



December 15, 2014

Secretary Arne Duncan  
U.S. Department of Education  
400 Maryland Ave. SW  
LBJ Education Building, 7W311  
Washington, D.C. 20202

Dear Secretary Duncan,

We appreciate the attention that your office and the White House, in particular Vice President Biden, have focused on the need for colleges to improve their responsiveness to sexual assault. Because of the Administration's professed concern for reforming the way that campus disciplinary systems whitewash serious criminal behavior, it was especially alarming to learn that your Department plans to intercede – on the side of concealment – in litigation that will determine whether government officials may invoke “student privacy” to cover up how they respond (or fail to respond) when a prominent athlete is accused of sexual assault.

Counsel for the U.S. Department of Justice served notice by way of a Dec. 12 motion that the Department of Education would seek leave to appear as *amicus* in support of the University of Montana and the Montana Commissioner of Higher Education in the case of *Krakauer v. Montana*, pending in the Montana Supreme Court. In this case, the University is appealing a Sept. 25 order from Montana's First Judicial District Court finding that the Family Educational Rights and Privacy Act presents no impediment to the disclosure of redacted records pertaining to the Commissioner of Higher Education's handling of a disciplinary appeal in a high-profile case of alleged sexual assault.

As the District Court correctly determined in its Sept. 25 order, FERPA is irrelevant to Mr. Krakauer's request under the Montana open records act (Mont. Code § 2-6-102) for at least three reasons. First, Mr. Krakauer agreed to accept the records with all identifying information about students redacted, meaning that by definition, the records no longer are covered by FERPA. Second, the records are not “directly related” to a particular student as that term is understood in the FERPA statute, 20 U.S.C. § 1232g(a)(4)(A)(i), because they relate primarily to the way in which Commissioner Clayton Christian, a high-ranking public official, reached his determination to overturn the disciplinary ruling of a campus judicial board. Third, as to the student-athlete whose case is discussed in the records, no legitimate expectation of privacy adheres. The records involve matters of legitimate public concern – allegations of felony-level criminal conduct – previously aired in a public trial and in public court records, relating to an athlete who has already signed a very broad FERPA waiver as a precondition for competing in Division I intercollegiate athletics.

Beyond the doubtful legal merits of the position that the Department is supporting, the larger question is why your agency believes that it is a valid discretionary use of the prestige and resources of the federal government to obscure the answer to a question of public importance – whether the State of Montana affords preferential treatment to student athletes in sexual assault cases – that can be answered only by disclosure of the records Mr. Krakauer seeks.

That the Department, which seldom intervenes in court cases where the application of FERPA is at issue, would choose this particular case in which to make an exception is simply shameful. Time after time, the Department has stood by idly as schools have forced families to go to court to contest the frivolous misuse of FERPA to obtain records to which they plainly were entitled. The Department remained silent when the family of a Valdosta, Ga., high school student who died an unexplained death in a high-school gym was forced to go to court to obtain security-camera footage of their son's last moments, which the school wrongfully withheld under FERPA. The Department remained silent when the father of a Midvale, Utah, student was forced to go to court to obtain security footage of an attack in which his son was injured, which the school wrongfully withheld on the grounds of FERPA. The Department said nothing when the State of Ohio told the *Columbus Dispatch* that the number of times students bring guns into public schools is a FERPA-protected secret. The Department said nothing when reporters in Falmouth, Maine, were told that FERPA forbids releasing information as to whether teachers receive any training before putting students into physical restraints. It is mystifying that the Department would choose to break its silence on this particular FERPA case – a case in which every salient fact about the reported assault has already been publicly aired in a criminal court proceeding (which resulted in the March 2013 acquittal of the accused athlete).

It is amply well-documented that colleges misuse FERPA to mislead the public about how they respond – or don't respond – to reports of sexual assault. The *Columbus Dispatch* reported Nov. 23 on the results of a nationwide series of public-records requests sent to public universities across the country, seeking the outcomes of campus disciplinary cases resulting in sanctions for a crime of violence or nonforcible sex offense – records that, by the express terms of FERPA, are not confidential. Despite the statute's clear language, some two dozen colleges untruthfully cited FERPA in refusing to produce the requested records, disclosure of which is essential if members of the campus community are to know how often sexual assaults occur on campus and whether they are adequately punished. Your agency has said nothing about the *Dispatch's* report, and in fact refused even to make a spokesperson available to address it. It is astonishing that the sole statement from your Department about FERPA and sexual assault on college campuses is a statement in favor of the continued concealment that has allowed violent crime to fester for so long to the detriment of so many.

It is imperative for the credibility of the Administration's professed commitment to reforming the way colleges treat sexual assaults that you instruct your counsel to withdraw support from the University of Montana's illegitimate FERPA arguments in this case. Given the avalanche of disclosures in recent months documenting that colleges take advantage of FERPA secrecy to minimize the severity of sexual assault on campus and to conceal the

inadequacy of their disciplinary responses, it is no longer tenable to maintain the façade of a “secret educational justice system” in which committing a sexual assault is treated as no different than cheating on a test (and at times punished less severely).

We assume that the decision to intervene on the side of the State of Montana in the *Krakauer* case was a misjudgment by a subordinate official that you will promptly correct. We hope that you will fully investigate how this decision was made, and will ensure that those responsible are held accountable. The public’s interest manifestly is on the side of disclosure in this case. That is where the Department of Education belongs as well.

Respectfully,

A handwritten signature in black ink, appearing to read "Frank D. LoMonte", with a long horizontal line extending to the right.

Frank D. LoMonte  
Executive Director  
Student Press Law Center

cc: Sen. Barbara Boxer  
Sen. Sherrod Brown  
Sen. Kirsten Gillibrand  
Sen. Elizabeth Warren  
Rep. Susan Davis  
Rep. Jackie Speier  
Denis McDonough, White House Chief of Staff  
Steve Ricchetti, Chief of Staff, Vice President Biden  
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