No. 20-_____

In the Supreme Court of the United States

KEVIN M. GUSKIEWICZ,
in his official capacity as Chancellor of The University of North Carolina at Chapel Hill, et al.,
Petitioners,

v.

DTH MEDIA CORPORATION, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF NORTH CAROLINA

No. 142PA18

Filed 1 May 2020

DTH MEDIA CORPORATION, CAPITOL BROADCASTING COMPANY, INC., THE CHARLOTTE OBSERVER PUBLISHING COMPANY, and THE DURHAM HERALD COMPANY

v.

CAROL L. FOLT, in her official capacity as Chancellor of The University of North Carolina at Chapel Hill, and GAVIN YOUNG, in his official capacity as Senior Director of Public Records for The University of North Carolina at Chapel Hill

On discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of a unanimous panel of the Court of Appeals, 259 N.C. App. 61, 816 S.E.2d 518 (2018), reversing a judgment entered on 9 May 2017 by Judge Allen Baddour in Superior Court, Wake County. Heard in the Supreme Court on 27 August 2019.

Stevens Martin Vaughn & Tadych, PLLC, by Hugh Stevens and Michael J. Tadych, for plaintiffs-appellees.

Joshua H. Stein, Attorney General, by Stephanie A. Brennan, Special Deputy Attorney General, and

Matthew Burke, Solicitor General Fellow, for defendants-appellants.

J.D. Jones Law, PLLC, by Jonathan D. Jones, for Student Press Law Center and Brechner Center for Freedom of Information, amici curiae.

Fox Rothschild, LLP, by Troy D. Shelton for Victims Rights Law Center, N.C. Coalition Against Sexual Assault, National Alliance to End Sexual Violence, National Network to End Domestic Violence, and the N.C. Coalition Against Domestic Violence, amici curiae.

MORGAN, Justice.

This matter presents questions which require this Court to interpret the federal Family Educational Rights and Privacy Act (FERPA) and the North Carolina Public Records Act (the Public Records Act) in order to determine whether officials of The University of North Carolina at Chapel Hill (UNC-CH or University) are required to release, as public records, disciplinary records of its students who have been found to have violated UNC-CH's sexual assault policy. The Court of Appeals unanimously determined that such records are subject to mandatory disclosure. We affirm.

Factual and Procedural Background

This case arises out of a dispute between various news organizations and officials of UNC-CH's administration. Plaintiffs DTH Media Corporation;

Capitol Broadcasting Company, Inc.; The Charlotte Observer Publishing Company; and The Durham Herald Company (collectively, plaintiffs) are news organizations based in North Carolina which regularly report on matters regarding UNC-CH. Defendants are Carol L. Folt, the former Chancellor of UNC-CH and Gavin Young, the Senior Director of Public Records of UNC-CH (collectively, defendants). Plaintiffs brought this legal action against defendants in the defendants' official capacities for alleged violations of the Public Records Act. The Act was enacted by the North Carolina General Assembly in order to make public records readily available because they "are the property of the people." *See* N.C.G.S. §§ 132-1 to -11 (2017). Defendants contend that they are prohibited from complying with the Public Records Act in light of applicable provisions of FERPA. The parties stipulated to the following facts, which were adopted by the lower courts and utilized in their respective determinations in the controversy prior to this Court's involvement.

Since 2014, UNC-CH has adhered to its comprehensive "Policy on Prohibited Discrimination, Harassment and Related Misconduct" that includes prohibitions on, and potential punishments for, sexual-based and gender-based harassment and violence. In a letter dated 30 September 2016, plaintiffs requested, pursuant to the Public Records Act, "copies of all public records made or received by [UNC-CH] in connection with a person having been found responsible for rape, sexual assault or any related or lesser included sexual misconduct by

[UNC-CH's] Honor Court, the Committee on Student Conduct, or the Equal Opportunity and Compliance Office." The letter was addressed to officials of UNC-CH, including defendant Young. In a letter dated 28 October 2016 and signed by Joel G. Curran, UNC-CH's Vice Chancellor for Communications and Public Affairs, UNC-CH expressly denied plaintiffs' request. In his letter, Vice Chancellor Curran asserted that the records requested by plaintiffs were "educational records" as defined by FERPA and were thus "protected from disclosure by FERPA."

After subsequent communications between the parties, including mediation proceedings which were conducted pursuant to N.C.G.S. § 78-38.3E, plaintiffs narrowed the scope of their request for records which were held in the custody of UNC-CH to: "(a) the name of any person who, since January 1, 2007, has been found responsible for rape, sexual assault or any related or lesser included sexual misconduct by the [UNC-CH] Honor Court, the Committee on Student Conduct, or the Equal Opportunity and Compliance Office; (b) the date and nature of each violation for which each such person was found responsible; and (c) the sanction[ ] imposed on each such person for each such violation." UNC-CH denied plaintiffs' revised, more limited request on 11 November 2016 during an in-person meeting, and further reiterated to plaintiffs on 18 November 2016 that the University would continue to decline plaintiffs' request for the records at issue pursuant to FERPA.

On 21 November 2016, following the continued denial of their request, plaintiffs filed a complaint and sought an order for defendants to show cause under the Public Records Act and the North Carolina Declaratory Judgments Act. *See* N.C.G.S. §§ 1-253 to -267. Plaintiffs sought in relevant part: (1) a preliminary order compelling defendants to appear and produce the records at issue; (2) an order declaring that the requested records are public records as defined by N.C.G.S. § 132-1; and (3) an order compelling defendants to permit the inspection and copying of these records, pursuant to N.C.G.S. § 132-9(a) in their capacity as public records.

Defendants filed their answer to plaintiffs' complaint and petition for the show cause order on 21 December 2016, claiming that "FERPA, a federal law that preempts the Public Records Act, strictly prohibits" the disclosure of the records at issue. More specifically, defendants asserted UNC-CH's position that

> [u]nder FERPA, the University has reasonably exercised its discretion not to release this information, because doing so would breach the confidentiality of the University's Title IX process and would interfere with and undermine that process. More specifically, disclosure of this information would deter victims from coming forward and participating in the University's Title IX process, thus preventing victims from receiving the help and support available to them through the

> University's Title IX process and preventing the University from learning about potential serial perpetrators, which would undermine the safety of the campus community. Additionally, disclosure of this information would permit the identification of victims by members of the campus community who know their relationship to the responsible person and by providing the responsible student motivation to reveal the name of the victim, which would lead to victims being re-traumatized. Such disclosure would deter the participation of witnesses and further impede the University's ability to render a fair, just, and informed determination, and jeopardize the safety of students found responsible during the Title IX process by placing them at risk for retribution.

Following a hearing on plaintiffs' request for declaratory judgment which was conducted on 6 April 2017, the Superior Court, Wake County entered an order and final judgment filed on 9 May 2017 which, *inter alia*, denied plaintiffs' request for a declaratory judgment in determining that defendants were not required to produce the student records requested by plaintiffs.[1] In reaching its decision, the trial court concluded that the Public Records Act does not compel the release of public records where an exception is

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[1] Both parties agree that the matter concerning UNC-CH employees' records which is addressed in the trial court's order and final judgment is not at issue on appeal.

"otherwise specifically provided by law," and agreed with defendants' position as expressed in the trial court's order and final judgment, that

> [i]n 20 U.S.C. § 1232(b)(6), FERPA grants the University the discretion to determine whether to release (1) the name of any student found 'responsible' under University policy of a 'crime of violence' or 'nonforcible sex offense,' (2) the violation, and (3) the sanction imposed. The University may disclose (but is not required to disclose) this information only if the University determines that the student violated the University's rules or policies.

In applying principles enunciated in the United States Constitution and pertinent cases of the Supreme Court of the United States, the trial court entered conclusions of law that the doctrines of both field preemption and conflict preemption operate to implicitly preempt, by force of federal law, any required disclosure by North Carolina's Public Records Act of the requested records. Plaintiffs appealed the portion of the trial court's order and final judgment relating to the denial of access to the student records in dispute to the Court of Appeals.

In addressing the respective arguments of plaintiffs and defendants, the lower appellate court's analysis of the questions presented for resolution included the following subjects: the Public Records Act enacted by the North Carolina General Assembly, the Family Educational Rights and Privacy Act enacted by the United States Congress, the

interaction between this state law and this federal law regarding their individual and joint impacts on the present case, and principles of federal preemption. In an effort to promote efficiency and to diminish repetition, we shall integrate the parties' respective arguments, the Court of Appeals' determinations, and the Court's conclusions throughout our opinion's overlapping treatment of them.

Analysis

A. The legislative enactments

Plaintiffs initially asked defendants to provide copies of all public records made or received by UNC-CH in connection with any person having been found responsible for rape, sexual assault, or any related or lesser-included sexual conduct by UNC-CH's Honor Court, the Committee on Student Conduct, or the Equal Opportunity and Compliance Office. This request was made pursuant to the Public Records Act, which is codified in the North Carolina General Statutes in §§ 132-1 through 132-11. The request was subsequently narrowed to encompass records in the custody of UNC-CH that included (a) the name of any person who, since January 1, 2007, had been found responsible for rape, sexual assault, or any related or lesser-included sexual misconduct by the UNC-CH Honor Court, the Committee on Student Conduct, or the Equal Opportunity and Compliance Office; (b) the date and nature of each violation for which each such person was found responsible; and (c) the sanctions imposed on each such person for each such violation.

In its totality, N.C.G.S. § 132-1 reads as follows:

(a) "Public record" or "public records" shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions. Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government.

(b) The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law. As used herein, "minimal cost" shall mean the actual cost of reproducing the public record or public information.

N.C.G.S. § 132-9(a) states, in its entirety:

> Any person who is denied access to public records for purposes of inspection and examination, or who is denied copies of public records, may apply to the appropriate division of the General Court of Justice for an order compelling disclosure or copying, and the court shall have jurisdiction to issue such orders if the person has complied with G.S. 7A-38.3E.[2] Actions brought pursuant to this section shall be set down for immediate hearing, and subsequent proceedings in such actions shall be accorded priority by the trial and appellate courts.

In declining plaintiffs' request for the identified records in its custody, UNC-CH interpreted the Family Educational Rights and Privacy Act—codified at 20 United States Code Section 1232g—to permit UNC-CH the ability to deny access to the records at issue, based upon its obligation to comply with Title IX of the Education Amendments of 1972, found in 20 U.S.C. §§ 1681-88. Pertinent provisions of FERPA regarding the parties' respective positions, the trial court's order and final judgment, the Court of Appeals decision, and this Court's determination include salient segments of:

- 20 U.S.C. § 1232g(a)(4)(A): "For the purposes of this section, the term 'education records' means . . . those records, files, documents, and other

[2] N.C.G.S. § 7A-38.3E governs the mediation of public records disputes.

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";

- 20 U.S.C. § 1232g(b)(1): "No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information . . .) of students without the written consent of their parents . . .";

- 20 U.S.C. § 1232g(b)(2): "No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information . . . except . . . such information is furnished in compliance with judicial order . . . upon condition that parents and the students are notified of all such orders . . . in advance of the compliance therewith by the educational institution or agency . . .";

- 20 U.S.C. § 1232g(b)(6)(B): "Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution

against a student who is an alleged perpetrator of any crime of violence . . . or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense";

- 20 U.S.C. § 1232g(b)(6)(C): "For the purpose of this paragraph, the final results of any disciplinary proceeding[ ] (i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and (ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student"; and

- 20 U.S.C § 1681(a): "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."

B. Consideration and application of the Public Records Act and the Family Educational Rights and Privacy Act

This Court reviews issues of statutory interpretation *de novo*. "The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson,* 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citing *Polaroid Corp. v.*

Offerman, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998)). "The cardinal principle of statutory construction is that the intent of the legislature is controlling. In ascertaining the legislative intent courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish." *State ex rel. Util. Comm'n v. Public Staff*, 309 N.C. 195, 210, 306 S.E.2d 435, 443-44 (1983) (citations omitted). "When construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself[.]" *State v. Ward*, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010). "When multiple statutes address a single matter or subject, they must be construed together, *in pari materia*, to determine the legislature's intent." *Carter-Hubbard Publ'g Co., Inc. v. WRMC Hosp. Operating Corp.*, 178 N.C. App. 621, 624, 633 S.E.2d 682, 684 (2006), *aff'd*, 361 N.C. 233, 641 S.E.2d 301 (2007). "Statutes *in pari materia* must be harmonized, 'to give effect, if possible, to all provisions without destroying the meaning of the statutes involved.'" *Id.* (citation omitted). As we said in *Empire Power Co. v. N.C. Dept. of E.H.N.R.*, 337 N.C. 569, 447 S.E.2d 768 (1994), a case upon which both parties rely to support their respective views here regarding statutory construction and its *in pari materia* component:

> as in any area of law, the primary function of a court is to ensure that the purpose of the Legislature in enacting the law, sometimes referred to as legislative intent, is accomplished . . . We should be guided by the rules of construction that statutes *in pari*

> *materia*, and all parts thereof, should be construed together and compared with each other. Such statutes should be reconciled with each other when possible.

Id. at 591, 447 S.E.2d at 781.

In the present case, the state's legislative body—the North Carolina General Assembly—has clearly expressed its intent through the Public Records Act to make public records readily accessible as "the property of the people," as described in N.C.G.S. § 132-1(b). There is no dispute between plaintiffs and defendants before this Court that the student disciplinary records meet the definition of "public records" under N.C.G.S. § 132-1, that UNC-CH comes within the purview of the Public Records Act, and that said records are within the custody and control of UNC-CH. The Public Records Act "affords the public a broad right of access to records in the possession of public agencies and their officials." *Times-News Publ'g Co. v. State of N.C.*, 124 N.C. App. 175, 177, 476 S.E.2d 450, 451-52 (1996) *disc. review denied*, 345 N.C. 645, 483 S.E.2d 717 (1997). The Act is intended to be liberally construed to ensure that governmental records be open and made available to the public, subject only to a few limited exceptions. The Public Records Act thus allows access to all public records in an agency's possession "*unless* either the agency or the record is specifically exempted from the statute's mandate." *Times-News*, 124 N.C. App. at 177, 476 S.E.2d at 452 (emphasis added). "Exceptions and exemptions to the Public Records Act must be

construed narrowly." *Carter-Hubbard Publ'g Co.*, 178 N.C. App. at 624, 633 S.E.2d at 684.

As for the Family Educational Rights and Privacy Act, the federal legislative body—the United States Congress—has clearly expressed its intent through FERPA that the ready accessibility of education records exhibited by an "educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information . . .) of students without the written consent of their parents . . ." shall result in "[n]o funds . . . be[ing] made available under any applicable program" to such an educational agency or institution, pursuant to 20 U.S.C. § 1232g(b)(1). Just as the student disciplinary records at issue in the instant case are considered to be "public records" under the state's Public Records Act, they are also considered to be "education records" under FERPA; just as UNC-CH is deemed to be an "agency of North Carolina government or its subdivisions" under the Public Records Act, it is also deemed to be an "educational agency or institution" under FERPA.

Defendants have chosen to construe FERPA in such a manner that they have considered UNC-CH to be prohibited "from disclosing 'education records,' including records related to sexual assault investigations and adjudications governed by Title IX." Regarding "campus disciplinary adjudications of sexual assault," UNC-CH opines that "FERPA

prohibits the disclosure of education records but grants universities discretion to determine whether to disclose three items of information: the name of the responsible student, the violation, and the sanction imposed." In light of its construction of FERPA and this federal law's perceived concomitant relationship with Title IX as embodied in 20 U.S.C. § 1681(a), *et seq*, UNC-CH assumes the posture as to the release of the student disciplinary records which are the focus of this legal controversy, that "the University has exercised its discretion and has declined to disclose this information because the University has determined that the release of this information would lead to the identification of victims, jeopardize the safety of the University's students, violate student privacy, and undermine the University's efforts to comply with Title IX."

Defendants' justification for its interpretation of FERPA in this subject matter area is premised on its application of FERPA's provision of 20 U.S.C. § 1232g(b)(6)(B), from which it is surmised that UNC-CH has the discretion to determine whether to release information about a student disciplinary proceeding outcome, and FERPA's provision of 20 U.S.C. § 1232g(b)(6)(C)(i), which limits the divulgence of "the final results of any disciplinary proceeding" to "the name of the student, the violation committed, and any sanction imposed by the institution or that student . . . ." Defendants discern that the phrase contained in 20 U.S.C. § 1232g(b)(6)(B), "*if* the institution *determines* as a result of that disciplinary proceeding that the student committed a violation of the

institution's rules or policies with respect to such crime or offense" (emphasis added) impliedly cloaks UNC-CH with the discretionary authority to determine whether to release the outcome of a student disciplinary proceeding in light of the introductory portion of the provision that "[n]othing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence . . . or a nonforcible sex offense . . . ." It is compelling in light of the Court's duty to observe and to implement the aforementioned canons of statutory construction, that there is no express provision in FERPA that reposes the authority in UNC-CH to exercise the discretion that it purports to have. On the other hand, plaintiffs assert that there is no conflict between the state's Public Records Act and the federal law, FERPA, that the Public Records Act and its underlying legislative intent support liberal access to the records at issue here, and that the Court of Appeals is correct in its determination that the two legislative enactments which govern these records can and should be construed *in pari materia* so as to afford plaintiffs the access to the student disciplinary records which is sought.

