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Tattoos, Tickets and Other Tawdry Behavior: How Universities Use Federal Law to Hide Their Scandals

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Tattoos, Tickets and other Tawdry Behavior:
How Universities Use Federal Law to Hide Their Scandals

Professor Mary Margaret Penrose[1]

One of the most egregious defects of the Buckley Amendment [a federal law governing disclosure of "education records"] is its propensity to allow colleges and universities the wherewithal to manipulate the law, thereby protecting the institution while giving the appearance of protecting student privacy.[2]

America loves her sports. The World Series. The Super Bowl. The Indianapolis 500. And, perhaps increasingly above all, college sports. College sports in the United States is one of the nation's most profitable industries.[3] But the monetary profit is not without cost. "Student-athletes," upon whose back much of this profit is made, are sadly a disposable commodity for most universities.[4] Good behavior and good athletic performances often result in good press flowing forth from the university. But, take a turn for the worse, bad behavior, bad grades, and schools seek to avoid all publicity by quickly turning to federal legislation that was never intended for such defensive machinations: the Family Educational Rights and Privacy Act ("FERPA"),[5] also euphemistically known as the Buckley Amendment after its main sponsor, James L. Buckley.[6]

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[1] Professor. Texas Wesleyan School of Law. The author would like to dedicate this article to her late father, Charles William Penrose. He was my first coach and always, always taught me to play fair.
[2] Matthew R. Salzwedel & Jon Ericson, *Cleaning Up Buckley: How the Family Educational Rights and Privacy Act Shields Academic Corruption in College Athletics*, 2003 WISC. L. REV. 1053, 1097 (2003).
[3] *E.g.,* Maureen Weston, *NCAA Sanctions: Assigning Blame Where It Belongs*, LII BOSTON COLLEGE L. REV. 551, 551-552 (2011)(indicating that "[s]uccess in a major athletic program, particularly a National Collegiate Athletic Association (NCAA) Division I national championship, translates into millions of dollars and immense pride for the players, coaches, alumni, students, and the university").
[4] One example is former Ohio State star running back, Maurice Clarett. His former professor, Paulette Pierce, in responding to allegations about improper academic assistance provided to Ohio State athletes, explained: "The sports culture doesn't care about the whole human being. . . . The athletic department is more concerned about what they can get from these players." Mike Freeman, *When Values Collide: Clarett Got Unusual Aid in Ohio State Class*, N.Y. TIMES, July 13, 2003.
[5] 20 U.S.C. § 1232(g)(2006); *see also* 34 C.F.R. § 99 (2009).
[6] Salzwedel & Ericson, *supra* note 2, at 1097. The article quotes one administrator as follows:

FERPA protects student privacy by requiring universities to protect student's "educational records" from disclosure without first securing student or parental consent.[7] What qualifies as an "education record, however, is subject to great debate and varied interpretation.[8] Universities, often to protect their own image and to stave the free flow of information, regularly invoke FERPA in response to open record requests or press inquiries where the information sought places the institution in a negative light.[9] The goal is non-disclosure.[10] The chorus is student privacy. The tool: the FERPA defense.

Take for example the academic cheating and improper benefits scandal at the Ohio State University in 2003 involving Maurice Clarett, among others.[11] University

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> What seems apparent . . . is that some college and university officials have grown accustomed to using the act – indeed, abusing it – as a defensive shield against disclosure of information that the public has a right to know and to which the Buckley Amendment has never had any relevance.

Id.

[7] 20 U.S.C. § 1232g(a)(4)(A) (2006); *see also* 34 C.F.R. § 99.3 (2009).

[8] George Schroeder, *It's Clear the O Stands for Opaque*, THE REGISTER GUARD, Feb. 18, 2011. Oregon, like most other Division I universities, apparently believes that any document containing a student's name is an off-limits "education record." As Schroeder explains, "Oregon refused to provide any information beyond the 127 words in its initial statement [describing NCAA allegations regarding its men's basketball program]. The school's public records officer says to do otherwise – to provide any information, any document, of any kind – would be a violation of federal privacy legislation designed to protect students' "education records." *Id.* *See also* John Drescher, *Law Misused to Hide Misconduct*, THE NEWS OBSERVER, Dec. 4, 2010 (reporting that "Universities interpret FERPA differently. Some schools interpret "education record" to mean a document with a student's grades and course work. Other colleges deem any document containing a student's name to be an education record"). *See also FOIA And Access: College Sports Programs Cite FERPA in Withholding Information,* University of Minnesota Silha Center for the Study of Media Ethics and Law (Summer 2009), available at http://www.silha.umn.edu/news/summer2009.php?entry=195063 (last visited July 18, 2011). This editorial reports that "[t]he bottom line [whether] the information gets released or not is up to each [University] counsel."

[9] Salzwedel & Ericson, *supra* note 2, at 1061 (explaining that "University presidents do their best to ensure the question is never answered. 'You are violating the student's right to privacy,' they are quick to say. In other words, welcome to the Family Educational Rights and Privacy Act of 1974 (FERPA) – otherwise known as the Buckley Amendment – the shield behind which higher education hides the academic corruption in college athletics").

[10] *Id.* at 1061 ("University presidents do their best to ensure the question [regarding misbehavior] is never answered").

[11] Freeman, *supra* note 4. Maurice Clarett, a star running back at Ohio State was alleged by a teaching assistant in the African-American and African studies department to have received special treatment after fleeing his midterm exam in African-American and African Studies 101 without completing it. *Id.* To aid

response: We cannot discuss the situation due to FERPA.[12] Yet, the head of the department from which the allegations originated wasted no time in lambasting the teaching-assistant who brought the issue to the school's attention, contending that she was mentally and psychologically unstable.[13] No student privacy issues were advanced on *her* behalf.[14] But, Mr. Clarett and his teammates immersed in scandal received the fullest protection of FERPA.[15] As the story unfolded and the negative implications grew, the reasons for protecting the athletes became a little clearer.[16]

Then there was the issue of an inordinate number of parking tickets accumulated by a particular University of Maryland athlete.[17] The University response: FERPA. We

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Clarett, the professor gave him two oral exams – one to make up the fled midterm and one satisfying the final exam requirement. *Id.* While the results of such exams are undoubtedly "education records" under FERPA, in this case a university official had no reservations indicating Clarett passed both tests. *Id.*

[12] Ohio State Athletics website, *Transcript From December 17th, 2003, Press Conference*, available at www.ohiostatebuckeyes.com/genrel/121703.aac.html (last visited July 15, 2011)(throughout this Press Conference, Ohio State officials indicated that they could not discuss interviews with or impressions about either Maurice Clarett or the teaching assistant quoted in the N.Y. Times article due to FERPA).

[13] Freeman, *supra* note 4. Kenneth Goings, chairman of the Department of African-American and African Studies department "whom the teaching assistant had sought out to discuss her concerns [about improper aid to Clarett], attacked the teaching assistant's credibility, saying he found it difficult to believe her because she had a history of psychiatric problems and displayed what he called erratic behavior." *Id.*

[14] Salzwedel & Ericson, *supra* note 2, at 1098. In explaining Ohio State's defense of Department chair Goings comments relating to Norma McGill's [the teaching assistant quoted in the Clarett article] psychiatric issues, Ohio State spokeswoman Elizabeth Conlisk explained that while McGill violated FERPA in discussing Clarett, [which this author agrees occurred], Goings did not because Goings' attack on the teaching assistant was based on rumors, not student records. *Id.*

[15] Although, when one reviews the entire New York Times article, it is clear that numerous education records were being provided to the newspaper through some university source, either the professor, the teaching assistant or some other individual. *See* Freeman, *supra* note 4 (detailing that Mr. Clarett's "records show he scored only 22 out of a possible 40 points on his quizzes and did not turn in the midterm or take the written final exam). A second, equally egregious example of improper "education records" disclosure appearing in the New York Times' piece includes the documented revelation that Chris Vance, a talented wide receiver for Ohio State, "scored a 55 on his midterm and a 35 on his final, had 11 unexcused absences and miss four of eight quizzes." *Id.* Citing an unnamed "university official," the paper revealed that "Vance failed the course" and further added that "he struggled in many of his other classes, too." *Id.* Such improper disclosures of true "education records" were rampant throughout the article.

[16] In revealing information from what clearly was an "education record," a second New York Times article indicated that Reggie Germany, a former Ohio State football player, received a 0.0 grade point average in 2000. *See* Mike Freeman, *Ohio State To Examine Special Help for Clarett*, N.Y. TIMES, July 14, 2003.

[17] Duane Simpkins, a University of Maryland basketball player, "racked up $8,000 worth of unpaid parking fines in part because he repeatedly received $250.00 tickets for parking in spaces reserved for the disabled." Brad Snyder, *Simpkins Parking Fines Hit $8,000. Terp Kept Using Spots for Disabled.*, BALT. SUN, Feb. 22, 1996. Ironically, Mr. Simpkins was again ticketed the very day *after* issuing an apology for

would love to release those tickets, but parking tickets amassing fines over $8,200.00[18] are "education records" that must be shielded.[19] Florida State found itself in a similar dilemma, an alleged academic cheating scandal among athletes. Florida State's response? FERPA.[20] Allegations at North Carolina of academic irregularities and improper benefits received by athletes? No surprise here, FERPA.[21] Requests for parking tickets at North Carolina,[22] Oklahoma State and the University of Oklahoma?[23] Taking their cue from the University of Maryland, in hoping to protect their athletes, FERPA.[24] Alleged sexual assaults by athletes at Wake Forest,[25] Indiana University,[26]

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amassing $1,485 in parking fines during the 1996 school year. *See* Brad Snyder and Dana Hedgpeth, *Simpkins Ticketed Day After Apology Feb. 17 Parking Fine Among Total of $1,485 for This School Year*, BALT. SUN, Feb. 23, 1996 (reporting Simpkins received yet another $20.00 fine on Feb. 17th for parking in a space not assigned to him).

[18] The New York Times reported that University of Maryland Guard, Duane Simpkins, amassed $8242.00 worth of campus parking tickets. *See Sports People: Basketball; Loan Details Revealed*, N.Y. TIMES, Feb. 22, 1996, at Sports.

[19] *Kirwan v. The Diamondback*, 721 A.2d 196, 199 (Md. Ct. of Apps. 1998)("the University asserted that the documents relating to the student-athletes are education records and that the federal Family Educational and Privacy Rights Act, 20 U.S.C. § 1232(g), prohibits disclosure").

[20] Mark Schlabach, *Twenty or More FSU Players Might Be Pulled From Bowl*, ESPN.com, Dec. 18, 2007 available at http://espn.go.com/espn/print?id=3159534&type=story (last visited July 18, 2011). Florida State refused to release the names of the 25 football players who were facing suspension over the cheating allegations because "[f]ederal privacy laws prohibit the school from releasing names." *Id.*

[21] Drescher, *supra* note 8 (reporting that "UNC declined to provide the players' tickets, saying they are an educational record").

[22] *Id.*

[23] Elise Jenswold, *Denied: OSU Officials Refused to Release Public Records*, THE DAILY O'COLLEGIAN, May 4, 2010 (reporting that "Oklahoma's two major public universities will not disclose parking citation records containing student names, claiming they are educational records protected from disclosure by a federal privacy law").

[24] *Id.* The article indicates OSU attorney Doug Price "said the individual records of citations given to students are educational records that must be kept confidential under FERPA." *Id.*

[25] Steven Roy Goodman, *Keeping Secrets: A Federal Law Meant to Protect Student Privacy is Often a Roadblock to Obtaining Important Information*, The John William Pope Center (June 14, 2011), available at http://www.popecenter.org/commentaries/article.html?=2536. In May 2011, the NBC Today Show ran a segment about sexual assaults involving athletes at both Wake Forest University and Indiana University. Wake Forest provided the following response to the story: "The University adheres to a federal law that prevents us from discussing the details of the case."

[26] *Id.* Indiana's response was very similar to the Wake Forest response: "Indiana University cannot release information about the specifics of the disciplinary proceeding because at least one of the students involved has not signed a FERPA waiver." *Id.*

Marquette,[27] the University of Notre Dame,[28] and the University of Colorado?[29] Say it with me: F-E-R-P-A.

Finally, and most recently, there is the tattoo scandal at Ohio State where student-athletes are alleged to have received tattoos and marijuana in exchange for signed Ohio State memorabilia, including championship rings.[30] Predictably, Ohio State claims FERPA prevents the university from giving out any detailed information, including

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[27] WISN 12 News reported "*4 Marquette Athletes Accused of Sexual Assault*,"(March 28, 2011) available at www.wisn.com/print/27345574/detail.html (last visited July 16, 2011). Marquette spokeswoman indicated the university "investigated [the allegations] fully at the time and looked at all the pieces of information and the students were found not responsible of any allegations of sexual assault." *Id.* In declining comment about the noncriminal investigation conducted by the university, the station reported "[t]he university spokeswoman said student privacy laws prevent her from commenting further." *Id.* However, three months later, the Associated Press reported that Marquette's Athletic Director resigned. *Marquette Athletic Director Cottingham Resigns*, THE ASSOCIATED PRESS, June 30, 2011. The story suggests that the manner in which the school "handled sexual assault allegations against [still unidentified] athletes" may have precipitated the resignation. *Id.* Further, the story confirms that the school "was 'not proud' of the incidents or the way they were handled," per Dr. Stephanie Quade, Marquette's Dean of Students. *Id.*

[28] *Notre Dame Releases Statement on Assault*, THE OBSERVER, Feb. 18, 2011. The Student Newspaper at the University of Notre Dame reported that "[t]he University does not release information about investigations, according to the statement [by University President Father John Jenkins], because it follows the Family Education Rights and Privacy Act (FERPA), which protects students' education records, grades and disciplinary histories." *Id.* In quoting Father Jenkins, the paper continued:

> However, beyond the limitations imposed by FERPA, it is Notre Dame's long-held belief and policy that our students deserve certain degrees of privacy as part of the educational process, and we have stood by that principle, even in the face of the criticism that might invite.

Id.

[29] *See Simpson v. Univ. of Colorado, et al.,* No. 06-1184 & 07-1182 (10th Cir. 2007)(wherein Plaintiffs alleged that "[n]ot only was the [Colorado] coaching staff informed of sexual harassment and assault by players, but it responded in ways that were more likely to encourage than eliminate such misconduct"). *See also* Rick Reilly, *What Price Glory?*, SPORTS ILLUSTRATED, Feb. 27, 1989, at 32; Kelly Whiteside, *NCAA Official Promises Revised Recruiting Rules*, USA TODAY, Mar. 12, 2004.

[30] George Dohrmann, *SI Investigation Reveals Eight-Year Pattern of Violations Under Tressel*, SPORTS ILLUSTRATED (June 6, 2011). The story reports that:

> From fall 2002 through last year, first at Dudley'z and then at Fine Line Ink, at least 28 Ohio State players are either know or alleged to have traded or sold memorabilia in violation of NCAA rules. It I a staggering number, a level of wrongdoing that would seem hard to miss for a coach and an entire athletic department – one that includes an NCAA compliance staff of at least six people. Yet the university trusted the coach, and the coach says he knew nothing before April 2010, when the Columbus lawyer tipped him off in an email.

