

Are Student-Athletes Alleged of Sex-Crimes Granted Educational Privacy Protections? FERPA's Misinterpretation by Academic Institutions

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Abstract

The tension between educational privacy rights and university obligations with regard to potentially criminal actions (such as sexual assault) by student-athletes raises many questions concerning what universities must disclose, and to whom. Universities may be hiding behind the Federal Education Rights and Privacy Act (FERPA) inappropriately. This Note maps out the issues surrounding governing law, where it is clear and where it is gray, and provides discussion of proper outcomes for the gray areas with a focus on FERPA's effect on university privacy duties and FERPA's effect on the student body through the student-athlete.

I. INTRODUCTION

The Family Educational Rights and Privacy Act of 1974¹ has become one of the more controversial pieces of legislation related to education and privacy rights. Also known as FERPA or the Buckley Amendment, the Act serves as a barrier between students and their parents, usually in service to the desires of students and their privacy. FERPA serves two distinct purposes:

Its first, simplest, and least controversial purpose is to confer on each student the right to inspect and correct any "education records" containing the student's name or personally identifiable information about the student. . . . Second, it protects students' privacy by prohibiting institutions from engaging in unauthorized disclosure of education records and by imposing on faculty and staff members the obligation to

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¹ 20 U.S.C. § 1232g (2013).

take reasonable precautions to prevent misuse or unauthorized disclosure of education records.²

FERPA also directly affects universities by threatening severe penalties to schools that violate the requirements of the legislation.

While creating affirmative responsibilities for schools, universities frequently attempt to benefit from FERPA by utilizing its (often-misinterpreted) language to shield it from making potentially embarrassing disclosures about students.³ Student-athlete waiver forms, which are used often and waive some of a student-athlete's rights under FERPA, usually only allow release of FERPA information to athletic academic counselors, coaching staff members, or other school officials.⁴ Consequently, a college or university can hide behind FERPA amidst public controversy involving alleged crimes committed by a high-profile student-athlete.⁵

Initially, FERPA was criticized by universities for broadly granting students a right to inspect and review records. In recent years, FERPA has been embraced by universities to avoid revealing information about allegations brought typically by female victims of sex-crimes at the hands of a student-athlete.⁶ Schools regularly argue that revealing information related to a student alleged of a sex-crime would be a violation of FERPA.⁷ Student-athletes, however, make this argument significantly unstable, because the student-athlete is often a popular, well-known star of the team, whose athletic talent is essential to the sport's success, often

² Lawrence White, Commentary, *Don't Like FERPA? Change the Law*, CHRON. OF HIGHER EDUC. (Jan. 7, 2013), <http://chronicle.com/article/Dont-Like-Ferpa-Change-the/136461/> [<https://perma.cc/9MTT-5L4Y>].

³ Tyler Kingkade, *Why Colleges Hide Behind This One Privacy Law All The Time*, HUFFINGTON POST (Jan. 26, 2017), http://www.huffingtonpost.com/entry/colleges-hide-behind-ferpa_us_56a7dd34e4b0b87beec65dda [<https://perma.cc/U6ZF-HZGG>].

⁴ Jack Stripling, *Right to Remain Silent*, INSIDE HIGHER ED (June 26, 2009), <https://www.insidehighered.com/news/2009/06/26/right-remain-silent> [<https://perma.cc/BW3Y-AQ9C>].

⁵ Surely, tension exists between the student privacy of non-athlete students and public disclosure by institutions. Few students want their personal information publicly available. Student-athletes are not the only ones trying to attract employers, for example. Yet, a school likely would not think twice about releasing personal information related to an engineering student based simply on that student being a prolific engineering student. Student-athletes who are notable public figures increase tension by constituting a tangible justification for millions of dollars from athletic donors and licensing deals for the school. Release the wrong information about the student-athlete and there goes that new deal with Nike or that new practice facility.

⁶ Allison Ellis, *Sexual Assault Survivors Speak Out Against Campus Rape*, MARIE CLAIRE (June 20, 2014), <http://www.marieclaire.com/politics/news/a9746/sexual-assault-victims-speak-out-about-college-rape-campus/> [<https://perma.cc/DY5S-Y8SM>].

⁷ See Jon Krakauer, *How Much Should a University Have to Reveal About a Sexual-Assault Case?*, N.Y. TIMES MAG. (Jan. 21, 2016), <https://www.nytimes.com/2016/01/20/magazine/how-much-should-a-university-have-to-reveal-about-a-sexual-assault-case.html> [<https://perma.cc/U2VG-P2FD>]. See generally 20 U.S.C. § 1232g.

creating an incentive for schools to leverage this law in the name of athletic success.⁸

This Note will explore these legal and social justice issues. FERPA presents many complex legal issues when it comes to privacy and the student-athlete. Part II will discuss the legislative history of FERPA. Part III will dissect the black letter law. Part IV will analyze key FERPA-related court cases and related instances. Part V will consider the specific case of Jameis Winston and evaluate what the proper FERPA interpretation for that case should have been. Finally, Part VI will propose solutions to eradicating the ambiguous nature of FERPA. As FERPA is analyzed in this paper, consider the following hypothetical along the way:

The star of a state university's basketball team, aged 21, is alleged to have sexually assaulted and raped two female freshmen students while at a campus party. All three parties are believed to have been inebriated and, in fact, rohypnol (a "date rape" drug) is found to have been in the system of one of the two girls at the time of the incident. Only the basketball player, the two female students, the medical examiner, and the campus police to whom the girls contacted shortly after believing they had been raped, and to whom they provided the drug results, know about the alleged incident. A possibility exists that another person also knows if the culprit turns out not to be the alleged student-athlete. Everyone knows the student-athlete to have an enormous temper and the word around is that he has committed many violent acts against female students at school usually at parties and is also HIV-positive. Many students do not know that he is HIV-positive, especially incoming freshmen. An anonymous tip alerts the community about the alleged crime, but the school refuses to release information and documents related to the incident that would reveal the identity of the student-athlete, citing its right and obligation to protect the student-athlete under FERPA.

