

11-15-2017

Krakauer's Heavy Burden: Balancing Students' Enhanced Right to Privacy Against the Public's Strong Right to Know

Tim Brothwell

Alexander Blewett III School of Law

Follow this and additional works at: https://scholarworks.umt.edu/mlr_online

Let us know how access to this document benefits you.

Recommended Citation

Tim Brothwell, Case Note, *Krakauer's Heavy Burden: Balancing Students' Enhanced Right to Privacy Against the Public's Strong Right to Know*, 77 Mont. L. Rev. Online 181, https://scholarship.law.umt.edu/mlr_online/vol77/iss1/23.

This Casenote is brought to you for free and open access by ScholarWorks at University of Montana. It has been accepted for inclusion in Montana Law Review Online by an authorized editor of ScholarWorks at University of Montana. For more information, please contact scholarworks@mso.umt.edu.

**CASENOTE; Krakauer's Heavy Burden: Balancing Students'
Enhanced Right to Privacy Against the Public's Strong Right to
Know**

Tim Brothwell

I. INTRODUCTION

Students have substantial privacy rights in their student records, and a party who seeks the unilateral release of these records has a significantly heavy burden to overcome in order to justify disclosure.¹ In *Krakauer v. State ex rel. Christian*,² the Montana Supreme Court was presented with the question of whether an out-of-state journalist's right to know sufficiently outweighed the privacy interest of a student in his educational records to allow for the unilateral release of the student's confidential student records to the journalist.³

II. FACTUAL AND PROCEDURAL BACKGROUND

In April 2015 journalist Jon Krakauer published a book, *Missoula: Rape and the Justice System in a College Town*.⁴ This book documented instances of alleged sexual misconduct and sexual assaults that had occurred on college campuses, primarily at the University of Montana.⁵ Before publishing his book, Krakauer filed a request in January 2014 with the University of Montana's Commissioner of Higher Education, Clayton Christian, for the release of a certain student's disciplinary records.⁶ Krakauer specifically named the student whose records he sought.⁷ Krakauer was particularly interested in determining what had happened during the final stages of the investigation into this student's alleged conduct; the student had been found guilty of rape at multiple stages of campus proceedings and was ordered expelled from campus, yet he was never actually expelled, and he continued to play for the University of Montana football team as its star quarterback.⁸ Krakauer speculated that the decision had been overturned when it reached the Commissioner's office, and he wanted the records to verify his conclusion.⁹

The Commissioner refused Krakauer's request, asserting that both the federal Family Educational Rights and Privacy Act of 1974 (FERPA)

¹ *Rios v. Read*, 73 F.R.D. 589, 598 (E.D.N.Y. 1977).

² 381 P.3d 524 (Mont. 2016).

³ *Id.* at 528.

⁴ *Id.* at 526.

⁵ *Id.*

⁶ *Id.* at 527.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

and Montana Code Annotated § 20–25–515 prevented him from complying with the request because the University had a duty to protect the privacy interests of the student.¹⁰ The Commissioner argued that in this instance the only way to comply with state and federal law was by completely refusing to release the records because Krakauer had requested the student’s records by naming the student and as a result it was not possible to adequately protect the student’s privacy interests through redaction.¹¹

In response, Krakauer filed suit in Montana District Court against the Commissioner in February 2014, citing his right to know under Article II, Section 9 of the Montana Constitution.¹² Krakauer’s motion for summary judgment was successful, and the district court ordered the Commissioner to “make available for inspection and/or copying within 21 days the requested records, with students’ names, birthdates, social security numbers, and other identifying information redacted.”¹³ The Commissioner appealed.¹⁴

III. MAJORITY HOLDING

The Montana Supreme Court reviewed the decision of the district court de novo to determine if the statutory and constitutional issues presented had been correctly decided.¹⁵ The Court reviewed three primary issues¹⁶: whether Krakauer as an out-of-state resident had standing under Article II, Section 9 of the Montana Constitution¹⁷; whether FERPA and Montana Code Annotated § 20–25–515 prohibited the release of the records; and whether Krakauer’s right to know under Article II, Section 9 of the Montana Constitution outweighed the student’s right to privacy under FERPA and Montana law.¹⁸

A. *FERPA and Montana Code Annotated § 20–25–515*

FERPA is a federal law that prevents educational institutions “from having a policy or practice of releasing education records or personally identifiable information contained in education records, and

¹⁰ *Id.*

¹¹ *Id.* at 528.