Id.

emails from former head football coach Jim Tressel to non-university employees.[31] Surely there is some "educational record" contained in those communications, right? Sports Illustrated broke the tattoo for benefits story in June, 2011, which has literally upended Ohio State football.[32] Shortly thereafter, ESPN, one of the country's foremost sports reporting networks, sued Ohio State to gain access to the Tressel emails and other non-student communications in order to accurately report on the story.[33] Thus far, Ohio State has denied ESPN's request relying on FERPA.[34]

This article seeks to expose the inappropriate, if not improper, inversion of FERPA by universities falsely in the name of "student privacy."[35] As will be seen, universities do not hesitate to embrace student-athletes FERPA waivers when the news is good: Academic All-Americans should have their grades trumpeted to the mountaintops, or at least on ESPN.[36] Bad boys and girls, however, particularly those whose behavior initiates NCAA investigations or criminal charges, are routinely and aggressively

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[31] *See ESPN, Inc. v. The Ohio State Univ.*, Writ of Mandamus and Memorandum in Support of Complaint for Writ of Mandamus, filed in The Supreme Court of Ohio, Cause No. 11-1177 (July 11, 2011).

[32] Dohrmann, *supra* note 30. Interestingly, Sports Illustrated reports that two players involved in the 2003 academic cheating scandal, Maurice Clarett and Chris Vance, also received/traded tattoos for memorabilia. *Id.* Had Ohio State been more transparent back in 2003 when smoke was emanating throughout the football program, it is possible that the current level of alleged violations would never have occurred. The advantage of transparency is that it often encourages good behavior and, in turn, discourages misbehavior. Persons shielded from public scrutiny, in contrast, tend to take advantage of such lack of transparency.

[33] *ESPN, Inc. v. The Ohio State Univ.*, Writ of Mandamus, filed in The Supreme Court of Ohio, Cause No. 11-1177 (July 11, 2011). In fact, ESPN had sought these emails and other NCAA investigative documents regarding this scandal in April, 2011. The University provided some documents but continues to withhold others based on FERPA.

[34] *Id.*

[35] Jill Riephenhoff & Todd Jones, *Student Privacy Law Gets Scrutiny*, THE COLUMBUS DISPATCH, June 27, 2009 (reporting that "[t]oday . . . FERPA is used as an excuse to keep secret everything from student parking tickets to coaches' names – and even the names of rogue boosters who hurt athletic departments . . . .").

[36] Todd Jones & Jill Riepenhoff, *Privacy Law Overused to Hide Misbehavior*, THE COLUMBUS DISPATCH, January 17, 2010. Frank LoMonte, executive director of the Student Press Law Center, was quoted as follows: "With athletes, it's common for schools to give out detailed personal information. . . . If a student athlete is academic All-America, the school is not shy about bragging about the GPA." *Id.* But, as the reporters remind, "when it comes to providing information that isn't flattering, the schools fall silent." As Mr. LoMonte observes, "It's a little self-serving for schools to be selective about what questions they'll answer about those athletes." *Id.*

shielded by the university.[37] This article will demonstrate that the use of "student privacy" and FERPA defenses by universities are not genuinely invoked for student well-being but, rather, are interposed to prevent further bad press for the institution.[38]

Part I of this article will present a short history of FERPA, including a clear explication of the legislation's purpose and history: to keep the lid of secrecy off our schools.[39] Part II will focus on case studies at the University of Maryland, Florida State University, the University of North Carolina and the Ohio State University. This section presents recent case decisions underscoring the fact that current university practice in protecting negative student information under the purported guise of "student privacy" does not, and should not, survive legal scrutiny. Finally, Part III is a call to Congress to hear the cries of former Senator Buckley, FERPA's main architect, and amend this much perverted legislation.[40]

It may be hard to believe that information relating to tattoos and parking tickets are protected "education records" under FERPA. For those objectively evaluating FERPA, such inversion of the law is as troubling as the student misbehavior mandating resort to FERPA.[41] The main distinction between the former and the latter is that universities know better. The schools' inverted resort to FERPA is not truly to advance "student privacy," but rather a convenient defense to salvage the school's own

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[37] *Id.*

[38] Salzwedel & Ericson, *supra* note 2, at 1105. As the authors explain, "[t]he standard appears to be if the record is good, disclose it to sell the university; and if the record is bad, do not disclose it and claim the student's right to privacy. *Id.*

[39] 120 CONG. REC. 13,952 (1974).

[40] Jones & Riepenhoff, *supra* note 35 (indicating that former Senator James L. Buckley "told the Dispatch last year that FERPA wasn't intended to block all information about students – and certainly not about athletes").

[41] Jones & Riepenhoff, *supra* note 35. "That academic records should be private is not in dispute. But First Amendment advocates and [former Senator] Buckley himself say that using FERPA to hide details about game suspensions is proof that the law is flawed." *Id.*

reputation.[42] Athletics are simply too profitable to provide open records access and, sadly, FERPA is being used to protect athletic departments more than the athletes themselves.[43] This article hopes to help change this approach.

I. Buckley's Plea: Take The Lid Of Secrecy Off Our Schools

Consider the following:

Two 20-year olds illegally park their cars on the Ohio State University campus.

One is an OSU student, the other attends Columbus State.

Both get tickets from an OSU campus police officer.

You can see the Columbus State student's ticket if you want, but the OSU student's ticket is off-limits.

Confused?

A federal law prohibits universities from releasing "educational records," and parking tickets qualify at Ohio State.

Still confused? That's understandable.

The people responsible for enforcing the Family Educational Rights and Privacy Act (FERPA) at the nations largest universities don't agree on the law, what it means or how to apply it.

And, the former U.S. senator who wrote the law 35 years ago is aghast by how it has been bastardized. What it was supposed to do, James Buckley told us, was keep grade cards and transcripts private unless a student wanted to make them public.

Now, the law is used by some to block the public from seeing who got parking tickets or whether they're paid. It prevents the public from

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[42] Matthew R. Salzwedel & Jon Ericson, *supra* note 2, at 1107. "Indeed, in addition to the academic corruption in athletics, the law also has provided a way to bury other potentially embarrassing information." *Id.*

[43] Schroeder, *supra* note 8. Schroeder quotes Carolyn Carlson, chair of the FERPA subcommittee for the Society of Professional Journalists and a Kennesaw State University journalism professor as condemning the common practice of university stonewalling. Carlson believes it is "an abuse of FERPA to conceal records of an NCAA investigation into possible rules violations by student athletes. Those records clearly should be in the public domain." *Id.* Further, Carlson adds, "I don't believe it was ever the intent of Congress to hide those types of records from the public's view." *Id.* Senator Buckley, FERPA's creator, obviously confirms her instinct.

> *knowing whether sports agents or other people with questionable motives have too much access to student athletes. It prevents donors and taxpayers from knowing whether sports programs that spend billions every year are being held to the highest standards*.[44]

This riddle was one of many instances the Columbus Dispatch, a Columbus, Ohio, newspaper, used to generate public attention regarding FERPA's misuse. The Dispatch's goal: to take the lid of secrecy off Ohio State athletics. The article quoted above appeared in 2009, two years before it became clear that the Ohio State athletic department was overrun with NCAA rules violations and rule violators. In a sense, the article was a harbinger of things to come – both for Ohio State and other major Division I programs whose NCAA violations were curiously exposed by simple parking tickets.[45]

Senator James L. Buckley, a one-term Senator for New York, was the architect of FERPA.[46] His goal was simple: provide students and their parents with ready access to students' education records to ensure two things: (1) first, that the records were complete and accurate, thereby ensuring proper decisions would be made about the student's academic and vocational future; and, (2) second, that schools would not carelessly release these otherwise secret files to third parties, particularly government agencies, revealing

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[44] Benjamin J. Marrison, *Response to Request For Records Lacks Logic*, THE COLUMBUS DISPATCH, May 31, 2009.

[45] As will be explained further *infra*, parking tickets led to the uncovering of significant NCAA violations at the University of Maryland, Oklahoma State University, the University of North Carolina, and, the Ohio State University. It is, thus, no wonder that schools have aggressively tried to conceal these tickets from the press and other observers. What lies behind the tickets have often been exposed as more egregious and troubling. *See infra* notes 131 through 153 and accompanying text. And, although the NCAA has not closed the North Carolina case, the school recently fired the head football coach, Butch Davis. One day later, the Athletic Director retired. *See* Heather Dinich, *UNC Going Backwards Instead of Moving On*, ESPN.com, July 28, 2011, available at http://espn.go.com/blog/acc/print?id=26879 (reporting that North Carolina has had a tough year, including nine NCAA allegations and continued questions about academic fraud).

[46] Mary Margaret Penrose, *In the Name of Watergate: Returning FERPA to its Original Design*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 75, 82 (2011).

academic-related information that was deemed to be private.[47] In drafting FERPA, Buckley believed we would be taking the "lid off secrecy in our schools."[48] The legislation was passed during the Watergate-era when secret files and government interference into the private affairs of citizens were acute reminders of the need for protection.[49] Government, including schools, should not operate in secrecy.

FERPA's legislative history, though extremely limited, demonstrates it was born out of equal parts Watergate residue and a single Parade Magazine article.[50] Buckley wanted to make sure that while the Nixon administration focused on the privacy rights of individuals, it did not leave out the vital subset of children.[51] There is nothing in the legislative history or supporting statements that suggest schools should be third-party beneficiaries to FERPA.[52] Quite the contrary! FERPA is a direct result of school misbehavior and carelessness with private academic data regarding students.[53] Not only

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[47] *Id.* at 86. The amended "education records" definition "was intended to empower students and their parents to 'know, review, and challenge all information – with certain limited exceptions – that an institution keeps on [a student], particularly when the institution may make important decisions affecting [the student's] future, or may transmit such personal information to parties outside the institution." *Id.* citing 120 CONG. REC. 39,862 (1974).
[48] CONG. REC. 13,952 (1974).
[49] *Id.* at 82-83.
[50] *Id.* at 84-85. *See also* 120 CONG. REC. 13,953 (citing Diane Divoky, *How Secret School Records Can Hurt Your Child*, PARADE MAG., Mar. 31, 1974).
[51] 120 CONG. REC. 13,951 (1974). Senator Buckley challenged that the burgeoning privacy laws could not leave out two of the "largest classes of Americans," students and their parents. *Id.*
[52] *Cf.* Riephenhoff & Jones, *Student Privacy Law Gets Scrutiny*, *supra* note 35. Even Ohio's former Attorney General, Richard Cordray expressed concern about the malleable application of FERPA. The Columbus Dispatch quoted Mr. Cordray as "concerned that legitimate public information is shrouded in secrecy, in part because significant sections of the law are so vague that universities might decline to disclose records in order to protect themselves . . . ." *Id.* In joining with Senator Buckley, Cordray also seeks to obtain a federal overhaul of the law. *Id.* Cordray asserts that "[w]hen an individual happens to be a student but the record is about committing a crime or getting paid (by a booster), I don't think it's appropriate to shield information." *Id.*
[53] Diane Divoky, *How Secret School Records Can Hurt Your Child*, PARADE MAG., Mar. 31, 1974. Ms. Divoky warned:

> You, the parent, probably can't see most of [your child's] records, or control what goes into them, much less challenge any untrue or embarrassing information they might contain. But a lot of other people – the school officers, welfare and health department workers, Selective Service board

did schools withhold information from parents about the items contained in their child's educational files, they routinely released such information without any assurances that the information being conveyed was accurate or reliable.[54]

Buckley's ideal role for FERPA was to protect the academically-related materials contained in a student's cumulative education folder.[55] The actual language protected:

> [A]ll official records, files, and data directly related to their children, including all material that is incorporated into each student's cumulative record folder, and intended for school use or to be available to parties outside the school or school system, and specifically including, but not necessarily limited to, identifying data, academic work completed, level of achievement (grades, standardized intelligence, aptitude and psychological tests, interest inventory results, health data, family background information, teacher or counsel ratings and observations, and verified reports of serious or recurrent behavior patterns.[56]

This laundry list was later condensed to the current "education records" definition that protects information "directly related to a student" that is "maintained by" the institution.[57] Despite the clear academically related materials covered by Buckley's

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> representatives, and just about any policeman who walks into the school and flashes a badge – have carte blanche to these dossiers on your child. And to top it all off, parents are never told who's been spying on their children.

Id. at 14.

[54] Penrose, *supra* note 46, at 84 (describing Buckley's consternation for schools that were able to act, unchecked, to collect and disseminate educational information without ever informing parents such data collection was occurring or providing them the right to validate the collected data).

[55] 120 CONG. REC. 13,952 (1974).

[56] 120 CONG. REC. 13,952 (1974).

[57] 20 U.S.C. § 1232g(a)(4)(A) (2006); *see also* 34 C.F.R. § 99.3 (2009). The current definition, which has not been modified since its initial amendment in December, 1974, reads as follows:

> For purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), 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.

initial definition, schools have transmogrified the original meaning to reach the most literal possible definition to protect not only the students, but themselves.

Many schools assert that if a student's name is on a document, whatever that document or its relevance to the student, if any, such document is "directly related to" the student.[58] Fortunately, as later portions of this article reveal, courts have not been so dogmatic in their application of FERPA.[59] Likewise, many universities believe that if an email is kept somewhere on a computer server, regardless of the university's conscious awareness of such email, that document is "maintained" by the school because it is literally being kept on the school's computer server. Again, courts have not viewed universities' literal application with favor, finding, instead, that such blind applications lack allegiance to FERPA's intended meaning.[60]

FERPA was always meant to protect students.[61] And, more specifically, to protect students from the schools and universities they attend. It is rich in irony that schools continue to benefit from legislation that was intended to curtail their stranglehold

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Id. These requirements are conjunctive and to receive FERPA protection, a record, file or document must satisfy both elements – directly related to *and* maintained by.

[58] *See Bauer v. Kincaid,*759 F.Supp. 575, at 591 (W.D. Missouri 1991)(reiterating that the "function of the statute is to protect educationally related information"); *c.f., Ellis v. Cleveland Mun. Sch. Dist.*, 309 F.Supp. 1019, 1022-1023 (explaining that items only "tangentially related to students" should not be deemed "education records");); *Wallace v. Cranbrook Ed. Comm.*, 2006 WL 2796135 at *4 (E.D. Mich. 2006)(unpublished opinion)(reminding it is "clear that Congress did not intend FERPA to cover records directly related to teachers and only tangentially related to students"). *See also., ESPN, Inc. v. The Ohio State Univ.*, Writ of Mandamus, filed in The Supreme Court of Ohio, Cause No. 11-1177 (July 11, 2011). *See also Kirwan v. The Diamondback*, 721 A.2d 196 (Md. 1998); *National Collegiate Athletic Ass'n v. The Associated Press*, 18 So.3d 1201, 1205-06 (Fla. App. 1 Dist. 2009); and *The News and Observer, et al., v. Baddour*, Case No. 10 CVS 1941, Order at 2 (May 12, 2011).

[59] *See also., ESPN, Inc. v. The Ohio State Univ.*, Writ of Mandamus, filed in The Supreme Court of Ohio, Cause No. 11-1177 (July 11, 2011). *See also Kirwan v. The Diamondback*, 721 A.2d 196 (Md. 1998); *National Collegiate Athletic Ass'n v. The Associated Press*, 18 So.3d 1201, 1205-06 (Fla. App. 1 Dist. 2009); and *The News and Observer, et al., v. Baddour*, Case No. 10 CVS 1941, Order at 2 (May 12, 2011).

