Attack-ademically Ineligible:
Student Athlete Sex Crimes and the Dangerous Misunderstandings of FERPA

Thesis

Presented in Partial Fulfillment of the Requirements for the Degree of Master of Science in the Graduate School of The Ohio State University

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The Ohio State University
2016

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Abstract

This thesis discusses privacy rights and university obligations with regard to alleged sex crimes by student-athletes. Sexual assault remains a long-standing problem at universities nationwide, the eradication of which is only just beginning as many schools join the movement to provide safe academic forums for victims to express their experiences. However, we are far from a rape-free collegiate America. When a sex-crime occurs, the treatment by universities of what they must disclose, and to whom, lacks consistency. The problem may be that universities hide behind the Federal Education Rights and Privacy Act (FERPA) more than what may be appropriate; it may be a matter of state law or university policy. Either way, this thesis maps out the issues, the governing law, where it is clear and where it is gray, and how to amend the gray areas for the sake of protecting students subjected to sex-crimes. The methods used were case analysis and use of a hypothetical for application. While many cases dot the landscape during the analytical process, the student-athlete as he or she relates to FERPA, served as the cornerstone to understanding FERPA’s effect on university privacy duties and FERPA’s effect on the student body through the student-athlete. The research showed that while FERPA may be ambiguous, universities hide behind FERPA more than what the legislation allows, thus harming school community interests and leaving students vulnerable to potentially dangerous situations, the likelihood of which could be
significantly diminished if more universities chose to speak up rather than cower behind FERPA.
Acknowledgments

I would like to thank Dr. Brian Turner and Dr. Donna Pastore for orienting my passionate message down the appropriate pathways to get to this point. I would also like to thank Professor Joshua Dressler of The Ohio State University Moritz College of Law and Dean Alan Michaels, Dean of The Ohio State University Moritz College of Law for sparking my interest in this topic. Also, thank you to Kristy McCray for meeting with me and reminding me of the community urgency that is necessary if we are to ever thwart sex crimes. Thank you to The Ohio State University for providing me a forum to promulgate this important topic. Finally, I would like to acknowledge and thank all of my family members who read my drafts and provided me with great constructive criticism. It takes a village, and I’m immensely indebted to mine, so thank you all.
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Chapter 1: Introduction and Purpose of Study

The Family Educational Rights and Privacy Act of 1974 has become one of the more controversial pieces of legislation related to education and privacy of the 21st century (White, 2013). Also known as FERPA or the Buckley Amendment, the Act serves as a barrier between students and their parents, usually beneficial to the desires of the student and their privacy. However, FERPA directly affects universities as well, handing out, at least in theory, severe penalties to schools that violate the requirements of the legislation. While this may paint a combative and adversarial relationship between the legislation and schools, universities frequently attempt to benefit from the legislation by hiding behind its often-misinterpreted language (White, 2013). To say the controversy ends there though would not do the current FERPA environment justice.

Student-athlete waiver forms, waiving some of a student-athlete’s rights under FERPA, often have no effect on the release of information in an alleged sex-crime situation, because these forms often only allow release of FERPA information to athletic academic counselors, coaching staff members, or other school officials. Further, a college or university hiding behind the FERPA’s language can become a nationally controversial headline once several other key ingredients are added: an alleged crime, a high-profile student-athlete, and the threat of imminent substantial danger that may exist as a result. Add to this the subsidiary ingredients of a prolific academic or athletic institution and a
crime that is inherently sexual in nature and the table is set for a steamy controversial feast on FERPA of eruptive proportions.

Through all of the controversy, FERPA has always seemed to serve two distinct purposes. Its first, simplest, and least controversial purpose is to confer on each student the right to inspect and correct any “education records” containing the student’s name or personally identifiable information about the student. Second, it protects students’ privacy by prohibiting institutions from engaging in unauthorized disclosure of education records and by imposing on faculty and staff members the obligation to take reasonable precautions to prevent misuse or unauthorized disclosure of education records (White, 2013).

Over the years, FERPA has served relatively well in its capacity to survive criticism from universities who found the legislation in its early years to be too broad in its granting of rights to post-secondary students to inspect and review records (White, 2013). In its contemporary environment though, while it may not be a revolutionary strategy, FERPA has come under more scrutiny than ever before because of universities’ strategy of fearfully hiding behind the legislation when called upon to reveal crucial information about sex-related crimes, a category of crime experiencing a bit of a coming-out party on campuses across the nation as students, especially female students, find the courageous personal empowerment—amongst a visceral victim-blaming culture—to reveal themselves as victims of sex-based crimes (Ellis, 2014). The result is pressure put on the administration by these students and members of the community. In an attempt to protect their students, the school cites FERPA, arguing that revealing information related
to a student alleged of a sex-based crime would be a violation of FERPA. Student-athletes, however, make this argument significantly unstable, especially when the student-athlete is a popular, well-known, star of the team, whose athletic talent is essential to the sport’s success. Why focus on student athletes? The number of rapes reported at colleges where the victim reports the accuser to be a student-athlete often equal or outnumber the number of rapes reported at colleges where the victim reports the accuser to not be a student-athlete (Boyd, 2016). According to Michele Davis, sexual assault nurse examiner for McLennan County, Texas (home of Baylor University), upwards of 50% of all rapes reported by the Baylor population come from athletics (Boyd, 2016). The skewed numbers are a disturbing trend. Slowing down for a moment, we can also see the potential of a familiar parallel beginning to take shape here: the reincarnated popular high school student-athlete who rapes or sexually assaults an easily replaceable hard working student, who never comes forth because of the expected criticism, rules, and lack of institutional resources. Not even the institution, with its funding and athletic agendas, could serve as a resource for the scared high school student and the same seems to be true of a sex-crime victim at a major university. The purpose of this study was to understand the limits of FERPA, to hold the appropriate parties accountable to the standards of FERPA, and to understand the future of student-athlete privacy rights in the face of public access interests. Universities have many duties and when those duties intersect with ethics or controversial policy, responsibilities under the legislation become murky. Nevertheless, during the deconstruction and analysis of FERPA throughout this paper, consider the following hypothetical along the way:
The star of a state university’s basketball team, aged 21, is alleged to have sexually assaulted and raped two female freshmen students while at a campus party. All three parties are believed to have been inebriated and, in fact, rohypnol (a “date rape” drug) is found to have been in the system of one of the two girls at the time of the incident. Only the basketball player, the two female students, the medical examiner, and the campus police to whom the girls contacted shortly after believing they had been raped, and to whom they provided the drug results, know about the alleged incident. A possibility exists that another person also knows if the culprit turns out not to be the alleged student-athlete. Everyone knows the student-athlete to have an enormous temper and the word around is that he has committed many violent acts against female students at school usually at parties and is also HIV-positive. Many students do not know that he is HIV-positive, especially incoming freshmen. An anonymous tip alerts the community about the alleged crime, but the school refuses to release information and documents related to the incident that would reveal the identity of the student-athlete, citing its right and obligation to protect the student-athlete under FERPA.

FERPA presents many complex legal issues when it comes to privacy and the student-athlete. To understand these issues better, we must first explain the methods used for this study and then go back in time and visit FERPA in its creation and infancy.
The primary research question this study focuses on is: should universities be required to release to the public any information related to their student-athletes when said student-athletes are alleged of sex-crimes? Subsidiary research questions include: 1.) What information is included in the emergency and criminal disclosure exceptions of FERPA? 2.) What is an education record? 3.) What have courts held about FERPA? The importance of this and similar research cannot be underestimated. It hopefully serves to help further the prevention of sex crimes by student-athletes, protect victims and potential victims through the dissemination of knowledge, and to assist in the assessment of FERPA-related institutional misconduct.
Chapter 2: Methods

The central pillar of this study relied on detailed analysis of the FERPA statute itself as well as court cases that explain certain ambiguous sections of the statute. I reviewed 112 of the most pertinent decisions that relate to FERPA, pertinent because FERPA constituted a significant or important portion of the legal analysis and holdings in those cases. The cases ultimately chosen for this thesis were chosen because they exemplify the courts’ current interpretations of FERPA as they relate to the criminal and emergency exceptions of FERPA that were at issue here. While some of the cases dealt with student-athletes and some did not, the cases as a whole provided a firm basis for application of the law to student-athletes alleged of sex-crimes, whether guilty or not guilty. I researched and found all of the cases through Westlaw.com and Lexis.com, both legal research websites that require a login name and password. In searching for helpful cases, I started by simply searching FERPA and adjusting the jurisdiction. I started my research broad, focusing on the United States Supreme Court and the federal circuit courts. I started with federal cases, because FERPA is federal legislation. From there I search state cases from all fifty states.

