

# **Legal Showdown: FERPA vs. NC Public Records Act**

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# Agenda

- ▶ (Quick) FERPA overview
- ▶ (Quick) NC Public Records Act overview
- ▶ The main event: *DTH Media Corp. v. Folt*

# Family Educational Rights and Privacy Act (FERPA) Overview

# The law

- ▶ FERPA is a federal law enacted in 1974
- ▶ It protects personally identifiable information (“PII”) from students’ education records from being disclosed without consent (or other exception)
- ▶ It permits a student to access own education record
  - ▶ To inspect and review (not have or copy) within 45 days of request



# What is an education record?

- ▶ “Education records” are:
  - ▶ Directly related to the student and
  - ▶ Maintained by the university
- ▶ Examples include:
  - ▶ Grades, schedules, disability status, home address, etc.
  - ▶ Financial aid records
  - ▶ Advising records
  - ▶ Housing records
  - ▶ Student support records
  - ▶ Disciplinary records
  - ▶ Anything in university’s possession that relates to the student!


# What is personally identifiable information?

- ▶ Specific information such as name, address, SSN, DOB, etc.
- ▶ “Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty”
- ▶ “Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.”

# What is consent?

- ▶ Student may consent to the disclosure of education records
  - ▶ Must be written
  - ▶ Must be signed and dated
  - ▶ Must specify the records to be disclosed, the party to whom the records are to be disclosed, and the purpose of the disclosure
- ▶ Student's presence and lack of objection is not sufficient.

Last Revised March 12, 2014

 **STUDENT CONSENT FOR ACCESS TO EDUCATION RECORDS**  
THE UNIVERSITY OF NORTH CAROLINA AT CHARLOTTE  
OFFICE OF THE REGISTRAR

Name of Student (Last, First, Middle Initial):	Student ID:	Date:
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The Family Educational Rights and Privacy Act (FERPA) affords certain rights to students concerning the privacy of, and access to, their education records. Students may choose to complete and submit this form to the Registrar allowing the release of their education records to specified third parties. Please note that while this form *authorizes* UNC Charlotte to release education records to third parties, it does not *obligate* UNC Charlotte to do so. UNC Charlotte reserves the right to review and respond to requests for release of education records on a case-by-case basis. For additional information, visit UNC Charlotte's FERPA Information page at <http://legal.unc.edu/legal-topics/ferpa> or the U.S. Dept. of Education's website at [www.ed.gov/policy/gen/guid/fpco/ferpa/index.html](http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html).

**SECTION A. Education records to be released (check all that apply):**

- Academic Information** (grades/GPA, registration, student ID number, academic progress, enrollment status)
- Financial Aid Information** (awards, application data, disbursements, eligibility, financial aid academic progress status)
- Loan Information** (University-maintained loan disbursements, billing and repayment history [including credit reporting history], communication history, balances, collection activity)
- Student Account Information** (billing statements, charges, credits, payments, past due amounts, collection activity)
- All records listed above**
- Other** (please specify): \_\_\_\_\_

**SECTION B. Person(s) to whom access to education records may be provided:**

Name(s) of person(s) to whom access to records may be provided (use additional pages if necessary) \_\_\_\_\_

Address(es) of person(s) to whom access to records may be provided \_\_\_\_\_ Relationship to Student \_\_\_\_\_

**SECTION C. Duration of release (check one):**

- One-Time Use:** This authorization can be used only once.
- Limited Use:** This authorization expires on: \_\_\_\_\_

**SECTION D. Purpose of release (check one):**

- Family Communications**
- Employment**
- Admission to an Educational Institution**
- Other** (please specify): \_\_\_\_\_

I understand that (1) I have the right not to consent to the release of my education records, (2) I have the right to inspect any written records released pursuant to this consent, and (3) I have the right to revoke this consent at any time by delivering a written revocation to the University Registrar.

Student's Signature \_\_\_\_\_ (Date) \_\_\_\_\_ Signature of Parent or Guardian (if under 18) \_\_\_\_\_ (Date) \_\_\_\_\_

Instructions for completing this form:

1. The form must be fully completed and signed by the student. Records cannot be released if any section of this form is not filled out entirely.
2. Completed forms should be submitted to the Office of the Registrar in Room 141 of the King Building, or mailed to Office of the Registrar, UNC Charlotte, King 141, 9201 University City Boulevard, Charlotte, NC, 28223, or faxed to the Office of the Registrar at (704) 687-1419. Questions about this form may be directed to the Office of the Registrar at (704) 687-5505.