¹² *Id.*

¹³ *Id.* (internal quotation marks omitted).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ The Court briefly addressed a fourth issue: whether the district court erroneously awarded Krakauer with attorney’s fees. *Id.* at 526. Because this opinion ultimately reversed the district court’s prior order to release the student’s records to Krakauer, the Supreme Court vacated Krakauer’s award of attorney’s fees until the substantive issues were re-determined.

¹⁷ The Court concluded that Krakauer had standing to bring his suit because based on the plain language of the Constitution, the right-to-know applies to all “persons,” not just Montana Citizens. *Id.* at 528–29.

¹⁸ *Id.* at 526.

conditions receipt of federal monies on those institutions' compliance with its directives."¹⁹ Under FERPA, student's disciplinary records are considered "education records," and FERPA authorizes the non-consensual release of student disciplinary records under certain conditions.²⁰

The Court noted that despite the general rule that FERPA prohibits schools from unilaterally releasing students' education records, there are several non-consensual exceptions within the act.²¹ One of these exceptions allows for the release of the final results of a disciplinary proceeding "if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense."²² However, the Court noted that this exception²³ only allows for the release of limited portions of the student's disciplinary records.²⁴ The Court concluded that it was unable to determine, based on the record, whether the Commissioner had found that a violation had occurred.²⁵ The Court remanded to the district court to perform an *in camera* review of the student's disciplinary record to determine if this exception applies.²⁶

Another exception under FERPA allows for the release of personally identifiable information pursuant to any lawfully issued subpoena, and the Court found that this additional exception *may* apply.²⁷ The Court noted that the district court's order for the Commissioner to release the records to Krakauer was indeed a valid order under FERPA.²⁸ However, the Court determined that even a valid order can be upheld only if the court properly balances the privacy interests of the student against the right to know.²⁹ Accordingly, the Court remanded the case for an *in camera* review, finding that the district court's balancing test was insufficiently performed.³⁰

The Court next looked to Montana law to determine if the student had a separate privacy interest under state law. Montana Code Annotated § 20–25–515 provides:

¹⁹ *Id.* at 529 (*see* 20 U.S.C. § 1232g (2013)).

²⁰ *Id.* at 530 (*see* 34 C.F.R. § 99.31(a)(13) & (14) (2012)).

²¹ *Id.* at 531.

²² *Id.* (citing 20 U.S.C. § 1232g(b)(6)(B)).

²³ *Id.* (citing 20 U.S.C. § 1232g(b)(6)(B) & (C)(i–ii)).

²⁴ *Id.* (citing 20 U.S.C. § 1232g(b)(6)(B) & (C)(i–ii)). Specifically, this exception allows for the release of "only the name of the student, the violation committed, and any sanction imposed by the institution on that student" and additionally "the name of any other student, such as a victim or witness, only with the written consent of that student." 20 U.S.C. § 1232g(b)(6)(C)(i–ii).

²⁵ *Id.* at 531.

²⁶ *Id.*

²⁷ *Id.* (citing 20 U.S.C. § 1232d(b)(2)(B)).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

A university or college shall release a student's academic record only when requested by the student or by a subpoena issued by a court or tribunal of competent jurisdiction. A student's written permission must be obtained before the university or college may release any other kind of record unless such record shall have been subpoenaed by a court or tribunal of competent jurisdiction.³¹

The Court concluded that the Montana Constitution requires a student's right to privacy in his or her records to be balanced against the public's right to know and obtain the records.³² This balancing test must be properly performed before requested records can be unilaterally released pursuant to § 20–25–515 and any applicable judicial exceptions under FERPA.³³

B. Krakauer's Right to Know and the Student's Right to Privacy

To determine whether the district court had erred in ordering the release of the student's records to Krakauer, the Court considered Krakauer's right to know and the student's right to privacy.³⁴ The Court applied a two-part test³⁵ to strike the balance between these two competing interests: "(1) whether the person involved had a subjective or actual expectation of privacy, (2) and whether society is willing to recognize that expectation as reasonable."³⁶

