Volume 20 | Issue 2 Article 8

2013

ESPN v. Ohio State: The Ohio Supreme Court Uses FERPA to Play Defense for Offensive Athletic Programs

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Casenotes

ESPN v. OHIO STATE: THE OHIO SUPREME COURT USES FERPA TO PLAY DEFENSE FOR OFFENSIVE ATHLETIC PROGRAMS

I. Introduction

On May 30, 2011, what was once unthinkable happened in the state of Ohio.[1] Jim Tressel, one of the most successful and revered football coaches in the history of The Ohio State University ("Ohio State"), resigned in disgrace.[2] Affectionately known as "The Vest" for the grey sweater vest he wore to each game, it was uncovered that Tressel had known about major violations of National Collegiate Athletic Association ("NCAA") rules by Ohio State football players and failed to report them to the University and to the NCAA.[3] In the course of investigating the incidents leading up to

1. *Compare* Nat'l Collegiate Athletic Ass'n, NCAA Football Coaching Records (2010), *available at* http://fs.ncaa.org/Docs/stats/football_records/DI/2010/Coaching.pdf (listing Jim Tressel as twenty-ninth winningest coach in Division I college football history), *with* George Dohrman & David Epstein, *The Fall of Jim Tressel*, Sports Illustrated (June 6, 2011), http://sportsillustrated.cnn.com/vault/article/magazine/MAG1186822/index.htm (describing Jim Tressel's resignation in disgrace). As a collegiate football coach in the state of Ohio, Jim Tressel amassed 229 wins and lost only 78 games, making him statistically the second most successful division I collegiate football coach in Ohio history measured by number of wins, only behind Woody Hays. *See* Nat'l Collegiate Athletic Ass'n, *supra*.

2. *See* Dohrman & Epstein, *supra* note 1 (explaining Ohio State football coach Jim Tressel's sudden ignominious resignation).

3. *See id.* (expressing how Jim Tressel knew of major NCAA rules violations within Ohio State's football program, but did not report any violations, initially claiming he was not aware of any violations). Under NCAA rules, it is the duty of any person involved in an intercollegiate athletics program to report a violation of NCAA rules, and failure to do so by an athletic director or anyone with compliance responsibility could result in a finding that the university lacks institutional control. *See* NCAA Comm. on Infractions, Principles of Institutional Control 3, *available at* http://www.athletics.illinois.edu/compliance/pdfs/institutional/Principles-of-Institutional-Control.pdf. A finding by the NCAA of "lack of institutional control" within a collegiate athletic program can result in suspension of the program. *See, e.g.*, Julie A. Hill, Morehouse College Public Infractions Report 3 (Nov. 5, 2003), *available at* https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=PublicReport&key=565&publicTerms=THIS%20PHRASE%20WILL%20NOT%20BE%20REPEATED (suspending Morehouse College's men's soccer program as result of, *inter alia*, lack of institutional control). Furthermore, failing to disclose potential violations is considered "one of the NCAA's cardinal sins and almost always leads to a coach's dismissal or resignation." *See* Dohrman & Epstein, *supra* note 1.

Tressel's resignation, media outlets were able to expose an athletic program rife with corruption that had been successfully hidden for years due to power and prestige Ohio State's athletic program possessed.[4]

ESPN, a sports-entertainment company, was one of the many news media companies to investigate the corruption that was occurring within Ohio State's football program.[5] One of the targets of ESPN's investigation was Ohio State quarterback Terrelle Pryor, who had allegedly been receiving improper benefits that were illegal under NCAA rules, such as cash, access to sports cars and free tattoos, while an amateur collegiate football player.[6] In the course of its investigation of Pryor, ESPN requested a number of documents relating to Pryor from Ohio State through Ohio's public records law.[7] When Ohio State refused to provide a certain number of the requested documents, ESPN filed suit, requesting a writ of mandamus from the Ohio Supreme Court to compel the disclosure of the withheld documents, a request which ultimately failed.[8]

Over the years, college sports have dealt with numerous scandals, ranging from drug use to academic corruption to athlete bribery.[9] Yet despite the crippling sanctions the NCAA often levies in

4. *See* Dohrman & Epstein, *supra* note 1 (describing extent of corruption and rule violations that existed within Ohio State Football program while Tressel was head coach). During the course of investigating the Ohio State program, media outlets were able to uncover a number of other violations in addition to the violations by Terrelle Pryor, including allegations that over twenty other players had swapped Ohio State memorabilia for tattoos, allegations that players had swapped memorabilia for marijuana, received money from school boosters, and had been provided access to heavily discounted cars. *See id.* (explaining various alleged allegations of NCAA rules violations at Ohio State while Jim Tressel was head football coach). Tressel allegedly also "broke NCAA rules" while an assistant coach at Ohio State in the mid-1980s. *See id.*

5. *See* State *ex rel.* ESPN, Inc. v. Ohio State Univ., 970 N.E.2d 939, 942 (Ohio 2012) (noting both ESPN and other media outlets' investigation through numerous open records requests); *id.* (defining ESPN as global sports-entertainment company).

6. *See id.* (explaining relation of Terrelle Pryor to ESPN's investigation of Ohio State). For a further discussion of ESPN's investigation of the improper benefits received by Terrelle Pryor, see *infra* notes 24-42 and accompanying text.

7. *See ESPN*, 970 N.E.2d at 942-43 (stating that ESPN requested access to seven categories of records through "public-records requests"). For a further discussion of ESPN's investigation of Ohio State, see *infra* notes 33-42 and accompanying text.

8. *See ESPN*, 970 N.E.2d at 943 (recounting that ESPN filed suit seeking writ of mandamus to compel Ohio State to provide withheld documents subsequent to Ohio State's rejection of ESPN's request to provide said documents).

9. *See, e.g.*, Dohrman & Epstein, *supra* note 1; Keith Harris & Sally Jenkins, *Maryland Basketball Star Len Bilas is Dead at 22*, Wash. Post (June 20, 1986), http://www.washingtonpost.com/wp-srv/sports/longterm/memories/bias/launch/bias1.htm (reporting death of University of Maryland basketball star Len Bilas due to cardiac arrest after cocaine was found in his system); David McNabb, *Flashback:*

response to these scandals, the tremendous amount of revenue surrounding major college sports creates immense pressure on schools to field winning programs, often resulting in perverse incentives for institutions whose primary focus is supposed to be on academic achievement.[10] As a result of these incentives, both athletic scandals and their attempted cover-ups persist across Division I athletics within the NCAA.[11]

One way the media and the public can seek transparency in universities' athletic programs is through various state open records laws.[12] Universities, however, have voiced concern on many occasions that the release of any student records will put the respective university in jeopardy of losing its federal funding because the release may violate certain requirements of the Family Educational

SMU Gets NCAA 'Death Penalty' Worse Than Penn State?, Dallas Morning News (July 23, 2012), http://www.dallasnews.com/sports/college-sports/smu-mustangs/20120723-flashback-smu-gets-ncaa-death-penalty-worse-than-penn-state.ece (recounting suspension of Southern Methodist University football program for payment of athletes); *NCAA Delivers Postseason Football Ban*, ESPN (June 11, 2010, 3:03 AM), http://sports.espn.go.com/los-angeles/ncf/news/story?id=5272615 (reporting penalties imposed on the University of Southern California football program because of improper benefits received by running back Reggie Bush); Matthew R. Salzwedel & Jon Ericson, *Cleaning Up Buckley: How the Family Educational Rights and Privacy Act Shields Academic Corruption in College Athletics*, 2003 Wis. L. Rev. 1053, 1054-55 (2003) (describing specific instances of academic corruption within university athletic programs).

10. *See* D. Stanley Eitzen, Fair and Foul: Beyond the Paradoxes of Sport 143 (2006) (illustrating examples of tremendous amounts of money involved in college sports that can be earned by universities). In the year 2004 alone, college sports were a "$4 billion dollar business." *See id.*

11. *See, e.g.*, Matt Masterson, *Men's Hockey: Kerdiles Suspension Reduced*, The Daily Cardinal (Oct. 19, 2012 3:22 PM), http://host.madison.com/daily-cardinal/sports/men-s-hockey-kerdiles-suspension-reduced/article_a0197972-1a2a-11e2-86f6-001a4bcf887a.html (explaining why University of Wisconsin hockey player had been suspended by NCAA); Susan Candlotti, *Disturbing E-mails Could Spell More Trouble for Penn State Officials*, CNN (July 2, 2012 10:05 AM), http://www.cnn.com/2012/06/30/justice/penn-state-emails/index.html?hpt=hp_t2 (reporting cover up of sex abuse scandal within Penn State University athletic program); Pat Forde, *Nashville Coach Says Former Mississippi State Booster Gave Money to Recruit*, Yahoo! Sports (Sept. 12, 2012, 10:59 AM), http://sports.yahoo.com/news/ncaaf—nashville-coach-says-former-mississippi-state-booster-gave-money-to-recruit.html (reporting on recruiting violations at Mississippi State University, resulting in resignation of Mississippi State football coach); Dana O'Neil, *Memphis Also Gets 3 Years' Probation*, ESPN (Aug. 21, 2009, 12:45 PM), http://sports.espn.go.com/ncb/news/story?id=4412279 (listing penalties received by Memphis University basketball team because of "major infractions").

12. *See, e.g.*, Kirwan v. The Diamondback, 721 A.2d 196, 199 (Md. 1998) (explaining cause of action originating when newspaper seeking to investigate violations at the University of Maryland filed open records request); State *ex rel.* ESPN, Inc. v. Ohio State Univ., 970 N.E.2d 939, 943 (stating that case arose when sports entertainment news agency filed public records request seeking to investigate violations at Ohio State University).

Rights and Privacy Act ("FERPA").[13] Yet, in a number of instances, including the instant case, universities have also sought to use FERPA's privacy requirements as a shield to protect themselves from having to disclose documents that would reflect negatively or impose negative consequences on its students, athletes, or programs.[14]

Though FERPA generally prohibits any schools that receive federal funds from releasing student records, current federal law is unsettled as to whether FERPA prohibits universities receiving federal funding from disclosing documents relating to misconduct of student-athletes in their specific athletic capacity, thereby resulting in disparate treatment by the state courts that have addressed the issue.[15] Indeed, the FERPA statute itself is wrought with ambiguity as to what types of records may and may not be released, thus providing a source of disagreement amongst the courts.[16] Further-

13. 20 U.S.C. § 1232(g) (2006); *see also Kirwan*, 721 A.2d at 203 (stating that University of Maryland argued that FERPA prohibited disclosure of student records). When a court rules that FERPA is merely a contractual condition on federal funding and not a binding law, it puts universities in the "precarious position of having to decide between the lesser of two evils: comply with FERPA, and risk the penalties of noncompliance with the state open records law, or comply with the state open records law, and risk the penalties of noncompliance with FERPA." *See* Mathilda McGee-Tubb, *Deciphering The Supremacy of Federal Funding Conditions: Why State Open Records Laws Must Yield to FERPA*, 53 B.C. L. Rev. 1045, 1066 (2012).