We conclude that the Court of Appeals correctly held that 20 U.S.C. § 1232g(b)(6)(B) did not grant implied discretion to UNC-CH to determine whether to release the results of a student disciplinary proceeding emanating from rape, sexual assault, or

sexual misconduct charges in absence of language expressly granting such discretion. We also note that the lower appellate court properly recognized that "[p]laintiffs' records request is limited to students who UNC-CH has already expressly determined to have engaged in such misconduct, and the records of which are expressly subject to disclosure under FERPA." *DTH v. Folt*, 259 N.C. App. at 69, 816 S.E.2d at 524 (citing 20 U.S.C. § 1232g(b)(6)(B)). Since FERPA contains no such language, but instead specifies that the categories of records sought here are public records subject to disclosure—"Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing . . ."—we see no conflict between the federal statute and the state Public Records Act. This North Carolina law has been interpreted consistently by our state courts as intended for liberal construction affording ready access to public records, subject to limited exceptions. *See Carter-Hubbard Publ'g Co.*, 178 N.C. App. at 624, 633 S.E.2d at 684. Accordingly, we conclude, as did the Court of Appeals, that defendants' contended interpretation of the two statutes "conflicts with both the Public Records Act's mandatory disclosure requirements and the plain meaning of FERPA's § 1232g(b)(6)(B), which allows disclosure." *Id.* at 70-71, 816 S.E.2d at 525. This result reconciles and harmonizes the Public Records Act and the Family Educational Rights and Privacy Act, while preserving the integrity of the well-established doctrines which guide proper statutory construction. It also reinforces that the Public Records Act may be available to compel disclosure through judicial process if

necessary, in the face of a denial of access to such records.

Unfortunately, the dissent subscribes to UNC-CH's depiction of the University's discretion "to produce the records at issue upon request by a third party if it chooses to do so *in the exercise of its independent judgment.*" In embracing the position of UNC-CH that the institution possesses such pervasive discretion in light of the federal law, the dissent strives to justify its acceptance of this representation by combining the open-ended, non-prohibitive beginning phrase of 20 U.S.C. § 1232g(b)(6)(B), "*Nothing in this section shall be construed* to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student . . ." (emphasis added) with the permissive introductory language of 34 C.F.R. § 99.31(a), "An educational agency or institution *may* disclose personally identifiable information from an education record of a student . . ." (emphasis added) so as to allow this tandem of federal law provisions to operate as though the state's Public Records Act does not exist. Indeed, it is a fairly elementary deduction, in neatly configuring these two separate segments of federal enactments into the single determinant which the dissent declares, that "Nothing in this section [20 U.S.C. § 1232g(b)(6)(B)] shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student . . . [such that] [a]n educational agency or

institution may disclose personally identifiable information from an education record of a student . . . ." We agree that, standing alone, a postsecondary educational institution possesses such discretion to disclose. However, when such a postsecondary educational institution is a *public* postsecondary educational institution such as UNC-CH, operating as an undisputed "agency of North Carolina" under the Public Records Act and therefore subject to comply with requests for public records when asserted under N.C.G.S. § 132-1, then "[n]othing in this section [20 U.S.C. § 1232g(b)(6)(B)] shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student."

Therefore, in properly applying the foundational principles of statutory construction so as to reconcile multiple legislative enactments in an effort to harmonize their joint and mutual operation, the established methodology to be applied here would be an examination, in the first instance, of the state law's mandatory Public Records Act provision and the federal law's permissive Code of Federal Regulations language which supplements FERPA's open-ended and non-prohibitive language, instead of the dissent's employment of the erroneous methodology of initially combining the two federal provisions, thus developing in a vacuum the flawed conclusion consistent with UNC-CH's view that the University commands discretion over the release of the public records, and only then secondarily considering the operation of the

Public Records Act after having prematurely succumbed to the conclusions that "a university has the authority to produce the records at issue upon request by a third party if it chooses to do so in *the exercise of its independent judgment*" and "the doctrine of conflict preemption is directly applicable" which would preclude the operation of the Public Records Act in the present case. Plaintiffs submitted their request for the records at issue to the University pursuant to the Public Records Act because of the educational institution's status as an "agency of North Carolina." It is therefore appropriate, due to the mandatory nature of the state law and the liberal construction which our state courts have given it, to look initially at the application of the Public Records Act in light of plaintiffs' request, then assess whether there are any other legislative provisions of any sort which present potential conflict with the operation of the Public Records Act, and then implement the established principles of statutory construction to reconcile such provisions. *See Times-News*, 124 N.C. App. at 177, 476 S.E.2d at 452 (The Public Records Act allows access to all public records in an agency's possession "*unless either the agency or the record is specifically exempted from the statute's mandate.*" (emphasis added)). In the present case, however, the dissent elects to ignore the logical inception of the analysis by vaulting the state's Public Records Act, grasping the federal nature of FERPA and the cited provision from the Code of Federal Regulations, and concluding that an opening assessment of the applicability of the state law upon which plaintiffs' records request is expressly premised leads to a "look

to North Carolina law to determine congressional intent." The dissent's depiction and conclusion are both inaccurate. This defective approach by the dissent miscalculates the authority of 20 U.S.C. § 1232g(b)(6)(B) and 34 C.F.R. § 99.31 in the face of N.C.G.S. § 132-1, by erroneously elevating the authority of the federal law's application here while wrongfully subjugating the authority of the state law's express mandates which require that the public records at issue be released in the dearth of any federal law express mandates which require that these public records be withheld.

Consistent with the rule of statutory construction to regard the plain meaning of the words of a statute, 20 U.S.C. § 1232g(b)(6)(C) allows only the disclosure of the name of the student, the violation committed, and any sanction imposed by the institution on that student upon the release of the final results of any disciplinary proceeding. We agree with the Court of Appeals that the dates of offenses which were requested by plaintiffs pursuant to the Public Records Act are not subject to disclosure under FERPA; therefore, UNC-CH is only required to disclose to plaintiffs, pursuant to the operation of the Public Records Act, the name of the student, the violation committed, and any sanction imposed by UNC-CH on that student upon the release of the final results of any disciplinary proceeding.

C. Examination of the federal preemption doctrine

Defendants invoke the doctrine of federal preemption in contending that "[e]ven if the [state's] Public Records Act mandated disclosure, FERPA would preempt the Act through conflict preemption[,]" and "FERPA also preempts the Public Records Act because mandating disclosure frustrates the purposes of federal law, which allocates to the University the ability to decide whether disclosure best promotes the prevention of sexual assaults and misconduct on a campus." Additionally, defendants posit that "FERPA's discretion also conflicts with the Public Records Act's purported disclosure mandate." These federal preemption theories, which are posited by defendants, are all based on the faulty premise that UNC-CH has the discretion to determine whether to release the final results of any student disciplinary proceeding—a postulation which we have already nullified in our earlier analysis. While defendants claim that "[c]onflict preemption applies because compliance with both FERPA and the Public Records Act is impossible here," we have already determined in this case that such compliance is possible. Although defendants argue that "FERPA and the Public Records Act conflict because the University cannot both exercise discretion about releasing information and be forced to release records containing that information," we have heretofore established in this case that the two Acts do not conflict under these circumstances as well as held in this case that UNC-CH does not have the discretion

regarding the release of the information at issue. Nonetheless, since our learned colleagues who are in the dissent have addressed their view of the role of the doctrine of federal preemption in this case and since the lower appellate court addressed the subject of the applicability of the federal preemption doctrine in notable detail in its opinion, we elect to examine the principle to a warranted degree.

Generally, if a state law conflicts with a federal law that regulates the same conduct, the federal law prevails under the doctrine of preemption. "A reviewing court confronting this question begins its analysis with a presumption against federal preemption." *State ex rel. Utilities Comm'n v. Carolina Power & Light Co.*, 359 N.C. 516, 525, 614 S.E.2d 281, 287 (2005); *see also Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715, 105 S. Ct. 2371, 85 L.Ed.2d 714 (1985). The presumption is grounded in the fact that a finding of federal preemption intrudes upon and diminishes the sovereignty accorded to states under our federal system. Indeed, in *Wyeth v. Levine*, the United States Supreme Court explained that "[i]n all [preemption] cases, and particularly those in which Congress has 'legislated . . . in a field which the States have traditionally occupied' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" 555 U.S. 555, 565, 129 S. Ct. 1187, 173 L.Ed.2d 51 (2009) (alterations in original) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct.

2240, 135 L.Ed.2d 700 (1996)). The exercise of such authority by the United States Congress, where shown clearly and manifestly by the federal legislative body, is known as "express preemption"; however, Congress may also achieve such a result through "implicit preemption." Congress may consequently preempt, i.e. invalidate, a state law through federal legislation. It may do so through express language in a statute. But even where a statute does not refer expressly to preemption, Congress may implicitly preempt a state law, rule, or other state action. *Oneok, Inc. v. Learjet, Inc.,* 575 U.S. 373, 376, 135 S. Ct. 1591, 191 L.Ed.2d 511 (2015). Congress may implement implicit preemption either through conflict or field preemption. *Id.* "Conflict preemption exists where 'compliance with both state and federal law is impossible' or where 'the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 377, 135 S. Ct. 1591 (citing *California v. ARC America Corp.*, 490 U.S. 93, 100-01, 109 S. Ct. 1661, 104 L.Ed.2d 86 (1989)). As to field preemption, "Congress has forbidden the State to take action in the *field* that the federal statute preempts." *Id.*

The Court of Appeals, in the present case, considered both types of the conflict preemption aspect of the federal preemption doctrine and determined that there was no conflict between the federal law, FERPA, and the state's Public Records Act, because compliance by UNC-CH with both of them is possible. As the lower tribunal noted in

considering the first type, "[d]efendants would not violate § 1232g(b)(6)(B) by disclosing and releasing the records Plaintiffs requested in order to comply with the Public Records Act." *DTH v. Folt*, 259 N.C. App. at 74, 816 S.E.2d at 527. With regard to the second type, the Court of Appeals reasoned that "the Public Records Act disclosure requirements do not 'stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" in that "[t]he plain text of § 1232g(b)(6)(B) permits Defendants' disclosure of the limited information specifically listed therein." *Id.* (quoting *Oneok*, 575 U.S. at 377, 135 S. Ct. 1591). Although in our view the Court of Appeals analyzed conflict preemption unnecessarily as explained above, it nonetheless applied the doctrine correctly in general, and *Oneok* in particular.

The dissent unequivocally views FERPA as preventing the operation of the Public Records Act in the present case, opining that "[a] federal law that grants discretion is fundamentally irreconcilable with a state law that seeks to override that discretion." In this analytical exercise, the dissent again begins with the fundamental misstep that the FERPA provision of 20 U.S.C. § 1232g(b)(6)(B) is buttressed by 34 C.F.R. § 99.31 so as to establish a federally entrenched discretion for a *public* postsecondary educational institution like UNC-CH which is mandatorily subject to the Public Records Act as a state agency before the dissent is inclined to include the state law in its contemplation. This misstep, in turn, leads to the dissent's logical—though erroneous

due to the faulty original premise—sequential misstep that "the federal law and state law fundamentally conflict." Consequently, instead of utilizing the aforementioned established tenets of statutory construction "that statutes *in pari materia*, and all parts thereof, should be construed together and compared with each other [because] [s]uch statutes should be reconciled with each other when possible," *Empire Power*, 337 N.C. at 591, 447 S.E.2d at 781, the dissent chooses to construe the cited principles in *Oneok* to support the applicability of the doctrine of conflict preemption in the instant case. Ultimately, as a result of the misapprehended precursors, the dissent arrives at its conclusion that conflict preemption exists here, as the principle is explained in *Oneok*.

Oneok presented an opportunity for the Supreme Court of the United States to address the issue of whether the federal Natural Gas Act preempted state antitrust lawsuits against interstate pipelines which would be based upon non-federally regulated retail natural gas prices. *Oneok,* 575 U.S. at 376, 135 S. Ct. 1591. In holding that the state's antitrust claims were not preempted by the federal Natural Gas Act, the high court explained that an examination of the applicability of preemption must "emphasize the importance of considering the *target* at which the state law aims in determining whether that law is preempted." *Id.* at 377, 135 S. Ct. 1591. Just as the United States Supreme Court determined in *Oneok* that it would not find the operation of the principle of conflict preemption as appropriate in construing the

federal law and the state law, we agree with the overarching principle enunciated in *Oneok* and therefore apply it here. While conflict preemption exists where compliance with both state and federal law is impossible or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, conflict preemption does not exist in the present case because compliance with both the Public Records Act and FERPA is possible, and the Public Records Act does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress regarding the governance of education under Title 20 of the Unites States Code.

Lastly, defendants' reliance on *United States v. Miami University*, 294 F.3d 797 (6th Cir. 2002) to establish the existence of the field preemption aspect of the federal preemption doctrine to this Court's satisfaction is unpersuasive. While we reiterate that the analysis which this Court elects to engage is arguably superfluous due to defendants' illustrated misassumptions, we choose to evaluate this remaining feature of the federal preemption doctrine in order to address defendants' contention that in *Miami University*, "[t]he court rejected claims that the Ohio public records law was broad and required disclosure." However, while the Sixth Circuit Court of Appeals acknowledged that FERPA generally shields student disciplinary records from release, the exception to the Act's disclosure prohibitions in *Miami University* which has direct application to the

instant case was viewed by the federal appellate court in the following manner:

> Congress balanced the privacy interests of an alleged perpetrator of any crime of violence or nonforcible sex offense with the rights of the alleged victim of such a crime and concluded that the right of an alleged victim to know the outcome of a student disciplinary proceeding, regardless of the result, outweighed the alleged perpetrator's privacy interest in that proceeding. *Congress also determined that, if the institution determines that an alleged perpetrator violated the institution's rules with respect to any crime of violence or nonforcible sex offense, then the alleged perpetrator's privacy interests are trumped by the public's right to know about such violations.*

294 F.3d 797, 812-13 (2002) (emphasis added).

The federal appellate court's ruling in *Miami University* clearly demonstrates that the principle of field preemption does not apply to this case and that defendants' dependence on its operation here is misplaced. Although FERPA is a legislative enactment of Congress, nevertheless the public records law of Ohio was deemed to be the prevailing authority where the access to information about the result of a student disciplinary proceeding regarding any allegation of a crime of violence or nonforcible sex offense outweighed the alleged student perpetrator's privacy interests which are generally protected by FERPA. In light of the strong parallels between the

state public records laws of Ohio and North Carolina, the subject matter of the disclosure of the outcomes of the types of student disciplinary proceedings of educational institutions located in each of the two states, and each university's respective reliance on the applicability of the field preemption doctrine based on a contention that FERPA preempts the operation of such a state public records law, we embrace the logic of the Sixth Circuit Court of Appeals. In enacting FERPA, Congress has not forbidden North Carolina's legislative body from taking action in the field of education where the disclosure of the result of a student disciplinary proceeding conducted at a public postsecondary educational institution which operates as an agency of North Carolina is mandated by the state's Public Records Act. Consequently, defendants' reliance on the principle of field preemption fails.

In the instant case, the federal preemption doctrine does not apply; therefore, the Family Educational Rights and Privacy Act does not preempt the Public Records Act so as to prohibit UNC-CH from disclosing the final results of any disciplinary proceeding as requested by plaintiffs.

Conclusion

We hold that officials of The University of North Carolina at Chapel Hill are required to release as public records certain disciplinary records of its students who have been found to have violated UNC-CH's sexual assault policy. The University does not have discretion to withhold the information sought

here, which is authorized by, and specified in, the federal Family Educational Rights and Privacy Act as subject to release. Accordingly, as an agency of the state, UNC-CH must comply with the North Carolina Public Records Act and allow plaintiffs to have access to the name of the student, the violation committed, and any sanction imposed by the University on that student in response to plaintiffs' records request.

AFFIRMED.

Justice DAVIS, dissenting.

I respectfully dissent. The majority's analysis fundamentally misapplies the federal preemption doctrine. As discussed more fully below, the dispositive issue in this case is whether FERPA confers discretion upon universities regarding whether to release the category of records at issue. If FERPA does so, then the doctrine of preemption precludes states from mandating that universities exercise that discretion in a certain way.

The threshold question of whether such discretion exists must be resolved solely by examining the relevant *federal* law, which in this case consists of FERPA and its accompanying federal regulations. The majority goes astray in this inquiry by instead looking to *state* law to determine whether discretion has been conferred. In doing so, the majority turns the preemption analysis on its head. It simply makes no sense to examine a provision of state law to determine whether *Congress* has conferred discretion upon universities.

The essence of the preemption doctrine is that state law cannot conflict with federal law. In this case, the specific question is whether the application of the North Carolina Public Records Act—which, in the absence of FERPA, would require defendants to produce these records—would be inconsistent with how Congress has authorized universities to treat such records. Therefore, because this inquiry solely concerns the intent of Congress, it is illogical to look to North Carolina law to determine congressional

intent. It is only once a determination has been made as to whether *federal* law confers such discretion that it then becomes appropriate to examine state law to ascertain whether a conflict exists between state and federal law on the issue. But state law has no bearing on the issue of whether such discretion exists in the first place. It is this basic error that infects the majority's entire analysis and causes it to reach a result that is legally incorrect.