While the Court acknowledged that Krakauer had a right to know information pertaining to the government's response to rape culture at the University, it ultimately held that the student's right to privacy was an enhanced right to privacy under FERPA and Montana law.³⁷ The Court held that the district court should not have found that the student did not have a reasonable expectation of privacy in the records.³⁸ The Court concluded that the district court had not properly considered the enhanced

³¹ *Id.* at 532 (citing MONT. CODE ANN. § 20–25–515 (2015)).

³² *Id.* at 532.

³³ *Id.*

³⁴ *Id.* at 533.

³⁵ The Court presents this two-part test as the proper balancing test for determining whether the right to know outweighs the student's right to privacy. However, this test is missing the key, third component that actually requires the balancing of the two constitutional issues at stake. As written, this two-part test would only address whether or not the student has a privacy interest. Immediately preceding this statement, the Court correctly states the third requirement of the test, that the Court must consider "whether the demands of individual privacy clearly exceed the merits of public disclosure." *Id.* at 533 (quoting *Associated Press, Inc. v. Mont. Dept. of Revenue.*, 4 P.3d 5, 9 (Mont. 2000)). While the Court ultimately does mention this important third step, it may have missed an opportunity to explicitly outline the process for the district court.

³⁶ *Id.*

³⁷ *Id.* at 534.

³⁸ *Id.*

right to privacy under FERPA and Montana law when it performed its balancing test.³⁹

The Court ultimately remanded the case to the district court to perform an *in camera* review of the student's records and to re-perform the balancing test.⁴⁰ The Court instructed the district court to weigh the student's enhanced privacy interests and to give careful consideration to whether the "futility of redaction affects the privacy analysis," given that Krakauer had named the student in his request.⁴¹

IV. JUSTICE MCKINNON'S DISSENT

The dissent agreed with the Court's conclusion that had the Commissioner voluntarily handed over the student's records it would have been a violation of FERPA.⁴² However, Justice McKinnon disagreed with the Court's decision to remand the case back to the district court to perform an *in camera* review, as she asserted that the Court could have decided the issue on its own.⁴³

Looking to the applicability of the FERPA exception allowing for the unilateral release of the final results of a disciplinary proceeding,⁴⁴ the dissent primarily argued that an *in camera* review was unnecessary because it could be inferred from the record that the student's prior guilty verdicts had clearly been overturned by the Commissioner.⁴⁵ The dissent contended that, given the Court's ability to infer that there had been no violation, the exception clearly did not apply, and an *in camera* review would be "pointless."⁴⁶

Further, the dissent criticized the majority's decision to remand the case for an *in camera* review because the student's enhanced right to privacy so clearly exceeded the public's right to know.⁴⁷ The dissent agreed with the majority that under Montana law there is also an enhanced right to privacy.⁴⁸ However, the dissent took this analysis a step further and argued that whenever the Court cannot adequately protect a reasonable expectation of privacy, records cannot be disclosed.⁴⁹ The dissent argued that the student's right to privacy is not reduced by the mere publicity of

³⁹ *Id.*

⁴⁰ *Id.* at 535.

⁴¹ *Id.* at 534.

⁴² *Id.* at 536 (McKinnon, J., dissenting).

⁴³ *Id.*

⁴⁴ See 20 U.S.C. § 1232g(b)(6)(B).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 538.

⁴⁸ *Id.* at 537; see MONT. CODE ANN. § 20-25-515; MONT. CODE ANN. § 20-25-512; MONT. CODE ANN. § 20-25-513.