⁸ Why focus on student-athletes? The number of rapes reported at colleges where the victim reports the accuser to be a student-athlete often equal or outnumber the number of rapes reported at colleges where the victim reports the accuser to not be a student-athlete. According to Michele Davis, a sexual assault nurse examiner for McLennan County, Texas (home of Baylor University), upwards of 50% of all rapes reported by the Baylor population come from athletes. *OTL: Baylor Investigation Follow-up*, ESPN, <http://www.espn.com/video/clip?id=14698615> [<https://perma.cc/7KEK-P8LV>] (containing content from Outside the Lines' investigation of Baylor athletics by Paula Lavigne).

II. LEGISLATIVE HISTORY

James L. Buckley, the U.S. senator from New York who sponsored FERPA in 1974, said he introduced the legislation in response to “the growing evidence of the abuse of student records across the nation.”⁹ Congress conceived FERPA in the 1970s to “protect student records from being released during a time when a substantial amount of social-science research was taking place in elementary and high schools.”¹⁰ The legislation’s application to colleges was an afterthought.¹¹ Senator Buckley and Congress clearly intended to limit the protection of student records to “education records” and intended to limit “education records” to records one would find for an elementary or high school student. Thus, as applied to colleges and universities, Senator Buckley and Congress understood their piece of legislation to apply only to a succinct and specific list of education records and not to every document that references a student’s information.¹²

Applying the statutory interpretation canon of *exclusio unius inclusio alterius*¹³ to FERPA, courts have held that the statute’s exemption of law enforcement records demonstrates that these records are not the same as educational records and should thus be allowably disclosed by colleges and universities free of penalty.¹⁴

FERPA’s long list of what is not an education record—a list much longer than the list of what is considered an education record—is an indication that the statute’s creators were suspicious of legal interpretations expanding the reach of the legislation. In FERPA’s list of what is not an education record, “include” is part of the language.¹⁵ Meanwhile, “include” is not part of language for what does constitute an education record.¹⁶ This indicates that Congress knew exactly what it wanted to categorize as an education record and exactly what it did not.

⁹ *Family Educational Rights and Privacy Act (FERPA)*, ELEC. PRIVACY INFO. CTR., <https://epic.org/privacy/student/ferpa/default.html> [<https://perma.cc/JAE7-CGYU>] (last visited Feb. 24, 2017).

¹⁰ *FERPA, HIPPA & DPPA: How Federal Privacy Laws Affect Newsgathering*, REPORTERS COMM. FOR FREEDOM OF THE PRESS 2 (2010), <http://www.lb7.uscourts.gov/documents/14-22952.pdf> [<https://perma.cc/K7JA-5TYS>].

¹¹ *Id.*

¹² *Id.*

¹³ *Bauer v. Kincaid*, 759 F. Supp. 575, 591 (W.D. Mo. 1991).

¹⁴ *See id.* at 587, 590–92.

¹⁵ 20 U.S.C. § 1232g(a)(4)(B).

¹⁶ *Id.* § 1232g(a)(4)(A).

III. WHAT'S REALLY IN THE STATUTE: EXPLORING THE BLACK LETTER LAW

The black letter law of FERPA should theoretically dictate the institutional direction of student privacy. Yet, schools, students, the media, and the general public all often differ on which parties they believe the statute actually serves, to what degree, and in which fashion. At FERPA's heart is an easy-to-state but highly restrictive rule: A college or university cannot disclose an education record unless the student identified in the record consents in writing to the disclosure.¹⁷ The only way university disclosure of an education record is warranted without consent from the student is under one of the specifically enumerated FERPA exemptions to the consent requirement.¹⁸ Otherwise, the disclosure must be considered not an education record in order to be disclosed.¹⁹ The exemption list has become a laundry list of sorts. Over the years, Congress has amended FERPA ten times, leaving FERPA today with sixteen total circumstances in which university disclosure can be made without consent.²⁰

For the purposes of a student-athlete allegedly involved in a crime, there are two key dynamics of the statute that affect university disclosure: the education record clause versus the non-education record clause and the enumerated exceptions that allow for disclosure of an education record without consent.

A. *Education Record or Not*

Section (a)(4)(A) of FERPA details what is to be considered an education record:

The term "education records" means . . . those records, files, documents, and other materials which-

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.²¹

The statute thus maintains a two-part test for determining if a student-athlete's record is an education record. It must first pertain to the student-athlete. Then, the university or somebody working in a similar capacity must also maintain the record. Both pieces of the two-part test are required. The test seems relatively

¹⁷ *Id.* § 1232g.

¹⁸ *Id.* § 1232g(b)(1)(A)–(L), (2)(B).

¹⁹ *Id.*

²⁰ See White, *supra* note 2. In terms of enforcement, FERPA is regulated by the Department of Education. If somebody desires to file a claim, they must file a complaint through the Department of Education. See 20 U.S.C. § 1232g(g); see also *Gonzaga University v. Doe*, 536 U.S. 273 (2002).

²¹ 20 U.S.C. § 1232g(a)(4)(A).

easy to satisfy. The problem comes when the list of what is not considered an education record for purposes of the statute is taken into consideration as well. Section (a)(4)(B) of FERPA explains what is not considered an education record. As the statute explains:

“education records” does not include-

- (i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;
- (ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;
- (iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person’s capacity as an employee and are not available for use for any other purpose; or
- (iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student’s choice.²²

This rather wordy section of the statute simply excludes four large categories of records that are, by definition, not education records: (1) supplemental records from a peripheral institutional capacity, (2) law enforcement records, (3) employee records of the university, and (4) medical and psychological records.²³ One might believe that the law enforcement exclusion readily ends our story; if a student-athlete’s alleged crime results in a police report, such a report would be covered under this exclusion and can thus be disclosed without penalty by the university. However, many university officials swiftly and confidently argue that once certain documents are passed on from the exempted entity to the academic institution, the

²² *Id.* § 1232g(a)(4)(B)(i)–(iv).

²³ *Id.*

record becomes an education record that cannot be disclosed by the university.²⁴ Such an argument, however, has a fatal flaw directly in the language of the statute.