I found the necessary pieces of legislation, including the actual FERPA legislation in two ways. First, I found it on Westlaw.com, which provides history and cases that have cited FERPA. Second, I found the statute through law.cornell.edu, which provides a link
to a vast library of law, including U.S. Code, which is where FERPA can be found (specifically in title 20, Chapter 30, Subchapter III).

Controversies at the athletic departments of several universities also provided insight into the perspectives of the institutions under fire for their handling or mishandling of student-athlete information. Much of the information came from online articles from common news media sources. As such, the numerous articles I used for this research came from different news media outlets and from journal articles. For the news media articles, my common search terms included: FERPA, Florida State, Ohio State, Emergency Exception, Exceptions, Safety, Student-Athlete, and Sex Crime. New media stories were compared across multiple media outlets to ensure similar facts and eliminate facts that could not be confirmed. I obtained many of the journal articles through Westlaw.com and Lexis.com. I also found many articles through heinonline.org, which requires a password. I found some of the articles through a simple Google search.

This research also relied on the legislative history of FERPA, that is, the notes, reports, and congressional discussions documented along FERPA’s path to being enacted. I arrived at the legislative history of FERPA by searching publicly available congressional notes. I simply searched FERPA and the year I desired. The significance of legislative history is that it provides courts and the public with information helpful to understanding Congress wanted the legislation to mean, a tool helpful in avoiding inappropriate interpretations of student-athlete privacy rights. The legislative history is where this story starts.
Chapter 3: Analysis

Legislative History

James L. Buckley, the U.S. senator from New York who sponsored FERPA in 1974, said he introduced the legislation in response to “the growing evidence of the abuse of student records across the nation” (epic.org, para. 5). He later added the legislation’s intent was, “to strengthen the parental role by requiring schools that receive federal funding to provide parents, on request, with all information relating to their children” (White, 2013, para. 3). The fact that FERPA was enacted in the 1970s is important. Congress conceived FERPA in the 1970s to protect student records from being released during a time when a substantial amount of social-science research was taking place in elementary and high schools (Reporter’s Committee for Freedom of the Press, 2010). The legislation’s application to colleges was an afterthought. As a result, Senator Buckley and Congress clearly had intent to limit the protection of student records to “education records” and intended to limit “education records” to records one would find for an elementary or high school student (Reporter’s Committee for Freedom of the Press, 2010). Thus, as applied to colleges and universities, Senator Buckley and Congress understood their piece of legislation to apply only to a succinct list of education records and not to every document that references a student’s identity.
For this reason, the definitional list of what constitutes an educational record (discussed later) was kept short by the drafters. The textual statutory interpretation canon of *exclusio unius inclusio alterius* applies to this piece of legislation. The Latin phrase is a principle of law that simply means when one or more items of a class are expressly mentioned, others of the same class are excluded (*Chevron U.S.A. Inc. v. Echazebal*, 2002). If a statutory list includes, for example, a list of breeds of dogs allowed at a dog park, those not listed would, under this canon of law, be purposely excluded by the omission of their names from the statute. As applied to FERPA then, under the definition for education records, some courts have held that the statute’s exemption of law enforcement records from the list demonstrates that law enforcement records are not considered in the same category as educational records and should thus be allowably disclosed by colleges and universities free of penalty (*Bauer v. Kincaid*, 1991).

Not only have courts used the *exclusio* canon in interpreting FERPA, but the fact that the statute’s framers included a long list of what is not an education record—much longer than the list of what is considered an education record—indicates the statute’s creators were suspicious of legal interpreters expanding the reach of the legislation. The use of the word “include” or “includes” in a statute suggesting items covered by a term has over time been a statutory signifier that the language is not exclusionary but rather illustrative. In FERPA’s list of what is not an education record, “include” is part of the language. Meanwhile, “include” is not part of language for what does constitute an education record (Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g(a)(4)(a) (1974)). This tends to indicate that the statute’s creators knew exactly
what they wanted to categorize as an education record and generally what they did not. To better understand this: it is easy in general to list the possibilities of what you do want; it becomes a lot more difficult to list all of the possibilities that could humanly exist when listing what you do not want, and that seems to be the statutory diagnosis here with the writers of FERPA. The language of the statute will help illustrate this inclusion and exclusion process in full.

**What’s Really in the Statute: Exploring the Black Letter Law**

The black letter law of FERPA theoretically dictates the institutional direction of student privacy. Yet, schools, students, the media, and the general public all often differ on which parties they believe the statute actually serves, to what degree, and in which fashion. With an adequate understanding of the legislative history now in hand, analyzing the black letter law and understanding which characters in this story have the correct interpretation of the statute now become more manageable tasks. Nevertheless, the statute is thick and detailed (to the irony of some who may find it vague).

At FERPA’s heart is an easy-to-state but highly restrictive rule: A college or university cannot disclose an educational record unless the student identified in the record consents in writing to the disclosure (Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (1974)). The only way university disclosure of an educational record is warranted without consent from the student is under one of the specifically enumerated FERPA exemptions to the consent requirement. Otherwise, the disclosure must not be considered an educational record in order to be allowably disclosed. The exemption list has become a laundry list of sorts. When FERPA was enacted in 1974, it contained a
mere 5 exceptions to the prohibition against nonconsensual disclosure, but over the last
38 years, Congress has amended FERPA 10 times, with the result being that today
FERPA contains 16 circumstances in which university disclosure may be made without
consent (White, 2013). Furthermore, FERPA is enforced by the Department of
Education. If somebody desires to file a claim, they must file a complaint through the
Department of Education (Gonzaga University v. Doe, 2002).

Before addressing the amendments, we must begin with the key pieces of the
statute as they relate to the legislative history mentioned above and, of course, as they
relate to the releasing of records related to an alleged crime by a student athlete, the
ultimate thrust of this piece. For the purposes of a student-athlete allegedly involved in a
crime, there are two key dynamics of the statute that affect university disclosure: the
education record clause versus the non-education record clause and the enumerated
exceptions that allow for disclosure of an education record without consent.

A.) Education Record or Not

To start with the education record versus non-education record dynamic of the
legislation, Section (a)(4)(a) of FERPA details what is to be considered an education
record: “The term ‘education records’ means… those records, files, documents, and other
materials which— (i) contain information directly related to a student; and (ii) are
maintained by an educational agency or institution or by a person acting for such agency
or institution.” The statute thus maintains a two-part test for determining if a student-
athlete’s record is an education record. It must first pertain to the student-athlete. Then,
the university or somebody working in a similar capacity must also maintain the record.
Both pieces of the two-part test are required. Nevertheless, at first glance, the test seems relatively easy to satisfy. The problem comes when the list of what is not considered an education record for purposes of the statute is taken into consideration as well.

