully submitted,

/s/ Kevin L. Murphy

Kevin L. Murphy (KBA #50646)

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klmurphy@kevinlmurphyllaw.com

Counsel for Plaintiff

CERTIFICATION OF COUNSEL

Pursuant to Fed. R. Civ. P. 37(a)(1), the undersigned hereby certifies that the movant has in good faith conferred with counsel for Defendants who have failed to make Mr. Bothof available for a deposition. Specifically, the undersigned has exchanged numerous letters and emails with Defendants' counsel arguing our respective positions as to the relevance of Mr. Bothof's deposition. Also, the parties did "meet and confer" by telephone conference.

/s/ Kevin L. Murphy
Kevin L. Murphy

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of July, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all parties of record.

/s/ Kevin L. Murphy
Kevin L. Murphy



Email Address:
pjacobs@sturgillturner.com

June 29, 2016

Kevin L. Murphy
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RE: *Jane Doe v. Northern Kentucky University, et al.*
U.S. District Court, E.D., Ky., Case No. 2:16-cv-00028-WOB-CJS
STBM File No. 64764.0005

Dear Mr. Murphy:

I am assisting Kacey and Josh with this matter. We object to your request to take the deposition of NKU Athletics Director Ken Bothof, as his testimony is not likely to lead to the discovery of admissible evidence. In particular, as identified in your Rule 26 Disclosure, the only information he might have is with respect to an alleged assault by members of the basketball team, which has no relevance whatsoever to the issue in this case, specifically whether Defendants acted with deliberate indifference as to Plaintiff's sexual misconduct complaints.

Sincerely,



Patsey Ely Jacobs

PEJ/tjm

cc: Sara Sidebottom, Esq.
Sara Kelley, Esq.
Kacey M. Coleman, Esq.
Joshua M. Salsburey, Esq.



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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION

JANE DOE

Plaintiff,

v.

NORTHERN KENTUCKY UNIVERSITY,
et al.

Defendant.

Case No. 2:16-CV-00028-WOB-CJS

Judge William O. Bertelsman

Magistrate Candace J. Smith

ORDER

Upon motion made by the Plaintiff to compel the deposition of Northern Kentucky University's Athletic Director, Ken Bothof, and the Court being sufficiently advised;

IT IS HEREBY ORDERED that Plaintiff's Motion to Compel is granted;

IT IS FURTHER ORDERED that Defendants' pay the reasonable expenses of Plaintiff, including attorneys' fees, incurred in bringing this Motion. Counsel for Plaintiff shall submit documentation as to the expenses and fees incurred in bringing this Motion within 10 days of the entry of this Order.

This the ____ day of _____, 2016.

E-Mail Address:
jsalsburey@sturgillturner.com

July 26, 2016

Honorable Candace J. Smith, Magistrate Judge
U.S. Courthouse
35 W. 5th Street, Room 375
Covington, KY 41011-1401
VIA EMAIL TO smith_chambers@kyed.uscourts.gov

RE: *Doe v. Northern Kentucky University, et al.*
USDC, EDKY-Covington, CASE NO. 2:16-CV-00028-WOB-CJS
STBM File No. 64764.0005

Dear Magistrate Judge Smith:

This matter is before the Court upon Plaintiff's motion to compel the deposition of NKU Athletics Director Ken Bothof (R. 24). As noted in the Court's July 25, 2016 email, Plaintiff's motion was improperly filed contrary to the Court's directions at the July 23, 2016 teleconference and related order entered July 15, 2016 (R. 23). Having referred Plaintiff back to the process set out in the Court's prior orders (R. 8 and R. 13), the Court has directed the parties to submit summaries of their positions on Bothof's deposition in anticipation of a new teleconference scheduled for July 28, 2016.¹ There are three fundamental problems with Plaintiff's demand to depose Bothof, which Defendants will address in turn.²

First, Bothof's deposition is not reasonably calculated to lead to the discovery of admissible evidence. In her Rule 26 disclosures, Plaintiff stated she expects Bothof will testify "about his knowledge of an alleged sexual assault by members of NKU's basketball team, and how it was handled." Plaintiff relies on *C.K. v. Bell Co. BOE*, 865 F.Supp.2d 795 (E.D.Ky. 2012) as support for her demand to depose Bothof even though it is undisputed he has no personal knowledge about *Plaintiff's* case or the male student (who is not an NKU basketball player) involved. Plaintiff's reliance on *C.K.* is misplaced. The undersigned is familiar with *C.K.*, having served as counsel for one of the individually named defendants in that case. The issue in *C.K.* was whether the defendants were deliberately indifferent toward alleged acts of sexual assault by a former teacher against a student. Discovery involved, but was not primarily concerned with, questions about whether there were other instances of sexual assault separate and apart from the teacher and student in that case that the defendants allegedly knew about but

¹ While Plaintiff only attached one letter to her motion to compel, the parties have engaged in extensive correspondence about Bothof's deposition over the course of two weeks spanning June and July 2016.

² Defendants also note that Plaintiff's reliance on Les Kachurek's deposition is misplaced. The basketball player incidents Plaintiff is interested in predate Kachurek's tenure with NKU, and counsel for Defendants explicitly objected to Plaintiff's questions to Kachurek about basketball players of whom he had no personal knowledge as "irrelevant" and "beyond the scope of this deposition."

chose to ignore.³ In contrast, the issue in Plaintiff's case is not whether NKU ignored her allegations of sexual misconduct such that she might prove her claims with evidence of other instances in which NKU allegedly chose to "look the other way." Rather, the issue is whether NKU's disciplinary *sanctions* against the accused male student and its enforcement thereof represented deliberate indifference. Such questions turn on the specific facts of—and therefore are unique to—*Plaintiff's* case. See *Doe v. Dallas Ind. Sch. Distr.*, 220 F.3d 380, 384 (5th Cir. 2000) ("determining what constitutes appropriate remedial actions for allegations of discrimination in Title IX cases 'will necessarily depend on the particular facts of the case'").