The specific provision of FERPA relevant to this case is 20 U.S.C. § 1232g(b)(6)(B) (2018), which provides, in pertinent part, as follows:

> *Nothing in this section shall be construed to prohibit* an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence . . . or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.

Id. (emphasis added). This statutory provision is supplemented by the following pertinent provisions contained in regulations promulgated by the United States Department of Education and codified in the Code of Federal Regulations:

> (a) An educational agency or institution *may* disclose personally identifiable information

> from an education record of a student . . . if the disclosure meets one or more of the following conditions:
>
> . . . .
>
> (14)
>
> > (i) The disclosure . . . is in connection with a disciplinary proceeding at an institution of postsecondary education. The institution must not disclose the final results of the disciplinary proceeding unless it determines that—
> >
> > > (A) The student is an alleged perpetrator of a crime of violence or non-forcible sex offense; and
> > >
> > > (B) With respect to the allegation made against him or her, the student has committed a violation of the institution's rules or policies.

34 C.F.R. § 99.31(a)(14)(i) (2019) (emphasis added).

The regulations then proceed to clarify that "paragraph[ ] (a) . . . of this section *do[es] not require* an educational agency or institution . . . to disclose education records or information from education records to any party, *except for parties under paragraph (a)(12) of this section*." 34 C.F.R. § 99.31(d) (emphasis added). Paragraph (a)(12), in turn, applies only to the disclosure of information "to the parent of

a student . . . or to the student." 34 C.F.R. § 99.31(a)(12).

Thus, FERPA's grant of discretion to universities regarding the release of these records to third parties such as plaintiffs is evidenced by the pertinent language of the statute itself read in conjunction with the language of the accompanying federal regulations. As quoted above, the applicable provision of FERPA states that "[n]othing in this section shall be construed to prohibit" disclosure—language that neither prohibits nor requires the release by universities of the category of records sought by plaintiffs. 20 U.S.C. § 1232g(b)(6)(B). This permissive language is then reinforced by the language of the accompanying federal regulations, which remove any doubt on this issue. These regulations plainly and unambiguously state that a university "may"—but is "not require[d]" to—disclose such records to parties other than the students themselves and their parents. 34 C.F.R. § 99.31(a), (d). Thus, the combined effect of 20 U.S.C. § 1232g(b)(6)(B) and 34 C.F.R. § 99.31 serves to make clear that a university has the authority to produce the records at issue upon request by a third party if it chooses to do so in the exercise of its independent judgment.

The Supreme Court of the United States—like this Court—has made clear that when a statute says an actor "may" take certain action, such language constitutes a grant of discretion to that actor. *See, e.g.*, *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, —— U.S. ——, 136 S. Ct. 1923, 1931, 195 L.Ed.2d 278 (2016) ("[W]e

have emphasized that the word 'may' clearly connotes discretion."); *Jama v. Immigration and Customs Enf't*, 543 U.S. 335, 346, 125 S. Ct. 694, 160 L.Ed.2d 708 (2005) ("The word 'may' customarily connotes discretion."); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533, 114 S. Ct. 1023, 127 L.Ed.2d 455 (1994) ("The word 'may' clearly connotes discretion."); *United States v. Rodgers*, 461 U.S. 677, 706, 103 S. Ct. 2132, 76 L.Ed.2d 236 (1983) ("The word 'may,' when used in a statute, usually implies some degree of discretion."); see also *Silver v. Halifax Cty. Bd. of Comm'rs*, 371 N.C. 855, 863-864, 821 S.E.2d 755, 760-762 (2018) (explaining that the word " 'may' is generally intended to convey that the power granted can be exercised in the actor's discretion").

Indeed, both in its appellate brief to this Court and at oral argument, plaintiffs' counsel *expressly conceded* that FERPA grants discretion to defendants regarding the release of the records sought in this lawsuit. *See* Pl.'s Br. at 12-13 ("In their brief defendants argue that . . . FERPA confers them with 'discretion' whether to release or withhold the records at issue. *Indeed, it does* . . .") (emphasis added).

This concession by plaintiffs' counsel is not surprising. Given the absence of any dispute that the category of documents sought by plaintiffs in this case is, in fact, governed by 20 U.S.C. § 1232g(b)(6)(B), there are only three possible conclusions. FERPA either (1) *prohibits* universities from producing the records at issue; (2) *requires* that they produce the records; or (3) allows universities to exercise their

own independent judgment over whether to produce them. Given that the majority does not take the position that Congress has either expressly required or expressly prohibited such disclosure, the only remaining option is the third one—that is, the conclusion that FERPA confers discretion on universities as to whether such records should be produced to a third party in a particular case. Indeed, at one point in its analysis, the majority appears to recognize that discretion exists under federal law, stating that "standing alone, a postsecondary educational institution possesses such discretion to disclose" these records.[1]

Because it is clear that such discretion exists under FERPA, the only remaining question is whether a state law such as North Carolina's Public Records Act can lawfully require that a university exercise its discretion in favor of disclosure. Under the doctrine of federal preemption, the answer is no. A university must be allowed to exercise its federally

[1] The majority also acknowledges that it is only because UNC-CH is a public institution that North Carolina's Public Records Act applies and therefore private educational institutions in this state unquestionably continue to possess the discretion granted by FERPA to decide whether to release the requested information. If there was no conflict between FERPA and the Public Records Act, then private and public institutions would be in the same situation. However, it is precisely because of that conflict that the majority's opinion results in different rules for post-secondary educational institutions in the state, depending on whether they are public or private.

mandated discretion unimpeded by a state law that seeks to eliminate that discretion.

The Supremacy Clause of the United States Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . [the] Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. As a result, "when federal and state law conflict, federal law prevails and state law is preempted." *Murphy v. Nat'l Collegiate Athletic Ass'n*, —— U.S. ——, 138 S. Ct. 1461, 1476, 200 L.Ed.2d 854 (2018). The Supreme Court of the United States has made clear that preemption can occur not only through a federal statute but also based on federal regulations. *See Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 102 S. Ct. 3014, 73 L.Ed.2d 664 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes."); *see also City of New York v. F.C.C.*, 486 U.S. 57, 64, 108 S. Ct. 1637, 100 L.Ed.2d 48 (1988) ("The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof.").

The Supreme Court has recognized three different forms of this doctrine: (1) express preemption, (2) field preemption, and (3) conflict preemption. *Murphy*, 138 S. Ct. at 1480. Express preemption occurs when a federal statute uses explicit language indicating its intent to override state law. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79, 110 S. Ct. 2270, 110 L.Ed.2d 65 (1990). Field preemption occurs when Congress passes comprehensive legislation intending "to

occupy an entire field of regulation," acting as the exclusive authority in that area and "leaving no room for the States to supplement federal law." *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 509, 109 S. Ct. 1262, 103 L.Ed.2d 509 (1989).

The final type of preemption is conflict preemption (also known as implied preemption), which occurs when federal law and state law fundamentally conflict. Conflict preemption exists when (1) "compliance with both state and federal law is impossible" or (2) when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok Inc. v. Learjet, Inc.,* 575 U.S. 373, 377, 135 S. Ct. 1591, 191 L.Ed.2d 511 (2015).

The present case involves conflict preemption. A university cannot simultaneously (1) exercise its discretion conferred by FERPA regarding whether these records should be produced to third parties upon request; *and* (2) be automatically required by state law to produce those same records on demand. A federal law that grants discretion to universities is fundamentally irreconcilable with a state law that seeks to override that discretion. FERPA gives defendants a choice, while the Public Records Act gives them a command. As a result, the doctrine of conflict preemption is directly applicable.

In asserting that the doctrine of conflict preemption does not apply in this case, the majority misapprehends the basic inquiry in which a court must engage when faced with a federal preemption

issue. If—as here—a conflict exists between state and federal law, the federal law must prevail. Thus, the majority's assertion that application of the preemption doctrine would require "erroneously elevating" the federal law while "wrongfully subjugating" the state law is, in reality, nothing less than a rejection of the preemption doctrine itself.

While its opinion is not entirely clear, the majority then appears to state its belief that—even assuming discretion does exist under FERPA—the preemption doctrine is not triggered simply because releasing the records as mandated by North Carolina's Public Records Act is one of the options available to defendants in the exercise of their discretion. But this reasoning is antithetical to the very concept of discretion. Black's Law Dictionary defines discretion as "[w]ise conduct and management *exercised without constraint*; the ability coupled with the tendency to act with prudence and propriety . . . [f]reedom in the exercise of judgment; *the power of free decision-making*." *Black's Law Dictionary* (11th ed. 2019) (emphasis added). It is self-evident that a law that commands a single outcome necessarily conflicts with a separate law that grants the power of unconstrained decision-making.

Moreover, the Supreme Court of the United States has expressly rejected the very mode of reasoning engaged in by the majority. In *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 116 S. Ct. 1103, 134 L.Ed.2d 237 (1996), a federal statute granted national banks the authority to sell

insurance, but Florida law prohibited such banks from doing so. *Id.* at 27-28, 116 S. Ct. 1103. The Supreme Court first noted that "the two statutes do not impose directly conflicting duties on national banks—as they would, for example, if the federal law said 'you must sell insurance,' while the state law said, 'you may not.' " *Id.* at 31, 116 S. Ct. 1103. Nevertheless, the Supreme Court determined that the federal statute preempted the Florida law. *Id.* The Supreme Court characterized the conflict as involving a federal statute that "authorizes national banks to engage in activities that the State Statute expressly forbids." *Id.* The Supreme Court concluded that when Congress grants an entity "an authorization, permission, or power," states may not "forbid, or [ ] impair significantly, exercise of a power that Congress explicitly granted." *Id.* at 33, 116 S. Ct. 1103.

Similarly, in *Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 102 S. Ct. 3014, 73 L.Ed.2d 664 (1982), a federal regulation permitted savings and loan associations to utilize due-on-sale clauses in contracts, but California law limited the use of these clauses. *Id.* at 144–145, 102 S. Ct. 3014. The Supreme Court held that the state law was preempted, explaining that the "conflict [between the laws] does not evaporate because the [ ] regulation simply permits, but does not compel" banks to include such clauses. *Id.* at 155, 102 S. Ct. 3014. Just as in *Barnett*, the Supreme Court found it immaterial that compliance with both laws "may not be a physical impossibility," reasoning that the state law

impermissibly deprived the banks of the "flexibility given it by the [federal regulation]." *Id. See also Lawrence Cty. v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 260–61, 105 S. Ct. 695, 83 L.Ed.2d 635 (1985) (holding that a federal law providing that counties "may use [certain specified federal] payments for any governmental purpose" preempted a state law requiring counties to allocate those payments to school districts; rejecting as "seriously flawed" the state's argument that no preemption existed simply because the funding of school districts constituted a governmental purpose).

The same principles apply here. FERPA and its accompanying regulations gave defendants the discretion to decide whether release of the records sought by plaintiffs was appropriate. The Public Records Act, conversely, would—if given effect—make the release of such records mandatory, thereby completely eliminating the discretion conferred by Congress. Therefore, the Public Records Act cannot be given effect under these circumstances. In short, a federal law's "may" cannot be constrained by a state law's "must."

For these reasons, I would reverse the decision of the Court of Appeals. Accordingly, I respectfully dissent.[2]

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[2] It is important to emphasize that this Court lacks the authority to determine whether the release of the records sought by plaintiffs is wise or unwise as a matter of public policy. Congress has expressly made that determination by conferring

Justices ERVIN and EARLS join in this dissenting opinion.

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discretion upon universities regarding the disclosure of such information.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-871

Filed: 17 April 2018

Wake County, No. 16 CVS 14300

DTH MEDIA CORPORATION; CAPITOL BROADCASTING COMPANY, INC.; THE CHARLOTTE OBSERVER PUBLISHING COMPANY; THE DURHAM HERALD COMPANY; Plaintiffs,

v.

CAROL L. FOLT, in her official capacity as Chancellor of The University of North Carolina at Chapel Hill, and GAVIN YOUNG, in his official capacity as Senior Director of Public Records for The University of North Carolina at Chapel Hill, Defendants.

Appeal by plaintiffs from order entered 9 May 2017 by Judge Allen Baddour in Wake County Superior Court. Heard in the Court of Appeals 20 March 2018.

Stevens Martin Vaughn & Tadych, PLLC, by Hugh Stevens and Michael J. Tadych, for plaintiffs-appellants.

Joshua H. Stein, Attorney General, by Stephanie A. Brennan, Special Deputy Attorney General, for defendants-appellees.

Engstrom Law, PLLC, by Elliot Engstrom, for Student Press Law Center, amicus curiae.

TYSON, Judge.

I. Background

This Court reviews the federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2017) ("FERPA"), and the North Carolina Public Records Act, N.C. Gen. Stat. §§ 132-1 to -11 (2017) (the "Public Records Act"), to determine whether officials of The University of North Carolina at Chapel Hill ("UNC-CH") are required to release students' disciplinary records, who have been found to have violated UNC-CH's sexual assault policy. The following facts were stipulated to by the parties and adopted by the trial court.

DTH Media Corporation; Capitol Broadcasting Company, Inc.; The Charlotte Observer Publishing Company; and, The Durham Herald Company (collectively, "Plaintiffs"), are North Carolina-based news organizations, which regularly cover events at UNC-CH. The defendants are Carol L. Folt, the Chancellor of UNC-CH, and Gavin Young, the Senior Director of Public Records of UNC-CH (collectively, "Defendants"), who are being sued in their official capacities.

Plaintiffs sent a public records request to UNC-CH in a letter dated 30 September 2016, asking for "copies of all public records made or received by [UNC-CH] in connection with a person having been found responsible for rape, sexual assault or any related or lesser included sexual misconduct by [UNC-CH's] Honor Court, the Committee on Student Conduct, or the Equal Opportunity and Compliance Office."

UNC-CH denied Plaintiffs' request on 28 October 2016 in a letter signed by Joel G. Curran, UNC-CH's Vice-Chancellor for Communications and Public Affairs. Vice-Chancellor Curran concluded the records requested by Plaintiffs are "educational records" as defined by FERPA and are "protected from disclosure by FERPA."

After denial of their request, Plaintiffs filed a complaint and petitioned for an order to show cause against Defendants on 21 November 2016, under the Public Records Act, and the North Carolina Declaratory Judgments Act, N.C. Gen. Stat. §§ 1-253 to -267. Plaintiffs sought, in part: (1) a preliminary order compelling Defendants to appear and produce the records at issue; (2) an order declaring that the requested records are public records as defined by N.C. Gen. Stat. § 132-1; (3) an order compelling Defendants to permit the inspection and copying of public records pursuant to N.C. Gen. Stat. § 132-9(a).

On 21 December 2016, Defendants filed their answer to Plaintiffs' complaint and petition. Following subsequent communications between the

parties, including a mediation conducted pursuant to N.C. Gen. Stat. § 78-38.3E, Plaintiffs narrowed the scope of their request to encompass records in the custody of UNC-CH and limited to: "(a) the name of any person who, since January 1, 2007, has been found responsible for rape, sexual assault or any related or lesser included sexual misconduct by the [UNC-CH] Honor Court, the Committee on Student Conduct, or the Equal Opportunity and Compliance Office; (b) the date and nature of each violation for which each such person was found responsible; and (c) the sanctions imposed on each such person for each such violation." Defendants stipulated that UNC-CH retains the records sought by Plaintiffs in their narrowed request. The matter was heard in Wake County Superior Court on 6 April 2017. On 9 May 2017, the trial court entered an order and final judgment denying Plaintiffs' request, as it related to students who had been found responsible for serious sexual misconduct. The court granted Plaintiffs' request for records related to UNC-CH employees, who had been disciplined for such offenses.

The trial court's order and final judgment concluded the Public Records Act does not compel release of student records where "otherwise specifically provided by law." The trial court concluded FERPA "otherwise specifically provides" and grants UNC-CH "discretion to determine whether to release (1) the name of any student found 'responsible' under [UNC-CH's] policy for a 'crime of violence' or 'nonforcible sex offense,' (2) the violation, and (3) the sanction imposed." Plaintiffs timely filed

notice of appeal from the trial court's order and final judgment.

Defendants complied with that portion of the trial court's order and final judgment relating to records regarding UNC-CH's employees, and both parties agree UNC-CH employees' records addressed in the order and judgment are not at issue on appeal.

II. Jurisdiction

Jurisdiction lies in this court over appeal of a final judgment of the superior court in a civil case. N.C. Gen. Stat. § 7A-27(b)(1) (2017).

III. Issue

Plaintiffs argue their public record's request for the disciplinary information of UNC-CH students falls within an exemption to FERPA's non-disclosure provisions and Defendants are required to comply with their Public Records Act request.

IV. Standard of Review

"Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *In re Proposed Assessments v. Jefferson-Pilot Life Ins. Co.*, 161 N.C. App. 558, 559, 589 S.E.2d 179, 180 (2003) (citation omitted). This appeal involves questions regarding the interpretation of FERPA and the Public Records Act. We review *de novo*.

V. Analysis

A. North Carolina Public Records Act

The Public Records Act is codified at N.C. Gen. Stat. §§ 132-1 to -11 (2017). The public policy underlying the Public Records Act is enunciated by the General Assembly at N.C. Gen. Stat. § 132-1(b), which provides, "The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost[.]"

