

NORTH CAROLINA COURT OF APPEALS

DTH MEDIA CORPORATION;)
CAPITOL BROADCASTING)
COMPANY, INC.; THE CHARLOTTE)
OBSERVER PUBLISHING COMPANY;)
and THE DURHAM HERALD)
COMPANY,)

Plaintiffs-Appellants)

v.)

From Wake County
16 CVS 14300

CAROL L. FOLT, in her official capacity)
as Chancellor of the University of North)
Carolina at Chapel Hill, and GAVIN)
YOUNG, in his official capacity as)
Senior Director of Public Records for the)
University of North Carolina at Chapel)
Hill,)

Defendants-Appellees)

BRIEF OF AMICUS CURIAE STUDENT PRESS LAW CENTER
IN SUPPORT OF PLAINTIFFS-APPELLANTS

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BRIEF OF AMICUS CURIAE STUDENT PRESS LAW CENTER
IN SUPPORT OF PLAINTIFFS-APPELLANTS

ISSUE PRESENTED

Whether the trial court erred in concluding, as a matter of law, that to the
extent the North Carolina Public Records Act requires the Defendants to disclose
the records requested by the Plaintiffs, the Act is preempted by federal law.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is a case about the public's ability to oversee how powerful government agencies do, or do not, exercise their authority to keep the public safe. A federal law that was enacted in 1974 with the express purpose of protecting vulnerable young people against overreach by government agencies is now being distorted, in a way its drafters never envisioned or intended, to make college campuses less safe. This Court has the opportunity to clarify that the Family Educational Rights and Privacy Act (hereinafter ("FERPA")) means what it says, what it was intended to say, and what logic dictates that it must say – not what image-conscious colleges would like it to say.

“Student privacy” has become the catch-all excuse whenever an educational institution fears disclosing records that contain unflattering information. FERPA is, contrary to the sky-is-falling rhetoric to which institutions are prone, an exceedingly narrow statute carrying zero practical risk of penalties. It is not a “reputation management” statute, and it cannot be refashioned into (in the memorable words of one North Carolina judge) an “invisible cloak” that envelops every aspect of citizens’ interaction with government agencies, the result that the lower court’s mistaken interpretation invites. *See News & Observer Publ’g Co. v. Baddour*, No. 10 CVS 1941 (N.C. Super. Ct. Memorandum Ruling, April 19, 2011) (*available at http://s3.amazonaws.com/cdn.getsnworks.com/spl/pdf/uncathletics_ruling.pdf*).

If FERPA really did operate as Appellees insist it does, it would plainly be unconstitutional. The Supreme Court’s 2012 ruling striking down portions of the Affordable Care Act made clear that Congress cannot extend to states “offers they can’t refuse” – that is to say, coercive regulation at the threat of a financial “gun to the head.” *NFIB v. Sebelius*, 567 U.S. 519, 581 (2012). Appellees would have the Court believe that FERPA places the University at risk of financial ruin for granting a legally proper request for newsworthy public records, leaving aside the facts that (1) records of this type have harmlessly been released elsewhere and (2) no institution has ever been penalized a dime in the four-decade history of FERPA, and given that unbroken history, the federal government certainly would not penalize a university that is acting in good-faith compliance with state law in an area of unique public concern.

ARGUMENT

I. FERPA is frequently manipulated for illicit concealment purposes.

Any claim of FERPA confidentiality by a university seeking to avoid disclosure of potentially embarrassing public records must be met with great skepticism, as educational institutions have been caught on multiple occasions abusing FERPA for illicit concealment purposes. *See* Mary Margaret Penrose, *Tickets, Tattoos and Other Tawdry Behavior: How Universities Use Federal Law to Hide Their Scandals*, 33 *Cardozo L. Rev.* 155 (April 2012) (detailing instances

where UNC-Chapel Hill and other colleges have been found by courts to have mischaracterized public records, such as athletes' parking tickets, as confidential education records).