Of the four categories of exclusions, only §§ (a)(4)(B)(i), (a)(4)(B)(iii), and (a)(4)(b)(iv) use language dictating exclusivity of the record—that nobody outside those listed in the exclusions can be privy to the record—and that breach of that exclusivity breaches the immunity given by the exclusions. For example, § (a)(4)(B)(i) relating to supplemental records from a peripheral institutional capacity uses the language: “sole possession of the maker . . . not accessible or revealed to any other person.”²⁵ Section (a)(4)(B)(iii) uses similar language: “records . . . which relate exclusively to [the] person.”²⁶ Section (a)(4)(B)(iv) provides, “records . . . used only in connection with . . . treatment . . . not available to anyone other than persons providing such treatment.”²⁷ Section (a)(4)(B)(ii), meanwhile, uses absolutely no language or connotation of exclusivity. If the creators of the FERPA statute wanted all four exclusions to terminate upon disclosing the record to a non-privy party, the drafters would have done so. They would have added the language of exclusivity from §§ (a)(4)(B)(i), (a)(4)(B)(iii), and (a)(4)(B)(iv) to § (a)(4)(B)(ii) to indicate it was no different. They could have also added an entirely new section on exclusivity, saying that it applied to all four of the excluded categories, and removed the exclusivity language from the three exclusions where such language is currently found. However, the FERPA drafters chose not to and § (a)(4)(B)(ii) on law enforcement records thus stands alone in allowing record disclosure even upon being transferred to the academic institution (as long as the record was for law enforcement purposes to begin with). Therefore, the university argument that police records handed over to them and added to the student-athlete’s educational file constitute a transformation of that document into an education record is not a valid argument for not disclosing information to their students.

B. *Education Record Exemptions*

With regards to the second dynamic of FERPA relevant to the student-athlete—the enumerated exceptions that allow for disclosure of an education record without consent—many claim that even those documents that qualify as education records can come within one of the exemptions that allow for disclosure even of education records. Section (b) of FERPA discusses those exemptions.²⁸ Essentially, if a document is considered to be an education record, it must fall

²⁴ *Id.*

²⁵ *Id.* § 1232g(a)(4)(B)(i).

²⁶ *Id.* § 1232g(a)(4)(B)(iii).

²⁷ *Id.* § 1232g(a)(4)(B)(iv).

²⁸ *Id.* § 1232g(b).

under one of the exemptions or else the university cannot disclose it without penalty.

The ninth exemption, Exemption (I), says that an education record may be disclosed “in connection with an emergency . . . if the knowledge of such information is necessary to protect the health or safety of the student or other persons.”²⁹ The Secretary of Education has said that this definition deserves the flexible discretion inherent to ensuring safety.³⁰ Nevertheless, curious as to the definition’s limits, the University of New Mexico asked the U.S. Department of Education to clarify a conflict between two New Mexico regulations that mandated the reporting of diseases and FERPA’s privacy protection for students.³¹ The U.S. Department of Education’s answer

restricted the exception to “a *specific situation* that presents *imminent danger* to students or other members of the community, or that requires an *immediate need* for further information in order to avert or diffuse serious threats to the safety or health of a student or other individuals.” The Department emphasized that the exception is “temporally limited to the period of the emergency and generally does not allow a blank release of personally identifiable information.”³²

Two other sections of FERPA are worth briefly noting in this context. First, FERPA allows states via statute to require disclosure of an education record for any purpose a state chooses.³³ Second, FERPA does not prohibit schools from

²⁹ *Id.* § 1232g(b)(1)(I).

³⁰ The Secretary of Education once set forth four criteria to determine if the emergency exception applied:

- (1) The seriousness of the threat to the health or safety of the student or other individuals;
- (2) The need for the information to meet the emergency;
- (3) Whether the parties to whom the information is disclosed are in a position to deal with the emergency; and
- (4) The extent to which time is of the essence in dealing with the emergency.

³⁴ C.F.R. § 99.36(b) (1987); Matthew A. Ward, *Reexamining Student Privacy Laws in Response to the Virginia Tech Tragedy*, 11 J. HEALTH CARE L. & POL’Y 407, 419 (2008). These have since been redacted by the Secretary of Education. *Id.*

³¹ *Id.*

³² 45 C.F.R. § 164.512(c)(1)(iii)(A)(2011). Other pieces of legislation, such as the Health Insurance Portability and Accountability Act (HIPAA), account for disclosure situations similar to FERPA’s health and safety concerns. These include situations involving communicable diseases or conditions, suspicions of child abuse, and other forms of domestic violence or abuse. Similar to FERPA, HIPAA allows for disclosure of protected health information for the prevention of a serious or immediate threat to the public health or safety. HIPAA also contains a catch-all provision allowing for disclosure when the covered entity, in exercising its professional judgment, believes such disclosure is necessary to prevent serious harm to potential victims of abuse, neglect, or domestic violence. *See* 45 C.F.R. § 164.104(a) (2013).

³³ *See* 20 U.S.C. § 1232g(b)(1)(E).

disclosing the results of disciplinary hearings related to alleged violent crimes, but they only can after rendering “final results.”³⁴ Schools often argue this section of FERPA requires the school not to reveal completed disciplinary results deemed confidential unless and until the full disciplinary hearing process is complete.³⁵ That is incorrect. A school is able to reveal records as long as it is not expressly prohibited from revealing those records.³⁶ An academic institution arguing it can’t reveal under this clause is simply wrong. Nevertheless, schools have tried to hide behind this clause, like the University of Michigan, for example, which in 2014, argued this FERPA clause entirely precluded it from revealing the results of a completed disciplinary investigation of sexual misconduct allegations against its football team’s kicker.³⁷ Finalized hearing results can be revealed by the institution.³⁸

IV. EVOLUTION OF EDUCATIONAL PRIVACY

The polarizing arguments over the interpretation of FERPA in American classrooms has, throughout the years, led to climactic decisions in American courtrooms, shaping and augmenting the direction of education privacy for all parties involved. Perhaps spurred by the growth of electronic record keeping, social media, and the advent of a shrinking world unmasked by the freedoms and vices of the World Wide Web, the turn of the millennium saw courts bring substantial change to the forefront of educational privacy.