Section (a)(4)(b) of FERPA explains what is not considered an education record. As the statute explains, the term “education records” does not include—(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute; (ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement; (iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person’s capacity as an employee and are not available for use for any other purpose; or (iv) records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student’s choice (Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g(a)(4)(b)(i)–(iv) (1974)).
This rather wordy section of the statute simply creates four large categories of records that are not education records: supplemental records from a peripheral institutional capacity, law enforcement records, employee records of the university, and medical and psychological records. One might argue that the law enforcement exemption seemingly signifies the end of our story; clearly a student-athlete alleged of a crime involves the police when somebody calls for them and such reports would be covered under this exemption and can thus be disclosed without penalty by the university. However, as many university officials might be swift to point out, once certain documents are passed on from the exempted entity to the academic institution, the record becomes an education record that cannot be disclosed by the university. Universities are swift to use this argument and do so with confidence. Such an argument, however, has a fatal flaw hidden in plain sight, directly in the language of the statute.

Notice that of the four categories of exceptions, only sections 4(b)(i), 4(b)(iii), and 4(b)(iv) use language dictating exclusivity of the record—that nobody outside those listed in the exemption can be privy to the record—and that breach of that exclusivity breaches the immunity given by the exemption. For example, Section 4(b)(i) relating to supplemental records from a peripheral institutional capacity uses the language, “sole possession of the maker… not accessible or revealed to any other person.” Section 4(b)(iii) uses similar language, “records… which relate exclusively to [the] person.” Section 4(b)(iv): “records… used only in connection with… treatment… not available to anyone other than persons providing such treatment.” Section 4(b)(ii), meanwhile uses absolutely no language or connotation of exclusivity. If the creators of the statute wanted
all four exemptions to terminate upon disclosing the record to a non-privy party, the drafters would have done so. They would have added the language of exclusivity from sections 4(b)(i), 4(b)(iii), and 4(b)(iv) to Section 4(b)(ii) to indicate it was no different. They could have also added an entirely new section on exclusivity, saying that it applied to all 4 of the exemption categories, and remove the exclusivity language from the three exemptions it is found in. However, the drafters chose not to and Section 4(b)(ii) on law enforcement records thus stands alone in remaining able to disclose records even upon being transferred to the academic institution (as long as the record was for law enforcement purposes to begin with). Therefore, the university argument that police records handed over to them and added to the student-athlete’s educational file constitute a transformation of that document into an education record does not seem to substantiate a valid argument for not disclosing information to their students.

B.) Education Record Exemptions

With regards to the second dynamic of FERPA relevant to the student-athlete—the enumerated exceptions that allow for disclosure of an education record without consent—those who often desire a university to disclose a document claim that if a record in contention is nevertheless an education record, it should still fall under one of the many exemptions for being allowed to be disclosed even as an education record. The statute allows for 12 exemptions.\(^1\) Section (b) of FERPA discusses those exemptions by stating that (1) 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

\(^1\) See, Appendix 1 for all 12 exemptions.
of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following—”. Essentially, this means that if a document is considered to be an education record, it must fall under one of the exemptions or else the university, without penalty, cannot disclose it. Many of the 12 exemptions are inapplicable to the discussion of this paper so I shall focus on one in particular that is significant to a student-athlete alleged of a sex crime.

The ninth exemption, Exemption (I), says that an education record may be disclosed “in connection with an emergency, if the knowledge of such information is necessary to protect the health or safety of the student or other persons.” At one point, the Secretary of Education set forth four criteria to determine whether the emergency exception applied: (1) The seriousness of the threat to the health or safety of the student or other individuals; (2) The need for the information to meet the emergency; (3) Whether the parties to whom the information is disclosed are in a position to deal with the emergency; and (4) The extent to which time is of the essence in dealing with the emergency. However, the Secretary has since redacted this procedure, claiming the definition deserves the flexible discretion inherent to ensuring safety (Ward, 2008).

Curious as to the definition’s limits, the University of New Mexico asked for guidance. The University of New Mexico asked the Department of Education to clarify a conflict between two New Mexico regulations that mandated the reporting of diseases against FERPA’s privacy protection for the University’s students (Ward, 2008). The
Department answered, “Congress’ intent was to limit application of the health or safety exception to exceptional circumstances” (Virginia Tech Review Panel, 2007, app. G-2 to -3, & G-7, para. 6). Thus, the Department restricted the exception to a “specific situation that presents imminent danger to students or other members of the community, or that requires an immediate need for further information in order to avert or diffuse serious threats to the safety or health of a student or other individuals” (Virginia Tech Review Panel, 2007, app. G-8, para. 8). The Department emphasized that the exception is “temporally limited to the period of the emergency and generally does not allow a blank release of personally identifiable information” (Virginia Tech Review Panel, 2007, app. G-9, para. 5). As this exception relates to other pieces of legislation such as the Health Insurance Portability and Accountability Act (HIPAA), most statutes provide for disclosure situations similar to the health and safety concerns listed in FERPA, thus avoiding most subsidiary pitfalls other laws may pose (Health Insurance Portability and Accountability Act, 45 C.F.R. § 164.104(a) (2007)).

Taking the hypothetical at the beginning of this paper, a student-athlete who is HIV-positive and alleged to have committed rape of two victims, and who has a reputation for violent acts against women would seem to represent both a health and a

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2 These include situations involving communicable diseases or conditions, suspicions of child abuse, and other forms of domestic violence or abuse. Similar to FERPA’s health and safety emergency exception, HIPAA allows for disclosure of protected health information for the prevention of a serious or immediate threat to the public health or safety. HIPAA also contains a catch-all provision allowing for disclosure when the covered entity, in exercising its professional judgment, believes such disclosure is necessary to prevent serious harm to potential victims of abuse, neglect, or domestic violence.
safety concern. The fact that the student-athlete has a violent propensity alone would seem to satisfy that threshold. The health and safety concern would also represent an emergency, as he would still be notoriously available at parties.

However, being alleged of raping two students and being convicted of raping two students are two distinct archetypes, universities would argue. If the student-athlete has not been convicted, is there an emergency? Do we know for sure that anybody’s safety or health is at risk because of the student-athlete? Moreover, although the record may fall into the exemption, no language in the statute compels us, as universities, to forcibly disclose; it’s a discretionary choice. We, the academic institutions subject to FERPA, have a duty first to the student-athlete, as a guardian of the student’s records, until an emergency is proven, and even then we’ll have to think about it. A strong argument can be made on both sides. Clearly, one of the grey areas of FERPA lies here, in the emergency health and safety exemption of education records that universities can disclose without penalty.

While these two dynamics of the statute represent two of the core points of dispute regarding FERPA and the student-athlete, there are two other sections of FERPA worth quickly noting before moving on. First, state statutes can require disclosure of an education record for any purpose the state chooses, which would of course make it simple to force a local institution to reveal an education record or just the opposite and prohibit an institution from disclosing. Second, Section (b)(6) states that universities are not prohibited from disclosing the results of disciplinary hearings related to alleged crimes of violence, but only once final results have been rendered pertaining to the disciplinary
proceeding. Schools often choose to cite this section of FERPA and argue that it requires the school not to reveal completed disciplinary results. That is incorrect. The language says a school can reveal by not being prohibited from revealing. An academic institution arguing it can’t reveal under this clause is simply wrong. Nevertheless schools have tried to hide behind this clause, like the University of Michigan, for example, which in 2014 argued this FERPA clause entirely precluded the school from revealing the results of a completed disciplinary investigation of sexual misconduct allegations against its football team’s kicker (Baumgardner, 2014).

Finalized hearing results can be revealed only at the discretion of the institution. Aside from deferring to the discretion of the institution, this section also is limited by the fact that nothing can be revealed until the proceeding has completed. One may be pressed to find an institution willing to divulge in hindsight (perhaps months later) that their disciplinary hearing concluded that the school was wrong, that the alleged student-athlete did in fact violate the school’s conduct policy by raping two students and was a danger to students when the school refused to reveal information to fearful students (perhaps under the law enforcement or health and safety exemptions) that the student-athlete was already under investigation for something dangerous that students should have been made aware of. Thus, this section of FERPA, while important for other reasons, leaves much to be desired for the student population attempting to ascertain who on campus is the imminent danger to their safety.

