The Ramifications of the Conflict Between Campus Crime and The Family Educational Rights and Privacy Act of 1974

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ABSTRACT

The Ramifications of the Conflict Between Campus Crime and The Family Educational Rights and Prvacy Act of 1974. *Rachel Luna (Don Tomlinson), Journalism, Texas A&M University.*

Negligence with regard to the privacy and protection of student records led to the passage of the Family Educational Rights and Privacy Act of 1974. By granting relatively liberal access of the record to the student or parent and limiting access to outside parties, the Family Educational Rights and Privacy Act has been hailed as a major success for student rights. Unforeseen to the creators of the Act, however, were the problems journalists would have in attaining information regarding campus crimes when school administrators began using the provisions under the Act to prevent the dissemination of campus crime information to affected individuals.

Introduction

New laws are enacted on a frequent and consistent basis. This web of laws is created throughout the various levels of government, and yet the laws must all interact. Inadvertently, these interactions between the established laws and regulations sometimes lead to conflict with other statutes. When this happens it is at the courts discretion to determine which parts of the laws take precedence.

Throughout history, dissatisfied parties have gone through the court system to resolve such matters. Our government was created in such a way as to allow lawmakers as well as citizens the ability to use their discretion in interpreting laws, and the ways by which they apply to citizens at any given time. This has allowed our government to evolve in accordance to the changing needs of our society.

Such is the case in referring to the rights of college students with respect to their rights to privacy in reference to their personal school records and some conflicting constitutionally guaranteed rights. Since the enactment of the Family Educational Rights and Privacy Act of 1974, students and school administrators have argued over rights of students as students and their legally conflicting rights as United States citizens. While the matter has not yet been completely resolved, trends set by decisions courts have already rendered in related cases have given a valid indication of the direction with which the court will most probably eventually conclude.

Student Records

Every time a student speaks with an advisor, joins an organization or applies to a special program, it is likely the event will be recorded. Due to recent technological advancements, these records are no longer kept in paper form within the safety of locked filing cabinets. Now these valuable records are often housed within a computer data base accessible throughout many locales on and off a university's campus.

According to the National Education Association's Code of Student Rights and Responsibilities Handbook, "records are kept to assist the school in offering appropriate educational experiences to the student. The interest of the student

must supersede all other purposes to which the records might be put."[1] Unfortunately, this attitude has not always been reflected in the actions of school administrators, in fact the reverse has often been the case. "School officials frequently use a student's record against him as a threat ... or as the basis for a suspension or other serious disciplinary action."[2]

Some universities compile information on their student's political beliefs, sexual conduct or organizational memberships; while others have been known to solicit information about their students from government or law enforcement agencies, and some have even used student or outside informers. Student records have been known to contain very objectionable or unnecessary information. One record was found to contain "progress reports, subject grades, intelligence quotients, tests, achievement scores, medical records, psychological and psychiatric reports, selective guidance notes and the evaluation of students by educators."[3] This plethora of information may be easily accessed or duplicated, often leading to "an indiscriminate decentralization of records without appropriate and protective means of control."[4]

Universities begin compiling their information with an often lengthy and personal application. Universities even gather psychological, intellectual and social profiles for those parties who are only in the prospective-student phase.

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[1] _____. *National Education Association's Code of Student Rights and Responsibilities Handboook*, 1973. Washington, DC: US Goverment Printing Office.
[2] Alan Levine, *The Rights of Students* (1973; New York: First Discus Printing), pp. 121-131.
[3] *Matter of Thibadeau*, 1 Ed. Dept. Rep. 607 (New York Commissioner of Education 1960).
[4] Robert A. Laudicina, *A Legal Overview of the New Student* (1976: Springfield, IL: Charles C. Thomas), pp. 123-124.

From standardized test scores to personal statements, the data collected is vast and varied.