Dibber v. Univ. of Mich., 2015 WL 1510411 (E.D. Mich. 2015) offers better instruction for resolving Bothof's deposition. In *Dibber*, a student filed suit alleging sexual harassment and threats of sexual assault at the hands of male classmates. The plaintiff noticed the depositions of two administrators. The defendants sought to preclude questions about incidents involving students outside of the plaintiff's specific college. The court agreed, explaining: "It appears that Plaintiff will only have to prove that the Defendants were deliberately indifferent to her reports of harassment, making discovery of others' reports of harassment irrelevant ... Plaintiff should not be permitted to elicit deposition testimony on irrelevant topics." Of course, even if *Dibber* justifies a broader scope of discovery than what Defendants maintain is appropriate, it does not support a request to depose an Athletics Director like Bothof who has no connection whatsoever to either Plaintiff, the male student involved in her case, or either of their respective programs of study at NKU. Plaintiff's insistence on pursuing discovery from Bothof is no different than the plaintiff's insistence in *Dibber* on deposing administrators about incidents outside of her own college of study at Michigan.

Second, the parties must account for FERPA. Even if it is appropriate to depose Bothof, he cannot discuss any of the basketball players or the alleged victim Plaintiff is interested in without NKU first going through the process of giving those students notice of the deposition and a reasonable opportunity to raise objections with the Court. And contrary to what Plaintiff continues to contend, FERPA's prohibition against disclosing "personally identifiable information" is not just a matter of refraining from mentioning a student by name. See 34 CFR 99.3. Defendants can elaborate on this as needed at the July 28, 2016 teleconference.

Third, Plaintiff's demand for costs incurred in filing her motion to compel is contrary to the inescapable fact that Plaintiff filed her motion prematurely, in violation of the Court's explicit instructions on this matter and ignorant of the law on which Defendants' good-faith position is based.

Respectfully submitted,

Joshua M. Salsburey

cc: Katherine M. Coleman
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³ Discovery in *C.K.* was primarily concerned with prior/similar acts by the teacher who allegedly assaulted the student in that case. Here, there is no allegation that the male respondent assaulted anyone but Plaintiff.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT COVINGTON

CIVIL ACTION NO. 16-28-WOB-CJS

JANE DOE

PLAINTIFF

v.

ORDER

NORTHERN KENTUCKY
UNIVERSITY, et al.

DEFENDANTS

* * * * *

On July 13, 2016, the Court held a telephone conference with counsel. (R. 23). During the conference, the Court established a July 22, 2016, deadline for Plaintiff to file a Motion to Compel the production of education records of a student who previously objected to the production of his records. (*Id.*). No such Motion to Compel was filed by this deadline, although Plaintiff did prematurely file a Motion to Compel NKU to produce its Athletic Director, Ken Bothof, for deposition. Plaintiff's counsel has since communicated with the Court and opposing counsel his misunderstanding as to the issue to which that motion filing due July 22 was supposed to be directed.

The confusion with respect to next steps concerning the objecting student's records having now been clarified, **IT IS ORDERED** that the deadline for Plaintiff to file a Motion to Compel the release of the objecting student's education records is extended to **Friday, July 29, 2016**.

Dated this 27th day of July, 2016.



Signed By:

Candace J. Smith

A handwritten signature in dark ink, appearing to be "CJS", written over the printed name.

United States Magistrate Judge



Email Address:
jsalsburev@sturgillturner.com

July 29, 2016

Kevin L. Murphy, Esq.
Kevin L. Murphy PLLC
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RE: *Jane Doe v. Northern Kentucky University, et al.*
U.S. District Court, E.D., Ky., Case No. 2:16-cv-00028-WOB-CJS
STBM File No. 64764.5

Dear Kevin:

I am writing to address a number of discovery issues including Ken Bothof's deposition, Plaintiff's deposition, and deficiencies in Plaintiff's July 7, 2016 discovery responses. I'll address each issue in turn.

Consistent with the Court's guidance at the July 28, 2016 telephonic conference in this case, NKU will produce Ken Bothof for deposition at a mutually agreeable date and time. We will ask about the witness's and parties' schedules on our end to facilitate that. Before Bothof is deposed, however, Plaintiff needs to make herself available for her own deposition. It is my understanding that Kacey previously has asked for dates for Plaintiff's deposition that have gone unanswered, but regardless, due process and fundamental fairness dictate that Defendants have the opportunity to depose Plaintiff and learn more about the substance and details of her claims and allegations before they continue to provide answers, documents, and witnesses to address the same. Relatedly, classes at NKU are scheduled to begin August 22nd and so to minimize disruption to the class schedules of Plaintiff and others we would like to depose Plaintiff before then. Accordingly, please provide dates and times between now and August 22nd on which Plaintiff might be deposed. Once Plaintiff's deposition is scheduled, we will promptly provide dates and times for Mr. Bothof's deposition.



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July 29, 2016
Page 2

Prior to her deposition, Plaintiff needs to supplement several of her July 7, 2016 discovery responses, specifically, Plaintiff's answer to Interrogatory No. 8 and her responses to Requests for Production Nos. 5 and 6. Interrogatory No. 8 asks Plaintiff to identify medical providers who treated Plaintiff for the mental injuries alleged in her complaint. Plaintiff has placed this information directly at issue in this case and her original answer stated this information was "to be provided," but to date we have not received it. This information will allow us to subpoena Plaintiff's records with those providers; although alternatively, Plaintiff can still sign and return the medical records authorization she objected to in response to Request for Production No. 8. As Plaintiff has placed her alleged mental health injuries directly at issue in this case, her objections on the basis of "physician-patient privilege" and other grounds are unfounded.

Second, Plaintiff needs to supplement her response to Request for Production No. 5 concerning social media. This request was reasonably limited to social media activity that referenced, referred to, or related to the allegations, claims, and damages asserted in Plaintiff's complaint. *Cf. EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430 (S.D. Ind., 2010). Further, as Plaintiff is well aware, there are a number of things on social media that are not publicly accessible but are well within Plaintiff's ability to access and produce. Accordingly, Plaintiff needs to produce the social media material sought in Request for Production No. 5.