Before embarking on the evolution of FERPA as related to alleged sexual misconduct or criminal activity, it is important to briefly note FERPA’s application to
institutional ability to reveal the academic ineligibility of student athletes. As FERPA relates to revealing that a student is academically ineligible, school faculty, including athletic department staff, are allowed to reveal a student’s participation in officially recognized sports with student consent, but FERPA does not directly say such an allowance includes revealing that the reason for not participating is because of academic ineligibility. Considering that the minimum grade requirements for both the NCAA and individual institutions are freely available online (NCAA, 2014), revealing that a student is academically ineligible implies a lot more than what meets the eye. An institution revealing a student is academically ineligible thus implicitly reveals quite a bit of information that if explicitly revealed without consent would seemingly violate FERPA. While FERPA allows students to restrict the revelation of this sort of directory information by submitting a form to their local institutional registrar, the high rate at which institutions reveal academic ineligibility suggests that schools believe they have the right to reveal it anyway, regardless of whether a form has been submitted to restrict such revelation. Schools argue smartly that they do not reveal academic ineligibility without consent from the student-athlete. For the sake of academically ineligible student-athletes (who may be extra vulnerable to consenting to revelations due to their compromised position as a student-athlete), academic institutions should follow proper procedures in obtaining the student-athlete’s consent to reveal their academic ineligibility; otherwise, a school is in violation of FERPA as it relates to academic ineligibility. As FERPA relates to the sexually or criminally accused student athlete, we must now turn to how in fact FERPA has been fought over in court throughout the years.
Evolution of Educational Privacy

A.) U.S. v. Miami University

Student disciplinary records are “education records” as defined by FERPA, and thus, protected from public disclosure, so said the court in U.S. v. Miami University (U.S. v. Miami University, 2000). In that case, the federal government filed a complaint alleging that the defendants, Miami University and The Ohio State University, violated FERPA by releasing student disciplinary records containing personally identifiable information without the prior consent of the students or their parents. The case arose after the Ohio Supreme Court in 1997 required Miami University to release all student disciplinary records, except any information that is personally identifiable as defined in FERPA, to the student editors of Miami University’s student newspaper. The court held that Ohio’s Public Records Act provides for access to all public records upon request unless the requested records fall within one of the specific exceptions listed in that act, none of which covered the “education records” defined by FERPA. The court further held that disciplinary records were not “education records” as defined by FERPA. After the Ohio Supreme Court decision, the Chronicle of Higher Education asked officials from Miami University and The Ohio State University for disciplinary records from 1995 to 1996 with as little redaction as the Ohio Supreme Court decision would allow. Both universities contacted officials at the Department of Education, explained that they would not comply with FERPA, and said that they would release the student disciplinary records to all who requested that information. Education officials then filed a complaint against
the universities in federal district court in Columbus and asked that court to bar release of the records.

The federal appeals panel found that, despite the fact that the Ohio Supreme Court’s rule that student disciplinary records are not education records, the federal district court was not bound by the decision because the interpretation of FERPA is a matter of federal law, not state law. The appeals court found that, under the plain language of the statute, student disciplinary records are education records because they directly relate to a student and are kept by that student’s university’s record keeping system (Reporters Committee for Freedom of the Press, 2002).

B.) State ex. rel. ESPN v. Ohio State University

ESPN sought to compel The Ohio State University to provide access to requested records relating to National Collegiate Athletic Association’s (NCAA’s) investigation into alleged violations of athletic association regulations (State ex. rel. ESPN v. Ohio State University, 2012). At a March 8, 2011 press conference, then Ohio State football coach Jim Tressel disclosed that in April 2010, he had received e-mails notifying him that certain Ohio State football players were connected to Eddie Rife, the owner of Fine Line Ink, a tattoo parlor, and the subject of a federal law-enforcement investigation. According to Tressel, the e-mails alerted him that players had exchanged Ohio State memorabilia for tattoos and that federal authorities had raided Rife's house and found $70,000 in cash and “a lot of Ohio State memorabilia.” Tressel neither forwarded the e-mails to his superiors at Ohio State nor to the NCAA. Tressel’s decision ultimately led to his resignation and an NCAA investigation. Tressel did, however, forward the e-mails to Ted Sarniak, a mentor
to Ohio State football player Terrelle Pryor during his high school and collegiate career. The court was swift to note that Sarniak was not employed by Ohio State or the NCAA, nor was he a law-enforcement officer.

On April 20, 2011, ESPN requested that Ohio State provide it with access to and copies of nine different categories of records, including “[a]ll documents and emails, letters and memos related to NCAA investigations prepared for and/or forwarded to the NCAA since 1/1/2010 related to an investigation of Jim Tressel” and “[a]ll emails, letters and memos to and from Jim Tressel, Gordon Gee, Doug Archie and/or Gene Smith with key word Sarniak since March 15, 2007.” Ohio State rejected ESPN's request for the Sarniak records by citing the confidentiality provisions of FERPA, to support its denial of the request. Ohio State later denied ESPN's request for documents related to the NCAA investigation because it would “not release anything on the pending investigation.”

Interestingly, the court took time to detail that The Ohio State University’s Department of Athletics retains copies of all e-mails and attachments sent to or by any person in the department; the e-mails cannot be deleted. The department also retains copies of all documents scanned into electronic records, which are organized by student-athlete and, additionally, Ohio State has collected documents related to its investigation of student-athletes who exchanged memorabilia for tattoos and Tressel’s failure to report that activity that were requested by the NCAA and has kept those documents in two secure electronic files. Therefore, the court concluded, Ohio State properly withheld identifying information concerning the student-athletes by redacting it from the records that the university released.
The Ohio State Supreme Court held that the requested records constituted “education records” subject to FERPA and that ESPN was only entitled to redacted versions of the records under FERPA. Keeping in mind the Sixth Circuit Court of Appeals decision in *U.S. v. Miami University*, the court here held that the records generally constitute “education records” subject to FERPA, because the plain language of FERPA does not restrict the term “education records” to “academic performance, financial aid, or scholastic performance.” Education records need only “contain information directly related to a student” and be “maintained by an educational agency or institution” or a person acting for the institution.

The impact of *State ex. rel. ESPN v. Ohio State University* on this discussion of student-athletes alleged of dangerous crimes is twofold. First, entities like ESPN and the media are entitled to request redacted records from academic institutions. Second, emails, attachments, scanned electronic records of documents sent to or by any person in an academic institution’s athletics department, and documents related to an investigation that are kept secure by the institution are protected from disclosure under FERPA. Therefore, a female student, fearing she has been sexually assaulted who reports only to the academic institution and not to law enforcement may risk producing information wholly protected by FERPA. Of course doing so has a major advantage for her – her identity is kept private. However, so is the perpetrator’s. A rumor about who the perpetrator might be would run into a dead end if a member of the public or school newspaper asked the university to disclose records related to identity. Ultimately, *State ex. rel. ESPN v. Ohio State University* was a victory for universities.
C.) Bauer v. Kincaid

Perhaps the most crucial decision related to this topic came in *Bauer v. Kincaid*. The court held in *Bauer* that criminal investigation and incident reports maintained by campus police were held not to be education records, the release of which by a university could result in loss of federal funding under FERPA (*Bauer v. Kincaid*, 1991). Traci Bauer, editor-in-chief of the *Southwest Standard*, a newspaper for Southwest Missouri State University (SMSU) students, brought an action against Southwest Missouri State University when it refused to release information about criminal occurrences committed on the SMSU campus. She claimed that under the Missouri Open Records Act (MORA), the university was obligated to provide all of the information that it collected and maintained regarding criminal activity. The act requires that all public governmental bodies provide all public records upon request for the purpose of ensuring that all public meetings would be conducted openly and subject to public examination (RSMO Chapter 610, 1973). It also was intended to provide a record of the decisions that each public official made and to make it available to the public for examination. The act was to be interpreted literally and, unless otherwise protected by law, there could be no exception as to what records were available for general viewing and copying.

