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Recap: *Krakauer v. State of Montana*; Montana's Constitutional Right to Know v. FERPA

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RECAP; *Krakauer v. State of Montana*: Montana's Constitutional Right to Know v. FERPA

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I. VIVIAN HAMMILL FOR APPELLANT STATE OF MONTANA

Vivian Hammill began by claiming that the Montana University System must protect the student privacy interests at stake in the Commissioner's records under both Montana Law and the Federal Education Rights and Privacy Act (FERPA). Further, under either of these laws, the fact that student information is made public by someone other than the university does not change the responsibility of the university to keep that same information protected. Pointing to the court order exception of FERPA,[1] Justice Baker asked Hammill whether or not a balancing test would be appropriate to determine whether or not release was proper. Hammill responded that a balancing test would not be appropriate. Hammill asserted that the privacy interests of students should only be overcome in the case of an exception to federal or state law. Hammill claimed that to allow for disclosure in any other instance would cause students to be hesitant of testifying in university disciplinary proceedings for fear of public disclosure and thus create a chilling effect. Justice Shea quickly asked whether redacting the names of students would solve this problem. Hammill responded that redaction would not solve anything in this case because Krakauer had asked for Jordan Johnson's records by name and the records contained information about students other than Johnson.

Without being asked, Hammill launched into a discussion about Krakauer's lack of standing to request the Commissioner's records under the Montana Constitution. Hammill maintained that the Montana Constitution only gave the right to know to Montana Citizens despite heated questioning from the Court and the assertion that the test was really wether or not Krakauer had a pulse, not whether he was a citizen.

II. MICHAEL MELOY FOR APPELLEE JON KRAKAUER

Just as soon as Michael Meloy had finished introducing himself, Justice Wheat interrupted Meloy's planned argument with a question and the questions just kept on coming. Most troubling to the Court was the fact that an in camera review of the Commissioner's records had not been performed by the District Court, meaning that the Court had nothing in the record to review. Meloy did not offer a satisfying reason for the lack of the review, claiming that he "didn't like" in camera reviews because such a

[1] 20 U.S.C.A. § 1232g(b)(2)(B) (2015).

review leaves the requesting party in the dark as to the contents of the records and unable to make arguments about the contents to a judge who is privy to the contents. The Justices were quick to point out that they do not care what Meloy likes but wanted to know why an in camera review was not performed in this instance. Meloy stated that he understood in camera reviews are part of the process and asserted that he never fought against ordering such a review, leaving Hammill responsible for the lack of one in this case.

Of significant importance was the actual information that Krakauer wished to avail himself of by receiving the records. Meloy asserted Krakauer simply wanted to see the process by which Johnson's previous disciplinary proceedings were reversed and did not care about the behavior of the students involved. Meloy stated that Krakauer's request required the Court to weigh the constitutional right to know against the right of privacy. Although lacking conviction, Meloy claimed that the people of Montana need to know why the Commissioner reinstated Johnson and that Krakauer represented the people by requesting that information. Justice McKinnon asked whether or not students had any heightened privacy to be considered when weighing the constitutional rights. Meloy responded by pointing out that the Montana Constitution does not differentiate between people in regard to the right of privacy and that he does not believe students should have a heightened right of privacy. When asked whether or not releasing the Commissioner's records in this case would lead to a pattern or practice that would be violative of FERPA, Meloy responded that Montana's weighing test was done on a case-by-case basis that could not establish a pattern or practice. Accordingly, Meloy claimed that FERPA could be "harmonized" with Montana law.

In regard to whether or not Krakauer has standing to request the Commissioner's records, Meloy was dismissive of Hammill's argument that the Montana Constitution only grants the right to know to Montana citizens. Meloy went so far as to say that he was "surprised" that Hammill even raised the argument because simple constitutional interpretation clearly leads to the conclusion that Krakauer has standing as a "person."[2] However, Meloy did not have a simple conclusion when it was pointed out to him that the preamble uses "the people of Montana."[3]

III. REBUTTAL OF VIVIAN HAMMILL FOR APPELLANT STATE OF MONTANA

Hammill left herself a brief two minutes for rebuttal. During this time, Hammill's most salient point was that the Montana University

[2] MONT. CONST. art. II, § 9.
[3] MONT. CONST. pmbl.

System needs guidance from the Court as to how a student's records should be handled under the Montana Constitution and FERPA.

IV. ANALYSIS

The Court did not spend any time asking whether or not FERPA preempted the Montana Constitution. Rather, the Court asked many questions about the appropriate weight to be given to the right to know or to the right of privacy. The emphasis on the balance hints that the Montana Constitution will control the release because FERPA does not mandate a balancing test but rather conditions release upon the satisfaction of specific exceptions.[4]

While the Court pointed out that the preamble to the Montana Constitution uses "the people of Montana," this is not likely an indication that the Court will find for the State on the issue of standing. According to the preamble, "the people of Montana" established the constitution in thanks for Montana's beauty and "equality of opportunity" and in order to "secure the blessings of liberty" for generations to come.[5] However, this does not mean that the Montana Constitution only bestows protections upon Montana citizens. When "the people of Montana" wrote the constitution, they chose to provide the right to know to any "person" who requests public documents.[6]

As to Hammill's argument that releasing the records will result in a chilling effect in regard to student testimony, redaction truly is the cure. Krakauer did not include the name of the female student who alleged that she was raped by Johnson in his book and the newspapers also guarded her identity. The names of involved parties other than Johnson are either unknown or scarcely known. Redacting the name of the alleged victim and redacting any other students' names in the released records truly would preserve their privacy. Accordingly, when balancing the right of privacy against the public's right to know how the Commissioner dealt with the star quarterback, the Court will likely find that the public's right outweighs.

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[4] 20 U.S.C.A. 1232g(b).
[5] MONT. CONST. pmbl.
[6] MONT. CONST. art. II, § 9.