NOTE
FERPA AND STATE OPEN RECORDS LAWS: WHAT THE NORTH CAROLINA SUPREME COURT GOT WRONG IN *DTH MEDIA CORP. V. FOLT*, AND HOW COURTS & CONGRESS CAN TAKE MEASURES TO RECONCILE PRIVACY AND ACCESS INTERESTS

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INTRODUCTION

Over the past few years, courts across the country have confronted a common scenario. First, members of the public and media request records from a public university pertaining to its investigations of sexual assault and misconduct on campus. Then, the media claims it has a right to access these records under state open records laws. But the university claims that it cannot, or will not, disclose the records under the Family Educational Rights and Privacy Act of 1974 ("FERPA").[1] Finally, the media then files suit to compel disclosure.

This precise situation has occurred in North Carolina, Kentucky, Iowa, and Montana—all within the past five years.[2] Because state open

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1 Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (2018).

2 *See generally* DTH Media Corp. v. Folt, 841 S.E.2d 251 (N.C. 2020), *cert. denied*, 141 S.Ct. 1126 (mem.) (2021) (holding that the University of North Carolina at Chapel Hill must disclose to the press some disciplinary records relating to students who violated sexual assault policy as a matter of state public records law); Univ. of Ky. v. Kernel Press, 620 S.W.3d 43 (Ky. 2021) (requiring that the University of Kentucky specify which documents relating to a sexual

records laws are one of the only ways to obtain information about Title IX sexual assault proceedings, the conflict between the two laws often involves sexual assault cases. Consequently, the conflict implicates important public policy concerns. The prevalence of college campus sexual assault has sparked national debate on how to vindicate the rights of both alleged victims,[3] and perpetrators and address the underlying structural forces contributing to the problem.[4]

The conflict between state open records laws and FERPA in sexual assault situations also raises several pressing questions for courts. The most obvious issue is which law governs when the two conflict. A more implicit issue, however—and one that courts have largely avoided reaching—is how to articulate the interests involved on both sides. What are the privacy interests in sexual assault records? What is the public interest in access to those records? Do these interests conflict and, if so, how can they be reconciled?

This Note will provide an overview of how each state has confronted this complex legal situation. The merits of various state approaches will then be addressed, with particular focus on a recent North Carolina case, *DTH Media Corp. v. Folt*.[5] This Note argues that

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assault investigation of a professor qualify as "educational record[s]" for purposes of FERPA protection); Press-Citizen Co. v. Univ. of Iowa, 817 N.W.2d. 480 (Iowa 2012) (holding that certain types of records relating to an on-campus sexual assault may be kept confidential if releasing them would reveal a victim's identity, even if the victim's name is not included); Krakauer v. State *ex rel.* Comm'r of Higher Educ., 445 P.3d 201 (Mont. 2019) (determining that a student athlete who was investigated for sexual assault by the University of Montana has an enhanced privacy interest in his educational records).

3 *See Campus Sexual Violence: Statistics*, RAINN, https://www.rainn.org/statistics/campus-sexual-violence (last visited Oct. 12, 2021) (reporting that thirteen percent of all graduate and undergraduate students experience rape or sexual assault through physical force, violence, or incapacitation during their time as a student).

4 *See* Christine Emba, *Our Endless Legal Debate About Campus Rape Misses the Central Problem*, THE WASH. POST (Sept. 15, 2017), https://www.washingtonpost.com/opinions/our-endless-legal-debate-about-campus-rape-misses-the-central-problem/2017/09/15/bf79d92c-9a4c-11e7-82e4-f1076f6d6152_story.html (noting that, despite the increased societal awareness about the prevalence of sexual assault on college campuses, the issue persists, and "because it's a unique crime . . . even the most perfectly calibrated legal solution can never fully solve it."). *See also Department of Education's Office for Civil Rights Launches Comprehensive Review of Title IX Regulations to Fulfill President Biden's Executive Order Guaranteeing an Educational Environment Free from Sex Discrimination*, U.S. DEP'T. OF EDUC. (April 6, 2021), https://www.ed.gov/news/press-releases/department-educations-office-civil-rights-launches-comprehensive-review-title-ix-regulations-fulfill-president-bidens-executive-order-guaranteeing-educational-environment-free-sex-discrimination (announcing the Biden Administration's intent to overhaul the Title IX system).

5 *See* 841 S.E.2d at 263 (holding that the University must "release as public records certain disciplinary records of its students who have been found to have violated [its] sexual assault policy.").

this case was erroneously decided, both as a matter of statutory interpretation and legislative intent. Because the Supreme Court of the United States declined to review *DTH Media Corp.*, alternative ways to reconcile FERPA with state open records laws will be both examined and suggested.[6] Specifically, this Note will argue in favor of statutory amendments that either: 1) Clarify the privacy and access interests involved, so that courts may balance them; or 2) Create an ordering scheme that applies when a case implicates both FERPA and an open records law.

A. Statutory Background

Before analyzing how courts have characterized the interplay between FERPA and state records laws, it is important to understand their respective mechanics—what they cover, the interests they advance, and how they treat privacy and educational records generally.

FERPA generally prohibits universities and other institutions of higher learning ("universities") from disclosing student records with personally identifiable information to third parties without written consent.[7] The law applies to "education records," broadly defined to include "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."[8] FERPA exempts a few limited categories from this definition, including certain administrative personnel records, records maintained by a university's law enforcement unit, and non-student employee records.[9] "Directory information," which includes basic data like student names, contact information, and demographic information is also generally exempt, though students and parents can opt out of disclosure.[10]

Initially, most courts faced with interpreting FERPA read the definition of education records to exclude disciplinary records. In *Red*

6 *Id.*

7 Benjamin F. Sidbury, *The Disclosure of Campus Crime: How Colleges and Universities Continue to Hide Behind the 1998 Amendment to FERPA and How Congress Can Eliminate the Loophole*, 26 J.C. & U.L. 755, 757–58 (2000).

8 20 U.S.C. § 1232g(a)(4)(A).

9 *Id.* § 1232g(a)(4)(B).

