

Hypothetical FERPA Case

Part I.

Douglas Foxworthy is a highly recruited wide-receiver for the Patagonia State University football team. Although he was “redshirted” in his first year, he saw considerable playing time in his sophomore year until a knee injury sidelined him for several games. During this period another player stepped into the position and proved his worth as an exceptional player. The coach was reluctant to allow Doug to resume playing first string, in part because of his injury and in part because of his attitude. Doug believed that he was entitled to return to his position. He was distraught about “being benched,” his grades suffered, and he sought counseling at the University Counseling Center at the coach’s insistence. Doug was angry. He felt betrayed by his coach and alienated from other team members.

Doug experienced adjustment issues during his freshman year. He resented being “red shirted” because he had given up several scholarship opportunities at other colleges to play at Patagonia. On one occasion a student on his hall ridiculed him for his lack of athletic prowess when hall-mates were viewing an NFL game. Later in the evening, Doug became intoxicated and shot a paintball gun at the student when he emerged from the shower. The student was not injured, but he complained to the Resident Advisor who called the University Police to investigate. The Police referred the matter to the Associate Dean’s office for a disciplinary hearing, rather than charging him with a state offense. State law was unclear about whether a paintball gun constituted a weapon. An Associate Dean, Student Affairs found Doug responsible for assault and alcohol abuse, and he assigned him 20 hours of community service, a stiff fine, and mandatory attendance in an anger management program. The Associate Dean did not notify his parents because Doug convinced him that his father would bring him home to work. His parents were divorced, and his father frequently drank heavily.

During the holiday break Doug placed an angry message on his Facebook page. It excoriated members of the football team, calling them “woosies,” “freaks,” and “losers.” He posted manufactured photos of coaches in Nazi Gestapo uniforms. He referred to several women on campus as “chicks that deserved to be raped” and several hall-mates as “gay jerk-offs.” Most troubling was his assertion that he planned to return to campus with “his Uzi locked and loaded to blow up the whole damn school.” Several concerned Patagonia students, who were listed as friends on Doug’s Facebook site, called campus police to report the offensive statements. University police investigators gained access to the site and recorded the information. Meanwhile, students told other students about being targeted for rape and murder on the site. Parents began to call the Dean’s office. A faculty member called the Associate Dean, Student Affairs “just to let her know that she had observed strange behavior” by Doug in her fall class. “He appeared agitated, as if he were on drugs.”

As the Dean of the College you are confronted with the following questions to resolve:

1. The campus police chief wants to know if he should notify the police to find Doug and arrest him. He understands that Doug may be in route back to campus from holiday break. The chief plans to disclose his police report to the local police, but he

wonders if he should simply refer the matter to the Associate Dean, Student Affairs for campus judicial action?

2. The chief has received Doug's judicial record from the associate dean. He wants to know if he can disclose it to the local police?
3. The chief has recommended that the campus community be notified by broadcast e-mail of the threat to blow up campus just in case an arrest cannot be made. What action is permitted? What information can be disclosed?
4. The local Patagonia city newspaper has been informed of Doug's Facebook page by a student intern with the paper. A reporter wants to talk with the Dean. The reporter wants to know about Doug's judicial record on campus and whether he has issued threats in the past. He also wants confirmation of the fact that he is a football player. What should be the Dean's response?

Part II.

Patagonia officials notified the campus community of Douglas's threat by broadcast e-mail, quoting parts of his Facebook page. The local police tried to arrest Douglas Foxworthy at the airport for communicating a threat of mass destruction under state law. When they could not locate him, they called the Office of Residence Life and Housing for his local address on campus. A receptionist told them of his room location, where the police located and arrested him. The police found no weapons in his possession. Upon interrogation Douglas admitted to posting the offensive remarks on his Facebook page but attributed them to his disappointment and anger at not being able to play more during the season. It was just "very poor judgment" on his part he said. He denied posting the threat. The police saw it differently. The University's police chief had sent Doug's campus judicial record along with the copy of his Facebook page to local police. In addition to his disciplinary record the report included a note from an associate dean revealing that a faculty member had reported Doug's "agitated state" last semester in class. The entire record was made public at Doug's initial court hearing. The local newspaper published it the next day. When a local television station, WXPS, interviewed another faculty member on campus he revealed that he had written a "strange and violent paper" in his class about "snuff films."

The Associate Dean, Student Affairs informed Doug by mail that he had been suspended pending the outcome of his criminal charges. The Athletic Department revoked his scholarship.

After several weeks Doug's brother admitted to posting the threat on Doug's Facebook page. He wanted Doug to stay home with him and go to school at a local university. He thought Doug would be happier and he feared his father's abuse when drinking. Criminal charges were dismissed, but after a hearing on campus the University refused to re-admit Doug in view of his disruption of campus.

1. Doug's father has requested that the University send him all records and tape recordings of his judicial hearings. How should the University respond?
2. Douglas has written the Secretary of Education asserting that his FERPA rights were violated by the disclosure of the putative threat to the campus community and releasing his judicial record to the local police. Was the disclosure improper?

3. Was the disclosure of Doug's room address by the RL&H receptionist improper under FERPA?
4. Doug also questions the disclosure of the Facebook threat without investigation. He asserts that such disclosure violated FERPA because an investigation by the University would have revealed it to be written by his brother. Was the broadcast e-mail an appropriate response under FERPA?
5. Doug has requested a University hearing under FERPA to review the accuracy of his record. He plans to question inclusion of any references to his Facebook page, claiming that he was not the author and demanding re-instatement because the finding was erroneous. What should the hearing address? Should the references be removed?
6. If FPCO determines that FERPA violations occurred, what should be its response?
7. Doug has filed an action in federal court against Patagonia State for deprivation of his free speech right under the First Amendment and intentional infliction of emotional distress. He claims that he was dismissed because of offensive remarks on his Facebook page and not because of the threat, which he did not author. Although the campus may have been disrupted, it was not disrupted because of his actions. He claims the University was reckless in investigating the case. Although offensive, his remarks were constitutionally protected and his dismissal was unlawful. He demands reinstatement, restoration of his athletic scholarship, and a million dollars in damages. What result?¹

¹ See *Murakowski v. University of Delaware*, 575 F. Supp. 2d 571 (D. Del. 2008) for a startling analysis of the First Amendment question.