[60] *See e.g., See also S.A. v. Tulare Cnty. Office of Ed.,* No. CV F 08-1215, 2009 WL 3126322 (E.D. Cal. Sept. 24, 2009); *S.A. v. Tulare Cnty. Office of Ed.,* No. CV F 08-1215, 2009 WL 3296653 (E.D. Cal. Sept. 24, 2009).

[61] The student-focused nature of Buckley's law is apparent from its initial title, "Protection of the Rights and Privacy of Parents and Students." 120 CONG. REC. 13,952 (1974).

on student-related information.[62] Buckley has made his opinion clear: schools are putting their own meaning on the law, a meaning *he* never intended.[63] Ask Senator Buckley about traffic tickets and he will tell you straight away – that's not what the law sought to do. Ask him about athletes misbehaving? He will tell you that when disclosing information relating to cheating, scandals and other athletic misbehavior, there is "zero harm" to the students. Buckley does not approve of the manner in which schools are misusing FERPA.[64] "One thing I have noticed," Buckley said during [an interview], "is a pattern where the universities and colleges have used [FERPA] as an excuse for not giving out any information they didn't want to give."[65] He is disappointed. He is frustrated. He has gone so far to say that if he were still in Congress, this is one issue he "would long ago" have taken to Senate floor.[66]

Buckley's ideals about student privacy and access to education records have not been fully achieved. Strangely, schools seems disinterested in what Buckley, FERPA's architect, has to say about the law he drafted.[67] His interpretations and commentary about misinterpretation seemingly fall on deaf ears. And, once again, schools are the ones ensuring that student privacy is not achieved by inverting a law intended to protect

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[62] Goodman, *supra* note 25. "Many universities now use FERPA for what Senator James Buckley (who sponsored the original law) feared that it might become: an excuse for not giving out any information they didn't want to give." *Id.*
[63] *Id.* *See also* Schroeder, *supra* note 8 (Buckley refers to universities machinations in this area as "extreme misinterpretations of" the law").
[64] *Id.*
[65] *Id.*
[66] *Id.* Buckley explained that "[b]ased on what I believe to be extreme misinterpretations of [FERPA] by colleges and universities, if I was still in the Senate, I would long ago have introduced amendments to the bill to get rid of [this] kind of (issue)." *Id.*
[67] Goodman, *supra* note 25. "[A]s Senator Buckley feared, [FERPA is] used as an excuse for remaining quiet about a university scandal." *Id.*

students from schools, not schools from student misbehavior.[68] The problem remains the same. Just as in 1974, "[i]t is time we take the lid off secrecy in our schools."[69]

II. Case Studies of Noteworthy Programs: What Winners Do

There are many, many examples of universities and their athletes behaving badly.[70] Student athletes at many, if not most, of the American universities, both private and public, evince a sense of entitlement that often displays itself in various forms of misbehavior. Parking tickets to the tune of $8,200.[71] More parking tickets.[72] Improper loans or "employment" payments without working.[73] Allegations of athletes committing sexual assaults.[74] Academic dishonesty.[75] Trading signed jerseys, shoes and other memorabilia for tattoos and marijuana.[76] The environment in Division I athletics seemingly invites, if not encourages, misbehavior.[77] While there are far too numerous

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[68] Drescher, *supra* note 8, Dec. 4, 2010. "Returning to Buckley's original intent would bring badly needed sunshine to college athletics. Almost every week another story breaks about possible NCAA violations involving big-time football and basketball programs. The cheating is about greed and money and winning at any price." *Id.*

[69] This is the very command Buckley issued on the floor of the Senate in 1974. *See* 120 CONG. REC. 13,952 (1974).

[70] *See supra* notes 11 – 29 and accompanying text.

[71] The Raleigh News & Observer reporter that University of Maryland basketball player Duane Simpkins received over 285 parking violations. *See* Drescher, *supra* note 8.

[72] *Id.* "When news broke that UNC football players might have accepted benefits from agents, [the paper] requested any campus parking tickets given to 11 players. We wanted to see what [vehicles] they were driving." *Id.*

[73] *Id.* Duane Simpkins committed NCAA violations when he obtained an improper loan from a former AAU basketball coach to pay his 285 parking tickets resulting in fines exceeding $8,200." *Id.*

[74] Goodman, *supra* note 24.

[75] The Florida State academic cheating scandal involving an on-line music course resulted in serious NCAA penalties. Mark Schlabach, *Twenty or More FSU Players Might Be Pulled From Bowl*, ESPN.com, Dec. 18, 2007 available at http://espn.go.com/espn/print?id=3159534&type=story (last visited July 18, 2011). The University of Minnesota also endured a very public and very damaging academic scandal in 1999 involving numerous members of the Men's Basketball team. *Gopher Goof: Four Minnesota Players Declared Ineligible for Game*, Mar. 11, 1999, located at sportsillustrated.cnn.com/basketball/college/1999/ncaa_tourney/men/news/1999/03/1 (last visited on July 11, 2011).

[76] Dohrmann, *supra* note 30.

[77] Marrison, *supra* note 44.

examples to list or evaluate, the following universities have been singled out by this author for their unique roles in both inverting and perverting FERPA.[78]

A. The University of Maryland – Where Inversion Was Born

The University of Maryland can be credited with originating the FERPA defense in response to inquiries about student-athlete misbehavior. In 1996, when one of its star basketball players had amassed over 250 parking tickets exceeding $8,200 in fines, the University stonewalled a newspaper request to obtain the parking tickets of certain athletes.[79] The seminal case in this area, *Kirwan v. The Diamondback*, resolved a dispute between the University of Maryland and the campus newspaper.[80] Apparently, "[i]n February 1996 the University of Maryland, College Park campus, notified the [NCAA] that a student-athlete accepted money from a former coach to pay the student-athlete's parking tickets."[81]

The Diamondback, through an open records request, sought three categories of records:

(1) all correspondence between the University and NCAA involving the suspended student-athlete; (2) records relating to campus parking violations committed by members of the men's basketball team; and, (3) records relating to campus parking violations committed by the men's basketball head coach, Gary Williams.[82]

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[78] In fullness of disclosure, this author has attended four Division I universities during her academic career: The University of Texas-Arlington (as a member of the Women's Basketball Team and Graduate Assistant Coach); Pepperdine University (law school); the Ohio State University (as a visiting student during law school); and, the University of Notre Dame (graduate studies in law school). Additionally, the author taught at another Division I powerhouse for nine years, the University of Oklahoma. This information is provided for those who wish to draw inferences about the four programs selected for individual treatment.
[79] *Kirwan v. The Diamondback*, 721 A.2d 196 (Md. 1998). The Diamondback limited its request to parking violations committed by members of the mean's basketball team. *Id.* at 197.
[80] *Id.*
[81] *Id.*
[82] *Id.*

The University refused to provide any of the requested documents, with a specific FERPA objection invoked protecting all documents relating to the student-athletes as "education records."[83] As a result, the Diamondback sued to secure copies of the requested documents.[84]

The trial court found the University's resort to FERPA unavailing and granted The Diamondback's request for summary judgment.[85] The Maryland Supreme Court proved no more sympathetic to the University's feigned attempt to protect student privacy.[86] The Court focused on FERPA's legislative history, noting that:

> The types of information or education records that were mentioned on the floor of Congress include student IQ scores, medical records, grades, anecdotal comments about students by teachers, personality rating profiles, reports on interviews with parents, psychological reports, reports on teacher-pupil or counselor-pupil contacts and government-financed classroom questionnaires on personal life, attitudes toward home, family and friends."[87]

As the Court appreciated, "[t]he legislative history of [FERPA] indicates that the statute was not intended to preclude the release of any record simply because the record contained the name of a student."[88] But, it is the next paragraph in the Court's opinion that most clearly presents Senator Buckley's vision:

> [FERPA] was obviously intended to keep private those aspects of a student's educational life that relate to academic matters or status as a student. Nevertheless, in addition to protecting the privacy of students, Congress intended to prevent educational institutions from operating in secrecy. Prohibiting disclosure of any document containing a student's name would allow universities to operate in secret, which would be contrary to

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[83] *Id.* at 198-99.
[84] *Id.* at 199.
[85] *Id.*
[86] *Id.* at 203-206.
[87] *Id.* at 204 (citing 120 CONG. REC. 13951-13954, 14584-14585).
[88] *Id.*

> one of the policies behind [FERPA]. Universities could refuse to release information about criminal activity on campus if students were involved, claiming that this information constituted education records, thus keeping very important information from other students, their parents, public officials, and the public.[89]

This decision is not remarkably visionary. Rather, the Court simply considered the environment wherein FERPA was passed and sought to ensure that the legislation's intent was achieved, not thwarted.[90] *Kirwan* remained true to FERPA's language and intent in providing a narrow definition for "education records." As *Kirwan* suggests, education records were intended to have some academic character. The Court's holding was simple: campus parking tickets and NCAA correspondence regarding student-athlete misbehavior are not "education records."[91]

What remains remarkable about *Kirwan* is not its holding, not its analysis and not its ultimate conclusion that schools are inverting FERPA to protect themselves, not their athletes. Instead, what remains intriguing is that nearly every university to face this same, or a similar, issue has acted exactly as the University of Maryland in refusing to provide access to documents detailing student-athlete misbehavior. *Kirwan*'s legacy should be a clear condemnation of university practices stonewalling student-athlete information requests. But, universities refuse to give up so easily. Despite the fact that no school or university has ever had their federal funding withdrawn as a result of FERPA, schools continue to claim that such consequence precludes them from providing open access to information about student misbehavior.[92]

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[89] *Id.*
[90] *Id.*
[91] *Id.* at 206 ("[W]e hold that 'education records' within the meaning of the Family Educational Rights and Privacy Act do not include records of parking tickets or correspondence between the NCAA and the University regarding a student-athlete accepting a loan to pay parking tickets").
[92] *See Chicago Tribune Co. v. University of Illinois Bd. of Trustees*, Defendants Motion to Stay Judgment Pending Appeal, Cause No. 10 C 568 (N.D. Ill. 2010). Amazingly, the University of Illinois, fully aware

The FERPA chimera is intended to distract us from the bad things happening at universities. But, even while the University of Maryland is protecting itself from releasing campus parking tickets for its men's basketball players, it cannot contain itself when the news is good.

March 6, 2007, Doran, Langhorne Named Academic-All Americans.[93] On March 6, 2007, the University of Maryland's Official Athletics' Website revealed that female hoopster Shay Doran, boasts a 3.67 grade point average and has been named to the Dean's List for six-consecutive semesters.[94] Doan's teammate, Crystal Langhorne, is described as holding a 3.4 grade point average and having been on the Dean's List during the 2006 spring semester.[95]

Does the University of Maryland not believe that a student-athlete's grade point average is an "education record"? Of course it does. These are precisely the type of records FERPA meant to protect from disclosure.[96] But, the University of Maryland, like every other university athletic department *requires* students to sign FERPA waivers to permit the university to broadcast positive news or to report negative news directly to the NCAA.[97] Most, if not all, athletic departments require such waiver as a condition of

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that no school or university has ever lost its federal funding due to a FERPA violation, argued that "the 'federal education money' at risk consists of more than $400 million in student loans and more than $140 million in direct financial assistance and grants, much of which is relied upon by the University's more than 77,000 students to pay their tuition and fees." *Id.* at 3.

[93] *Doran, Langhorne Named Academic All-Americans*, Official Press Release issued by the University of Maryland and posted on their official athletics website, March 6, 2007. Available at www.umterps.com/sports/w-baskbl/spec-rel/030607aaa.html (last visited July 18, 2010).

[94] *Id.*

[95] *Id.*

[96] *See* 120 CONG. REC. 13,952 (1974)(listing "grades" as explicitly protected under the initial definition for FERPA protected materials).

[97] Salzwedel & Ericson, *supra* note 1, at 1104-1105 (explaining that the "Public Relations Purposes" FERPA waiver permits universities to selectively disclose "only the best academic records" which is clearly "in the self-interest of both the athletics program and the athlete"). *Id.* at 1105. More careful scrutiny of such selective disclosure, however, reveals how entirely unprincipled such selectivity truly is.

participating in the athletic program.[98] No matter that such mandated waivers are clear violations of FERPA and were condemned on the Senate Floor during FERPA's consideration.[99] In the end, this positive information regarding student athletes is vital to universities to enable them to paint a picture of good citizens in their athletic programs. Parking tickets? FERPA. Academic All-Americans. Press Releases. Perhaps it is understandable that Senator Buckley is distraught. We all should be.[100]

B. Florida State – Online Music Classes Led to FERPA Defense

Coach Bobby Bowden, former Florida State University Head Football Coach, is both beloved and reviled for his long tenure and great success at the helm of Florida State football.[101] His infamous departure from the program followed close on the heels of a university-wide academic cheating scandal involving 61 student-athletes.[102] The scandal involved numerous athletic programs and, ultimately, resulted in major NCAA violations, student eligibility sanctions and forfeitures of past victories in ten sports, including baseball, men's track and field, women's track and field, men's swimming, women's

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For those that are never mentioned as posting positive grade point averages, it becomes readily apparent that the reason such athletes are left out is simply because they are not good students. *Id.*

[98] *Id.* at 1101-1106.

[99] 120 CONG. REC. 39864 (Dec. 13, 1974). *See also infra* notes 167-175 and accompanying text.

[100] *Langhorne Voted Academic All-American for a Second Time*, Feb. 26, 2008. The University of Maryland was quick to once again "boast" Langhorne's 3.43 grade point average when in 2008 she was again voted to the All-American team. Available at the University of Maryland official athletics website: www.umterps.com/sports/w-baskbl/spec-rel/022608aac.htlm (last visited July 18, 2011). And, the University does not limit its academic press release solely to Women's Basketball. In June, 2010, the University's athletic website applauded Caitlyn McFadden for her 3.72 grade point average while leading the Terrapins to the national championship game in Women's Lacrosse. *See McFadden Named Academic All-American* available at www.umterps.com/sports/w-lacros/spec-rel/061010aaa.html

[101] *Bowden Will Coach Bowl Game*, ESPN.com, Dec. 1, 2009, available at http://espn.go.com/espn/print?id=4703506&type=story (last visited July 18, 2011). Former Florida State President, T.K. Wetherell reminded that "Bobby Bowden in many ways became the face of Florida State. It was his sterling personality and character that personified this university." *Id.* The article further notes that Coach Bowden was "[t]he winningest coach is Atlantic Coach Conference history." *Id.* His teams "put together one of the most dominant runs in college football history between 1987 and 2000, with 14 consecutive finishes in the nation's top five and a pair of national titles." *Id.*

[102] Mark Schlabach, *Twenty or More FSU Players Might Be Pulled From Bowl*, ESPN.com, Dec. 18, 2007, available at http://espn.go.com/espn/print?id=3159534&type=story (last visited July 18, 2011).

swimming, men's basketball, women's basketball, softball and men's golf.[103] In other words, nearly the entire Florida State athletic department was enmeshed in a cheating scandal so endemic to the school that the NCAA considered the behavior egregious rules violations[104]

The problems began when at least 39 Florida State student-athletes admitted to receiving improper assistance in on online music course.[105] The "extremely serious" violations included having a former "learning specialist" type portions of papers for some athletes and providing quiz answers for an online psychology course for others.[106] The lion's share of violations, however, surrounded an online music class where 61 student-athletes were implicated in cheating, including 25 football players.[107] According to an Associated Press release, "Florida State tracks how many athletes sign up for classes, which should have tipped officials to a dramatic increase in the music course, but that information never got passed up the chain of command."[108] Secrecy, as many know, aids benevolent ignorance. Why should we look if no one else can ever see?