10 *Id.* § 1232g(a)(5). *See also FERPA and Access to Public Records*, STUDENT PRESS L. CTR. (May 6, 2005), https://splc.org/2005/05/ferpa-and-access-to-public-records/ ("Schools must tell students (or the parents of minor students) what will be disclosed and give them an opportunity to submit an opt-out form; for those who opt out, even directory information is not to be disclosed.").

& Black Publishing Co. v. Board of Regents, the Georgia Supreme Court held that records related to adjudication of alleged misconduct and hazing within University of Georgia fraternities do not constitute FERPA educational records.[11] The court concluded that disciplinary records are "not the type [the statute] is intended to protect, i.e., those relating to individual student academic performance, financial aid, or scholastic probation."[12] Consequently, it ordered the University to produce the records in response to a request under Georgia's open records law.[13]

In *Miami Student v. Miami University*, the Ohio Supreme Court similarly held that disciplinary records related to alleged student misconduct do not constitute educational records for FERPA purposes.[14] Like the Georgia Supreme Court, it reasoned that disciplinary records "do not contain educationally related information . . . and are unrelated to academic performance . . . ."[15] Thus, it too ordered the release of requested records.[16]

B. Legislative Intent & Purpose

FERPA's legislative history suggests it was primarily intended to confer students and parents with a general right to privacy regarding students' educational records.[17] According to Senator James Buckley, the law's principal author, FERPA was enacted in response to growing concerns that educational institutions were gathering student information without safeguards against unauthorized disclosure.[18] However, FERPA's lack of a private right of enforcement suggests Congress was more concerned with systemic, rather than individual,

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11 Red & Black Pub. Co. v. Bd. of Regents, 427 S.E.2d 257, 261–62 (Ga. 1993).

12 *Id.*

13 *Id.* at 262.

14 *See* State *ex rel.* The Miami Student v. Miami Univ., 680 N.E.2d 956, 959–60 (Ohio 1997) (ordering a university to disclose the general location of the incident and the type of penalty imposed on the student).

15 *Id.* at 959.

16 *Id.* at 960.

17 *See* 121 CONG. REC. S13,990 (daily ed. May 13, 1975) (statement of Sen. Buckley) ("The immediate reason for the legislation was, of course, the growing evidence of the abuse of student records across the nation."). *See also* Sidbury, *supra* note 7, at 757 ("Buckley's primary justification for proposing FERPA was to control the careless release of educational information . . . .").

18 Phyllis E. Brown, *The Family Educational Rights and Privacy Act* [sic], *in* EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS, & DISCRIMINATION LITIGATION § 6:16 (Ronna Greff Schneider ed., 2019) ("FERPA was adopted as a response to a growing nationwide concern that there was not a provision to protect school records from unauthorized use.").

abuses of student privacy and confidentiality.[19] Many courts have endorsed this understanding, arguing that FERPA prohibits universities from maintaining a "policy or practice" of releasing education records without consent.[20]

Congress also enacted FERPA with transparency and access values in mind. A major function of the statute is to protect an individual's right to access records pertaining to them. FERPA requires universities to allow students and their parents to "inspect and review" their own records.[21] Thus, Congress intended FERPA to not only protect student privacy interests, but to also promote transparency and access in certain circumstances.

1. The 1998 Amendment

When Congress amended FERPA in 1998, it changed the scope of the statute's coverage, and further clarified that the statute protects both privacy and access interests.

First, Congress explicitly addressed the issue of how FERPA treats disciplinary records. FERPA was amended to allow, but not mandate, postsecondary educational institutions to disclose information about certain campus crimes and related disciplinary proceedings to third parties.[22] The amendment specifically provides that "nothing in this

19 *See id*. ("FERPA was adopted to address systemic, not individual, violations of student privacy and confidentiality rights through the unauthorized release of educational records."). *See also* Gundlach v. Reinstein, 924 F. Supp. 684, 692 (E.D. Pa. 1996), *aff'd*, 114 F.3d 1172 (3d Cir. 1997) (noting that FERPA violations occur when institutions show a "policy or practice" of releasing educational records that implicate privacy and confidentiality concerns).

20 *See generally* Matthew R. Salzwedel & Jon Ericson, *Cleaning Up Buckley: How the Family Educational Rights and Privacy Act Shields Academic Corruption in College Athletics*, 2003 WIS. L. REV. 1053 (2003) (citing the following cases: J.P. *ex rel.* Popson v. W. Clark Comm. Sch., 230 F. Supp. 2d 910, 949 (S.D. Ind. 2002) (stating that "the fact that one teacher has a habit of throwing out such notes at the end of each school year does not establish the existence of a school-wide policy or practice of throwing them out"); Daniel S. v. Bd. of Educ. of York Comm. High Sch., 152 F. Supp. 2d 949, 954 (N.D. Ill. 2001) (stating that a single incident of release of personal information is not a ""policy or practice ""sufficient to state a claim under the Buckley Amendment); Jensen *ex rel.* C.J. v. Reeves, 45 F. Supp. 2d 1265, 1276 (D. Utah 1999) ("FERPA was adopted to address systematic, not individual, violations of students' privacy . . . ."); Bauer v. Kincaid, 759 F. Supp. 575, 589 (W.D. Mo. 1991) ("FERPA provides for the withholding of federal funds otherwise available to an educational institution which has a policy or practice of permitting the release of educational records.").").

21 *See* 20 U.S.C. § 1232g(a)(1)(A) ("No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying . . . the parents of students . . . the right to inspect and review the educational records of their children.").