Meanwhile, the defendants, the Southwest Missouri State University Board of Regents, among others, claimed that under FERPA, the school was prohibited from providing the requested documents. They also claimed that SMSU’s Safety and Security Department, which maintained the requested files, was not a public governmental body and therefore was not subject to the regulations under MORA.
Using MORA’s definition of “governmental body,” the district court deemed that the Board of Regents was obligated to surrender the records to the Southwest Standard. The university’s claim that the records were maintained by the Safety and Security Department was simply an attempt to shield the university from the requirements under MORA. Even if SMSU’s Safety and Security Department was not considered a public governmental body, it was under the command of the university’s Board of Regents, and therefore, the records were subject to MORA (RSMO Chapter 610, 1973). The court ruled that it was unreasonable to believe that the university’s Board of Regents did not have any authority or legal control over the Safety and Security Department.

Moreover, the court concluded that FERPA is not a justification for the defendant university officials’ refusal, in violation of the state “sunshine” law, to release such reports to the plaintiff, who was editor-in-chief of a student newspaper (Theuman, 1993). FERPA, the court observed, protected as confidential any information which a student was required to produce or divulge in conjunction with application and attendance at an educational institution, and also protected academic data generated while an individual was a student at such an institution, imposing a financial penalty for disclosure of such records in order to deter their indiscriminate release. Criminal investigation records were specifically excluded, in section (4)(B)(ii) (as previously mentioned) from the educational records that FERPA protects, the court pointed out. The court rejected the defendant officials’ argument that, in accordance with the United States Department of

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3 A sunshine law requires certain state proceedings, meetings, records, votes, deliberations, and/or other official actions be open to the public for observation, participation, or inspection, and can vary by state in scope and reach. Sunshine laws can also require government meetings be held with sufficient advance notice and at times and places that are convenient and accessible to the public, with exceptions for emergency meetings.
Education’s interpretation of the statute, criminal investigation reports that are kept separately from educational records but are given to persons other than law enforcement officials must be considered educational records subject to FERPA. The court emphasized that the statute’s exemption for law enforcement records demonstrated that law enforcement records were not considered in the same category as educational records. The court declined to assume that the legislature intended a result that in no way furthered the plain purpose of the statute in protecting educationally related information. The editor’s request for declaratory and injunctive relief was accordingly granted and criminal investigation and incident reports maintained by campus police were held not to be educational records. Thus, the court also held that members of the general public enjoy a First Amendment right to receive access to government records concerning crime in the community and the activities of law enforcement agencies.

MORA is significant in this case because it represents state law. Courts clearly are taking into consideration pieces of state legislation relating to freedom of information. All 50 states contain some form of legislation that works concomitantly with FERPA. Usually though, the interpretation of what is excluded from FERPA protections doesn’t change much; it is usually state protections for other categories of records.

Ultimately, the language from this case holding that transferred criminal reports given to people other than law enforcement are not then protected from disclosure is crucial. With this language, criminal reports that include identifying information about a student-athlete handed over to a university’s athletic department are not protected by FERPA. Bauer was and remains a win for proponents of liberal disclosure.
D.) Norwood v. Slammons

A few months later Norwood v. Slammons attempted to narrow the scope of Bauer. In Norwood, a prospective student sued university officials, seeking disclosure of records pertaining to university's investigation of sexual incident in the athletic dormitory under Arkansas’ Freedom of Information Act (Norwood v. Slammons, 2001). The record pertained to a highly publicized incident involving Arkansas Razorback basketball players and a 34-year-old Springdale woman and included an audio tape of a hearing in which Razorback basketball team members, Todd Day, Elmer Martin, Roosevelt Wallace, and Darrell Hawkins were disciplined by the university for various alleged violations of University rules and/or policy relating to a February 27, 1991 incident in an athletic dormitory involving admitted sexual activity on the part of various males and the woman. Norwood alleged that after the hearing in question, Day, Martin, Wallace, and Hawkins signed waivers of their rights under FERPA thereby allowing the defendant, Sugg, to discuss their punishment with the press and media. Norwood therefore alleged that the records of the “J Board” hearing had become “public records” under the Arkansas Freedom of Information Act of 1967.

The court held the prospective student was not yet a member of the institution, only a member of the general public, and that there is no First Amendment right of general public access to disciplinary or investigatory records of a postsecondary educational institution. To have a FERPA claim, one must have a violation of a student right, which requires being a student, which the plaintiff in this case was not. However, the court also noted its limited jurisdiction, asserting that since it is a federal court, with
federal jurisdiction, it was not the best forum to decide whether the potential future student was entitled to the information under the state freedom of information statute.

While the *Norwood* court dodged many of the questions we seek to answer, it provides some helpful guidelines. With regards to investigations of incidents that are inherently sexual in nature, investigations by the university (and not by the police affiliate thereof) are seemingly protected by FERPA in the sense that the university is not required to release the information to the public just because the public demands it. A state statute related to freedom of information however may nevertheless compel the university to do so. Whether Arkansas’ Freedom of Information Act did indeed compel such service was, again, never addressed by the court. I shall briefly do so here.

Arkansas’ Freedom of Information Act says “all public records shall be open to inspection and copying by any citizen of the State of Arkansas during the regular business hours of the custodian of the records” (Arkansas Freedom of Information Act, 25 AR ST Ch. 19, 1967). The term “public records” under the Arkansas Freedom of Information Act is deemed to include “writings, recorded sounds, films, tapes, or data compilations in any form, required by law to be kept” (Arkansas Freedom of Information Act, 25 AR ST Ch. 19, 1967). Therefore, while the court never answered the question, for what it is worth, the prospective Arkansas student had a valid argument that she was entitled to the information. This then means that states can compel universities to reveal information that can be disclosed under FERPA, but that the university desires not to disclose.
E.) The Virginia Tech Tragedy

On April 16, 2007, a Virginia Tech student (whose name shall be omitted to avoid glorification) murdered 32 of his fellow classmates and professors, wounded 17 more, and then killed himself (CourierPost, 2012). Soon after, the American Bar Association President implored the legal community to identify changes that could be made to prevent similar tragedies from occurring (Ward, 2008). Communication breakdowns at various stages prevented Virginia Tech educators from developing the full picture of the assailant’s unhealthy behavior patterns, and medical evaluators involved blamed the lapses on a misunderstanding of FERPA. The gaps in communication prevented early and effective management of the assailant’s mental illness. The assailant’s professors maintained their own chain-of-command system for discussing his behavior, moving from professor to department chair to the Care Team. At the same time, the resident staff had their own internal system for discussing the assailant’s behavior, and the two channels seemed to have never intersected. This lack of information-sharing “contributed to the failure to see the big picture . . . [and] although to any one professor these signs might not necessarily raise red flags, the totality of the reports would have and should have raised alarms” (Va. Tech Review Panel, 2007). In addition, the Care Team's strict interpretations of FERPA hampered their ability to investigate, causing “widespread lack of understanding” through “conflicting practice” as to what could and could not be shared (Ward, 2008).

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4 This notation is in response to the Alex Teves Challenge, a challenge proposed by the family of one of the victims of the Aurora, Colorado mass shooting of 2012, to refrain from using shooter’s names. The challenge can also be interpreted as a fitting suggestive moral compass in judging what should be and should not be redacted by universities when disclosing events under FERPA that do not involve imminent danger.
While the emergency was imminent and live, there is no doubt that the disclosure was allowed. Confusion and the speed at which the emergency events occurred probably led to little to no disclosure. However, Virginia Tech presents a question pertinent to this paper: Are red flags and alarming information ahead of an emergency enough to constitute an emergency?