A. *United States v. Miami University*

Student disciplinary records are “education records” as defined by FERPA, and thus, protected from public disclosure, so said the court in *United States v. Miami University*.³⁹ In that case, the federal government filed a complaint alleging

³⁴ 20 U.S.C. § 1232g(b)(6).

³⁵ Krakauer, *supra* note 7.

³⁶ See generally *Bauer v. Kincaid*, 759 F. Supp. 575 (W.D. Mo. 1991).

³⁷ Nick Baumgardner, *Michigan Standing Behind Student Privacy Law on Brendan Gibbons Situation, but Media Law Prof Says That’s Debatable*, MLIVE (Jan. 30, 2014), http://www.mlive.com/wolverines/index.ssf/2014/01/michigan_standing_behind_ferpa.html [<https://perma.cc/R5LQ-5GUX>].

³⁸ 20 U.S.C. § 1232g(b)(6). It is important to briefly note FERPA’s application to grades and academic ineligibility. Considering that minimum grade requirements for schools and the NCAA are available online, revealing that a student is academically ineligible implicitly reveals a lot of information that, if explicitly revealed without consent, would violate FERPA. For the sake of academically ineligible student-athletes (vulnerable to consenting due to their compromised position as a student-athlete), academic institutions should follow proper procedures in obtaining student-athlete consent to reveal grade-related academic ineligibility; otherwise, a school is in violation of FERPA. *FERPA*, CATHOLIC UNIV. OF AM. OFFICE OF GEN. COUNSEL, <http://counsel.cua.edu/ferpa/questions/> [<https://perma.cc/F5JM-DUW5>] (last visited Mar. 14, 2017).

³⁹ *U.S. v. Miami Univ.*, 91 F. Supp. 2d 1132, 1160 (S.D. Ohio 2000).

that the defendants, Miami University and The Ohio State University, violated FERPA “by releasing student disciplinary records containing personally identifiable information without the prior consent of the students or their parents.”⁴⁰ The case arose after the Ohio Supreme Court in 1997 required Miami University to release all student disciplinary records, except any information that is personally identifiable as defined in FERPA, to the student editors of Miami University’s student newspaper.⁴¹ The Ohio Supreme Court held that Ohio’s Public Records Act provides for access to all public records upon request unless the requested records fall within one of the specific exceptions listed in that act, none of which covered the “education records” defined by FERPA, further holding that disciplinary records were not “education records” as defined by FERPA.⁴² After the decision, the *Chronicle of Higher Education* asked officials from Miami University and The Ohio State University for disciplinary records from 1995 to 1996 with as little redaction as the Ohio Supreme Court decision would allow.⁴³ Both universities contacted the U.S. Department of Education, explaining that they could not comply with FERPA, and said that they would release the student disciplinary records to all who requested them, at which point federal officials filed a complaint against the universities in federal district court in Columbus asking the court to bar release of the records.⁴⁴

The federal appeals panel also found that, despite the fact that the Ohio Supreme Court’s rule that student disciplinary records are not education records, the federal district court was not bound by the decision because the interpretation of FERPA is a matter of federal law.⁴⁵ The appeals court held that, under the plain language of the statute, “student disciplinary records are education records because they directly relate to a student and are kept by that student’s university.”⁴⁶

B. State ex rel. ESPN, Inc. v. Ohio State University

ESPN sought to compel The Ohio State University to provide access to requested records relating to National Collegiate Athletic Association’s (NCAA) investigation into alleged violations of athletic association regulations.⁴⁷ At a

⁴⁰ *Id.* at 1134.

⁴¹ *Id.* at 1135.

⁴² *Id.*

⁴³ *Id.* at 1135–36.

⁴⁴ *Id.*

⁴⁵ See *U.S. v. Miami Univ.*, 294 F.3d 797, 810 (6th Cir. 2002).

⁴⁶ *Id.* at 812. See also *State-Ordered Student Records Release Violates FERPA*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (July 2, 2002), <http://www.rcfp.org/browse-media-law-resources/news/state-ordered-student-records-release-violates-ferpa> [<https://perma.cc/CNA4-B39K>].

⁴⁷ *State ex rel. ESPN, Inc. v. Ohio State University*, 132 Ohio St. 3d 212, 2012-Ohio-2690, 970 N.E.2d 939, ¶4.

March 8, 2011 press conference, then Ohio State football coach Jim Tressel disclosed that, in April 2010, he had received e-mails notifying him that some of his players had exchanged Ohio State memorabilia for tattoos.⁴⁸ Tressel neither forwarded the e-mails to his superiors at Ohio State nor to the NCAA.⁴⁹ “Tressel’s decision ultimately led to his resignation and an NCAA investigation.”⁵⁰

On April 20, 2011, ESPN requested that Ohio State provide access to all documents related to the NCAA’s investigation of Jim Tressel since January 1, 2010 and “[a]ll emails, letters and memos to and from Jim Tressel, Gordon Gee, Doug Archie and/or Gene Smith with key word Sarniak since March 15, 2007,” a request Ohio State rejected, citing the confidentiality provisions of FERPA, asserting it would “not release anything on the pending investigation.”⁵¹

The Ohio Supreme Court held that the requested records constituted “education records” subject to FERPA, entitling ESPN to only redacted versions of the records.⁵² Keeping in mind the Sixth Circuit Court of Appeals decision in *United States v. Miami University*, the Ohio Supreme Court here held that the records constitute “education records,” because the plain language of FERPA does not restrict “education records” to “academic performance, financial aid, or scholastic performance.”⁵³ “Education records need only ‘contain information directly related to a student’ and be ‘maintained by an educational agency or institution’ or a person acting for the institution.”⁵⁴

The impact of *State ex rel. ESPN, Inc. v. Ohio State University* on this discussion of student-athletes alleged of dangerous crimes is twofold. First, entities like ESPN and the media are entitled to request redacted records from academic institutions. Second, emails, attachments, scanned electronic records of documents sent to or by any person in an academic institution’s athletics department, and documents related to an investigation that are kept secure by the institution are protected from disclosure under FERPA. Therefore, a female student who reports a sexual assault only to the academic institution and not to law enforcement may risk producing information wholly protected from disclosure by FERPA. Of course doing so may have a major advantage for her if she wants her identity kept private. However, so too will be the perpetrator’s. A rumor about who the perpetrator might be would run into a dead end if a member of the public or school newspaper asked the university to disclose records related to identity.