Fortunately for the athletes, though, the NCAA attributed most of the blame for the scandal on the school itself which is why the majority of the athletes were only suspended for partial seasons.[109] Though, in fairness, what college-aged student does not recognize that academic cheating is unethical, morally wrong and punishable? The fact

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[103] Heather Dinich, *NCAA Penalties Extend to 10 FSU Sports*, ESPN.com, Mar. 6, 2009, available at http://espn.go/espn/print?id=3958292&type=story (last visited July 18, 2011).
[104] *Id.* "The [NCAA] committee stated this case was 'extremely serious' because of the large number of student-athletes involved and the fact that academic fraud is considered by the committee to be among the most egregious of NCAA rules violations." *Id.*
[105] *Id.*
[106] *Id.*
[107] Associated Press, *Florida State-NCAA Transcript Released*, Oct. 14, 2009. Available at ESPN.com, http://espn.go.com/espn/print?id=4559377&type=story (last visited July 18, 2011).
[108] *Id.*
[109] *Id.* Florida State "accepted most of the blame for what happened due to failures by faculty members and academic officials and tutors in the athletic department." *Id.*

that Florida State, as a university, was deemed the more flagrant participant by the NCAA was ultimately what caused the Florida Supreme Court to find that such records were not protected under FERPA because they did not meet the "education records" definition requiring documents be "directly related" to a student.[110]

How did this story finally come to light? Much like the case involving the University of Maryland, journalists brought suit to acquire documents being shared between the NCAA and Florida State.[111] In this instance, the NCAA was as reluctant as Florida State to shield the documents and ensuing investigation proclaiming rather dramatically that if information were released to the public about the investigation, it "would rip the heart of out of the NCAA."[112] Apparently, the NCAA, like many of its member institutions, prefers to operate under the cloak of secrecy to ensure that its decisions are not challenged by transparency. The Florida Court of Appeals disagreed with Florida State and the NCAA and ruled that such documents were available to journalists under Florida's open record laws.[113] Because the Florida Supreme Court refused to hear the case, the Court of Appeals remains the last word on the issue.

For documents to be protected as "education records," such documents must contain information that is "directly related" to a student, not simply tangentially related

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[110] *National Collegiate Athletic Ass'n v. The Associated Press*, 18 So.3d 1201, 1205-06 (Fla. App. 1 Dist. 2009).

[111] *Florida State Cheating Allegations Examined*, NPR, Oct. 15, 2009, transcript available at http://www.npr.org/templates/story/story.php?storyId-113840355 (last visited July 18, 2011). Reporter Andrew Carter of the Orlando Sentinel spoke with radio host Robert Siegel about the cheating allegations and attendant lawsuit. In describing the breadth of the cheating, Mr. Carter explained that "[i]t involved a total of 61 athletes spread across ten sports and the number of faculty members is three." *Id.* Mr. Carter explained that the various press organizations were bringing suit because "Florida State, of course, is a public institution here. And, we believe . . . that FSU is kind of, you know, hiding behind the curtain of the NCAA that doesn't want us to release this . . . ." *Id.*

[112] Associated Press, *Judge Rules, But Records Still Sealed*, ESPN.com, Aug. 20, 2009, available at http://espn.go.com/espn/print?id=4411868&type=story (last visited July 18, 2011).

[113] *National Collegiate Athletic Ass'n v. The Associated Press*, 18 So.3d 1201 (Fla. App. 1 Dist. 2009).

to a student.[114] Otherwise, simply placing a student's name on a document or in a file would cast a veil of secrecy over entire documents and investigations. As lawyers arguing for The Associated Press, et al., argued, "the investigation of the academic cheating scandal at FSU focused primarily on the unethical conduct of staff members of FSU's Athletic Academic Support Services department," not the students themselves.[115] This delineation has been oft raised in FERPA cases and has been regularly adopted by courts overturning schools' desires to shield information from searching eyes.[116] FERPA, most courts agree, is only intended to protect the academic records and cumulative file of students – not every single document that contains a student's name.[117]

The Florida Court of Appeals succinctly presented the controversy as follows:

> The plaintiffs [Associated Press, et al.] sought disclosure of documents in the NCAA disciplinary proceeding and appeal and, when the request was denied, they filed suit under Chapter 119, Florida Statutes against the NCAA, Florida State University, its President, and the Gray Robinson law firm. In the early stages of the case, the NCAA offered to produce the June 2, 2009 response by the Committee on Infractions. However, the NCAA declined to provide the response in its original format, and the document that was given to the plaintiffs was a version of the report that had been retyped by University personnel from the image on the custodial website. The plaintiffs did not regard the retyped version of the response as compliance with their public records request.
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> The public records case was tried before the court on August 20, 2009. Two documents were at issue in the litigation: the transcript of the October 28, 2008 hearing before the NCAA Committee on Infractions and the Committee's June 2, 2009 response to the University's appeal. The plaintiffs argued that both documents were public records. The NCAA argued that the documents were not

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[114] See *supra* note 57 (containing "education record" definition).

[115] *Plaintiff's Memorandum of Law Concerning The Family Educational Rights and Privacy Act ("FERPA")*, filed in *The Associated Press, et al., v. Florida State University Board of Trustees, et al.,* 09-CA-2298 (Aug. 14, 2009). The case was originally pending in the Circuit Court of the Second Judicial Circuit of the State of Florida in and for Leon County, 2009 WL 2762352.

[116] *See e.g., Ellis v. Cleveland Mun. Sch. Dist.*, 309 F. Supp.2d 1019 (N.D. Ohio 2004).

[117] The most decisive word on what qualifies as an "education record" was provided by Justice Kennedy in his majority opinion, *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426 (2002), wherein Justice Kennedy explained that an "education record" would ordinarily be expected to be kept in the a "filing cabinet in a records room or on a permanent secure database." *Id.* at 433. *Falvo* suggests that only those documents that are kept "in the same way the registrar maintains a student's folder in a permanent file" will be considered "education records" pursuant to FERPA. *Id.*

> public records and, alternatively, that they were exempt under federal laws protecting student records.
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> On August 28, 2009, the trial court rendered judgment for the plaintiffs. In summary, the trial court concluded that the transcript and response were public records because they were received by an agency of the state government and that they were not exempt under federal laws designed to protect students because they did not contain information directly related to a student. The court ordered the immediate disclosure of the transcript and response, but the NCAA appealed to this court, and the judgment by the trial court was stayed pending the disposition of the appeal.[118]

The Florida appellate court took what has increasingly become the standard approach when dealing with document requests that only marginally refer to students.[119] If the document is not "directly related to" the student, with the phrase "directly related to" being deemed tantamount to "exclusively" or "primarily," then the document is not an "education record" enabling universities to hide behind FERPA.[120] The legislative history clearly supports such limited application and courts continue to narrowly interpret the legislation to help reign in schools and universities that would prefer to operate in secret.

Both Florida State and the NCAA wanted to keep private (read "secret") all documents regarding the expansive cheating episodes at Florida State.[121] Findings of

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[118] *National Collegiate Athletic Ass'n v. The Associated Press*, 18 So.3d 1201, 1205-06 (Fla. App. 1 Dist. 2009).

[119] The Court itself found that "[b]y the language of this statute, a record qualifies as an education record only if it 'directly' relates to a student. *See Ellis v. Cleveland Mun. Sch. Dist.,* 309 F.Supp.2d 1019 (N.D.Ohio 2004) (documents, including student witness statements related to discipline of substitute teacher alleged to have improperly administered corporal punishment did not directly relate to students and thus were not "education records"); *see also Briggs v. Bd. of Trustees Columbus State Cmty. Coll.,* 2009 WL 2047899 (S.D.Ohio 2009) (records of student complaints against professor relate directly to professor, not students, and are not 'education records'); *Wallace v. Cranbrook Educ. Cmty.,* 2006 WL 2796135 (E.D.Mich.2006) (holding that statements provided by students in relation to investigation of school employee's misconduct did not directly relate to students and thus were not 'education records' under FERPA); *Baker v. Mitchell-Waters,* 160 Ohio App.3d 250, 826 N.E.2d 894 (2005) (records relating to allegations of abuse or neglect of students by teachers are not subject to FERPA)." *Id.* at 1210.

[120] *Id.*

[121] Todd Jones & Jill Riepenhoff, *NCAA Has Ways to Dodge Scrutiny*, THE COLUMBUS DISPATCH, June 22, 2009 (explaining that for years the NCAA has used FERPA to shield negative information about athletes,

systemic, unchecked academic fraud throughout the Florida State athletic department would cast both the university and the NCAA in a negative light. It affects competition when otherwise academically-challenged athletes are provided "help" to remain academically eligible. It suggests that the NCAA is not serious about ensuring that athletes themselves are doing the academic work for which they receive credit. It could affect recruiting. Parents and players might be less inclined to attend a university that is reputed to help students gain degrees through dishonest methods. When considering which schools to attend, would serious students look toward a program that appears immersed in academic dishonesty? It could affect donors. Who wants to support a program that is filled with fraud and deceit? Donors might find new places to invest their money. It could affect legislative disbursements. The state legislature might step back and require external checks to ensure that state government dollars are not being used for inappropriate means.

It is clear why Florida State and the NCAA would resort to the FERPA defense. How much better off are these institutions when the public is left literally in the dark and unable to make a fair assessment about these programs? Parents who want their student-athlete to attend classes and gain a degree the old-fashioned way might steer clear of Florida State were they aware that the online music class was part of their child's "academic" experience. Athletes might not appreciate that when attending Florida State they will be pulled into something less than admirable when it comes to completing coursework. The need for full disclosure ensures that student-athletes have a clear and

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coaches and boosters). The reporters believe "[t]hat [the NCAA's] closed nature tightens when scandals develop in athletic departments." *Id.* The Florida State litigation seemingly confirms their beliefs. Interestingly, it was not until the 1996 case of University of Maryland student-athlete Duane Simpkins that the NCAA began resorting to FERPA to protect miscreant behavior. *Id.*

advance understanding of the schools they attend. And, as athletic scholarships opportunities grow, the level of competition for these scarce commodities is more and more urgent. Good schools want the best athletes. FERPA, when properly interpreted, provides protection to these athletes by ensuring that schools are not permitted to operate in secrecy to hide their misdeeds.

Florida State, while once eager to shield its students' academic performance from the scrutiny of the public eye, is now as eager as the University of Maryland to trumpet its many Academic All-Americans. Baseball standout James Ramsey, who we are told made the Dean's list in the Fall of 2008, 2009 and Spring 2010) earned President's List honors during the Spring 2010 semester for posting a perfect 4.0 grade point average.[122] Blake Browne, a member of the Florida State Lacrosse team, holds a 3.3 grade point average and plans to enter law school.[123] Women's tennis standout, Katie Rybakova, has a 3.93 grade point average and has made the President's List (described above) three times and the Dean's List twice.[124] Kyle Cobb, another Academic All-American graduated, we are told by Florida State, with a 3.94 grade point average and will compete as a graduate student during the 2011-2012 golf season.[125] Finally, Florida State proudly details that the following members of its Florida State Bowling team all achieved above 3.5 grade point averages and were selected as Academic All-Americans: Corinne Kelley,

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[122] *Ramsey Earns Academic Honor*, May 7, 2010, Florida State Press Release available at www.seminoles.com/sports/m-basebl/spec-rel/050710aab.html (last visited July 18, 2011).
[123] *Seminoles' Browne Named Academic All-American*, Florida State Press Release, July 3, 2011 available at http://fsulacrosse.com/news.cfm?articleID-265 (last visited July 18, 2011).
[124] Zach Mendelson, *Senior Katie Rybakova Was Named to the Capital One Academic All-American Women's At-Large Team by CoSIDA*, Seminoles.com, June 9, 2011 available at www.cstv.com/printable/schools/fsu/sports/w-tennis/spec-rel/060911aab.html?frame (last visited July 18, 2011).
[125] *Cobb: Academic All-American*, Florida State Press Release, June 14, 2011 available at www.seminoles.com/sports/m-golf/spec-rel/061411aaa.html (last visited July 18, 2011).

Pauline Harris, Nicole Gielski, Rachel Sather, Wright Dobbs, Benjamin Hainsey, Alex Klemp, Colton Kokrda, George Seliga, Alex M. Reuille, and Cliff Hill.[126]

The irony of Florida State's positions regarding academic performance – no documents regarding alleged instances of cheating in music class but accolades and fine print for those confirmed to be outstanding academically – would be laughable were it not so predictable.[127] Good news is great for universities. And, good news is great for the good kids put on display by Florida State. Every one of these athletes has reason to be proud and are deserving of favorable press releases. But, consistency requires that if the university is willing to publish, post, distribute and display the grade point averages of its impressive student-athletes despite such grade point averages clearly and unequivocally being "education records" under FERPA, it should also be willing to share the flip side of the coin when negative information is discovered.[128] Schools like Florida State must receive signed FERPA waiver forms from its athletes to make academic information, such as grade point averages, printable in a press release.[129] Thus, claims that schools are only protecting student privacy when they ignore these same FERPA waiver forms for cheaters and other miscreants are disingenuous, at best.[130]

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[126] *Eleven Bowlers Were Named NCBCA Academic All-Americans*, Florid State Press Release available at http://union.fsu.edu/bowlteam (last visited July 18, 2011). This disclosure naturally begs the question, of course, of the remaining bowlers on the Florida State team, how far below a 3.5 are their respective grade point averages? In this perverse fashion, trumpeting the successes of a large number of students, the school actually invades the academic privacy of a larger number of student-athletes who are clearly not within this elite academic category. Yet, universities do not seem to have any reticence to protect those athletes who fall outside this category, particularly when they can boast 11 Academic All-Americans.

[127] Salzwedel & Ericson, *supra* note 2, at 1105. "The standard appears to be if the record is good, disclose it to sell the university; and if the record is bad, do not disclose it and claim the student's right to privacy." *Id.*

[128] *Id.* (discussing the hypocrisy of universities' selective disclosure).

[129] *Id.* at 1101-1107.

[130] *Id.* "Universities engage in – and in fact are the masters of – the very sort of anecdotal disclosure that is condemned when examples of academic corruption in college athletics are made public by whisteblowers and the media." *Id.*

Posting the good deeds of student-athletes while simultaneously burying the bad has only served to put student-athletes at further risk of exploitation by universities. FERPA should not be a one-sided tool for schools to carve out imprecise depictions of their campus and programs. If this tortured application continues, students will once again be victimized by schools' secret files. No wonder Senator Buckley is frustrated.

C. The University of North Carolina – More Parking Tickets

In a recurring theme, the University of North Carolina athletic department found itself the subject of NCAA allegations regarding athletes receiving improper benefits and accusations of academic dishonesty.[131] Just as familiar as the allegations, the asserted defense is far too common: FERPA prevents us, the University, from sharing the underlying facts with anyone other than the NCAA.[132] And, in an increasingly disappointing approach, the university takes great liberty with the law and fails to present the reviewing courts with appropriately analogous legal authority.[133]

News outlets sought documents regarding: (1) university investigations relating to the alleged misconduct by North Carolina football coaches and players, including investigation information relating to "any sports agent, any UNC-CH booster and/or any UNC-CH academic tutor," (2) unredacted phone numbers and phone bills for university-issued phones to the Athletic Director, the Head Football Coach, and one Assistant Coach, John Blake, (3) university-issued parking tickets given to 11 student-athletes, and, (4)

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[131] Stewart Mandel, *Despite Breathtaking NCAA Charges, UNC's Davis May Survive*, SPORTS ILLUSTRATED, June 21, 2011 (describing, tongue in cheek, the nine major violations levied against Butch Davis' football program).

