

Case Brief: *DTH Media Corp. v. Folt**

INTRODUCTION

The rate of sexual assault in higher education continues to be alarmingly high.¹ Although legislation, such as Title IX, has been enacted to ensure that universities are responding promptly to sexual assault allegations, compliance is not guaranteed.² When the Office for Civil Rights began to investigate the University of North Carolina at Chapel Hill for noncompliance and mishandling sexual assault cases,³ media outlets filed an action seeking disclosure of disciplinary records of students that had violated UNC’s sexual assault policy.⁴ In *DTH Media Corp. v. Folt*,⁵ the Supreme Court of North Carolina mandated the release of these records.⁶ The court held that the University does not have discretion to withhold the disciplinary records—as stated in the federal Family Educational Rights and Privacy Act (“FERPA”)—but instead is required to disclose the information under the North Carolina Public Records Act.⁷

FACTS OF THE CASE

The Daily Tar Heel, a student-run newspaper,⁸ among other North Carolina-based news organizations, sent a letter on September 30, 2016, to the UNC administration broadly requesting that—in accordance with the North

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1. See Richard Pérez-Peña, *1 in 4 Women Experience Sex Assault on Campus*, N.Y. TIMES (Sept. 21, 2015), <https://www.nytimes.com/2015/09/22/us/a-third-of-college-women-experience-unwanted-sexual-contact-study-finds.html> [<https://perma.cc/TY3X-HLMG> (dark archive)] (“27.2 percent of female college seniors reported that, since entering college, they had experienced some kind of unwanted sexual contact.”).

2. Tara K. Steng & Akiko Kamimura, *Sexual Assault Prevention and Reporting on College Campuses in the US: A Review of Policies and Recommendations*, 6 J. EDUC. & PRAC. 65, 66–67 (2015).

3. See generally *Federal Investigation Finds UNC Violated Title IX in Handling of Sexual Violence Complaints*, ABC 11 (June 26, 2018), <https://abc11.com/unc-university-of-north-carolina-chapel-hill-sexual-harassment/3656640/> [<https://perma.cc/SYB8-WXEE>] (discussing how the Office for Civil Rights of the Department of Education ultimately found that “[t]he University of North Carolina at Chapel Hill violated federal law in its handling of sexual harassment and sexual violence complaints”).

4. Tyler Dukes & Randall Kerr, *UNC-Chapel Hill Releases Names of Students Found Responsible for Sexual Misconduct*, WRAL (Aug. 6, 2020, 6:22 PM), <https://www.wral.com/unc-chapel-hill-releases-names-of-students-found-responsible-for-sexual-misconduct/19223106/> [<https://perma.cc/N7WC-DP TA>].

5. 374 N.C. 292, 641 S.E.2d 251 (2020).

6. *Id.* at 309–10, 641 S.E.2d at 263.

7. *Id.*

8. *About*, DAILY TAR HEEL, <https://www.dailytarheel.com/page/about> [<https://perma.cc/JY 9M-R2DJ>].

Carolina Public Records Act—they hand over “copies of all public records made or received by [UNC-CH] in connection with a person having been found responsible for rape, sexual assault or any related or lesser included sexual misconduct.”⁹ The administration promptly denied the request, asserting that under FERPA the documents were “educational records” and thus “protected from disclosure.”¹⁰

Plaintiffs subsequently filed a complaint which sought: (1) an order compelling the defendant to produce the records at issue; (2) an order declaring that the records requested are public records; and (3) an order compelling the defendants to permit the inspection and the copying of the records.¹¹ In response, the defendants claimed that because FERPA preempts North Carolina’s Public Records Act, the University was authorized to exercise its discretion when determining what information to release in order to protect its students and the Title IX process.¹²

After mediation between the parties, the media narrowed their request.¹³ This time they asked the school to release:

(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 sanction[] imposed on each such person for each such violation.¹⁴

However, the administration denied the request, again stating that doing so would violate FERPA.¹⁵

The trial court agreed with the defendants and denied the plaintiffs’ declaratory judgment, stating that, although the requested student records are “public records,” FERPA grants the University discretion to release the information.¹⁶ Therefore, under the doctrines of field preemption and conflict

9. *Folt*, 374 N.C. at 294, 641 S.E.2d at 254 (alteration in original) (citation omitted).

10. *Id.* (citation omitted).

11. *Id.* at 295, 641 S.E.2d at 254.

12. *Id.*, 641 S.E.2d at 245–55 (stating the University’s position that “disclosure of this information would deter victims from coming forward and participating in the University’s Title IX process, thus preventing victims from receiving the help and support available to them through the University’s Title IX process and preventing the University from learning about potential serial perpetrators, which would undermine the safety of the campus community”).