⁴⁸ *Id.* ¶ 2.

⁴⁹ *Id.* ¶ 3.

⁵⁰ *Id.*

⁵¹ *Id.* ¶¶ 5–6.

⁵² *Id.* ¶ 30.

⁵³ *Id.*

⁵⁴ *Id.* (citation omitted).

Ultimately, *State ex rel. ESPN, Inc. v. Ohio State University* stands as a victory for universities who wish to keep this kind of information private.

C. Bauer v. Kincaid

One of the most crucial decisions related to criminal activity and educational privacy came in *Bauer v. Kincaid*.⁵⁵ The federal district court held in *Bauer* that criminal investigation and incident reports maintained by campus police are not education records.⁵⁶ Traci Bauer, editor-in-chief of the *Southwest Standard*, a newspaper for Southwest Missouri State University (SMSU) students,

brought an action against Southwest Missouri State University when it refused to release information about criminal occurrences committed on the SMSU campus. She claimed that under the Missouri Open Records Act (MORA), the university was obligated to provide all of the information that it collected and maintained regarding criminal activity.⁵⁷

MORA requires that all public governmental bodies provide all public records upon request with no exception as to what records were available, unless otherwise protected by law.⁵⁸

Using MORA's definition of "governmental body," the district court deemed that the Board of Regents was obligated to surrender the records to the *Southwest Standard*.⁵⁹ The *Bauer* court held that even if SMSU's Safety and Security Department was not considered a public governmental body, the department was under the legal control of the university's Board of Regents, and therefore, the records were subject to MORA.⁶⁰

The *Bauer* court concluded that FERPA is not a justification for the university officials' refusal, in violation of the state "sunshine" law,⁶¹ to release such reports to the plaintiff, who was editor-in-chief of a student newspaper.⁶²

⁵⁵ *Bauer v. Kincaid*, 759 F. Supp. 575 (W.D. Mo. 1991).

⁵⁶ *Id.* at 587.

⁵⁷ *Bauer v. Kincaid*, 759 F. Supp. 575 (1991), PRIVACY, WHAT-WHEN-HOW, <http://what-when-how.com/privacy/bauer-v-kincaid-759-f-supp-575-1991/> [<https://perma.cc/CA4Q-46HL>].

⁵⁸ *Id.*

⁵⁹ *Bauer*, 759 F. Supp. at 594.

⁶⁰ MO. REV. STAT. § 174.120 (1973); *see also Bauer*, 759 F. Supp. at 584.

⁶¹ A sunshine law requires certain state or governmental proceedings, meetings, records, votes, deliberations, and/or other official actions be open for public observation, participation, or inspection, and can vary by state in scope. REPORTERS COMM. FOR FREEDOM OF THE PRESS, THE FIRST AMENDMENT HANDBOOK 73 (7th ed., 2012), <http://www.rcfp.org/rcfp/orders/docs/FAHB.pdf> [<https://perma.cc/Z9AM-D7RG>].

FERPA, the court observed, protected as confidential any information which a student was required to produce or divulge in conjunction with application and attendance at an educational institution, and also protected academic data generated while an individual was a student at such an institution, imposing a financial penalty for disclosure of such records in order to deter their indiscriminate release. Criminal investigation records were specifically excluded, in § 1232g(a)(4)(B)(ii) [(as previously mentioned)] from the educational records that FERPA protected.⁶³

The *Bauer* court rejected the defendant's argument that, in accordance with the U.S. Department of Education's interpretation of the statute, criminal investigation reports that are kept separately from educational records but are given to persons other than law enforcement officials must be considered educational records subject to FERPA.⁶⁴ The court emphasized that "[t]he statute's exemption for law enforcement records demonstrates that law enforcement records are not considered in the same category as educational records."⁶⁵ The *Bauer* court declined to assume that the legislature intended a result that in no way furthered the plain purpose of the statute in protecting educationally related information.⁶⁶ The court held that members of the general public enjoy a First Amendment right to receive access to government records concerning crime in the community and the activities of law enforcement agencies.⁶⁷

MORA is significant in this case because it represents state law. Courts considering FERPA issues are clearly taking into consideration pieces of state legislation relating to freedom of information. All fifty states contain some form of legislation that works concomitantly with FERPA. Ultimately, the court's holding that transferred criminal reports given to people other than law enforcement personnel are not protected from disclosure is crucial. With this language, criminal reports that include identifying information about a student-athlete handed over to a university's athletic department are not protected by FERPA. *Bauer* was and remains a win for proponents of liberal disclosure of these types of materials in the control of universities.

⁶² *Bauer*, 759 F. Supp. at 595; John E. Theuman, *Validity, Construction, and Application of Family Educational Rights and Privacy Act of 1974 (FERPA)* (20 U.S.C.A. § 1232g), 112 A.L.R. FED. 1 (1993).

⁶³ *Id.* § 5[d]. See *Bauer*, 759 F. Supp. at 590.

⁶⁴ See *id.* at 591.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 594.

