

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
WACO DIVISION**

JANE DOE 1, *et al*,

Plaintiffs,

v.

BAYLOR UNIVERSITY,

Defendant.

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Civil Action No. 6:16-CV-00173-RP

**DEFENDANT’S MOTION TO COMPEL THE PRODUCTION  
OF UNREDACTED DOCUMENTS**

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**Attorneys for Defendant**

TO THE JUDGE OF THE HONORABLE COURT:

Defendant Baylor University (“Baylor” or “Defendant”) moves to compel production of unredacted documents as follows:

**I. Overview**

The Plaintiffs have improperly redacted the names of witnesses and related information from their production of documents. In particular, they have produced Facebook postings and emails but have blocked the names of their friends and, in many instances, have redacted entire substantive paragraphs. As discussed below, the Plaintiffs’ redactions are improper. Accordingly, pursuant to Rule 37 of the Federal Rules of Civil Procedure, Baylor moves to compel the Plaintiffs to produce copies of unredacted records.

**II. Procedural History**

On June 16, 2017, Baylor sent a request for production of documents to the Plaintiffs. Exh. 11 (Baylor’s RFPs). The RFPs requested copies of Plaintiffs’ communications with other students, Baylor employees, the alleged assailants, and other individuals regarding Plaintiffs’ alleged assaults and their allegations in the lawsuit. *See id.*, RFP nos. 3, 6, 9-14, 18, 26, 27, 36, 41, 42, 46-49, 51-57, 60-62, 74, 75, 78, 83-87, 90-94. Plaintiffs objected to many of these items, claiming that they cannot release the names of their witnesses unless they provide FERPA-like notifications to the witnesses and inform the witnesses that they have a right to file objections with the Court. Exh. 1-10, RFPs nos. 9-12, 46, 48, 49, 52-56, 57, 60, 61, 62, 74, 78, 83-88, 90-93. Four of the plaintiffs ultimately produced documents but selectively redacted the names of witnesses and other substantive information. *See, e.g.*, Exh. 12-A & 12-B (Doe 3 social media); Exh. 13 (Doe 2 emails); Exh. 14 (Doe 4 social media); Exh. 15-A & 15-B (Doe 6 social media).

Baylor's counsel communicated with Plaintiffs' counsel on the phone and in writing to discuss the deficiencies but have been unable to resolve their differences. *See, e.g.*, Exh. 16-A & 16-B (communications dated 9/21/17 and 10/10/17). In particular, Baylor disagrees with Plaintiffs that their personal, non-education records are covered by FERPA.

**III. Plaintiffs may not redact the names of their friends and other witnesses from their Facebook posts, emails, and related communications.**

**A. FERPA does not apply to Plaintiffs' personal communications with their friends.**

Plaintiffs have improperly redacted the names of their witnesses and, in some instances, they have redacted entire conversations. *See, e.g.*, Exh. 12-A (Doe 3), pp. 183, 350-366, 368-400; Exh. 14 (Doe 4), pp. 164-203; Exh. 15 (Doe 6), pp. 115-116, 126-163; Exh. 13 (Doe 2). As noted above, Plaintiffs claim that they must withhold this information on the basis of FERPA, the Family Educational Rights & Privacy Act, 20 U.S.C. § 1232g. But FERPA applies only to educational records maintained by schools that receive federal aid. 20 U.S.C. § 1232g(a)(1). The plain language of the statute shows that it does not apply to a student's out-of-school personal communications with her friends or other third parties, nor does it apply to communications by a former student who is writing another current or former student. *Id.*

Plaintiffs' contention that their personal communications are subject to FERPA-like protections is without merit. The FERPA procedures in the Court's order apply only to educational records maintained by Baylor University. Dkt. 156, ¶¶ 3(b) (defining "Student Information") & 4(a) ("Before producing Student Information in response to a discovery request, *Baylor* shall provide affected students with written notice of the discovery request in accordance with FERPA, 20 U.S.C. § 1232g and 34 C.F.R. §99.31(a)(9)(i) & (ii)") (emphasis added). The protective order was necessary to comply with regulatory requirements that prohibit schools

from releasing a third-party student's information in litigation unless the school gives advance notice to affected students. *Id.*; *see also* 34 C.F.R. § 99.31(a)(9)(i) & (ii) (the institution must make a "reasonable effort" to notify the affected student of the order or subpoena "so that the . . . eligible student may seek protective action"). Under FERPA, students have a *statutory* expectation of privacy in their education records. 20 U.S.C. § 1232g; 34 C.F.R. § 99.31(a)(9)(i) & (ii). Under FERPA's regulations and the Court's protective order, only Baylor has a legal obligation to notify students of their right to object or consent. Dkt. 156 at ¶ 4(a).