[132] *Petition for Writ of Supersedes Under Rule 23 And Motion for Temporary Stay*, filed by Defendants, Richard Baddour, the North Carolina Athletic Director in *The News and Observer, et al. v. Richard A. Baddour*, North Carolina Court of Appeals (from Orange County) 10 CVS 1941, June 1, 2011, at 3 (contending that "[t]he disputed material Plaintiffs seek is protected from disclosure by the federal Family Educational Rights and Privacy Act").

[133] *Id., passim.*

information relating to academic tutors, including Jennifer Wiley.[134] The media requests were precipitated by North Carolina's notification from the NCAA[135] of numerous potential violations committed by the football program, such as improper benefits to players and academic fraud.[136] The allegations are eerily similar to those lodged against Maryland and Florida State. The response to such requests, the same. FERPA.

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[134] *The News and Observer, et al., v. Baddour*, Case No. 10 CVS 1941, Order at 2 (May 12, 2011). *See also* Fax Only Memo issued by Judge Howard E. Manning in the same case, *The News and Observer, et al., v. Baddour*, at 1-2 (April 19, 2011).

[135] A June 21, 2011, University Press Release details some of the allegations as follows: unethical conduct by former assistant coach, John Blake; unethical conduct by alumnus Jennifer Wiley including providing travel expenses, parking expenses and tutoring; academic fraud; preferential treatment received by student-athletes; and, failure to monitor. Available at http://tarheelblue.cstv.com/sports/m-footbl/spec-rel/060211aag.html (last visited July 19, 2011).

[136] On June 21, 2011, following its litigation defeat before the North Carolina Court of Appeals, the University Chancellor and Athletic Director issued the following joint statement on the Athletic Department's official website:

June 21, 2011

Dear Carolina friends:

We are writing to update you on the investigation of the Carolina football program. Today we received an NCAA notice of allegations for our football program. The allegations relate to improper benefits, inappropriate contact with agents and runners, academic misconduct, failure to monitor, and unethical conduct on the part of John Blake, Jennifer Wiley and one student-athlete. We have posted more information for you on TarHeelBlue.com.

The investigation into our football program began a year ago. We pledged then to take the investigation seriously, to go where the facts took us, and to face the issues head on. Early on, we severed our relationship with John Blake. We sat out student-athletes for our season opener against LSU. Over the season, we held 14 student-athletes out of one or more games. We also disassociated former Tar Heel football player Chris Hawkins, tutor Jennifer Wiley and jeweler A.J. Machado. We have cooperated fully with the NCAA and will continue to do so as we prepare for our Oct. 28 hearing.

We deeply regret that Carolina is in this position. As we move forward, Coach Butch Davis and the two of us are focused on emerging from this as a stronger athletics program. We know that your association with the University and with Carolina Athletics is important to you, and we know that we are the caretakers of that relationship.

Thank you for your support of Carolina.

Sincerely,

Holden Thorp
Dick Baddour

In refusing to provide the requested documents, the University of North Carolina represented in court proceedings that FERPA documents are "statutorily privileged[137] and that the disclosure of students' "education records" is "illegal," thereby suggesting that there will be horrible ramifications for complying with the journalists' open records requests.[138] In fact, it is common knowledge that the only possible sanction for violating FERPA is the withdrawal of federal funding.[139] And, such sanction only occurs when the educational institution violates FERPA by having a "policy or practice" of improperly disclosing protected "education records" to a third party without the student's consent. Isolated or individual discovery requests have not been found by any court to be an illegal act pursuant to the plain language of FERPA. And, even disclosure of "education records" is statutorily permissible pursuant to judicial decree.[140]

Further, the Department of Education, the entity responsible for both interpreting and enforcing FERPA has never ever sought to withdraw any school's federal funding.[141] Perhaps because the sanction is so draconian, it is highly unlikely that the Department of Education will ever resort to such extreme measures. Rather, the actual practice of the

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Available at http://tarheelblue.cstv.com/sports/m-footbl/spec-rel/062111aah.html (last visited July 19, 2011). A full version of the NCAA allegations is also available from the University on its official Athletics' website http://tarheelblue.cstv.com/sports/m-footbl/spec-rel/062111aag.html (last visited July 19, 2011).

[137] *Id.* at 6 (inaccurately suggesting that FERPA documents are "statutorily privileged"). Numerous courts have concluded, correctly, that FERPA does not provide any "privileged" status to "education records." Rather, universities continue to assert such protection to amplify the alleged consequences of disclosure.
[138] *Id.* at 8 (stating that "FERPA . . . [makes] unlawful the disclosure of 'education records' and 'personally identifiable information' contained in those records unless a specific exception applies"). Notably, one clear exception is by judicial decree. Hence, the University's statement that "[t]o comply with the trial court's order, the University must produce material that this Court could well determine is statutorily protected, making its release a statutory violation"). *Id.* at 7.
[139] Riepenhoff & Jones, *Oversight vs. Privacy at OSU*, THE COLUMBUS DISPATCH, May 31, 2009, at A1 (reporting that the Department of Education has ever withheld federal funding from Ohio State or any other college).
[140] *See* 34 C.F.R. § 99.31 (which permits disclosure of "education records" "to comply with a judicial order or lawfully issued subpoena").
[141] Riepenhoff & Jones, *Oversight vs. Privacy*, *supra* note 139.

Department has been to seek voluntary compliance from institutions and has, to date, been uniformly successful in doing so.

So why do schools continue to assert that a one-time disclosure of potential "education records" would result in disabling consequences and, perhaps, complete and total loss of federal funding?[142] That is a good question for educators and educational institutions in whose trust we place our children to learn their disciplines accurately and with the fullest disclosure. Full disclosure mandates that schools confess to courts, and others, that the ultimate sanction, loss of federal funding, has not ever occurred – at any school – for any violation.[143] Instead, most schools use the fear-factor, loss of federal funding and all that sanction implies, to try to persuade courts to shut the lid of secrecy tightly down for schools.[144] FERPA, after all, allegedly protects any information that is traceable back to a student provided first that such information is (1) *directly*, not tangentially, related to the student, and, (2) is *maintained* by the institution.[145]

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[142] *See e.g., See Chicago Tribune Co. v. University of Illinois Bd. of Trustees*, Defendants Motion to Stay Judgment Pending Appeal, Cause No. 10 C 568 (N.D. Ill. 2010).

[143] *But see Chicago Tribune Co. v. University of Illinois Bd. of Trustees*, Defendants Motion to Stay Judgment Pending Appeal, Cause No. 10 C 568, at 14 (N.D. Ill. 2010)(wherein counsel for the University of Illinois argues that "[t]he harm to the University [of Illinois] from losing its federal funding would be immediate and irreparable. In the University's most recently completed fiscal year, Fiscal Year 2010, the University received $448,883,775.00 in student loans and capital contributions disbursed from or through the [federal Department of Education], $71,628,791.00 of student financial assistance from the [Department of Education] , and $73,923,296.00 of grants and other federal funding from the [Department of Education]. No where in the brief, however, does the University inform the court, truthfully, that no school or university has ever had their federal funding withdrawn and that the alleged "immediate and irreparable" harm is not even remotely likely to happen. Instead, as one reads the University of Illinois brief, images of Dr. Evil from the Austin Powers movies comes to mind as he holds his pinkie finger in his mouth proclaiming vast monetary fines if his demands are not met. The fantasy nature of Dr. Evil's demands are, sadly, analogous to the University of Illinois' hyperbolic claims of loss of federal funding.

[144] *Id.* at 7 (explaining that the federal funding allegedly at risk comprises "63.2% of the University's total operating revenues"). Such grand numbers certainly sound disastrous. But, the true risk is below negligible. Rather, the numbers are cast out so as to invoke an emotional reaction to the threat of loss of federal funding which, in turn, would purportedly injury the University's 77,000 students. The tact is effective, but inaccurate if not deceptive.

[145] 20 U.S.C. § 1232g(a)(4)(A) (2006); *see also* 34 C.F.R. § 99.3 (2009).

The North Carolina Court of Appeals did not accept the University's arguments that releasing coaches' phone records and student-athlete parking tickets would lead to irreparable harm by violating student's federally protected rights to privacy and denied the University's request for a Supersedes Writ.[146] The Court's decision essentially affirmed the trial court's holding that the records at issue did not qualify as FERPA-protected "education records."[147] Thus, the University of North Carolina must release the documents sought by numerous journalists, including phone call records and phone bills for select members of the Athletic Department, including the Athletic Director and Head Football Coach; university-issued parking tickets, investigative materials relating to the allegations of misconduct in the football program; and, limited information relating to non-student employee tutors.[148] The trial judge held, consistent with *Kirwan v. The Diamondback* that just because "an ultimate sanction" for excess university parking tickets "**might** include academic or disciplinary ramifications does not convert the entire UNC-CH parking system into a disciplinary arm of the University. The parking tickets issued by UNC-CH public safety, if any, to 11 players are not education records protected by FERPA."[149]

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[146] Order dated June 15, 2011, in No. P11-478, *The News and Observer v. Baddour* (June 15, 2011). Prior to the appellate court's ruling on June 15th, the Court had ordered a temporary stay in the case. *See* Order dated June 2, 2011, in No. P11-478, *The News and Observer v. Baddour* (June 2, 2011). The appellate court also lifted the temporary stay, thereby confirming the trial court's mandate to disclose the documents. Order dated June 15, 2011, in No. P11-478, *The News and Observer v. Baddour* (June 15, 2011).

[147] *The News and Observer, et al., v. Baddour*, Case No. 10 CVS 1941, Order at 4-5 (May 12, 2011). *See also* Fax Only Memo issued by Judge Howard E. Manning in the same case, *The News and Observer, et al., v. Baddour*, at 2-3 (April 19, 2011)(finding that "the telephone number of a student that happens to appear on the phone bill of a coach or the athletic director is not part of the education records protected by FERPA," and, further, that parking tickets issued by the university public safety department did not qualify as education records).

[148] *The News and Observer, et al., v. Baddour*, Case No. 10 CVS 1941, Order at 4-5 (May 12, 2011). *See also* Fax Only Memo issued by Judge Howard E. Manning in the same case, *The News and Observer, et al., v. Baddour*, at 2-3 (April 19, 2011).

[149] *The News and Observer, et al., v. Baddour*, Case No. 10 CVS 1941, Order at 4-5 (May 12, 2011)(emphasis in original). *See also* Fax Only Memo issued by Judge Howard E. Manning in the same

The University issued a press release about the case through its General Alumni Association informing its alumni that "[t]he University has released phone records and records of parking tickets sought by media outlets as part of the investigation of the football program after the N.C. Court of Appeals ruled against UNC's desires to keep the records private."[150] Now, those seeking to ensure that state dollars are not being misused and student-athletes are not receiving special treatment will be able to assess, fully, the situation the University sought to keep secret.

As part of its efforts at secrecy, the University sent a facsimile request to the Department of Education to assess whether the University's approach of non-disclosure comports with the Department of Education's interpretation.[151] However, as the North Carolina trial court, and other trial courts have found, the Department of Education's

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case, *The News and Observer, et al., v. Baddour*, at 2-3 (April 19, 2011)(containing identical, though slightly differently worded, finding).

[150] *UNC Releases Records Sought in Football Probe*, Press Release Posted June 16, 2011, available at the UNC General Alumni Association website http://alumni.unc.edu/print.aspx?sid=8297 (last visited July 19, 2011).

[151] *See* Leslie Chambers Strohm Letter, dated Nov. 7, 2010, to Bernard Cieplak, Family Policy Compliance Office, U.S. Department of Education. (on file with the author)(indicating that "FERPA would restrict [the University's] ability to provide documents containing personally identifiable information about students"). Again, the "education records" definition requires more from a document than that it merely "contain personally identifiable information" about the student. *See* 20 U.S.C. § 1232g(a)(4)(A) (2006); *see also* 34 C.F.R. § 99.3 (2009). Wherein FERPA defines

> [T]he term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which –
>
> (iii) contain information directly related to a student; and,
> (iv) are maintained by an educational agency or institution, or by a person acting for such agency or institution.

Id. Courts has required more from schools claiming the FERPA defense than merely that the document or record contain a student's name or personal identifier. As the statutory language clearly explicates, an "education record" has conjunctive requirements that prevent a record that simply has a student's name from being swept into the FERPA realm. *Id.* The concept of "personally identifiable information" does not transform a non-education record into one. Rather, if an education record already exists and contains "personally identifiable information," that document must be shielded and protected from third parties absent a student's consent.

interpretations do not displace the courts role to "say what the law is."[152] Instead, the final word on the matter came from state court judge, Howard Manning, Jr., who clearly reminded the University, "FERPA does not provide a student with an invisible cloak so that the student can remain hidden from public view while enrolled [at a university]."[153]

However, North Carolina, like other athletic programs, has no hesitation in spreading good news about its student-athletes. The official North Carolina Tar Heel website proudly released information about Heather O'Reilly, Anna Rodenbough and Yael Averbuch that unequivocally qualifies as "education records." The Athletics' website informed everyone that these exceptional students received Academic All-American honors by carding a 3.40, 3.81 and 3.65 grade point averages, respectively.[154] These impressive members of the Women's nationally ranked soccer team merit positive attention, and the University did not shy away from releasing their respective "education records." Similarly, North Carolina promoted the 3.89 grade point average of Barden Berry, a member of the golf team, who was selected to the ESPN The Magazine Academic All-America team.[155] When the news is good, and we are all glad to see such remarkable achievements, there is no need to claim FERPA protection as the resort to an "invisible cloak" is neither necessary nor desired.

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[152] *See Marybury v. Madison*, 5 U.S. 1 (Cranch) 137 (1803). In a phrase that continues to have meaning, particularly regarding Article III judges in federal courts, "[i]t is emphatically the province and the duty of the judicial department to say what the law is." *Id.* at 177. "Those who apply the rule to particular cases, must of necessity expound and interpret that rule. *Id.* In other words, federal agencies interpretations of the law are helpful, but not decisive in federal courts of law. State courts should grant the federal agency opinion no greater right simply because the issue interpreting a federal statute is tried in state court. *C.f., Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

[153] *The News and Observer, et al., v. Baddour*, Case No. 10 CVS 1941, Order at 3-4 (May 12, 2011). *See also* Fax Only Memo issued by Judge Howard E. Manning in the same case, *The News and Observer, et al., v. Baddour*, at 2 (April 19, 2011).

[154] *O'Reilly Named ESPN The Magazine Women's Soccer Academic All-American of the Year*, Press Release (Nov. 21, 2006), available at http://tarheelblue.cstv.com/genrel/112106aab.html (last visited July 19, 2011).

[155] *Carolina's Berry Selected Third-Team Academic All-America*, Press Release (June 10, 2008), available at http://tarheelblue.cstv.com/sports/m-golf/spec-rel/061008aaa.html.