D. *Norwood v. Slammons*

Decided a few months after the *Bauer* decision, another federal district court in *Norwood v. Slammons*⁶⁸ attempted to narrow the scope of *Bauer*. In *Norwood*, a prospective student sued university officials, seeking disclosure of records pertaining to the university's investigation of a sexual incident in the athletic dormitory.⁶⁹ The record pertained to a highly publicized incident from February 27, 1991, involving four Arkansas Razorback basketball players and a 34-year-old woman including an audio tape of a hearing in which the four team members were disciplined for various university violations.⁷⁰ *Norwood* alleged that after the hearing, the students signed FERPA waivers, thereby allowing the defendant to discuss their punishment with the media since the waivers effectively made the hearing records "public records" under the Arkansas Freedom of Information Act of 1967.⁷¹

The *Norwood* court held the prospective student was not yet a member of the institution, only a member of the general public, and that there is no First Amendment right "of general public access to the disciplinary or investigatory records of a post-secondary educational institution."⁷² To have a FERPA claim, one must have a violation of a student right, which requires being a student, which the plaintiff was not. However, the *Norwood* court noted its limited jurisdiction, asserting that as a federal court, with federal jurisdiction, it was not the best forum to decide whether the potential student was entitled to the information under the state freedom of information act.⁷³

The *Norwood* court provides some helpful guidelines for continued examination of these issues. Investigations into sex-crimes headed by a university (and not by the police affiliate thereof) are protected by FERPA in the sense that the university is not required to release the information to the public just because the public demands it. A state law related to freedom of information may nevertheless compel the university to do so anyway. Whether Arkansas' Freedom of Information Act did indeed compel such service was, again, never addressed by the *Norwood* court. I shall briefly do so here.

Arkansas' Freedom of Information Act says "all public records shall be open to inspection and copying by any citizen of the State of Arkansas during the regular business hours of the custodian of the records."⁷⁴ The term "public

⁶⁸ *Norwood v. Slammons*, 788 F. Supp. 1020 (W.D. Ark. 1991).

⁶⁹ *Id.* at 1022.

⁷⁰ *Id.* at 1022–23.

⁷¹ *Id.* at 1023.

⁷² *Id.* at 1026–27.

⁷³ *Id.* at 1027–28.

⁷⁴ ARK. CODE ANN. § 25-19-105 (2014).

records” under the Arkansas Freedom of Information Act includes “writings, recorded sounds, films, tapes, . . . or data compilations in any medium required by law to be kept.”⁷⁵ Therefore, while the court never answered the question, the prospective Arkansas student had a valid argument that she was entitled to the information. This then means that states can compel universities to reveal information that can be disclosed under FERPA, but that the university desires not to disclose.

E. *The Virginia Tech Tragedy*

On April 16, 2007, a Virginia Tech student (whose name shall be omitted to avoid glorification)⁷⁶ murdered thirty-two of his fellow classmates and professors, wounded seventeen more, and then killed himself. The American Bar Association “implored the legal community to identify changes that could be made to prevent similar tragedies.”⁷⁷ “Communication breakdowns at various stages prevented Virginia Tech educators from developing the full picture of [the assailant’s] unhealthy behavior patterns,” and medical evaluators involved blamed the lapses on a misunderstanding of FERPA.⁷⁸ The lack of information-sharing “contributed to the failure to see the big picture. . . . [and] [a]lthough to any one professor these signs might not necessarily raise red flags, the totality of the reports would have and should have raised alarms.”⁷⁹ “[T]he Care Team’s strict interpretations of FERPA hampered their ability to investigate, causing ‘widespread lack of understanding’ through ‘conflicting practice’ as to what could and could not be shared.”⁸⁰

While the emergency was imminent and live, there is no doubt that the disclosure was allowed. Confusion and the speed at which the emergency events occurred probably led to little to no disclosure. However, Virginia Tech presents a question pertinent to this note: Are red flags or alarming information ahead of an emergency enough to constitute an emergency?

⁷⁵ *Id.* § 25-19-103(5)(A).

⁷⁶ This notation is in response to the Alex Teves Challenge, a challenge proposed by the family of one of the victims of the Aurora, Colorado mass shooting of 2012, to refrain from using the shooter’s names. *Alex Teves Challenge: Aurora Shooting Victim’s Parents Ask Media to Stop Using Suspect’s Name, Photo*, HUFFINGTON POST (July 18, 2013), http://www.huffingtonpost.com/2013/07/18/alex-teves-challenge_n_3616472.html [<https://perma.cc/BVZ8-85DV>]. The challenge can also be interpreted as a fitting suggestive moral compass in judging what should be and should not be redacted by universities when disclosing events under FERPA that do not involve imminent danger.

⁷⁷ Ward, *supra* note 30, at 407.

⁷⁸ *Id.* at 412, 434.

⁷⁹ VA. TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH 52–53 (2007), <http://www.governor.virginia.gov/TempContent/techPanelReport.cfm> [<https://perma.cc/W3EA-66EP>].

⁸⁰ Ward, *supra* note 30, at 413 (footnotes omitted).

The U.S. Department of Education didn't think so. In the aftermath of the Virginia Tech tragedy, the Department of Education released three brochures clarifying that "the Department still requires the health and safety emergency to be imminent, and permits disclosure only during the duration of the emergency."⁸¹ Overall, Virginia Tech reminds us that FERPA's health and safety exemption has significant gray area but should adequately cover a rape or sexual assault scenario similar to our student-athlete hypothetical, where the initial offense has already occurred.

V. THE CURIOUS CASE OF JAMEIS WINSTON

Jameis Winston was a prolific quarterback at Florida State University from 2012 to January of 2015. The most controversial of Winston's numerous incidents at school involved a sexual assault allegation filed against him on December 7, 2012.⁸² On December 5, 2013, State Attorney Willie Meggs announced the completion of the investigation with no charges filed, asserting that the woman's testimony lacked credibility.⁸³ Both Winston and the alleged victim at the time made allegations of improper police conduct: the victim stated she was pressured into dropping her claim; and Winston complained of inappropriate leaks to the media.⁸⁴

The *New York Times* eventually got ahold of the transcript from Winston's hearing once the hearing concluded.⁸⁵ By providing the media access to the transcript, FERPA allowed the public, through the *New York Times*, to become aware that although a medical examination of the victim revealed bruised knees and semen on the woman's body—and the victim would later identify Winston by name as her attacker—Tallahassee police reportedly never obtained a DNA sample from Winston, never interviewed him, nor attempted to obtain video of the

⁸¹ *Id.* at 432.

⁸² Dan Wolken, *State Doesn't Expect Jameis Winston to Speak With Investigators*, USA TODAY SPORTS (Nov. 15, 2013), <http://www.usatoday.com/story/sports/ncaaf/2013/11/15/jameis-winston-florida-state-sexual-assault-investigation/3578745/> [<https://perma.cc/QY5A-EK8Y>].