Most recently, counsel for Northern Kentucky University was sanctioned for unfounded reliance on FERPA to obstruct the deposition of a key witness in a Title IX lawsuit against the university. *See Doe v. Northern Kent. Univ.*, No. 2:16-CV-28 (E.D. Kent. Oct. 24, 2016) (finding university counsel's reliance on FERPA to obstruct deposition of basketball coach was not substantially justified, and ordering university to pay attorney fees and costs). Even though the Department of Education has said on numerous occasions that FERPA applies only to records and not to information provided through personal observation or recollection, the university's counsel repeatedly instructed a witness not to answer questions during his deposition on FERPA grounds, a tactic the court found to be an abuse of the statute. *Id.*

The universe of records and information that educational institutions have refused to produce on the grounds of FERPA goes vastly beyond what Congress could ever conceivably have envisioned as "education records," including such plainly non-confidential and non-educational items as videotapes and minutes of open-to-the-public government meetings, and even statistics showing how often guns are brought into schools or how often football players suffer concussions. *See, e.g., Bracco v. Machen*, No. 01-2009-CA-4444 (Fla. Cir. Ct. Jan. 10, 2011) (videos

of Student Senate meetings ordered released); Adelaide Blanchard, *UW-Milwaukee to pay newspaper legal fees, release papers that sparked suit*, The Badger Herald (Feb. 16, 2010) (college releases minutes of committee meetings to resolve lawsuit) (available at <https://badgerherald.com/news/2010/02/16/uwmilwaukee-to-pay-n/>); Bill Bush, *Privacy law shields school-district tallies of gun incidents*, The Columbus Dispatch, Dec. 10, 2013 (Ohio Department of Education withholds even de-identified data on gun incidents in schools, purportedly in reliance on FERPA); Tony Casey, *ETSU won't share football concussion numbers as NCAA faces class action lawsuit*, Johnson City Press, Feb. 5, 2017 (college claims FERPA confidentiality in refusing to release even de-identified number of concussions) (available at <http://www.johnsoncitypress.com/Football/2017/02/04/ETSU-won-t-share-football-concussion-numbers-as-it-faces-potential-class-action-lawsuit>). Whether as a result of ignorance or a purposeful intent to conceal, educational institutions so regularly mischaracterize public records as confidential under FERPA that their categorization should be entitled to no judicial deference.

II. The public has an overriding interest in access to these records.

If there was ever a case in which claims of FERPA secrecy call for an extra dose of skepticism, it is this case. Colleges are notorious for manipulating statistics to downplay the severity of sexual assault on their campuses. *See Collin Binkley et al., Reports on college crime are deceptively inaccurate*, The Columbus Dispatch,

Sept. 30, 2014 (analyzing colleges' federally reported data to show that, on an annual basis, half of all major colleges claim to have experienced no violent crime of any kind, and nearly 20 percent claim not to have experienced a single sexual assault over the past 12 years, although their own records prove otherwise) (*available at* <http://www.dispatch.com/article/20140930/NEWS/309309904>). The secretive college disciplinary system imposes inexplicably disparate penalties – at times, as insultingly light as an apologetic essay and a \$75 fine – for conduct that would result in years in prison if committed anywhere other than a university campus. *Id.* It is no wonder, then, that UNC would prefer to keep its disciplinary records a secret.

The issue of sexual assault on college campuses is of such national urgency that then-Vice President Biden was put in charge of a White House initiative to address distressing levels of sexual violence. *See* Aamer Madhani & Rachel Axon, *Biden: Colleges must step up to prevent sexual assault*, USA Today, April 29, 2014 (*available at* <https://www.usatoday.com/story/news/nation/2014/04/29/biden-colleges-sexual-assaults/8460745/>). More than 200 colleges are under active Title IX investigation, often for the very same conduct that the Appellant news organizations are seeking to investigate here. Nick Anderson, *At first, 55 schools faced sexual violence investigations. Now the list has quadrupled*, The Washington Post, Jan. 18, 2017) (reporting that Department of Education's civil-rights division has 304 investigations underway related to sexual violence at 223 colleges and

universities) (*available at* https://www.washingtonpost.com/news/grade-point/wp/2017/01/18/at-first-55-schools-faced-sexual-violence-investigations-now-the-list-has-quadrupled/?utm_term=.3324bc275674). It is difficult to think of an issue where the public more urgently needs access to records to independently assess whether powerful government agencies (in this case, a flagship state university) are doing their jobs. Without these records, the public will be left with a “trust-me” honor system, relying on the assurances of colleges that have every motive to misrepresent this urgent safety risk.

