

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF KENTUCKY  
NORTHERN DIVISION AT COVINGTON

CIVIL ACTION NO. 2:16-CV-28 (WOB-JGW)

JANE DOE

PLAINTIFF

VS.

ORDER

NORTHERN KENTUCKY  
UNIVERSITY, ET AL.

DEFENDANTS

The Court conducted a hearing on October 18, 2016, regarding the production of documents, which defendants assert are education records governed by the Family Education Rights and Privacy Act ("FERPA"). Defendants further assert that they are prohibited from producing the documents without prior, written consent of current or former students. Defendants have withheld information and invoked FERPA when it is not applicable to the information requested, including during a deposition.

Plaintiff requested all documents evidencing any sexual assault, rape, and/or unwanted advances that occurred on campus and in offsite living quarters in the last seven years, to which defendants objected on the basis of FERPA. Other than plaintiff's records, plaintiff has only received documents concerning one other student and an administrative hearing pertaining to sexual misconduct.

Having heard from the parties, and being advised,

**IT IS ORDERED AS FOLLOWS:**

1. This Order shall govern both the production and withholding of "education records" as that term is defined under FERPA. Nothing herein shall prevent plaintiff from challenging the status of any documents requested as "education records" under FERPA or seeking the production of such records in their unredacted form.
2. Plaintiff seeks all documents evidencing any sexual assault, rape, and/or unwanted advances that occurred on campus and in offsite living quarters in the last seven years, and the Court now **ORDERS** the production of such documents.
3. This Order shall also govern the conduct of depositions conducted in this matter.
4. Information that a person obtained through personal knowledge or observation, or has heard orally from others, is not protected under FERPA. This is true even if education records exist which contain that information.
5. Defendants shall produce all documents and education records relating to any allegations of sexual assault, sexual misconduct, rape, and/or unwanted advances that occurred on campus and in offsite living quarters in the last seven years, including, but not limited to, the following:

- a. All documents relating to an incident occurring on or about February, 2015 involving members of the men's basketball team;
  - b. All documents relating to an incident occurring on or about March, 2016 involving members of the men's basketball team;
  - c. All documents constituting a transcript from any hearing relating to an incident of sexual misconduct and any disciplinary action taken as a result of that hearing, whether based on the Code of Student Conduct or any student athlete code of conduct, written or unwritten.
  - d. All documents relating to any such allegation for which: (1) an administrative hearing was not conducted; or (2) an administrative panel found that it was more likely than not that the former or current student was not guilty of the charges.
6. The term "document" includes documents of all types described or referenced in Fed. R. Civ. P. 34, including but not limited to any document or folder relating to electronic and/or hard copies of electronic mail (whether located on tapes, disks, or other storage mechanisms) and including, but not limited to, messages or communications located on backups, individual PC hard drives, personal digital assistants (or PDAs), smart

phones (including text messages), laptop computers, or home computers linked into defendants' e-mail system by modem or otherwise. The term "document" includes all emails and correspondence by and between employees and/or students, with names redacted. Email will be produced in native format if not redacted.

7. Defendants shall produce such records, subject to redaction of students' personally identifiable information and consistent with rules of procedure and General Orders 04-01 and 08-01 of this Court, and subject to the following "notice/objection" period in compliance with FERPA:

- a. Defendants shall be provided five (5) business days from the date of entry of this Order to make reasonable efforts to send notice to such students using the form letter attached hereto as Exhibit A.
- b. A hard copy of the notice letter, with the name and address of the non-party current or former student redacted, shall be provided to counsel for plaintiff;
- c. The affected student shall have ten (10) calendar days from the date of such notice in which to seek protective action with the Court in advance of defendants' production. In the event the tenth day falls on a Saturday, Sunday, or federal holiday, the affected

student shall have until the next calendar day when the Court is open in which to file any objection.

- d. In the event no objection is made, defendants shall produce the subject records within five (5) business days following the expiration of such notice period.
  - e. In the event objection is made, defendants shall produce the subject records in accordance with the ruling of the Court within five (5) business days following the date of the ruling.
8. In the event that defendants withhold documents on the basis that the documents are education records and protected under FERPA, defendants shall provide to plaintiff a FERPA log, describing the content of the documents being withheld with sufficient specificity to enable plaintiff to challenge defendants' characterization of the documents.
  9. No party shall instruct a witness not to answer a question in any deposition on the basis of FERPA. In the event a party believes an objection is appropriate on the basis of FERPA, the party shall follow the procedures under Fed. R. Civ. P. 30(d)(3).
  10. This Order does not constitute a waiver of any other objection a party may have on grounds of relevance or other applicable law. Likewise, no party waives any objections to admissibility that they may otherwise have. Nothing about

this Order or any document production made pursuant to this Order shall be construed as a waiver of any party's rights or obligations to decline disclosure of material to third parties under federal or state law.

11. Any education records provided shall be used by all counsel solely for use in this litigation and shall be copied only as necessary for these purposes. Counsel shall secure any such records or information in a manner sufficient to prevent any unauthorized viewing or use of the records or information, consistent with all applicable law and this Order.
12. Nothing about this Order shall prevent any party from using documents produced pursuant to this Order in connection with any trial, hearing, deposition or other public proceeding in this case. Further, nothing about this Order shall be construed to restrict the parties' counsel from making inquiries of witnesses or potential witnesses regarding the subject matter of the documents produced.
13. Nothing about this Order shall prevent plaintiff from seeking an Order of the Court to obtain the identity of a person whose name has been redacted so that plaintiff can call such person as a witness at any trial in this matter.
14. Upon termination of this litigation, the originals and all copies of any education records provided to parties or counsel shall be destroyed, with their destruction being certified in

writing to the source, is requested. The destruction of documents is not required of court personnel and does not relate to documents in the court's record.

This 27<sup>th</sup> day of October, 2016.



**Signed By:**

**William O. Bertelsman** *WOB*

**United States District Judge**