Third, Plaintiff needs to supplement her response to Request for Production No. 8 to provide the text messages sought therein. It is implausible that Plaintiff only sent one text message responsive to that request. Further, as with the social media records addressed above, the scope of records sought in No. 8 is entirely reasonable and concerns only information placed directly at issue in this case by Plaintiff. As with the social media records, Defendants are entitled to the text messages sought in No. 8.

To the extent Plaintiff's concerns turn on a desire for a protective order limiting the use of records addressed above to the defense of this litigation, please confirm and we will prepare a proposed agreed protective order to that end. Otherwise, please provide the supplemental answers and responses sought above by no later than August 5, 2016.

Finally, please be advised that Les Kachurek is now being represented in this case by Attorney Barbara Kriz, whom I am copying on this message.



July 29, 2016
Page 3

Thank you for your prompt attention to these matters. I will be out of the office until August 2, 2016 but if there is an urgent need in my absence you may contact my law partner, Patsey Jacobs.

Sincerely,

Josh Salsburey

cc: Joan Gates, Esq.
Sara Kelley, Esq.
Kacey Coleman, Esq.
Patsey Jacobs, Esq.
Barbara Kriz, Esq.

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Exhibit 22

(to be filed under seal)

Exhibit 23

(to be filed under seal)

Exhibit 24

(to be filed under seal)



e-mail address:
kcoleman@sturgillturner.com

March 2, 2016

VIA ELECTRONIC MAIL AND U.S. MAIL

Kevin L. Murphy
Kevin L. Murphy PLLC
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KLMurphy@kevinlmurphyllaw.com

RE: *Jane Doe v. Northern Kentucky University, et al.*
U.S. District Court, E.D., Ky., Case No. 2:16-cv-00028-WOB-CJS

Dear Mr. Murphy:

In the above-referenced litigation Ms. Doe has either named as Defendants, or asserted acts of alleged wrongdoing by, University officials with whom she has worked with respect to her Title IX claims. As such, we recognize that Ms. Doe may no longer be comfortable working with these University employees/agents. To ensure Ms. Doe has continued access to the University's Title IX services and procedures the University hereby identifies additional University personnel who are available to provide services to Ms. Doe and assist in her with any concerns:

Title IX Coordinator Services:

Ms. Leslie Fields
Associate Athletic Director for Compliance
Deputy Title IX Coordinator
BB&T Arena
Phone: 859/572-7572
fieldsl4@nku.edu

Ms. Fields can respond to and provide assistance with respect to any issues or concerns regarding Ms. Doe's classes, living arrangements or other campus activities for which she requests accommodation, as well as any concerns regarding possible violation of the sanctions which have been imposed as a result of the Title IX proceeding.



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EXHIBIT 25



March 2, 2016
Page 2

Norse Violence Prevention Program Advocate Services:

Ms. Laura Dekatas
Administrative Specialist, Center for Student Inclusiveness
Advocate, Norse Violence Prevention Center
Student Union, 303
Phone: 859/572-5401
dekatasl1@nku.edu

Ms. Dekatas has already communicated with Ms. Doe directly, via email, on February 24, 2016, introducing herself and providing her contact information. Ms. Dekatas and the advocates in the NVP can assist Ms. Doe with support services.

In addition, counseling services are available to Ms. Doe on the NKU campus as follows:

Health, Counseling & Student Wellness

University Center, Room 440 (this is the center of campus, between the Student Union and Lucas Administration buildings)
Phone – 859-572-5650
Email – hcsw@nku.edu
Website - <http://hcsw.nku.edu/>

Free counseling services are also available through:

Women's Crisis Center

Northern KY 24 Hour Crisis Line – 1-800-928-3335 or 859-491-3335
Website - <http://www.wccky.org/index.php>

Covington location:
835 Madison Ave
Covington KY 41011

Maysville location:
111 East Third Street
Maysville KY 41056

In addition to the 2 walk-in locations listed above, the Center has a number of additional walk-in sites available in the area which are identified on their website.



March 2, 2016
Page 3

Women Helping Women

Phone: 513/977-5541

24-Hour Crisis Line: 513/381-5610

TTY 513/977-5545

Hamilton County Office
215 E. Ninth Street, 7th Floor
Cincinnati, OH 45202-6109

Butler County Office
347 South College Ave., Suite D
Oxford, OH 45056

Please advise Ms. Doe of these available resources. Of course, Ms. Doe may prefer, in light of the pending litigation, to direct any request for services or concerns through your office. In such case please direct such requests/concerns to our office and we will work with the appropriate University personnel to provide an expeditious response.

Very truly yours,

STURGILL, TURNER, BARKER & MOLONEY, PLLC

Katherine M. Coleman (Kacey)

KMC/tjm

cc: Sara Sidebottom (via electronic mail)
Sara Kelley (via electronic mail)

Exhibit 26

(to be filed under seal)