⁴⁹ *Id.* at 538.

the case and the status of the student, which the majority declined to decide itself.⁵⁰

The dissent also gave substantial weight to the fact that Krakauer had requested the student's records primarily in order to publish information about the student in his book.⁵¹ The dissent seems to suggest that Krakauer's right to know is not as strong because of his reason for requesting the record in the first place: rather than generally requesting records in order to comment on the University's response to rape culture on campus, Krakauer appeared to have been largely interested in what happened to this particular student so that he could include this information in his book.⁵²

The dissent concluded that because Krakauer had requested the student's records by naming the specific student, it would no longer be possible to protect the student's enhanced right to privacy if the records are released. An *in camera* review would accordingly be unnecessary, especially given Krakauer's purpose in requesting the records.⁵³

V. ANALYSIS

While the dissent makes a compelling argument that it does seem *highly likely* that the student's conviction was overturned by the Commissioner, the majority was correct to avoid reading anything into the record that is not there. The majority properly determined that an *in camera* review by the district court is necessary to determine if 20 U.S.C. § 1232g(b)(6)(B) will apply. In the event that the district court finds that this FERPA exclusion does not apply, it should find that the student's enhanced right to privacy outweighs the public's right to know in this instance because the student's enhanced right to privacy cannot possibly be protected given that Krakauer named the student in his request.

A. FERPA and Students' Enhanced Right to Privacy

FERPA protects the confidentiality of educational records kept by government-funded schools.⁵⁴ FERPA prohibits educational agencies from disclosing "educational records" or "personally identifiable information contained therein" without parental consent or court order.⁵⁵ Student disciplinary records qualify as "education records" because "they directly relate to a student and are kept by that student's university."⁵⁶

⁵⁰ *Id.*

⁵¹ *Id.* at 539.

⁵² *Id.* at 538–39.

⁵³ *Id.*

⁵⁴ See 20 U.S.C. § 1232g; Lynn Daggett, *FERPA in the Twenty-First Century: Failure to Effectively Regulate Privacy for all Students*, 58 Cath. U. L. Rev. 59, 62 (2008).

⁵⁵ 20 U.S.C. § 1232g(b)(1).

⁵⁶ *United States v. Miami Univ.*, 294 F.3d 797, 812 (6th Cir. 2002).

Accordingly, the disciplinary records at issue in this case constitute “education records” under FERPA, and the Court was correct to conclude that the student’s records fall under the purview and protection of FERPA.

A party seeking disclosure of education records protected by FERPA bears “a significantly heavier burden . . . to justify disclosure than exists with respect to discovery of other kinds of information, such as business records.”⁵⁷ The legislative purpose behind FERPA is to prevent the disclosure of student records, even when a court orders such disclosure, *unless* the court has properly considered the privacy interest of the student. In the words of one senator involved, Congress passed FERPA because “there [is] clear evidence of frequent, even systematic violations of the privacy of students and parents by the schools through the unauthorized collection of sensitive personal information and the unauthorized, inappropriate release of personal data to various individuals and organizations.”⁵⁸ Drawing on FERPA’s legislative history, in *Rios v. Read*, decided shortly after FERPA’s passage, a federal court noted that “[t]hese privacy violations are no less objectionable simply because release of the records is obtained pursuant to judicial approval unless, before approval is given, the party seeking disclosure is required to demonstrate a genuine need for the information that outweighs the privacy interest of the students.”⁵⁹

The proposition that a requesting party has a “significantly heavier burden,”⁶⁰ in the words of the court in *Rios*, to justify its records request strongly implies that students have an enhanced privacy interest compared to businesses and other people. Given the legislative history of FERPA,⁶¹ the logical conclusion is that the justification for requiring this “significantly heavier burden”⁶² in the first place is the strong privacy rights of students under FERPA such that the requesting party has a higher burden than it would in most other circumstances. Unlike the *Rios* court’s “significantly heavier burden”⁶³ approach, the Montana Supreme Court defined the issue as a student’s “enhanced right to privacy.”⁶⁴ Despite these two different approaches, the result seems identical: a party seeking a student’s records must have significantly stronger interests than would typically be required to justify the release of other government records.

This approach in *Rios*, that the requesting party faces a significantly heavier burden to justify its request in students’ records, has

⁵⁷ *Rios*, 73 F.R.D. at 598.

⁵⁸ *Id.* at 598–99 (citing 121 Cong. Rec. S7975 (daily ed. May 13, 1975)).

⁵⁹ *Id.* at 599 (citing Sen. Rep. No. 93–1026, 93rd Cong., 2nd Sess. 187 (1974)).