Situational FERPA dedication has been the norm for most universities. And, while this author welcomes positive press for academically minded student-athletes, schools should not be permitted to resort to the FERPA defense only when the news is bad. There should be some measure of consistency. Nothing mandates that a university ever release a student's grade point average to the public. Nothing. And, by selectively doing so, schools may unintentionally be suggesting things about other students – those not selected as Academic All-Americans due to lack of qualifying grade point averages that causes as much embarrassment as actually releasing the protected "education record."[156] Universities opportunistically utilize their student-athlete FERPA waivers to shed positive light on an athletic program while retiring into the shadows when the news

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[156] Perhaps the most shocking use of FERPA's waiver provisions to enable an athletic department to release student grade point averages occurred at Drake University. Salzwedel & Ericson, *supra* note 2 at 1104-1105. Despite having a required, and limited, FERPA waiver form signed by members of its Women's' Basketball Team, the university released the following academic information:

Player's Name	Grade Point Average
Mandy Kappel	3.85
Jayme Anderson	3.76
Kristin Santa	3.72
Allison Burchill	3.68
Martha Chaput	3.60
Molly Nelson	3.50
Erin Richards	3.48
Maureen Head	3.47
Carla Bennett	Not Disclosed – FERPA
JaNae Mosley	Not Disclosed – FERPA
Stephanie Schmitz	Not Disclosed – FERPA
Kris Horner	Not Disclosed – FERPA

Id. at 1105. How embarrassing for those individuals who grade point averages are withheld pursuant to FERPA? The withholding of such data suggests that these students perform poorly in the classroom. Precisely how poorly is left up to the imagination. As the authors explain:

> The conclusion becomes obvious: because disclosing only the best academic records is in the self-interest of both the athletics program and the athlete, the policy *appears* to be a decision based on principle. But it is not. As the pattern makes clear, there is no comprehensive commitment to privacy. Drake University's selective disclosure reveals that Bennett, Mosley, Schmitz, and Horner must have earned less than a 3.47 grade point average.

Id. (emphasis in original).

is unpleasant.[157] Fortunately, courts have been consistent in their application which, ultimately, one can only hope, will eventually result in schools being forced to act consistently as well.

D. The Ohio State University – The True National Champions

The Ohio State Buckeyes can proudly proclaim national championships in numerous sports including football, basketball, golf, gymnastics and even synchronized swimming. But, in addition to these accolades, this author would proclaim Ohio State the national champions at playing the FERPA "education records" game.[158] More than any other institution, it appears, Ohio State is quick to proclaim that any document relating to a student in any capacity, regardless of author or information contained therein, is a federally-protected "education record."[159] This was true during the Maurice Clarett academic scandal,[160] the Troy Smith episode[161] and the most recent "tattoo-gate."[162] Ohio State, it appears, has perfected the FERPA defense.

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[157] *Id.* (with the authors using the term hypocrisy rather than opportunistically).

[158] Jill Riepenhoff & Todd Jones, *Oversight vs. Privacy at OSU*, THE COLUMBUS DISPATCH, May 31, 2009, at A1. "Since 2000, Ohio State has reported to the NCAA more than 375 violations – the most of any of the 69 Football Bowl Subdivision schools that provided documents to *The Dispatch* through public-records request." *Id.* While the number of violations may seem problematic, this author agrees with Riepenhoff and Jones that the greater violation may be secrecy and cover-up. The two reported that:

> The public likely will never know the specifics [of these numerous NCAA violations], because records of all the violations were heavily edited by Ohio State in the name of student privacy. Ohio State says [FERPA] ties its hands. If OSU releases what it thinks is private information, the U.S. Department of Education could withhold federal funding." *Id.*

Of course, as this article and the Riepenhoff & Jones article remind, such loss of federal funding has never happened. *Id.*

[159] *See e.g., Transcript From December 17, 2003 Press Conference*, available at http://www.ohiostatebuckeyes.com/genrel/121703.aac.html (last visited July 18, 2011)(wherein the school representative, Dr. Platz, continually deflected questions from reporters based on FERPA).

[160] *See supra* notes 11 through 16 and accompanying text.

[161] Jill Riepenhoff & Todd Jones, *Secrecy 101*, THE COLUMBUS DISPATCH, May 31, 2009, at A1. (reporting that "[f]ormer Ohio State athletic director Andy Geiger tried the paternalistic approach when he learned five years ago that former quarterback Troy Smith had accepted $500 from a booster. 'People don't need to know everything,' Geiger told *The Dispatch* in 2004 when questioned about the allegation. For days,

The initial tattoo-gate story appeared in Sports Illustrated in June, 2011.[163] However, months before the Sports Illustrated story broke, ESPN sought information about this same scandal and the university's investigation and response.[164] ESPN, emailed an open records request on April 20, 2011, seeking emails related to the NCAA's investigation of Ohio State football; internal investigation documents, letters and emails regarding the NCAA investigation; phone bills detailing calls and texts from former Coach Tressel's cellular and office phones; former Coach Tressel emails including the terms "Rife, Cicero, Pryor, Terrelle, DeVier, Posey and/or tattoos;" email correspondence between athletic department and university personnel; and "all emails, letters and memos to and from Jim Tressel, Gordan Gee, Doug Archie and/or Gene Smith with key word Sarniak."[165] Jim Lynch, of Ohio State, responded to the request refusing to release many of these documents based on FERPA.[166]

At issue in the ESPN lawsuit, and the focal point of the Sports Illustrated story, are allegations regarding improper benefits received by several Ohio State football players, namely, tattoos and marijuana in exchange for autographed Ohio State memorabilia.[167] The scandal has been ingloriously dubbed "tattoo-gate" by many observers and sportscasters. Sports Illustrated reports that "the memorabilia-for-tattoos violations actually stretched back to 2002, Tressel's second season at Ohio State, and

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Geiger and football coach Jim Tressel would not explain the broken rule that led to Smith's suspension from the Alamo Bowl that year." *Id.*

[162] *See ESPN, Inc. v. The Ohio State Univ.*, Writ of Mandamus, filed in The Supreme Court of Ohio, Cause No. 11-1177 (July 11, 2011).

[163] Dohrmann, *supra* note 30.

[164] *See ESPN, Inc. v. The Ohio State Univ.*, Writ of Mandamus, filed in The Supreme Court of Ohio, Cause No. 11-1177 (July 11, 2011).

[165] *Id.* at Exhibit A (Justine Gubar Affidavit).

[166] *Id.* at Exhibit B.

[167] Dohrmann, *supra* note 30.

involved at least 28 players."[168] The story also reports that former Buckeye, Maurice Clarett alleged that Tressel had arranged cars for him to drive while at Ohio State and "that coaches connected him with boosters that gave him thousands of dollars."[169]

The Sports Illustrated story is disturbing on many levels. The story reports numerous episodes of student athletes receiving "improper benefits" while under Tressel's watch, including a claim by one tattoo artist that he tattooed at least 10 Ohio State football players, including Chris Vance (previously implicated in the Maurice Clarett academic scandal), in return for signed memorabilia.[170] The story also details the sordid history of former Coach Tressel's blind ignorance regarding players receiving improper benefits – both at Youngstown State[171] and Ohio State.[172] In the end, the NCAA found that several Ohio State athletes would have to sit out the first five games of the upcoming 2011-2012 football season and repay their improperly received benefits back to charity.[173] In an unusual move, particularly since the NCAA often claims FERPA protections in relation to student-athlete investigations such as the academic

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[168] *Id.*
[169] *Id.*
[170] *Id.* Two sources confirmed they saw former Buckeye Chris Vance receiving the tattoos.
[171] *Id.* (revealing that Tressel "claimed not to know that his star quarterback [at Youngstown State] had received a car and more than $10,000 from a school trustee and his associates – even though it was later established in court documents that Tressel had told the player to go see the trustee).
[172] *Id.* The Sports Illustrated story reports:

> In 2003, during Tressel's third season in Columbus, Buckeyes running back Maurice Clarett was found to have received money and other benefits. Even though Tressel said he spent more time with Clarett than with any other player, he also said he did not know that Clarett had been violating the rules. A year later an internal Ohio State investigation (later corroborated by the NCAA) found that quarterback Troy Smith had taken $500 from a booster. It was the second time the booster had been investigation for allegedly providing improper benefits to a star player, but again Tressel said he had not knowledge of the illicit payment.

Id.
[173] *NCAA Requires Loss of Contests for Six Ohio State Football Student Athletes*, NCAA Press Release (Dec. 23, 2010).

fraud case at Florida State, the NCAA recently identified the individual players and the specifically listed the improper benefits they received.[174] So much for student privacy!

Much like ESPN, whose Writ of Mandamus remains pending, this author believes that Ohio State's FERPA objections are no more sustainable than those previously found defective in the Maryland, Florida State and North Carolina cases. ESPN's lawyer, John Griener, argues that Ohio State's "sole excuse for not complying with part of the [open records] Request is its aggressive (and misguided) interpretation of [FERPA]."[175] ESPN describes the records sought as "emails involving a Pennsylvania businessman without official affiliation to either Ohio State or any student."[176] Further, "[t]hey are not records that directly involve any Ohio State student, much less grades, academic data, financial aid or scholastic performance."[177] ESPN is simply seeking documents that may reveal the true nature and full depth of corruption at Ohio State.

ESPN's lawsuit is very similar to the Florida State case where the focus of misbehavior is not student conduct but, rather, the misleading behavior of university personnel.[178] ESPN's core records request seeks emails directly from former Coach Tressel regarding his role and the university's response to "tattoo-gate."[179] The documents do not seek "education records" about any football players or other students.

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[174] *Id.* The Press Release indicates that Mike Adams must repay $1,000 for selling his 2008 Big Ten Championship ring; Daniel Herron must repay $1,150 for selling his football jersey, pants and shoes and for receiving discounted [tattoo] services; Devier Posey must repay $1,250 for selling his 2008 Big Ten Championship ring and receiving discounted [tattoo] services; Terrelle Pryor must repay $2,500 for selling his 2008 Big Ten Championship ring, his 2009 Fiesta Bowl sportsmanship award and his 2008 Ohio State Gold Pants, a gift from the University; and, Solomon Thomas must repay $1,500 for selling his Big Ten Championship ring, his 2008 Gold Pants and receiving discounted [tattoo] services. *Id.*

[175] *ESPN, Inc. v. The Ohio State Univ.*, Memorandum in Support of Complaint for Writ of Mandamus, at 5, filed in The Supreme Court of Ohio, Cause No. 11-1177 (July 11, 2011).

[176] *Id.*

[177] *Id.*

[178] *Compare National Collegiate Athletic Ass'n v. The Associated Press*, 18 So.3d 1201, 1205-06 (Fla. App. 1 Dist. 2009).

[179] *ESPN, Inc. v. The Ohio State Univ.*, Memorandum in Support of Complaint for Writ of Mandamus, filed in The Supreme Court of Ohio, Cause No. 11-1177 (July 11, 2011)(and accompanying affidavits).

Instead, this suit requests access to documents revealing the profundity of deception and cover-up by university officials, including former Coach Tressel.[180] The fact that some of these documents may contain student names or reveal student misconduct is clearly secondary to the chief information being sought.[181] ESPN's key goal is to uncover the breadth of tattoo-gate. Ohio State's goal is to keep the lid of secrecy on this still-emergent scandal.[182]

Courts have consistently found that athlete's misconduct, such as accruing massive parking tickets, are not FERPA protected education records.[183] Likewise, courts have regularly held that information directly related to NCAA infractions attributable to the institution do not qualify as "education records."[184] *ESPN, Inc. v. The Ohio State Univ.* will be an interesting decision, ultimately yielding an important ruling. Will the Ohio Supreme Court follow the leads of Maryland, Florida and North Carolina in taking the lid of secrecy off athletic departments that try to hide their misdeeds behind FERPA? Or, will the Ohio Supreme Court provide those institutions welcoming a rare victory for secrecy with an abrupt deviation from recent precedent? Only time will tell if Ohio State

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[180] *Id.* at 12-13.
[181] *Id.*
[182] *Id.* at 21. Closing its brief with the following plea:

> The events surrounding the Ohio State football program in this past year should sadden not only football fans, but anyone concerned with collegiate sports, academic integrity and accountability. But that sadness does not mean that the events should be secret. This court should join with courts from around the country in sending an unmistakable message to collegiate athletic departments – do not attempt to cover up your misdeeds behind FERPA and honor your obligations under [open records requests]. And It should do so by granting ESPN's petition for a Writ of Mandamus.

Id.
[183] *See Kirwan v. The Diamondback*, 721 A.2d 196 (Md. 1998); *The News and Observer, et al., v. Baddour*, Case No. 10 CVS 1941, Order at 2 (May 12, 2011).
[184] *See The News and Observer, et al., v. Baddour*, Case No. 10 CVS 1941, Order at 2 (May 12, 2011); *National Collegiate Athletic Ass'n v. The Associated Press*, 18 So.3d 1201, 1205-06 (Fla. App. 1 Dist. 2009).

is given license to shield its football program and former coach from outside scrutiny. Regardless of the court's ruling in the case, such defensive use of FERPA in the name of student privacy most assuredly runs afoul of FERPA's intended design.[185] One can only hope that like Maryland, Florida, and North Carolina before it, the Ohio Supreme Court will not permit universities to hide their misbehavior behind a law intended to benefit students, not schools.

Only the most strained interpretation of FERPA would find that emails discussing the trading of sports memorabilia for tattoos and marijuana qualify as "education records." It is hard to appreciate how emails sent to a Pennsylvania businessman by a former football coach could be considered at all educationally-related.[186] If so, one can only surmise that Ohio State has taken all of these same emails and deposited them in the cumulative files of the students mentioned. And, since the Pennsylvania businessman would not qualify as a person entitled to have access to any Ohio State student's "education records," ironically, Ohio State is confessing to FERPA violations committed by this same former coach in releasing the students' "education records."[187]

If this explanation is hard to follow, that is by design. Not the author's design but, rather, by the many universities that invoke the FERPA defense. Essentially, all documents that a university seeks to withhold from public scrutiny will be categorized as

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[185] *See generally*, Penrose, *supra* note 46.
[186] *But see President & Trs. Of Bates Coll. v. Congregation Beth Abraham*, No. CV-01-21, 2001 Me. Super LEXIS 22.
[187] 34 C.F.R. § 99.3 (defining "disclosure" as "to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written or electronic means . . . ."). *See also* 34 C.F.R. § 99.30(a) (indicating that a parent or eligible student must "provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records").

FERPA protected "education records."[188] It does not appear to matter that in situations like that at issue in the ESPN litigation, the actual FERPA defense reveals another FERPA violation (sending emails that qualify as "education records" to someone not affiliated with the university) in the form of improper disclosure.[189]

The truth is that schools do not want us to know the truth. The lid of secrecy that Senator Buckley wanted removed has been firmly replaced, perversely all in the name of student-privacy.[190] Schools, like Ohio State, seemingly care less about their athletes than they do their own legacies.[191] Ohio State has quickly disassociated itself from Terrelle Pryor.[192] The University has ruled him ineligible for the 2011-2012 academic year and suspended him for five years from associating, in any manner, with the athletic department or its athletes.[193] During this same time period, the University reassociated itself with former Coach Tressel, allowing him to retire rather than resign. Ohio State's

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[188] *See e.g., Bauer v. Kincaid,*759 F.Supp. 575 (W.D. Missouri 1991); *Laramie Cty. Comm. Coll. v. The Cheyenne Newspapers Inc.*, Docket No. 176-092, at 2 (D. Wyo. 2010).