*This information is released subject to the confidentiality provisions of appropriate state and federal laws and regulations which prohibit any further disclosure of this information without the specific written consent of the person to whom it pertains, or as otherwise permitted by such regulations.*

# Example exceptions to written consent

- ▶ Directory information
- ▶ To university officials if legitimate educational interest
- ▶ To parents if student is dependent
- ▶ To another university if student transfers
- ▶ Health/safety emergency
- ▶ Judicial order/subpoena
- ▶ Certain disciplinary information
  - ▶ Crimes of violence (just victim or victim and public) or
  - ▶ Alcohol/drug violations (if responsible)



# Crime of violence exceptions

- ▶ Two crime of violence exceptions in FERPA (added in 1998):
  - ▶ Disclose final results of disciplinary proceeding to victim (regardless of responsibility finding)
  - ▶ Disclose publicly if student found responsible for alleged crime of violence or non-forcible sex offense
    - ▶ Only the name of the student, the violation committed, and any sanction imposed against the student
    - ▶ May not disclose the name of any other student, including a victim or witness, without the prior written consent
- ▶ All FERPA exceptions to written consent are permissive, not mandatory, disclosures

# NC Public Records Act Overview

# The law

- ▶ North Carolina Public Records Act
  - ▶ Requires public entities to retain public records
  - ▶ Requires public entities to disclose public records when asked unless an exception applies
- ▶ Retention periods vary for different types of records
  - ▶ Eight years for student disciplinary records
- ▶ Not technically an exception in the NC PRA for education records (other than personally identifiable admissions records, which are not covered by FERPA)

# The law

- ▶ A public record is any documentary material or artifact “regardless of physical form or characteristics . . . made or received . . . in connection with the transaction of public business by any agency of North Carolina . . . .”
- ▶ “The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people.”



# Public records requests

- ▶ Responding to requests:
  - ▶ Must allow inspection
  - ▶ May not demand the identity of requestor or the reason for the request
  - ▶ Must respond “as promptly as possible”
  - ▶ Must redact confidential information, but very limited
    - ▶ Examples include: trade secrets, SSNs, ongoing criminal investigations, most personnel information
    - ▶ NC courts have held that “exceptions and exemptions to the Public Records Act must be construed narrowly.”

# Denial of access

- ▶ Anyone who is denied access to a public record may seek a court action to compel release of the records
- ▶ The burden is on the agency
- ▶ The presumption is that all public records are open to the public unless there is an explicit exception

The background features abstract, overlapping geometric shapes in various shades of green, ranging from light to dark, creating a modern and dynamic visual effect. The shapes are primarily triangles and polygons, some with thin white outlines, set against a white background.

The Main Event:  
*DTH Media Corp. v. Folt*

# Review – In one corner . . .

## ▶ FERPA

- ▶ Federal law
- ▶ Protects identifiable student information, including information that, combined with other available information, could identify a student
- ▶ Permits, but does not require, a university to disclose name, violation, and sanction of students disciplined for crimes of violence
  - ▶ Prohibits universities from disclosing identifiable victim or witness information



# Review – In the other corner . . .

- ▶ NC Public Records Act
  - ▶ State law
  - ▶ Requires disclosure of records made by public entities unless a specific exception applies
  - ▶ Student information (other than applicant information) is not a listed exception



# *DTH Media Corp. v. Folt*

- ▶ NC Supreme Court case decided in May 2020
- ▶ In September 2016, several newspapers requested from UNC Chapel Hill, pursuant to the NC Public Records Act, “copies of all public records made or received by [UNC Chapel Hill] in connection with a person having been found responsible for rape, sexual assault or any related or lesser included sexual misconduct”
- ▶ UNC Chapel Hill denied the requests based on FERPA, and the newspapers sued

# Plaintiffs' argument

- ▶ FERPA permits the university to disclose specific information from student disciplinary records: student's name, violation committed, and sanction imposed
- ▶ NC Public Records Act requires the disclosure of records unless a specific exception applies
- ▶ The university can comply with both federal law (FERPA) and state law (PRA) so there is no preemption issue

# University's argument

- ▶ Student disciplinary records are protected by FERPA
- ▶ FERPA gives the university the discretion to decide whether to disclose the records under the crime of violence exception
- ▶ The university “reasonably exercised its discretion not to release this information, because doing so would breach the confidentiality of the University’s Title IX process and would interfere with and undermine that process.”
- ▶ Based on the preemption doctrine, where a federal law grants discretion to an entity, state law cannot take it away

# History of the case

- ▶ Trial court (May 2017) found in Chapel Hill's favor
  - ▶ FERPA (as a federal law) controls
- ▶ Court of Appeals panel (April 2018) unanimously found in plaintiffs' favor
  - ▶ No conflict between the laws because PRA requires disclosure and FERPA does not prohibit disclosure

# Supreme Court's decision

- ▶ 4 to 3 decision (no ideological split)
- ▶ “We conclude that . . . [FERPA] did not grant implied discretion to UNC-CH to determine whether to release the results of a student disciplinary proceeding emanating from rape, sexual assault, or sexual misconduct charges.”
- ▶ “[W]e conclude, as did the Court of Appeals, that [UNC-CH]’s contended interpretation of the two statutes ‘conflicts with both the Public Records Act’s mandatory disclosure requirements and the plain meaning of FERPA’s [crime of violence exception], which allows disclosure.’”
- ▶ Only the three pieces of information permitted to be disclosed by FERPA are required to be disclosed under PRA



# What's next?



- ▶ UNC Chapel Hill has filed a petition for writ of certiorari with the U.S. Supreme Court
- ▶ *DTH Media Corp. v. Folt* decision will stand unless and until:
  - ▶ U.S. Supreme Court overturns it, or
  - ▶ N.C. legislature amends the PRA
- ▶ FERPA still protects almost all student information from public disclosure



Questions?