III. Records of this kind have, harmlessly, been released elsewhere.

If it violated FERPA for educational institutions to release public records reflecting the outcome of disciplinary adjudications in sexual assault cases, we would know it by now, because records of this kind have been released and published many times without incident. For example, reporters obtained public records of the outcomes of sexual assault disciplinary cases from two dozen public institutions across the country, including the University of Florida, the University of Cincinnati and Bowling Green State University – at times, with the names of the perpetrators included – and published their findings without a single federal enforcement action against any of the institutions. *Campus Insecurity: Inside the investigation*, The Columbus Dispatch, Nov. 24, 2014 (*available at* <http://www.dispatch.com/article/20141124/NEWS/311249711>); *see also* Patricia

Boh *et al.*, *Sweeping rape under the rug*, The Daily Campus, May 1, 2012 (student reporters used public records to examine 100 cases of sexual assault reported to SMU and discovered that only one resulted in criminal penalties) (*available at* <http://www.smudailycampus.com/news/sweeping-rape-under-the-rug>).

In 2010, the Maryland Attorney General issued an interpretation directing the University of Maryland to comply with requests to produce a decade's worth of public records documenting disciplinary cases involving cases of sexual assault, stating:

If the University finds that its rules or policies were violated in a matter involving a forcible sexual offense, incest, or statutory rape, the final results of the disciplinary proceeding – including the identity of the accused student – may be disclosed without violating FERPA. Accordingly, the student's identity would be available in response to a [public records] request.

Md. Attorney General issues FERPA Opinion, SPJ D.C. Pro Blog (June 7, 2010) (*available at* <http://spjdc.org/2011/04/students-win-fight-for-sexual-assault-records/>). *See also* Alexandra Moe, *AG Rules Universities Must Reveal Punishments in Sex Assault Cases*, Capitol News Service, April 1, 2010 (*available at* http://cnsmaryland.org/cns/wire/2010-editions/04-April-editions/100401-Thursday/SexualAssault_CNS-UMCP.html).

Following that interpretation, records of a decade's worth of sexual-assault disciplinary cases, including the names of those disciplined, were released to the student-run news organization, Capitol News Service, which broadcast a series of stories based on the records without incident (and in fact won a 2011 Society of Professional Journalists' award for its coverage). *See* Danielle Lama, *Students win fight for sexual-assault records*, SPJ D.C. Pro Blog (April 29, 2011) (reporting student reporters' findings of a "huge disconnect between the amount of sexual assaults that occur and the number of people who are held accountable") (*available at* <http://spjdc.org/2011/04/students-win-fight-for-sexual-assault-records/>). Those records revealed that only four people had been disciplined for sexual assault at Maryland over the preceding 10 years, exactly the type of information that the public needs from UNC-Chapel Hill to assess the efficacy of the college's handling of sexual assault cases. In case it needs pointing out, the University of Maryland remains federally funded.

Indeed, in the 40-year history of FERPA, "no institution has ever lost funding as a result of FERPA violations." Rob Silverblatt, *Hiding Behind Ivory Towers: Penalizing Schools That Improperly Invoke Student Privacy to Suppress Open Records Requests*, 101 *Geo. L.J.* 493, 498 (2013). Surely the first such penalty will not be issued because a university complied with valid open records request.

IV. FERPA neither preempts state open-records statutes nor requires an individualized discretionary assessment of each request.

Because FERPA says nothing about preempting state law, preemption can be found only if Congress has comprehensively occupied the field, or if state law imposes obligations irreconcilable with federal law. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Neither is true here.

“Mere existence of a federal regulatory or enforcement scheme” is insufficient to establish implied preemption of state law. *English v. General Elec. Co.*, 496 U.S. 72, 87 (1990). Field preemption may not be inferred unless the authority conferred on the federal entity tasked with implementing the program is so broad that Congress must have intended to preclude state regulation in the area. *See Cipollone*, 505 U.S. at 516 (preemption will be implied only where federal legislation “so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the states to supplement it.”) (internal quotations omitted).