22 *See id.* § 1232g(b)(6)(B) ("Nothing in this section shall be construed to prohibit an institution . . . from disclosing the final results of any disciplinary proceeding conducted by such institution . . . ."); Sidbury, *supra* note 7, at 756 ("In 1998, Congress amended FERPA to allow, but not require, institutions of postsecondary education to disclose information about incidents

section shall be construed to prohibit an institution of postsecondary education from disclosing, to an alleged victim of any crime of violence . . . or a nonforcible sex offense, the final results of any disciplinary proceeding . . . against the alleged perpetrator . . . ."[23] Thus, universities may disclose the names of perpetrators, the violent or "nonforcible sex" offenses they committed, and the results of disciplinary proceedings.[24] They may also disclose the names of other students involved, including victims or witnesses, with the consent of those students.[25]

These changes reflect a balance of both access and privacy interests. On the one hand, as Senator McIntyre explained, "[t]he intent of the amendment was to allow openness of school records."[26] Specifically, the amendment was a response to concerns about universities using FERPA as an excuse to not release information of public concern. Before the 1998 amendment, universities could interpret FERPA as allowing them to conceal information about campus crime and disciplinary proceedings from the public eye. Many educational institutions abused this interpretation and used it as a shield against releasing information unfavorable to them.[27] Congressional clarification that "nothing in this section . . . shall prohibit" universities from releasing disciplinary records was intended to curb this abuse by clarifying that nondisclosure was not a statutory requirement.[28]

On the other hand, the Amendment leaves room for universities to consider student privacy interests. The permissive language of "nothing in this section *shall be construed to prohibit*" is key,[29] as it clearly indicates that universities are not required to disclose records of disciplinary proceedings. The text of the rule easily could have

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of campus crime to third parties.").

23 20 U.S.C. § 1232g(b)(6)(A).

24 *Id.* § 1232g(b)(6)(C)(i). *See also* Sidbury, *supra* note 7, at 756 ("The information that universities may disclose is limited to the name of the perpetrator, the violation committed, and the result of the disciplinary proceeding.").

25 20 U.S.C. § 1232g(b)(6)(C)(ii).

26 120 CONG. REC. S39,858 (statement of Sen. McIntyre); Salzwedel & Ericson, *supra* note 20, at 1064.

27 *See* Salzwedel & Ericson, *supra* note 20, at 1107 (arguing that universities could deal with campus crimes as conduct subject to disciplinary board hearings, and could thus deny awareness of and not have to disclose information about said crimes) (citing Maureen P. Rada, *The Buckley Conspiracy: How Congress Authorized the Cover-Up of Campus Crime and How it Can be Undone*, 59 OHIO ST. L.J. 1799, 1814–15 (1998).

28 20 U.S.C. § 1232g(b)(6)(B). *See also* Salzwedel & Ericson, *supra* note 20, at 1071 ("[S]ince 1974, Congress has occasionally relaxed the law's nondisclosure requirements, particularly in the area of campus crime and student disciplinary proceedings.").

29 20 U.S.C. § 1232g(b)(6)(B) (emphasis added).

mandated or categorically prohibited disclosure of disciplinary records. Thus, the amendment's plain text clearly grants universities discretion to either withhold or disclose these records based on any relevant factors, including the sensitive privacy interests of students in sexual assault disciplinary proceedings.

Ultimately, FERPA's overarching structure reflects a balance between two Congressional desires: Protecting student privacy and promoting educational institution transparency.

2. State Open Records Laws

Every state has some version of an open records law that provides public access to its government's records.[30] Generally, these laws create a presumption in favor of access unless a record falls under a specifically exempted category.[31] Consequently, courts tend to construe state open records laws broadly to include many types of records.[32] Codified exemptions reflect a legislative judgment that there is either no public value in the information contained in those records, or that some other value overrides the public interest in access.[33]

Most state open records laws include an exemption for records containing information that, if disclosed, would constitute an unwarranted invasion of privacy.[34] Although state statutes define the

30 *See* Roger Nowadzky, *A Comparative Analysis of Public Record Statutes*, 28 URB. LAW. 65, 65 (1996) ("While each state's public records statute may be uniquely drafted, there is . . . commonality in the approaches taken."). *See also* STUDENT PRESS L. CTR., *supra* note 10 ("Every state has a public-records law requiring state and local government agencies . . . to disclose upon request the documents they maintain.").

31 *See, e.g.*, N.Y. PUB. OFF. L. § 84 (McKinney) (containing a statement of policy that "the public, individually and collectively and represented by a free press, should have access to the records of government . . . ."); CAL. GOV'T CODE § 6253(b) (West 2020) (stating that all records not falling within an exemption must be disclosed); 5 ILL. COMP. STAT. § 140/3 (2019) (requiring that each public body grant public access to requested records, unless within a limited category of exceptions).

32 *See, e.g.*, Ohio *ex rel.* Cincinnati Post v. Schweikert, 527 N.E.2d 1230, 1232 (Ohio 1988) ("Further, the law's public purpose requires a broad construction of the provisions defining public records."); Memphis Publ'g Co. v. Cherokee Child. & Fam. Servs., 87 S.W.3d 67, 78 (Tenn. 2002) (determining that public records laws apply to independent contractors who are working for the government); O'Neill v. City of Shoreline, 240 P.3d 1149, 1153 (Wash. 2010) ("In sum, 'public record' is defined very broadly, encompassing virtually any record related to the conduct of government.").

33 *See* STUDENT PRESS L. CTR., *supra* note 10 ("Every state open-records act excludes certain categories of records from disclosures because legislators have decided there is no overriding public interest in the information.").

34 *See, e.g.*, COLO. REV. STAT § 24-72-204(6)(a) (West 2021) (permitting the state to refuse to disclose records if it would cause substantial injury to public interest, including privacy harms); D.C. CODE ANN. § 2-534(a)(2) (West 2021) (exempts records containing information "of a personal nature where the public disclosure thereof would constitute a clearly unwarranted

scope of this privacy exemption with varying degrees of specificity, most courts interpret it with a balance-of-interests approach. Under this approach, a court will first determine whether the information contained in the records is private enough to overcome the general presumption in favor of disclosure.[35] Then, the court must weigh this privacy against the possible benefits of allowing public access to the records.[36]

Many states do specifically exempt all education-related records, often through other statutes. For example, California's educational code asserts that "[a] school district shall not permit access to pupil records to a person without written parental consent or under judicial order . . . ."[37] Florida law similarly provides that students have a right of privacy in their own records.[38] In yet other states, courts have been the ones to determine that certain education-related records are exempt; some of these courts have specifically found disciplinary ones exempt.[39]

The more common scenario, though, is that neither a state's open records law, nor any other law, expressly addresses education-related

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invasion of personal privacy"); Young v. Rice, 826 S.W.2d 252, 255 (Ark. 1992) (explaining that public interest must be balanced against a "clearly unwarranted personal privacy invasion."); Dir., Ret. & Benefits Servs. Div., Off. of the Comptroller v. Freedom of Info. Comm'n, 775 A.2d 981, 987–92 (Conn. 2001) (determining that a state employee home address is private enough to warrant protection).

