

Public University Required to Disclose Sexual Assault Disciplinary Records

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June 8, 2018



Recently the North Carolina Court of Appeals issued a controversial, but unanimous decision requiring the University of North Carolina at Chapel Hill ('UNC-CH') to release its students' sexual assault disciplinary records.

In *DTH Media Corporation v. Folt*, multiple media organizations claimed that UNC-CH violated the North Carolina Public Records Act ("NCPRA") when it refused to release disciplinary records of students who have violated the school's sexual assault policy. The court held that the federal Family Educational Rights and Privacy Act ("FERPA") did not prohibit such disclosure and therefore the NCPRA required that the records be released.

The Public Records Request

In *Folt*, the plaintiffs—several media organizations—sent a public records request to UNC-CH asking for any record it made or received in connection with a person being found responsible for sexual misconduct. The request was later narrowed to the following:

(a) the name of any person who, since January 1, 2007, has been found responsible for rape, sexual assault or any related or lesser included sexual misconduct by the [UNC-CH] Honor Court, the Committee on Student Conduct, or the Equal Opportunity and Compliance Office; (b) the date and nature of each violation for which each such person was found responsible; and (c) the sanctions imposed on each such person for each such violation.

UNC-CH denied the request. Once the dispute got to trial, the court ordered UNC-CH to release such information regarding teachers but not students, citing FERPA's protection of student information. The media organizations then appealed the decision.

Requirements of the NCPRA and FERPA

State Law

The NCPRA is intended to provide broad public access to state agencies' records. It allows any person to obtain copies of public records, which include any documents "made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions."

The NCPRA includes several exceptions protecting the disclosure of certain confidential information. For example, records of criminal investigations are protected from disclosure. An exception also exists for the cost-benefit analysis of economic development incentives if the release of such information "would frustrate the purpose for which they were created." Further, the NCPRA exempts release of records that are protected by virtue of another state or federal law. However, NCPRA contains no specific exception applying to college students' disciplinary records.

In *Folt*, there was no dispute that under the NCPRA UNC-CH student disciplinary records were "public records."

Federal Law

The applicable federal law, FERPA, was enacted in 1974 to protect the privacy of student education records, and it applies to all schools that receive federal funding. Many of FERPA's provisions prohibit schools from disclosing education records to third parties without appropriate written consent.

Education records protected by FERPA include documents that "contain information directly related to a student; and are maintained by an educational agency or institution or a person acting for such agency or institution." In *Folt*, the parties agreed that student disciplinary records are education records under FERPA.

However, FERPA also provides certain exceptions where education records *may* be released. One provision allows postsecondary institutions (essentially any educational institution following high school) to disclose:

[F]inal results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence [as the term is defined by FERPA], 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.

The release of information under this provision is not expansive—disclosure can only be the final result of a disciplinary hearing and must be limited to the name of the student, violation committed, and any sanction imposed by the school. Release of the name of any other student, such as a victim or witness, is only permissible with the written consent of that student.

University vs. the Media: Arguments

The legal arguments in *Folt* focused on whether FERPA preempts the NCPRA. As shown above, FERPA *allows* release of certain education records at the school's discretion. UNC-CH argued that the particular FERPA provision regarding disclosure of disciplinary proceedings *requires* that the school exercise discretion about whether to disclose the information. Thus, UNC-CH claimed an obligation to use discretion in releasing the requested records, and it exercised that discretion by denying the media's public records request.

The media organizations argued that FERPA does not require such discretion. Instead, because the NCPRA *requires* release of public records, and FERPA did not *prohibit* the release of the particular student disciplinary information, UNC-CH was required to release it.

The North Carolina Court of Appeals Decision

The North Carolina Court of Appeals held that UNC-CH must disclose the requested disciplinary records to the extent allowed by FERPA. Much of the court's decision focused on the legal principle that laws related to similar subject matters must be read in context with each other. According to the court, FERPA and the NCPRA do not contradict each other for purposes of the media's narrow request. Under the court's interpretation that FERPA allows (not requires) discretion, it was possible for UNC-CH to comply with both FERPA and the NCPRA. However, the court recognized that FERPA only allows for disclosure of the student's name, violation, and sanctions, and not the date of the violation(s). So, UNC-CH was required to provide all requested information except for the dates.

Further, the court held that federal preemption principles did not apply in *Folt* because FERPA does not expressly state an intent to preempt disclosure laws related to student educational records. In fact, the court cited to legislative history, including the statement of the congressman who introduced the FERPA provision at issue, finding that FERPA would not prevent disclosure of information about disciplinary proceedings involving serious crimes, and that, instead, such disclosure would be subject to state law.

Punting to the Legislature

UNC-CH presented several policy arguments, including the adverse effect disclosure would have on the university's Title IX process. The university's concerns included deterring victims from filing sexual assault complaints and jeopardizing the safety of alleged sexual assault perpetrators.

Neither the trial court nor the appellate court addressed these arguments. Instead, the court pointed out that is the role of the legislature—not courts—to determine issues of public policy. The court, however, did note FERPA's requirement that names of victims or witnesses only be disclosed with written permission from those individuals.

This raises the question: Could the legislature amend the NCPRA to specifically prevent disclosure of public colleges' student disciplinary records? The simple answer is "yes." If the legislature included an exception for economic development incentives in the NCPRA, certainly the North Carolina General Assembly could propose a new exception to help address UNC-CH's concerns regarding Title IX. As the court suggested, this is a matter of public policy and public concern that should be addressed by legislators.

Stay Tuned

Because the appellate court's decision in *Folt* was unanimous, and no constitutional question was involved, UNC-CH does not have an automatic right for the North Carolina Supreme Court to hear the case. However, on May 16th, UNC-CH asked the Supreme Court to consider the case in its discretion, and on October 24th, the Supreme Court allowed the case to move forward. So, we must wait for the Supreme Court to decide the case in 2019.

In the meanwhile, public colleges and universities must understand the *Folt* decision because, if and until the North Carolina Supreme Court or General Assembly addresses the decision, *Folt* is the law.

Conclusion

The *Folt* case has a simple practical effect: If a public college or university receives a request under the

NCPRA to disclose student disciplinary records related to sexual offenses, the school must disclose:

- The name of the student;
- The violation committed; and,
- Any sanction imposed by the school.

Folt also serves as a reminder of the complexity of FERPA and disclosure laws. Typically, issues related to educational institutions' disclosure arise from violations of FERPA disclosure prohibitions. As such, any request for student records must be highly scrutinized before disclosure. But in *Folt*, the tables were turned: FERPA's purported deference to state law, in fact, led to the *requirement* of student information disclosure.

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