⁸³ Iliana L. Romero & Brendan Sonnone, *Jameis Winston Cleared of Wrongdoing After FSU Sexual Assault Conduct Hearing*, ORLANDO SENTINEL (Dec. 21, 2014, 6:16 PM), <http://www.orlando-sentinel.com/sports/florida-state-seminoles/jameis-winston/os-jameis-winston-fsu-cleared-conduct-hearing-20141221-story.html> [<https://perma.cc/9VVR-LR8V>].

⁸⁴ Richard Luscombe, *Woman in FSU Sexual Assault Case Says Local Police Told Her to Drop Claim*, GUARDIAN (Nov. 21, 2013), <https://www.theguardian.com/world/2013/nov/21/woman-fsu-sexual-assault-police-drop-claim> [<https://perma.cc/D9CR-RNV8>]; Staff report, *Jameis Winston's Attorney Says Law Enforcement Leaked DNA Results*, SPORTING NEWS (Nov. 21, 2013), <http://www.sportingnews.com/ncaa-football/news/jameis-winstons-attorney-says-law-enforcement-leaked-dna-results/1gicbapahve11b6s6gv9wisyw>.

⁸⁵ Juliet Macur, *Transcript of Winston Hearing Reveals Accuser's Words, and Florida State's Complicity*, N.Y. TIMES (Dec. 23, 2014), http://www.nytimes.com/2014/12/24/sports/ncaafootball/transcript-of-jameis-winston-hearing-reveals-accusers-words-and-florida-states-complicity.html?_r=0 [<https://perma.cc/FU29-XNZP>].

encounter taken by Seminoles teammate Chris Casher.⁸⁶ Notably, Officer Scott Angulo, who did private security work for the Seminole Boosters (the primary financier of Florida State athletics), conducted the investigation.⁸⁷ After being cleared, Winston released a statement saying:

Rape is a vicious crime. . . . The only thing as vicious as rape is falsely accusing someone of rape. [The accuser] and her lawyers have falsely accused me, threatened to sue me, demanded \$7,000,000 from me, engaged in a destructive media campaign against me, and manipulated this process to the point that my rights have and will continue to be severely compromised.⁸⁸

Two critical points should be made in light of Winston's comments. First, Winston remarkably (and arguably atrociously) equates the viciousness of an allegation of rape to the viciousness of actually being raped. Second, the case clearly had a profoundly negative effect on Winston's reputation. Consequently, his case presents a pivotal opportunity to examine FERPA as related to a famous student-athlete as well as the ambiguities of FERPA that Winston's case implicates.

The release of records from the school hearing conformed to FERPA. If they had been released prior to the completion of the investigation, the release would be a violation of FERPA and subject Florida State University to penalty under FERPA's provisions. However, the initial report to the Tallahassee Police Department represents a law enforcement record that should have been made available for release subject to Florida's Freedom of Information Act. The medical examination of the alleged victim is a closer call under FERPA. The temporal proximity of the examination may deem it not to have been an emergency subject to the health and safety exemption of a student record under FERPA. If the examination took place weeks after the incident, the emergency may be ruled over or at least non-imminent pursuant to the Secretary of Education's standards for the health and safety exemption. But if the examination was completed shortly and within a reasonable time after the alleged rape, then the report's findings of bruises and semen may be enough to constitute an emergency as the alleged perpetrator represented a danger to the community.

What seems more than just speculative is the possibility that Florida State, weary that the allegations against its star player were true and the negative attention it could incite, decided to withhold from the public documents not

⁸⁶ *Id.*

⁸⁷ Walt Bogdanich, *A Star Player Accused, and a Flawed Rape Investigation*, N.Y. TIMES (Apr. 16, 2014), <https://www.nytimes.com/interactive/2014/04/16/sports/errors-in-inquiry-on-rape-allegations-against-fsu-jameis-winston.html>.

⁸⁸ Romero & Sonnone, *supra* note 83.

protected by FERPA because they posed too much of a risk to the institution's athletic reputation and its ability to recruit the best talent in the country. If the contemporary cynic is correct that universities have evolved to be more like corporations than academic institutions, then such a cover-up theory to serve the school's economic interests is not all that farfetched.

Notably, the Florida Sunshine Law, established in 1995, guarantees that the public has access to the public records of government bodies in Florida.⁸⁹ Public records include "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of physical form, characteristics, or means of transmission, made or received" in connection with official business by any agency, and most importantly, any person in Florida can request public documents with no purpose needed.⁹⁰ In other words, Florida state law requires that Florida State University disclose documents allowable under FERPA if requested; the university cannot choose not to.

Therefore, as long as somebody in Florida requested the police report pursuant to the Florida Sunshine Law, Florida State failed to properly disclose the report under FERPA even though it was transferred to them by the Tallahassee Police Department. Florida State perhaps could have also been compelled to disclose the medical examination of the victim if the examination reasonably substantiated the claim that a health or safety emergency imminently threatened other students. Florida State abided by the guidelines of FERPA when it released the school disciplinary hearing transcript only once the investigation had concluded.

VI. FIXING THE GRAY MATTER

In 2015, the University of Louisville dismissed star basketball player Chris Jones after he sent a disturbing text to his girlfriend that he would "smack TF (the f---) out of" her.⁹¹ While the institution disclosed Jones' name in the report, the victim's name was redacted. The university released the call response report in response to a media request for it five days after the incident, pursuant to FERPA, and a restraint in Kentucky's Open Records Act exempting pending criminal investigations.⁹² The institution abided by FERPA, knew its obligations under the state's open records act and went forth correctly. While imperfect, it represents an example of how schools should properly handle educational privacy.

⁸⁹ FLA. STAT. ANN. § 119.01 (2015).

⁹⁰ FLA. STAT. ANN. § 119.011.

⁹¹ Andrew Wolfson, *Chris Jones Threatened Girlfriend, U of L Says*, COURIER-J. (Feb. 23, 2015), <http://www.courier-journal.com/story/news/local/2015/02/23/uofl-report-chris-jones-threatened-girlfriend/23906123> [<https://perma.cc/T2BP-E8FD>].