⁶⁰ *Id.* at 598.

⁶¹ *Id.* at 598–99 (citing 121 Cong. Rec. S7975 (daily ed. May 13, 1975)).

⁶² *Id.* at 598.

⁶³ *Id.*

⁶⁴ *Krakauer*, 381 P.3d at 533.

been adopted by other jurisdictions.⁶⁵ Thus, the Montana Supreme Court is not alone in concluding that the traditional balancing act between the right to know and the right to privacy is amplified in the FERPA setting. Furthermore, as Justice McKinnon's dissent notes, Montana law also provides students with a strong right to privacy, independent of their enhanced right to privacy under FERPA.⁶⁶

Given the legislative purpose behind FERPA and Montana's own amplified right to privacy, the Court was correct to conclude that a student's right to privacy in his or her records is enhanced, something that the district court did not consider in reaching its conclusion. The district court gave significant weight to the fact that much of the criminal component of this case had already been made public, treating its consideration of release of the student records nearly as loosely as it would have treated the release of ordinary public records. The district court may have reached its conclusion that the right to know outweighed the right to privacy because it viewed the student's privacy interests as relatively light interests in public records. Thus, a re-balancing of these competing constitutional factors needs to be performed, considering the enhanced right to privacy. The district court, having reviewed the full factual record once before, is in a better position to perform this task than the Supreme Court.

B. Balancing the Right to Know Against the Right to Privacy

The Montana Constitution provides that “[n]o person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.”⁶⁷ Krakauer's principal argument is that his right to know, under the Montana Constitution, should allow him access to the student's disciplinary records. As the Court noted, the Montana Constitution gives a high priority to the public's right to know.⁶⁸ However, although the right to know is strong, it is not absolute.⁶⁹

If the Court determines that a privacy interest is present, it performs what is actually a *three*-part test to determine whether the demand of individual privacy clearly exceeds the merits of public disclosure.⁷⁰ The Court considers: (1) whether the person involved had a subjective or actual expectation of privacy; (2) whether society is willing

⁶⁵ See *Ragusa v. Malverne Union Free Sch. Dist.*, 549 F. Supp. 2d 288, 292 (E.D.N.Y. 2008); *Alig-Mielcarek v. Jackson*, 286 F.R.D. 521, 526 (N.D. Ga. 2012).

⁶⁶ *Krakauer*, 381 P.3d at 537 (McKinnon, J., dissenting).

⁶⁷ MONT. CONST. art. II, § 9.

⁶⁸ *Krakauer*, 381 P.3d at 533 (majority opinion) (citing *Lance v. Hagadone Inv. Co.*, 853 P.2d 1230, 1239 (Mont. 1993)).

⁶⁹ *Associated Press, Inc.*, 4 P.3d at 10.

⁷⁰ *Krakauer*, 381 P.3d at 533 (citing *Great Falls Tribune Co. v. Day*, 959 P.2d 508, 513 (Mont. 1998)).

to recognize that expectation as reasonable⁷¹; and (3), if the first two prongs are met to demonstrate the existence of a privacy interest, “whether the demands of individual privacy exceed the merits of public disclosure.”⁷²

Given this fact-intensive analysis, the Court correctly chose to remand this case to the district court to perform the balancing test. However, the Court left several important issues untouched that could have been considered without performing a full factual analysis.

The dissent correctly noted that there does not appear to be any legal precedent for the assertion that a student has a diminished expectation of privacy simply because he is the star quarterback on a football team.⁷³ In his response brief, Krakauer argued that, simply because the student in this case agreed to abide by the student-athlete conduct code, he no longer had a subjective expectation of privacy.⁷⁴ Krakauer compared student athletes to public employees, who have a reduced expectation of privacy under Montana law.⁷⁵ Krakauer’s assertion is that student athletes, such as the student at issue in this case, have a reduced expectation of privacy due to their public status in the community.⁷⁶ If this position were adopted, every student athlete would lose her privacy rights under FERPA the moment that she reaches a certain level of athletic success. Had FERPA intended such a broad exception, one would think Congress would have made this exception itself.