> The educational system compels the student to reveal his abilities and personality to school authorities. As a result the school system is, in many respects, a depository of personal and potentially embarrassing information. As a collector of such information ... the school has a responsibility to the community to act in a careful and discriminatory manner, always being cognizant of the harm that can result if the information is dispersed with reckless disregard for the student's interests.[5]

Universities often use this data in compiling aesthetic charts and graphs for brochures to potential students, parents and alumni. Relevant data include information regarding gender, ethnicity, grade point averages and the like, which are all generated with fervor.

> With intensified technologically based record-keeping, college students ... today are systematically subject to an imposing and awesome storage of statistical data about themselves and those with whom they associate. The release of such statistical data, particularly commentary on one's personal activities, often has occurred without appropriate institutional controls, including the securing of the affected individual's consent.[6]

Needless to say, the indiscriminate release of student records can significantly affect a student's opportunity for future employment, their credit rating, and their general reputation. The university may even possess information that could serve as the basis for criminal charges against its students.

Problems arising due to the flagrant disregard of students' rights to

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[5] Doe v. McMillan, 450 F. 2d. 1304, D.C. Cir., (1972).
[6] see article cited in n. 4.

privacy reached a high in the turbulent sixties, during which time student unrest was already severe. "On the one hand many schools maintain that records are so confidential that the student and his parents cannot see them; on the other, schools frequently allow anyone else who claims to have a legitimate interest--such as a policeman, social worker, potential employer--to see these same confidential records."[7]

An example occurred in 1966 when the House Un-American Activities Committee issued subpoenas to colleges and university presidents throughout the nation requesting lists which would document the members and leaders of anti-Vietnam organizations.[8] At about the same time, the Higher Education Assistance Agency of Pennsylvania sent out a request to institutions throughout the country for a list of all Pennsylvania students who, due to an attempt to disrupt class or other campus activity, had been subsequently dismissed or convicted of a felony. Failure to comply with this request would lead to an immediate and complete withdrawal of state aid to all Pennsylvania students attending that institution.[9]

The Family Educational Rights and Privacy Act of 1974

In response to these and similar glaring disregard of student rights to privacy, in 1974 Senator James Buckley of New York sponsored the Family

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[7] see article cited in n. 2.
[8] *The New York Times*, November 14, 1966, p. 16.
[9] *The Corporation of Haverford College, et al v. Reecher, et al*, Civil action No. 70-2411, U.S. Dist. Court of the Eastern District of Pennsylvania.

Educational Records and Privacy Act.[10] "Senator James Buckley's original and apparent intent was to restore the rights of parents with regard to the availability of their children's educational records. The Buckley Amendment further ensured the individual student's rights of privacy."[11]

In a speech Buckley said that information about students and their parents was often being collected without proper consent of the students or their parents. This information included such subjects as ethnic attitudes, personality tests, family life and social development. Buckley remarked that student records abuse were becoming more evident and measures were needed to curb this trend; legislation such as FERPA were intended to prevent these occurrences.[12]

The Buckley Amendment, as it is more commonly known, has jurisdiction over all educational institutions which receive federal funds through United States Department of Education federal programs.

The jurisdiction of the Buckley Amendment therefore includes all public colleges and universities and "virtually all private colleges and universities since federal moneys in one way or another are received in support of various programs by a very large number of those institutions."[13]

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[10] 20 U.S.C. 1232g.
[11] see article cited in n. 4.
[12] Speech to Legislative Congress of Parents and Teachers, 120 Congressional Record 36532, Dec. 13, 1974.
[13] see article cited in n. 4.

In the eyes of school administrators FERPA is often viewed as "a double-edged sword. On one hand, it opens the file up for student inspection; while on the other hand it restricts access to the file by outsiders."[14]

Under the federal law, parents have no right of access to students in post-secondary institutions, except in the case of dependent students. In either case, whether the rights are granted to the student or the parent, the rights generated by FERPA include the following:

- the power to inspect and review all information pertaining to the student which is recorded in any form by the school system, with some exceptions which are listed below. Procedures must be established at each institution for the processing of requests for school records within a reasonable time frame not to exceed 45 days after the request has been made;
- the right to obtain information when records have been released to a third party including the specific records which are to be released, the reasons for their release, to whom they have been released, and a copy of the records to be released if the information is so desired. If the information is released in response to a judicial order, or in accordance to a subpoena, the student must be informed of all such interaction prior to compliance by the educational institution or agency;

[14] Eugene T. Connors, *Student Discipline and the Law*. (1979; Bloomington IN: Phi Kappa Delta Education Foundation).

