WEAPONIZING FERPA: THE CURIOUS CASE OF DTH MEDIA CORP. V. FOLT

*Alexander W. Prunka**

I. INTRODUCTION

In the era of the #MeToo movement, there has been a dramatic push to name names and expose individuals accused of sexual misconduct and harassment across the world.[1] Before Harvey Weinstein was first accused and the #MeToo movement stormed onto the scene, though, college campuses were already predicting what was to come.[2]

For example, in 2014, on the heels of recent changes to the federal government's interpretation of Title IX as it relates to peer-to-peer sexual misconduct, advocates founded the It's On Us campaign to end sexual assault.[3] In 2015, a shocking documentary premiered detailing the prevalence of sexual assault on college campuses and institutional failure to address the issue.[4] The documentary featured prestigious universities, including the University of North Carolina at Chapel Hill ("UNC").

The Daily Tar Heel ("DTH"), UNC's campus newspaper, has long argued that UNC should disclose the names of individuals found responsible for sexual misconduct by University.[5] DTH has a history of seeking access to student disciplinary records: it took its 1996 attempt to publicize Honor Court proceedings and declassify their

---

* J.D. Candidate 2020, Wake Forest University School of Law. Many thanks to my family, the Michael Bublé Fan Club, and most importantly my ever-patient fiancée, Kelsie. Additional thanks to Ms. Andie Harrelle and Dr. Tamika Wordlow-Williams for giving me the opportunity to work at the Office of Student Rights and Responsibilities at East Carolina University where I gained appreciation for student conduct topics.

1. *See generally*, Christen A Johnson & KT Hawbaker, *#MeToo: A Timeline of Events*, CHICAGO TRIBUNE (Mar. 7, 2019, 9:43 AM), https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html (outlining the history of the #MeToo movement).

2. Lena Felton, *How Colleges Foretold the #MeToo Movement*, ATLANTIC (Jan. 17, 2018), https://www.theatlantic.com/education/archive/2018/01/how-colleges-foretold-the-metoo-movement/550613/.

3. *Our Story*, IT'S ON US, https://www.itsonus.org/our-story/ (last visited Dec. 20, 2018).

4. *See* THE HUNTING GROUND (The Weinstein Company 2015). The author notes the painful irony of the fact that Harvey Weinstein's company was behind a film on this subject.

5. Jane Wester, *Column: We Should Know Who's Found Responsible for Sexual Assault*, DAILY TAR HEEL (Oct. 2, 2016, 11:47 PM), https://www.dailytarheel.com/article/2016/10/column-we-should-know-whos-found-responsible-for-sexual-assault.

records to the North Carolina Court of Appeals.[6] DTH has been so dedicated to exposing UNC's shortcomings in addressing sexual misconduct, it once published the details of victims' complaints to the Department of Education against the victims' wishes and without their consent.[7] So what happens when a student news organization allows its desire to spite its university and publicly shame those accused of sexual misconduct to drive its reporting agenda? Groundbreaking litigation, apparently.[8]

The Federal Educational Rights and Privacy Act of 1974[9] ("FERPA") is a comprehensive statute protecting the privacy of student records.[10] With its broad protections, FERPA can be seen as a shield: protecting students from unwarranted invasions of privacy at all educational levels.[11] FERPA does, however, have some narrow exceptions.[12] The North Carolina Public Records Act[13] ("Public Records Act"), on the other hand, *requires* disclosure of a broadly defined class of public records and exceptions or exemptions are narrowly construed.[14]

On April 17, 2018, the North Carolina Court of Appeals issued a landmark decision in a lawsuit brought by DTH against UNC.[15] Reversing the superior court's judgment in favor of UNC, the court of appeals' decision compels UNC to disclose records identifying students found responsible by the University for virtually any violation of sexual misconduct policies over a nearly ten-year period. Thus, the court of appeals effectively endorsed DTH's attempt to weaponize FERPA—a protective statute—through a misleading interpretation of a particular FERPA exception read in conjunction with the Public Records Act.

Part II discusses the history and background of FERPA, the Public Records Act, and Title IX of the Education Amendments of 1974 ("Title IX"). Part III discusses the case of *DTH Media Corp. v. Folt*[16] and the decision by the North Carolina Court of Appeals.

---

6. DTH's arguments fell flat at the court of appeals. *See* DTH Publ'g Corp. v. Univ. of North Carolina, 496 S.E.2d 8 (N.C. Ct. App. 1998).

7. *See* Tyler Kingkade, *The Daily Tar Heel Published Details of Rape Victims' Federal Complaint Without Consent*, HUFFINGTON POST (Jan. 29, 2013), https://www.huffingtonpost.com/2013/01/28/daily-tar-heel-sexual-assault_n_2552699.html.

8. *See, e.g.*, DTH Media Corp. v. Folt, 816 S.E.2d 518 (N.C. Ct. App. 2018) (bringing suit against university to compel disclosure of records naming those found responsible for sexual misconduct by the university); *DTH Publ'g Corp.*, 496 S.E.2d at 10 (bringing suit against university to compel disclosure of records university was allegedly wrongly withholding).

9. 20 U.S.C. § 1232g (2012).

10. *See infra* Part II.A.

11. *Id.*

12. *See, e.g.*, 20 U.S.C. § 1232g(b)(6)(A)–(B) (2012) (permitting the release of records in certain instances).

13. N.C. GEN. STAT. § 132-1 *et seq.* (2017).

14. *See infra* Part II.B.

15. DTH Media Corp. v. Folt, 816 S.E.2d 518, 518–21 (N.C. Ct. App. 2018).

16. 816 S.E.2d 518 (N.C. Ct. App. 2018).

Finally, Part IV argues the court of appeals was fundamentally incorrect in deciding for DTH. This Note concludes the North Carolina Supreme Court should properly determine that FERPA grants UNC discretion in determining whether to release the records in question, the Public Records Act is in conflict with that discretion, and FERPA preempts the Public Records Act to the extent it conflicts with the discretion given by FERPA. Further, this Note analyzes some of the public policy implications of the court of appeals decision to illustrate the need to reverse.

II. BACKGROUND

FERPA and the Public Records Act form the basis of the legal question before the North Carolina Supreme Court in *DTH Media Corp. v. Folt*.[17] However, without recent interpretations of Title IX and subsequent changes to universities' Title IX enforcement policies regarding peer-to-peer sexual misconduct,[18] the push to expose inadequacies in institutional responses to sexual misconduct may not have materialized. Thus, Title IX is indirectly at the heart of the litigation as well.