The Public Records Act "affords the public a broad right of access to records in the possession of public agencies and their officials." *Times-News Publ'g Co. v. State of N.C.,* 124 N.C. App. 175, 177, 476 S.E.2d 450, 451-52 (1996), *disc. review denied,* 345 N.C. 645, 483 S.E.2d 717 (1997). "[T]he purpose of the Public Records Act is to grant liberal access to documents that meet the general definition of 'public records[.]' " *Jackson v. Charlotte Mecklenburg Hosp. Auth.*, 238 N.C. App. 351, 352, 768 S.E.2d 23, 24 (2014).

The Public Records Act defines "public records" to include "all . . . material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions." N.C. Gen. Stat. § 132-1(a).

The Public Records Act permits public access to all public records in an agency's possession "*unless* either the agency or the record is specifically exempted from the statute's mandate." *Times-News,* 124 N.C. App. at 177, 476 S.E.2d at 452 (emphasis supplied). "Exceptions and exemptions to the Public Records Act must be construed narrowly." *Carter-Hubbard Publ'g Co., Inc. v. WRMC Hosp. Operating Corp.*, 178 N.C. App. 621, 624, 633 S.E.2d 682, 684 (2006) (citation omitted), *aff'd*, 361 N.C. 233, 641 S.E.2d 301 (2007).

Here, the trial court correctly determined that the UNC-CH student disciplinary records requested by Plaintiffs are "public records" as defined by the Public Records Act at N.C. Gen. Stat. § 132-1(b). Neither party contests the trial court's determination and conclusion that the records at issue are "public records" under the Public Records Act. Also, neither party disputes that UNC-CH is a public agency of North Carolina and is subject to the Public Records Act. See N.C. Gen. Stat. § 132-1(b).

B. Family Educational Rights and Privacy Act

The Congress of the United States enacted FERPA in 1974 "under its spending power to condition the receipt of federal funds on certain requirements relating to the access and disclosure of student educational records." *Gonzaga Univ. v. Doe,* 536 U.S. 273, 278, 122 S. Ct. 2268, 2272-73, 153 L.Ed.2d 309, 318 (2002). "The Act directs the Secretary of Education to withhold federal funds from any public or private 'educational agency or institution' that fails

to comply with these conditions." *Id.* FERPA provides, in part, that:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of their parents to any individual, agency, or organization. . . .

20 U.S.C. § 1232g(b)(1).

FERPA defines "education records" as "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." 20 U.S.C. § 1232g(a)(4)(A); *see also* 34 C.F.R. § 99.3 (specifying definition of "education records" under FERPA). Plaintiffs and Defendants concede that UNC-CH receives federal funding and is generally subject to FERPA.

The parties also do not dispute the records Plaintiffs requested are "educational records." Twenty years ago with similar parties, this Court recognized that student disciplinary records are "educational records" for purposes of FERPA. *DTH Publ'g Corp. v. UNC-Chapel Hill*, 128 N.C. App. 534, 541, 496 S.E.2d 8, 13, *disc. review denied*, 348 N.C. 496, 510 S.E.2d 382 (1998); *see United States v. Miami Univ.,* 294 F.3d 797, 812 (6th Cir. 2002) ("[S]tudent

disciplinary records are education records because they directly relate to a student and are kept by that student's university.").

FERPA permits the release of certain student disciplinary records in several situations. FERPA expressly exempts and does not prohibit disclosure "to an alleged victim of any crime of violence . . . or a nonforcible sex offense, the final results of any disciplinary proceeding conducted by the institution against the alleged perpetrator . . . ." 20 U.S.C. § 1232g(b)(6)(A). Most relevant here is another exemption of FERPA, which allows an educational institution to release "the final results of any disciplinary proceeding . . . if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense." 20 U.S.C. § 1232g(b)(6)(B).

Plaintiffs assert: (1) this express exemption removes their request for disclosure from exclusion under FERPA's sanctions; (2) FERPA does not prohibit Defendants from complying with their request; and, (3) as a result, the express intent of the Public Records Act requires Defendants to comply with Plaintiffs' request.

Defendants contend § 1232g(b)(6)(B) of FERPA impliedly grants and requires educational institutions to exercise discretion when deciding whether to release the student disciplinary records admittedly exempted from FERPA's non-disclosure provisions. They argue the binding Public Records Act

conflicts with § 1232g(b)(6)(B) by removing the institution's discretion to decide whether to release the exempted records. Defendants assert "the federal Family Educational Rights and Privacy Act . . . governs the records at issue and precludes their release." Defendants conclude that to the extent the Public Records Act conflicts with FERPA's implied grant of discretion to UNC-CH, FERPA is supreme and pre-empts our Public Records Act, as federal law. The trial court agreed with Defendants' arguments.

C. Reconciling the Public Records Act and FERPA

1. Canons of Statutory Interpretation

To assess the parties' arguments, we must first determine whether a conflict exists between FERPA and the Public Records Act. In reviewing the relationship and any overlapping coverages between FERPA and the Public Records Act, we are guided by several well-established principles of statutory construction.

"The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998)). "The best indicia of that intent are the [plain] language of the statute . . ., the spirit of the act and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citations omitted).

"When construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself[.]" *State v. Ward*, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010). "Interpretations that would create a conflict between two or more statutes are to be avoided, and statutes should be reconciled with each other whenever possible." *Taylor v. Robinson*, 131 N.C. App. 337, 338, 508 S.E.2d 289, 291 (1998) (internal quotation marks and ellipses omitted) (citing *Meyer v. Walls,* 122 N.C. App. 507, 512, 471 S.E.2d 422, 426 (1996), *aff'd in part, rev'd in part,* 347 N.C. 97, 489 S.E.2d 880 (1997)).

"'[S]tatutes *in pari materia* must be read in context with each other.'" *News & Observer Publ'g Co. v. Wake Cty. Hosp. System, Inc.*, 55 N.C. App. 1, 7, 284 S.E.2d 542, 546 (1981) (quoting *Cedar Creek Enters. v. Dep't of Motor Vehicles*, 290 N.C. 450, 454, 226 S.E.2d 336, 338 (1976)). "'*In pari materia*' is defined as '[u]pon the same matter or subject.'" *Id.* at 7-8, 284 S.E.2d at 546 (quoting Black's Law Dictionary 898 (4th ed. 1968)).

Here, the "plain language" of § 1232g(b)(6)(B) of FERPA states:

> Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding . . . if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.

Defendants argue, and the trial court agreed, that this language requires UNC-CH to exercise discretion on whether to release the admittedly public records of the final results of disciplinary hearings. Defendants have not cited any case law interpreting FERPA to support their proposed interpretation of this provision. Plaintiffs argue the plain language of the statute does not support Defendants' and the trial court's interpretation.

Our comprehensive review of relevant case and statutory law from this and other jurisdictions, both state and federal, fails to disclose any authority interpreting FERPA's § 1232g(b)(6)(B) as providing to public postsecondary educational institutions an express absolute discretionary authority over whether to release FERPA-exempted student disciplinary records and subject to disclosure under its express terms.

The language "[n]othing . . . shall be construed to prohibit an institution . . . from disclosing the final results of any disciplinary proceeding" does not indicate any congressional intent to require educational institutions to exercise discretion over or before releasing FERPA-exempted student disciplinary records in contravention of unambiguous and broad state public records laws expressly requiring such disclosure. No language in § 1232g(b)(6)(B) or the corresponding Code of Federal Regulations provisions speak to whether an educational institution *must* exercise discretion over whether to disclose student disciplinary records. 20

U.S.C. § 1232g(b)(6)(B), 34 C.F.R. 99.31(a)(14). Defendants do not argue that the records Plaintiffs requested are prohibited or exempted from disclosure, or cannot be disclosed or released under § 1232g(b)(6)(B) without potential sanctions under FERPA.

The only language in § 1232g(b)(6)(B) that concerns an educational institution's purported "discretion" is: "if the institution *determines* as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense." 20 U.S.C. § 1232g(b)(6)(B) (emphasis supplied). Plaintiffs' records request is limited to students, who UNC-CH has already expressly determined to have engaged in such misconduct, and the records of which are expressly subject to disclosure under FERPA. 20 U.S.C. § 1232g(b)(6)(B).

UNC-CH's process used to determine whether a student violated school policy or crimes involves a completely different and separate determination from whether the admittedly public records relating to the discipline previously imposed for the misconduct should be released. FERPA's plain language in § 1232g(b)(6)(B) does not condition an educational institution's compliance on requiring the exercise of discretion to determine whether to release disciplinary records that FERPA expressly exempts from non-disclosure, in the face of a public records request.

Defendants' assertion of an absolute authority to exercise discretion on whether to release non-exempt records is undercut by other provisions of FERPA. § 1232g(b)(2)(B) provides:

> (2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless—
>
> . . .
>
> (B) except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency . . . .

20 U.S.C. § 1232g(b)(2)(B) (emphasis supplied).

The regulations implementing this provision provide:

> (a) An educational agency or institution may disclose personally identifiable information from an education record of a student without

> the consent required by § 99.30 if the disclosure meets one or more of the following conditions:
>
> . . .
>
> (9)(i) The disclosure is to comply with a *judicial order* or lawfully issued subpoena.

34 C.F.R. 99.31(a)(9)(i) (emphasis supplied).

Defendants' position that FERPA grants them absolute discretion to decide whether to release exempt disciplinary records is contradicted by these provisions, which do not prohibit an educational institution from complying with a judicial order. § 1232g(b)(2)(B) makes no distinction between a judicial order that *requires* disclosure and an order that *authorizes* disclosure. If a court orders an educational institution to release an exempt record, § 1232g(b)(2)(B) does not indicate the institution would be in violation of FERPA by complying with a mandatory court order. 20 U.S.C. § 1232g(b)(2)(B); 34 C.F.R. 99.31(a)(9)(i).

However, we note that we do not interpret § 1232g(b)(2)(B) as granting a court the authority to remove an education record's non-disclosable status by ordering its release. *See Press-Citizen Co. v. Univ. of Iowa,* 817 N.W.2d 480, 493 (Iowa 2012) (stating that "[it] would make no sense to interpret the 'judicial order' exception" in a way that would mean FERPA only has effect until a party requesting records obtains a court order compelling release).

Interpreting § 1232g(b)(2)(B) and § 1232g(b)(6)(B) together indicates an educational institution would not be subject to loss of funding or other sanction for complying with a judicial order mandating disclosure of records that are exempt from FERPA's protections. 20 U.S.C. § 1232g(b)(2)(B); § 1232g(b)(6)(B); *see In re Hayes*, 199 N.C. App. 69, 79, 681 S.E.2d 395, 401 (2009) ("Words and phrases of a statute are to be construed as a part of the composite whole[.]"), *disc. review denied*, 363 N.C. 803, 690 S.E.2d 695 (2010).

2. Public Records Held by Public Agency

We decline to interpret FERPA as advocated by Defendants. Such an interpretation conflicts with both the Public Records Act's mandatory disclosure requirements and the plain meaning of FERPA's § 1232g(b)(6)(B), which allows disclosure. *See Taylor*, 131 N.C. App. at 338, 508 S.E.2d at 291 ("Interpretations that would create a conflict between two or more statutes are to be avoided, and statutes should be reconciled with each other whenever possible.").

The disciplinary records at issue are stipulated by the parties to be "public records," and held by a "public agency" subject to the Public Records Act and that § 1232g(b)(6)(B) exempts them from FERPA's general non-disclosure of educational records.

3. Limitations on Disclosure

Plaintiffs request:

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

FERPA only authorizes disclosure of "the *name* of the student, the *violation* committed, and any *sanction* imposed by the institution on that student" from the general rule of non-disclosure of disciplinary records. 20 U.S.C. § 1232g(b)(6)(B) (emphasis supplied). The dates of offenses requested by Plaintiffs are not disclosable under FERPA. *See id.*

N.C. Gen. Stat. § 132-1(b) provides that the public may obtain copies of public records "unless *otherwise specifically provided by law*." N.C. Gen. Stat. § 132-1(b) (emphasis supplied). Because § 1232g(b)(6)(B) "otherwise specifically provide[s]" that only the information listed therein is subject to disclosure, the dates of student offenses are not subject to disclosure under the Public Records Act. *See id.*; 20 U.S.C. § 1232g(b)(6)(B).

No conflict exists between FERPA and the Public Records Act for UNC-CH to release the public records within Plaintiffs' limited and narrow requests. The express terms of FERPA permit the disclosure of the

information requested by Plaintiffs, except for the dates of violations. *See* 20 U.S.C. § 1232g(b)(6)(B). Defendants concede that if FERPA does not provide them the discretion to withhold what are admitted to be public records, they are compelled to release the records.

As qualified above, we hold Defendants, as administrators of a public agency, are required to comply with Plaintiffs' request to release the public records at issue under the Public Records Act. FERPA's § 1232g(b)(6)(B) does not prohibit Defendants' compliance, to the extent Plaintiffs' request the names of the offenders, the nature of each violation, and the sanctions imposed. Defendants' arguments are overruled.

D. Federal Pre-emption

Defendants also argue FERPA pre-empts the Public Records Act with respect to the Public Records Act's mandatory disclosure requirements. We disagree.

The Supremacy Clause of the Constitution of the United States provides that the laws of the United States, the Constitution and treaties "shall be the supreme Law of the Land." U.S. Const. Art. VI, cl 2. "Congress may pre-empt, i.e., invalidate, a state law through federal legislation" either expressly or implicitly. *Oneok, Inc. v. Learjet, Inc.*, —— U.S. ——, ——, 135 S. Ct. 1591, 1595, 191 L.Ed.2d 511, 517 (2015). "A reviewing court confronting this question begins its analysis with a presumption against federal

preemption." *State ex rel. Utilities Comm'n v. Carolina Power & Light Co.*, 359 N.C. 516, 525, 614 S.E.2d 281, 287 (2005) (citing *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715, 105 S. Ct. 2371, 2376, 85 L.Ed.2d 714, 722-23 (1985)).

The Congress of the United States may expressly pre-empt a state law "if the federal law contains explicit pre-emptive language." *Salzer v. King Kong Zoo*, 242 N.C. App. 120, 123, 773 S.E.2d 548, 550 (2015) (internal quotation marks and citations omitted). With respect to Plaintiffs' public records request, FERPA does not expressly pre-empt the Public Records Act, as neither § 1232g(b)(6)(B) nor any other provision of FERPA contains explicit language stating it pre-empts state public records laws. *See id.*

Defendants also argue UNC-CH is not required to comply with Plaintiffs' public records request under the theory of federal "implicit pre-emption." Implicit pre-emption can occur through either "conflict" or "field" pre-emption. *Id.* at 123-24, 773 S.E.2d at 551. Field pre-emption occurs where Congress "intended to foreclose any state regulation in the area, irrespective of whether state law is consistent with federal standards." *Oneok*, —— U.S. at ——, 135 S. Ct. at 1595, 191 L.Ed.2d at 511 (citation and quotation marks omitted). "In such situations, Congress has forbidden the State to take action in the field that the federal statute pre-empts." *Id.* (emphasis omitted).

Field pre-emption occurs when the federal government either "completely occupies a given field

or an identifiable portion of it." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212-13, 103 S. Ct. 1713, 1727, 75 L.Ed.2d 752, 770 (1983) (citation omitted).

> The intent to displace state law altogether can be inferred from a framework of regulation so pervasive . . . that Congress left no room for the States to supplement it or where there is a federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.

Arizona v. United States, 567 U.S. 387, 399, 132 S. Ct. 2492, 2501, 183 L.Ed.2d 351, 369 (2012) (internal quotations and citations omitted). "Field pre-emption is wrought by a manifestation of congressional intent to occupy an entire field such that even without a federal rule on some particular matter within the field, state regulation on that matter is pre-empted, leaving it untouched by either state or federal law." *Guyton v. FM Lending Servs., Inc.*, 199 N.C. App. 30, 44, 681 S.E.2d 465, 476 (2009) (citation omitted).

Here, FERPA contains no manifestation of congressional intent to occupy the field of public educational records and particularly those which are expressly exempted from FERPA's non-disclosure rules. The plain language of § 1232g(b)(6)(B) does not manifest such an intent. In looking to congressional intent, the statements from the Congressional Record of the U.S. Representative who introduced the amendment that would be codified as § 1232g(b)(6)(B)

of FERPA is salient and compelling. The stated intent and purpose of § 1232g(b)(6)(B) is to:

> [D]eal with the Family Educational Rights and Privacy Act that was passed in 1974 that basically has allowed universities, Federal[ly funded] universities, to withhold the release of names of students found by disciplinary proceedings to have committed crimes[.] I believe there should be a balance between one student's right of privacy to another student's right to know about a serious crime in his or her college community. The Foley amendment to the Higher Education Amendments Act of 1998 [P.L. 105-244] provides a well-balanced solution to the problem. It would remove the Federal protection that disciplinary records enjoy and *make reporting subject to the State laws that apply*.

144 Cong. Rec. H2,984, (daily ed. May 7, 1998) (statement of sponsor Rep. Foley) (emphasis supplied); *see* Zach Greenberg & Adam Goldstein, *Baking Common Sense into the FERPA Cake: How to Meaningfully Protect Student Rights and the Public Interest*, 44 J. Legis. 22, 26 (2017).

No indication from the text of § 1232g(b)(6)(B) nor within its legislative history supports the contention that Congress intended to occupy the field of educational records to such an extent that FERPA would pre-empt state public records laws with respect to public educational records that are expressly exempted from FERPA's protections.