14. *See* Family Educational and Privacy Rights Act, 20 U.S.C. § 1232(g) (2006) (restricting release of student records without parental consent, except to certain listed groups or organizations); Salzwedel & Ericson, *supra* note 9, at 1061 (arguing that universities use FERPA as shield to prevent disclosure of academic corruption); *ESPN*, 970 N.E.2d at 943 (stating that Ohio State cited FERPA as justification for not providing ESPN with certain documents); *see also* Jamie Ball, *This Will Go Down on Your Permanent Record (But We'll Never Tell): How the Federal Educational Rights and Privacy Act May Help Colleges and Universities Keep Hazing A Secret*, 33 Sw. U. L. Rev. 477, 479-80 (2004) (arguing that FERPA can help hide student-on-student crimes).

15. *Compare ESPN*, 970 N.E.2d at 946 (holding that FERPA prohibited disclosure of certain documents relating to student-athletes' NCAA rules violations because they were "education records"), *with Kirwan*, 721 A.2d at 206 (holding that documents relating to student-athlete NCAA violations were not "education records" under FERPA). For a further discussion of whether records of student-athlete NCAA rule violations are "education records" under FERPA, see *infra* notes 149-181 and accompanying text.

16. *See* Salzwedel & Ericson, *supra* note 9, at 1066 (describing FERPA as "written in haste, enacted without consideration by any congressional committee, and subject to confusion and numerous amendments," therefore resulting in ambiguity and problems).

more, the United States Supreme Court has done little to help resolve the questions raised by the statute.[17]

This Casenote evaluates how the Ohio Supreme Court's decision in *State ex rel. ESPN v. Ohio State* provided an unprecedented amount of protection for The Ohio State University to conceal the misdeeds of its student-athletes.[18] Section II narrates the events leading up to ESPN's suit seeking disclosure of records relating to certain Ohio State student-athletes.[19] Section III discusses FERPA and the somewhat limited surrounding legal framework that exists with regard to FERPA as applied as to universities and athletic programs.[20] Section IV examines the Ohio Supreme Court's opinion in *ESPN*, and focuses on the court's reasoning for extending FERPA privacy protections to documents pertaining to student-athlete NCAA rule violations.[21] Section IV also provides a critique of the Ohio Supreme Court's opinion, and specifically highlights its inconsistencies with established federal and state court decisions.[22] Finally, Section V discusses how *ESPN* will impact institutional transparency and corruption in university athletic departments as the stakes associated with success in major collegiate athletics only continue to grow.[23]

II. Facts

In early 2008, Terrelle Pryor was known predominantly as a high school quarterback from Jeanette, Pennsylvania, and was considered to be one of the top college football prospects in the United States.[24] Sports Illustrated described Pryor as "the most

17. *See id.* at 1078 (observing that Supreme Court decided no cases interpreting FERPA until 2002, and that there is serious "dearth" of Supreme Court precedent interpreting it).

18. State *ex rel.* ESPN v. Ohio State Univ., 970 N.E.2d 939 (Ohio 2012).

19. For a further discussion of the events leading up to ESPN's suit of Ohio State, see *infra* notes 24-42 and accompanying text.

20. For a further discussion of FERPA and its surrounding legal framework as applied to universities, see *infra* notes 43-101 and accompanying text.

21. For an explanation of the Ohio Supreme Court's opinion in *ESPN*, see *infra* notes 102-146 and accompanying text.

22. For an analysis and critique of the Ohio Supreme Court's opinion in *ESPN*, see *infra* notes 147-181 and accompanying text.

23. For a discussion of the impact of *ESPN* on university athletic departments, see *infra* notes 182-202 and accompanying text.

24. *See Scout.com College Football Team Recruiting Prospects*, Scout, http://recruiting.scout.com/a.z?s=73&p=9&c=4&yr=2008&pid=88 (last visited Sept. 9, 2012) (ranking Terrelle Pryor as top overall college football recruit for class of 2008); *see also The Rivals 100 2008 Prospect Ranking*, Rivals.com, http://rivals.yahoo.com/ncaa/football/recruiting/rankings/rank-1803 (last updated Jan. 16, 2008) (listing Terrelle Pryor as top football recruit for class of 2008).

fawned-after high school quarterback in the history of scrutinized, fawned-after quarterbacks," and as a result, characterized his waited-for college selection to be the most anticipated in history.[25] Following a heated recruitment process, Pryor eventually elected in March of 2008 to attend The Ohio State University on a football scholarship, committing via phone call to Ohio State head football coach Jim Tressel.[26] However, what once began as a promising collegiate football career eventually collapsed in a flurry of scandal.[27] Pryor and four of his teammates were suspended by the National Collegiate Athletic Association ("NCAA") in December 2010 for selling school football memorabilia such as jerseys, rings, and awards, and for receiving improper benefits from a tattoo parlor in Columbus, Ohio.[28] Subsequently, the NCAA launched an investigation into Pryor, amid allegations that the quarterback received more improper benefits, including access to over a "half-dozen" vehicles.[29] The scandal eventually culminated in football coach Jim Tressel's resignation.[30] Furthermore, following his suspension and Tressel's resignation, Pryor elected to leave The Ohio State Univer-

25. *See* Stewart Mandel, *The Perfect Recruiting Storm*, Sports Illustrated (Feb. 6, 2008, 5:27 PM), http://sportsillustrated.cnn.com/2008/writers/stewart_mandel/02/05/recruiting.pryor/?cnn=yes (describing intense competition between collegiate coaches to secure commitment from Pryor to attend their respective Universities to play football). Mandel describes in his article the intensity of Pryor's recruitment, which even led rival head coaches from major programs to run into each other in the bleachers at Pryor's high school games. *See id.* Mandel also described how Pryor's recruitment had become a "national phenomenon," drawing interest from coaches ranging from the west coast to the deep south, and many locations in between. *See id.*

26. *See* Christopher Lawler, *Top-ranked QB Pryor Commits to Ohio State*, ESPN (Mar. 19, 2008, 6:58 PM), http://sports.espn.go.com/ncaa/recruiting/football/news/story?id=3301454 (reporting Terrelle Pryor's verbal commitment to Ohio State head football coach Jim Tressel).

27. *See, e.g.*, *Ohio State Football Players Sanctioned*, ESPN (Sept. 09, 2012, 11:36 PM), http://sports.espn.go.com/ncf/news/story?id=5950873 (recounting memorabilia for tattoos scandal resulting in suspension of Pryor and four other teammates).

28. *See id.* (explaining reasons for Terrelle Pryor's suspension). The NCAA also required Pryor to repay $2,500 for selling three items he had received in the course of playing football for Ohio State. *See id.*

29. *See* Mike Wagner, Jill Ripenhoff & Tim May, *Significant Inquiry by NCAA and OSU under way for Pryor, Sources Say*, Columbus Dispatch (May 30, 2011, 7:35 PM), http://www.dispatch.com/content/stories/sports/2011/05/30/zzz.html.

30. *See Jim Tressel Tenders Resignation*, ESPN (May 31, 2011, 12:58 PM), http://sports.espn.go.com/ncf/news/story?id=6606999&campaign=rss&source=ESPN (announcing that Ohio State football coach Jim Tressel had resigned amid NCAA violations arising out of "tattoo-parlor scandal").

sity and its football team.[31] He was subsequently banned from all contact with the Ohio State athletic program by the university.[32]

Throughout the course of the scandal that resulted in Pryor and Tressel leaving the Ohio State football program and The Ohio State University, ESPN, along with other news media sources, consistently covered and reported on the progression of the scandal as new developments arose.[33] In the course of covering this scandal, ESPN made over twenty public records requests pertaining to the Ohio State athletic department.[34] In response to these requests, Ohio State provided ESPN with over 700 pages of responsive documents, made more than 350 additional pages available on its website, and "as a courtesy" provided more than 4,200 pages of additional records that were requested by and provided to other media outlets.[35]

One of ESPN's requests included a request that Ohio State "provide it with access to . . . all emails, letters and memos to and from Jim Tressel, Gordon Gee, Doug Archie, and/or Gene Smith with the key word "Sarniak" since March 15, 2007."[36] The key word "Sarniak" was in reference to Ted Sarniak, a mentor to Terrelle Pryor during his high school and college career to whom Tressel had forwarded several emails regarding certain football players' connection to Eddie Rife, the owner of the tattoo parlor involved in the improper benefits scandal.[37] Sarniak was neither an employee

31. *See* Erick Smith, *Terrelle Pryor Announces End of His Ohio State Playing Career*, USA Today (June 8, 2011, 3:52 PM), http://content.usatoday.com/communities/campusrivalry/post/2011/06/terrelle-pryor-leaving-ohio-state/1#.UE9bjxwo04U (reporting on Pryor's decision to leave Ohio State University during ongoing investigation and following his suspension).

32. *See Ohio State: QB Couldn't Play in '11*, ESPN (July 26, 2011, 8:12 PM), http://espn.go.com/college-football/story/_/id/6805747/ohio-state-bans-terrelle-pryor-five-years-says-play-11-season?campaign=rss&source=ESPNHeadlines (explaining letter sent from Ohio State athletic director Gene Smith stating that university was "disassociating" itself from Pryor for "period of five years").

33. *See, e.g.*, *Ohio State Football Players Sanctioned*, *supra* note 27 (providing example of ESPN covering the Ohio State football scandal); Smith, *supra* note 31 (providing example of other media sources covering the scandal); Wagner, Ripenhoff & May, *supra* note 29 (providing third example of publication covering this Ohio State football scandal).

34. *See* State *ex rel.* ESPN, Inc. v. Ohio State Univ., 970 N.E.2d 939, 942 (Ohio 2012) (recounting at least 21 public-records requests made through at least seven different individuals).

35. *See id.* (describing Ohio State's level of compliance with ESPN's public records requests).

36. *Id.* at 942-43.