A. Student Disciplinary Records and FERPA

FERPA has two major purposes: to ensure access to student records for parents and students and "to protect [students' and families'] right to privacy by limiting the transferability of their [educational] records without their consent."[19] Educational records are "those records, files, documents, and other materials which contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution."[20] The statue provides only a handful of narrow exceptions.[21]

FERPA protects student privacy through an exercise of Congress' spending power.[22] However, because FERPA's statutory scheme and

17. *See generally id.* at 523–26 (deciding whether FERPA and the North Carolina Public Records act conflicted and whether the records must be released).

18. *See infra* Part II.C.

19. *See* 120 CONG. REC. 39,862 (daily ed. Dec. 13, 1974) (joint statement of Sens. Buckley and Pell). FERPA, introduced as a floor amendment in the Senate, was never considered by a committee and thus lacks much of the typical legislative history, such as committee reports and hearings. *See* Robert W. Futhey, Note, *The Family Educational Rights & Privacy Act of 1974: Recommendations for Realigning Educational Privacy with Congress' Original Intent*, 41 CREIGHTON L. REV. 277, 311 (2008). As discussed later, subsequent legislative history is nearly worthless in determining legislative intent. *See infra* Part IV.A.2. This is, however, the only dependable signal of the legislative intent behind FERPA.

20. 20 U.S.C. 1232g(a)(4)(A) (2012).

21. *See* 20 U.S.C. 1232g(a)(4)(B) (2012).

22. *See* 20 U.S.C. § 1232g(b) (2012) ("No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records . . . .").

enforcement mechanisms do not confer a private right of action for violations,[23] the only avenue for enforcement is for aggrieved students to file a complaint with the Department of Education.[24] While the Department of Education has broad authority to withhold funding from institutions in violation of FERPA[25], no school has ever lost funding.[26] X

FERPA has been substantively amended several times.[27] In 1990, a section of the Student Right to Know, Crime Awareness, and Campus Security Act modified FERPA by inserting a provision which permits institutions of higher education to disclose the outcome of disciplinary proceedings to the victims of crimes of violence.[28] The Higher Education Amendments Act of 1998 amended FERPA further, creating an exception and giving institutions of higher education the authority to disclose *to anyone* the final result of a disciplinary proceeding conducted against a student who was alleged to have committed a crime of violence or nonforcible sex offense and has been determined to have violated the institutions rules pertaining to such offenses (hereinafter the "final result exception").[29] The final result exception, while narrow and limited in scope, includes a broad list of crimes.[30]

The day after the House of Representatives voted in favor of the final result exception, Representative Thomas Foley, the amendment's primary sponsor, made a statement on the floor of the House, [31] claiming the amendment was designed to provide balance "between one student's right of privacy to another student's right to

23. *See* Gonzaga Univ. v. Doe, 536 U.S. 273, 287 (2002).

24. *See* 34 C.F.R. § 99.63 (2008); *see also Gonzaga Univ.*, 536 U.S. at 287.

25. *See* 20 U.S.C § 1232g(b) (2012).

26. *See* Tyler Kingkade, *Why Colleges Hide Behind this One Privacy Law All the Time*, HUFFINGTON POST (Feb. 1, 2016, 6:44 PM), https://www.huffingtonpost.com/entry/colleges-hide-behind-ferpa_us_56a7dd34e4b0b87beec65dda.

27. *See* Lynn M. Daggett, *Bucking Up Buckley I: Making the Federal Student Records Statute Work*, 46 CATH. U. L. REV. 617, 617 (1996–1997).

28. *See* Student Right-to-Know and Campus Security Act, Pub. L. No. 101-542, § 204, 104 Stat. 2381, 2385-87 (1990) (codified as amended at 20 U.S.C. § 1232g(b)(6) (2012)); Daggett, *supra* note 27, at 621.

29. In the student disciplinary record disclosure system there are two separate, yet equally important exceptions: 20 U.S.C. § 1332g(b)(6)(A) which applies only to disclosure to the victims, and 20 U.S.C. § 1332g(b)(6)(B) which applies to disclosure to anyone. As noted *supra*, and as applies *infra*, this is Section 1332g(b)(6)(B)'s story only. *See, e.g.*, *Law & Order: Point of View* (NBC television broadcast Nov. 25, 1992) (providing the framework for this witty citation and serving as the world's introduction to the legendary Detective Lennie Briscoe).

30. Included in the list of offenses which fall under into the category of "crime of violence" are arson; burglary; criminal homicide; destruction, damage, or vandalism of property; kidnapping or abduction; robbery; forcible sex offenses; and perhaps most broad "assault offenses." 34 C.F.R. § 99.39 (2000).

31. *See* 144 CONG. REC. 8435 (daily ed. May 7, 1998) (statement of Rep. Foley) ("It did pass yesterday. We hope the Senate will consider the amendment.").

know about a serious crime in his or her college community,"[32] and that it would make reporting on such records "subject to the State laws that apply."[33] Representative Foley discussed the allegation that schools were using student disciplinary hearings to conceal crime issues on campuses.[34] He stated the amendment was important "[b]ecause . . . parents and community leaders and others deserve to know the statistical problems that are being experienced on our Nation's campuses."[35]

In the mid-1990's, a years-long battle between news media and Miami University began over student disciplinary records.[36] After the *Miami Student* successfully convinced the Ohio Supreme Court that student disciplinary records were not student records protected by FERPA, *The Chronicle of Higher Education* sought the disclosure of disciplinary records, "fraught with personally identifiable information and virtually untainted by redaction."[37] In 2002, the Sixth Circuit held student disciplinary records *were* protected under FERPA, in part because of the final result exception.[38] Because Ohio's public records law did not apply to federally-protected records, disclosure was prohibited.[39] In its decision, the Sixth Circuit opined about the significant weight Congress has placed on student privacy rights through its creation of FERPA.[40]

B. North Carolina's Public Records Law

Until 1935, North Carolina had no public records statute and relied on common law principles to govern citizen access to public records.[41] The statute enacted in 1935 contained significantly more access rights, but it was primarily enacted for historical preservation purposes and citizen access was an afterthought.[42]

In 1975, North Carolina passed a new public records law providing for much broader access to state and local government records.[43] The law as it is now is incredibly broad.[44] Any document