13. *Id.* at 294, 641 S.E.2d at 254.

14. *Id.* (alterations in original).

15. *Id.* at 294–95, 641 S.E.2d at 254.

16. *See id.* at 296, 641 S.E.2d at 255 (“FERPA grants the University the discretion to determine whether to release (1) the name of any student found ‘responsible’ under University policy of a ‘crime of violence’ or ‘nonforcible sex offense,’ (2) the violation, and (3) the sanction imposed.”).

preemption, federal law implicitly preempts the North Carolina Public Records Act.¹⁷

The North Carolina Court of Appeals reversed the trial court, stating that FERPA and the Public Records Act are not in conflict and, therefore, the mandatory disclosure required by the Public Records Act controls.¹⁸ The court relied heavily on the plain language of FERPA, which states in 20 U.S.C. § 1232g(b)(6)(B) that “[n]othing . . . shall be construed to prohibit an institution . . . from disclosing the final results of any disciplinary proceeding.”¹⁹ Thus, the court reasoned, the federal statute does not require the University to have discretion over releasing “FERPA-exempted student disciplinary records” and therefore does not conflict with the Public Records Act.²⁰

The Supreme Court of North Carolina affirmed the decision by the court of appeals, holding that the University of North Carolina at Chapel Hill does not have discretion to withhold the information sought by the plaintiffs since the records are subject to release under FERPA and required to be released under the North Carolina Public Records Act.²¹

LEGAL ISSUES AND OUTCOME

In coming to this result, the majority discussed the legislative intent behind both FERPA and the North Carolina Public Records Act. The court found that the North Carolina legislature had “clearly expressed” its intent to make public records, which include students’ disciplinary records, readily accessible since they are “the property of the people.”²² As such, the Public Records Act should be liberally construed in order to ensure the public’s access is uninhibited.²³ On the other hand, through FERPA, Congress expressed its intent to protect students’ “educational records,” which include students’ disciplinary records.²⁴ Because of these clashing interests, the court had to decide whether the federal and state laws conflict. If so, then the federal law would control due to the doctrine of preemption.²⁵

17. *Id.*

18. *DTH Media Corp. v. Folt*, 259 N.C. App. 61, 77–78, 816 S.E.2d 518, 529, *discretionary review allowed, writ allowed*, 371 N.C. 570, 819 S.E.2d 376 (2018), *aff’d*, 374 N.C. 292, 841 S.E.2d 251 (2020), *cert. denied*, 141 S. Ct. 1126 (2021).

19. *Id.* at 68–69, 816 S.E.2d at 524 (alteration in original).

20. *Id.* at 68, 816 S.E.2d at 524. The appeals court did affirm the trial court’s determination that FERPA did not allow the disclosure of the date of offense but only the name of the student, violation committed, and the sanction imposed on the student. *Id.* at 71, 816 S.E.2d at 525.

21. *Folt*, 374 N.C. at 309–10, 641 S.E.2d at 263.

22. *Id.* at 300, 641 S.E.2d at 257.

23. *Id.* at 300–01, 641 S.E.2d at 257–58.

24. *Id.* at 301, 641 S.E.2d at 258.

25. See JAY B. SKYES & NICOLE VANATKO, CONG. RSCH. SERV., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER 1–2 (2019) (discussing how the Supremacy Clause creates the preemption doctrine).

There are a number of provisions within FERPA that are relevant in ascertaining Congress's intent.²⁶ The most important of these is 20 U.S.C. § 1232g(b)(6)(B), which states:

Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding . . . 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 offense²⁷

The defendants construed this to mean that although the disclosure of disciplinary educational records are permitted under FERPA, the University is given discretion to determine whether to disclose the information.²⁸ The majority rejected this reasoning by finding that the statute does not give implied discretion to the University.²⁹ The language "if the institution determines" simply limits the public records to students' disciplinary records that were found to have violated University policies and does not give the University discretion to decide whether to disclose.³⁰ Furthermore, interpreting FERPA to allow such discretion conflicts with both the access to public records intended by the North Carolina Public Records Act and the plain language allowing disclosure in FERPA.³¹

Interestingly, the majority conceded that FERPA, standing alone, would give the University discretion to disclose³² but reasoned that because both FERPA and the North Carolina Public Records Act apply, the language "nothing in this section shall be construed to prohibit . . . disclosure" suggests that the North Carolina Public Records Act can require disclosure without conflicting with FERPA.³³ By starting with the mandatory language in the Public Records Act and layering FERPA overtop, the majority found harmony in the two provisions.³⁴

The dissent rejected the majority's approach and stated that statutory construction requires the court to look first at the federal law to determine whether the University is given discretion to disclose.³⁵ Only then should the court turn to the state law to see if its mandate conflicts with the authority given

26. *Folt*, 374 N.C. at 298–99, 641 S.E.2d at 256–57.