The Department of Education tended to think so. In the aftermath of the tragedy, the Department of Education released three brochures clarifying the ability of schools to release information in emergency situations. The brochure demonstrates that the Department still requires the health and safety emergency to be imminent, and permits disclosure only during the duration of the emergency. Many would argue the violent writings in class by the Virginia Tech shooter, for example, should have been enough to prompt an emergency pursuant to FERPA. However, deciding that a violent writing is an emergency is a difficult conclusion to make with many ramifications if the scenario turns out not to be an emergency. This is clearly another gray area of FERPA. In the hypothetical case of a violent and infected student-athlete alleged of rape and still “at large” on campus, this might be a much easier call to make, some might argue. The emergency here in our hypothetical has arguably already commenced. Overall, Virginia Tech reminds us that the health and safety exemption of FERPA has significant gray area but should adequately cover a rape or sexual assault scenario similar to our hypothetical with the student-athlete.
Chapter 4: Application, Solutions, and Conclusion

This chapter applies FERPA to the Jameis Winston case to try and decipher what was proper and what was improper in that particular scenario. The chapter will then provide solutions to solving the especially ambiguous areas of FERPA, before drawing conclusions and suggestions for future research.

The Curious Case of Jameis Winston

Jameis Winston was a prolific quarterback at Florida State University from 2012 to January of 2015. He carried an undefeated record as a starter into the first ever College Football Playoff where he was defeated by Oregon’s potent offense and fast hard-hitting defense. He was the number one overall draft pick in the 2015 NFL Draft and now plays for the Tampa Bay Buccaneers.

Winston had multiple controversial incidents that became nationally televised, from shoplifting soda and crab legs to standing on a table at the Florida State University Student Union building shouting lewd comments to attempting to shoot squirrels with a BB gun near campus. Of course, most controversial was the sexual assault allegation filed against him. On November 14, 2013, the State Attorney of the Second Judicial Circuit announced the opening of a sexual assault investigation involving Winston that was originally filed with the Tallahassee Police Department on December 7, 2012 (Wolken, 2013). On December 5, 2013, State Attorney Willie Meggs announced the
completion of the investigation and that no charges would be filed against anyone in this case, asserting that the woman’s testimony lacked credibility (Romero & Sonnone, 2014). Meggs argument relied upon the fact that prosecutors only bring charges for cases where the evidence will result in a likely conviction at trial. In this case, he believed, the evidence did not show that (Wolken, 2013).

Additionally, both parties made allegations of improper police conduct, with the victim claiming to have been pressured into dropping her claim while Winston’s attorney alleged inappropriate leaks to the media. Florida State’s policy is that athletes charged with a felony cannot play until their case is resolved, but Winston continued to play throughout the investigation because he was never charged.

In a classic example of FERPA in action, the New York Times eventually got ahold of the transcript from the Winston hearing once the hearing concluded. Of course, under FERPA information from completed disciplinary proceedings falls under one of the exemptions. The words of the victim best characterize her point of view in the story:

“I remember being raped,” she said.

“I remember pleading with him to stop clearly.”

“I remember one of his friends telling him to stop and saying, ‘She is saying no clearly’” (Macur, 2014, para. 2-4).

She goes on to say she remembers being carried from a bedroom into a bathroom by the man she says raped her. She remembers that he locked the door behind him, and she remembers how he held her down while, she “tried to struggle and resist him” (Macur, 2014, para. 5).
“I remember those things as clearly as they were in 2012,” she said (Macur, 2014, para. 6).

The New York Times reported irregularities in the rape investigation involving Winston. Though a medical examination of the victim revealed bruised knees and semen on the woman’s body—and the victim would identify Winston by name as her attacker a month later—Tallahassee police reportedly never obtained a DNA sample from Winston, never interviewed him, nor attempted to obtain video of the encounter taken by Seminoles teammate Chris Casher. Officer Scott Angulo, who, the Times’ article noted did private security work for the Seminole Boosters (the primary financier of Florida State athletics), conducted the investigation. To top it off, after the FSU hearing (presided over by retired Florida Supreme Court justice Major B. Harding, on December 21, 2014) cleared Winston of violating the student conduct code in the sexual assault allegation, Winston released a statement upon the investigation’s culmination, saying, “Rape is a vicious crime. The only thing as vicious as rape is falsely accusing someone of rape. [The accuser] and her lawyers have falsely accused me, threatened to sue me, demanded $7,000,000 from me, engaged in a destructive media campaign against me, and manipulated this process to the point that my rights have and will continue to be severely compromised” (Romero & Sonnone, 2014, para. 19). There are two key points to take away from Winston’s comments. The first and more important point is that Winston atrociously equates the viciousness of an allegation of rape to the viciousness of actually being raped. The second point is that clearly interaction between Winston’s privacy and the public personally affected him in an extremely negative fashion. Thus, Jameis
Winston’s case represents a pivotal opportunity to examine FERPA as it relates to a famous student-athlete as well as the gray areas of FERPA that Winston’s case further implicates. On January 25, 2016, Florida State agreed to pay $950,000 to settle the lawsuit against it, filed by the student who accused Jameis Winston of rape, with $250,000 going to the woman and $700,000 going to her lawyers. (Tracy, para. 1, 5).

Regarding the school hearing, the release of records there conformed to FERPA guidelines. If they had been released prior to the completion of the investigation, without more, the release would be a violation of FERPA and subject Florida State University to penalty under FERPA. However, the initial report to Tallahassee Police Department represents a law enforcement record that should have been made available for release subject to Florida’s Freedom of Information Act (discussed later). The medical examination of the alleged victim is a closer call under FERPA. The temporal proximity of the examination may deem it not to have been an emergency subject to the health and safety exemption of a student record under FERPA. If the examination took place weeks after the incident, the emergency may be ruled over or at least non-imminent pursuant to the Secretary of Education’s standards for the health and safety exemption. If however, the examination was completed shortly and within a reasonable time after the alleged rape, then report’s findings of bruises and semen may be enough to constitute an emergency as the alleged perpetrator represented a danger to the community.

The lack of effort from the Tallahassee Police Department is interesting in that one must speculate that perhaps the school’s reasoning was related to FERPA. Since Officer Angulo worked closely with the university, perhaps the university was semi-
affluent of its obligations under FERPA. Perhaps they reasoned his affiliation to the school made him a member of the school rather than the police, in which case, records he put together would be protected under FERPA. However, because Florida State lacked substantial investigatory procedure, perhaps Florida State simultaneously was unsure if such reasoning protected Officer Angulo’s findings; that instead perhaps he was still acting in a law enforcement role when procuring the investigatory documents and thus subject to disclosure under FERPA. Either way, what seems more than speculative is the possibility that Florida State was simply weary that the allegations against its star player were true and that the negative attention it would incite through documents not protected by FERPA was too much of a risk to the institution’s athletic reputation and its ability to recruit the best talent in the country, which in turn increases revenue for the school. If the contemporary cynic is correct that universities have evolved to be more like corporations than institutions of higher learning, then such a cover up theory is not all that farfetched.

One of the major facets of the Jameis Winston situation is the fact that the alleged rapist could be characterized as a harmful and dangerous degenerate pursuant to the police report and medical examination but that Jameis Winston, with his popularity and million dollar smile, could easily be—and often was—characterized as the opposite. One thus might question whether releasing the law enforcement and medical records would have any substantial affect at all in linking Winston to the incident, while simultaneously arguing that releasing the records stands to unfairly prejudice the investigation, the school, and the student-athlete. However, the point of FERPA has little to do with protecting suspects in a rape case. FERPA is a piece of federal privacy legislation aimed
at protecting students. In this sense, if the suspect is a student, FERPA will have an enormous effect on him or her. However, if the student is a suspect in a rape case, they ought to assume both that FERPA will not protect their names in law enforcement records anyway and might not protect their names in medical records confirming them as the source of semen in a rape case either.