SUBJECT TO ORDER (D.E. 112) ENTERED 10/27/16

CALL RESPONSE RUN REPORT
COMMONWEALTH OF KENTUCKY

ADMIN	AGENCY ORI/NAME: 0191500 NORTHERN KY UNIVERSITY POLICE				CALL/CAD EVENT NUMBER: 2012-00217			
	REPORTING OFFICER: A CHAMPAGNE				BADGE/I.D. #: 103		BEAT/POST: 	
CHARGE, LOCATION & TIME	CALL TYPE: MISCELLANEOUS				CALL TYPE OTHER: 		REPORTED BY: R YELTON	
	LOCAL ORDINANCE VIOLATION: 				LOCATION TYPE: SCHOOL-COLLEGE/UNIVERSITY			
	INCIDENT DATE	INCIDENT TIME	DAY OF WEEK	EXACT/ESTIMATE	TIME RECEIVED	TIME DISPATCHED	TIME ARRIVED	TIME CLEARED
	04/17/2012	21:45	TUESDAY	ESTIMATE	21:45	21:45	21:48	22:31
	EXACT LOCATION OF INCIDENT: ADDRESS: 30 CAMPBELL DR							
	CITY: HIGHLAND HEIGHTS						STATE: KY	ZIP CODE: 41076
	COUNTY: CAMPBELL				LATITUDE: 39 DEG 2.272 MIN	LONGITUDE: 84 DEG 27.924 MIN		
	IN CITY LIMITS: YES				MILES FROM CITY: 			
	LOCAL CITATION NUMBERS: 							
	INVOLVED PERSON INFORMATION	PERSON SEQUENCE		PERSON TYPE				
1 of 2		REPORTED BY						
INVOLVED PERSON NAME: 							PHONE: 	
ADDRESS: 								
CITY: 				STATE: 	ZIP CODE: 	SSN: 		
DATE OF BIRTH: 		SEX: FEMALE	ETHNIC ORIGIN: UNKNOWN		RACE: UNKNOWN			
PERSON SEQUENCE		PERSON TYPE						
2 of 2		OTHER						
INVOLVED PERSON NAME: 							PHONE: 	
ADDRESS: 								
CITY: 				STATE: 	ZIP CODE: 	SSN: 		
DATE OF BIRTH: 		SEX: MALE	ETHNIC ORIGIN: NOT HISPANIC		RACE: WHITE			

NARRATIVE

04/17/2012 2145 hours. Dispatched and responded to University Suites in reference to a report of inactive harassment. Upon arrival I spoke with complainant [REDACTED] [REDACTED] stated that last Thursday a classmate by the name of [REDACTED] was making rude comments toward her via text messaging. [REDACTED] stated that [REDACTED] had asked to have sex with her. [REDACTED] stated she told him no and [REDACTED] asked why. [REDACTED] stated that she ended the conversation and reported this incident to the dean of students. [REDACTED] stated that the dean told [REDACTED] not to have any contact with her. Since this incident [REDACTED] has not spoken to, or attempted to contact [REDACTED].

[REDACTED] also stated that she has seen [REDACTED] in various areas of the university. [REDACTED] stated that she believed [REDACTED] knew where she would be and was waiting on her. [REDACTED] stated that during these times [REDACTED] did not attempt to communicate with her. [REDACTED] stated that his presence makes her uncomfortable and wanted the police department to be aware.

[REDACTED] stated that he has never made any threats to her, nor has he ever had any physical contact with her. To date, [REDACTED] has not made any action constituting a crime. [REDACTED] is a student at NKU and lives on campus.

Exhibit 28

(to be filed under seal)

Exhibit 29

(to be filed under seal)



Email Address:
kcoleman@sturgillturner.com

October 21, 2016

Kevin L. Murphy, Esq.
Murphy Landen Jones PLLC
2400 Chamber Center Drive, Suite 200
P.O. Box 17534
Ft. Mitchell, KY 41017-0534
KLMurphy@kevinlmurphyllaw.com

RE: *Jane Doe v. Northern Kentucky University, et al.*
U.S. District Court, E.D., Ky., Case No. 2:16-cv-00028-WOB-CJS
STBM File No. 64764.5

Dear Kevin:

While I have not heard from you further concerning the order directed by the court regarding production of certain non-party student education records in this matter, your prior communication indicates you seek production in accordance with your discovery requests. As such, please see the attached revised order, which directs the production of the student educational records specified in your discovery requests but provides procedures consistent with the FERPA rights of the affected students. Please note however, that your discovery requests do not reach to the alleged 2016 incident.

We hope to hear from you soon since, as you are aware, the Court's mandated deadline to reach an agreement on this issue is Monday, October 24, 2016, at which time the Court will enter its own Order.

Sincerely,

Katherine M. Coleman

KMC/tjm
Enclosures

cc: Joan Gates, Esq.
Sara Kelley, Esq.
Barbara Kriz, Esq.

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FILED ELECTRONICALLY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION
CASE NO. 2:16-CV-00028-WOB-CJS

JANE DOE

PLAINTIFF

v.

AGREED ORDER

NORTHERN KENTUCKY
UNIVERSITY, et. al.

DEFENDANTS

The Court having directed the production of certain non-party student education records in this matter, as set out herein, and having further directed the parties to agree upon the terms for such production, by agreement of the parties, IT IS ORDERED as follows:

1. This Agreed Order shall govern production of those student “education records,” as that term is defined under the Family Educational Rights and Privacy Act (FERPA), which Defendants assert they are prohibited from producing without the prior written consent of the current or former student to whom such records relate. Nothing herein shall prevent Plaintiff from challenging the status of any documents requested as “education records” under FERPA.
2. Plaintiff seeks “all documents evidencing any sexual assault, rape, and/or unwanted advances that occurred on campus and in offsite living quarters in the last seven years;” and the Court has ordered production of such documents.
3. Defendants shall produce such records, subject to any redaction needed consistent with rules of procedure and General Orders 04-01 and 08-01 of this Court, and subject to the following “notice/objection” period in compliance with FERPA:

- a. Defendants shall be provided five (5) business days from the date of entry of this Agreed Order to make reasonable effort to send notice to such student(s) using the form letter attached hereto as Exhibit A.
 - b. A copy of the notice letter, with the name and address of the non-party current or former student redacted, shall be provided to counsel for Plaintiff.
 - c. The affected student(s) shall have ten (10) calendar days from the date of such notice in which to seek protective action with the court in advance of Defendant's production. In the event the tenth day falls on a Saturday, Sunday or federal holiday, the affected student shall have until the next calendar day when the court is open in which to file any objection.
 - d. In the event no objection is made Defendants shall produce the subject records within five (5) business days following the expiration of such notice period.
 - e. In the event objection is made, Defendants shall produce the subject records in accordance with the ruling of the court within five (5) business days following the date of court ruling.
4. This Order does not constitute a waiver of any other objection a party may have on grounds of relevance or other applicable law. Likewise, no party waives any objections to admissibility that they might otherwise have. Nothing about this Order or any document production made pursuant to this Order shall be construed as a waiver of any party's rights or obligations to decline disclosure of material to third parties under federal or state law.
5. Any education records provided shall be used by counsel solely for use in this litigation and shall be copied only as necessary for these purposes. Counsel shall secure any such records

or information in a manner sufficient to prevent any unauthorized viewing or use of the records or information, consistent with all applicable law and this order.