Neither FERPA nor the Department of Education’s implementing regulations mention, or even acknowledge the existence of, state public records laws. To the contrary, in one of its most recent FERPA rulemakings, the Department of Education declined to address how its regulations might affect the public’s right of access to public records under state law, stating, “FERPA is not an open records statute or part of an open records system.” *See Family Educational Rights and Privacy*, 73 Fed. Reg. 74805, 74831 (Dec. 9, 2008) (hereinafter “FERPA Rulemaking”). Clearly, the

Department does not believe itself to be making policy as to what records are public under state law or to be displacing state public-records laws.

“Field preemption” occurs only where Congress “has forbidden the State to take action in the field that the federal statute preempts.” *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015). That Congress has forbidden states from taking action in the field of student educational privacy would be surprising news to most of America’s state legislatures, including North Carolina’s, which has enacted several statutes governing the privacy of student records. *See, e.g.*, N.C.G.S. § 115C-402(e) (specifying the contents of students’ “official records” and providing that “[t]he official record of each student is not a public record”); N.C.G.S. § 115C-174.13(b) (providing that “written material containing the identifiable scores of individual students on any test” is a confidential education record exempt from the open records act); N.C.G.S. § 8-53.4 (making information acquired in rendering school counseling services inadmissible on student privacy grounds). If the trial court were correct, these statutes would all be invalid. Indeed, the FERPA statute itself *explicitly contemplates* that states will legislate in the field, by deferring to exemptions created by states that allow “state and local officials or authorities” to have access to otherwise-confidential education records as provided by state statute. 20 U.S.C. § 1232g(b)(1)(E). It is thus entirely within the authority of states to require

the production of records that Congress has explicitly chosen not to make confidential.

The areas in which courts have found federal field preemption to exist are areas of traditional federal expertise and responsibility. *See, e.g., Arizona v. United States*, 567 U.S. 387 (2012) (field preemption in the realm of immigration); *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625 (2012) (field preemption in the safety of interstate transportation). Education and the maintenance of state records are two areas of law over which states have primary expertise and responsibility, subjects historically committed to the discretion of state and local government. To find that Congress has preempted state authority in these areas of unique state expertise and discretion would represent a drastic recalibration of federalism. *See FMC Corp. v. Holliday*, 498 U.S. 52, 62 (1990) (noting the Court’s “presumption that Congress does not intend to pre-empt areas of traditional state regulation”); *see also English*, 496 U.S. at 72 (holding that where “the field which Congress is said to have pre-empted includes areas that have been traditionally occupied by the States, congressional intent to supersede state laws must be clear and manifest.”) (internal quotations omitted).

Nor can the University’s refusal to honor Appellant’s request for public records be legitimized on the grounds of conflict preemption. As with field preemption, the ultimate question in conflict preemption comes down to a finding of

federal intent, and a court is not permitted to find implied conflict preemption where an agency, at the time it enacted a rule for a federal program, “was not concerned about” preventing the outcome produced by the state law. *Williamson v. Mazda Motor of America, Inc.*, 562 U.S. 323, 324 (2011). The Department of Education explicitly stated in its 2008 rulemaking that it was unconcerned with the operations of state open-records law. *See FERPA Rulemaking, supra*, at 74831. The absence of an intent to preempt could not be clearer.

The trial court’s only basis for finding a conflict between federal and state law was the notion that federal law requires an individualized discretionary assessment of each production of records, a requirement that appears nowhere in FERPA or its implementing regulations. The Department of Education has no authority to penalize a failure to make a discretionary assessment of a public records request, and there is no mechanism by which a person whose public records request is rejected without a discretionary assessment can obtain federal redress. Thus, the trial court erred in concluding that a federal mandate to discretionarily evaluate each request exists at all, much less that it overrides state law.

The use of the term “may” in the federal FERPA regulation, 34 C.F.R. § 99.31(a) – which provides that an educational institution “may disclose personally identifiable information from an education record” under certain conditions – does not really mean “take your pick, it’s entirely up to you,” as the University would

have the Court believe. This is made crystal clear by looking at the types of situations that follow the phrase “may,” some of which clearly are legally compulsory. For instance, the Department says that educational institutions “may disclose” if the purpose of the disclosure is “to comply with a judicial order or lawfully issued subpoena.” 34 C.F.R. § 99.31(a)(9)(i). Obviously, this provision does not mean “you may choose not to disclose” so that an educational institution could claim to have federal dispensation to treat a court order as optional. What “may disclose” means in the context of FERPA is simply that disclosure will not result in any federal penalty. The trial court erred in reading a federal intent to make compliance with state law optional into this single word, which in context obviously means no such thing.