Regarding the effect of Florida’s Freedom of Information statute on records available under FERPA, Florida and Ohio are known for having pro-access freedom of information laws, making the comparison of Jameis Winston to the ESPN case and U.S. v. Miami much more pertinent since at least two of the cases involve Ohio freedom of information law—freedom of information law similar in scope to Florida’s. Nevertheless, the Florida Sunshine Law, established in 1995, is a series of laws designed to guarantee that the public has access to the public records of government bodies in Florida. Public records include all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of physical form or characteristics, or means of transmission, made or received pursuant to law to ordinance or in connection with the transaction of official business by any agency (X FL ST Ch. 119, 2008). Most importantly, under the Florida Sunshine Law, any person in Florida can request public documents and a purpose does not have to be stated. Records can be used in any way the person desires. This means that Florida state law requires that Florida State University disclose documents allowable under FERPA if requested; the university cannot choose not to.
Therefore, with regards to FERPA, Florida State should have properly disclosed the police report under FERPA even if transferred to them by the Tallahassee Police Department as long as somebody in Florida requested it (pursuant to the Florida Sunshine Law). Florida State could have even been compelled to disclose the medical examination of the victim if the examination reasonably substantiated the claim that a health or safety emergency was imminent to other students. One argument here could be that the bruises from the report indicate that the perpetrator could have a violent nature, which could constitute an imminent emergency to the student population if members of the student population could reasonably expected to be in a scenario similar to the victim’s with the alleged suspect. Keep in mind the Secretary of Education has left a broad door open in defining what constitutes an imminent danger or emergency. However, the release of the transcript from the school disciplinary hearing when the final results of the investigation were concluded was correctly released, pursuant to the guidelines of FERPA.

**Fixing the Gray Matter**

Noting the proper mechanisms necessary for fixing the gray matter might be best served by yet another example: the University of Louisville. In the early months of 2015, the University of Louisville dismissed their star guard, Chris Jones, after it was revealed he sent a disturbingly ominous text to his girlfriend, after she allegedly “messed up” his room (Wolfson, 2015). The text from him said that he would “smack TF out of her” (Wolfson, 2015). Decoding the message is neither difficult nor necessary to understand the fear it might instill in its intended reader. While the institution disclosed Jones’ name in the report, the victim’s name was redacted in the disclosure. The reason this
information is so readily available and in such a fashion is because the university released the call response run report on the situation, in response to a media request for the information, five days after the incident pursuant to FERPA and a restraint in Kentucky’s Open Records Act exempting pending criminal investigations (Wolfson, 2015). The institution abided by FERPA, knew its obligations under state open records act and went forth correctly. The Louisville situation, while imperfect, represents the starting point for understanding how educational institutions should properly handle educational privacy and the starting point for deciphering FERPA’s gray area.

Moreover, revisiting our hypothetical regarding the alleged student-athlete rapist, whether information related to the basketball player could be revealed seems obvious in light of the picture painted above. Though only alleged, the allegation is one a reasonable person might make. The basketball player poses an imminent emergency to the student body because of his violent behavior, his secret use of rohypnol, and his HIV status. Records belonging to the police and medical examiners would likely be free to be disclosed. The police reports would be exempt from the definition of education records, and the medical records would be considered education records but subject to Exemption (I) which allows for their disclosure. Assuming a pro-information state statute like Ohio’s or Florida’s, the hypothetical academic institution would be compelled to disclose upon public request. However, if such a case saw the light of a courtroom, plenty of room exists for a judge to interpret FERPA in a method beneficial to protecting the student-athlete as a result of the gray matter that exists in the statute. To these ends, substantial changes to FERPA could help eradicate some of the grayness and ambivalence.
I believe one meaningful amendment to FERPA would be to include language stating, “Records that can be disclosed shall be disclosed if requested by the public, unless otherwise provided by state statute.” This language would eliminate confusion of ensuring a state’s related statute compels disclosure if requested. It would also reinforce the policy of FERPA that whatever is not protected shall not be treated differently than records from anywhere else.

Secondly, an amendment must be added to encourage universities to disclose. This would entail adding a hold-harmless provision, which would protect a college’s funding if the college discloses information contained in an educational record in good faith. If the funding is not of issue, such a provision could also protect the university from civil and criminal liability. Frank LoMonte, executive director of the Student Press Law Center, believes meaningful reform could hinge on this very issue of getting rid of the perception, fueled by a poorly drafted statute, that a school that slips up and mistakenly honors an open-records request will lose all of its federal money and be shut down (LoMonte, 2012). Interestingly enough, as LoMonte later points out, “In the 38-year history of the statute, not one institution has ever been penalized one dime, and yet that perception persists” (LoMonte, 2012, para. 2).

Such an amendment could be especially important in emergency health and safety situations as the amendment will encourage educators to err on the side of disclosure.

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5 LoMonte also believes the statutory definition of what is an “education record” could be tightened so that it is clear that a student’s parking tickets, run-ins with the law, job applications or any other document that is generated in a non-academic capacity is not a FERPA record. “If the student is just doing something that any member of the general public could do, like getting a traffic ticket, then they’re not acting in their ‘student’ capacity and there shouldn’t be two sets of disclosure rules just because one driver was lucky enough to register for a racquetball class,” he said.
Looking at the consequences of disclosing information in opposite extremes reinforces the need to err on the side of disclosure to protect students’ health and safety (Ward, 2008). If the university discloses information and in a good faith manner, and a subsequent investigation determines no real threat existed, the college would be able to remedy this situation. Even if the student suffers some humiliation from a disclosure of his or her information, the college is able to offer amends, provide resources to fix the situation, and even add an official explanation of the situation to the student’s record to address any possible concerns with future employment or schooling. While some may argue that such a disclosure would harm a student, the student can recover and continue, whereas, in contrast, the consequences of failing to act are much more serious: student deaths and/or substantial harm through infection or violence to students. Thus, in our hypothetical, having this amendment would help encourage the information to be released about the threat of the basketball player, because the university would be free from liability. However, the question of reputational harm may nevertheless still deter the institution from disclosing (perhaps offering a funding incentive to reveal in cases of extreme notoriety would be helpful here).

As Matthew Ward (2008) points out, hold-harmless provisions can be modeled on the typical hold-harmless provisions of child abuse statutes. These provisions typically provide: “[a]ny person who in good faith makes or participates in making a report of abuse or neglect . . . or participates in an investigation or resulting judicial proceeding is
immune from any civil liability or criminal penalty\(^6\)” (p. 428). Simply replacing “abuse or neglect” makes this language ideal for an amendment.

Introductory information may also be helpful as an amendment to the statute reminding everyone that members of the general public enjoy a First Amendment right to receive access to government records concerning crime in the community and the activities of law enforcement agencies, not the media exclusively or independently. The court in Bauer articulated this point well.

Another significant amendment would be to include definitional language asserting the reasonable person standard for what constitutes imminent, danger, safety, and emergency. All a university has to essentially do under the current construction of emergency by the Secretary of Education is claim they did not believe an emergency was imminent. If expressly held to the reasonable person standard, decisions by universities regarding emergency situations will better fall in line with what society feels constitutes an emergency. The university that fails to do so and instead chooses to author a different definition would be subject to penalty. Thus, this important amendment to the legislation would serve as an incentive for the academic institution to be fair and reasonable in assessing emergencies, danger, and safety and the element of temporal proximity thereof.

It is conceptually impossible to eliminate altogether the gray matter inherent in FERPA. However, tightening up many of the definitions related to health, safety, and emergencies, as well as protecting the actual academic institutions in order to encourage them to more willingly disclose, among other suggestions will aid in repairing the

\(^6\) The language comes from an example from Maryland. MD. CODE. ANN., CTS. & JUD. PROC. § 5-620 (LexisNexis 2006); MD. CODE ANN., FAM. LAW § 5-708 (LexisNexis 2006).
unsettled matters of FERPA. In a vacuum, these suggestions would benefit the student-athlete as a student and, in serious criminal circumstances, disadvantage a student-athlete if the athlete becomes involved in a sex-based crime like our hypothetical and Jameis Winston. Such a balance would be fair policy and makes sense.