37. *See id.* at 942 (describing connection between Tressel, Pryor, and Sarniak, and establishing existence of the documents requested through public-records request).

of Ohio State, the NCAA, nor any law-enforcement body.[38] Ohio State rejected ESPN's request for the Sarniak records.[39] With regard to the Sarniak emails, the University specifically cited the confidentiality provisions of FERPA as the particular basis for denying the request.[40] For the other documents the University failed to provide, the University cited the overbreadth of the requests and the ongoing nature of the investigation as the basis for denying the requests.[41] ESPN subsequently filed suit seeking a writ of mandamus in an attempt to compel Ohio State to provide access to the requested records.[42]

III. BACKGROUND

A. Joining the Squad: FERPA Becomes a Law of the Land

Congress enacted FERPA in 1974 in an attempt to curb the "growing abuse of student records across the nations."[43] In the pertinent section, FERPA prohibits an "educational agency or institution which has a policy or practice of permitting the release of education records" from receiving federal funds.[44] The law also serves to prohibit a certain level of institutional secrecy, as it mandates that educational institutions provide students and their parents with access to their own records.[45]

38. *See id.* (describing relation of Ted Sarniak to requested records).

39. *See id.* at 943 (stating that Ohio State refused to provide ESPN with records pertaining to Sarniak).

40. *See id.* ("Ohio State rejected ESPN's request for the Sarniak records by citing the confidentiality provisions of the Family Educational Rights and Privacy Act . . . to support its denial of the request.").

41. *See id.* (providing additional background into circumstances leading up to ESPN filing suit against Ohio State).

42. *See id.* (noting procedural history of case); *see also* David Eggert, *ESPN Sues Ohio State for Release of Tressel Emails*, COLUMBUS DISPATCH, July 12, 2011, at 2B, *available at* http://www.dispatch.com/content/stories/local/2011/07/12/espn-sues-ohio-state-for-release-of-tressel-emails.html (reporting on ESPN suing Ohio State for release of certain records relating to Terrelle Pryor).

43. *See* Salzwedel & Ericson, *supra* note 9, at 1063 (quoting 121 CONG. REC. § 13,990 (daily ed. May 13, 1975) (statement of Sen. Buckley)).

44. *See* Family Educational and Privacy Rights Act, 20 U.S.C. § 1232g (2006) (restricting release of student records without parental consent, except to certain listed groups or organizations).

45. *See* Salzwedel & Ericson, *supra* note 9, at 1064 (discussing purpose of passing FERPA legislation). The article quotes Senator Thomas J. McIntyre in furthering this claim, stating that "[t]he intent of the amendment was to allow openness of school records." *See id.* (quoting 120 CONG. REC. § 39,858 (1974) (quoting Sen. McIntyre)). However, this stated intent is an interesting contrast to Senator Buckley's interpretation of the Act, contending that its purpose is to promote the privacy of school records, not the openness of them. *Compare id.* (stating purpose of Act's amendment was to promote institutional openness of school records), *with* Salzwedel & Ericson, *supra* note 9, at 1063 (quoting 121 CONG. REC. § 13,990 (daily

FERPA defines "education records" quite broadly.[46] However, this breadth is at times also arguably vague.[47] 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."[48] Though the statute fails to specifically define what records fall within this definition of education records, it lists certain specified records which are not protected by the statute, including records maintained by an educational institution's law enforcement unit and certain records made or maintained by certain medical personnel relating to a student's treatment.[49]

In addition to listing documents excepted from the definition of education records, FERPA specifically provides for a number of situations where student information and records may be disclosed.[50] Among the exceptions listed in the statute is an exception for when consent is obtained from a student's parents, as well as an exception to comply with a subpoena or court order.[51] Furthermore, FERPA allows for the disclosure of "directory information," which includes such information as name, address, photograph, and enrollment status of students.[52] Another class of exceptions is designed to promote campus safety.[53] These exceptions include specific provisions for the disclosure of information regarding sex-

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ed. May 13, 1975) (statement of Sen. Buckley)) (stating that Act's purpose was to promote privacy of education records).

46. *See* United States v. Miami Univ., 294 F.3d 797, 812 (6th Cir. 2002) (characterizing FERPA's definition of education records as broad).

47. *See* Salzwedel & Ericson, *supra* note 9, at 1067 (characterizing FERPA's definition of "education records" as vague).

48. § 1232g(a)(4)(A) (defining term "education records" for purposes of FERPA).

49. *See id.* § 1232g(a)(4)(B) (listing categories of records which do not fall within definition of "education records" for purpose of FERPA).

50. *See id.* § 1232g (listing situations where institution will be exempt from FERPA's constraints).

51. *See id.* (enumerating specific instances where institution may disclose education records and maintain its FERPA compliance).

52. *See id.* § 1232g(a)(5)(A) (defining directory information as information relating to student including "name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, [and] weight and height of members of members of athletic teams . . ." among several other classifications).

53. *See* McGee-Tubb, *supra* note 13, at 1054-55 (observing existence of several FERPA exemptions designed to "protect the safety of students and others on campus").

ual assault disciplinary proceedings, as well as other campus crime information.[54]

Finally, the Act expressly directs the Secretary of Education to enforce FERPA's spending conditions.[55] Specifically, FERPA directs the Secretary of Education to "establish or designate an office and review board within the Department" with the purpose of investigating, prosecuting, and adjudicating FERPA violations.[56]

The amount of universities' funding that FERPA can potentially impact is tremendous.[57] Despite the high stakes that FERPA creates, however, universities often struggle to determine what is required of them under the statute.[58] This circumstance is due in large part to remaining ambiguities in the FERPA statute and its regulations.[59] Despite these ambiguities, FERPA cases have seldom made it to the Supreme Court.[60] In fact, the Supreme Court decided no cases on FERPA for the first twenty-eight years after the statute was enacted.[61]

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54. *See id.* at 1055 (specifying that exception exists within FERPA for instances of sexual assault). Specifically, FERPA provides for the disclosure of records of a disciplinary proceeding to a victim of a "nonforcible sex offence." § 1232g(b)(5).

55. *See* § 1232g(f) (stating that "[t]he Secretary shall take appropriate actions to enforce this section and to deal with violations of this section").

56. *See id.* § 1232g(g) (enumerating specific responsibilities of Secretary of Education under FERPA and creating office and review board under Secretary of Education).

57. *See* AM. ASS'N OF UNIVS., UNIVERSITY RESEARCH, THE ROLE OF FEDERAL FUNDING 1 (2011) (stating that $33 billion of universities' total annual $55 billion in research spending comes from federal government). Given that universities perform 31 percent of the "nation's total research," this statistic becomes even more significant. *See id.* (stating that universities perform 31 percent of United States' total research and 56 percent of United States' basic research).

58. *See* McGee-Tubb, *supra* note 13, at 1056 (discussing impact of FERPA ambiguity on universities).

59. *See id.* (discussing remaining ambiguities in FERPA statute despite potentially significant impact that noncompliance could have on academic institutions and despite few specified attempts at clarification).

60. *See id.* (stating that Supreme Court has "rarely" helped to define FERPA's terms).

61. *See* Lynn M. Daggett, *FERPA in the Twenty-First Century: Failure to Effectively Regulate Privacy for All Students*, 58 CATH U. L. REV. 59, 63 (2008) (discussing Supreme Court's treatment of FERPA after its enactment). In addition to declining to decide cases on FERPA grounds, the Supreme Court rarely even acknowledged the statute between 1974 and 2002, only mentioning FERPA twice, and even then, only in footnotes. *See id.* (indicating lack of FERPA issues before Supreme Court).

B. Called Up to the Varsity Team: FERPA Goes Before the Supreme Court

Finally, in 2002, the Supreme Court decided its first two cases pertaining to FERPA.[62] The first of these, decided in February 2002, was *Owasso Independent School District v. Falvo No. I-011*.[63] Two months later, the Court decided the second of these cases in *Gonzaga University v. Doe*.[64] *Falvo* confronted the issue of what types of records constituted "education records" for the purpose of FERPA.[65] Conversely, *Gonzaga* addressed the issue of who could remedy a FERPA violation.[66]

1. *"Teamwork Makes the Dream Work": The Supreme Court Holds Peer-Graded Assignments Are Not Education Records Under FERPA*.[67]

The *Falvo* case arose when a parent, Kristja Falvo, brought suit against a school district and individual school officials for allowing students to grade each other's assignments and call out their own grades in class, alleging that this practice violated her and her minor children's rights under FERPA.[68] The Supreme Court rejected Falvo's claim, holding that peer-grading assignments did not violate FERPA, thereby reversing the 10th Circuit.[69]

The Court reached this conclusion on several grounds.[70] First, it determined that the students grading each others' assignments were not "person[s] acting for" an educational institution as required by the statute.[71] The Court held that the phrase "acting for"

62. *See id.* (observing that Supreme Court had not decided any cases on FERPA prior to 2002, and that in 2002, Court decided two cases on FERPA).

63. 534 U.S. 426 (2002).

64. 536 U.S. 273 (2002).

65. *See Falvo*, 534 U.S. at 426 (raising issue of whether student's peer-graded assignment is "education record" for purposes of FERPA).

66. *See Gonzaga*, 536 U.S. at 273 (addressing issue of whether FERPA presents right to private right of action).

67. Dizzy Wright, Teamwork Makes the Dream Work (Funk Volume 2012).

68. *See Falvo*, 534 U.S. at 426 (explaining reason suit was brought). In *Falvo*, the respondents alleged, amongst other things, that allowing students to grade each other's papers and call out grades embarrassed the elementary school students. *See id* at 429. The school district refused, so the respondent filed a class action lawsuit against the school district. *See id.* (discussing procedural history of the case).

69. *See id.* at 430 (stating that Court had granted certiorari "to decide whether peer grading violates FERPA" and "[f]inding no violation of the Act.")

70. *See id.* at 433-35 (analyzing definition and application of "education records" in FERPA statute).

71. *See id.* at 434. The Court discussed that the statute imposes restrictions on individuals "acting for" a school district, and it is "awkward" semantically to state

was with regard to agents acting on behalf of the school, such as teachers, administrators, and employees.[72] Because these quizzes were not "maintained" by individuals "acting for" an educational institution, they were not protected under this portion of FERPA.[73]

Second, it determined that the quizzes were not records protected by FERPA because FERPA requires educational institutions to keep a record of those who have requested access to a student's education records, as well as a record of access for each pupil.[74] The Court reasoned that if quizzes were held to be education records, it would require each teacher to be burdened with the task of maintaining records of access for each of their students' papers until the students finally turned in their assignments, which the Court found to be a highly impractical reality.[75] The Court ruled that what Congress likely intended was that the records contemplated by the statute were of the type to be "kept in one place with a single record of access," such as by a "single central custodian, such as a registrar."[76]

The final aspect of the Court's reasoning examined FERPA's requirement of recipients of federal funds to provide parents with a hearing in front of an impartial official at which they "may contest the accuracy of their child's education record."[77] The Court found that it was doubtful Congress would have intended to provide parents with "this elaborate machinery" to challenge the accuracy of

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that a student is "acting for" a school district either when the student takes a quiz or when the student grades a peer's assignment. *See id.* (explaining that FERPA applies to those "acting for" institution and reasoning that this description did not logically apply to students).