35 *See, e.g.*, Herald Co. v. Ann Arbor Pub. Schs., 568 N.W.2d 411, 414 (Mich. App. 1997) ("In determining whether the information withheld is of a 'personal nature . . . the customs, mores, or ordinary views of the community' must be taken into account.") (citation omitted); Deseret News Publ'g. Co. v. Salt Lake County, 182 P.3d 372, 380 (Utah 2008) (holding that to be exempt from disclosure, public records must invade personal privacy in a "clearly unwarranted" manner).

36 *See, e.g.*, Perkins v. Freedom of Info. Comm'n, 635 A.2d 783, 791 (Conn. 1993) ("[T]he invasion of personal privacy exception . . . precludes disclosure . . . only when the information sought by the request does not pertain to legitimate matters of public concern and is highly offensive to a reasonable person."); Comm'n on Peace Officer Standards & Training v. Superior Ct., 165 P.3d 462, 477 (Cal. 2007) (holding the privacy interests of public officers generally do not outweigh the public interest in accessing basic information like officer names and employment status); Sarasota Herald-Trib. v. Florida, 916 So. 2d 904 (Fla. Dist. Ct. App. 2005) (holding that public interest in open trials outweighs privacy interests in keeping victim autopsy photos undisclosed); In Def. of Animals v. Or. Health Scis. Univ., 112 P.3d 336, 347–48 (Or. Ct. App. 2005) (ruling that public interest in disclosure of staff records does not outweigh privacy interests of employees when staff had been harassed in the past).

37 CAL. EDUC. CODE § 49076(a) (West 2018).

38 *See* FLA. STAT. § 1002.22(2)(d) (2021) ("Students and their parents shall have the right of privacy with respect to such records and reports.").

39 *See, e.g.*, Fla. State Univ. v. Hatton, 672 So. 2d 576, 579–80 (Fla. App. 1996) (holding investigational records about student disciplinary proceedings containing student-identifying information exempt from state open records law); Chi. Trib. Co. v. Bd. of Educ. of Chi., 773 N.E.2d 674, 681–82 (Ill. App. Ct. 2002) (holding that the Illinois Freedom of Information Act exempts all files "maintained" about students and that "maintained" is a "very broad" term).

records. This situation can be found in North Carolina, whose Public Records Act ("Public Records Act") defines public records as "all . . . material . . . made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions."[40] North Carolina courts have construed this provision liberally, holding that "unless either the agency or the record is specifically exempted from the statute's mandate," records created by the state are public.[41] The Public Records Act does not outline an explicit exception for certain kinds of education-related records. It does, however, exempt records from disclosure when "otherwise specifically provided by law."[42] Whether or not this language implies FERPA is unclear.

C. The Question of Preemption

When cases arise that implicate open records laws and student records, courts are left to evaluate what records can and should be released, and how FERPA factors into the analysis. This evaluation requires courts to engage in preemption analysis.

Rooted in the Supremacy Clause, preemption doctrine mandates that if state law conflicts with federal law that regulates the same kind of conduct, federal law prevails.[43] There are a few ways that a federal law might preempt a conflicting state law. The first is conflict preemption, which exists where "compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[44] The second form of preemption is referred to as field preemption, in which "Congress has forbidden the State to take action in the *field* that the federal statute [preempts]."[45]

Accordingly, when a court addresses a case seemingly governed by both FERPA and a state's open records law, it must decide if the situation is covered by conflict or field preemption, or if the statutes do

40 N.C. GEN. STAT. § 132–1(a) (West 1995).

41 DTH Media Corp. v. Folt, 841 S.E.2d 251, 258 (N.C. 2020), *cert. denied*, 141 S.Ct. 1126 (mem.) (2021) (quoting Times-News Pub. Co. v. State, 476 S.E.2d 450, 452 (N.C. Ct. App. 1996)).

42 N.C. GEN. STAT. § 132–1(b) (West 1995).

43 *See* Kansas v. Garcia, 140 S.Ct. 791, 801 (2020) ("The Supremacy Clause provides that the Constitution, federal statutes, and treaties constitute the supreme Law of the Land . . . . [and] provides a rule of decision for determining whether federal or state law applies in a particular situation.") (internal quotations omitted).

44 Oneok, Inc. v. Learjet, Inc., 575 U.S. 373, 377 (2015) (citing California v. ARC America Corp., 490 U.S. 93, 100–01 (1989) (internal quotations omitted)).

45 *Id.*

not conflict at all.

I. HOW NORTH CAROLINA APPROACHED THE INTERSECTION BETWEEN FERPA AND ITS OPEN RECORDS LAW

In 2020, the North Carolina Supreme Court decided whether FERPA preempts the Public Records Act in *DTH Media Corp. v. Folt*.[46] Plaintiff *The Daily Tar Heel*, the student newspaper at the University of North Carolina at Chapel Hill ("UNC"), sought administrative records of Title IX proceedings identifying students found responsible for sexual misconduct.[47] The requests sought information describing the nature of the sexual misconduct and punishments enforced by the University.[48] Citing FERPA, UNC refused to turn the records over.[49] The University argued that FERPA's provision on sexual assault disciplinary proceedings gives it discretion to not disclose the names of students found guilty, specific violation(s) committed, and sanction(s) imposed.[50] UNC then argued that, in exercising this statutorily-conferred discretion, it properly concluded that releasing the records would "lead to the identification of victims, jeopardize the safety of the University's students, violate student privacy, and undermine the University's efforts to comply with Title IX."[51] This federally-authorized discretion, UNC reasoned, preempts any disclosure obligations it may have under the Public Records Act.[52]

The North Carolina Supreme Court disagreed. First, it held that, as a matter of statutory construction, FERPA does not give UNC the discretion to withhold disciplinary records of this nature. The court noted that there is "no express provision in FERPA" that grants a university discretion to withhold the information sought by *The Daily Tar Heel*.[53] It then rejected the proposition that such discretion can be inferred from FERPA's language that "[n]othing in this section shall be construed to prohibit an institution . . . from disclosing the final results of any disciplinary proceeding . . . against . . . an alleged perpetrator of .