---

32. *See id.* at 8434.
33. *See id.*
34. *See id.*
35. *See id.* at 8435.
36. *See* United States v. Miami Univ., 294 F.3d 797, 803 (6th Cir. 2002).
37. *Id.* at 803–04, 811.
38. *See id.* at 811–13.
39. *See id.*
40. *See id.* at 807.
41. *See* Thomas H. Moore, *You Can't Always Get What You Want: A Look at North Carolina's Public Records Law Comments*, 72 N.C. L. REV. 1527, 1543 (1993–1994)
42. *Id.*
43. *See* Moore, *supra* note 41, at 1544–45.
44. *See id.* at 1544. The law encompasses:

> all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in

created by a public agency constitutes a public record, with the main limitation being specific statutory exceptions.[45] While the General Assembly has provided broad protection to the educational records of elementary and secondary students,[46] no similar provision exempting records of students within the UNC system or the North Carolina Community College system exists. [47]

It is difficult to imagine that this lack of exception was anything other than deference to FERPA[48] or a mere oversight. As Ryan Fairchild explained, the wording of the Public Records Act is so breadth and liberal that application could conceivably require absurd disclosures.[49] Despite the potential for absurdity, the North Carolina Supreme Court has been clear that "whether [exceptions] should be made is a question for the legislature, not the Court."[50]

The North Carolina Court of Appeals first addressed FERPA's protection of student disciplinary records in the UNC system twenty years ago in *DTH Publishing Corp. v. University of North Carolina*.[51] There, it held that student disciplinary proceedings were validly held in closed session under the state open meetings law because the proceedings required divulging student records.[52] The court reasoned that "FERPA was adopted to address systematic . . . violations of students' privacy and confidentiality rights through unauthorized

---

> connection with the transaction of public business by any agency of North Carolina government or its subdivisions. Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government

N.C. GEN. STAT. § 132-1(a) (2017).

45. *See* News & Observer Pub. Co., Inc., v. Poole, 412 S.E.2d 7, 12 (N.C. 1992); *see also* Ryan C. Fairchild, *Giving Away the Playbook: How North Carolina's Public Records Law Can Be Used to Harass, Intimidate, and Spy*, 91 N.C. L. REV. 2117, 2126 (2013).

46. *See* N.C. GEN. STAT. § 115C-402(e) (2017).

47. The only exceptions for records of UNC on the books are for personally identifying information from or about an applicant to a constituent institution, or pertaining to liability insurance programs of constituent institutions. *See* Fairchild, *supra* note 45, at 2129–30.; N.C. GEN. STAT §§ 132-1.1(f), 116-222 (2017).

48. Some states' failure to enact student privacy laws may be the result of a belief that FERPA adequately provides robust protection for student privacy rights, or that the federal government has occupied the field. *See* Lynn M. Daggett, *FERPA in the Twenty-First Century: Failure to Effectively Regulate Privacy for All Students*, 58 CATH. U. L. REV. 59, 113 (2008).

49. *See* Fairchild, *supra* note 45, at 2130–31. Such disclosures could include football playbooks, academic exams, and academic research work. *See id.*

50. *News & Observer Pub. Co., Inc.*, 412 S.E.2d at 18.

51. 496 S.E.2d 8, 8 (N.C. Ct. App. 1998).

52. *See id.* at 13.

releases of sensitive educational records,"[53] and FERPA's conditional funding therefore rendered the records "privileged or confidential."[54] The court held that the minutes of disciplinary proceedings were exempt from the Public Records Act because release would "frustrate the purpose" of a closed session.[55] While *DTH Publishing* dealt broadly with student disciplinary records,[56] the issue of records falling under the final result exception has not been addressed by North Carolina courts until now.

C. Title IX and Sexual Misconduct

Title IX declares: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ."[57] On April 4, 2011, in response to a growing epidemic of sexual misconduct on college campuses,[58] Vice President Joe Biden and Secretary of Education Arne Duncan announced a "Dear Colleague" letter outlining the Department of Education's interpretations of how peer-to-peer sexual misconduct relates to Title IX.[59] The significant policy pivots in the letter were not subject to notice and comment rulemaking procedures.[60]

---

53. *Id.* at 12 (quoting Smith v. Duquesne Univ., 612 F. Supp. 72, 80 (1985), *aff'd*, 787 F.2d 583 (1986)). The "privileged and confidential" status of the records allowed disciplinary hearings to be held in closed session under an exception to the state open meetings law. *See id.*

54. *See id.*; *see also* N.C. GEN. STAT. § 143-318.11(a) (2017).

55. *See DTH Publ'g Corp.*, 496 S.E.2d at 13; *see also* N.C. GEN. STAT. § 143-318.10(e) (2017).

56. *See DTH Publ'g Corp.*, 496 S.E.2d at 8–9 (discussing the factual background of the case).

57. Education Amendments of 1972, Pub. L. No. 92-318, § 901, 86 Stat. 373 (1972) (codified as amended at 20 U.S.C. 1681(a) (2012)).

58. *See, e.g.*, CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY at xiii (2007) (stating that almost twenty percent of women report being victims of sexual assault since entering college). For a more thorough discussion on the issue of sexual misconduct on college campuses, see Brian A. Pappas, *Out from the Shadows: Title IX, University Ombuds, and the Reporting of Campus Sexual Misconduct*, 94 DENV. L. REV. 71, 74–75 (2016–2017).

59. *See* Press Release, U.S. Dep't of Educ., Vice President Biden Announces New Administration Effort to Help Nation's Schools Address Sexual Violence (Apr. 4, 2011), https://www.ed.gov/news/press-releases/vice-president-biden-announces-new-administration-effort-help-nations-schools-ad; U.S. Dep't of Educ. Office for Civil Rights, Dear Colleague Letter (Apr. 4, 2011) [*hereinafter* Dear Colleague Letter]. The Dear Colleague Letter dramatically altered prior understanding of Title IX by requiring universities to address allegations of sexual misconduct originating on and off campus and by prescribing required knowledge and a preponderance of the evidence standard in addressing such allegations. *See* Brian A. Pappas, *Dear Colleague: Title IX Coordinators and Inconsistent Compliance with the Laws Governing Campus Sexual Misconduct*, 52 TULSA L. REV. 121, 127 (2016); Dear Colleague Letter, *supra* note 59, at 11.