The Court, however, did not consider Krakauer’s argument. In its holding, the Court noted that students have an enhanced right to privacy,⁷⁷ but it did not respond to Krakauer’s assertion that *this* student has a reduced expectation of privacy largely due to his status as a star quarterback on the football team.⁷⁸ However, it is important to note that the Court did not actually treat this student differently than any other student, as evidenced by the very fact that the case was remanded due to an improper consideration of the student’s privacy interests.⁷⁹ Despite this inference, the Court should have corrected Krakauer’s erroneous argument by explicitly stating that student athletes should be afforded the same enhanced right to privacy under FERPA afforded to other students.

The purpose of FERPA is to protect all students’ right to privacy, not just some students’ right to privacy.⁸⁰ An enormous judicial exception

⁷¹ *Id.*

⁷² *Moe v. Butte-Silver Bow Cnty.*, 371 P.3d 415, 420 (Mont. 2016) (citing *Billings Gazette v. City of Billings*, 313 P.3d 129, 143 (Mont. 2013)).

⁷³ *Krakauer*, 381 P.3d at 538 (McKinnon, J., dissenting).

⁷⁴ Appellee’s Response Brief at 44, *Krakauer v. State ex rel. Christian*, 381 P.3d 524 (Mont. 2016) (No. DA 15–0502).

⁷⁵ *Id.* at 45.

⁷⁶ *Id.*

⁷⁷ *Krakauer*, 381 P.3d at 533 (majority opinion).

⁷⁸ *Id.* at 535.

⁷⁹ *Id.*

⁸⁰ 20 U.S.C. § 1232g(b)(1).

would be created if the Court were to agree with Krakauer⁸¹ and hold that any student athlete takes on the role of a public figure, automatically waiving his or her right to privacy simply by reaching success in his or her athletic career. This type of precedent could have far-reaching consequences on FERPA's nationwide applicability, and if an exception should be made, it should be made by Congress, not the judiciary.

Despite the student's enhanced right to privacy, Krakauer has his own strong right in this case—the right to know. Rape culture on university campuses around the United States is a pervasive and wide-spread issue that affects millions of students.⁸² It is estimated that as many as one in four women will be sexually assaulted at some time during their collegiate career.⁸³ The public's right to know how the University is responding to wide-spread complaints of sexual assault is undeniably strong, as it affects the entire University community and beyond. Having written a book addressing this specific issue, Krakauer has a clear right to gather this information from the University.

Considering the constitutional right to know, the Court has held that a requesting party must be provided with “access to the widest breadth of information possible, tempered only by the privacy rights of those identified in the investigative materials.”⁸⁴ The first clause of this quote arguably stands for the proposition that Krakauer should be entitled to receive the records of his choice under his right to know—not just general, redacted records from the Commissioner, as the dissent recommended.⁸⁵ However, the second part of the sentence restricts the right to know, noting that access is not unfettered but in fact limited “by the privacy rights of those identified in the records.” The right to know is strong and information should ordinarily be delivered according to the manner in which it was requested. Even so, the right to privacy may ultimately trump the right to know, limiting not only whether the information gets released but how much of the information gets released.

Although Krakauer would ordinarily be entitled to receive the “widest breadth of information possible,” FERPA mandates redaction of identifying information. If anonymity were truly possible, the release of redacted records would have been a fair compromise between the student's enhanced right to privacy and Krakauer's journalistic right to know and inform the public. As the dissent noted, reading between the lines of the record, the requested records would most likely have contained enough information for Krakauer to determine that an anonymous student was

⁸¹ Appellee's Response Brief at 44–45, *Krakauer v. State ex rel. Christian*, 381 P.3d 524 (Mont. 2016) (No. DA 15–0502).

⁸² See Terry Steinberg, *Rape of College Campuses: Reform Through Title IX*, 18 J.C. & U.L. 39, 42 (1991).

⁸³ *Id.*

⁸⁴ *Lincoln Cnty. Comm'r v. Nixon*, 968 P.2d 1141, 1144 (Mont. 1998) (citing *Allstate Ins. Co v. City of Billings*, 780 P.2d 186, 189 (Mont. 1989)).