46 *See* 841 S.E.2d 251, 263 (N.C. 2020) (holding preemption doctrine inapplicable in the case before the court).
47 *Id.* at 254.
48 *Id.*
49 *Id.*
50 *Id.* at 258.
51 *Id.*
52 *See* 841 S.E.2d 251, 254 (N.C. 2020)
53 *Id.* at 258.

. . a non-forcible sex offense."[54]

Instead, the court read this language to be mandatory and to specify a category of records subject to disclosure: disciplinary records related to sexual assaults.[55] The court cited as further evidence the FERPA section which provides that "final results" of any disciplinary proceeding "shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student."[56]

Finding that this language creates a category of records subject to mandatory disclosure, the court held that FERPA does not conflict with the Open Records Act.[57] Indeed, the court noted that the Open Records Act has been "interpreted consistently . . . as intended for liberal construction affording ready access to public records . . . ."[58] Accordingly, preemption was unnecessary, because both statutes mandated disclosure of the requested records.[59]

A. What the North Carolina Supreme Court Got Wrong

The North Carolina Supreme Court erroneously decided *DTH Media Corp. v. Folt*. As a matter of statutory interpretation, the court failed on two main fronts: It misread FERPA's plain language and misunderstood its purpose.

1. Plain Language

First, the court misread the plain meaning of FERPA's text.[60] "Nothing in this section shall be construed to prohibit [a university] from disclosing the final results of any disciplinary proceeding" is not

54 20 U.S.C. § 1232g(b)(6)(B); *DTH Media Corp.*, 841 S.E.2d at 259.

55 *See* 841 S.E.2d at 257, 259 ("We conclude that . . . 20 U.S.C. § 1232g(b)(6)(B) did not grant implied discretion . . . to determine whether to release the results of a student disciplinary proceeding emanating from rape, sexual assault, or sexual misconduct charges in absence of language expressly granting such discretion.").

56 *See id.* at 260 (finding that because the statute does not *expressly* mention disclosure of offense dates, such dates do not mandatorily need to be disclosed).

57 *See id.* at 259 ("Since FERPA contains no such [permissive] language, but instead specifies that the categories of records sought here are . . . subject to disclosure . . . we see no conflict between the federal statute and the state Public Records Act.").

58 *Id.*

59 *See id.*

60 *See* Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002) (stating that analysis of statutory construction begins with the language of the statute); Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) (explaining that if the statutory language has a "plain and unambiguous meaning," the inquiry ends with the text).

mandatory language.[61] To prohibit is to "officially forbid" something.[62] Congress simply stated that nothing shall officially get in a university's way of disclosing disciplinary records. This has a different meaning than to affirmatively *require* universities to disclose such records. To require is to "make it officially necessary for someone to do something."[63] If Congress intended FERPA to require disclosure of disciplinary records related to sexual assault proceedings, it more likely would have used language like 'universities *must* disclose,' or 'universities are *required* to disclose.'[64] Absent such language, the best reading of "nothing shall prohibit" is that nothing in FERPA officially prevents or forbids universities from releasing disciplinary records. The logical conclusion from this reading, then, is that FERPA leaves the choice to disclose to the universities themselves. The court even recognizes this distinction, if only implicitly, later in the opinion when it describes the provision as "allow[ing] disclosure."[65] Allowing is simply not the same thing as requiring disclosure.

The court also misread the text providing that "the final results of any disciplinary proceeding shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student."[66] Nothing in this language creates a mandatory obligation on the part of a university to disclose disciplinary records as a general category. Rather, it is merely a definitional provision that clarifies that when universities decide to release disciplinary records, FERPA limits disclosure to three types of information.

2. Statutory Purpose

Second, the North Carolina Supreme Court erred by not looking to the overall design and purpose of FERPA, which confirms university discretion to release sexual assault disciplinary records.[67] FERPA is a

61 20 U.S.C. § 1232g(b)(6)(B).

62 *Prohibit*, CAMBRIDGE ACAD. CONTENT DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/prohibit (last visited Oct. 21, 2021).

63 *Require*, CAMBRIDGE BUS. ENGLISH DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/require (last visited Oct. 21, 2021).

64 *See* W. Va. Univ. Hosps. v. Casey, 499 U.S. 83, 98 (1991) (stating that the best evidence of Congressional purpose is statutory text).

65 DTH Media Corp. v. Folt, 841 S.E.2d 251, 259 (N.C. 2020), *cert. denied*, 141 S.Ct. 1126 (mem.) (2021).

66 20 U.S.C. § 1232g(b)(6)(B).

67 *See* Sec. and Exch. Comm'n v. C. M. Joiner Leasing Corp., 320 U.S. 344, 350–51 (1943) ("[C]ourts will construe the details of an act in conformity with its dominating general purpose, [and] will read text in the light of context . . . so as to carry out . . . the generally expressed legislative policy.").

protective statute; its provisions are designed to *prevent* disclosure of student information to third parties without student or parental consent.[68] It does contain a few exceptions, including for personnel records and basic "directory information" such as addresses.[69] But even among these exemptions, the only one that directly covers information about students—the directory information one—includes an opt-out provision.[70] This statutory context illustrates that the "overall design" of FERPA is primarily aimed at keeping sensitive student information from public view absent consent.[71] The North Carolina Supreme Court's reading requiring mandatory disclosure of disciplinary records is totally inconsistent with this overarching protective statutory scheme.[72]

B. Alternative Paths the Court Could Have Taken

Had the court properly interpreted FERPA's disciplinary records provision, it could have taken two different approaches to solving the issue in the case. Neither approach warrants the decision that UNC had to disclose the disciplinary records in their entirety.