6. Nothing about this Order shall prevent any party from using documents produced pursuant to the Agreed Protective Order in connection with any trial, hearing, deposition or other public proceeding in this case. Further, nothing about this Order shall be construed to restrict the parties' counsel from making inquiry of witnesses or potential witnesses regarding the subject matter of the documents produced.
7. A party seeking to maintain the confidentiality of document(s) produced pursuant to this Agreed Protective Order which may be disclosed in proceedings, hearings, or at trial shall follow all rules and practices established by the Court regarding the filing of documents under seal.
8. Upon termination of this litigation, the originals and all copies of any education records provided to parties or counsel shall be destroyed, with their destruction being certified in writing to the source, if requested. The destruction of documents is not required of court personnel and does not relate to documents in the court's record.

This ___ day of _____, 2016.

Stipulated and Agreed to by:

/s/ Katherine M. Coleman

Katherine M. Coleman (KBA #84089)

STURGILL, TURNER, BARKER

& MOLONEY, PLLC

333 West Vine Street, Suite 1500

Lexington, KY 40507

Telephone: (859) 255-8581

kcoleman@sturgillturner.com

Counsel for Defendants

/s/ Kevin L. Murphy

Kevin L. Murphy (KBA #50646)

MURPHY LANDEN JONES PLLC

2400 Chamber Center Drive, Suite 200

P.O. Box 17534

Ft. Mitchell, KY 41017-0534

KMurphy@MLJfirm.com

Counsel for Plaintiff

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Exhibit A

[LETTERHEAD]

[DATE]

[STUDENT NAME]

[ADDRESS]

Dear [STUDENT NAME]:

In the legal action styled *Jane Doe v. Northern Kentucky University, et. al.*, in the U.S. District Court at Covington, Case No. 2:16-CV-00028-WOB-CJS, pursuant to an Agreed Order entered by the Court [DATE] (a copy of which is enclosed), Northern Kentucky University is required to produce records related to you that otherwise may be protected by the federal Family Education Rights and Privacy Act ("FERPA"). The following records related to you have been identified for production: _____.

Pursuant to FERPA this letter is to provide you notice of this production. Under FERPA you have the right to raise an objection regarding the disclosure of your education records. To raise an objection, you must file your objection, in writing, with the U.S. District Court in Covington, Kentucky, before which this action is pending. The following is contact information for the Court:

U.S. District Court
35 W. 5th Street
Covington, KY 41011-1401
Phone: (859) 392 - 7925

Please direct any objection to the Court Clerk.

If you do not object, *in writing*, to the Court on or before the close of business on _____ (10 calendar days from the date of this notice), the University will produce the records that have been identified or requested in the University's possession.

Sincerely,

Counsel for Northern Kentucky University

Enclosures

x:\wdox\clients\64764\0005\corr\00745531.doc

Kacey Coleman

From: Kacey Coleman
Sent: Sunday, December 11, 2016 3:51 PM
To: kmurphy mljfirm.com (kmurphy@mljfirm.com)
Cc: Bryan Beauman; Kevin Henry
Subject: FW: Jane Doe v. NKU, et al

Tracking	Recipient	Delivery
	kmurphy mljfirm.com (kmurphy@mljfirm.com)	
	Bryan Beauman	Delivered: 12/11/2016 3:51 PM
	Kevin Henry	Delivered: 12/11/2016 3:51 PM

Kevin:

Bryan shared your communication below.

The incident to which you refer occurred off-campus on a street corner in, I believe, Cincinnati, and therefore did not occur "on campus or in off-site living quarters," and as such is in the same situation as the 2016 bus incident I previously advised would not fall within the discovery requests, and which you therefore specifically identified as part of your proposed Order on production.

We are agreeable to an Agreed Order concerning production of the records concerning this incident which references the Court's 10-27 Order on production. We believe that should be sufficient to support notice to the affected students. We will then produce such records in accordance with the terms of the Court's 10-27 Order.

In the course of Ms. Dralle's deposition you alluded to an exposure incident. I have asked NKU to review their records, but again, this may be an off-campus incident. If you can provide more information (names if possible) we can further confirm.

I have a number of medical appointments this week and will be in and out of the office. Please ensure that you copy or respond directly to Bryan and/or Kevin on this matter to ensure a timely response.

Very truly yours,

Katherine M. Coleman

Katherine M. Coleman (Kacey)



333 West Vine Street, Suite 1500, Lexington, KY 40507
p 859.255.8581 f 859.231.0851 www.sturgillturner.com

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From: Kevin Murphy [<mailto:KMurphy@mljfirm.com>]
Sent: Friday, December 09, 2016 9:19 AM
To: Bryan Beauman; Kevin Henry
Subject: Jane Doe v. NKU, et al.

I know you are new to this case, but I need some information. Judge Bertelsman ordered that I am entitled to all documents and education records relating to any allegations of sexual assault, sexual misconduct, rape, and/or unwanted advances that occurred on campus and in offsite living quarters in the last seven years, which would include but not be limited to allegations as it is defined under the Student Code of Conduct. Based upon the deposition of Leslie Fields Wednesday, your production of documents and your letter declaring full compliance, you did not send a letter out to [REDACTED]. I would like you to confirm that. And if indeed she did not receive a letter, I would like to know why, given that what happened to her clearly fits the definition of both dating violence and domestic violence, and given the language of the Court Order.