72. *See id.* (observing that phrase "acting for" could only logically be applied to stated types of employees and workers).

73. *See id.* at 435 (explaining why students' peer-graded quizzes were not "education records"). In its opinion, the court cited the dictionary definition of "maintain" to define what it meant to maintain a record, that definition being "to keep in existence or continuance; preserve; retain." *See id.* at 433 (defining "maintain").

74. *See id.* at 435 (reasoning that it would be unreasonable if student quizzes were education records under FERPA because then all teachers would be required to provide access to records for each of their individual students' school work).

75. *See id.* (analyzing language of FERPA statute). The court also observed that if it did not reach this conclusion, the "'procedural machinery' would permit a parent 'to challenge the accuracy of the grade on every spelling test and art project the child completes.'" *See* Salzwedel & Ericson, *supra* note 9, at 1085 (quoting *Falvo*, 534 U.S. at 435).

76. *See Falvo*, 534 U.S. at 435. Justice Scalia disagreed with this central repository concept in his *Falvo* concurrence, finding it confusing and superfluous. *See* Salzwedel & Ericson, *supra* note 9, at 1085 n.149 (analyzing Justice Scalia's concurrence in *Falvo*).

77. *See Falvo*, 534 U.S. at 435 (quoting § 1232g(a)(2)).

typical mundane assignments.[78] Therefore, when combined with the other duties that *Falvo*'s suggested interpretation of FERPA would have imposed on educators, the Court concluded that the impact of this suggested interpretation would have been incredibly burdensome on educators, and as such was neither the likely intent of Congress nor the correct interpretation of the FERPA statute.[79]

2. *There's No I in Team: The Supreme Court Determines that FERPA Creates No Personal Enforcement Rights*

The *Gonzaga* case arose out of another individual's allegations of institutional FERPA violations.[80] The respondent in *Gonzaga* sued Gonzaga University after he was informed that he would not receive the affidavit of good moral character from the University, a requirement to become a teacher, following an investigation by a "teacher certification specialist" into alleged sexual misconduct by the respondent while he was a student.[81]

The Court in its holding found in favor of Gonzaga University.[82] The Court ruled that FERPA, as a piece of spending clause legislation, did not confer a private right of enforcement.[83] The Court held that, if Congress wishes to create new individually en-

78. *See id.* The court also observed that the respondent's suggested interpretation of FERPA would require teachers to change many of their standard practices (such as peer grading) in order to comply with FERPA. *See id.* (noting observations of Court).

79. *See id.* (analyzing potential impact of respondent's interpretation of FERPA).

80. *See* Gonzaga Univ. v. Doe, 536 U.S. 273, 277 (stating that case arose out of former student's allegations of violation of FERPA).

81. *See id.* At the time, to become a teacher in the State of Washington, an individual had to receive an "affidavit of good moral character from a dean of their graduating college or university." *See id.* Respondent John Doe in this case did not receive an affidavit of good moral character. *See id.* In 1993, Gonzaga University had a "teacher certification specialist" who had overheard a student telling another that John Doe had engaged in sexual misconduct against a student at the university. *See id.* Gonzaga's teacher certification specialist launched an investigation into respondent John Doe's actions, which eventually resulted in the school denying him the required affidavit to become a teacher. *See id.*

82. *See id.* at 291 (reversing State of Washington Supreme Court). The state of Washington's decision had held that FERPA did create a private right of action, and had reinstated a $300,000 damages award, et al., in punitive damages for Gonzaga's violation of FERPA. *See id.* at 277-78 (listing damages awarded by trial court).

83. *See id.* at 279 (holding that FERPA creates no private right of action or enforcement). At the time *Gonzaga Univ.* was heard, there was a split between the circuits on this issue, with the Second, Fifth, Sixth, and Tenth Circuits all holding that an individual may bring a section 1983 action to vindicate FERPA violations. *See* Salzwedel & Ericson, *supra* note 9, at 1079-80 (discussing dissonance between federal and state courts on issue of whether FERPA created individual standing).

forceable rights, it must do so in "clear and unambiguous terms."[84] Since Congress had included no "rights-creating language" in FERPA, the Court held that no private right of action existed for a FERPA violation.[85]

C. Back on the Development Team: Lower Courts Grapple with Conflicts Between FERPA and State Law

Following these two landmark Supreme Court decisions, lower state and federal courts started to grapple with a number of lingering, unresolved issues pertaining to FERPA.[86] Lower courts still need to address whether state open records laws conflict with FERPA, and what types of records meet the definition of "education records" for the purposes of FERPA.[87]

Within the Sixth Circuit, the controlling case on many of these issues is *United States. v. Miami University*.[88] *Miami University* arose when a student newspaper in Ohio requested the disciplinary records from Miami University in order to track crime statistics on campus.[89] In *Miami University*, the Sixth Circuit reached two holdings relevant to FERPA, and later to *ESPN*.[90] The first of these held that the University's acceptance of federal funds made conditions attached to those funds (such as FERPA's student privacy require-

84. *See Gonzaga Univ.*, 536 U.S. at 290 (holding that FERPA contained no "rights-creating language" and therefore created no individual cause of action). The Supreme Court also noted that it had never held that spending clause legislation similar to FERPA had conferred individually enforceable rights. *See* Salzwedel & Ericson, *supra* note 9, at 1080-81 (analyzing Supreme Court's holding in *Gonzaga Univ.*).

85. *See Gonzaga Univ.*, 536 U.S. at 290 (reversing State of Washington Supreme Court).

86. *See, e.g.*, McGee-Tubb, *supra* note 13, at 1056 (describing conflicting decisions between various courts on whether FERPA conflicts with state open records laws).

87. *See, e.g.*, *id.* (detailing present divergent court interpretations of whether FERPA conflicts with state open records laws); *see also* Ethan M. Rosenzweig, *Please Don't Tell: The Questioning of Confidentiality in Student Disciplinary Records under FERPA and the Crime Awareness and Campus Security Act*, 51 Emory L.J. 447, 458-60 (detailing conflicting court interpretations of whether student "disciplinary records" were "education records" under FERPA). There is still "no clear answer as to whether student disciplinary records are educational records within the meaning of FERPA." Ball, *supra* note 14, at 478.

88. 294 F.3d 797 (6th Cir. 2002); *see, e.g.*, State *ex rel.* ESPN v. Ohio State Univ., 970 N.E.2d 939, 946-47 (Ohio 2012) (citing *Miami Univ.* as controlling law for FERPA cases in Ohio).

89. *See Miami Univ.*, 294 F.3d at 803 (discussing factual scenario giving rise to instant case).

90. *See ESPN*, 970 N.E.2d at 945-48 (citing *Miami Univ.* as controlling law on FERPA issues in case).

ments) legally binding.[91] The second holding found that student disciplinary records are "education records" for the purposes of FERPA.[92] In reaching this second decision, the court focused largely on the language of FERPA, and the fact that FERPA contained special rules for the release of disciplinary records within its text.[93]

A number of courts have disagreed, however, with these holdings from the Sixth Circuit.[94] Several United States District Courts have held that FERPA does not prohibit or protect institutions from public records requests because they have held that FERPA merely puts conditions on receiving federal funding, and does not in itself affirmatively prevent disclosure.[95] In addition, a number of courts have disagreed on what constitutes education records.[96] The more narrow interpretation of "education records" has constrained the term to records "relating to individual student academic performance, financial aid, or scholastic probation."[97] A sampling of cases

91. *See Miami Univ.*, 294 F.3d at 808 (holding that accepted spending clause legislation "imposes enforceable, affirmative obligations upon the states").

92. *See id.* at 811-14 (holding that disciplinary records were "education records" under FERPA because Congress had specifically accounted for how disciplinary records were to be treated within FERPA statute). As a result of this decision, the court determined that the universities involved in this case did not need to disclose unredacted student disciplinary records under the state open records law because FERPA created a federal prohibition. *See, e.g.*, McGee-Tubb, *supra* note 13, at 1061 (discussing impact of *Miami Univ.* decision).

93. *See Miami Univ.*, 294 F.3d at 811-14 (analyzing language of FERPA). In reaching this decision, the Sixth Circuit overturned the State of Ohio Supreme Court, which had held that FERPA does not prohibit the disclosure of education records; it merely penalizes those institutions that disclose them. *See* State *ex rel.* The Miami Student v. Miami Univ., 680 N.E.2d 956, 958-59 (Ohio 1997) (holding that FERPA merely imposes funding condition on universities).

94. *See, e.g.*, McGee-Tubb, *supra* note 13, at 1060-64 (discussing conflicting holdings between courts on issue of FERPA-open records law conflicts); *see also* Rosenzweig, *supra* note 87, at 458-60 (evaluating cases that found FERPA does not preempt state open records laws).

95. *See* McGee-Tubb, *supra* note 13, at 1063-64 (discussing courts that have found FERPA to be contractual condition on receiving federal education funding). These courts have found that FERPA does not "affirmatively prohibit disclosure," and thus does not fall within the "otherwise prohibited" exceptions of state open records laws. *See id.* The "otherwise prohibited" exceptions to state open records laws are exceptions within state open records laws that exempt disclosure if the disclosure would be prohibited by another law. *See, e.g.*, State *ex rel.* ESPN, Inc. v. Ohio State Univ., 970 N.E.2d 939, 944 (Ohio 2012) (holding that Ohio State did not have to disclose education records under Ohio's public records law because FERPA prohibited such disclosure).

96. *See* Rosenzweig, *supra* note 87, at 458-60 (discussing disagreement between courts on definition of "education records").