First, the court could have found a conflict between FERPA and the Open Records Act. Treating FERPA as a protective statute and reading the disciplinary records provision in light of that design conflicts with the overall design and purpose of the Open Records Act. Again, the court stated that North Carolina courts have "consistently" interpreted the latter as "intended for liberal construction affording ready access to public records, subject to limited exceptions."[73] In other words, the Open Records Act is a mandatory disclosure statute designed to facilitate the release of government information. This interpretation conflicts with FERPA, a protective statute specifically designed to prevent disclosure of student records as a matter of federal

68 *See supra* note 17 (discussing the policy concerns behind FERPA's introduction).

69 20 U.S.C. §§ 1232g(a)(4)(B)(i)–(5)(A).

70 *Id.* § 1232g(a)(5)(B).

71 320 U.S. at 350–51.

72 The weight of academic authority also supports a permissive reading of FERPA's provision regarding sexual misconduct disciplinary proceeding records. *See, e.g.*, Sidbury, *supra* note 7, at 757 ("The language of [the 1998 FERPA amendment] leaves this determination to the discretion of the institution."); Emma B. Bolla, *The Assault on Campus Assault: The Conflicts Between Local Law Enforcement, FERPA, and Title IX*, 60 B.C. L. REV. 1379, 1382 (2019) (describing the "current permissive standard of [disclosure]" as per FERPA).

73 DTH Media Corp. v. Folt, 841 S.E.2d 251, 259 (N.C. 2020), *cert. denied*, 141 S.Ct. 1126 (mem.) (2021).

policy.[74] In this case, FERPA preempts North Carolina law as per the Supremacy Clause.[75] Consequently, there would be no legal basis for ordering UNC to release the records.

The second route is actually one that the court took, but did so improperly. Courts routinely try to construe statutes to avoid finding direct, irreconcilable conflicts of interpretation. Indeed, the court cited the canon: "Statutes *in pari materia* must be harmonized, 'to give effect, if possible,' to all provisions without destroying the meaning of the statutes involved."[76] The court then reasoned that its understanding of FERPA "reconciles and harmonizes" it with state law because both require mandatory disclosure of disciplinary records.[77] Yet, this approach completely ignored FERPA's main purpose: to protect student privacy absent consent.[78] Contrary to the court's intent, there was no "harmonization" because the court did not give effect to "all" relevant provisions and "destroy[ed] the meaning" of one of the two statutes at issue.

Instead, the court should have acknowledged that FERPA is generally designed as a protective statute, but that it also discourages institutional secrecy.[79] Under this reading, the protective parts of FERPA may be in tension with the Open Records Act, but the statutes are not completely irreconcilable. The court could have found that both laws require universities to release records of sexual assault and misconduct proceedings to the extent that doing so would not reveal any information that jeopardizes the privacy interests of individual students. For example, the court could have read both laws as requiring UNC to disclose records showing what punishments students got for which violations, with redactions of information harmful to the named students. This could have harmonized FERPA's role as a protective statute, and its interest in promoting institutional openness, with the Open Records Act's general presumption in favor of disclosure.

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74 *See supra* note 17 (explaining the reasons behind FERPA's introduction).

75 *See* U.S. CONST. art. VI, § 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land . . . .").

76 841 S.E.2d at 257 (citing Carter-Hubbard Publ'g Co. v. WRMC Hosp. Operating Corp., 633 S.E.2d 682, 685 (N.C. Ct. App. 2006), *aff'd*, 641 S.E.2d 301 (N.C. 2007)).

77 *See id.* at 259 (holding that records at issue were, by mandate, subject to disclosure).

78 *See* Sidbury, *supra* note 7, at 757–58 (describing Senator Buckley's main justification for FERPA as to control the careless release of educational information). *See also* SCHNEIDER, *supra* note 18, at § 6:16 (describing FERPA as establishing "principally a right to privacy of educational records.").

79 *See* 120 CONG. REC. S39,858 (statement of Sen. McIntyre) ("The intent of the amendment was to allow openness of school records.").

II. ALTERNATIVE APPROACHES—HOW OTHER STATES HAVE MORE APPROPRIATELY DEALT WITH THE INTERSECTION OF FERPA AND OPEN RECORDS LAWS

Courts in other states (as well as some federal courts) have addressed potential conflict between FERPA and open records laws differently from the *DTH Media Corp.* decision.

In *Press-Citizen Co. v. University of Iowa*, the Supreme Court of Iowa faced a similar fact pattern as that faced by the North Carolina Supreme Court.[80] In this case, the student newspaper at the University of Iowa requested records related to alleged sexual assaults under the Iowa Open Records Act.[81] The Supreme Court of Iowa reconciled this state law with FERPA by limiting disclosure to redacted records that do not disclose personally-identifying information.[82] The court also held that it may be consistent with both statutes to withhold records entirely where the requester would otherwise know the identity of the involved student(s), despite redactions.[83] The court believed this approach was consistent with both the Iowa Open Records Act *and* FERPA's overarching purpose of student confidentiality protection.[84]

Other courts have deployed a balance-of-interests analysis. For instance, the Ohio Supreme Court did so in *State ex rel. The Miami Student v. Miami University.*[85] There, the Miami University student newspaper requested student disciplinary records from the administration to report on campus crime trends.[86] The administration first refused to release the records.[87] After an Ohio Public Records Act request, the University released them but, citing FERPA, redacted "the identity, sex, and age of the accused, as well as the date, time and location of the incidents . . . ."[88] The court acknowledged both interests

80 *See* 817 N.W.2d 480, 492 (Iowa 2012) (permitting redactions to protect a victim's identity).

81 *Id.* at 482–83.

82 *Id.* at 492.

83 *Id.* The trial court reviewed the contested records *in camera* to make determinations about what needed to be redacted, and about whether the requester would be able to identify the students even with redactions. *Id.* at 482.

84 *See id.* at 492 (stating that the overarching goal of FERPA, protecting student confidentiality, was paramount even when considering state law).