[189] *See id.* However, one can only surmise that in such instance as Tressel's alleged release of "education records" to someone outside the university with no legitimate interest in the athlete's "education records" that the University would rely on its advance FERPA waivers.

[190] *Bauer v. Kincaid,*759 F.Supp. 575, 591 (W.D. Missouri 1991)(reminding that the "function of [FERPA] is to protect educationally related information").

[191] *See e.g.,* Pat Brennan, *Disassociation Could Mean Eligibility for Terrelle Pryor*, THE LANTERN, July 26, 2011. Ohio State spokesman, Jim Lynch, confirmed that the University had sent Terrelle Pryor a letter – despite the fact that such letter falls well within the realm of documents that Ohio State has, in the recent past, classified as "education records." *See also* July 26, 2011, letter from Ohio State Athletic Director Eugene Smith to Terrelle Pryor (copy on file with author)(informing Pryor that "the University must also disassociate you from its athletic program for a period of five (5) years. 'Disassociation' means that you are to be completely disassociated from any involvement in the University's athletic program." *Id.* In contrast to Ohio State's disassociation with Pryor, the University permitted former Coach Tressel to change his resignation status to retirement. *See* Martha Neil, *Ex OSU Football Coach Jim Tressel Won't Be Fined $250,000, Will Be Allowed to Retire*, ABA JOURNAL.com (July 8, 2011), available at http://www.abajournal.com/news/article/ex_osu_football_coach_jim_tressel_wont_be_fined (last visited July 18, 2011)(indicating that the University's shift from termination to retirement for Tressel will prevent imposition of the previously scheduled $250,000 fine and allow Tressel to receive another $52,000 from the University). *Id. See also* Encarnacion Pyle, *Ohio State Waives Fine, Instead Will Pay Tressel $52,250*, THE COLUMBUS DISPATCH, July 8, 2011 (reporting that the University allowed Tressel "to retire instead of resign so he could be a Buckeye for the rest of his life").

[192] Brennan, *supra* note 187.

[193] *Id. See also* July 26, 2011, letter from Ohio State Athletic Director Eugene Smith to Terrelle Pryor (copy on file with author).

change in position will: (1) forgive the $250,000 fine it formerly imposed against the coach; (2) pay him an additional $52,250; (3) allow him to collect up to 250 hours worth of unpaid sick time and vacation leave; (4) continue to provide insurance coverage for the coach and his family; and, (5) allow Tressel, under his contract, to obtain a tenured faculty position at Ohio State.[194] Apparently it pays to be the coach.

As Ohio State chants "FERPA" and student privacy before the Ohio Supreme Court, it did not hesitate to release its internal rulings about Mr. Pryor's eligibility and suspension to ESPN and other news outlets, even confirming through a spokesman that it sent Pryor such letter.[195] Yet, ESPN cannot learn about Coach Tressel's emails sent to someone outside the university regarding Pryor and other athletes? The two-sided coin always seems to benefit the university – particularly when the news casts the school, or its employees, in a negative light. Perhaps that is because the hollow claim of "student privacy" truly seeks to protect the coach, not the player.

And, while Ohio State's dedication to student privacy is heralded before the Ohio Supreme Court, the school allows its former coach to continue to benefit financially from his time at Ohio State while "disassociating" itself from the young man it placed under Tressel's care.[196] It is hard to believe, under such circumstances, that Ohio State truly cares about its student athletes when it rewards the misbehavior of its coach[197] while

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[194] Pyle, *supra* note 187 (confirming that Ohio State told the NCAA that Tressel's behavior in the current scandal was "out of character for him" and "contrary to his proven history of promoting an atmosphere of NCAA compliance within the football program").
[195] Brennan, *supra* note 187.
[196] *See id. See also*, Pyle, *supra* note 187.
[197] Pyle, *supra* note 187 (reporting that in a news release Tressel shared his gratitude "for this opportunity to retire from the university that I so deeply respect and that I will continue to support"). *Id.*

simultaneously "disassociating" itself from the coach's athlete.[198] Adherents to student privacy? Doubtful. Adherents to student welfare? We may never know as the University claims FERPA prevents us from scrutinizing its, and its employees, behavior.

III. Call to Congress: Clarity, Reciprocity, Waivers and Fines

Former Senator Buckley has been both resolute and consistent in his condemnation of Universities' misuse of FERPA.[199] An increasingly interesting cast of characters continues to join the Senator in calling for FERPA reform.[200] If schools, and their athletic departments, cannot be appropriately deterred by Buckley's own comments and cases that confirm Buckley's recollection of his law's intended purpose, perhaps it is time for Congress to step in.[201] Congress has the power, ultimately, to return FERPA to a student-focused privacy law. Once Congress senses the urgency of the situation, this author suggests that Congress implement the following four changes.

A. Step One: Revamping the Current Definition

From the University of Notre Dame's Athletic Director's admission that he does not "know the law very well"[202] to Purdue University's inaccurate assessment that if it failed

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[198] *See* July 26, 2011, letter from Ohio State Athletic Director Eugene Smith to Terrelle Pryor (copy on file with author)(ending the letter by indicating that Pryor can continue to enroll in classes because "[a]s you know, [Ohio State] would encourage you to complete your degree").

[199] Penrose, *supra* note 46, at 96-97.

[200] *Id.* at 97 (noting that Paul Gammill, who briefly headed the federal agency responsible for interpreting FERPA, the Family Policy Compliance Office, remarked "[i]t sounds like some institutions are using this act to hide things"). Two other noteworthy individuals calling for FERPA amendment include the current and former Ohio Attorney Generals. *See* Riepenhoff and Jones, *Student Privacy Law Gets Scrutiny*, THE COLUMBUS DISPATCH, June 27, 2009 (quoting former-Attorney General Richard Cordray as "concerned that legitimate public information is shrouded in secrecy, in part because significant sections of the law are so vague that universities might decline to disclose records in order to protect themselves . . . ."). *See also* Riepenhoff, *DeWine Urging More Latitude in Privacy Law*, THE COLUMBUS DISPATCH, July 9, 2011.

[201] *See SPLC Hails Progress Toward Reforming FERPA Excesses*, June 10, 2009, available at www.educationnews.org/articles/splc-hails-progress-toward-reforming-ferpa-excesses (last visited July 18, 2011).

[202] Michael Rothstein, *Indiana Schools Stress Caution in Student Privacy*, THE JOURNAL GAZETTE, June 14, 2009. The Athletic Director, Jack Swarbrick, an attorney, was quoted as follows:

> I don't know the law very well, but there seems to be a lot of uncertainty

to redact student-athlete names from an NCAA investigation of a former Women's Assistant Basketball Coach for improper phone calls and academic fraud it could be subject to lawsuits under FERPA,[203] the academic and athletic worlds are steeped in FERPA confusion. The kneejerk reaction from schools seeking to prevent disclosure of unpleasant information is to deny access to any document making reference, however slight or removed, to a student.[204] All, purportedly, in the righteous name of FERPA. As one Indiana paper reported, "[w]hen it comes to [FERPA] Notre Dame runs into the same problem as the rest of college athletics: Inconsistency."[205]

The first and most important change that must be made to FERPA is to redefine exactly what qualifies as an "education record."[206] This phrase is the most pliable, and unfortunately manipulated, portion of FERPA. Congress must act to rein in schools that have inverted the law to protect schools, not students, from embarrassing disclosures. As Buckley explains, "the law needs to be revamped."[207]

First, FERPA must be amended to clearly mandate the creation of a true "education record" that contains all of a student's academically-related materials.[208] This

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> and inconsistency in the way all schools, including us, sort of deal with that. I think it's all well intended. What you're trying to do is not only make sure you're in compliance but make sure you're consistent with the spirit of that thing, which is to protect student-athlete issues.

Id.

[203] *Id.* Purdue Athletic Director, Morgan Burke, an attorney, indicated that the University "had to redact [student athlete names on an NCAA document] because we don't want a lawsuit coming back from there for violating their rights." *Id.* This comment, from an attorney, suggests that there is a private cause of action for FERPA violations which there is not. *See Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

[204] *Id.*

[205] *Id.*

[206] *Id.* As Rothstein explains, one of the major issues with FERPA is "interpreting exactly what is and what is not considered an academic record." *Id.*

[207] *Id.*

[208] *Bauer v. Kincaid,*759 F.Supp. 575, at 591 (W.D. Missouri 1991)(reiterating that the "function of the statute is to protect educationally related information"); *c.f., Ellis v. Cleveland Mun. Sch. Dist.*, 309 F.Supp. 1019, 1022-1023 (explaining that items only "tangentially related to students" should not be deemed "education records").

is the vision that the Supreme Court had for FERPA when Justice Kennedy spoke of "records kept in a filing cabinet in a records room at the school or on a permanent secure database."[209] Likewise, it was the vision of Senator Buckley who indicated that athletic-related documents are not the types of records protected under FERPA because releasing such information causes "zero harm to the kids."[210] And the former Ohio Attorney General observed, "[w]hen an individual happens to be a student but the record is about committing a crime or getting paid (by a booster), I don't think its appropriate to shield information [under FERPA]."[211]

A careful reading of FERPA's legislative history reveals that the law *intended* to protect academically related materials, not simply all documents that contain a student's name.[212] Such lack of discretion by those interpreting FERPA has transmogrified the law into something that the original drafters might not recognize.[213] Senator Buckley has been quite clear, were he in the Senate today, he would bring FERPA legislation to the floor.[214] Chief among the current shortcomings is the varied, and varying definitions afforded the nebulous term "education records."

Perhaps an amended definition is as simple as returning to FERPA's original demarcation of items qualifying as "education records."[215] The initial focus was squarely on academically-related materials, including grades, standardized testing information,

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[209] *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426, 433 (2002).
[210] Jill Riepenhoff & Todd Jones, *Secrecy 101: College Athletic Departments Use Vague Law to Keep Public Records from Being Seen*, THE COLUMBUS DISPATCH, May 31, 2009, at 1A. Senator Buckley remarked that the shielding of such information from public view under FERPA was a "ridiculous extension" of the law." *Id.*
[211] Riepenhoff & Jones, supra note 35.
[212] *Id.*
[213] Riepenhoff & Jones, *supra* note 139 (discussing Professor David Ridpath's FERPA criticism).
[214] Jill Riepenhoff and Todd Jones, *Secrecy 101: College Athletics Departments Use Vague law to Keep Public Records from Being Seen*, THE COLUMBUS DISPATCH, May 31, 2009, at 1A.
[215] *See supra* notes 55 through 57 and accompanying text.

intelligence measures, teacher and counsel ratings and written observations, and verified reports of serious or recurrent misbehavior.[216] The original definition spoke of a student's "cumulative file," not merely documents kept in various locations that might refer, tangentially, to the student.[217] Some consideration must be given to advanced record keeping methods, including electronically stored data. But the information's storage method should not transform an otherwise floating piece of information about a student – one not placed in the modern equivalent of the student's "cumulative file" – into FERPA protected materials.[218] Any arrived upon definition must be flexible without being manipulable. A return to the menu-type listing might give much need direction to educators and athletic directors who claim, or feign, uncertainty.

Congress must act to reel in schools before courts end up delineating the parameters of FERPA. The role of Congress is to make the law. And, this law, as Buckley admonishes, desperately needs to be re-made.[219] Athletic statistics and instances of extra-curricular misbehavior should not be enveloped in any revised definition. The only possible exception might be where a student is academically-punished, such as a suspension, expulsion or placement on academic probation.[220] But, as the cases at

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[216] 120 CONG. REC. 13,952 (1974).

[217] *Id.* Wherein the initial definition only included records, files and data "incorporated into each student's cumulative record folder. . . ." *Id. See also Ellis v. Cleveland Mun. Sch. Dist.*, 309 F.Supp.2d 1019, (N.D. Ohio 2004)("teacher discipline information is clearly outside the purview of FERAP as it relates to teachers and not students); *Wallace v. Cranbrook Ed. Comm.*, 2006 WL 2796135 at *4 (E.D. Mich. 2006)(unpublished opinion)(reminding it is "clear that Congress did not intend FERPA to cover records directly related to teachers and only tangentially related to students").

[218] *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426, 433 (2002). *See also S.A. v. Tulare Cnty. Office of Ed.,* No. CV F 08-1215, 2009 WL 3126322 (E.D. Cal. Sept. 24, 2009); *S.A. v. Tulare Cnty. Office of Ed.,* No. CV F 08-1215, 2009 WL 3296653 (E.D. Cal. Sept. 24, 2009).

[219219] Jones & Riepenhoff, *NCAA Has Ways to Dodge Scrutiny*, THE COLUMBUS DISPATCH, June 22, 2009 ("reporting Buckley . . . said the law is being used in ways he never intended").

[220] While some misbehavior occurring on university campuses will result in academic sanctions, such as probation, suspension or expulsion, it is just as common that such sanctions result from academic shortcomings. FERPA permits disclosure of the results of disciplinary hearings for university students provided that the offense is either "a crime of violence or non-forcible sex offense" and "the student has

Maryland and North Carolina demonstrate, the number of parking tickets one receives does not ordinarily result in an academic penalty.[221] Accordingly, this author would urge Congress to redraft FERPA's "education records" definition to limit the definition to academically-related materials. In so doing, we can return to a law that protects students and prevents schools from claiming its protection for themselves.

B. Step Two: Requiring Full Reciprocity

FERPA was primarily enacted to "take the lid of secrecy off schools" and protect students from schools retaining secret files regarding students. The right given to students to protection from such secrecy is to provide access to their "education records."[222] When a student, or parent, exercises their right of access, schools are required to provide students with a full copy of their "education records" and a list of all persons that have had access to such records.[223]

Despite the clarity of these requirements, does anyone believe that the University of Maryland – in a FERPA request from Duane Simpkins – would give him anything beyond his academically related file? Does anyone really believe that Florida State gave

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committed a violation of the institution's rules or policies." 34 C.F.R. § 99.31 (a)(14)(i). Further, the most recent amendments to FERPA permit disclosure – at least to parents – of information relating to their child's drug or alcohol related misconduct at college. *See* 34 C.F.R. § 99.31 (a)(15)(i) which permits disclosure "to a parent of a student at an institution of postsecondary education regarding the student's violation of any Federal, State, or local law, or any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance . . . if the student is under the age of 21 at the time of the disclosure to the parent." *Id.*

[221] *See Kirwan v. The Diamondback*, 721 A.2d 196 (Md. 1998); *The News and Observer, et al., v. Baddour*, Case No. 10 CVS 1941, Order at 2 (May 12, 2011).

[222] 34 C.F.R. § 99.10. FERPA requires that a university "shall comply with a request for access to records within a reasonable period of time, but not more than 45 days after it has received the request." *Id.*

[223] Under the 1974 Amendments to FERPA, universities are required to keep a record of access with the "education records" that inform the student of all persons or entities that have requested and/or obtained the student's "education records." *Legislative History of Major FERPA Provisions*, United States Department of Education, at 6, available at http://www2.ed.gov/print/policy/gen/guid/fpco/ferpa/leg-history.html (last visited July 18, 2011). Further, the Department of Education explains that this notice of access must indicate "specifically the legitimate interest that each [person or entity] has in obtaining the information." *Id.* "The record of access is available only to parents and school officials responsible for custody of records . . . ." *Id.*

the 61 students accused of cheating in the online music course unfettered access to the NCAA records that it shielded from the press, since Florida State contended these were "education records"? Or, that North Carolina put the numerous parking tickets and all NCAA investigation documents in the players' "education records"? Or, that when Terrell Pryor seeks his "education records" from Ohio State that there will be both all the emails that mention his name withheld from ESPN in the pending litigation *and* a list of all persons that have also had access to those emails? It is time to reel in these recalcitrant educations and impose an unequivocal statutory right of reciprocity on all schools and universities, particularly those utilizing the FERPA defense.