**Practical Implications**

The central findings of this research provide an opportunity to suggest practical implications for academic institutions. The following suggestions are measures that athletic departments can immediately take to better their legal positioning and understanding of FERPA. First, review student-athlete waiver forms. With so many versions of the forms only allowing the release of grade or generic medical information, many do not provide for the release of any supplementary information otherwise protected as an education record. Expanding the forms to include more types of education records can protect academic institutions from litigation. In other words, schools can alter their student-athlete waiver forms to allow for a broader range of material that can be legally disclosed, for example, the waiving of personal health information such as disease, vaccination, and medication information if necessary for certain situations like investigations or emergencies.

Secondly, and perhaps more importantly, athletic departments should hold a seminar or provide written materials to student-athletes informing them that certain student information can legally be released even without student consent, if an emergency exists that threatens other students and if that information would aid in the elimination of that threat. This would mean explaining to student-athletes that: If they are
accused of sexually assaulting another student and are deemed to be a health or safety threat to that student or any other person (even a non-student), the school may legally release to the appropriate persons otherwise protected student information against the student’s interests.

**Future Research**

Future research on FERPA should focus on the progress universities have—or have not—made in adhering to the standards of FERPA requiring disclosure of sex-crime information related to student-athletes and as well as all students. Future research would also be helpful for student-athletes in the civil context, where the focus would be on understanding FERPA’s restrictions related to the release of injury news, medical evaluations, suspensions, enrollment letters, financial aid information, and grades. Finally, future research investigating and reporting on the increase in Title IX cases that relate to FERPA would be immensely helpful. It is an area constantly changing with new cases seemingly breaking by the hour, but specifically researching what makes FERPA cases especially compelling in the Title IX context would make for compelling research. It would provide guidance in understanding when schools are in line and out of line under Title IX when they withhold certain student information or do not provide adequate resources.

**Conclusion**

The Family Educational Rights and Privacy Act of 1974 provides numerous protections for students and their parents while concomitantly insinuating criticism over its interpretation, typical of federal legislation. This statute in particular though has a
profound effect on the student-athlete. If a high-profile student-athlete at a prolific academic or athletic institution is alleged to have committed a sex-crime and the threat of imminent substantial danger exists as a result, all sorts of interests fight each other over the disclosure of related information. In the end, FERPA is designed to protect students, not protect the integrity of the academic institution. The role of state freedom of information statutes further enforces this policy, by compelling universities to disclose if requested, regardless of the secondary impacts on the academic institution’s finances or reputation.

Nevertheless, the number of academic institutions fearfully hiding behind FERPA in student-athlete cases and incidents is likely to steadily increase in the future because of the continued ambiguous nature of FERPA’s black letter law, Congress’ deference to state law, courts’ deference in FERPA case law to the legislative history of FERPA, and the hardened tradition by many academic institutions to put financial and reputational goals ahead of 1st Amendment rights. Universities often play possum—frighteningly hoping that their act of playing dead by remaining silent after not disclosing when required to—will make all the turmoil vanish. For all of these reasons, changes to FERPA are necessary to color in the gray of the extremely important statute. Namely, clearing up definitions and adding protections and incentives for institutions to disclose information will clear up a substantial amount of FERPA’s gray matter.

Whether withheld correctly or incorrectly, the fact that some institutions withhold student information under FERPA for the institutions’ own benefit rather than the student’s is disheartening. A fresh academic ideology would be encouraging and
relatively revolutionary. The academic institution that strives to disclose or withhold student records based solely on the interests of the student and the community will be the academic institution pioneering the road to a brave new world… a brave new world of educational privacy where the beauteous of mankind’s courage eradicates fear in the name of moral fulfillment and progress.
References


_MD. CODE ANN., CTS. & JUD. PROC._ § 5-620 (LexisNexis 2006); _MD. CODE ANN., FAM. LAW_ § 5-708 (LexisNexis 2006).


X Florida Statute, Ch. 119 (2008).


25 Arkansas State, Ch. 19 (1967).

45 C.F.R. § 164.104(a) (2007).
Appendix A: Section (b) of FERPA – Release of Education Records Exceptions

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of federally-supported education programs; recordkeeping

(1) 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 education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following—

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required;

(B) officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student’s parents be notified of
the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C) (i) authorized representatives of (I) the Comptroller General of the United States, (II) the Secretary, or (III) State educational authorities, under the conditions set forth in paragraph (3), or (ii) authorized representatives of the Attorney General for law enforcement purposes under the same conditions as apply to the Secretary under paragraph (3);

(D) in connection with a student’s application for, or receipt of, financial aid;

(E) State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to State statute adopted—

(i) before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and such system’s ability to effectively serve the student whose records are released, or

(ii) after November 19, 1974, if—

(I) the allowed reporting or disclosure concerns the juvenile justice system and such system’s ability to effectively serve, prior to adjudication, the student whose records are released; and

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(II) the officials and authorities to whom such information
is disclosed certify in writing to the educational agency or
institution that the information will not be disclosed to any
other party except as provided under State law without the
prior written consent of the parent of the student.

(F) organizations conducting studies for, or on behalf of, educational
agencies or institutions for the purpose of developing, validating, or
administering predictive tests, administering student aid programs, and
improving instruction, if such studies are conducted in such a manner as
will not permit the personal identification of students and their parents by
persons other than representatives of such organizations and such
information will be destroyed when no longer needed for the purpose for
which it is conducted;

(G) accrediting organizations in order to carry out their accrediting
functions;

(H) parents of a dependent student of such parents, as defined in section
152 of title 26;

(I) subject to regulations of the Secretary, in connection with an
emergency, appropriate persons if the knowledge of such information is
necessary to protect the health or safety of the student or other persons;

(J) (i) the entity or persons designated in a Federal grand jury subpoena, in
which case the court shall order, for good cause shown, the educational
agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished to the grand jury in response to the subpoena; and (ii) the entity or persons designated in any other subpoena issued for a law enforcement purpose, in which case the court or other issuing agency may order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished in response to the subpoena; (K) the Secretary of Agriculture, or authorized representative from the Food and Nutrition Service or contractors acting on behalf of the Food and Nutrition Service, for the purposes of conducting program monitoring, evaluations, and performance measurements of State and local educational and other agencies and institutions receiving funding or providing benefits of 1 or more programs authorized under the Richard B. Russell National School Lunch Act (42 U.S.C. 1751 et seq.) or the Child Nutrition Act of 1966 (42 U.S.C. 1771 et seq.) for which the results will be reported in an aggregate form that does not identify any individual, on the conditions that—
(i) any data collected under this subparagraph shall be protected in a manner that will not permit the personal identification of students and their parents by other than the authorized representatives of the Secretary; and

(ii) any personally identifiable data shall be destroyed when the data are no longer needed for program monitoring, evaluations, and performance measurements; and

(L) an agency caseworker or other representative of a State or local child welfare agency, or tribal organization (as defined in section 450b of title 25), who has the right to access a student’s case plan, as defined and determined by the State or tribal organization, when such agency or organization is legally responsible, in accordance with State or tribal law, for the care and protection of the student, provided that the education records, or the personally identifiable information contained in such records, of the student will not be disclosed by such agency or organization, except to an individual or entity engaged in addressing the student’s education needs and authorized by such agency or organization to receive such disclosure and such disclosure is consistent with the State or tribal laws applicable to protecting the confidentiality of a student’s education records.

Nothing in subparagraph (E) of this paragraph shall prevent a State from further limiting the number or type of State or local officials who will continue to have access thereunder.