- the ability to grant or deny written permission prior to release to third parties with certain exceptions, including a.) other local school officials within the educational institution or local educational agency who have legitimate educational interests, and b.) to officials of other school systems of which the student has intention to enroll, with the condition that notification is made to proper persons;
- opportunity for a hearing to challenge information contained in school records to insure that these records are not inaccurate, misleading or otherwise in violation of privacy or other rights of students, and to provide an opportunity for the amendment or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein.
- in the instance when an administrative head of an educational institution is granted permission to request any state or local educational institution to release any data from personal statistics or students' records to a third party, the data shall not include the names of the students or their parents, except in cases where the information is related to the student's application for financial assistance, or if the information is in compliance with any judicial order, granted that proper prior notification is made;
- all persons, agencies or organizations desiring access to the records of students shall be required to sign a written form which shall be

permanently kept in the student's record and can only be released to and inspected by the student or parent upon request, which specifies the legitimate educational or related interest for which the said individual has in seeking this information;

- personal information shall be released to a third party under the understanding that such information will not be released to anyone else without the expressed written consent of the parents or the student.

It was understood that some of the material which was contained in a student's record would be altered or otherwise negatively affected by the new provision granting legal access to all records contained therein. These provisions were created in accordance to the rights of all United States citizens with regard to access of delicate documents. Records which are excluded from FERPA's right to student access include:

- undisclosed personal notes which are written and maintained by a teacher or other such school official and are not accessible or revealed to any other person;
- campus law enforcement records which are not open to student review, in the cases in which these records are maintained separately from other records, the records are only released to other law enforcement officials in the same jurisdiction, and the institution's

security personnel do not have access to the student's other educational records;

- medical or psychiatric records created and maintained for treatment are available only to the physician and may be shown to the student upon request;
- records which refer to the student's employee ability which are created and kept up by the institution in the normal course of business are not open for review by students;
- parental financial records, including statements used for scholarship applications, may not be opened to student inspection;
- records created after the student has left the institution, including post-graduate and alumni files, need not be opened to the former student.

This leaves the question of what can be legally released by the educational institutions; the data which was excluded from the protective arms of FERPA. "An inadvertent consequence of Senator Buckley's concern for school children and their parents was the creation of access legislation for the adult student having potentially serious impact upon post-secondary institutions. Colleges and universities were concerned that Senator Buckley's original legislation, particularly as it related to student access of information, would cause breaches of confidentiality and probable demise of meaningful and informative faculty recommendation. Subsequent legislative amendment and interpretive

rules, however, largely resolved early reservations."[15]

In response to such confusion regarding the Family Rights and Privacy Act, Buckley encouraged schools to develop standards on what should be included in a student's folder. Buckley suggested that school's throw out unsubstantiated teacher's opinions or language which could be used to categorize students.[16]

FERPA requires all institutions to inform the students and their guardians of their aforementioned rights as accorded to them by the statute. An institution may provide this information through the issuance of individual letters, public notice or notice in a college publication. Applicants who were not admitted to the institution in question are not granted, and have no right of access to any information maintained by the institution referring to them. This includes applications which have been submitted to and may be kept by the institution.

Some states have laws which clarify or extend the provisions and protections of the Buckley Amendment. These extensions and clarifications take precedence over the Buckley Amendment.

There are three exceptions to the dissemination of information prohibitions as set by the Buckley Amendment. First, information may be released in adherence to a court order or subpoenas, but in these cases, the court must make some effort to notify the student prior to the release of the information. The second exception occurs if an emergency situation arises

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[15] see article cited in n. 4.

[16] Questions About and Objections to the Buckley Amendment, The Family Rights and Privacy Act, 121 Congressional Record, 13990. Nov. 19, 1974.

during which the release of the information is necessary for the protection of human lives. The final exception is the release of "directory information."