The legislative history shows Congress intended that records exempted from FERPA under § 1232g(b)(6)(B) would be "subject to the State laws that apply." 144 Cong. Rec. H2,984, (daily ed. May 7, 1998) (statement of sponsor Rep. Foley). This intent is plainly inconsistent with "[t]he intent to displace state law." *Arizona*, 567 U.S. at 399, 132 S. Ct. at 2501, 183 L.Ed. 2d at 369. FERPA does not pre-empt the Public Records Law under the "field pre-emption" theory. *See id.*

Defendants also assert implied pre-emption under the "conflict pre-emption" theory. Conflict pre-emption occurs in two circumstances: (1) "where compliance with both state and federal law is impossible" and (2) "where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok,* —— U.S. at ——, 135 S. Ct. at 1595, 191 L.Ed.2d at 517 (internal quotation marks and citation omitted).

With regard to the first type of conflict pre-emption, it is possible for UNC-CH to comply with both § 1232g(b)(6)(B) and the Public Records Act. Whereas § 1232g(b)(6)(B) allows UNC-CH to disclose the records at issue without federal sanction, the Public Records Act expressly requires the requested records to be released. As discussed above, and contrary to Defendants' assertion, FERPA does not expressly or impliedly grant educational institutions the absolute discretion to decide whether to release exempt educational records. *See* 20 U.S.C. § 1232g(b)(6)(B). Defendants would not violate

§ 1232g(b)(6)(B) by disclosing and releasing the records Plaintiffs requested in order to comply with the Public Records Act.

With regard to the second type of conflict pre-emption Defendants assert, the Public Records Act disclosure requirements do not "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See Oneok,* —— U.S. at ——, 135 S. Ct. at 1595, 191 L.Ed.2d at 517. The plain text of § 1232g(b)(6)(B) permits Defendants disclosure of the limited information specifically listed therein. *See* 20 U.S.C. § 1232g(b)(6)(B). No indication in § 1232g(b)(6)(B) nor elsewhere in FERPA supports the contention that Congress established the objective of barring public records requests of information that it expressly exempted from FERPA's non-disclosure provisions.

The legislative history of § 1232g(b)(6)(B) indicates Congress' intent and objective in amending FERPA was to strike "a balance" between students' privacy rights and other students' and their parents' rights to know about dangerous individuals in campus communities. *See* 144 Cong. Rec. H2,984, (daily ed. May 7, 1998) (statement of Rep. Foley). Congress decided to strike this balance by "remov[ing] the Federal protection that disciplinary records enjoy and make reporting subject to the State laws that apply." *Id.* Compelling Defendants' compliance with the Public Records Act with regard to the limited and exempted information Plaintiffs have requested does not "stand[ ] as an obstacle to the accomplishment and

execution of the full purposes and objectives of Congress." *Oneok,* —— U.S. at ——, 135 S. Ct. at 1595, 191 L.Ed. 2d at 517.

Defendants cite *Fidelity Federal Savings and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 102 S. Ct. 3014, 73 L.Ed.2d 664 (1982), to support their pre-emption arguments. *Fidelity Federal* involved a regulation issued by the Federal Home Loan Bank Board ("FHLBB") that permitted federally-chartered savings and loan associations to exercise due-on-sale clauses. 458 U.S. at 141, 102 S. Ct. at 3016-17, 73 L.Ed.2d at 664. The preamble to the regulation provided "that the due-on-sale practices of federal savings and loan associations shall be governed 'exclusively by Federal law' and that the association 'shall not be bound by or subject to any conflicting State law which imposes different . . . due-on-sale requirements.'" *Id.* at 147, 102 S. Ct. at 3019, 73 L.Ed.2d at 671. California law limited mortgage lenders' exercise of due-on-sale clauses. *Id.* at 148-49, 102 S. Ct. at 3019-20, 73 L.Ed.2d at 672. California homeowners sued Fidelity Federal Savings and Loan Association for exercising the due-on-sale clauses in violation of California law. *Id.*

The Supreme Court of the United States determined the FHLBB's regulation pre-empted California law. *Id.* at 159, 102 S. Ct. at 3025-26, 73 L.Ed.2d at 679. Defendants cite this case for their proposition, "[w]here Congress legislates to define the discretion an organization may exercise, that legislation preempts state law curtailing that

discretion." Contrary to Defendants' assertion, *Fidelity Federal* is not analogous to the situation before us. The Supreme Court determined the FHLBB's regulation pre-empted California's conflicting law because the preamble to the FHLBB regulation expressly stated that federal savings and loans would not be subject to any state laws that imposed different requirements from federal laws. *Id.* An additional FHLBB regulation stated, "the due-on-sale practices of federal savings and loans 'shall be governed exclusively by the Board's regulations in preemption of and without regard to any limitations imposed by state law on either their inclusion or exercise.'" *Id.* (citation omitted).

Defendants also cite *Andrews v. Federal Home Loan Bank*, 998 F.2d 214 (4th Cir. 1993), for the proposition that where federal law allows for an organization to exercise discretion, any state law taking away that discretion is pre-empted. In *Andrews*, the United States Court of Appeals for the Fourth Circuit held that where federal law expressly provided, "The directors of each Federal Home Loan Bank . . . shall have power . . . to select, employ, and fix the compensation of such officers, employees, attorneys, and agents . . . and to *dismiss at pleasure* such officers, employees, attorneys, and agents[,]" a dismissed bank employee's wrongful termination claim under state law was pre-empted. 998 F.2d at 220 (emphasis in original) (citation omitted).

Unlike the express language of the federal statute in *Andrews*, nothing in § 1232g(b)(6)(B) of FERPA

purports to grant an educational institution express discretion over the release of exempt student records. To read § 1232g(b)(6)(B) as granting such discretion would contravene the intent of Congress to preserve or give states authority over disclosure of exempt student disciplinary records. See 144 Cong. Rec. H2,984, (daily ed. May 7, 1998) (statement of sponsor Rep. Foley).

Fidelity Federal and *Andrews* are patently distinguishable from the case at hand, because neither § 1232g(b)(6)(B), any other provision of FERPA, nor any relevant federal regulations expressly or impliedly pre-empt state law to grant educational institutions discretion over disclosure of exempt student disciplinary records. *See*, *e.g.*, 20 U.S.C. § 1232g(b)(6)(B).

Federal law does not pre-empt the Public Records Act with regard to the specific limited information sought in Plaintiffs' public records request, which is not otherwise prohibited from disclosure under § 1232g(b)(6)(B) of FERPA. Defendants have failed to overcome the presumption against federal pre-emption and their arguments are overruled. *See Carolina Power & Light Co.*, 359 N.C. at 525, 614 S.E.2d at 287 (stating the rule of presumption against federal pre-emption).

E. Policy Arguments

Defendants also assert numerous "policy arguments" concerning the effects of potential disclosure of the requested records at issue under

Title IX. See 20 U.S.C. §§ 1681-1688. After concluding that FERPA pre-empted the Public Records Act, the trial court declined to address Defendants' policy arguments, stating, "[T]he Court has not considered the policy reasons for UNC[-CH]'s exercise of discretion, UNC[-CH]'s desire to protect and nurture its students, or any other potentialities of disclosure."

Defendants argue the release of the specific records requested by Plaintiffs would interfere with UNC-CH's Title IX process for dealing with sexual assault by: (1) deterring victims and witnesses from coming forward and participating in UNC-CH's Title IX process; and, (2) by jeopardizing the safety of alleged sexual assault perpetrators.

"'It is critical to our system of government and the expectation of our citizens that the courts not assume the role of legislatures.' Normally, questions regarding public policy are for legislative determination." *In re N.T.*, 214 N.C. App. 136, 144, 715 S.E.2d 183, 188 (2011) (quoting *Cochrane v. City of Charlotte*, 148 N.C. App. 621, 628, 559 S.E.2d 260, 265 (2002)). We do not address the asserted merits of Defendants' policy arguments.

We note in passing, FERPA specifically mandates that any disclosures "may include the name of any other student, *such as a victim or witness, only with the written consent* of that other student." 20 U.S.C. § 1232g(b)(6)(C) (emphasis supplied).

VI. Conclusion

The Public Records Act requires UNC-CH, a public agency, to comply with Plaintiffs' public records request. FERPA does not prohibit the disclosure of the limited information requested by Plaintiffs, except for the dates of offenses. No indication from the text of § 1232g(b)(6)(B) or within its legislative history supports Defendants' assertion that Congress intended to occupy the field of educational records to such an extent that FERPA pre-empts state public records laws with respect to public educational records that are expressly exempted from FERPA's protections. The legislative history of the 1998 amendments to FERPA shows Congress intended that records exempted from FERPA under § 1232g(b)(6)(B) would be "subject to the State laws that apply." 144 Cong. Rec. H2,984, (daily ed. May 7, 1998) (statement of sponsor Rep. Foley).

FERPA expressly limits the educational records release and disclosures to:

> the final results of any disciplinary proceeding—[and] (i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and (ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student.

20 U.S.C. § 1232g(b)(6)(B)-(C).

Defendants must comply with Plaintiffs' public records request to release the student disciplinary records at issue, as provided above. That portion of the superior court's order and judgment appealed from, and as contrary to our holding, is reversed. This cause is remanded to the superior court for further proceedings as are necessary and consistent herewith. *It is so ordered.*

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Judges BRYANT and ELMORE concur.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
STATE OF NORTH CAROLINA
COUNTY OF WAKE
16-CVS-14300

May 9, 2017

DTH MEDIA CORPORATION; CAPITOL BROADCASTING COMPANY, INC.; THE CHARLOTTE OBSERVER PUBLISHING COMPANY; THE DURHAM HERALD COMPANY; Plaintiffs,

v.

CAROL L. FOLT, in her official capacity as Chancellor of The University of North Carolina at Chapel Hill, and GAVIN YOUNG, in his official capacity as Senior Director of Public Records for The University of North Carolina at Chapel Hill, Defendants.

ORDER AND FINAL JUDGMENT

This matter was assigned under Tenth Judicial District Civil Superior Court Rule 2.2 and came on for hearing before the undersigned on April 6, 2017 on the Plaintiffs' Request for Declaratory Judgment The Plaintiffs appeared through Hugh Stevens and Mike Tadych of the law firm Stevens Martin Vaughn & Tadych, PLLC. The Defendants appeared through Special Deputy Attorney General Stephanie Brennan

of the North Carolina Attorney General's Office. The issue before the Court was whether the Public Records Act, N.C.G.S. §§ 1321 *et seq.,* requires the Defendants to disclose certain disciplinary records sought by Plaintiffs concerning persons found to have violated the University's policy related to sexual assaults and related misconduct at The University of North Carolina at Chapel Hill ("UNC").

Findings of Fact

The parties, through their respective counsel of record, stipulated to the following factual statements, which are adopted by the Court:

1. This action is brought pursuant to the North Carolina Public Records Law, N.C. Gen. Stat. §§ 132-1 *et seq*. and the North Carolina Uniform Declaratory Judgments Act, N.C. Gen. Stat. §§ 1-253 *et seq*. The plaintiffs are news organizations that regularly cover The University of North Carolina at Chapel Hill ("UNC"). The defendants, who are sued in their official capacities, are the Chancellor and the Senior Director of Public Records for UNC.

2. This action arises out of public records requests made by the plaintiffs to UNC, including the request set out in a letter dated September 30, 2016. That letter asked UNC to provide "copies of all public records made or received by The University of North Carolina at Chapel Hill ('the University') in connection with a person having been found responsible for rape, sexual assault or any related or lesser included sexual misconduct by the UNC Chapel

Hill Honor Court, the Committee on Student Conduct, or the Equal Opportunity and Compliance Office."

3. UNC responded to [the request] by a letter dated October 28, 2016 and signed by Joel G. Curran, UNC's Vice Chancellor for Communications and Public Affairs.

4. In subsequent conversations, including a mediation conducted pursuant to N.C. Gen. Stat § 7A-38.3E, the plaintiffs narrowed their request to encompass records in the custody of UNC that include (a) the name of any person who, since January 1, 2007, has been found responsible for rape, sexual assault or any related or lesser included sexual misconduct by the UNC Honor Court, the Committee on Student Conduct, or the Equal Opportunity and Compliance Office; (b) the date and nature of each violation for which each such person found responsible; and (c) the sanctions imposed on each such person for each such violation.

5. UNC has records that contain information sought by Plaintiffs in their narrowed request. Some of the records relate to persons who are students, or who were students when the records that relate to them were created. UNC also has records that relate to persons who are UNC employees, or who were UNC employees when the records that relate to them were created.

Conclusions of Law

The Court makes the following conclusions of law:

1. Plaintiffs seek records that are public records as defined in N.C.G.S. § 132-1(a). These records are the property of the people as expressed in N.C.G.S. § 132-1(b). However, while these records ordinarily are obtainable by the people under the Public Records Act, an exception exists where "otherwise specifically provided by law." N.C.G.S. § 132-1(b).

AS TO STUDENT RECORDS:

2. As to disciplinary records sought by Plaintiffs concerning students, the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, otherwise specifically provides. Student disciplinary records generally are deemed to be "educational records" protected from public disclosure by FERPA. *DTH Publ'g Corp. v. Univ. of N.C.*, 128 N.C. App. 534, 540-42, 496 S.E.2d 8, 12-13 (1998); *see also U.S. v. Miami University*, 294 F.3d 797 (6th Cir. 2002).

3. In 20 U.S.C. § 1232g(b)(6), FERPA grants the University the discretion to determine whether to release (1) the name of any student found "responsible" under University policy of a "crime of violence" or "nonforcible sex offense," (2) the violation, and (3) the sanction imposed. The University may disclose (but is not required to disclose) this

information only if the University determines that the student violated the University's rules or policies. *Id.* § 1232g(b)(6)(B). The information that may be disclosed at the University's discretion is limited to "the final results of any disciplinary proceeding," which must include "only the name of the student, the violation committed, and any sanction imposed by the institution on that student." 20 U.S.C. § 1232g(b)(6)(C)(i). 20 U.S.C. § 1232g(b)(6) provides, in relevant part:

> (B) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence (as that term is defined in section 16 of Title 18), or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.
>
> (C) For the purpose of this paragraph, the final results of any disciplinary proceeding—
>
> (i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and

(ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student.

4. The Supremacy Clause provides that the laws of the United States, the Constitution, and treaties "shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Congress can preempt a state law through federal legislation either expressly or implicitly. *E.g.*, *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595, 191 L. Ed. 2d 511, 517 (2015). Implicit preemption can be accomplished through "conflict" or "field preemption." *Id.* In either situation, federal law controls over state law.

5. Field preemption occurs where Congress "intended to foreclose any state regulation in the area, irrespective of whether state law is consistent or inconsistent with federal standards." *Id.* (internal quotes removed). "In such situations, Congress has forbidden the State to take action in the field that the federal statute pre-empts." *Id.* Field preemption occurs when the federal government either "completely occupies a given field or an identifiable portion of it." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212-13, 103 S. Ct. 1713, 1726-27 (1983).

6. Conflict preemption occurs in two circumstances: (1) "where compliance with both state and federal law is impossible" and (2) "where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of

Congress." *Oneok, Inc.*, 135 S. Ct. at 1595, 191 L. Ed. 2d at 517 (internal quotes removed).

7. To the extent the Public Records Act requires disclosure of the requested records, it is implicitly preempted by federal law through both field and conflict preemption. Field preemption applies because Congress has spoken in the area of student educational records, including disciplinary records, in a blanket effort to address the confidentiality and privacy of such records.

8. Conflict preemption also applies because it is not possible for Defendants to comply with federal law by exercising the University's discretion to determine whether to disclose information and also to comply with mandatory disclosure under state law. Strict application of the Public Records Act would not permit Defendants to act in accordance with federal law. Federal law makes disclosure of the information in Section 1232g(b)(6)(B) permissive – it neither requires nor prevents disclosure. But federal law also places discretion squarely in the hands of the University concerning disclosure. Overlying state law to require disclosure in every case would not permit the University to comply with federal law, because it would substitute mandatory disclosure in every case for the application of reasoned discretion required by federal law. In order to comply with federal law, the University must exercise discretion.

9. The reasons and justification for the University's exercise of discretion are not considered -- and need not be considered -- by the Court in its

determination of the legal issues at hand. In making these findings of fact and conclusions of law and arriving at this decision and Order, therefore, the Court has not considered the policy reasons for UNC's exercise of discretion, UNC's desire to protect and nurture its students, or any other potentialities of disclosure.

10. Because Congress has spoken on this issue through FERPA and FERPA "otherwise specifically provide[s]," the records sought by Plaintiffs concerning students are not obtainable by the people.

AS TO EMPLOYEE RECORDS:

11. As to disciplinary records sought by Plaintiffs involving employees, the State Human Resources Act provides that, except as specifically provided, personnel records of UNC employees are confidential and are not subject to the Public Records Act. N.C.G.S. § 126-22.

12. Under the State Human Resources Act, certain specified information about a state employee is public, including: "Date and type of each dismissal, suspension, or demotion for disciplinary reasons . . . . If the disciplinary action was a dismissal, a copy of the written notice of the final decision of the head of the department setting forth the specific acts or omissions that are the basis of the dismissal." N.C.G.S. § 126-23(a)(l1). Otherwise, "[a]ll other information contained in a personnel file is confidential" and not subject to public disclosure. N.C.G.S. § 126-24.