I already know of another woman who was a victim of sexual misconduct and she never received a letter. As you know, I have no access to their names, and no access to how many students were victims. Thus, I am forced to rely on the good faith and candor of NKU and its counsel to send letters in full compliance with the Court Order. I now need to know who made the decisions as to who did and did not receive a letter, and what criteria they used. I need to know who at NKU provided the information, and what other students did not receive a letter that should have under the Order of Judge Bertelsman.

I wanted to give you an opportunity to explain before going to Court. Leslie Fields is a Title IX officer at NKU, and she knew firsthand what happened to [REDACTED], and that she reported the second incident of violence to her coach, who let Fields and others know. Please explain.

Kevin L. Murphy



2400 Chamber Center Drive, Suite 200
Ft. Mitchell, KY 41017
(P) 859.578.3060 | (F) 859.578.3061

The preceding information is from the law firm of Murphy Landen Jones PLLC and may be protected by attorney/client privilege. If you believe it has been sent to you in error, do not read it. Please reply to the sender that you have received the message in error, then delete the message. Do not retain a copy. Thank you.

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333 WEST VINE STREET, STE 1500 ~ LEXINGTON, KENTUCKY 40507

TELEPHONE: (859) 255-8581 ~ FACSIMILE: (859) 231-0851

Kacey Coleman

From: MAILER-DAEMON@server83.appriver.com
To: kmurphy@mljfirm.com
Sent: Sunday, December 11, 2016 3:51 PM
Subject: Relayed: Jane Doe v. NKU, et al.

Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:

kmurphy@mljfirm.com

Subject: FW: Jane Doe v. NKU, et al.

Exhibit 32

(to be filed under seal)

Thursday February 2, 2017

Kevin L. Murphy
Murphy Landen Jones PLLC
2400 Chamber Center Drive, Suite 200
Fort Mitchell, KY 41017

Dear Mr. Murphy:

You have asked me to issue a report and to testify in the case of Doe v. Northern Kentucky University. At your request, I have focused much of my analysis on whether the conduct of NKU and its staff has been reasonable. The following is my report.

In the previous four years, I have testified in one matter styled *Barbara Schilfer v. Commemorative Clinic and Attorney General of Canada, et al.* This was in the Ontario Superior Court, Case No. CV-12-453-809. While the Canadian system is a bit different, this amounted to a deposition or affidavit. I was an expert witness for the government.

My compensation for this litigation is \$100 an hour. My qualifications can be found in my Curriculum Vitae, which is attached. I have a book about to be published entitled *Addressing Violence Against Women on College Campuses*. It is scheduled to be published no later than July of 2017 by Temple University Press. Included in the articles mentioned in my CV, I have written an article about an evaluation of violence prevention on a college campus, and I have also authored numerous articles on violence against college students.

As my resume indicates, I was part of a team that received over a million dollars in grants from the Office of Violence Against Women—a Justice Department program—to provide violence prevention education. Part of that was to coordinate response teams, law enforcement trainings, SaVE Act compliant education, and to implement best practices for Title IX and SaVE Act implementation. My primary role was to educate. I worked on coordinated community response teams, and was the principle investigator for this grant that was given to the University of Colorado at Colorado Springs. I have knowledge about the practices reasonably used at institutions of higher learning for complying with Title IX, in 2014 as well as through the present.

As my CV indicates, I have a Masters from the University of Windsor, and a Ph.D. from the University of Toronto. Currently I am Professor and Chair of Criminal Justice at the University of Central Florida. I have spent a considerable amount of time studying violence against women, and the impact it has on them, which includes violence on college campuses.

I reviewed the depositions of Ann James, Gabby Dralle, Les Kachurek, Jane Doe, Geoffrey Mearns, Bothof (both), Kevin Schappell, and Leslie Fields. I watched the video deposition of Jeffrey Waple. I also reviewed the sanctions, the waivers, emails, the Student Code of Conduct,

Kevin L. Murphy
February 1, 2017
Page 2

other student sanctions, NKU Clery report, NKU training materials, correspondence relating to Doe and Student M, therapy documents, and statements produced by NKU through January 31, 2017.

You have asked me to express several opinions relating to compliance with the Clery Act, the actions and inactions of NKU before and after the hearing, and the harm NKU did to Jane Doe. You have also asked me to opine on my research, and that of others included with this report, regarding the harm to sexual violence victims, and the past, current and foreseeable harm to Jane Doe resulting from the conduct of NKU and its employees.

You have asked me to look at the testimony of NKU employees in this regard. A person designated as a Title IX authority, Leslie Fields, did not know what the Clery Act was, yet she was a CSA (Campus Security Authority) for reporting purposes. From my reading of the NKU staff depositions, it appears there was no clear policy or protocol at NKU to determine who was actually responsible for properly reporting alleged sexual misconduct to the NKU police for proper reporting under the Clery Act. Further, the witnesses could not clearly state whether a form produced by Gabby Dralle was to be used or not to be used. Best practices—and reasonable efforts to implement a reporting system at that time--called for putting each and every incident/allegation in writing. Failing to do so is both unreasonable and indicates that a university or college does not take its duties under this aspect of the law seriously. This is a major problem, and NKU did not implement reasonable procedures. Demonstrative of that is the lack of a written Clery report on Jane Doe's case, and no one knows if anyone actually reported it to the police before the cafeteria incident. The same holds true for the basketball player incident in 2015—evidently no form was completed to fulfill the obligations of the Clery Act.

Filling out the forms for Clery Act compliance is important for a variety of reasons. One such reason is it provides information for the crimes that allegedly occurred on campus, which may be of interest to student applicants and their parents. Another reason is if one person was allegedly involved in three sexual incidents, which, from reading the depositions provided to me, appeared to happen at NKU with a basketball player, people like Jeffrey Waple, Ann James, Ken Bothof, Geoffrey Mearns, and Leslie Fields should not only have been alarmed, but also should have immediately documented this incident in writing for Clery Act purposes. This reveals no adequate climate and risk assessment, which must take place on campus to effectively address and prevent sexual violence. Yet there were no meetings about it, and no management plan to avoid the fourth, fifth, or sixth time this basketball player could have been involved in the future in a sexual misconduct situation. NKU's failure to take action was unreasonable. A reasonable practice, and one used of many other universities, would be to also draw upon organizations like "Men Can Stop Rape" which utilizes male trainers to speak to diverse athletic teams and other men's groups about sexual violence and consent.