"Directory information" includes a student's name, address, telephone number, date and place of birth, height and weight of athletic participants, major field of study, participation in recognized student organizations, dates of attendance, awarded degrees and the most recent educational institution attended. The annual FERPA rights notice must include a list of the "directory information" which the specific institution releases as well as an opportunity for the student to prevent this release of information.

When a violation of FERPA has occurred, it is generally expected that the individual will file a formal complaint to a specified department within the educational agency which has made the error. If no resolution arises, the student may then move to take the complaint to the FERPA office within the Department of Education.

If the FERPA office agrees that a FERPA violation has occurred it will attempt to bring compliance through voluntary means. If the institution continues to resist compliance, the office may recommend the matter to a review board which can suggest to the secretary a withdrawal of funds under any program which is administered by the Department of Education.

The individual may also file complaints directly to the Family Policy and Regulations Office of the Department of Education. Specific allegations must be included in the complaint citing the reasons a violation of FERPA has been suspected to have occurred. The accused agency will then be notified of the

alleged FERPA violation, instructed that it will be under investigation with regard to the violation and allowed to respond, in writing, on its own behalf. If it is found that a FERPA violation has occurred, the agency is given an opportunity to comply voluntarily before funds can be withdrawn.

As of 1993, the Secretary of Education had only found 150 violations of FERPA provisions. Due to the potentially major punishment of federal funding withdrawal, voluntary compliance was reached in every single case before any rulings were reached.[17]

The only other way with which violating institutions can be forced to comply with FERPA regulations is through "technical assistance letters". These letters are provided by the Compliance Office, and generally state the purpose of FERPA and how it might apply to the targeted agency or institution.

Due to the restrictions placed upon all interested parties it is important to mention that not everyone is in support of FERPA. "The Buckley Amendment will not satisfy all students, few laws could ... [but] students should rejoice that Congress has at least acted decisively and positively in a student right issue."[18]

In 1991, the Student Press Law Center published survey results which indicated that 24 universities routinely released information in violation of FERPA by disclosing information which would personally identify students involved in campus crimes. As a result, 14 of these universities received "technical assistance" letters, warning of possible termination of federal funds.

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[17] Declaration of LeRoy S. Rooker, Director. Office of Family Compliance; found in F. Supp 1227, 1229: 1991 U.S. Dist. LEXIS 16757, 4.

[18] Thomas Flygare, *The Legal Rights of Students*. (1975; Bloomington IN: Phi Kappa Delta Education Foundation).

Only five of the 14 universities which were sent the letters clearly stopped releasing the questionable information. The Student Press Law Center's newsletter relayed the minimal effect its survey had on the universities' practices. The newsletter also noted the fact that the Department of Education has never terminated a university's funding for violating any of the provisions under the FERPA.[19]

Disciplining Students

Campus crimes have always been a precarious subject. From the earliest of records, it can be noted the opinion was that campuses should not to be intruded upon by outsiders, and that educational institutions should be allowed to govern themselves. The ability to try student and faculty cases in campus courts rather than town courts can be seen in European universities as early as the thirteenth and fourteenth century. During these hearings, students were usually treated with extreme sympathy, "the student accused of the gravest crime was viewed with a fatherly and lenient eye,"[20] thus adopting the doctrine of *in loco parentis* which was embraced by educators until the 1960's. Literally this doctrine means "in the stead of parents" and encompasses the treatment of student offenders. This treatment describes the parental punishment often noted as offender receive the proverbial slap on the wrist in on-campus hearings

[19] 778 F. Supp. 1227, 1230; 1991 U.S. Dist LEXIS 16757.
[20] Nathan Schachner, *The Medieval Universities* (1938; reprint, New York: A.S. Barnes; 1962), pp. 199-208.

for crimes which would have received much more serious reprimands in the real world.