13. Except as to the information specifically made public by N.C.G.S. § 126-23, therefore, the State Human Resources Act "otherwise specifically provide[s]," and the records sought by Plaintiffs concerning employees are not public records obtainable by the people.

THEREFORE, it is hereby ORDERED as follows:

1. Plaintiffs' request for declaratory judgment and other relief is DENIED and judgment is GRANTED in favor of Defendants, except as to employee records that are designated as public under N.C.G.S. § 126-23, as specified below. As to the records sought by Plaintiffs concerning discipline of students, Defendants need not produce such records.

2. As to records sought concerning discipline of employees, the University shall provide Plaintiff with records setting forth the "date and type of each dismissal, suspension or demotion for disciplinary reasons" for any employee found responsible under University policy for rape, sexual assault or any related or lesser included sexual misconduct by the UNC Honor Court, the Committee on Student Conduct, or the Equal Opportunity and Compliance Office from January 1, 2007 through the date of this Order. If the disciplinary action was a dismissal, the University shall also provide a copy of the dismissal letter. The University need not provide any FERPA protected student information in these records.

3. Because Plaintiffs did not substantially prevail pursuant to N.C.G.S. § 132-9(c), Plaintiffs' request for attorneys' fees is DENIED.

This ORDER disposes of all issues in this case and the Court certifies that there is no just reason for delay as to entry of final judgment. The Court therefore enters FINAL JUDGMENT. IT IS SO ORDERED.

/s/ Allen Baddour
The Honorable Allen Baddour
Superior Court Judge

United States Constitution

Article VI

Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Code

Title 20

Education

Chapter 31

General Provisions Concerning Education

Subchapter III

General Requirements and Conditions Concerning Operation and Administration of Education Programs: General Authority of Secretary

Part 4

Records; Privacy; Limitations on Withholding Federal Funds

§ 1232g Family educational and privacy rights

. . .

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

. . .

(6) . . .

(B) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence (as that term is defined in section 16 of Title 18), or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.

North Carolina General Statutes

Chapter 132

Public Records

§ 132-1 "Public records" defined

. . .

(b) The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law. As used herein, "minimal cost" shall mean the actual cost of reproducing the public record or public information.

Code of Federal Regulations

Title 34

Education

Subtitle A

Office of the Secretary, Department of Education

Part 99

Family Educational Rights and Privacy

Subpart D

May an Educational Agency or Institution Disclose Personally Identifiable Information from Education Records?

§ 99.31 Under what conditions is prior consent not required to disclose information?

(a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:

. . .

(12) The disclosure is to the parent of a student who is not an eligible student or to the student.

. . .

(14)

(i) The disclosure, subject to the requirements in § 99.39, is in connection with a disciplinary proceeding at an institution of postsecondary education. The institution must not disclose the final results of the disciplinary proceeding unless it determines that—

(A) The student is an alleged perpetrator of a crime of violence or non-forcible sex offense; and

(B) With respect to the allegation made against him or her, the student has committed a violation of the institution's rules or policies.

(ii) The institution may not disclose the name of any other student, including a victim or witness, without the prior written consent of the other student.

(iii) This section applies only to disciplinary proceedings in which the final results were reached on or after October 7, 1998.

. . .

(d) Paragraphs (a) and (b) of this section do not require an educational agency or institution or any other party to disclose education records or information from education records to any party except for parties under paragraph (a)(12) of this section.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
STATE OF NORTH CAROLINA
COUNTY OF WAKE
16-CVS-14300

DTH MEDIA CORPORATION; CAPITOL BROADCASTING COMPANY, INC.; THE CHARLOTTE OBSERVER PUBLISHING COMPANY; THE DURHAM HERALD COMPANY; Plaintiffs,

v.

CAROL L. FOLT, in her official capacity as Chancellor of The University of North Carolina at Chapel Hill, and GAVIN YOUNG, in his official capacity as Senior Director of Public Records for The University of North Carolina at Chapel Hill, Defendants.

AFFIDAVIT OF CHRISTIANE HURT

Christiane Hurt, first being duly sworn, hereby deposes and says:

Background

1. I am more than eighteen (18) years of age and am competent to give testimony in this matter.

2. I currently serve as Assistant Vice Chancellor for Student Affairs and Chief of Staff to the Vice Chancellor for Student Affairs at The University of

North Carolina at Chapel Hill ("University") and have served in that role since July 1, 2014. In this capacity, I am responsible for serving as the liaison between Student Affairs and the University's Title IX staff members, supporting and representing the Vice Chancellor on University initiatives and matters that affect students, and overseeing communications for Student Affairs.

3. In my role, I am aware that the University has accepted substantial federal funding and that this funding is critically important to the University.

4. Prior to serving as the Assistant Vice Chancellor for Student Affairs and Chief of Staff, I served as the Director of the Carolina Women's Center at the University from January 2013 to July 31, 2016. In this role, I advocated for a wide-range of gender-equity issues, including violence prevention. I also assessed campus needs and developed responsive educational programming.

5. From May 2013 through December 2013, I served as the University's Interim Title IX Coordinator. In this capacity, I provided oversight and leadership related to Title IX compliance and oversaw the University's response to an investigation of reports alleging gender-based discrimination, harassment, and sexual assault.

6. I also served as Chair of the University's Title IX Policy Task Force, a 22-person committee comprised of students, faculty, staff, and community members who met for more than a year to recommend

revisions to the University's Title IX policy and process for addressing reports of discrimination, harassment, and sexual violence involving students.

7. Prior to the adoption of the current University Policy, the University had another policy in place to address prohibited harassment, including sexual misconduct, and discrimination. That policy was initially effective June 24, 2008 and was revised several times. Exhibit 11 is a true and correct copy of that policy as revised by amendments through May 1, 2013.

8. For the 20 years prior to joining the University, I held administrative positions with the National Sexual Assault Resource Sharing Project, the Washington Coalition of Sexual Assault Programs, and the Orange County Rape Crisis Center.

9. I have participated in numerous training programs regarding Title IX compliance, trauma-informed investigation of Title IX reports, the Family Educational Rights and Privacy Act of 1972 ("FERPA"), and related topics. These training programs have been sponsored by the National Association of College and University Attorneys, by the Association of Title IX Administrators, and by leading Title IX experts Gina Maisto Smith and Leslie Gomez, partners at the law firm of Cozen O'Connor.

10. Through my professional experience, I have developed expertise regarding best practices in responding to the needs of victims of sexual assault.

11. I strongly believe that the release of either Title IX files or the identities of individuals who have been found responsible ("Responding Parties") through the University's Title IX process would irrevocably harm both the students who report alleged assaults ("Reporting Parties") and Responding Parties.

12. I also strongly believe that the release of identities of individuals and/or Title IX records would irrevocably damage the efficacy of the University's Title IX process.

Consequences for Reporting Parties

13. Reporting Parties want control over their story, and they want to be sure information they provide regarding the sexual violence they have experienced is used exactly as they intend. Reporting Parties want privacy before, during, and after the investigation and adjudication process. They want to [know] how information is shared, what information will be used, and who has access to that information at every step of the process.

14. During meetings of the University's Title IX Policy Task Force, we addressed the sharing of information, and it was clear that Reporting Parties needed definitive answers about reports of sexual violence—where these reports were going and who accesses them.

15. In all of these settings, Reporting Parties consistently have concerns about privacy, and the

University, in turn, repeatedly must assure them that we take their privacy seriously.

16. In my experience, survivors of sexual assault usually do not come forward if they even suspect that they will not have control over own story. This fact was a significant driver in the University's development of confidential campus resources, which are designated individuals and offices at the University who help connect survivors to resources and to support options while guaranteeing their confidentiality. These resources can be effective, in large part, because they are able to promise that they will not share information about any reported incident of sexual assault with a single other person or office. These resources are critically important to our campus community.

17. Survivors' desire for control and confidentiality is also a significant reason that many choose to access the University's Title IX process who do not elect to be involved with criminal proceedings.

18. As the University has developed its Title IX policy and process, we have taken into account that students do not want other individuals, particularly other students, to know about what they have experienced. As evidence of this deeply-held sentiment, the student representatives on the Title IX Policy Task Force strongly lobbied to remove students from the hearing panels that adjudicate Title IX reports. This decision to do so was made because, for students, privacy and confidentiality were the most significant priorities in the development of a policy

that would address sexual assaults involving students.

19. We know that in 85 or 90 percent—if not 100 percent—of the sexual violence reports the University receives, the parties are known to each other and frequently have been in a relationship with each other. Their friend groups therefore know their connections. Reporting Parties are often concerned that if the identity of the Responding Party is made known, it will be easy to identify Reporting Parties, and their narrative will no longer be within their control. Reporting Parties generally do not want the stigma of being a sexual assault victim unless they have chosen to come forward. But they absolutely do not want to be outed, which would be an entirely disempowering event.

20. My primary concern with the possibility of releasing the identities of Responding Parties to media outlets is that this will create a very significant chilling effect upon reporting and seeking help. As a result, students who have experienced sexual violence will not come forward for help or adjudication. This would not only prevent the University from assisting Reporting Parties by providing information about options and support resources, but it would also prevent the University from learning about potential serial offenders who pose a danger to our campus community.

21. The very real potential that the identities of Reporting Parties could be exposed publicly through the disclose of the names of Responding Parties would

compound the impact of the trauma that Reporting Parties have experienced in a way that I find absolutely untenable.

22. A Reporting Party's confidentiality and privacy is breached if information about the case and the reported conduct is made public without the Reporting Party's consent—regardless of whether the Reporting Party's name is redacted.

Consequences for Responding Parties

23. I am additionally concerned about the harm Responding Parties would experience as a result of public exposure. We have seen instances when once the identity of a Responding Party becomes known to our community, the public exacts retribution. If a Responding Party has legitimately served their sanction and is no longer a threat to the community but is harassed by the community because of a past violation, that does not help the Responding Party reintegrate into the University. These Responding Parties, themselves, can become victims of harassment.

24. During the meetings of the Title IX Policy Task Force, the group intentionally focused on developing a restorative process. Releasing the names of Responding Parties drives us far away from that restorative place. Our community wanted a process where we allowed for healing and where we allowed for as much control by Reporting Parties as possible. Releasing the names of Responding Parties would potentially brand people as pariahs and make it

unsafe for them to be at the University even if a sanction permits their presence.

Conclusion

23 [*sic*]. I strongly oppose the possibility of having the University release to the news media the names of Responding Parties in our Title IX process because I believe that doing so will have irreparable and significant consequences for both Reporting and Responding Parties and for the University's Title IX Process.

24 [*sic*]. I understand and appreciate the desire to hold the University accountable for addressing sexual violence, to learn whether we are doing what we say we are doing, to understand whether the sanctions we impose are stiff and significant. But the news media does not have to obtain the identities of Responding Parties or specific investigation files to evaluate the University's handling of sexual assault reports. Instead, the news media can assess the aggregate, de-identified data the University regularly releases about its Title IX process and outcomes and could conduct interviews with relevant University officials to learn more about the Title IX operation.

25 [*sic*]. Whether the name of a Responding Party is released to the public or to the news media should be the decision of the Reporting Party. The University should not be required to usurp the discretion of survivors in making this determination.

Further affiant sayeth not.

[SIGNATURE PAGE FOLLOWS]

This the 3rd of April, 2017.

/s/ Christiane Hurt
Christiane Hurt

Signed and sworn before me this
the 3rd day of April, 2017. [NOTARY SEAL]

/s/ Justin A. Moody
Notary Public

My Commission Expires: 12-13-2020

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
STATE OF NORTH CAROLINA
COUNTY OF WAKE
16-CVS-14300

DTH MEDIA CORPORATION; CAPITOL BROADCASTING COMPANY, INC.; THE CHARLOTTE OBSERVER PUBLISHING COMPANY; THE DURHAM HERALD COMPANY; Plaintiffs,

v.

CAROL L. FOLT, in her official capacity as Chancellor of The University of North Carolina at Chapel Hill, and GAVIN YOUNG, in his official capacity as Senior Director of Public Records for The University of North Carolina at Chapel Hill, Defendants.

AFFIDAVIT OF KATHERINE B. NOLAN

Katherine B. Nolan, first being duly sworn, hereby deposes and says:

Background

1. I am more than eighteen (18) years of age and competent to give testimony in this matter.

2. I am the Interim Title IX Compliance Coordinator at The University of North Carolina at Chapel Hill ("University") and have served in that

role since November 2014. In this capacity, I coordinate the University's response to all reports of sex and gender discrimination, including sexual harassment, sexual assault, interpersonal violence, stalking, sexual exploitation, and related retaliation. I also routinely interact with students to explain the University's process for addressing reports of sexual misconduct, to discuss available support and resource options, to answer questions, and to address concerns.

3. Prior to serving as the Interim Title IX Compliance Coordinator at the University, I served as the Title IX Coordinator at The University of Alabama from May 2012 through May 2013.

4. I received my Juris Doctorate from the University in May 2008.

5. I have participated in numerous training programs regarding Title IX compliance, trauma-informed investigation of Title IX reports, the Family Educational Rights and Privacy Act of 1972 ("FERPA"), and related topics. These training programs have been sponsored by the National Association of College and University Attorneys, by the Association of Title IX Administrators, by United Educators, and by leading Title IX experts Gina Maisto Smith and Leslie Gomez, partners at the law firm of Cozen O'Connor.

The University's Title IX Responsibilities

6. Title IX of the Education Amendments of 1972, 20 U.S.C. sections 1681 *et seq.*, and its implementing

regulations, 34 C.F.R. Part 106, states that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

7. The U.S. Department of Education's Office for Civil Rights ("OCR"), in several guidance documents interpreting Title IX, including most significantly in its April 4, 2011 "Dear Colleague" letter, has made clear that "[s]exual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX," Russlynn Ali, *"Dear Colleague"* Letter, U.S. Dep't of Educ. (April 4, 2011),https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf, at 1. Exhibit 1 is a true and correct copy of the Dear Colleague Letter.

8. In 2014, OCR issued further guidance in its "Questions and Answers on Title IX and Sexual Violence," U.S. Dep't of Educ. (April 29, 2014), http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf. Exhibit 2 is a true and correct copy of OCR's Q&A.

9. OCR's "Dear Colleague" Letter states that regardless of whether a college or university receives a complaint, "a school that knows, or reasonably should know, about possible harassment must promptly investigate what occurred and then take appropriate steps to resolve the situation." "Dear Colleague," at 4.

10. Additionally, in order for colleges and universities to comply with Title IX, institutions must publish a notice of nondiscrimination, designate a Title IX Coordinator, and adopt and publish grievance procedures.

11. Specifically with respect to grievance procedures, the "Dear Colleague" Letter requires that the University:

a. Conduct "adequate, reliable, and impartial investigations of complaints" which includes the opportunity for the parties to present witnesses and other evidence;

b. Provide both parties with similar and timely access to the evidence that will be used at a hearing;

c. Employ a "preponderance of the evidence" standard for determining whether an accused student has committed a violation of Title IX;

d. Assure that all individuals involved in the investigation, adjudication, and resolution of Title IX complaints have adequate training;

e. Provide both parties simultaneous notice of the outcome of a complaint; and

f. Provide the parties with identical opportunities to appeal the determination.

12. In order to implement the requirements of Title IX as articulated in the "Dear Colleague" Letter,

the University instituted a Policy on Prohibited Discrimination, Harassment, and Related Misconduct ("University Policy"). Exhibit 3 is a true and correct copy of the University Policy.

13. The University also adopted procedures for implementing the policy. There are procedures for the reporting party and procedures for the responding party. Exhibit 4 is a true and correct copy of the various procedures used, depending on the status of the parties.

14. A 22-person task force comprised of student, faculty, staff, and community members met for more than a year to develop recommendations which would ultimately form the basis of the current University Policy. The University consulted with national experts in developing the policy, and the policy is considered a national model.

15. The University Policy (Ex. 3) and Procedures (Ex. 4) describe support and resources available to reporting parties and responding parties; interim protective measures to address the safety concerns of reporting parties; processes for investigation and adjudication; and potential sanctions and remedies.

16. The Equal Opportunity and Compliance Office ("EOC Office"), is the designated office to receive reports of sexual harassment, including sexual violence. In many cases we facilitate support services such as implementing accommodations, interim measures, and connecting students to other

services and support on campus and in the community.

17. Consistent with Title IX and the University Policy, when the University receives a report of sexual violence or when the University has actual or constructive knowledge of sexual violence, the EOC Office evaluates all available information as well as the wishes of the student who reported the sexual assault ("Reporting Party") to determine how to proceed.

18. In addition, where the Responding Party is a student, our office immediately refers cases involving violence to the Emergency Evaluation and Action Committee ("EEAC") to determine whether the Responding Party poses a serious threat of disruption to the academic process or a continuing danger to members of the University community or University property. The EEAC has broad authority to consider relevant safety concerns and take appropriate measures, including suspension from the campus and all student activities. Exhibit 5 is a true and correct copy of the University's EEAC Policy and Procedures.