60. *See* Lance Toron Houston, *Title IX Sexual Assault Investigations in Public Institutions of Higher Education: Constitutional Due Process Implications*

In response, universities refined how they addressed peer-to-peer sexual misconduct.[61] Along with new policies came a substantial increase in disciplinary enforcement of sexual misconduct policies.[62] Since the release of the Dear Colleague Letter, complaints of noncompliance to the Office for Civil Rights have increased exponentially each year,[63] and to date, the Office has opened more than 500 investigations into universities' handling of sexual misconduct allegations.[64]

Accompanying these changes has been a host of litigation against universities by students accused or disciplined in Title IX sexual misconduct proceedings.[65] *Doe v. The Ohio State University*,[66] claimed that The Ohio State University's disciplinary procedures relating to Title IX sexual misconduct allegations would violate an accused student's right to privacy.[67] The district court, noting that such a claim would not be ripe without disclosure, concluded the claim was without merit because all parties, the district court, and the Sixth Circuit Court of Appeals were in agreement that student disciplinary records produced in Title IX disciplinary proceedings were protected under FERPA.[68] The court noted that there was no concern about disclosure under the final result exception because the records in question did not constitute a final result of a disciplinary proceeding.[69]

Since the beginning of President Donald Trump's term, the Department of Education has rolled back the clock on the interpretation of how Title IX applies to peer-to-peer sexual misconduct. In September 2017, the administration rescinded the

---

of the Evidentiary Standard Set Forth in the Department of Education's 2011 Dear Colleague Letter, 34 HOFSTRA LAB. & EMP. L.J. 321, 333 (2017). The Dear Colleague Letter was designated a "significant guidance document." Dear Colleague Letter, *supra* note 59, at 1 n.1. The Dear Colleague Letter thus purported to create interpretive rules of general rather than creating new regulations. *See generally*, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007) (defining and discussing significant guidance documents).

61. *See* Erin E. Buzuvis, *Title IX and Procedural Fairness: Why Disciplined-Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault*, 78 MONT. L. REV. 71, 71 (2017).

62. *See id.* at 71–72. Victims choose to pursue investigations with universities for a host of reasons: the confidentiality of the process, misunderstanding of the law, fear they would not be believed by the police, and lack of control in the criminal justice system. *See* Eliza Gray, *Why Victims of Rape in College Don't Report to the Police*, TIME (June 23, 2014), http://time.com/2905637/campus-rape-assault-prosecution/.

63. *See* Buzuvis, *supra* note 61, at 82.

64. *See Title IX: Tracking Sexual Assault Investigations*, CHRONICLE OF HIGHER EDUC., https://projects.chronicle.com/titleix/ (last visited Dec. 18, 2018).

65. *See* Buzuvis, *supra* note 61, at 85. No disciplined student has ever prevailed against a university defendant in a Title IX suit. *See id.*

66. Doe v. The Ohio State Univ., 136 F. Supp. 3d 854 (S.D. Ohio 2016).

67. *See id.* at 860, 868.

68. *Id.* at 869.

69. *See generally id.* at 864.

Dear Colleague Letter and subsequent clarifying guidance,[70] issuing interim guidance that gives colleges and universities more flexibility in crafting peer-to-peer sexual misconduct policies and allows the use of the more stringent clear and convincing standard in disciplinary proceedings.[71] These changes were implemented in hopes of making the process more fair for all parties and with the intention that official rules would be promulgated in the future.[72]

In November 2018, the Department of Education proposed new rules.[73] The proposed rule features more protections for the accused and narrows the definition of actionable sexual misconduct.[74] Further, universities would have discretion in determining whether to investigate allegations of off-campus sexual misconduct.[75] While the exact impact these changes will have is unclear,[76] it is plain that Title IX will remain the driving force behind universities enforcing peer-to-peer sexual misconduct policies.

III. THE CASE: DTH MEDIA CORP. V. FOLT

On September 30, 2016, DTH sent a letter to UNC requesting "copies of all public records made or received by [UNC] in connection with a person having been found responsible for rape, sexual assault or any related or lesser included sexual misconduct."[77] In a column days later, DTH Editor-in-Chief Jane Wester argued disclosure of names was necessary because she "badly want[ed] to know" how

70. Stephanie Saul & Kate Taylor, *Betsy DeVos Reverses Obama-Era Policy on Campus Sexual Assault Investigations*, N.Y. TIMES (Sept. 22, 2017), https://www.nytimes.com/2017/09/22/us/devos-colleges-sex-assault.html.

71. *See generally* U.S. Dep't of Educ. Office For Civil Rights, Q&A on Campus Sexual Misconduct (Sept. 2017) (discussing interim interpretations of Title IX).

72. *See* Press Release, U.S. Dep't of Educ., Department of Education Issues New Interim Guidance on Campus Sexual Misconduct (Sept. 22, 2017), https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct.

73. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,642 (proposed Nov. 28, 2018) (to be codified at 34 C.F.R. pt. 106).

74. Sophie Tatum, *Education Dept. Unveils New Protections for Those Accused of Sexual Misconduct on Campuses*, CNN (Nov. 16, 2018, 1:17 PM), https://www.cnn.com/2018/11/16/politics/education-department-betsy-devos-sexual-misconduct/index.html.

75. Andrew Kreighbaum, *What the DeVos Title IX Rule Means for Misconduct Off Campus*, INSIDE HIGHER EDUC. (Nov. 27, 2018) https://www.insidehighered.com/news/2018/11/27/what-title-ix-plan-would-mean-misconduct-campus.

76. Sarah Brown & Katherine Mangan, *What You Need to Know About the Proposed Title IX Regulations*, CHRONICLE OF HIGHER EDUC. (Nov. 16, 2018, 4:40 PM), https://www.chronicle.com/article/What-You-Need-to-Know-About/245118.