It appears that this doctrine was adopted by America's universities. The practice of carrying out student judicial hearings and rendering punishments within a school system is most common when faced with disciplining students. "Because a post-secondary education was characterized as a 'privilege' and not as a 'right', the courts generally accept the proposition that the institutions were free to extend or retract the privilege of attendance upon their own terms."[21]

The idea of college campuses being a sanctuary for only the privileged appears to have begun diminishing as the GI Bill went into effect after World War II. The "baby boomers" and an increasingly sophisticated world added to the necessity of a higher education which led to a much larger class of college students. "With the wall between academe and the world outside disintegrating, inevitably the problems of the larger culture have begun to intrude upon the academy."[22]

It was not until the 1960s when student unrest waned strongly and severe campus crimes were frequent that the *in loco parentis* began to wane. The twenty-sixth Amendment, the controversies of both the Vietnam War and the Civil Rights movement, and overall rebellion against parental authority all added to the demise of the old doctrine.

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[21] Michael Clay Smith and Richard Fossey, *Crime on Campus: Legal Issues and Campus Administration* (1995; Phoenix, AZ: The Oxy Press).
[22] see article ctited in n. 17.

In *Bradshaw v. Rawlings*, it was found that "the modern college is not an insurer of its students. Whatever may have been its responsibility in an earlier era, the role of today's college administrations has been notably diluted in recent decades. The student's role as a child has been replaced by the concept of viewing the student as a person who simply is buying a product--that product being an education.[23]

More recently, the following suggestion for dealing with campus crimes was suggested:

> Successful administration of an institution of higher education today requires a curious combination of politics, psychology, and magic, together with unerring competence in the law. Nowhere is this more true than in dealing with the crime that now rampages over our nation's campuses.[24]

Campus Crimes

Prior to the late-1980's, the only data available was through the Uniform Crime Reports published by the FBI. For these reports, campuses were allowed to cite their annual statistics on a voluntary basis, and of the more than 3,600 universities in our nation only 12 percent did so. By the mid-1980's, a typical report of the FBI's Uniform Crime Reports included about 2,000 acts of violence each year on campus.

In 1988, *USA Today* conducted its own survey for the preceding year. Of the 698 colleges and universities it focused upon, it listed the following crimes: 31 homicides; 1,874 armed robberies; 653 rapes; 13,079 assaults; 22,170

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[23] *Bradshaw v. Rawlings*. 612, F.2d 135, 3rd Cir., (1979).
[24] see article cited in n. 21.

burglaries; and 144,717 thefts.[25] Considering this is only about 20% of the nation's campuses, it is safe to assume the FBI's earlier data was severely underestimated.

While these numbers may seem alarming it is important to bear in mind that the number of offenses is surely much larger. "Studies of the general population suggest that as many as two-thirds of crimes committed are not reported to proper authorities."[26]

Other sources for data error include the exclusion of crimes committed off-campus and the alleged dishonesty of campuses reporting accurate statistics. "Even after passage of the mandatory federal reporting law, some observers suspect that, at least at some institutions, crime statistics may be shaded downward or intentionally understated by image-conscious authorities."[27] In an editorial one administrator said her study found that among all levels of university staff members and university administrators there is "widespread skepticism " about crime rates reported by some institutions forced to comply with the Campus Security Act.[28]

Prevalent among today's students who are not oblivious to occurrences of crimes on campus are the theories that either their campus or they themselves are immune from the potential threats posed by campus crimes. Unfortunately reality presents a strong objection to their beliefs. A study of 222 campuses in

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[25] *USA Today* (Oct. 4, 1988), p. 1.
[26] A.B. Biederman and J.P. Lynch, *Understanding Crime Incidence Statistics.* (1991; New York: Springer Verlag).
[27] see article cited in n. 21.
[28] *Chronicle of Higher Education* (Jan 20, 1993) p. A32.

1985 showed very little difference between campus crime rates on rural versus urban campuses, although violent crimes were shown to have a slightly higher frequency on urban campuses. This has been reflective of the fact that in urban settings more students are commuters than in rural settings.[29]

Some of the population is realizing the increase potential threat of these campus crimes. A 1986 Gallup poll reported that on 100 college campuses it was found that 38% of students were concerned about crimes on or near campus "a great deal" or "a fair amount."[30] Colleges and universities are no longer isolated from the threats which endanger the outside world.