19. In the event that the EOC Office or Title IX Coordinator determines that an investigation is warranted, an investigator designated by EOC or the Title IX Coordinator performs the following tasks:

a. Notifies the parties that the matter will proceed to investigation;

b. Conducts interviews with the Reporting Party and the alleged perpetrator ("Responding Party");

c. Prepares statements based upon the interviews of the Reporting and Responding Party and allows each party to review and edit their interview statement;

d. Gathers evidence relevant to the allegations, which may include text messages, email messages, social media posts, photographs, and security camera video footage[;]

e. Conducts interviews with all relevant witnesses;

f. Reviews any pertinent medical records, including any available reports and photographs completed as part of a sexual assault examination;

g. Prepares a draft report of the investigator's factual findings, which the parties have the opportunity to review and provide comment on;

h. Communicates and coordinates with law enforcement when appropriate; and

i. Issues a final investigation report which may contain a determination of responsibility based upon a preponderance of the evidence standard and a recommended sanction and remedy.

20. As set forth in Exhibits 3 and 4, some cases are resolved at the investigation phase, but others

may proceed to a hearing. Regardless of the manner of resolution, a Responding Party may choose to accept responsibility at any stage in the process.

21. Parties' appeal rights are set forth in Exhibit 4, University Procedures.

The University's Title IX Investigation Files

22. Given the thorough nature of the investigations the EOC Office conducts, the file that corresponds to an investigation is typically quite voluminous and detailed. That file often contains the following records:

a. Initial report received from Reporting Party;

b. Summaries of interviews conducted with the Reporting and Responding Parties;

c. Summaries of interviews conducted with witnesses;

d. Text messages, email messages, social media posts, photographs, and security camera footage provided by the Reporting Party, the Responding Party, and/or witnesses;

e. Correspondence between the parties and the witnesses;

f. Medical records related to the Reporting Party, including information derived from a sexual assault examination;

g. A report of the sexual assault nurse examiner, which typically describes any injuries the Reporting Party has suffered, including bruising or tearing of the Reporting Party's vagina;

h. Photographs taken during a sexual assault examination of the Reporting Party, including of the Reporting Party's vagina;

i. Information from law enforcement if applicable;

j. Drafts of the EOC Investigator's report; and

k. The final investigation report of the EOC Investigator.

23. These case files contain very personal and sensitive information about the parties and the witnesses. As such, we employ a number of security precautions to assure that these files remain confidential and are not inappropriately accessed. These files are accessed on computers that are password-protected. To the extent these computers are portable (i.e., laptops), these computers are encrypted. In addition, the files are stored on a secure server that is accessible only to individuals within the EOC Office who have a legitimate need to know the information contained within these files. Moreover, the computers that access the secure server are subject to regular security scans that identify potential vulnerabilities. Finally, our physical office space is locked at all times and is accessible only to

those who have the entry code to unlock the door or to those with scheduled appointments.

24. Many of these files contain the medical records describing the condition and injuries sustained by the Reporting Parties. These files often contain photographs of these injuries, including pictures of the Reporting Party's vagina.

25. Additionally, these files contain the interview statements of the parties and witnesses, which often reference specific, identifying details such as the names of the student organizations to which they belong (e.g., Greek organizations); where they live; where they are from; their relationship to one another; the courses they take; the location and date where the alleged incident occurred; what they were wearing; and other details, the sum total of which may render the statement identifiable even if the identity of the party or witness were redacted.

26. Participants in the Title IX process are asked to maintain confidentiality during the process to protect the integrity of the proceedings.

Consequences for Reporting Parties

27. Based upon my work and experience, I believe that releasing any of these records and/or the identities of Responding Parties who have been found responsible for sexual assault and other forms of sexual misconduct through the University's Title IX process will have a number of very negative and very serious consequences.

28. Privacy and confidentiality are of the utmost importance to the vast majority of the Reporting Parties with whom I have interacted at the University. They often struggle with the decision to even tell someone that they have been assaulted. Often they do not want the alleged perpetrator to know that they have reported an incident, but come to our office to seek support, resources, and accommodations.

29. In many instances, Reporting Parties request that we promise not to share their name with the Responding Party during an investigation or ultimately decide that they do not want to move forward with an investigation precisely because they do not want their identities to be known to anyone else.

30. If we had to tell Reporting Parties that the name of the Responding Party may ultimately be shared with the news media, I am confident that a number of Reporting Parties would never even contact us for assistance. Additionally, if potential Reporting Parties preemptively see others names in the media, they may never walk in the door to seek help for fear of media exposure. As a result, the University would not be able to provide Reporting Parties with critical support and resources and to discuss with them their options for pursuing resolution. Additionally, the University's ability to investigate reports of sexual violence and to prevent future instances of sexual assault would be compromised.

31. I am also concerned that if the University were to publicly identify a Responding Party, the identity of the Reporting Party would easily become known to our campus community. In my experience reviewing and responding to reports of sexual violence, I have found that most sexual assaults are perpetrated by people the Reporting Party knows. As a result, the identity of someone found responsible for sexual assault will often be an individual in the Reporting Party's friend group or someone others might recognize as a romantic partner of the Reporting Party.

32. Additionally, if the University released the identity of a Responding Party to the news media, the Responding Party may feel the need to defend himself or herself publicly and, in doing so, may specifically identify the Reporting Party who initiated the investigation.

33. The likelihood that a Reporting Party's identity would become public knowledge is something that a Reporting Party does not currently anticipate when they walk in the door to report their assault. The University cannot prevent a Responding Party from speaking publicly and disclosing the identity of the Reporting Party. In cases in which the identities of Reporting Parties have become known publicly, we are aware that these Reporting Parties have received unwanted harassment and/or threats of violence.

34. Reporting Parties currently maintain the ability to share their story with the news media and to name their alleged perpetrator, and I am aware of

this having occurred. This decision should always be at the discretion of the Reporting Party and not an automatic practice of the University.

35. Many Reporting Parties elect the University Title IX process over the criminal process because of privacy and confidentiality concerns. The criminal process is part of the public domain. By contrast, in the University process, we can better maintain the privacy of Reporting Parties. I therefore think it is critical for the University to err on the side of being protective of the Reporting Parties who come forward seeking a more private process through which to address an incident of sexual violence.

Consequences for Responding Parties

36. Title IX confers upon the University the responsibility to protect all of our students from retaliation associated with the investigation of reports of sexual assault. I am deeply concerned about our ability to prevent Responding Parties from experiencing retaliation if their names become public.

37. In the few cases in which the identities of Responding Parties have become known publicly, we are aware that these Responding Parties have received threats of violence and have feared for their safety.

38. I am also concerned that if the University were forced to release the names of Responding Parties to the news media, Responding Parties would refuse to participate in our investigations. As a result,

the University's investigation could be delayed or stymied altogether, which in turn would negatively affect the Reporting Party and add risk to the greater University community.

39. Additionally, there have been a number of occasions when Responding Parties have accepted responsibility for the alleged conduct. This has occurred more often than we anticipated and has benefitted Reporting Parties because it relieves them from having to endure a hearing and/or an appeals process. If, however, Responding Parties knew that their names would be shared with the news media in the event that they accepted responsibility for their conduct, I anticipate that they would no longer be willing to admit the allegations and accept responsibility.

40. It is also important to note that the University's Title IX investigation and adjudication process is much different than the criminal process. As previously described, individuals found responsible through our Title IX process are subjected to the lowest standard of proof (i.e., preponderance of the evidence). Many are close cases that tum on complex issues of capacity and consent. As a result, the conclusion that an individual violated our University policy is a far different outcome than a judicial determination that in individual committed a crime. Yet the release of the identity of a Responding Party could subject the Responding Party to consequences far greater than those imposed by the University process.

Consequences for Witness Participation

41. In addition to potentially exposing the identities of Reporting Parties, I am concerned that releasing the names of Responding Parties could implicate the witnesses who participate in an investigation.

42. I believe that if our students knew that the names of Responding Parties would be disclosed to the news media, they would be less likely to agree to be interviewed as part of our process because the media attention would necessarily elevate the risk of their own exposure and the potential for retaliation as a result of their participation in an investigation.

43. We need people to participate in our process because we want to gather all of the information and evidence we can obtain so we can arrive at an informed and just outcome. The University has no power to compel witnesses to participate in the process.

44. As previously noted, in my experience, most incidents of assault happen at parties or in situations where Responding Parties are present with their friend groups. During the course of an investigation, my office will routinely interview friends of the Responding Party to gather information relevant to the allegations. I fear that if witnesses knew their identities could be deduced from the disclosure of the names of Responding Parties, witnesses would refuse to participate in an investigation due to fear of

alienation and consternation from the Responding Party or their friend group.

45. Currently, witnesses sometimes decline to participate in an investigation for fear that they will be ostracized. For example, members of small and tight-knit communities of students (e.g., student-athletes, the Greek system, small cohorts in graduate and professional programs, housing communities) are generally reluctant to risk alienating their friends by participating in investigations. Often these witnesses do not want their names referenced in our investigation reports and instead request anonymity. Were we to indicate that information regarding an investigation could ultimately be public, I am concerned that witness participation would decline even further.

Conclusion

46. The release of the identities of Responding Parties in our Title IX process to the news media would have grave and irreversible consequences for the Reporting Parties, Responding Parties, and witnesses who participate in our Title IX investigations.

47. If required to disclose the names of Responding Patties, my experience and training inform me and my opinion based on my training and experience is that Reporting Parties will no longer access our process and take advantage of the support and resources the University can and does provide. It is also my opinion based on my experience and

training that Responding Parties would face retaliation if their identities were publicly available. Finally, my experience and training inform me and it is my opinion that both Responding Parties and witnesses would refuse to participate in our investigations process, which would jeopardize our ability to address allegations of sexual violence, redress the effects of any such incidents, and prevent their recurrence.

Further affiant sayeth not.

[SIGNATURE PAGE FOLLOWS]

This the 31st of March, 2017.

/s/ Katherine B. Nolan
Katherine B. Nolan

Signed and sworn before me this
the 31st day of March, 2017. [NOTARY SEAL]

/s/ Justin A. Moody
Notary Public

My Commission Expires: 12-13-2020

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
STATE OF NORTH CAROLINA
COUNTY OF WAKE
16-CVS-14300

DTH MEDIA CORPORATION; CAPITOL BROADCASTING COMPANY, INC.; THE CHARLOTTE OBSERVER PUBLISHING COMPANY; THE DURHAM HERALD COMPANY; Plaintiffs,

v.

CAROL L. FOLT, in her official capacity as Chancellor of The University of North Carolina at Chapel Hill, and GAVIN YOUNG, in his official capacity as Senior Director of Public Records for The University of North Carolina at Chapel Hill, Defendants.

AFFIDAVIT OF EW QUIMBAYA-WINSHIP

Ew Quimbaya-Winship, first being duly sworn, hereby deposes and says:

Background

1. I am more than eighteen (18) years of age and competent to give testimony in this matter.

2. I am the Student Complaint/Deputy Title IX Coordinator at The University of North Carolina at Chapel Hill ("University") and have served in that

role since Spring 2013. In this capacity, I am the initial point of contact for students who wish to report an incident of discrimination or harassment, including sexual assault or sexual violence ("Reporting Parties"). I am also responsible for advising Reporting Parties about available support options. Additionally, I provide information to accused students ("Responding Parties") about the University's investigation and adjudication process and about available support resources.

3. Prior to serving as the Student Complaint/ Deputy Title IX Coordinator at the University, I served as Title IX Co-Coordinator and Director of the RISE Program at Warren Wilson College in Asheville, North Carolina from Summer 2011 to Spring 2013. The RISE Program was a sexual assault and interpersonal violence program that offered crisis response services and prevention education programming. Additionally, I have presented at Department of Justice conferences on various prevention education programs provided at Rochester Institute of Technology ("RIT"). From the Fall of 2002 to the Fall 2008, I was the Educational Program Coordinator in the Women's Center at RIT. From the Fall 2004 to Fall 2006, I served as a Primary Investigator for the Department of Justice/Office on Violence Against Women Grant to Reduce Violent Crimes Against Women on Campus Program. I share this to add that work accomplished by the RIT team at that time was captured in a study funded by the U.S. Department of Justice and published in the February 2003 "Report on Social Norms". The report

stated that work accomplished under this grant demonstrated one of the only examples in the literature of a sexual assault educational campaign that successfully decreased the incidence of assaults.

4. I have participated in numerous training programs regarding Title IX compliance, trauma-informed investigation of Title IX reports, the Family Educational Rights and Privacy Act of 1972 ("FERPA"), and related topics. These training programs have been sponsored by the National Association of College and University Attorneys, by the Association of Title IX Administrators, by the U.S. Department of Justice, and by leading Title IX experts Gina Maisto Smith and Leslie Gomez, partners at the law firm of Cozen O'Connor.

Consequences for Reporting Parties

5. I am deeply concerned that being requited to release the names of Responding Parties to the news media will compromise the University's ability to effectively address reports of sexual violence and will negatively affect the safety and well-being of Reporting Parties.

6. Some of my earliest memories when I first joined the University are of meeting Reporting Parties whose immediate concerns centered around confidentiality. Whether *The Daily Tar Heel* would find out about their report was a specific concern for many. At that time, the University was the subject of news reports about complaints that had been filed against the University with the U.S. Department of

Education's Office for Civil Rights. I had to talk with Reporting Parties about that and build their trust. Sometimes it took several meetings before they would share any real information about what had happened to them. And some of them never shared this information. Students have become more willing to disclose information about sexual assault to me over the years. But of late, I have observed that students are once again concerned about media attention in response to a recent, very prominent incident of alleged sexual assault.

7. The concern about the potential for media attention is compounded by the inaccurate information that is sometimes conveyed by news reports regarding Title IX. For example, *The Daily Tar Heel* published an article about responsible employees at the University, and this article contained misinformation about the obligations of those employees. The headline of this article was "Mandatory Reporting" and conveyed false information about what responsible employees must do when they receive a report of sexual assault. Many University Title IX officials contributed to that article and tried to dispel the notion that responsible employees engage in rote mandatory reporting. *The Daily Tar Heel*, however, ignored the distinctions I and others made between the expectations of responsible employees and the concept of mandatory reporting.

8. As a result of this false information, I encountered a number of Reporting Parties who did

not understand the role of responsible employees and who did not know who they could entrust with their stories. The article evoked a lot of distrust. When students who are informed about their need for safety hear things that differ from the information I share with them, they question my honesty and the integrity of the University's Title IX process. This cycle repeats every time a news report contains misinformation that contradicts what I have previously shared with them. Students then come back to check what I have previously stated. As a result, I spend a lot of time doing damage control.

9. I firmly believe that Reporting Parties will feel exposed if the University were to disclose the names of Responding Parties. They will feel that their story is being hijacked by other people. Reporting Parties even become nervous about the aggregate, statistical data the University must disclose in accordance with the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act") and the annual report described in the Policy on Prohibited Discrimination, Harassment and Related Misconduct ("Policy").

10. When I meet with Reporting Parties, it is my practice to tell them up front about who I am, the information I share, and who I share it with. My practice is also to tell them that I report non-identifiable information about incidents of sexual violence (e.g., when the incident occurred, where the incident occurred), and they often become very nervous. Some refuse to continue the conversation

despite the fact that the only information I share for Clery Act compliance purposes contains no identifiable information, and the only person I tell is with the UNC Police (formerly the University's Department of Public Safety).

11. Reporting Parties want to control when and how their information is shared. If you take that from them, it becomes uncomfortable and may even perpetuate their sense of feeling unsafe. Despite my assurance that when I share very general information with UNC Police, UNC Police will never know who they are and will certainly never contact them to follow up about their report, I would estimate that about 20 to 25 percent of the Reporting Parties I talk to immediately start editing their stories or end our conversation altogether when they learn that I have to share minimal de-identified information for Clery purposes.

12. Some Reporting Parties do not want to see the Responding Party punished in any way. Instead, some Reporting Parties come forward to request that I help educate Responding Parties and assist them in understanding the consequences of their actions. If appropriate, our office can move forward with an educational intervention for the Responding Party. For the Reporting Parties that do not request a formal investigation, I believe that a University practice of releasing the names of Responding Parties would discourage them from contacting me and from disclosing an assault.

13. Students may share their story if they want to do so. There is nothing stopping a Reporting Party from publicly releasing information about an assault they experienced, including the name of the alleged perpetrator. But this is entirely different than the University sharing that same information. Reporting Parties want to have the ability to disclose what they want, when they want, with whom they want. If the University were required to disclose publicly information about a report, the Reporting Party may be put into a position where they have to face the public's scrutiny of their report. Which, in the end, may only serve to revictimize the Reporting Party.

14. Releasing the names of alleged perpetrators would empower Responding Parties to disclose information about Reporting Parties—including those who desperately seek privacy and confidentiality. If I name an offender publicly, what would keep the offender from mentioning the name of the Reporting Party? I worry about the scenario where a media outlet calls a Responding Party, and the Responding Party names the Reporting Party and calls them a liar. The first time that happens, it will be so destructive to the persons involved and to our work.

15. In domestic violence situations in particular, disclosing the name of an offender can be dangerous for the Reporting Party. The desire for revenge becomes a significant safety concern.

16. More generally, releasing the names of Responding Parties will almost certainly have a

chilling effect on our process. Any perceived risk of exposure will chill reporting.

17. As a result of this chilling effect, I am concerned that if Reporting Parties do not come forward, we will lose the opportunity to provide them with critical support services and resources. We have a number of accommodations, protective measures, and supports that we can offer to Reporting Parties, both on campus and within the community. We can coordinate medical attention, counseling services, assistance with academic adjustments, and protective measures to assure their safety, among others. In fact, these are the vast majority of services that we do provide. If we do not have the chance to even meet these Reporting Parties, we will lose the opportunity to help them.

