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In a split ruling, the North Carolina Supreme Court requires public records disclosure of FERPA-protected Title IX disciplinary information

By Steven M. Richard

After nearly four years of litigation, the North Carolina Supreme Court, in a split 4 to 3 ruling, has held that the officials at the University of North Carolina at Chapel Hill (UNC-CH) must release as public records certain disciplinary records of students who have been found to have violated UNC-CH's sexual assault policy. The majority's analysis reconciles the provisions of the Federal Family Educational Rights and Privacy Act ("FERPA") and North Carolina's Public Records Act to be compatible and require the production of the requested information. By contrast, a strongly worded dissent counters that federal preemption controls and a state public records law cannot supersede the discretion afforded to the institution under FERPA to deny the public record request.

Background

A group of news organizations based in North Carolina, which regularly report on matters pertaining to UNC-CH, served a request initially seeking "copies of all public records made or received by [UNC-CH] in connection with a person having been found responsible for rape, sexual assault or any related or lesser included sexual misconduct by [UNC-CH's adjudicative bodies]." In response to UNC-CH's opposition, the news organizations narrowed their request to seek "(a) the name of any person, who, since January 1, 2007, has been found responsible for rape, sexual assault or any related or lesser included sexual misconduct by [UNC-CH's adjudicative bodies]; (b) the date and nature of each such violation for which each such person was found responsible; and (c) the sanction[] imposed on each such person for each such violation." UNC-CH held firm in declining to provide the requested information, justifying its position as within the scope of its discretion afforded under FERPA to protect the confidentiality of "education records" relating to its Title IX proceedings. A lengthy legal battle ensued in the North Carolina state courts, ultimately reaching its Supreme Court.

UNC-CH is subject to the Public Records Act, and the requested student disciplinary records fall within the statute's definition of a public record. Before the North Carolina state courts, the central issue concerned the interpretation and application of FERPA's provision codified at 20 U.S.C. § 1232g(b)(6)(B), which states:

Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence . . . or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense."

(Italics added). Section 1232g(b)(6)(C) defines the "final results of any disciplinary proceeding" to include "only the name of the student, the violation committed, and any sanction imposed by the institution on that student" and "may include the name of any other student, such as a victim or a witness, only with the written consent of that other student." The news organizations' request for the names of students held responsible for sexual misconduct offenses and the sanctions fell within the scope of information that may be disclosed, while the dates of the violations did not.

Initially, a trial court concluded that the Public Records Act does not compel the release of public records where an exception is "otherwise specifically provided by law," and agreed with UNC-CH's position that FERPA grants the university the discretion whether to release the disciplinary proceeding information. The North Carolina Court of Appeals reversed by unanimously determining that such records are subject to mandatory disclosure under the Public Records Act and that nothing under FERPA precludes such disclosure, setting the stage for the Supreme Court's split ruling affirming this determination.

The majority's analysis in favor of disclosure

The majority concludes that FERPA and the public records law should be read *in pari materia*, meaning reconciled with each other when possible. Particularly, the majority emphasizes that exceptions to the Public Records Act must be construed narrowly. Interpreting FERPA, the majority states that "there is no express provision in FERPA that reposes the authority in UNC-CH to exercise the discretion that it purports to have." Specifically, it holds that UNC-CH does not have discretion under FERPA to ignore its obligations under the Public Records Act, absent an express authorization to do so, which the majority does not read to exist under §1232g(b)(6)(B).

Specifically, the majority focuses on the language in §1232g(b)(6)(B), specifying that "[n]othing in this section shall be construed to prohibit an institution of post-secondary education from disclosing" to create no conflict, as it enables a public institution to respond to the mandatory requirements of the Public Records Act consistent with its FERPA-obligations. While the majority agreed that, "standing alone," §1232g(b)(6)(B) affords discretion to the postsecondary educational institution, that discretion is overridden when subject to mandatory public records disclosure requirements, as is the situation here.

The dissent's view that federal preemption controls

The dissent portrays the majority's reconciliation of FERPA and the Public Records Act as a fundamental misapplication of federal preemption law. The dissent stresses that the specific question is whether the application of the Public Records Act—which in the absence of FERPA, would require the production of the records—would be inconsistent with how Congress has authorized universities to treat such records. Unlike the majority, the dissent finds a clear conflict, requiring federal law to control and the institution's discretion to be protected.

In addition to reviewing §1232g(b)(6)(B)'s specific language, the dissent cites the Department of Education's regulations, which state at 34 C.F.R. § 99.31(a)(14)(i) that as an exception to FERPA's consent requirement, an institution *may disclose* personally identifiable information relating to the final results of a sexual misconduct disciplinary proceeding. The dissent stresses that FERPA's grant of discretion to universities regarding the release of these records to third parties, such as the news organizations, is evidenced by the pertinent language of the §1232g(b)(6)(B) itself read in conjunction with the language of the accompanying federal regulations.

Under the federal preemption doctrine, the dissent maintains that a state law, such as the Public Records Act, cannot compel that a university must lawfully exercise its discretion in favor of disclosure. "A university must be allowed to exercise its federally mandated discretion unimpeded by a state law that seeks to eliminate that discretion." The dissent further notes that the effect of the majority's analysis is to create different disclosure and confidentiality rules for post-secondary educational institutions, depending on whether they are public or private.

Takeaways

The dispute that spanned several years within the North Carolina courts evidences inherent tensions that arise between the right to know under public records acts and the confidentiality of student education records under FERPA. On one side, advocates of disclosure contend that the public has a right to know how the public's business and affairs are conducted, including the identification of individuals found responsible for acts of sexual violence or misconduct on a public campus. They also contend that the release of such examination allows for a fuller and more transparent examination of how the public institution conducts its disciplinary processes. On the other side, there are equally important considerations. College and university disciplinary cases are not criminal processes and seek to further educational goals, such that public disclosure of respondent names could have long-lasting impacts upon the identified students. Also, the privacy rights of complainants must be recognized and respected. The identification of responsible respondents could enable a factual connection to identify the complainants.

The tensions between public records acts and FERPA's requirements will remain an ongoing concern and litigated issue, as campus sexual misconduct matters continue to generate public attention. The North Carolina Supreme Court's contrasting majority and dissenting opinions will certainly be cited by parties on both sides as the issues are litigated in other states.

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