97. *See* Red & Black Pub. Co., Inc. v. Board of Regents, 427 S.E.2d 257 (Ga. 1993); *see also* Rosenzweig, *supra* note 87, at 458-60 (providing further guidance on scope of "education records").

in which courts have determined records were not subject to FERPA include records involving a student organizational court in a fraternity hazing case, documents relating to the conduct of a university's basketball coach, and correspondence between a university and the NCAA regarding student-athletes accepting money to pay for parking tickets.[98]

Specifically, the case most directly in conflict with the holding in *ESPN* is *Kirwan v. The Diamondback*.[99] In *Kirwan*, a student newspaper requested certain records relating to potential NCAA violations by members of the University of Maryland basketball team.[100] In that case, the Maryland Court of Appeals held that the University of Maryland's records relating to the NCAA violations of its basketball team were not prohibited from release by FERPA because those records were not "education records" protected by the law.[101]

IV. ANALYSIS OF THE OHIO SUPREME COURT'S DECISION IN *ESPN*

A. Narrative Analysis

The Ohio Supreme Court considered three main issues with regard to ESPN's claim.[102] The first issue considered whether Ohio State's refusal to provide certain records and redacted versions of others resulted in a *per se* violation of the State of Ohio's public records law.[103] Second, the court determined whether Ohio State was entitled to an exemption from Ohio's public records law

98. *See Red & Black Pub. Co., Inc.*, 427 S.E.2d at 259; Unincorporated Operating Div. of Ind. Newspapers, Inc. v. The Trustees of Indiana Univ., 787 N.E.2d 893 (Ind. Ct. App. 2003); Kirwan v. The Diamondback, 721 A.2d 196 (Md. 1998).

99. *Compare Kirwan*, 721 A.2d at 206 (holding that records relating to student-athlete's NCAA rules violations were not "education records," and thus records were not protected from disclosure by FERPA), *with ESPN*, 970 N.E.2d at 946-47 (holding that records relating to student-athlete's NCAA rule violations were "educations records," and thus protected from disclosure by FERPA).

100. *See Kirwan*, 721 A.2d at 198 (discussing facts leading to litigation in *Kirwan*). In *Kirwan*, a student newspaper at the University of Maryland, College Park campus began investigating the events surrounding the suspension of a University of Maryland men's basketball player and certain other allegations regarding the men's basketball team. *See id.* The specific event that resulted in the player's suspension was his acceptance of money from a former coach to pay for the player's parking tickets. *See id.*

101. *See id.* (holding that records at issue were not education records). For a further discussion of the holding of the Maryland Court of Appeals, see *infra* notes 155-170 and accompanying text.

102. *See ESPN*, 970 N.E.2d at 944 (analyzing ESPN's claim under Ohio's public records law and outlining Ohio State's claimed exemptions).

103. *See id.* at 943-44 (discussing ESPN's contention that Ohio State violated Ohio's Public records law *per se*). For a further discussion of ESPN's contention that Ohio State violated Ohio's public records law and the court's evaluation of the claim's merits, see *infra* notes 108-117 and accompanying text.

through FERPA.[104] And third, the court considered whether certain documents were protected by attorney-client privilege.[105] The court devoted little attention to the attorney-client privilege claim, however, quickly finding that Ohio State could claim this privilege on those documents that constituted communications with attorneys on legal subjects, so only the first two claims will be discussed here.[106]

1. *"It Was Kind of Like the Polish Army or Something."*[107]: *The Court Finds a Violation of the Ohio Public Records Law*

The Ohio Supreme Court's opinion first evaluated whether Ohio State committed *per se* violations of Ohio's public records law in its responses to ESPN's public records requests.[108] The court observed that ESPN had indeed made requests for certain documents that qualified as public documents under the statute, and that Ohio State had initially denied the requests for certain documents on the grounds that the requests were "overly broad" and because certain documents falling within the request were a part of an ongoing investigation.[109]

In evaluating Ohio State's denial of ESPN's requests, the court focused on two ways which the denial violated the public records law.[110] First, the court noted that Ohio State had not provided

104. *See ESPN*, 970 N.E.2d at 945 (discussing Ohio State's claim of exemption to Ohio's public records law through FERPA). For a further discussion of the Court's analysis of Ohio State's claimed FERPA exemption, see *infra* notes 119-146 and accompanying text.

105. *See ESPN*, 970 N.E.2d at 944 (stating that Ohio State claimed that some records were exempt under attorney-client and work-product privileges).

106. *See id.* at 948 (finding that Ohio State acted properly in withholding certain documents under attorney-client privilege in brief, three-paragraph section of opinion). The court also determined in a footnote to these paragraphs that all the documents Ohio State asserted were protected by work-product privilege were also protected by attorney-client privilege, and therefore the claim of work-product privilege did not need to be addressed. *See id.* at 948 n.1 (deciding attorney-client privilege applied to all documents exempted as work-product privilege).

107. *Gordon Gee Regrets 'Polish Army' Quip*, ESPN (Jan. 13, 2012, 5:56 PM), http://espn.go.com/college-sports/story/_/id/7459696/ohio-state-president-gordon-gee-regrets-polish-army-comment (quoting Ohio State President Gordon Gee).

108. *See ESPN*, 970 N.E.2d at 944 (considering whether Ohio State violated Ohio's public records law by redacting some information from requested records and withholding other records altogether).

109. *See id.* (outlining factual scenario surrounding claimed public records law violation).

110. *See id.* at 943-44 (evaluating ESPN's claim of public records law violation). For a further discussion of the Court's analysis of the aspects of ESPN's allegations of a violation of Ohio public records law, see *infra* notes 111-117 and accompanying text.

ESPN with the opportunity to revise its request following its rejection.[111] The court observed that Ohio's public records law required that the requester of public records be provided with both the opportunity to revise the request and information of the manner in which records are maintained and accessed by the public office following a denial based on overbreadth.[112] As ESPN had been given neither this information nor the opportunity to revise the request, the court found that Ohio State had failed to comply with that respective part of the public records statute.[113]

The court's second focus in evaluating Ohio State's rejection of ESPN's claim was the Ohio State's refusal to provide the requested documents on the basis of an ongoing investigation.[114] The court observed that the public records statute did not contain an "ongoing investigation" exemption from the requirement to comply with public records requests.[115] As a result, the court also found Ohio State had also failed to comply with the public records law on this second ground.[116] Consequently, the court found that Ohio State had violated the public records law, and granted ESPN's request for a writ of mandamus for the documents that were not protected by privilege.[117]

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111. *See id.* (holding that Ohio State had violated Ohio's public records law because they had not given ESPN opportunity to amend their request after denial based on overbreadth of initial request); *see also* Ohio Rev. Code Ann. § 149.43 (West 2012) ("If a requester makes an ambiguous or overly broad request . . . the public office . . . shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's . . . duties").

112. *See ESPN*, 970 N.E.2d at 944 (applying Ohio's Public Records Law to ESPN's claim). For more on the pertinent section of Ohio's public records law, see *supra* note 111.

113. *See ESPN*, 970 N.E.2d at 944 (holding in part that Ohio State had failed to comply with part of Ohio's public records law). For more on Ohio's public records law, see *supra* note 111.

114. *See ESPN*, 970 N.E.2d at 943 (addressing Ohio State's denial of ESPN's request for records because requested records concerned ongoing investigation).

115. *See id.* (analyzing Ohio Public Records Law). "[Ohio's public records law] does not contain an 'ongoing investigation' exemption for public records." *Id.* (quoting State *ex rel.* Ohio Patrolmen's Benevolent Ass'n v. Mentor, 732 N.E.2d 969 (Ohio 2000)).

116. *See ESPN*, 970 N.E.2d at 943-44 (holding that Ohio State had violated Ohio public records law for not providing ESPN with requested records since "ongoing investigation" was not valid exemption from public records law).

117. *See id.* at 949 (granting ESPN's request for writ of mandamus). However, the writ of mandamus granted to ESPN was extremely limited by Ohio State's claimed FERPA exemption. See *infra* notes 119-146 and accompanying text.

2. *"We do not play the Little Sisters of the Poor."*[118]: *The Court Determines Whether FERPA Preempts the Ohio Public Records Law*

The Ohio Supreme Court next turned its attention to whether FERPA provided an exemption for Ohio State from having to disclose certain records.[119] The particular documents at issue through which Ohio State had claimed an exemption through FERPA were the records relating to Ted Sarniak, Terrelle Pryor's mentor.[120]

In evaluating Ohio State's claimed FERPA exemption, the court first considered whether there would be tension with the Ohio public records statute if FERPA prohibited the release.[121] The court determined that no conflict would exist, observing that the Ohio public records law exempts records that are prohibited by state or federal law from being released from the requirements of the statute.[122] Therefore, if FERPA prohibited Ohio State from disclosing certain education records, Ohio State would also be exempted from disclosing those records under the state public records statute.[123]

a. Whether FERPA prohibits the disclosure of education records by educational agencies and institutions

Turning to the merits of Ohio State's claimed FERPA exemption, the Ohio Supreme Court first considered whether FERPA

118. *Ohio St. Prez Disregards TCU, Boise St.*, ESPN (Nov. 25, 2010, 2:05 AM), http://sports.espn.go.com/ncf/news/story?id=5845736 (quoting Ohio State President Gordon Gee).

119. *See ESPN*, 970 N.E.2d at 945-48 (analyzing whether FERPA provided exemption to Ohio's public records law).

120. *See id.* at 942 (describing documents that ESPN sought through its open records request). Ted Sarniak was a businessman from Terrelle Pryor's hometown of Jeanette, PA, who was "one of the first calls" Jim Tressel made to when he discovered Pryor was embroiled in potential conduct that would violate NCAA rules. *See Ted Sarniak III Dead at 68*, ESPN (July 22, 2012, 9:23 PM), http://espn.go.com/college-football/story/_/id/8189445/ted-sarniak-iii-terrelle-pryor-mentor-ohio-state-scandal-dead-68 (detailing extent of relationship between Sarniak and Tressel during scandal).

121. *See ESPN*, 970 N.E.2d at 944 (analyzing whether Ohio's Public records law allowed refusal of records request if FERPA prohibited records' release). For a further discussion of conflict between state public records laws and FERPA, see *supra* note 95.

122. *See ESPN*, 970 N.E.2d at 944 (determining that Ohio public records law would permit records to be withheld if prohibited by FERPA). The court observed that Ohio's public records statute "exempts 'records the release of which is prohibited by state or federal law' from the definition of 'public record.'" *Id.* (quoting Ohio Rev. Code Ann. § 149.43(A) (West 2012)).