77. Transcript of Record at 29, DTH Media v. Folt, 816 S.E.2d 518 (N.C. Ct. App. 2018) (No. 17-871).

many people UNC has found responsible for sexual assault and what sanctions were being imposed.[78]

UNC denied the request, and DTH filed a declaratory judgment action on November 21, 2016.[79] Eventually, the Superior Court entered judgment in favor of UNC, concluding that FERPA grants universities discretion in determining whether to release records to the public under the final result exception and that this grant of discretion preempted required disclosure under the Public Records Act.[80] DTH appealed, and the North Carolina Court of Appeals issued its shocking decision on April 17, 2018.[81] The court reasoned that under proper canons of statutory interpretation, FERPA and the Public Records Act should be read to avoid conflict.[82] Reading the statutes in such a way, the court concluded the final result exception did not grant public universities absolute discretion in making disclosures.[83] The court determined that DTH was entitled to the records to the fullest extent they fell under the § 1232g(b)(6)(B) exception, fully granting the request except as to the date of the offenses.[84] Finally, the court explained its belief that FERPA did not preempt the Public Records Act in this case.[85]

IV. FERPA PREEMPTS THE PUBLIC RECORDS ACT

The North Carolina Supreme Court should first determine that the final result exception is a grant of discretionary power to universities to disclose particular records. Next, it should determine that the Public Records Act does not yield to the final result exception because the exception does not serve as an express statutory exemption which prohibits disclosure of the records in question. Finally, the court should conclude that FERPA and the Public

78. *See* Wester, *supra* note 5. Ironically, based on the explanation Wester gives in her column, all of the needs underlying the request could be met without identifying students. *See id.*

79. Transcript of Record, *supra* note 77, at 6–7. Wester again went on the record and demonstrated that the needs underlying the request did not require identifying students, saying

> It would help us tremendously into figuring out basically how seriously UNC is taking these cases, how many of the cases that enter the system get resolved — because we can't really even see that right now — so basically, there's stuff we can report, we can talk to survivors and stuff without the record, but we really need to see more on UNC's side of it.

Katie Rice, *The Daily Tar Heel Files Lawsuit against UNC to Obtain Campus Sexual Assault Records*, DAILY TAR HEEL (Nov. 22, 2016, 12:52 AM), https://www.dailytarheel.com/article/2016/11/the-daily-tar-heel-files-lawsuit-against-unc-to-obtain-campus-sexual-assault-records.

80. Transcript of Record, *supra* note 77 at 37–39.

81. DTH Media Corp. v. Folt, 816 S.E.2d 518, 518 (N.C. Ct. App. 2018).

82. *See id.* at 523.

83. *See id.* at 524.

84. *See id.* at 521, 526.

85. *See id.* at 526–29.

Records Act conflict, and FERPA's grant of discretion preempts the Public Records Act through implicit conflict preemption.

The court of appeals' interpretation of the final result exception is based on the exception's plain language.[86] However, the reasoning suggests the court's interpretation of FERPA's text relies on the conclusion that FERPA is *in pari materia* with the Public Records Act, and that they must be read in context with one another.[87] Statutes are considered *in pari materia* when they share a common aim or purpose or when they speak on the same subject.[88] When the text of a statute under consideration is clear, though, statutes *in pari materia* should not control construction.[89]

Even assuming, *arguendo*, the court of appeals read the statutes *in pari materia* to resolve ambiguity, such a reading would be improper because FERPA and the Public Records Act cannot reasonably be considered *in pari materia*. FERPA is a shield providing comprehensive protections to students by preventing disclosure of student records.[90] The Public Records Act, on the other hand, is a sword, broadly requiring disclosure of a vast array of records.[91] No matter how the subjects, purposes, and aims of the statutes are framed they will never be *in pari materia*.[92] Since much of the court's analysis of the final result exception rests upon the faulty notion that it must be read in context with the Public Records Act,[93] it is a fair assumption that the mistake substantially and fatally flawed the court's entire analysis.

A. The Meaning of the Section 1232g(b)(6)(B) Exception

1. The Plain Text

North Carolina courts have long followed the plain language rule in statutory interpretation: "If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms."[94]

---

86. *See id.* at 524.
87. *See id.* at 523–24.
88. *See* Hous. Auth. of City of Greensboro v. Farabee, 200 S.E.2d 12, 15–16 (N.C. 1973).
89. *See id.* at 16.
90. *See, e.g.*, Daggett, *supra* note 27, at 617–19. *See also supra* Part II.A.
91. *See supra* Part II.B.
92. While the court of appeals does not explain how, exactly, the statutes are *in pari materia*, the mere fact that they both speak to "records" in some respect would be decidedly insufficient to support a threshold determination that they are on the same subject.
93. *See* DTH Media Corp. v. Folt, 816 S.E.2d 518, 523–24 (N.C. Ct. App. 2018).
94. Lanvale Props., LLC v. Cty. of Cabarrus, 731 S.E.2d 800, 809 (N.C. 2012) (internal quotations and citations omitted).

While the court of appeals concluded that nothing in the text of the final result exception[95] "required" UNC to exercise discretion in determining whether to disclose results within the final result exception,[96] a plain reading of the statute indicates the final result exception grants universities the discretion to determine whether to make such disclosures.

The language "[n]othing in this section shall be construed to prohibit . . ." indicates that the conduct is allowed, but not required.[97] The exception creates a discretionary decision: *the university* may choose whether to engage in the excepted conduct.[98] Thus, a *university* clearly has a discretionary choice of whether to disclose the final result of certain disciplinary proceedings.[99]

The court of appeals ignores this common-sense reading, arguing the only hint of discretion within the final result exception is the limiting condition that the exception applies only when "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."[100] Further, the court of appeals insists that FERPA's judicial order exception demonstrates that the

---

95. The final result exception reads as follows:

> 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.

20 U.S.C. § 1232g(b)(6)(B) (2012).

96. *See DTH Media Corp.*, 816 S.E.2d at 524–25.

97. Prohibit is defined as "to forbid by law." *Prohibit*, BLACK'S LAW DICTIONARY (10th ed. 2014). Because the subsequent action is not forbidden, but is not required it, it is allowed. Indeed, the Department of Education notes that the final result exception is a permissive exception. *See* Family Educational Rights and Privacy, 65 Fed. Reg. 41,852, 41,860 (July 6, 2000) (to be codified at 34 C.F.R. pt. 99). The comment response notes that the new provision does not require a university to disclose any records under the FERPA exception, but concludes that FERPA "does not prevent" disclosure required under state public records laws. *Id.* For the reasons described in Part IV.A, the court's conclusion would make little sense in this case because the North Carolina Public Records Act *would* require disclosure of *all* records falling under the FERPA exception.

98. *See* 20 U.S.C. § 1332g(b)(6)(B). Discretion is defined as "[w]ise conduct and management exercised without constraint." *Discretion*, BLACK'S LAW DICTIONARY (10th ed. 2014).