85 State *ex rel*. The Miami Student v. Miami Univ., 680 N.E.2d 956 (Ohio 1997).

86 *Id.*

87 *Id.*

88 *Id.*

at play, the "fundamental policy of promoting open government" underscoring Ohio's Public Records Act, and FERPA's goal of protecting private student information from disclosure.[89] It ultimately found that the University releasing the disciplinary records but redacting certain identifiable information that could put student safety and privacy at risk was an appropriate way to balance these competing interests.[90]

The Montana Supreme Court took a similar approach in recent cases involving disciplinary records that addressed alleged sexual assaults near the University of Montana campus. In *Krakauer v. State by and Through Christian*, the court held that FERPA's prohibition of unilateral disclosure of personally-identifying information applies when journalists seek records under the Montana Constitution's right of access to public records.[91] The Montana Supreme Court remanded the case and ordered the district court to: 1) Conduct an *in camera* review of the requested records; and 2) Balance the students' "enhanced" privacy interests with the public's constitutional right of access in determining whether the records may be released.[92]

On remand, the district court found that the journalist's interest in accessing the records outweighed students' privacy interests. The Montana Supreme Court, reviewing the appeal from that remand, disagreed. It reasoned that: 1) The student named in the records demonstrated an actual privacy interest in his disciplinary records; 2) There is a social interest in recognizing a reasonable student's actual privacy interest; 3) Redaction of personally-identifiable information in some situations would be futile; and 4) The student's demand for individual privacy outweighs the public interest in disclosure.[93]

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89 *Id.* at 958–59.

90 *See id* (ruling that the University could have redacted even more categories of student information to protect student safety and privacy). .

91 381 P.3d 524, 536 (Mont. 2016).

92 *Id.* at 533–34 ("In the context of this particular case . . . the national and state legislatures have taken the affirmative action of enacting legislation establishing the privacy interests of students in their records, as a matter of law. This action sets this case apart from others involving general privacy interests, and courts must honor the unique privacy protection legislatively cloaked around the subject records by factoring that enhanced privacy interest into the balancing test.").

93 Krakauer v. State *ex rel.* Comm'r of Higher Educ., 445 P.3d 201, 207, 212 (Mont. 2019), *cert. denied*, 140 S.Ct. 1107 (mem.) (2020) ("[A] court must still determine whether a student has an actual privacy interest in his records based on the facts of the case. Where the court finds the privacy interest exists, robust protection in favor of individual privacy [exists too] . . . .").

III. FINDING A SOLUTION—HOW TO BEST RECONCILE STUDENT PRIVACY WITH PUBLIC ACCESS INTERESTS

Though the most effective way to reconcile FERPA with state open records laws is through United States Supreme Court clarification, the Court recently denied UNC's petition for certiorari.[94] Yet, as UNC pointed out in its petition and as this discussion has illustrated, many courts across the country have confronted the difficult question of how to reconcile FERPA with state open records laws.[95] Those courts have reached very different decisions based on different methodologies and rationales.

Given public debate over how universities should conduct disciplinary proceedings related to sexual assault, and the Biden administration's plan to overhaul Title IX campus sexual assault rules,[96] this question will not go away anytime soon.[97] Members of the press and public will continue to request student disciplinary records, and courts will have to ascertain whether disclosure is required, prohibited, or discretionary based on FERPA and state open records laws.[98]

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94 *See generally* Guskiewicz v. DTH Media Corp., 141 S.Ct. 1126 (2021) (denying UNC's petition for certiorari).

95 Petition for Writ of Certiorari by the University of North Carolina at Chapel Hill at 19–22, Guskiewicz v. DTH Media Corp., 141 S.Ct. 1126 (mem.) (2021) (No. 20-527) [hereinafter Petition] ("This Court's review is . . . warranted because the question presented is important and is likely to generate disparate rules for thousands of colleges and universities across the country . . . . [and] involves a recurring issue of federal law . . . generating confusion among courts . . . .").

96 Tyler Kingkade, *Biden Administration Announces Next Steps in Overhauling Title IX Campus Sexual Assault Rules*, NBC NEWS (April 6, 2021, 9:00 AM), https://www.nbcnews.com/news/us-news/biden-administration-announces-next-steps-overhauling-title-ix-campus-sexual-n1263113.

97 *See* Petition, *supra* note 95, at 22–23 ("[T]his case is hardly the first that has required a court to . . . decid[e] 'where disclosure ends and where confidentiality begins' under potentially conflicting state and federal statutory schemes.") (internal citations omitted). *See also* Press-Citizen Co. v. Univ. of Iowa, 817 N.W.2d 480, 486–87 (Iowa 2012) (quoting Caledonian–Rec. Publ'g Co. v. Vt. State Coll., 833 A.2d 1273, 1274–76 (Vt. 2003) (providing an extensive overview of litigation regarding FERPA and public records laws, and noting that "state and federal courts are sharply divided" in outcomes).

98 The Kentucky Supreme Court recently faced the same scenario after the United States Supreme Court denied certiorari in *DTH Media Corp.*: Members of the University of Kentucky student-run newspaper requested the University's files pertaining to allegations of sexual assault by a faculty member. Univ. of Ky. v. Kernel Press, 620 S.W.3d 43, 47–48 (Ky. 2021). The Kentucky Supreme Court held that the University did not comply with its obligations under the Kentucky Open Records Act and that it could not withhold the entire investigatory file under FERPA. *Id.* at 55–58. It reasoned that FERPA's protective provisions should be construed narrowly, so that universities cannot use the law as "an invisibility cloak" for institutional secrecy. *Id.* at 57.

Absent a Supreme Court ruling, those decisions will probably continue to yield a wide range of results. Consequently, this nationwide patchwork of decisions will leave universities facing "uncertain and conflicting rules about the extent of their discretion to disclose education records related to sexual assault proceedings."[99]

Fortunately, there are ways to avoid this outcome. One approach would be for state legislatures to explicitly incorporate FERPA's confidentiality requirements into open records laws. Some states reference federal law in their open records laws, but do not explicitly discuss FERPA. In Iowa, for example, the state's open records law contains language meant to preclude any conflict with federal law that would lead to revocation of funds. The Iowa Open Records Act provides:

> If it is determined that any provision of this chapter would cause the denial of funds, services, and essential information from the United States government which would otherwise definitely be available to an agency of this state, such provision shall be suspended as to such agency, but only to the extent necessary to prevent denial of such funds, services, or essential information.[100]

When the Iowa Supreme Court addressed a case implicating both FERPA and the Open Records Act, it relied on this language to conclude that the Iowa Open Records Act incorporates and "gives priority" to the non-disclosure rules of FERPA.[101] In other words, because FERPA's enforcement mechanism is the revocation of federal funds, the court reasoned that state universities cannot release records that conflict with FERPA's protective measures.[102] Yet, this is a circuitous way to address any conflict between the two laws, because the Open Records Act does not explicitly reference FERPA by name, nor does it describe which elements of FERPA are incorporated into the Act.