123. *See id.* (holding that Ohio's public records law would allow for FERPA exemption if FERPA prohibited records' release).

would prohibit or merely penalize Ohio State for releasing education records.[124] The court observed that FERPA states that "[n]o 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," unless releases of that information are only done with the written consent of their parents.[125] The court also cited the United States Supreme Court in *Gonzaga University v. Doe*, which observed that Congress's intent in enacting FERPA was to condition the receipt of federal funds on "certain requirements relating to the access and disclosure of student educational records."[126] The court then cited the U.S. Supreme Court's opinion in *Owasso Independent School Dist. No. I 011 v. Falvo*, to further emphasize that schools must meet certain conditions as established by FERPA in order to receive any federal funds.[127]

Having established the U.S. Supreme Court's framework for the application of FERPA, the court then turned to ESPN's contention that FERPA does not "prohibit" the disclosure of requested records by educational agencies and institutions, but "merely penalizes them."[128] In evaluating this contention, the court focused on U.S. Supreme Court and Circuit Court precedent.[129] The court first cited the U.S. Supreme Court's opinion in *Falvo*, emphasizing the part of the opinion stating that FERPA specifies that "sensitive information about students may not be released without parental consent."[130] Having established that prohibition, the court then turned to the Sixth Circuit's opinion in *United States v. Miami Uni-*

124. *See id.* at 945-46 (analyzing whether FERPA prohibited release of education records, or merely penalized institutions that did so). For further discussion on how courts have handled the issue of whether FERPA actually prohibits the release of education records, see *supra* notes 88-95 and accompanying text.

125. *See ESPN*, 970 N.E.2d at 945.

126. *See id.* (quoting Gonzaga Univ. v. Doe, 536 U.S. 273, 278 (2002)). For a further discussion of *Gonzaga Univ.*, see *supra* notes 80-85 and accompanying text.

127. *See ESPN*, 970 N.E.2d at 945 (applying United States Supreme Court's opinion in *Falvo* to instant case). *Falvo* held that "FERPA is directed to the conditions schools must meet to receive federal funds . . . ." *Id.* (quoting Owasso Independent School Dist. No. I 011 v. Falvo, 534 U.S. 426, 430 (2002)).

128. *See ESPN*, 970 N.E.2d at 945 (analyzing ESPN's claim that FERPA as written merely penalizes schools for violating FERPA, but does not prohibit the actual release of documents). For further discussion of whether FERPA prohibits schools from releasing records, or whether it merely penalizes them, see *supra* note 95 and accompanying text.

129. *See ESPN*, 970 N.E.2d at 945 (citing both United States Supreme Court and Sixth Circuit Court of Appeals in evaluating ESPN's contention).

130. *See id.* (quoting *Falvo*, 534 U.S. at 428). For further discussion of *Falvo*, see *supra* notes 68-79 and accompanying text.

versity, which specifically held that an institution that accepts federal funds is well aware of the conditions imposed by FERPA, and that "once the conditions and funds are accepted, the school is indeed prohibited from systemically releasing education records without consent."[131] Though the court observed that the Sixth Circuit limited its conclusion to instances of "federal government action to enforce FERPA," the court determined that the limitation was only to emphasize the means through which FERPA was to be enforced, and did not alter universities' duties under FERPA.[132] Therefore, the court concluded that FERPA, if applicable, does constitute a prohibition on the release of education records.[133]

Applying this rule to Ohio State, the court observed that Ohio State received "approximately twenty-three percent of its total operating revenues" from federal funds, and was therefore prohibited from releasing education records "without parental consent."[134] The court found this conclusion to be in line with the holdings of several other state courts that had already addressed the issue of FERPA as applied to public universities.[135]

b. Whether records pertaining to either a student-athlete's conduct or a student-athlete's mentor constitute "education records" for the purposes of FERPA

Having determined that FERPA does prohibit the release of education records, the court then turned to the question of whether records responsive to ESPN's requests for documents "related to Sarniak and the prior NCAA investigations" constituted "education records" for the purposes of FERPA.[136] The court first considered ESPN's claim that the requested records are not education records concerning Sarniak and records relating to compli-

131. *See ESPN*, 970 N.E.2d at 945 (quoting United States v. Miami Univ., 294 F.3d 797, 809 (6th Cir. 2002)). For further discussion of *Miami Univ.*, see *supra* notes 88-93 and accompanying text.

132. *See ESPN*, 970 N.E.2d at 945 (analyzing Sixth Circuit's holding in *Miami Univ.* and applying to instant case).

133. *See id.* at 946 (holding that FERPA prohibits the release of student records). For a further discussion of whether FERPA prohibits schools from releasing records, or merely penalizes them for doing so, see *supra* note 95 and accompanying text.

134. *See ESPN*, 970 N.E.2d at 945-46.

135. *See id.* at 946 (noting Court's findings on this issue to be consistent with several other state courts).

136. *See id.* (evaluating what constituted "education records" under FERPA). For a further discussion of whether the records in this case constituted education records, see *infra* notes 155-170 and accompanying text.

ance by Ohio State coaches and administrators with NCAA regulations
"do not directly involve Ohio State students or their academic performance, financial aid, or scholastic performance."[137] The court observed ESPN's reliance in support of its claim on the Ohio Supreme Court's opinion in *State ex rel. Miami Student v. Miami University*, in which the court compelled the disclosure of student disciplinary proceedings because the cases were "nonacademic in nature."[138]

The court, however, rejected ESPN's first argument regarding the education records issue on two grounds.[139] First, the court observed that *Miami Student* had been overturned by the United States Court of Appeals for the Sixth Circuit in *Miami University*.[140] The court observed that *Miami University* had specifically held that student disciplinary records were education records subject to FERPA because "[u]nder a plain language interpretation of the FERPA, student disciplinary records are education records because they *directly relate to a student* and are kept by that student's university."[141] Second, the court observed that its own opinion in *Miami Student* specifically permitted Miami University certain personally identifiable information from the disclosed disciplinary documents in order to "comport with the FERPA's requirements."[142] Consequently, the court determined that FERPA did not restrict the term "education records" only to documents relating to academic performance, financial aid, or scholastic performance, and therefore that the documents at hand did generally constitute education records subject to FERPA.[143]

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137. *See ESPN*, 970 N.E.2d at 946. ESPN obtained this definition from the Ohio Supreme Court in State *ex rel.* Miami Student v. Miami Univ., 680 N.E.2d 956 (Ohio 1997). For further discussion, see *infra* note 138 and accompanying text.

138. *See ESPN*, 970 N.E.2d at 946 (noting ESPN's reliance on *Miami Student* for their argument).

139. *See id.* at 946-48 (analyzing whether records in this case were "education records" under FERPA). For further discussion of the Ohio Supreme Court's analysis of whether the documents in the instant case were "education records," see *infra* notes 140-145 and accompanying text.

140. *See ESPN*, 970 N.E.2d at 946 (observing that ESPN's cited authority had been overturned by Sixth Circuit).

141. *Id.* (emphasis added).

142. *See id.* at 947 (comparing impact of the decisions in *Miami Student* and *Miami Univ.*).

143. *See id.* at 946-47 (holding that "education records" were not as limited as ESPN argued under FERPA). For a discussion of a holding that education records were as limited as ESPN argued, see *infra* notes 152-170.

Having determined that the documents did constitute education records based on their content, the court finally turned to ESPN's claim that the requested records were not "education records" subject to FERPA because the were not "maintained by an educational agency or institution."[144] The court, however, quickly rejected this claim, noting that Ohio State's Department of Athletics retained all the responsive records for the purpose of FERPA compliance.[145]

Therefore, the court determined that Ohio State for the most part established that FERPA and the attorney-client privilege prohibited the disclosure of the requested records, and denied ESPN's requested writ to that extent.[146]

V. Critical Analysis

The Ohio Supreme Court's opinion in *ESPN*, which held that a coach's emails relating to a student-athlete's potential violation of NCAA rules were education records protected by FERPA, reflected the Sixth Circuit's broad interpretation of FERPA's privacy protections for students in *Miami University*.[147] Indeed, the Ohio Supreme Court decided *ESPN* by closely following the Sixth Circuit's analysis of the United States' claim in *Miami*.[148] However, while correctly addressing the issue of FERPA-Ohio public records law conflict, the court's analysis contains a number of weaknesses regarding one of

144. *See ESPN*, 970 N.E.2d at 947 (quoting § 1232g(a)(4)(A)(ii)).

145. *See id.* (holding that because the records were maintained by the Department of Athletics, they satisfied FERPA's central custodian requirements). In this case, the Ohio State Department of Athletics retained copies of all emails and attachments "sent to or by any person in the department," as well as copies of all documents "scanned into electronic records, which are organized by student-athlete." *See id.* The Court found that these facts made it more likely that they were education records under FERPA than the quizzes found not to be education records in *Falvo*. *See id.* (citing Owasso Independent School Dist. No. I 011 v. Falvo, 534 U.S. 426, 433 (2002)).

146. *See ESPN*, 970 N.E.2d at 948-49 (finding "for the most part" that Ohio State established their claimed privileges, and denying ESPN's requested writ of mandamus "to that extent").

147. *See id.* (holding that FERPA did protect the documents at issue); United States v. Miami Univ., 294 F.3d 797, 811-12 (6th Cir. 2002) (holding that disciplinary record were education records under FERPA); *see also Miami Univ.*, 294 F.3d at 808 (holding that requirements of FERPA are binding on institutions that accept federal education funds); McGee-Tubb, *supra* note 13, at 1060-66 (detailing different FERPA outcomes).

148. *See ESPN*, 970 N.E.2d at 946-48 (citing Sixth Circuit's decision in *Miami Univ.* repeatedly in reaching its decision).

the important issues of the case, specifically the issue of whether the requested documents were "education records" under FERPA.[149]

In addressing whether the documents at issue were "education records," the court resolved the ambiguity in the term by looking to how the Sixth Circuit resolved the issue of university disciplinary records.[150] Although this approach recognizes the federal courts' superior role in interpreting federal statutes, the court sacrificed both the purpose of the statute and the fact that the records at issue here were not "disciplinary records" when applying FERPA in this case.[151]

In evaluating the court's analysis in *ESPN*, it is helpful to consider a similar case from another state supreme court with a similar set of facts, *Kirwan v. The Diamondback*.[152] In *Kirwan*, a student newspaper at the University of Maryland had requested documents under Maryland's Public Information Act relating to potential NCAA violations of one of University's suspended basketball players.[153] The documents requested were all correspondence between the University and the NCAA regarding the suspended student-athlete, records relating to violations of NCAA rules by other members of the basketball team, and records relating to parking violations of its head basketball coach.[154]

149. For a discussion of weaknesses in the Ohio Supreme Court's opinion in *ESPN*, see *infra* notes 150-181 and accompanying text.