Plaintiffs' personal emails and Facebook conversations are not analogous to educational records maintained by a university, and the participants in those conversations did not, and do not, possess a statutory or common law right of privacy. In sum, Baylor's discovery requests are appropriately focused on Plaintiffs' own communications about their own claims and allegations in the lawsuit. Plaintiffs' FERPA and privacy objections are without merit and must be rejected.

**B. The requested information is relevant, and the existing protective order will ensure that the information is handled in a confidential manner.**

The requested information is relevant and responsive to Baylor's requests. The Plaintiffs have shared their stories with friends and members of the community. The timing, content, and/or evolution of Plaintiffs' statements and their recollections regarding the alleged assailants and Baylor are relevant to the merits of their claims and their claims for damages. The redacted information identifies individuals with knowledge of relevant facts about Plaintiffs' allegations—individuals who may need to be deposed. The redacted information identifies individuals whom Plaintiffs believe will support their "heightened risk" theory.

Jane Doe 3's records are a prime example of improper redactions that have prevented Baylor from learning the names of Plaintiffs' witnesses and the extent of their knowledge. Doe 3 has produced redacted Facebook messages with her friends that raise questions about her

communications and interactions with John Doe 3, her alleged assailant. In 2014, Doe 3 told her counselor that she had been “very attracted” to John Doe 3 and did not give him a “clear no” on the occasion in question. Exh. 17, p. 96. In December 2015, she told John Doe 3 that she was “mad” that they did not have sex “more often” and that she was “sorry” that they hurt each other and “wish[ed] we could start over [but] I’ll leave you alone if that’s what you want.” Exh. 12-B, pp. 409. On December 7, 2015, she met him at his apartment; afterward, she texted him: “I had a good time, hope you did too.” *Id.*, p. 413.

Later that day, according to the redacted documents that she produced, Jane Doe 3 communicated with her friends about filing a Title IX complaint against John Doe 3, and she discussed the content of a message that she planned to send him. Exh. 12-A at 366-367, 393. Jane Doe 3 wanted to send a text message that would “make him just annoyed enough to try again.” *Id.*, p. 394. An unidentified friend responded: “*I think a bit of entrapment is in order*” and “*When we talk, we can figure out how to f--- him over the most.*” *Id.* at 394-395. Jane Doe 3 wrote that “the negative press” against Baylor might mean that “they’d be more willing to let me win . . . .” *Id.* p. 358. Regarding her alleged assault, Jane Doe 3 told Doe 8 and other unidentified friends that “I barely remember what happened. It may very well have been a total misunderstanding for all I know” (*id.* p. 376) and “honestly i don’t think I have much of a case, it was very much a gray area type situation, but I feel like i need to try.” *Id.* p. 373 (spelling in original). The text messages also reference an “emotionally abusive” relationship with another person and a different sexual encounter that she characterized as “technically” an assault, but due to redactions, it is not clear who she is referencing. *Id.*, p. 351. The information redacted from these documents is relevant to the question of consent, Jane Doe 3’s alleged damages, her knowledge of complaint procedures, and her decision not to follow through with a formal

complaint. Finally, because the redacted messages show that Jane Doe 3 spoke with one or more of the unidentified people off-line about her claim, Baylor has a right to discover the names of these individuals and their knowledge of Plaintiff's claim and alleged damages. Finally, the redacted messages that were written in June 2014 are relevant to Baylor's statute of limitations defense. *Id.*, p. 369.

The Plaintiffs should be ordered to produce their records without redacting the names of their witnesses or their conversations. To the extent that any of the records reveal sensitive information about sexual assaults or other confidential information, the Plaintiffs may designate the records as confidential under the current protective order. Baylor prays that the Court will order the Plaintiffs to produce unredacted documents.

### **CONCLUSION**

For the foregoing reasons, the Defendant Baylor University prays that the Court will grant this motion to compel, clarify that FERPA does not apply to Plaintiffs' personal out-of-school communications, and order the Plaintiffs to provide Baylor with unredacted copies of the records in question.

Respectfully submitted,

**THOMPSON & HORTON LLP**

/s/ Lisa A. Brown

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**CERTIFICATE OF CONFERENCE**

I hereby certify that I communicated with Plaintiffs' counsel regarding Plaintiffs' redactions and their belief that they need to send FERPA notices to the Plaintiffs' witnesses. The parties have been unable to resolve their differences.

/s/ Lisa A. Brown

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing pleading was served upon all counsel of record on December 12, 2017, via the Court's ECF/CMF electronic service system as follows:

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