Within the past ten years, concerns for campus crimes have increased. Much of this concern stems from the media presenting a steady stream of reports of serious crimes occurring at college campuses.

> More recently, however, celebrated cases have caused the media to cast a spotlight on campuses in the United States and to portray the campuses as a dangerous environment: professors slain at Stanford University and the University of Iowa; a professor kidnapped at the University of Cincinnati; and students killed in shooting, hazing and stalking incidents.[31]

It is not too uncommon for headlines to include horror stories of murders and rapes throughout many of the nation's finest college campuses. In 1986 at Lehigh University a 19-year old was raped, sodomized, tortured and murdered in her dormitory room by a fellow student.[32] In 1991 a University of Iowa graduate,

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[29] James Alan Fox and Daryl A. Hellman, "Location and Other Correlates on Campus Crimes," 13 *Journal of Criminal Justice* 429, 1985.
[30] *Newsweek on Campus*, Feb. 1986, p. 10.
[31] Bonnie S. Fisher and John J. Sloan III, eds., *Campus Crime: Legal, Social and Policy Perspectives.* (1995; Springfield IL: Charles C. Thomas).
[32] Todd S. Purdum, The Reality of Crime on Campus, *New York Times* (April 10, 1988,), p. 12.

upset because "his dissertation was not nominated for an academic award," shot and killed four persons and himself.[33] Indeed, when all of the on-campus crimes are tallied, it is clear that most of the perpetrators are themselves students of the institution.[34]

Also increasing concern about campus crimes, mostly from within the institutions themselves, are recent court decisions holding colleges and universities liable for "foreseeable" victimizations. In *Miller v. State of New York*, a case which involved the rape of a 19-year-old in her dormitory, an award of $400,000 was upheld by the state's highest court. In its ruling, the court noted that the educational institution and student had a relationship similar to that seen between a landlord and a tenant. The court held that the university had failed in its responsibility to maintain a "reasonably safe condition" for its students, as was evidenced by its policy of leaving the doors to its dormitories unlocked at all hours.[35]

In *Mullins v. Pine Manor College* the court recognized the demise of *in loco parentis*, but it did not grant colleges permission to escape all liabilities. The court further stated:

> The fact that a college does not police the morals of its resident students, however, does not entitle it to abandon any effort to ensure their physical safety. Parents, students, and the general community still have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm.[36]

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[33] *Los Angelas Times* (Nov. 2, 1991), p. A20.
[34] M. Smith, *Crime and Campus Police: A Handbook for Police Officers and Administrators* (1989). Asheville, NC: College Administration Publications).
[35] *Miller v. State of New York*. 62 N.Y.2d 506, 478 N.Y.S.2d 829, 467 N.E. 2d 493 (1984); as to damages see 110 A.D.2d 627, 487 N.Y.S. 2d 115 (1985).
[36] *Mullins v. Pine Manor College*, 389 Mass. 47, 449 N.E.2d 335-6 (1983).

The two rights which victims claim are: (1.) the universities duty to warn and (2.) the university's duty to provide students with adequate security protection. "Recent court decisions have established both duties, however, the decisions have been narrow in focus." Specifically these rights are granted only to those persons with which the university has a "special relationship."[37]

Another push for campus crime awareness has been a grassroots movements by family members and friends of victimized students. This includes a lobbying of state and federal legislatures and campus administrators for more security measures and crime prevention programs on campuses. Howard and Constance Clery, whose 19-year-old daughter, Jeanne, was raped, slashed and strangled ... launched a relentless crusade to publicize campus crimes. They pressed a $25 million lawsuit against [the university] and organized student-right-to-know efforts around the country."[38]

These measures helped push for the realization that "there is a clear need -- (A) to encourage the development on all campuses of security policies and procedures; (B) for uniformity and consistency in the reporting of crimes on campus," [39] which led to the passage of the Student-Right-To-Know and Campus Security Act of 1990.[40]

The regulation was enacted primarily to allow for better campus crime education for prospective students and their families, as well as for better