99. Comparing UNC to federally funded private universities outside the reach of the Public Records Act reinforces this rationale. For private universities, administrators would obviously be required to make a decision about whether to release records under the final result exception. Their decision would be an exercise of discretion, despite the lack of language requiring the exercise of discretion. Why would FERPA treat public and private universities differently without explicit wording to such an effect?

100. *See DTH Media Corp.*, 816 S.E.2d at 524.

FERPA exception does not grant institutions discretion in determining whether to release records.[101]

The court's logic misses the mark, ignoring that the judicial order exception is an independent exception.[102] "Just as Congress' choice of words is presumed to be deliberate, so too are its structural choices."[103] In 1998, Congress chose to amend FERPA to add the final result exception.[104] The court should have presumed Congress was deliberate in its structural placement and wording of the final result exception, rather than focus on such a circular argument.[105]

2. Legislative Intent Demonstrates That Discretion is Appropriate

Although the meaning of the final result exception is plain on its face, even if the language is ambiguous, FERPA evinces a legislative intent to leave the decision to disclose records under the exception within the discretion of universities. Our supreme court notes that "legislative intent controls the meaning of a statute" and directs that to determine intent, "a court must consider the act as a whole, weighing the language of the statute, its spirit, and that which the statute seeks to accomplish."[106]

Because we must presume that Congress was deliberate in its wording of the final result exception,[107] it is telling that Congress crafted a permissive exception.[108] Under the court of appeals' decision and the language of the Public Records Act, virtually any request for

---

101. *See id.* at 524–25. This logic is rather circular. The court focuses on the conclusion that because the judicial order exception does not differentiate between judicial orders which *require* disclosure and those which merely *authorize* disclosure, an institution could not lose funding for complying with a judicial order requiring disclosure of records under the final result exception. *See id.* Further, in this portion of the analysis the court of appeals appears to confuse and side-step the true issue, twice turning its conclusions on whether disclosures under these two exceptions would leave an institution in violation of FERPA. *See id.* at 525. The question is *not* whether release of records under the final result exception would violate FERPA: it decidedly would not. The question is whether the Public Records Act can completely annihilate the discretion FERPA gives. Answering the first question says nothing about the second.

102. Existing in its own independent sub-sub-sub section, the judicial order exception is broader than the final result exception and encompasses records well outside the scope of the final result exception. *See* 20 U.S.C. § 1232g(b)(2)(B) (2012).

103. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 353 (2013).

104. *See supra* note 29 and accompanying text.

105. Theoretically a judicial order could compel the release of records under the final result exception. *See DTH Media Corp.*, 816 S.E.2d at 598 (remanding the litigation to superior court to issue a judicial order compelling disclosure). That said, it makes very little sense to stretch a whimsical argument about lack of distinction in the judicial order exception into substantive support for the incorrect conclusion that the final result exception does not grant institutions discretion in deciding whether to disclose records.

106. North Carolina Ins. Guar. Ass'n v. Bd. of Trs. of Guilford Tech. Cmty. Coll., 691 S.E.2d 694, 699 (N.C. 2010) (internal quotations and citations omitted).

107. *Univ. of Tex. Sw. Med. Ctr.*, 570 U.S. at 353.

108. *See supra* Part IV.A.1.

disclosure coming within the final result exception would become mandatory for the sixteen constituent universities within the UNC system. For public universities in North Carolina, the final result exception would become a required disclosure. Where Congress did not choose to require disclosure of these records, such a requirement for disclosure is surely inconsistent with the intent of the law.

Requiring disclosures in such a way is grossly inconsistent with the spirit and goals of FERPA. The court of appeals places great emphasis on the statement Representative Foley made the day *after* the provision was approved by the House of Representatives.[109] In regards to this type of misguided reliance, Justice Scalia said it best: "Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote."[110] Considering, for the sake of discussion, that Representative Foley's statement has even a scintilla of importance in determining the intent of Congress, the statement clearly demonstrates that the intent of the amendment was to balance the interest "between one student's right of privacy to another student's right to know about a serious crime in his or her college community."[111] Balance requires the measurement and offsetting of competing interests to achieve the most desirable result,[112] and *universities* would be in the best position to balance the interests of the community against the privacy interest of the students.[113] It is preposterous to conclude that Congress expected that the law these records would be subject to would require blind disclosure without any balancing of interests.

---

109. *See DTH Media Corp.*, 816 S.E.2d at 527.

110. Sullivan v. Finkelstein, 496 U.S. 617, 632 (1990) (Scalia, J., concurring). Justice Scalia is hardly alone in this belief. *See also* Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 407 (1987) (noting that the Court does not attach substantial weight to statements made by sponsors of legislation after the passage of an act); Wallace v. Jaffree, 472 U.S. 38, 86–87 (1985) (Burger, C.J., dissenting) (proselytizing that statements made by a bill's sponsor after its passing do not offer a "shred of evidence" that the body shared the sponsor's intentions in passing the legislation). For a detailed explanation of reasons underlying the uselessness of post-passage legislative history, see Covalt v. Carey Canada Inc., 860 F.2d 1434, 1438 (7th Cir. 1988).

111. *See* 144 CONG. REC. H2984 (daily ed. May 7, 1998) (statement of Rep. Foley).

112. *See Balance*, BLACK'S LAW DICTIONARY (10th ed. 2014) (third definition).

113. Universities are in a position to know the case facts, the severity of the offense, and the community's need to know, whereas an appellate court is not in a position to balance the interests in what is now eleven years' worth of disciplinary records. The court of appeals paid special attention to the language "make reporting subject to state laws that apply." *See* 144 CONG. REC. H2984 (daily ed. May 7, 1998) (statement of Rep. Foley). Had Congress intended that the final result exception would require disclosure, as the Public Records Act allegedly requires, it would have chosen language conveying such an intent.

B. The Public Records Act Does Not Yield to the Discretion Granted by the Final Results Exception

Because the conflicting law exemption found in section 132-1(b) of the Public Records Act is construed so narrowly,[114] our supreme court should not determine that the Public Records Act yields to FERPA. Construing this provision narrowly, the court should note that while FERPA itself would specifically provide a broad exemption for student records under the Public Records Act,[115] the final result exception removes certain records from that category. Thus, the final result exception does not "otherwise provide" that records within the exception may not be disclosed. Instead, because the final result exception *permits* disclosure the records, they are therefore subject to section 132-1(b)'s disclosure requirements unless preempted by FERPA.