I have also considered the actions of NKU prior to issuing the sanctions on Student M, and how the conduct of NKU in relation to those sanctions harmed Jane Doe. For instance, NKU revictimized Jane Doe by failing to include her input before issuing the sanctions. In allowing Student M to remain on campus, without a monitoring plan for Student M, NKU adversely impacted Jane Doe. NKU never took the time to attempt to understand the ramifications of that,

Kevin L. Murphy
February 1, 2017
Page 3

with ample research and training available at the time regarding how important safety is to victims of sexual violence. They revictimized her by putting her in a situation, because of their conduct, to have constant fear and anxiety. The failure to enforce the sanctions further eroded her perception of well-being, and thus gave her a sense of helplessness and despair. They did not inform or educate the police about the sanctions and/or the no-contact order, as demonstrated in the cafeteria incident. Based on his testimony, Jeffrey Waple did not know that the police stated they could not enforce the sanctions as it related to the no-contact order. A further consequence of failing to meet with Jane Doe prior to issuing the sanctions was her belief that Student M had to stay a certain distance away from her while in areas not prohibited by the sanctions. All of these consequences of revictimization could have been avoided. Instead, NKU engaged in unreasonable conduct that caused Jane Doe great harm through revictimization.

Based on my experience, research and writing, revictimization has very serious consequences for one who has been sexually assaulted, and NKU's unreasonable conduct at the time sanctions were recommended and issued did revictimize Jane Doe in that regard. Jane Doe's reaction to being revictimized led to fear and her maladaptive attempts at coping, including, but not limited to: pushing her best friend away; retreating into her room to just do school work; going home on weekends; sleeping in a blacked-out room; and her interaction with Student M shortly after the rape. These are all maladaptive coping behaviors, and at trial I will explain what maladaptive coping behaviors are, and why victims of sexual violence employ them, even though to others, the behavior seems strange or destructive. I will explain that the fear that Jane Doe had prior to the hearing was every bit as strong afterwards, because NKU let Student M remain on campus without a safety analysis, without monitoring, and refused to enforce the sanctions. Thus, she could see him at the cafeteria, at the gym, or anywhere. In my opinion, Jane Doe's harm and pain were actually worse after the sanctions because before the sanctions, she retreated to her home on weekends. After the sanctions, she thought that the cafeteria was a safe place because Student M was not supposed to be there. Thereafter, the cafeteria incident occurred, leading to a panic attack because Ann James failed to tell her that seven months earlier. She waived the sanctions permitting him to be there at any time.

In my opinion, Jane Doe has engaged in various foreseeable behaviors in attempting to cope, including behaviors that harm and continue to harm her, which are well known and extensively discussed in published research. The research on these points is well-established, was available to NKU and some of it was even included in their training materials from the Norse Violence Prevention Center. Jane Doe's reactions to the situations in which she found herself are consistent with widely disseminated research as it relates to the percentage of women who report rape on campus, and why it takes some women so long to report it, and the cultural differences related thereto. NKU should have known about this research and acted accordingly. Jane Doe suffered panic attacks, which all occurred post sanctions, as well as anxiety and lack of sleep. These are all common consequences of revictimization.

The times Jane Doe felt most safe were when Student M was not on campus in the fall of 2014. After the sanctions, as stated above, NKU most definitely should have managed the components of those sanctions stringently, and the campus police should have been notified of the sanctions. There was no collaboration between offices. All of this conduct by NKU was

Kevin L. Murphy
February 1, 2017
Page 4

unreasonable. After deciding not to expel him, the proper way to enforce what should have been serious sanctions would have been to bring in the campus police, the resident assistant, the dorm director, the cafeteria staff, and all others to coordinate. When NKU decided to keep him there, they should have performed a risk assessment and thereafter a management plan, and failing to do so endangered Jane Doe and potentially the entire campus. The failure to do so was unreasonable and harmed Jane Doe greatly.

The Title IX team, with the CSAs, should have met at least once a month to review allegations of sexual misconduct, cases they were addressing, and procedures to ensure compliance with Clery and Title IX. This would include Ann James, the chief of the NKU police, Gabby Dralle, Kristy Webb, the Dean of Students, as well as all those who have Title IX titles. Failure to do so was unreasonable.

Of major concern is NKU's failure to adequately train these individuals involved in Title IX and sexual misconduct on campus. As stated, they evidently had no team meetings wherein they could have assessed if they had a climate problem. It appears they did not conduct a proper climate survey, which, as I will explain in my testimony is of great importance in implementing Title IX in a reasonable way. These individuals did not have sufficient training to assess safety needs of the campus, and did not have regular conversations with the students and staff in the dorms.

The lack of knowledge on the part of NKU staff as to how the impact of sexual violence and severe trauma varies across different groups of people was also unreasonable. For instance, Jeff Waple, Ann James, the hearing panel, and others should have had a clear understanding of how victims seek help, and how to deal with that. From the testimony, there is no evidence of any assessment training. In this case, Police Chief Les Kachurek testified that in 2015, his police force knew next to nothing about Title IX and the Violence Against Women Act. Further, he seemed to have a knowledge base that NKU did not take advantage of, based upon his previous Title IX employment on another campus. NKU's failure to provide appropriate information to its staff was unreasonable.

All of the CSAs involved in Jane Doe's case and in all other cases are responsible for reporting an alleged act of sexual violence. From the testimony regarding the basketball players, neither Mr. Bothof nor Ms. Fields completed a Clery report in writing. It is also not clear whether Ann James made a written Clery report. All CSAs aware of this incident were responsible to do so—to report for Clery.