18. The consequences of students failing to report a sexual assault are serious. I recall a student who did not report her sexual assault and, as a result, did not access medical services or counseling. She ended up with a sexually-transmitted infection that damaged her reproductive system. She may now have difficulty getting pregnant. With timely medical, treatment, she could have obtained treatment for her condition.

19. I am also aware of a number of situations in which Reporting Parties did not come forward and ended up failing courses or dropping out of school.

20. I have encountered Reporting Parties who did not share information about an assault who went

on to suffer serious psychological difficulties, including but not limited to posttraumatic stress disorder, anxiety, and depression.

21. I am also aware of some Reporting Parties did not tell us about their assaults and who instead engaged in risky coping behaviors, including alcohol and drug abuse.

Consequences for Responding Parties

22. In addition to gravely affecting Reporting Parties, there is a legitimate concern as to what would happen to Responding Parties in the event that we publicly expose their identities. Based on my experience and how people react to an individual being accused to sexual misconduct, releasing the names of responsible parties would likely give rise to a witch hunt. In one of the few cases in which the identity of a Responding Party was known to our campus community, that student became terrified to go to class.

23. The mob mentality, the desire for vigilante justice is a risk for Responding Parties. The people who are accused and even found responsible have the right to be safe, and I do not see that happening when they are known publicly. They become ostracized.

24. I understand that one of the reasons the news media is seeking information about the identities of Responding Parties is because they want to hold the University accountable for assuring the safety of our campus community. But just because a

Responding Party's behavior has violated our Policy does not automatically make that individual an ongoing threat.

25. Some Responding Parties acknowledge and accept what they have done. We are an educational institution. Our response is not incarceration or loss of liberty. Our response is informed by our educational mission—to provide educational opportunities and a safe space to learn in, including for the Responding Party in appropriate cases. We are a community that believes in responsibility, but also redemption wherever possible. What I saw more times than not when I previously worked with offenders is that they wanted to learn and to understand what they did wrong. The campus and the community's desire for retribution can interfere with that learning process.

26. When the University believes there is ongoing threat to our campus community, the University takes immediate action. The University has an assessment team, the Emergency Evaluation and Action Committee (EEAC), that is comprised of individuals from UNC Police, the Office of the Dean of Students, Title IX, and others. The team will gather information from other campus offices in order to make a careful and thorough assessment of the facts. These assessments may ultimately lead to interim suspensions of Responding Parties, trespass orders from campus, and timely warnings that are distributed to all members of our campus community.

27. We care deeply about our students, and our first priority is always their well-being.

Consequences for Witnesses

28. Just as Reporting Parties fear that their names will end up in the newspaper, so to do witnesses who want to be supportive and helpful but who fear retaliation based upon the possibility of public disclosure. My experience is that witnesses fear not only that they will be named publicly, but that people in their communities will be able to figure out that they have participated in a report.

29. In the short time since this lawsuit was filed, I have separately met with two students who have expressed concerns about serving as a witness in Title IX investigations. They both expressed reluctance to participate in the Title IX investigation process specifically because of the risk that their names would be made available publicly.

Conclusion

30. Based on my experience in dealing with victims of sexual misconduct, I firmly believe that releasing the names of Responding Parties to the news media would have dire consequences for Reporting Parties. Too many survivors already live in the shadows. I am certain that the prospect of the University sharing the names of their perpetrators could result in their re-traumatization and would drive them further underground. In addition, my experience informs me that disclosing the names of

Responding Parties would jeopardize their own safety. I would urge the news media to reconsider their request. I believe there are other ways for the media to learn about our Title IX process and about how we work every day to keep our campus safe.

Further affiant sayeth not.

[SIGNATURE PAGE FOLLOWS]

This the 3rd of April, 2017.

/s/ Ew Quimbaya-Winship
Ew Quimbaya-Winship

Signed and sworn before me this
the 3rd day of April, 2017. [NOTARY SEAL]

/s/ Justin A. Moody
Notary Public

My Commission Expires: 12-13-2020

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
STATE OF NORTH CAROLINA
COUNTY OF WAKE
16-CVS-14300

DTH MEDIA CORPORATION; CAPITOL BROADCASTING COMPANY, INC.; THE CHARLOTTE OBSERVER PUBLISHING COMPANY; THE DURHAM HERALD COMPANY; Plaintiffs,

v.

CAROL L. FOLT, in her official capacity as Chancellor of The University of North Carolina at Chapel Hill, and GAVIN YOUNG, in his official capacity as Senior Director of Public Records for The University of North Carolina at Chapel Hill, Defendants.

AFFIDAVIT OF FELICIA WASHINGTON

Felicia Washington, first being duly sworn, hereby deposes and says:

Background

1. I am more than eighteen (18) years of age and competent to give testimony in this matter.

2. I am the Vice Chancellor for Workforce Strategy, Equity and Engagement at the University of North Carolina at Chapel Hill and have served in

that role since 2014. Prior to serving as a Vice Chancellor, I was a member of the University's Board of Trustees from 2010 to 2014. Prior to my current position, I was also a partner at K&L Gates, ILP, focusing on employment and business immigration law. I was with K&L Gates, LLP and Kennedy Covington from 1990 through December 2013. I earned a Bachelor's degree in economics from UNC-Chapel Hill in 1987, and a Juris Doctor from the University of Virginia School of Law in 1990.

3. As Vice Chancellor for Workforce Strategy, Equity and Engagement, I am responsible for overseeing the Division of Workforce Strategy, Equity and Engagement ("DWSEE"). I am responsible for the administration of, and compliance with, federal and state laws and UNC-system and UNC-Chapel Hill policies regarding human resources management, equal opportunity, and prohibited harassment and discrimination.

4. DWSEE consists of three units: the Office of Human Resources; the Equal Opportunity and Compliance Office ("EOC"); and the Office of Diversity and Multicultural Affairs. These three offices work to implement strategies for supporting and enriching Carolina's workforce, complying with BO/ADA laws, and enhancing inclusiveness across all parts of our campus.

5. One of these units, the BOC Office, has primary responsibility for developing, implementing, and executing policies and activities that arise from the University's commitment to foster equitable

treatment to employees and students and its obligation to comply with employment laws, the Americans with Disabilities Act, Title IX, and other related state and federal laws and regulations.

6. The BOC Office oversees the implementation of the University's Policy on Prohibited Discrimination, Harassment and Related Misconduct, Including Sexual and Gender-Based Harassment, Sexual Violence, Interpersonal Violence and Stalking.

7. Becci Menghini, Senior Associate Vice Chancellor for the Division of Workforce Strategy, oversees the BOC Office and serves as my chief of staff. Katie Nolan, the University's Interim Title IX Compliance Coordinator, reports to Menghini, and has a dotted-line reporting relationship to me.

8. I am aware that the University has accepted substantial federal funding and that this funding is critically important to the University.

9. I have substantial expertise in and have participated in numerous training programs regarding Title IX compliance and related topics. Additionally, I understand the obligations imposed by the Family Educational Rights and Privacy Act of 1972 ("FERPA") and have worked to help the University comply with these obligations.

The University's Title IX Process

10. The University has developed a thorough, careful, and detailed policy and related procedures to

meet its Title IX responsibilities related to sexual violence and sexual and gender-based harassment. Exhibit 3 is the University's Policy on Prohibited Discrimination, Harassment, and Related Misconduct ("University Policy"), and Exhibit 4 is related procedures that are utilized depending on the status of the parties ("Procedures").

11. The University's implementation of the University Policy and Procedures is important and complex, and the University takes its responsibilities very seriously.

12. In the University's Process, parties are referred to as Reporting Parties and Responding Parties.

13. The University Policy and Procedures describe support and resources available to Reporting Parties and Responding Parties; interim protective measures to address the safety concerns of Reporting Parties; processes for investigation and adjudication; and potential sanctions and remedies.

14. Title IX requires the University to have a process that is completely separate from any criminal proceeding; however, individuals who report that they have experienced sexual assault may also separately pursue criminal or civil proceedings. The Violence Against Women Reauthorization Act (VAWA) requires the University to expressly provide Reporting Parties (a) the option "to" report to and seek assistance from law enforcement *and* (b) the option "not to" report and seek assistance from law

enforcement, due to the public nature of the law enforcement process.

15. Though the application of the University Policy, the University determines whether the University Policy was violated, not whether a crime has occurred.

16. The primary goals of the University Policy are to provide a safe and equitable environment for all members of the Carolina community. In keeping with these goals, the University seeks to educate, rehabilitate, and hold responsible students who are found to have violated the University Policy.

17. There are multiple paths to resolution available to individuals affected by the types of conduct prohibited under the University Policy, and only some Reporting Parties choose to proceed to an investigation and, subsequently, a hearing before a University Hearing Panel. Exhibit 4A contains a detailed chart that sets forth various paths to resolution. (*See* Ex. 4A at 11)

18. Regardless of the manner of resolution, a Responding Party who is a student may choose to accept responsibility for a University Policy violation at any stage in the process, and many Responding Parties do so.

19. The standard for a finding a student "responsible" under the University Policy is a "preponderance of the evidence" standard, as is required by the U.S. Department of Education's Office

of Civil Rights, as compared to the "beyond a reasonable doubt" standard used in criminal proceedings. Thus, cases where the evidence tips 50.1% in favor of a finding of responsibility and 49.9% against will result in a finding of responsibility under University Policy.

20. In cases in which parties are found responsible and sanctions are imposed by the University, the University may impose a wide range of sanctions, from training and education on the one hand to suspension from the University or expulsion in more egregious cases. Under the UNC Policy Manual, expulsion means expelled from every university in the UNC System. UNC Policy Manual § 700.4.3[G](3).

The University's Title IX Cases

21. The University addresses a range of Title IX reports that fall within a wide spectrum. In most cases that are reported to the University, the Reporting and Responding Parties know each other, and, in many cases, they have dated or been in a relationship. The cases typically do not involve stranger rape.

22. Many of the encounters at issue involve alcohol consumption by one or both parties.

23. In many cases, the only witnesses to the critical portion of the encounter are the Reporting and Responding Parties, and their accounts and memories may differ.

24. For all of these reasons, many cases that are reported to us raise difficult questions of capacity, consent, and credibility.

25. Accordingly, and in light of our application of the preponderance standard, which, again, is the standard required by the U.S. Department of Education's Office of Civil Rights, the University is called upon to resolve many close and difficult cases.

The University's Commitment to Confidentiality

26. The University is committed to protecting confidentiality and privacy, to the greatest extent possible, in the Title IX process. Privacy is not only mandated by federal law, it is essential to the effectiveness of our work.

27. Under FERPA, the University has discretion to disclose the final results of disciplinary proceedings conducted by the University against a student who is an alleged perpetrator of any crime of violence, or a nonforcible sex offense, if the result constituted a violation of the University's Policy. In this context, final result means the name of the student, the violation committed, and the sanction imposed. The University has determined that releasing this information would be highly detrimental to the University's Title IX process and would not be in the best interest of the University or its students. Therefore, the University generally maintains the privacy of this information.

28. The University's decision to maintain confidentiality has been based on significant and weighty considerations about the potential impact on the University's Title IX process and involved parties.

29. In many cases, the Reporting Party desires confidentiality and does not want their own name, the responsible student's name, and/or other details to be released to the public.

30. The privacy of campus proceedings is a reason many Reporting Parties opt to pursue their options on campus rather than through criminal proceedings.

31. Because Reporting Parties can frequently be linked to responsible students (particularly in the age of google and social media), Reporting Parties may reasonably fear that they will be identified if the responsible student's name becomes public. Releasing names of responsible parties also may prompt those parties to publicly name the Reporting Party in response to press inquiries.

32. Witnesses, too, may be deterred from participating in the process if the press receives Title IX files and results and investigates and/or reports on them.

33. In addition, both Reporting and Responding Parties who are named publicly can be subject to harassment, retaliation, and retribution—effectively imposing a punishment beyond the University's sanction, potentially threatening the student's safety

and hindering the University's ability to educate and rehabilitate students through the Title IX process.

34. Moreover, requiring the release of final results, including naming the responsible student, would strongly discourage accused students from accepting responsibility without contesting allegations—a highly desired outcome that avoids unnecessary re-traumatization and decreases the length of the adjudication process.

35. For all of these reasons, the University has determined that public release of the name of the responsible student generally does not serve the University or its students' best interests.

36. University employees are subject to the provisions of the State Human Resources Act related to the privacy of personnel records. Information that is deemed public under the Act is available for public inspection, but all other personnel records are confidentially maintained.

Protecting The University Community

37. The University has determined that releasing the final results of individual Title IX proceedings, including the responsible student's name, generally is not necessary for safety reasons. The University has other ways to protect the University community and the public at large.

38. Under University Policy, the University provides interim protective measures to include no

trespass orders. In addition, cases involving violence are referred to the Emergency Evaluation and Action Committee ("EEAC") to determine whether the Responding Party poses a serious threat of disruption to the academic process or a continuing danger to members of the University community or University property. Exhibit 5 is a true and correct copy of the University's EEAC policy. The EEAC committee has broad authority to consider relevant safety concerns and take responsive measures in appropriate cases, to include interim suspensions.

39. The University takes immediate action when there is an ongoing threat to our campus community. The Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act, 20 U.S.C. § 1092(t) ("Clery Act"), requires the University to warn the campus community of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or staff occurring on the campus, and the University follows this requirement.

40. In cases in which an investigation or adjudication is pending or where there is an active sanction of probation, suspension or expulsion for violating University Policy, that is noted on the student's transcript. If a student withdraws prior to resolution, that is noted on the transcript as well.

Accountability Mechanisms

41. Many mechanisms exist for accountability, which allow the parties and the public to obtain information about the Title IX process.

42. It is important to understand that private attorneys are involved in many of the matters that proceed to investigation and hearing, which provides a direct element of accountability to the parties.

43. Further, the University Policy provides for a comprehensive annual review of the University's Title IX process with involvement of multiple constituents, so that the process is continuously assessed, evaluated, and improved. As part of the annual review, an annual report is made publicly available. The report contains detailed, aggregated data about the cases we see under the University Policy. The annual report contains information about reports of misconduct under the Policy, as well as specific initiatives the University took during the 2014-15 academic year to strengthen its Policy, procedures, trainings, outreach, and resources. Exhibit 6 is a true and correct copy of our 2014-15 Annual Report.

44. The University also complies with the reporting requirements of the Clery Act, including releasing an Annual Security Report. That annual report includes crime, arrest and disciplinary referral statistics compiled from information reported to UNC Police (formerly the University's Department of Public Safety), UNC Health Care Police, the

Department of Housing and Residential Education, the Office of the Dean of Students, the Title IX and Equal Opportunity and Compliance Office, the Office of Student Conduct, other University units, and law enforcement agencies in the area. Exhibit 7 is a true and correct copy of relevant excerpts from the University's most recent Annual Security report.

45. In addition, in April 2015, the University participated in the Association of American Universities ("AAU") Campus Climate Survey on Sexual Assault and Sexual Misconduct. The AAU sought to gain a detailed understanding of the general campus climate regarding sexual assault, sexual harassment, intimate partner violence, and stalking and to help collect institution-specific data to guide prevention and support efforts. The survey captured data that may or may not have been reported to University officials.

46. In September 2015, AAU released aggregate survey data. The University made UNC-Chapel Hill specific information publicly available. Exhibit 8 is a true and correct copy of infographics capturing preliminary takeaways from the survey data. In addition, the more detailed UNC-Chapel Hill report and data tables can be accessed online at http://safe.unc.edu/create-change/aau-survey/.

47. Finally, we have had students who were dissatisfied with the Title IX process or its results exercise their rights to file complaints with the Office of Civil Rights or civil lawsuits against the University.

Plaintiffs' Requests

48. Plaintiffs' request for records and for the University to name names of responsible students has the potential to derail the University's hard work in developing effective Title IX policies and procedures, as well as the hard-fought progress we have made in building trust with members of the campus community who experience sexual assault and related violations.

49. Although we have made important progress in providing improved mechanisms for reporting and more resources for students, with a significant increase in the number of reports requiring formal investigations for nearly all forms of misconduct under the University Policy, we know that there are still many incidents that do not get reported.

50. The trust we have built, and our commitment to privacy, is essential to encouraging students to come forward as Reporting Parties. But that trust is fragile and could be destroyed by one highly publicized incident. It would invariably be destroyed by the public naming of names. If the process we have so carefully constructed is not accessed, the University will be powerless to effectively address the pressing issue of sexual assault in our campus community.

Conclusion

51. As discussed herein, the University has developed very thorough and detailed policies and

procedures for handling cases of sexual misconduct and gender-based harassment under Title IX. The University is deeply concerned that granting Plaintiffs' request for records would have a devastating and irreversible impact on the University's efforts to address sexual assaults and related issues in the University community.

Further affiant sayeth not.

[SIGNATURE PAGE FOLLOWS]

This the 4th of April, 2017.

/s/ Felicia Washington
Felicia Washington

Signed and sworn before me this
the 4th day of April, 2017. [NOTARY SEAL]

/s/ Justin A. Moody
Notary Public

My Commission Expires: 12-13-2020