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[37] see article cited in n. 31.
[38] see article cited in n. 21.
[39] 1136 CONG. REC. s16615, daily ed. Oct. 24, 1990.
[40] 20 USC 1092.

protection of these students once they have enrolled. As Representative William Goodling, who sponsored the Act, explained, students "will give little thought to the possible dangers which exist on college campuses today – unless their schools provide them with information on crime trends on campus and the security precautions they will need to prevent themselves from becoming victims. The reality of the matter is that students are being killed, raped, and assulted [sic] on college campuses."[41]

This Student-Right-To-Know and Campus Security Act consists of three parts. First, the Act required for the release of student disciplinary hearings to the accusers of violent crimes. Second, the Act requires all colleges and universities which receive federal funding, or whose students receive federal funding, to report publish and distribute "to all current students and employees, and to any applicant for enrollment upon request ... " campus crime statistics. The annual reports must contain the following information:

- a statement of current campus policies for handling campus crimes or other emergencies, including the procedures undertaken for receiving reports by students and employees;
- a statement for current policies with regard to campus security maintenance;
- a statement concerning the policies of campus law enforcement including: a.)the enforcement officials on campus and their working relationships with local law enforcement officials; b.) policies which

[41] 137 CONG. REC.H6255, daily ed. Aug. 1, 1991.

encourage quick and accurate reporting of campus crimes to local law enforcement units;

- a description of type and frequency of programs designed to inform students and employees to take responsibility for their own safety and the safety of others;
- a descriptive list of programs designed for crime prevention for students and employees
- a statement of policy concerning the monitoring and recording of criminal activity at off-campus student organizations;
- a description of policies and procedures regarding possession, use, and sale of alcoholic beverages and illegal drugs;
- a description of alcohol and drug abuse programs available to students and employees.

The annual reports must include certain crimes statistics for the two previous years. The law also requires the dissemination of crime reports which, if reported in a timely manner, "will aid in the prevention of similar occurrences."[42] Finally, educational institutions must also provide the secretary of education with their crime statistics upon request. Failure to do so may result in a $25,000 fine for each offense.

The original results under this new law were published in 1993, and represented crimes reported in 1992. The results "include 30 murders, nearly

[42] 20 USC Sec. 1092 (f)(3).

1,000 rapes, 1,800 robberies from persons, 32,127 burglaries, and 8,981 stolen motor vehicles."[43] While the statistics allowed for increased awareness, the Student-Right-To-Know and Campus Security Act did not force colleges to report crime incidents to local law enforcement authorities. Also, specific information concerning campus crimes remained elusive.

The Conflict Between FERPA and Campus Crimes

From the very beginning the implications of FERPA have been questioned. In its original form, designated records that were maintained by a campus "law enforcement unit" were not protected by FERPA if it met the following four criteria. First, the records must be kept only for the purposes of law enforcement. Second, the law enforcement agency must not have access to other institutional student records. Third, law enforcement records must be maintained separately from other institutional student records. Finally, these law enforcement records could not be made accessible to parties other than law enforcement officials of the same jurisdiction.

"FERPA's provision for dealing with campus law enforcement records was poorly drawn and difficult to deal with. Several universities relied on it, however, as the basis for refusing to disclose campus police records about crimes in which students were involved."[44] This behavior was encouraged by the Department of Education, who often threatened universities with a cut in federal funding if they

[43] see article cited in n. 21.
[44] see article cited in n. 21.

released crime records which contained personally identifiable information concerning students.

In *Campus Communications v. Criser* it was concluded that police reports were not educational records, and that a person's status as a student of a public university did not entitle him or her to any special privileges related to campus crime activity.[45] This win foreshadowed the impeding call for access to crime records, concerning students, which were maintained by on-campus police units. Fueled by criticism that, universities had downplayed the vastness of these campus crimes reports, as journalist both on and off campus began filing law suits against the institutions in the early 1990's.