A better approach would be for states to simply amend their open records laws to: 1) *Explicitly* reference FERPA and exempt any records subject to its protection; and 2) Reiterate that these state laws do not eliminate the discretion conferred by FERPA. This approach would resolve any ambiguity faced by state courts in cases where FERPA seems to conflict with state law. Alternatively, Congress could be the one to take action, and could amend FERPA to directly address state

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99 *See* Petition, *supra* note 95, at 26 ("This Court alone can provide the clarity necessary to resolve that confusion and ensure that universities across the United States know exactly what their obligations are moving forward.").

100 IOWA CODE § 22.9 (2021).

101 817 N.W.2d at 487–88.

102 817 N.W.2d at 487–88.

open records laws. There are two ways Congress could make this change.

First, Congress could make clear that the disciplinary records provision confers universities discretion to not disclose records related to sexual assault disciplinary proceedings, notwithstanding state open records laws.[103] In this case, preemption would be explicit. Yet, to prevent universities from using FERPA as a shield against disclosure of merely embarrassing or unfavorable information,[104] Congress could require universities give sufficient reasons for nondisclosure subject to *in camera* review by a federal court.

This approach would be beneficial for a few reasons. First, absent a Supreme Court ruling, amendment of federal law is the most efficient way to uniformly resolve the issue. Second, this approach would reflect the dual purposes of FERPA: Its primary purpose of safeguarding student privacy, and its secondary purpose of discouraging institutional secrecy with minimal impact on public interest in open access. State laws would still largely allow public access to government documents, but leave the limited category of student disciplinary records related to sexual assault subject to presumptive university discretion. And that discretion, if challenged, would still be subject to judicial review.

The second approach would be for Congress to amend FERPA to codify the balance-of-interests approach. Congress could provide that FERPA gives universities discretion over disclosure of sexual assault disciplinary records, *unless* an overriding public interest exists.[105] This statutory scheme would establish a presumption in favor of university discretion, with an exception for particularly newsworthy or important public information. Congress could also specify that certain kinds of information are so sensitive that they must be redacted even if a

103 The proposed language would be placed in 20 U.S.C. § 1232g(b)(6)(B).

104 *See, e.g.*, Univ. of Ky. v. Kernel Press, 620 S.W.3d 43, 57 (Ky. 2021) ("The FERPA 'education record' exclusion was clearly not intended as an 'invisibility cloak' that can be used to shield any document that involves or is associated in some way with a student."); Zach Greenberg & Adam Goldstein, *Baking Common Sense into the FERPA Cake: How to Meaningfully Protect Student Rights and the Public Interest*, 44 J. LEGIS. 22, 39 (2017) (arguing that universities use FERPA "as a sword to curtail government transparency" by withholding information that was never private).

105 This approach reflects the Montana Supreme Court in both Krakauer v. State *ex rel.* Christian, 381 P.3d 524 (Mont. 2016), and Krakauer v. State *ex rel.* Comm'r of Higher Educ., 445 P.3d 201, 207, 212 (Mont. 2019), *cert. denied*, 140 S.Ct. 1107 (mem.) (2020). Like in the Montana approach, judges would conduct *in camera* review of the disputed records to make this balance-of-interests determination. *See* 381 P.3d at 540 (requiring the district court on remand to conduct an *in camera* review of the records as part of its balancing of competing interests).

university discloses them, regardless of newsworthiness.

There would be several benefits to this approach. Courts are well-equipped to conduct this kind of balance-of-interests analysis. They perform balancing tests all the time under various statutes; even most state open records laws require such analysis to construe privacy exemptions.[106] In addition, as recognized by the Montana Supreme Court, unique privacy and access issues involved with allegations of sexual assault and misconduct make a contextual, case-by-case approach proper: Rape culture on college campuses is an issue of "increasing public interest and concern," as is Title IX compliance.[107] But on the other side of the coin rests the privacy interests students have in keeping these records, which contain sensitive information that could have severe reputational, emotional, and safety implications for both alleged perpetrators and victims.[108] *In camera* review by courts would ensure that these sensitive and context-specific determinations take into account all of the interests involved.[109] Amending FERPA to instruct courts to balance these interests would promote uniformity while allowing for the contextual, case-by-case adjudication that these situations often warrant.

CONCLUSION

The North Carolina Supreme Court's decision in *DTH Media Corp. v. Folt* is particularly problematic as a matter of statutory interpretation. But as this Note has illustrated, there are several analytical approaches courts could take to better harmonize and reconcile FERPA with state open records laws. North Carolina is not alone among states that have struggled—and will continue to struggle—reconciling FERPA with their own open records laws in the context of sexual assault disciplinary proceedings. The Supreme Court's unwillingness to provide guidance leaves state legislatures and Congress as the ideal legislative bodies to intervene and provide clear rights and obligations for both universities and the public when this situation arises.

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106 *See* discussion *supra* note 36 and accompanying text (mentioning several different state applications of the balancing test).

107 381 P.3d at 540.

108 *Id.* at 540–41.

109 *See id.* at 542 ("We have recognized the efficacy of an *in camera* review of requested records by a district court to ensure that privacy interests are protected."). The court also noted that "it is proper for a district court to conduct such an *in camera* inspection in order to balance the privacy rights of all the individuals involved in the case against the public's right to know." *Id.* (quoting Jefferson Cnty. v. Mont. Standard, 79 P.3d 805, 809 (Mont. 2003)).