Regarding lack of training, all members of any hearing panel should have had constant and sufficient training. Every year, NKU should have recruited a pool of people willing to put the time in for proper training. In this case, it is apparent that sometimes within a week or two before a hearing on sexual misconduct, persons in authority were looking for people to fill those positions, calling into question the ability to train them adequately. Failure to recruit and train hearing panel members is also inconsistent with reasonable practices.

Kevin L. Murphy
February 1, 2017
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Given that Mr. Waple and Ms. Dralle testified accurately that this act was the worst type of sexual misconduct that a student could commit, the starting point for consideration of sanctions should have been expulsion. Given the testimony of Mr. Waple, at the very least, Student M should have received a multi-semester suspension to permit Jane Doe to embark upon the road of healing. Since Student M was left on campus, there should at least have been an order compelling Student M to undergo a mental health assessment, and to check in periodically, analogous to probation. Again, when the decision was made to keep him on campus, NKU should have mandated that he seek a professional assessment. They did so in other less serious matters. Failure to do so in relation to Student M was unreasonable.

NKU did nothing to manage Student M reasonably, and no risk management was in place whatsoever. This caused serious harm to Jane Doe, and put her at risk every day. NKU's failure to contact the campus police to give them the no contact order, and to give the police the information about him and what happened between the two, was not consistent with reasonable practices, which they would have learned had they been properly trained. As Mr. Waple testified, there was no one to monitor Student M. Reasonable practices required NKU to constantly check in with Jane Doe, and to get her the help that she needed throughout. NKU failed to do so.

The foregoing conduct of NKU revictimized and deprived Jane Doe of access to the educational opportunities or benefits provided by the school, and then the harm was exacerbated by all of the waivers or "permissions" to circumvent the sanctions. Waivers equal no discipline, and at no time should NKU reasonably have suspended those sanctions. Each and every time they did so, they had reason to know the harm they were causing Jane Doe, and I will testify about the horrendous impact that Jane Doe incurred as a result of the "waivers" given by Ann James, which includes harming herself by a deliberate overdose of Tylenol.

Further, regarding the waivers, Ann James made promises to Jane Doe that she did not keep, such as the 24-hour notice, which further enhanced Jane Doe's sense of helplessness. There is no federal law or regulation that requires NKU to treat a student found responsible for nonconsensual sexual intercourse by force equally with the victim after a hearing in which he was found responsible and sanctions have been applied. NKU's decision to do so was unreasonable.

Given there were no extenuating circumstances according to Mr. Waple, Student M should have faced a multi-semester suspension or expulsion. He received neither. Mr. Waple should have also met with Jane Doe before he issued the sanctions. Instead, he gave her no opportunity to explain the impact the sexual assault had on her, and her intense fear about Student M being on campus. It is clear that Waple had very little knowledge about what happened to her, and what continued to cause her suffering. This conduct by NKU was also unreasonable.

Further evidence of NKU's lack of implementation of reasonable practices is the cafeteria situation. This illustrates what they could have done with regular meetings and better training. For instance, if he was going to remain on campus, Student M should have used the Student Union while his assigned cafeteria was closed. They could have modified his meal card, and on Saturdays and Sundays, NKU could have arranged that he could call the cafeteria and have his meal waiting for him out in the hallway for pick up. They could even have gotten a microwave and refrigerator

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and had him eat in his room if necessary. But NKU never should have permitted him to be in the same cafeteria, so as not to expose Jane Doe to further harm.

In my opinion, NKU permitting Student M to be a member of NKU Rocks, and checking IDs at the gymnasium, was also unreasonable. Once again, it conveys to Jane Doe that you are not important—that we do not care. This gave Jane Doe a higher sense of fear and anxiety as she navigated around the campus. Additionally, why should the victim have her cafeteria time cut? Why shouldn't the gym be open to her during hours of operation? As it relates to NKU Rocks and the gymnasium job, NKU put Student M in this position without ever doing a risk assessment.

It is also my opinion, based upon my research and the statistical data generally available, that as a result of NKU's conduct Jane Doe faces a future with greatly enhanced risks to her psychological and physical well-being unless she gets the funds to obtain professional counseling and medical care, including, but not limited to, depression, eating disorders, drug use, alcohol abuse, other maladaptive behaviors, and PTSD. In my opinion, Jane Doe is also likely to suffer a loss of income over a lifetime associated with revictimization and PTSD.

In conclusion, what happened to Jane Doe before and after the hearing was severe, and NKU's unreasonable actions and unreasonable inactions directly and negatively impacted her access to the educational opportunities and benefits provided by the school. Their refusal to assess the impact of their conduct on Jane Doe has been detrimental to her recovery. Ann James and others were aware of the harm NKU's actions were causing Jane Doe, did next to nothing to mitigate it, and actually increased her harm greatly.

The foregoing opinions are derived from my education, experience, research, documents provided, review of the documents listed in my CV, and those attached to this report. I also draw upon my knowledge of Title IX, the Reauthorization of the Violence Against Women Act, the Clery Act, the SaVE Act, and other written materials such as the first report of the White House Task Force to Protect Students from Sexual Assault, and other federal guidance.

Sincerely,



Catherine E. Kaukinen, Ph.D

ELECTRONICALLY FILED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION AT COVINGTON
CASE NO. 2:16-CV-00028-WOB-CJS

JANE DOE

PLAINTIFF

v.

ORDER

NORTHERN KENTUCKY UNIVERSITY, *et al.*

DEFENDANTS

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This matter having come before the Court upon Plaintiff's motion for sanctions [D.E. 163], Defendant Northern Kentucky University (NKU) having responded, and the Court being otherwise sufficiently advised, the Court finds that Defendant NKU did not act in bad faith or with any willful intent to violate the Court's order and that Plaintiff has suffered no prejudice. Therefore, IT IS HEREBY ORDERED that Plaintiff's Motion for Sanctions is DENIED.