150. *See ESPN*, 970 N.E.2d at 946-48 (citing Sixth Circuit's decision in *Miami Univ.* repeatedly in reaching its decision). Furthermore, there is still "no clear answer as to whether student disciplinary records are educational records within the meaning of FERPA." Ball, *supra* note 14, at 478 (discussing uncertainty with definition of "educational records" under FERPA).

151. *See Miami Univ.*, 294 F.3d at 811 (stating that federal courts owe "no deference to a state court's interpretation of a federal statute"); *compare* Kirwan v. The Diamondback, 721 A.2d 196, 204 (Md. 1998) (focusing on Congress's intent in enacting FERPA), *with ESPN*, 970 N.E.2d at 946-47 (centering on the text of FERPA statute and Sixth Circuit's interpretation of that text). For a further discussion of why the records at issue in ESPN were not "disciplinary records" or "education records," see *infra* notes 152-170 and accompanying text.

152. 721 A.2d 196 (Md. 1998).

153. *See id.* at 198 (discussing violations leading up to respondent newspaper filing suit for requested records). In *Kirwan*, the University of Maryland's student newspaper, *The Diamondback*, was specifically investigating allegations that certain members of the University's men's basketball team were parking illegally on campus, and were receiving special treatment from the University with regards to the fines imposed. *See id.* (explaining facts of case).

154. *See id.* (discussing reasons documents had been requested by newspaper). In particular, the documents the University sought to protect by FERPA were regarding over $8,000 in parking fines accumulated by men's basketball player Duane Simpkins, which had been paid off by a former coach, as well as violations committed by other players for using handicapped parking spaces. *See Md. Opens Athlete Parking Ticket Records*, Student Press Law Ctr., Winter 1998, at 9, *available at* http://www.splc.org/news/report_detail.asp?id=323&edition=5.

In its decision, the Maryland Court of Appeals held in favor of the student newspaper, and ordered that the records be disclosed.[155] In doing so, the court determined that FERPA did not prohibit the release of the records relating to the students because they were not "education records" as defined by FERPA.[156] In making this determination, the Maryland Court of Appeals carefully examined Congress's intent in passing FERPA.[157] Within this examination, the court observed that the sponsor's intent in writing the legislation was to "stop the *widespread* dissemination of education records to others."[158] The protections of the legislation were adopted to protect from "*systemic*, not individual violations of students' privacy and confidentiality rights."[159] As a result, it can be concluded that the law's purpose is to prevent the widespread dissemination of students' personal education records.[160]

Additionally, the Maryland Court of Appeals also recognized that part of the legislative purpose of FERPA was to prevent educational institutions from operating in secrecy.[161] The court observed that FERPA's legislative history indicated that "the statute was not intended to preclude the release of any record simply because the record contains the name of a student."[162] The court reasoned that "[p]rohibiting disclosure of any document containing a student's name would allow universities to operate in secrecy," in direct contrast to one of the purposes of the act.[163] Furthermore, the court

155. *See Kirwan*, 721 A.2d at 206 (holding that FERPA did not protect requested documents, and that documents must be disclosed).

156. *See id.* (holding parking ticket records were not "education records" under FERPA). For further background on FERPA's definition of education records, see *supra* notes 46-54 and accompanying text.

157. *See Kirwan*, 721 A.2d at 204 (examining intent of FERPA's framers).

158. *See id.* (emphasis added).

159. *See id.* (emphasis added). The court observed that Congress at the time was "greatly concerned with systemic violations of students' privacy." *Id.* (quoting 120 Cong. Rec. 13951 (1974)).

160. *See Kirwan*, 721 A.2d at 204 (explaining purpose of FERPA). In its opinion, the court noted that Congress was particularly concerned about "students being required to participate in medical research and experimental education programs without parental notification or permission." *See id.* (citing 120 Cong. Rec. 13951 (1974)).

161. *See Kirwan*, 721 A.2d at 204 ("[I]n addition to protecting the privacy rights of students, Congress intended to prevent educational institutions from operating in secrecy."). This intent of FERPA was reiterated by Senator Thomas J. McIntyre, who stated that FERPA's intent "was to allow openness of school records" by providing access for students and their parents to their records. *See* Salzwedel & Ericson, *supra* note 9, at 1064 (quoting 120 Cong. Rec. 39858 (1974) (statement of Sen. McIntyre)).

162. *See Kirwan*, 721 A.2d at 204.

163. *Id.* For more on Congress's purpose of fostering institutional openness, see *supra* note 161.

provided a laundry list of documents that Congress intended to be protected by FERPA, including "IQ scores, medical records, grades, anecdotal comments about students by teachers, [and] personality rating profiles . . . ."[164] Bolstered by these guidelines on what types of documents were intended to be included within the scope of "education records," the court found that the requested records pertaining to student-athlete misconduct were not "education records" under FERPA, and ordered the documents released.[165]

The *Kirwan* court also cited a number of other cases which determined records were not "education records" protected by FERPA.[166] One case in particular with the most similar facts to *ESPN* regarding student records was *Red & Black Publishing Co. v. Board of Regents*.[167] In *Red & Black Publishing Co.*, the Georgia Supreme Court held that records of a student organization court were subject to inspection under Georgia's Open Records Act.[168] The Georgia Supreme Court determined, *inter alia*, that because the records requested were not "relating to individual student academic performance, financial aid, or scholastic probation," they were not subject to FERPA protection.[169] The United States District Court for the Western District of Missouri in *Bauer v. Kinkaid* also adopted this rule as a baseline for the evaluation of whether or not a record is a student record.[170]

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164. *See Kirwan*, 721 A.2d at 204. The full list of documents provided by the court included "student IQ scores, medical records, grades, anecdotal comments about students by teachers, personality rating profiles, reports on interviews with parents, psychological reports, reports on teacher-pupil or counselor-pupil contacts and government-financed classroom questionnaires on personal life, attitudes toward home, family and friends." *Id.*

165. *See id.* at 204-06 (analyzing congressional intent in definition of "education records," and ordering requisite records in instant case released).

166. *See id.* at 204-05 (analyzing other cases interpreting "education records" under FERPA).

167. 427 S.E.2d 257 (Ga. 1993). *Red & Black Pub. Co.* is also notable for being one of the cases that have lent support to the idea that FERPA merely penalizes institutions for releasing education records, but does not legally prohibit the release of those records. *See* McGee-Tubb, *supra* note 13, at 1065 (including *Red & Black Pub. Co.* within its discussion of decisions that have found FERPA as contractual condition).

168. *See Red & Black Pub. Co.*, 427 S.E.2d at 260 (holding that FERPA did not prevent release of records at issue in this case). In *Red & Black Pub. Co.*, the Georgia Supreme Court reviewed a case where the University of Georgia student newspaper sued the university for access to records of the University's Student Organization Court. *See id.* at 259. In particular, fraternities and sororities were subject to the jurisdiction of that court. *See id.* at 260.

169. *See id.* at 261 (citing Bauer v. Kinkaid, 759 F. Supp. 575, 591 (W.D. Mo. 1991)).

170. *See Bauer v. Kinkaid*, 759 F. Supp. at 591 (holding that documents relating to academic performance, financial aid, or scholastic performance were clearly

Despite this detailed and exhaustive analysis of FERPA's purpose and intent in *Kirwan* and its application toward records of the same type as those in *ESPN*, the Ohio Supreme Court instead focused on the Sixth Circuit's analysis of whether disciplinary records were "education records" without actually considering whether the documents before them actually constituted disciplinary records.[171] The Ohio Supreme Court in *ESPN* focused on how the Sixth Circuit in *Miami University* overturned the Ohio Supreme Court's holding in *Miami Student*, a holding in which the Ohio Supreme Court had applied the rule established by *Bauer*.[172] The *ESPN* court therefore focused this time on the *Miami University*'s emphasis on the "plain language of the statute," not restricting the term "education records" to "academic performance, financial aid, or scholastic performance."[173] Yet, this reading neglects certain important facts of the Sixth Circuit's opinion in *Miami University*.[174] In *Miami University*, the Sixth Circuit emphasized the "plain language of the statute" because FERPA already contains a specific rule regarding the release of student disciplinary records.[175] Specifically, it focused on the fact that FERPA contains clear language allowing release of student disciplinary records in several discrete situations.[176] Because Congress had specifically allowed for release of disciplinary records only in certain situations, the court reasoned that disciplinary records therefore must be covered by the statute at all other times

education records under FERPA). In *Bauer*, a university student brought suit seeking access to reports of criminal incidents and investigations maintained by campus police. *See id.* at 575. The court held, *inter alia*, that these records were not protected by FERPA. *See id.* at 591.

171. *See* State *ex rel.* ESPN v. Ohio State Univ., 970 N.E.2d 939, 946-48 (Ohio 2012) (following Sixth Circuit's analysis of disciplinary records in *Miami Univ.*); *id.* at 946 (asserting documents were "disciplinary records" without actually analyzing definition).

172. *See* State *ex rel.* Miami Student v. Miami Univ., 680 N.E.2d 956, 958 (Ohio 1997) (citing *Red & Black Pub. Co.*, 427 S.E.2d 257 (Ga. 1993)); Bauer v. Kinkaid, 759 F. Supp. at 589); *ESPN*, 970 N.E.2d at 946-48 (citing United States v. Miami Univ., 294 F.3d 797 (6th Cir. 2002), for rules of its decision); *see also ESPN*, 970 N.E.2d at 946 (dismissing ESPN's citation of *Miami Student* because it had been overturned by Sixth Circuit).

173. *See ESPN*, 970 N.E.2d at 946.

174. *See generally id.* (neglecting certain important facts of the case in *Miami Univ.*). For a further discussion of the Ohio Supreme Court's misapplication of *Miami Univ.*, see *infra* notes 175-181 and accompanying text.

175. *See Miami Univ.*, 294 F.3d at 814 (focusing on fact that FERPA contains special rules for how disciplinary records are to be handled in certain cases).