C. FERPA's Grant of Discretion to Colleges and Universities Preempts the Public Records Act

The supreme court should determine that the Public Records Act is in conflict with the final result exception of FERPA, and therefore FERPA implicitly preempts the Public Records Act to the extent it requires disclosure of records within the final result exception.[116] The court of appeals relies on the notion that it should presume both that the Public Records Act does not conflict with FERPA[117] and that federal preemption does not apply.[118] While it would be logical to presume that two statutes enacted by the same sovereign are not

---

114. *See supra* Part II.B. In brief, UNC contends that FERPA and the Public Records Act can be reconciled by applying the deference the Public Records Act affords to conflicting laws. *See* Brief of Defendant-Appellees at 19–21, DTH Media v. Folt, 816 S.E.2d 518 (N.C. Ct. App. 2018) (No. 17-871). This argument should be unpersuasive, however, because the court should narrowly construe the meaning of "unless otherwise specifically provided by law." *See* News & Observer Pub. Co., Inc. v. Poole, 412 S.E.2d 7, 18 (N.C. 1992).

115. *See generally* 20 U.S.C. § 1232g (2012) (withholding substantial funding from institutions that impermissibly disclose student records).

116. While there may be some merit to the argument that FERPA preempts the Public Records Act through implicit field preemption, the argument would be more complex and less compelling than conflict preemption argument based on a clear-cut conflict.

117. *See* DTH Media Corp. v. Folt, 816 S.E.2d 518, 524 (N.C. Ct. App. 2018).

118. *See id.* at 526. In describing its presumption against federal preemption, the court of appeals relies on *State ex rel. Utilities Comm'n v. Carolina Power & Light Co.*, but neglects to address the subsequent explanation therein that such a presumption exists when the field supposedly preempted is one *traditionally occupied by the states*, which are those fields relating to the exercise of a state's police powers over health and welfare. *See* 614 S.E.2d 281, 287 (2005) (citing Hillsborough Cty. v. Auto. Med. Labs., Inc., 471 U.S. 707, 715 (1985)). It is difficult to see how the Public Records Act is an exercise of North Carolina's police power over health and welfare and equally difficult to understand how North Carolina has traditionally occupied the field of the privacy of student records when there is only one provision in all of the general statutes relating to the confidentiality of student records. *See supra* note 47 and accompanying text.

meant to contradict one another, there is little sense in assuming that two unrelated legislatures would avoid conflict to any extent.[119]

Federal preemption may be either express or implied.[120] Courts have taken two avenues of analysis of implicit conflict preemption: "obstacle" preemption occurs when a state statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"[121] while "impossibility" preemption occurs when compliance with both state and federal law is a "physical impossibility."[122]

It has been argued that the federal judiciary has grossly misapplied implicit conflict preemption through a broad reading of purposes and objectives preemption.[123] Since at least 2000, Supreme Court justices have warned of such an overwhelming expansion.[124] Advocates for change often argue in favor of a much stronger presumption against preemption and/or an increased reliance on the nuanced and cumbersome "physical impossibility" analysis.[125] In response to the seemingly artificial requirement of choosing between ridiculously broad or the uncompromisingly narrow analyses, analysis of implicit preemption should simply be "an inquiry into whether the ordinary meanings of state and federal law conflict."[126]

Such a plain text approach to implicit preemption analysis requires a full understanding of the purposes underlying the Supremacy Clause.[127] The Supremacy Clause contains a rule of applicability requiring application of federal law in state courts with equal force as state law[128] and a rule of priority requiring application of federal law over state law when conflict exists.[129] These two rules, without further historical understanding, leave the final phrase of the Supremacy Clause –"anything in the Constitution or laws of any State to the contrary notwithstanding"[130]– seemingly redundant.[131]

Understood in the context of the ratification debates, however, this phrase was critically necessary to the success of the Supremacy

---

119. *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 233 (2000).

120. *See* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992).

121. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

122. *See* Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963).

123. *See* Wyeth v. Levine, 555 U.S. 555, 583 (2009) (Thomas, J., concurring in judgment); *see also* Nelson, *supra* note 119, at 229.

124. *See, e.g.*, Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861, 907 (2000) (Stevens, J., dissenting) (opining about the potentially limitless application of purposes and objectives preemption).

125. *See* Nelson, *supra* note 119, at 230–31.

126. *Wyeth*, 555 U.S. at 588 (Thomas, J., dissenting) (internal quotations and citations omitted).

127. U.S. CONST. art. VI, cl. 2.

128. Nelson, *supra* note 119, at 246.

129. *See id.* at 250. This rule of priority would displace the traditional rule, which would apply the law of the statute more recently passed in the event of a conflict. *See id.*

130. U.S. CONST. art. VI, cl. 2.

131. Nelson, *supra* note 119, at 254.

Clause.[132] At the time of ratification, there was a judicial presumption against reading statutes in a manner which resulted in conflict, which would result implied repeal.[133]

In response to the presumption against implied repeals, legislatures sometimes include a *non obstante* provision to indicate to courts that new legislation may indeed contradict other statutes and that possible conflict should not skew the meaning of the statute.[134] The language of such clauses often dictated that the statute would apply "any law to the contrary notwithstanding," or similar wording to the same effect.[135] Instead of leaving the Supremacy Clause's rule of priority open to the interpretation of state courts, which might still apply the presumption and stretch the meaning of a federal statute to avoid conflict and implied repeal, the drafters of the Constitution included the phrase "anything in the Constitution or laws of any State to the contrary notwithstanding" as the final phrase of the Supremacy Clause as a universal *non obstante* clause, applying to all federal laws, and specifically contemplating potential conflict with state law and cautioning interpreting courts not to stretch their interpretation of federal statutes.[136] A plain text approach to implicit preemption, free from judicial policymaking, gives meaning to the framer's express words and their intent that courts should strain to find harmony between apparently conflicting state and federal statutes.[137]

In 2011, the Supreme Court came its closest to implementing a plain text approach, guided by the Supremacy Clause's *non obstante* provision, to implicit preemption. In *PLIVA, Inc. v. Mensing*,[138] Justice Thomas delivered the opinion of the court.[139] Although the critical implied preemption analysis was only a plurality portion of the opinion, the time may soon arrive that our nation's courts finally do away with difficult and nuanced tests for conflict preemption.[140]