27. *Id.* at 299, 641 S.E.2d at 256–57.

28. *Id.* at 301–02, 641 S.E.2d at 258–59.

29. *Id.* at 302, 641 S.E.2d at 259.

30. *See id.* at 301–04, 641 S.E.2d at 258–60.

31. *See id.*

32. *Id.* at 303–04, 641 S.E.2d at 259–60.

33. *Id.*

34. *Id.* at 304, 641 S.E.2d at 260.

35. *Id.* at 310, 641 S.E.2d at 263–64 (Davis, J., dissenting).

under federal law.³⁶ In executing this approach, the dissent argued that the discretion given to the University under FERPA is inherently in conflict with the mandatory disclosure required under the North Carolina Public Records Act.³⁷ The dissent pointed out the majority's logical flaw in admitting that FERPA gives discretion to universities and yet concluding that it can coexist with the North Carolina Public Records Act, which mandates disclosure.³⁸ In the dissent's eyes, an irreconcilable conflict arises because the University cannot simultaneously have discretion and be required to disclose students' disciplinary records.³⁹

Lastly, the dissent also argued that the majority cannot avoid a preemption issue because the mandatory disclosure under state law is simply one of the options allowed under FERPA.⁴⁰ To support this conclusion, the dissent relied upon Supreme Court precedent in *Barnett Bank of Marion County, N.A. v. Nelson*,⁴¹ which held that a federal law that said "you may sell insurance" while the state law said "you may not" were conflicting duties which triggered the preemption doctrine.⁴² Because the North Carolina Public Records Act logically cannot coexist with FERPA, the Supremacy Clause and subsequent preemption doctrine applies, and FERPA controls.⁴³

BRIEF ANALYSIS AND POTENTIAL IMPACT

Requiring public record disclosures of students' sexual misconduct aids in holding perpetrators and universities accountable. Disclosure gives the public the ability to see whether a university is not only investigating sexual assault allegations but actually holding students accountable for their actions and punishing them accordingly. It also provides the ability for students to keep themselves safe by having threats within their community identified. Furthermore, it could provide more deterrence to students if there is a possibility that their name and sexual misconduct could be publicized in the news.

However, there are potential harms with the release of these records. There could be an unintended consequence of victims being identified through the release of the information. Other students might be able to deduce the identity of the victim through the release of the perpetrator's name because they might know of their past involvement or relationship. This could discourage

36. *Id.*

37. *Id.* at 313, 641 S.E.2d at 265.

38. *Id.* at 313–15, 641 S.E.2d at 265–66.

39. *Id.* at 312–13, 641 S.E.2d at 265.

40. *Id.* at 314–15, 641 S.E.2d at 266.

41. *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25 (1996).

42. *Folt*, 374 N.C. at 315, 641 S.E.2d at 266–67.

43. *Id.* at 315–16, 641 S.E.2d at 267.

victims from coming forward if they are afraid that they could potentially be identified. Additionally, disclosure has a long-lasting impact on the perpetrator's future—especially when a perpetrator has not been afforded a criminal trial. This is an important consideration since criminal trials provide some protections against abuse that the university process does not. For example, a criminal trial gives the defendant a right to a jury of their peers and requires that parties abide by the rules of evidence; in contrast, a university's investigation of misconduct and subsequent trial are not held to the same constraints.

Although the court's decision in *Folt* has the propensity for both positive and negative consequences, it is important to ask whether the outcome aligns with the purpose of Title IX. At its core, Title IX protects people from discrimination based on sex.⁴⁴ It is also a powerful tool to combat sexual violence on a university's campus by requiring efficient and prompt action when an allegation is made.⁴⁵ However, Title IX cannot achieve its purpose if it is not being followed. But, after *Folt*, the mandatory release of the disciplinary records can perhaps act as an extra layer of forced transparency from UNC and other North Carolina schools to perpetuate compliance through another medium: the media. Therefore, *Folt* has moved the needle closer to protecting students in higher education from sexual assault—a major goal of Title IX.

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44. *Title IX and Sexual Violence in Schools*, ACLU, <https://www.aclu.org/title-ix-and-sexual-violence-schools> [https://perma.cc/UF5L-77EM].

45. *Id.*

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