A fair reading of FERPA already requires schools to provide students with copies of *all* documents maintained by the university in their "education records." However, this author doubts that such student-focused protection is being properly afforded by the schools and athletic departments with secrets to hide. Rather, as Senator Buckley intuits, schools are inverting FERPA to their benefit while righteously proclaiming themselves as defenders of student privacy.[224] Ohio State's assertion that it cannot provide ESPN with former Coach Tressel's emails to an outside booster, despite the individuals complete lack of any formal connection to the school or any right of access to the athletes "education records," suggests that the school has corralled these emails and placed them in the respective cumulative files of all the athletes mentioned. This seems rather untenable. Rather, this is just another example of an athletic department resorting to the FERPA defense without any real thoughts of reciprocity.

[224] Jones & Riepenhoff, *supra* note 36 (wherein The Columbus Dispatch reported that Senator Buckley "told the Dispatch last year that FERPA wasn't intended to block all information about students – and certainly not information about athletes").

While schools regularly resort to the FERPA to avoid disclosing unseemly behavior, by coaches and athletes, in truth universities would be hard pressed to monitor all the cell phones and email accounts of its athletic staff. The only time that problematic emails transform into "education records" appears to be when the university realizes it has something to hide. But, does that awareness also result, as it must under FERPA, in the placement of all such protected documents in the student's "education records" to which they have a statutory right of access? Doubtful. The defensive use of FERPA has a flip-side that Congress must proactively protect. Every document that a university classifies as an "education record" in response to an open records request must be deposited in the student's actual file that he or she has access to. This right of reciprocity already exists but is not likely being protected with the same measure of zeal as is afforded the athletic department. When a student-athlete seeks their "education records," they must be provided copies of all documents – literally, all documents – that a university categorizes as an "education record." Thus, if Coach Tressel's emails regarding Terrell Pryor are "education records," then so too are all emails that any Ohio State coach sends to any person naming an Ohio State athlete. This would apply to all basketball players, volleyball players, football players, softball players, members of the golf and gymnastics teams. Yet, all would likely agree that Ohio State does not want, much less intend, to monitor its coaches emails in this way.

Accordingly, FERPA must be amended to mandate full reciprocity from schools. Any document classified by a university as an "education record" cannot simply be situationally categorized to benefit the university but remain secret from the student. Congress should amend FERPA to prohibit schools from classifying documents as

FERPA-protected from outside eyes but not considered an "education record" in relation to the actual student affected. A new and improved FERPA should require full reciprocity so that any document the university claims is protected under FERPA will be maintained by the school in a student's cumulative file, thereby giving all students complete right of access to their records. Without such protection clearly articulated, universities will continue to use FERPA defensively without actually ensuring that there are no more secret files kept on students. Congress, alone, has the power to finally blow the lid of secrecy off schools. An enforceable right of reciprocity is central to that goal.

C. Step Three: Eliminate NCAA and Athletic Department Waivers

Schools routinely respond to open records requests with the FERPA defense: we would love to help you but federal law mandates we refrain from giving you what you seek. This response, however, ignores a document maintained by nearly every Division I athletic program, a FERPA waiver.[225] Senator Walter Mondale expressed clear concerns about advance FERPA waivers as a requirement for participation in any educational activity.[226] His concerns, however, were immediately disposed of by athletic department

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[225] Salzwedel & Ericson, *supra* note 2, at 1101-1102. Reporting that while "Congress did not intend the Buckley Amendment to serve as an instrument for greater control over athletes . . . the NCAA and university officials wasted no time – notwithstanding the concerns voiced [on the floor of the Senate] – ensuring that the law would not hinder their control of the athlete. They used the law's waiver *provision* to accomplish that goal." *Id.* (emphasis in original).

[226] 120 CONG. REC. 39864 (Dec. 13, 1974). The Mondale exchange on the Senate floor appears to have been a harbinger of the FERPA defense. Schools claim protection of records when it serves their underlying purposes, but in demanding advance FERPA waivers is able to release this same information when it benefits the university. The Mondale/Pell exchange was as follows:

> Mr. Mondale: Mr. President, I am somewhat concerned as are Senator Williams and Senator Javits about the provision of this amendment that would permit students to waive their rights to confidentiality of or access to their records. Under the provisions of this amendment would a postsecondary institution be permitted to require, as a condition of application, acceptance, or any other service normally provided to students at the institution, that a student sign such a waiver?
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> Mr. Pell: There is nothing in the proposed language which would permit an institution to require such a waiver as a precondition of application, or any other

and conferences across the country. One example came in 1975, immediately following FERPA's passage, that *required* advance FERPA waivers from all Missouri Valley Conference athletes as a condition of participation.[227] As one article explains, this practice has not changed: "[t]oday, unlike students' freedom to participate in any other extracurricular activity, colleges, universities, and the NCAA require athletes to sign *two* waivers of their right to privacy before they are allowed to participate in collegiate athletics."[228] Such requirement flies completely in the face of both the legislative history and the underlying purpose of FERPA.[229] For these reasons, Congress should amend FERPA to prohibit the use of advance waivers by schools and their athletic departments, including NCAA waivers.[230]

The legislative history expresses clear concern, and equal assurance, that students not be required to waive, in advance, their FERPA rights as a prerequisite to participation

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> service normally provided to students at the institution.
>
> Mr. Mondale: Would there by any conditions under which an institution could compel any of its students to sign such a waiver?
>
> Mr. Pell: Under the proposed language an institution would be permitted to request such a waiver of applicants or students but would not be permitted to require that the student waive his rights to either the confidentiality of his records, or his access to those records as a precondition to enrollment or matriculation or any other service normally provided to students at the institution under any circumstances.

Id.

[227] *Id.* at 1101-1102. The Missouri Valley Conference Commission at the time, Mickey Holmes, sent a memorandum to all conference schools with a sample "Release of Academic and Participation Records" that the Commission indicated "is a basic requirement for initial certification of eligibility and if the form is not signed, the student-athlete shall not be eligible for practice, competition, or financial aid based on athletic ability at your institution." *Id.* This advance waiver approach continues even today. *Id.* at 1102.

[228] *Id.* at 1102 (emphasis in original).

[229] 120 CONG. REC. 39864 (Dec. 13, 1974)(wherein Senator Pell assures his senatorial colleagues that "A postsecondary institution could not request a general waiver which would apply for all time, but would have to ask for a waiver at the appropriate time for each class of confidential statement or recommendation").

[230] Such amendment would also bring life to Senator Pell's assurances given during the FERPA amendment process that no such advance waivers could be required of students. *See* 120 CONG. REC. 39864 (Dec. 13, 1974).

in any education program.[231] These assurances, though unambiguous, have not been provided to students in open contravention of the law's stated design. This author cannot conceive of any reason in advance of participation in college athletics that students should be required to sign a FERPA release – either for the university or the NCAA. Rather, just as Senator Pell explained in responding to Senator Mondale's concerns about advance waivers, schools should only "ask for a waiver at the appropriate time for each class of confidential [education records]."[232] If schools need access to records impacting academic eligibility, this information can be directly requested from the student at the time such eligibility becomes relevant. Similarly, students pulled in to an NCAA investigation should be able to control precisely what information is being exchanged between the school and the NCAA to preclude these entities from commandeering the information and shrouding the data in secrecy, even from the students themselves. As Salzwedel and Ericson assert, part of the purpose behind the waiver is that "[f]or the college or university, an athlete's privacy is property to be controlled, not a right to be protected."[233] In fact, it is these very waivers that permit Ohio State, among others, to withhold former Coach Tressel's emails while simultaneously trumpeting the grade point averages of its many Academic All-Americans. "Armed with the athlete's waiver, the result is anecdotal disclosure and self-congratulation."[234]

Schools should be prevented from relying on these advance FERPA waivers to allow the release of favorable information, high grade point averages, while simultaneously ignoring the waivers when the news is starkly more negative, academic

[231] 120 CONG. REC. 39864 (Dec. 13, 1974).
[232] *Id.*
[233] Salzwedel and Ericson, *supra* note 2, at 1104.
[234] *Id.*

fraud and cheating allegations. Further, "[w]hat is particularly striking is that not only [are advance FERPA waivers] applied selectively *to* athletes but that the waiver only applies in *athletics*."[235] Precluding the use of advance FERPA waivers will return FERPA to a student-focused law requiring schools and universities to provide a student, at the time the waiver is sought, the opportunity to deny disclosure.[236] The consequences for failure to release requested information should rightly be returned to the student, for whom the protection was originally created.[237]

Advance FERPA waivers empower schools, not students. FERPA, however, was intended to empower students, not schools. This inversion must be ceased and Congress should, accordingly, amend FERPA to preclude the use of advance waivers by universities, their athletic departments and the NCAA.

D. Step Four: Giving FERPA Teeth by Imposing Fines

Finally, and perhaps most importantly, FERPA must be given teeth. The draconian threat of loss of all federal funding has proven too extreme to be effective. For this reason, no university or school has ever had their federal funding withdrawn in response to improperly releasing a student's "education records." The threat exists only in theory and continues to be used, defensively by schools, as yet one more reason to shield their misbehavior. We would love to provide you the information you seek. But, if we do we could lose all our federal funding which would, ultimately, result in the

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[235] *Id.* at 1105.
[236] *See generally*, 120 CONG. REC. 39864 (Dec. 13, 1974).
[237] 120 CONG. REC. 39862 (Dec. 13, 1974)(explaining that FERPA is intended to require schools "to conform to fair information record-keeping practices. It is not intended to overturn established standards and procedures for the challenge of substantive decisions made by the institution. It is intended, however, to open the bases on which decisions are being made, and to give [students] the opportunity to challenge and correct – or at least enter an explanatory statement – inaccurate, misleading or inappropriate information about which [the student] which may be in their files and which may contribute, or have contributed to an important decision made about them by the institution").

complete loss of all financial aid, scholarships and our university will be unable to operate and we will be forced to close our doors. This line, quite common among institutions, is just another chimerical extension of the FERPA defense.

To be effective, a sanction must be more than hypothetical. Studies demonstrate that it is the certainty of punishment, rather than the punishment's severity, that deters violation. In the instant matter, schools eagerly cite the never-imposed penalty as reason for overprotecting information that the schools wants to withhold. The threat of complete loss of federal funding sounds ominous, until one realizes that the penalty has never ever been applied to any school. The truth is that the Department of Education works with schools that violate FERPA to secure voluntary compliance. And, only those schools that have a "policy or practice" of regularly violating FERPA's provisions could ever face the ultimate, currently hypothetical, penalty.

Congress needs to amend FERPA to include a more useful, and usable, sanction. While students might prefer a private right of action similar to Title IX, this author believes a monetary fine imposed for each intentional or reckless violation would more effectively secure compliance. Congress should establish a system of fines that are significant, like $10,000 to $25,000 for each obvious violation, but not so inordinate that, like the loss of all federal funding, the potential of the penalty becomes meaningless.

Further, monetary fines should be imposed for the refusal to release non-FERPA documents as well as for intentional or reckless improper disclosures. There are three possible scenarios where the imposition of a monetary fine against a university makes sense in any amended legislation: (1) when a school improperly refuses to disclose information that is clearly *not* FERPA protected (such as parking tickets); (2) when a

school improperly discloses true FERPA materials to a third party without contemporaneous consent, thereby disallowing advance FERPA waivers as they are commonly misused; and, (3) when a school fails or refuses to provide full and reciprocal access to a student's "education records," meaning that any document the institution classifies as an "education record" will be maintained in the student's permanent "education record."

The current "penalty" structure with its oft-cited but never-used feature is toothless. This toothlessness empowers universities to rely on the literal language of the law to invert its legislative purpose and help universities shield themselves from bad press. FERPA must be returned to its student-focused nature. A more reliable, less crippling, penalty structure would go a long way in ensuring that schools give more thought to their FERPA decisions than current "deny or delay" practice indicates. Were FERPA to require actual compliance, the modern practices would die a much needed death. A law, as FERPA demonstrates, is only as formidable as its potential penalty. Without any viable sanction reining in schools, schools – not students – continue to be the unintended beneficiaries of Senator Buckley's student-privacy law.

IV. Conclusion – Put An End to the FERPA Defense

It is time to return American universities and their athletic programs to the original idea that James Buckley encapsulated in FERPA: student access to and privacy in education-related records maintained by universities.[238] The former Senator is on the record, many times in fact, that he does not believe present references to his statutory creation, FERPA, are being properly offered.[239] FERPA was intended to provide

[238] 120 CONG. REC. 39862 (Dec. 13, 1974).
[239] *See* Jones & Riepenhoff, *Privacy Law Overused to Hide Misbehavior*, *supra* note 36.

students with access to their "education records," including grades and other data that might impact their academic and vocational future. FERPA was never intended to empower schools to hide behind students' misbehavior and righteously allege they are doing so in the name of student privacy.

Congress must act to more clearly define what items are truly intended to be protected as "education records."[240] Congress must further act to limit the defensive use of FERPA by universities whose own behavior should be evaluated in perpetuating the continued misbehavior of student athletes. This author believes that four changes are imperative to the future successful use of FERPA: (1) an amended definition that limits "education records" to academically-related materials; (2) a right of reciprocity preventing schools from giving one FERPA interpretation to documents they seek to shield from outside eyes while giving a different definition of "education records" to documents they actually place in students' files; (3) prevent the use of advance FERPA waivers as currently used by universities, athletic departments and the NCAA; and, (4) a viable penalty scheme that includes fines for withholding non-FERPA protected documents or improperly disclosing actual FERPA protected documents.

If we are serious about education, then we need to be serious about holding universities accountable for their supervision of our student athletes. This author loves college sports perhaps as much as any living being. I live for fall and the sound of a

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[240] A Student Press Law Center White Paper, *FERPA and Access to Public Records*, at 5. The Student Press Law Center echoes this author's plea:

> In the absence of clear guidance from Congress or the Department of Education, abuses of FERPA have exploded. It has become routine for some schools and colleges to cry "FERPA" in response to virtually any open-records request, putting requesters in the position of having to wage a costly, time-consuming public-records lawsuit to get answers.

Id.

marching band on a football Saturday. I love the BCS, the Final Four, and the Frozen Four. I cringe when I hear "Hail to the Victors" and perk up when I hear the opening notes of the Notre Dame Fight Song. I am like many in my community – a college sports fanatic.

But, as a former college athlete and graduate assistant coach, this author fears what has become of our national athletic departments. I fear for student welfare. I fear the lessons that university officials operating behind the powerful FERPA curtain are teaching student-athletes. Competition for grades must be as fair as competition for national championships. And, competition for national championships must be as fair as competition for athletes vying for starting positions. The corruption pervading college athletics can, and should, be revealed without disingenuous resorts to FERPA. Methods of cheating and instances of misbehavior are not protected "education records." And, while the courts continue to monitor and reign in universities, Congress owes us the confidence of consistent interpretation. More importantly, our student athletes deserve it. Let us put an end, once and for all, to universities' reliance on the FERPA defense.