Though *PLIVA* specifically discusses judicial speculation about actions which could reconcile federal and state law under an impossibility preemption analysis,[141] it stands for a broader textualist approach to conflict preemption: "The *non obstante* provision of the

132. *See id.* at 255.
133. *See id.* at 241–42.
134. *See id.*
135. *Id.* at 238.
136. *See id.* at 255.
137. *See* Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861, 911 (2000) (Stevens, J., dissenting).
138. PLIVA, Inc. v. Mensing, 564 U.S. 604 (2011).
139. *See id.* at 622–23.
140. Following the death of Justice Scalia in 2016 and Justice Kennedy's retirement in 2018, Justices Gorsuch and Kavanaugh have been elevated to the high court, leaving the court even more conservative than it was at the time of *PLIVA*. *See, e.g.*, Adam Liptak, *Confirming Kavanaugh: A Triumph for Conservatives, but a Blow to the Court's Image*, N.Y. TIMES (Oct. 6, 2018), https://www.nytimes.com/2018/10/06/us/politics/conservative-supreme-court-kavanaugh.html.
141. *See PLIVA,* 564 U.S. at 623.

Supremacy Clause indicates that a court need look no further than the ordinary meaning of federal law, and should not distort federal law to accommodate conflicting state law."[142]

Taking a textual approach to implicit conflict preemption simply requires determining whether the text of the state law conflicts with the text of the federal law.[143] Focusing on the text of statutes would simplify the analysis by removing the need to classify the conflict in terms of obstacle or impossibility. A clear rule based in a textual analysis will remove the need to speculate and stretch meaning, producing more consistent results and comporting more fully with the *non obstante* provision of the Supremacy Clause.

It is clear that the Public Records Act conflicts with FERPA to the extent that it would *require* blind disclosure of all records falling within the final result exception. The ordinary language of the exception clearly reveals Congress' intent to grant universities discretion in disclosing these records.[144] Because the Public Records Act would require UNC to blindly disclose the records, it interferes with UNC's ability to exercise the discretion the final result exception grants.

D. Policy Implications

North Carolina courts generally defer questions of public policy to the General Assembly.[145] Though the North Carolina Supreme Court need not give much weight to considerations of policy implications, it is important to consider some potential implications of affirming the court of appeals.

The most troubling policy consideration is that the release of records identifying students as responsible for "rape, sexual assault or any related or lesser included sexual misconduct" could create constitutional privacy issues. *Doe v. The Ohio State University* left open the possibility that if Title IX investigation records were not protected, an accused may have a cognizable substantive due process claim under the United States Constitution.[146] Named students certainly would have a legitimate concern: the Southern District of Ohio framed it as "the interest in avoiding disclosure of highly personal matters."[147] State run universities would be required to disclose their conclusions, often based on "investigations" with low evidentiary standards and limited due process rights, that individuals committed crimes.

---

142. *Id.* (internal quotations, punctuation, and citations omitted).

143. *See* Wyeth v. Levine, 555 U.S. 555, 588 (2009) (Thomas, J., concurring in judgment).

144. *See supra* Part IV.A.

145. *See* Martin v. N.C. Hous. Corp., 175 S.E.2d 665, 671 (N.C. 1970).

146. Doe v. The Ohio State Univ., 136 F. Supp. 3d 854, 869 (S.D. Ohio 2016) (concluding that because Title IX investigation records were protected under FERPA plaintiff did not have a substantive due process claim).

147. *Id.*

Furthermore, what about the negative effects that required blind disclosure would have upon the goals Title IX's peer-to-peer sexual misconduct policy enforcement? Confidentiality in the process is at the crux of Title IX and a major reason why victims often prefer reporting to their university rather than the police.[148]

Finally, there are instances where false accusations occur.[149] In a system where for at least the majority of the last ten years the federal government has *required* adjudication of these allegations by universities using the low standard of preponderance of the evidence,[150] are we ready to risk upending lives by labeling people as predators[151] and rolling back progress made for victims?[152] The Duke Lacrosse and *Rolling Stone* cases show that such risks should be considered.

These few concerns beg the question: with so much at stake, and a grant of discretion so clear, is there a need to weaponize the final result exception in conjunction with the Public Records Act?

V. CONCLUSION

In the end, what would truly serve the interests of progress and student welfare would be a release of detailed, non-personally identifiable information about sexual misconduct on campus. Indeed, Wester has gone on the record several times describing the needs allegedly at the heart of DTH's request.[153] These needs do not require naming names. Even Representative Foley, who sponsored the final result exception, noted the importance of using statistics to inform the community.[154]

It is frustrating that no exception to the Public Records Act is on the books for student records in the University of North Carolina system.[155] The General Assembly could have created such a provision

148. *See supra* note 62 and accompanying text. UNC notes that victims could sometimes be identified just through the release of their attacker's identity. Transcript of Record, *supra* note 79, at 17.

149. There is some dispute as to the prevalence of false allegations of sexual misconduct, but most reports suggest they are fairly rare. *See* Rowan Scarborough, *False Sex Assault Reports Not as Rare as Reported, Studies Show*, WASH. TIMES (Oct. 7, 2018), https://www.washingtontimes.com/news/2018/oct/7/false-sex-assault-reports-not-rare-reported-studie/.

150. *See supra* Part II.C.

151. William D. Cohan, *The Duke Lacrosse Player Still Outrunning His Past*, VANITY FAIR (Mar. 24, 2014, 8:49 PM), https://www.vanityfair.com/style/2014/03/duke-lacrosse-rape-scandal-ryan-mcfadyen.

152. Kurtis Lee, *Fallout from Rolling Stone Feared by Advocates for Sex Assault Victims*, L.A. TIMES (Apr. 6, 2015, 1:38 PM), https://www.latimes.com/nation/nationnow/la-na-nn-rolling-stone-fallout-question-answer-20150406-story.html.

153. *See supra* notes 78–79 and accompanying text.

154. *See supra* note 34–35 and accompanying text.

155. *See supra* text accompanying note 47.

and still could moot this litigation by fixing it now. Perhaps Congress, too, should reconsider the need for the final result exception.

For now, the question is before the North Carolina Supreme Court. With a proper textual approach to statutory construction, our supreme court should conclude that the final result exception does give discretion to universities, and therefore the Public Records Act's requirement to disclose is in conflict with FERPA. Without acrobatic harmonizing, the supreme court should find that FERPA preempts the Public Records Act to the extent this conflict exists, and reverse the court of appeals.