⁹² *Id.*

Revisiting our hypothetical regarding the alleged student-athlete rapist, whether information related to the basketball player could be revealed seems obvious. Though only alleged, the allegation is one a reasonable person might make. The basketball player poses an imminent emergency to the student body because of his violent behavior, his secret use of rohypnol, and his HIV status. Records belonging to the police and medical examiners would likely be free for disclosure. The police reports would be exempt from the definition of education records and the medical records would be considered education records but subject to Exemption (I), which allows for their disclosure. Assuming a pro-information state statute like Ohio's or Florida's, the hypothetical academic institution would be compelled to disclose upon public request. However, if such a case saw the light of a courtroom, plenty of room exists for a judge to interpret FERPA in a way beneficial to protecting the student-athlete. To these ends, substantial changes to FERPA can help eradicate some of the grayness and ambivalence.

One meaningful amendment to FERPA would be to include language saying: "Records that can be disclosed *shall* be disclosed if requested by the public unless otherwise provided by state statute." This language would eliminate confusion over whether a state's related statute compels disclosure if requested or simply allows disclosure. It would also reinforce FERPA's policy that whatever is not protected shall be available for disclosure.

Second, a "hold-harmless amendment" must be added to FERPA to encourage universities to disclose. The change would protect a school's funding and protect the university from civil and criminal liability if the school, in good faith, disclosed information deemed an educational record. Frank LoMonte, executive director of the Student Press Law Center, believes meaningful reform hinges on eradicating the "perception, fueled by a poorly drafted statute, that a school that slips up and mistakenly honors an open-records request will lose all of its federal money and be shut down."⁹³ Offering a funding incentive to reveal in cases of extreme notoriety would be helpful as well.

A hold-harmless FERPA amendment would be especially important in emergency health and safety situations, as the amendment would encourage educators to err on the side of disclosure. Looking at the consequences of disclosing information in opposite extremes reinforces the need to err on the side of disclosure to protect student health and safety.⁹⁴ If the university discloses information in good faith, and a subsequent investigation determines no real threat existed, the school would be immune from punishment.⁹⁵ In our hypothetical,

⁹³ FERPA, HIPPA & DPPA: How Federal Privacy Laws Affect Newsgathering, *supra* note 10. See also Frank D. LoMonte, *Why FERPA Is Unconstitutional*, INSIDE HIGHER ED (Sept. 13, 2012), <https://www.insidehighered.com/views/2012/09/13/federal-privacy-law-should-be-deemed-unconstitutional-essay> [<https://perma.cc/EWY4-PJ45>].

⁹⁴ Ward, *supra* note 30, at 423.

⁹⁵ See *id.* at 428.

having this amendment would encourage the release of the information related to the threat of the basketball player because the university would be free from liability.

A hold-harmless FERPA provision can be modeled on the hold-harmless provisions of child abuse statutes, which typically say: “[a]ny person who in good faith makes or participates in making a report of abuse or neglect . . . or participates in an investigation or resulting judicial proceeding is immune from any civil liability or criminal penalty.”⁹⁶ Simply replacing “abuse or neglect” makes for an ideal amendment. New introductory information may also be helpful as an amendment, reminding everyone that members of the general public enjoy a First Amendment right to access government records concerning community crime and law enforcement activity, not the media exclusively or independently. The court in *Bauer* articulated this point well.

Another significant FERPA amendment would be to include definitional language asserting the reasonable person standard for what constitutes imminent danger, safety, and emergency. All a university has to essentially do under the current construction of emergency is claim they did not believe an emergency was imminent. If expressly held to the reasonable person standard, decisions by universities regarding emergency situations can be held to a testable standard. The university that instead chooses to author a different definition would be subject to penalty. Thus, this important amendment would serve as an incentive for academic institutions to be fair and reasonable in assessing emergencies, danger, safety, and the temporal proximity thereof.

It is conceptually impossible to eliminate altogether the gray matter inherent in FERPA. However, tightening up many of the definitions related to health, safety, and emergencies, as well as protecting the actual academic institutions in order to encourage them to more willingly disclose, among other suggestions, will aid in repairing the unsettled matters of FERPA. In a vacuum, these suggestions would benefit the student-athlete as a student and, in serious criminal circumstances, disadvantage a student-athlete if the athlete becomes involved in a sex-crime like our hypothetical or Jameis Winston. Such a balance would be fair policy and makes sense.

VII. CONCLUSION

The Family Educational Rights and Privacy Act of 1974 provides numerous protections for students while concomitantly insinuating criticism over its interpretation. The statute has a profound effect on the student-athlete. When a high-profile student-athlete at a prolific institution is alleged to have committed a sex-crime and the threat of imminent, substantial danger exists as a result, many interests fight each other over the disclosure of related information. In the end,

⁹⁶ *Id.*

FERPA is designed to protect students, not the integrity of academic institutions. The role of state freedom of information acts further enforces this policy by compelling universities to disclose, regardless of the secondary impacts on the academic institution's finances or reputation.

Nevertheless, the number of academic institutions fearfully hiding behind FERPA in student-athlete cases is likely to increase in the future because of the continued ambiguous nature of FERPA's black letter law, Congress's deference to state law, courts' deference to the legislative history of FERPA, and the hardened tradition by many academic institutions to put financial and reputational goals ahead of First Amendment rights. Universities often play possum—frighteningly hoping that their act of playing dead by remaining silent after not disclosing when required to—will make all the turmoil vanish. For all of these reasons, changes to FERPA are necessary. Clearing up definitions and adding protections and disclosure incentives for institutions will clear up a substantial amount of FERPA's gray matter.

Whether withheld correctly or incorrectly, the fact that some institutions withhold student information under FERPA for the institutions' own benefit rather than the student's is disheartening. A fresh academic ideology would be encouraging and relatively revolutionary. The academic institution that strives to disclose or withhold student records based solely on the interests of the student and the community will be the academic institution pioneering the road to a brave new world—a brave new world of educational privacy where the beautiful of mankind's courage eradicates fear in the name of moral fulfillment and progress.