⁸⁵ *Krakauer*, 381 P.3d at 538–39 (McKinnon, J., dissenting).

convicted at various levels of campus proceedings, only to have his sentence overturned by the Commissioner. Alternatively, Krakauer may have found that a student was found responsible by the Commissioner but given virtually no penalty for rape, an equally controversial result. Even without the student's name, Krakauer could have revealed to the public how the University handled an incident involving sexual assault at multiple stages of campus proceedings.

Unfortunately, because Krakauer made his request by naming the student, the records cannot be released without invading the student's enhanced right to privacy. The release of even redacted records should not be allowed at this point because it would be obvious whose records they are. Unless 20 U.S.C. § 1232g(b)(6)(B) applies, this student's right to privacy trumps Krakauer's right to know private information about the student, as opposed to learning how the University addresses rape on campus in general.

VI. CONCLUSION

Given the unique issues in this case, the Court was correct to remand the case to the district court to perform an *in camera* review to decide whether 20 U.S.C. § 1232g(b)(6)(B) applies. In considering the exception, the district court must determine whether or not the Commissioner found that the student had violated the University's rules or policies regarding crimes of violence.⁸⁶ If the Court were to find that a violation had occurred, and the student had not been punished via expulsion and removal from the football team, the plain language of the statute makes it clear that at that point the school would not be prohibited from releasing certain portions of the student's disciplinary records under FERPA.⁸⁷

However, as noted above,⁸⁸ it is crucial to note that what 20 U.S.C. § 1232g(b)(6)(C) allows to be released is actually very limited. Under § 1232g(b)(6)(C), the University would only be permitted to release "the name of the student, the violation committed, and any sanction imposed by the institution on that student."⁸⁹ Thus, even if this exception applies, Krakauer would likely not receive the information he seeks: why the convictions were overturned.

On remand, the district court should re-balance the competing constitutional interests, considering the student's enhanced right to privacy, to determine what if any records should be released. Absent the applicability of 20 U.S.C. § 1232g(b)(6)(B), the court should determine that the student's enhanced right to privacy outweighs Krakauer's right to

⁸⁶ 20 U.S.C. § 1232g(b)(6)(B).

⁸⁷ 20 U.S.C. § 1232g(b)(6)(B) & (C).

⁸⁸ See *supra* note 24.

⁸⁹ *Id.*

know in this instance. The judiciary should not create an exception to FERPA for all student athletes, and Krakauer has requested the student's records by name, amplifying the need to protect the records. If the court finds that 20 U.S.C. § 1232g(b)(6)(B) does apply, it will still need to balance the right to privacy against the right to know because the exception does not mandate release of the records. The exception allows release under FERPA, but it does not affect analysis under Montana Code Annotated § 20-25-515 or under the individual right to privacy guaranteed by the Montana Constitution.⁹⁰ Thus, under Montana privacy law, if the FERPA exception did apply, it would still be just one more important factor for the court to consider in balancing the right to privacy against the right to know.

⁹⁰ MONT. CONST. art. II, § 10. Although the Court did not explicitly explain this in its discussion of MONT. CONST. art. II, § 10 (see *Krakauer*, 381 P.3d 524, 537), it is crucial to note that the right-to-privacy guaranteed by the Montana Constitution under art. II, § 10 provides greater privacy protection than the U.S. Constitution. *State v. Ellis*, 210 P.3d 144, 148 (Mont. 2009) (citing *State v. Burns*, 830 P.2d 1318, 1320 (Mont. 1992)). This enhanced right to privacy under the Montana Constitution has typically been considered in a 4th amendment search-and-seizure setting. See, e.g., *State v. Graham*, 175 P.3d 885, 888 (Mont. 2007). However, it has also been considered in other settings, such as in considering a woman's right to an abortion. See *Armstrong v. State*, 989 P.2d 364, 375 (Mont. 1999). In *Armstrong*, the Court again noted that "[n]otwithstanding, and independently of the federal constitution, where the right of individual privacy is implicated, Montana's Constitution affords significantly broader protection than does the federal constitution." *Id.* (citing *Gryczan v. State*, 942 P.2d 112, 121 (Mont. 1997)). This is further supportive of the assertion that a student has an enhanced right-to-privacy in their student records under Montana constitutional law.