V. The University’s characterization of FERPA would render it an unconstitutionally coercive incursion on federalism.

The University’s contention that granting Appellants’ request for public records would trigger federal sanctions under FERPA is belied not only by 43 contrary years of experience, but by basic principles of federalism. It is not possible for FERPA to work as a “gun to the head” compelling state agencies to ignore their own disclosure laws under threat of financial ruin.

In the first place, FERPA’s own wording, history and structure establish that it cannot be enforced against a university that grants a request for public records. By its terms, FERPA penalizes only a “policy” or “practice” of failing to safeguard

student education records, not an individualized determination that a particular record is subject to compulsory production under state law. 20 U.S.C. § 1232g(b)(1). Meanwhile, Congress provided only one remedy for a FERPA violation: complete disqualification from federal education funding. *Id.* This would be tantamount to a “financial death penalty,” as UNC-Chapel Hill reports that 23 percent of its annual budget, \$639 million, comes from federal sources. UNC-Chapel Hill Comprehensive Annual Financial Report at 37 (*available at* http://finance.unc.edu/files/2016/12/2016_cafr.pdf).

Realistically, Congress could only have intended FERPA to penalize the rare outlier school that wantonly makes a *practice* of handling student records carelessly. Otherwise, Congress would have provided (and the Department would have enacted) milder intermediate penalties, as Congress has proven amply capable of doing with comparable education-funding statutes. *See, e.g., Adjustment of Civil Monetary Penalties for Inflation*, 77 Fed. Reg. 60047, 60049 (Oct. 2, 2012) (amending 34 CFR Part 36) (specifying range of civil penalties for violating statutes administered by the DOE, all but one of which is capped at \$35,000 per violation and none of which provides for complete revocation of federal funding). It is nonsensical to take the position that the penalty for willfully falsifying a crime report to mislead the public in violation of the Clery Act is an offense carrying a penalty of no more than \$35,000, while the penalty for granting a request for public records truthfully

informing the public about those crimes is \$639 million. *See* 20 U.S.C. § 1092(f). For the penalty structure to make any sense at all, a FERPA violation must necessarily require a total institutional breakdown in recordkeeping, not a one-time decision made in good-faith reliance on controlling state disclosure laws.

If FERPA did carry a financial death penalty for good faith compliance with state public-records laws, it would be unconstitutional. The Supreme Court has long held that conditions placed on the receipt of federal funding cannot be “so coercive as to pass the point at which pressure turns into compulsion.” *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (internal quotes and citation omitted). In striking down the mandatory expansion of Medicaid under the Affordable Care Act, the Supreme Court reaffirmed that threats to withhold significant amounts of federal funding if a state agency did not acquiesce to federal policy choices would constitute unconstitutional “economic dragooning.” *NFIB v. Sebelius*, 567 U.S. 519, 582 (2012).¹

Simply put, it is inconceivable that FERPA overrides state laws regulating the release of information by state institutions under penalty of, in the words of *Sebelius*, a “gun to the head” of financial ruin. *Id.* at 581. The Court should avoid interpreting

¹ Tellingly, the United States attempted to defend the ACA’s unconstitutional coercion by comparing it to FERPA’s harsh remedy of complete defunding. *See* Brief for Respondents, p. 47, *NFIB v. Sebelius*, 567 U.S. 519 (2012). By the government’s own acknowledgment, a ruling that the ACA’s state Medicaid expansion mandate was unconstitutional applies to the FERPA “financial death penalty” as well.

FERPA in a way that guarantees its unconstitutionality, when there are far more logical and limited ways to read the statute consistent with legislative intent and common sense.

CONCLUSION

For the foregoing reasons, this Court should reverse the ruling of the Superior Court and order production of the records sought by Appellants.

Respectfully submitted, this the 27th day of September, 2017.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for *Amicus Curiae* certifies that the foregoing brief, which is prepared using Times New Roman 14-point font, is less than 3,750 words (excluding cover, indexes, tables of authorities, certificates of service, this certificate of compliance and appendices) as reported by the word-processing software.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing BRIEF AMICUS CURIAE by depositing copies, contained in a first-class postage paid wrapper, into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

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