176. *See id.* at 812 (holding Congress did intend student disciplinary records to be covered by FERPA). Specifically, the Court stated that Congress's intent is demonstrated by "a review of the express statutory exemptions from privacy and exemptions to the definition of 'education records' . . ." including an exemption that allows disclosures of disciplinary records to victims of certain crimes. *See id.*

by the language of the statute.[177] Given that Congress had therefore spoken on the issue of disciplinary records, the Sixth Circuit was therefore required to show deference to the expressed intent of Congress in holding that disciplinary records were covered by FERPA.[178]

In the case of *ESPN*, however, Congress had not spoken on the issue of whether correspondence relating to NCAA compliance pertaining to a student-athlete's eligibility constituted either disciplinary records or education records under FERPA, which should thereby allow the court to consider congressional intent in interpreting "education records" under the statute.[179] When considering congressional intent in the statute, it is clear that "education records" is a narrow term, certainly not originally contemplated to include correspondence pertaining to NCAA compliance.[180] Given the narrow interpretation of "education records" adopted by other courts, including the United States Supreme Court, on top of the Maryland Court of Appeals' holding that nearly identical documents were not "education records," it seems clear that the records in *ESPN* should not have been "education records" protected by FERPA.[181]

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177. *See id.* (discussing Congress's intent with regard to student disciplinary records in FERPA). In its discussion, the Court noted that "[t]he FERPA sanctions the release of student disciplinary records in several discrete situations through exemption." *Id.* Specifically, FERPA allows disclosure "*to an alleged victim* of any crime of violence . . . or a nonforcible sex offence, the final results of any disciplinary proceeding conducted by the institution against the alleged perpetrator . . . ." *Id.* (quoting 20 U.S.C. § 1232g(b)(6)(A) (2006)).

178. *See Miami Univ.*, 294 F.3d at 815 (holding disciplinary records are "education records," and thus are protected by FERPA).

179. *See ESPN*, 970 N.E.2d at 941 (describing records at issue to be correspondence between football coach and student-athlete's mentor regarding that athlete's compliance with NCAA rules). *Compare Miami Univ.*, 294 F.3d at 812-15 (analyzing whether "student disciplinary records" were protected by FERPA, which Court found to be addressed by text of the statute), *with* Kirwan v. The Diamondback, 721 A.2d 196, 204 (Md. 1998) (analyzing whether records of student-athlete receiving impermissible benefits were "education records" protected by FERPA, which Court found not to be addressed by text of FERPA, thus leading it to look at Congressional intent).

180. *See Kirwan*, 721 A.2d at 204-06 (determining that records relating to student-athlete's NCAA violations were not "education records," and basing that conclusion on demonstrable Congressional intent in passing FERPA).

181. *See* Owasso Independent School Dist. No. I-011 v. Falvo, 534 U.S. 426, 434 (2002) (requiring numerous standards of types of documents to be considered "education records," including record of access for each person, central custodian, and maintenance by central figure such as registrar); *Kirwan*, 721 A.2d at 206 (holding that records of student-athlete's violation of NCAA rules were not "education records); *see also* Salzwedel & Ericson, *supra* note 9, at 1084-85 (stating that Supreme Court's decision in *Falvo* served to narrow what Court emphasized was overly broad and heavy-handed federal law). For more on the Supreme Court's

VI. Impact

The Ohio Supreme Court's expansive definition of "education records" in *ESPN* should have a twofold impact.[182] First and foremost, if extended to other jurisdictions, the decision would allow universities' athletic departments to receive nearly blanket protection on records it preserves relating to its student-athletes' NCAA compliance; this protection would also be available to universities in the state of Ohio.[183] Second, this decision, if extended to other jurisdictions, will foster the kind of secrecy within athletic departments that FERPA originally intended to prevent.[184]

College sports are already gigantic sources of revenue for many universities.[185] Within athletic departments, the revenue drawn from the football teams is often responsible for funding the entire department and many of the other sports.[186] Furthermore, having a successful collegiate sports team often spurs donations to both a university and its athletic program on a grand scale.[187] As a result of these high stakes, universities place tremendous pressure on coaches to field successful athletic teams.[188] However, with this pressure to win often results in scandals and academic corruption

interpretation of education records under FERPA in *Falvo*, see *supra* notes 74-76 and accompanying text.

182. For a discussion of this impact, see *infra* notes 183-202 and accompanying text.

183. *Compare ESPN*, 970 N.E.2d at 949 (holding that documents pertaining to athlete's potential violations of NCAA rules were protected by FERPA), *with Kirwan*, 721 A.2d at 206 (holding that documents relating to athlete's violation of NCAA rules were not protected by FERPA).

184. *See* Salzwedel & Ericson, *supra* note 9, at 1064 (stating that intent of FERPA was to foster openness of school records); *id.* at 1112 (arguing that universities must become more transparent and less able to use FERPA as shield).

185. *See* Eitzen, *supra* note 10, at 143 (describing college sports as multi-billion dollar industry)

186. *See* Frank Deford, *The Luxurious Revenue College Sports Model*, NPR (Oct. 5, 2011), http://www.npr.org/2011/10/05/141047227/the-luxurious-revenue-college-sports-model ("[F]ootball – perhaps with some help from men's basketball – must pick up the bills for all the many other sports that lose money").

187. *See* Jobyann Renick, *The Use and Misuse of College Athletics*, 45 J. Higher Educ. 545, 549 (1974) (observing correlation between athletic success, donations to universities' athletic programs, and donations to universities). The article quotes the president of Georgia Tech University, who stated that in the wake of the school winning the basketball National Invitation Tournament (NIT), "thousands of dollars were pledged to the college treasury in the days following the tournament," and added that "the [state] General Assembly [was] expected to look more favorably upon the school." *See id.* at 548.

188. *See* Francis T. Cullen, Edward J. Latessa & Joseph P. Byrne, *Scandal and Reform in Collegiate Athletics: Implications from a National Survey of Head Football Coaches*, 61 J. Higher Educ. 50, 53 (1990), *available at* http://www.jstor.org/stable/1982034 (stating that survey of Division I football coaches revealed that head football coaches thought that corruption in college athletics was derived from "intense

within athletic programs.[189] Athletes are caught receiving improper benefits, and schools are charged with failing to provide athletes with a serious education.[190] Instead, these schools often concern themselves more with keeping student-athletes eligible.[191]

The simple fact of the matter is that, at some universities, athletics have trumped academics in terms of institutional priority.[192] The result has been a number of inherent contradictions with university ideals that develop at these institutions that come to rely on the success of their athletic programs.[193] Simply put, educational goals are preempted by the lures of more revenue.[194] Professors are fired while coaches receive more benefits, and unsuccessful athletic programs actually drain money away from academics.[195] Academically under-qualified athletes receive admission to universities, while more qualified applicants are rejected.[196] Men's and women's programs receive different amounts of support, undermining the notion that participation in sports is primarily educational

'pressure to win'"); *see also id.* at 62 (stating that "pressure to win . . . is fueled by the large economic stakes inherent in major collegiate athletics").

189. *See id.* at 53 (stating that survey suggested that scandal in college athletics is product of "intense 'pressure to win'").

190. *See* Renick, *supra* note 187, at 549 ("The pressure to field a successful team sometimes encourages practices which are not in the best academic interest of the students"); Cullen, *supra* note 188, at 50 (noting that payoffs from boosters to star players seems "ubiquitous").

191. *See* Renick, *supra* note 187, at 549 ("The real reason for such practices is the desire of athletic personnel . . . to keep a player academically eligible while concentrating on success in intercollegiate sports").

192. *See, e.g.*, Curtis Eichelberger and Oliver Staley, *Rutgers Athletics Grow at Expense of Academics Unlike at Texas*, BLOOMBERG (Aug. 16, 2011, 2:51 PM), http://www.bloomberg.com/news/2011-08-16/rutgers-boosting-athletics-at-expense-of-academics-fails-to-emulate-texas.html (reporting that Rutgers was spending more money on its athletic programs while simultaneously cutting academic programs). The article reported that, of the 53 public institutions surveyed by Bloomberg, "46 diverted money to sports in their fiscal years ended in 2010 . . . ." *Id.*

193. *See* EITZEN, *supra* note 10, at 137-38 (observing that athletes recruited to universities for reasons "other than their cognitive abilities" receive about $1 billion in scholarships). The book also observes that the careers of key policy-makers within universities' athletic programs depend on the ability to generate continuous revenue to be "consistently competitive with other institutions," thus creating "desperate pressure" to generate "increasingly large amounts of revenue," leading to "business, not academic decisions." *See id.*

194. *See id.* at 160-63 (discussing contradictions between academic ideals and modern athletic department goals).

195. *See, e.g.*, Eichelberger & Staley, *supra* note 192 (comparing how Rutgers University was cutting funding to its academic programs while simultaneously raising both tuition and funding for sports).

196. *See* EITZEN, *supra* note 10, at 161 (discussing how academically underprepared athletes are recruited to universities).

in motivation.[197] And while at the university, athletes' educational experiences and attainment are denigrated by altered transcripts, surrogate test-takers, and "phantom" courses.[198]

Institutional transparency is the best way to combat corruption in collegiate athletics.[199] As occurred in the scandal promulgating *ESPN*, seeking to keep athletes eligible and programs successful, Universities and Athletic Departments attempt to cover up the events that precipitate these types of scandals by invoking FERPA.[200] Often in instances involving misconduct at a university, student newspapers and other media outlets attempt to access records relating to misconduct through state open records laws.[201] By expanding the protections of FERPA fully to athletic departments and student-athletes, the Ohio Supreme Court's holding will assist athletic departments in covering up student athlete misconduct and academic corruption, thus inhibiting the type of transparency required to clean up college athletics.[202]

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197. *See* John R. Thelin, *Good Sports? Historical Perspective on the Political Economy of Intercollegiate Athletics in the Era of Title IX, 1972-1997*, 71 J. Higher Educ. 391, 393-98 (2000) (discussing vast historical funding disparities between men's and women's athletic programs).

198. *See* Eitzen, *supra* note 10, at 161 (discussing flaws in athletes' educational programs and experiences).

199. *See* Salzwedel & Ericson, *supra* note 9, at 1093 (arguing that best and only hope of "solving the academic corruption" in college athletics is telling truth and transparency of information).

200. *See* Renick, *supra* note 187, at 549 ("The real reason for such practices is the desire of athletic personnel . . . to keep a player academically eligible while concentrating on success in intercollegiate sports.").

201. *See* McGee-Tubb, *supra* note 13, at 1059-60 (observing that tension between FERPA and state open records laws "arises most often when a news outlet submits an open records request for student information from a university").

202. *Compare* Salzwedel & Ericson, *supra* note 9, at 1093 (arguing that transparency is best way to clean up college athletics), *with* State *ex rel.* ESPN v. Ohio State Univ., 970 N.E.2d 939, 948-49 (Ohio 2012) (holding that FERPA prohibits disclosure of majority of information ESPN sought regarding student-athlete NCAA violations).

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