In March of 1991 the editor of the Southwest Missouri State University newspaper, Traci Bauer, sued the Director of University Relations, The Director of Safety and Security Department, the University President and other officials of her university. Bauer contended that the plaintiffs had violated rights of free speech, free press and equal protection under the Constitution.[46]

During these proceedings it was agreed that criminal investigation reports were excluded from protection under FERPA, because they do not contain the same type of information which a student is required to submit as a precourse to their admittance to an institution. These reports are also not the type of record which a normal person acquires during their status as a student. The court agreed that "the fact that the statute specifically exempts records maintained for

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[45] *Campus Communications v. Criser*, 582 F. 2d 100, 1st Cir. (1986).
[46] *Bauer v. Kincaid*. 759 F. Supp. 575, 1991 U.S. Dist. LEXIS 3538 (1991).

law enforcement purposes demonstrates that Congress did not intend to treat criminal investigations and incident reports as educational records."[47]

Bauer alleged that the use the FERPA created an arbitrary classification of student versus nonstudent criminals and victims; which in effect violated access to information which the general public usually has the right to know. The court found no logical basis for this differentiation, and found this "irrational classification" in violation of the equal protection clause of the Fifth Amendment.

The court also found denying access to campus reports is a violation of a student's First Amendment Rights. This was based upon the reasoning that the First Amendment guaranteed the right to free speech included the right to speak, print and receive information. The court argued that it is "surely one of the purposes of the First Amendment to enable the public to scrutinize the actions of government through actions of government information."[48] Therefore, it was found that criminal investigation and incident reports were not protected from dissemination, and failure to release this information was in direct violation of a student's Fifth Amendment and First Amendment rights.

Later that year, the Student Press Law Center challenged the Department of Education regarding the legality of FERPA concerning campus crimes. The plaintiffs were three student journalists and the Student Press Law Center, a non-profit organization which promotes the legal rights of the student press. The defendants were the Secretary of Education as well as the Department of

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[47] Id. at 590-591.
[48] Id. at 594.

Education, FERPA enforcers. The plaintiffs alleged that the provision which allows the Department of Education to withdraw federal funds upon the release of information regarding incident reports of the campus police was in violation of their Constitutional rights. Specifically, these rights are the Fifth Amendment Right to equal Protection and the First Amendment Rights to free speech and freedom of the press.[49]

The Student Press Law Center asserted that campus crime reports are not "educational records". As defined by FERPA, educational records are "those records, files documents and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution."[50] Educational records do not include "the records and documents of [a] law enforcement unit," granted that the law enforcement unit meets the following stipulations: The unit must not have access to education records, the unit must maintain its records apart from education records, its records must be compiled only for law enforcement purposes, and it can not make these records available to "persons other than law enforcement."[51] Thus, the fourth condition transforms law enforcement records into education records once they have been released to the public.

The plaintiffs in this case asserted that the extra burden that the FERPA imposes on the student press is unjust. The defendants claimed that the

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[49] *Student Press Law Center v. Alexander, et al.* 378 F. Supp. 1227; 1991 U.S. Dist. LEXIS 16757, (1991).
[50] Id. at 1232g(a)(4)(A).
[51] Id. at 1232g(a)(4)(B)(ii).

information which they seek is readily available from the local law enforcement authorities. The extra burden placed upon them by being forced to search through local law enforcement records is "cumbersome and ineffective". Defendants in the case disputed "the added burden on plaintiffs as trivial."

The plaintiffs requested and received a preliminary injunction based upon the likelihood of success on the merits of their claim that the defendants had denied them their rights of access to information which was, in essence, a First Amendment violation. Also, the courts concluded that the defendants did not provide one solid reason for the prevention of disclosure of information with regard to student crime reports.

The court therefore granted the plaintiff's motion for a preliminary injunction and concluded that both the Department of Education and the Secretary of Education could no longer withhold or threaten to withhold any federal funds on the basis of FERPA violations with regard to the dissemination of personal identification concerning students law enforcement records such as campus crime reports. In 1992, with the corroboration of the United States Department of Education, Congress amended FERPA to state that law enforcement records were not educational records.

The dispute of whether or not student disciplinary records are protected remains a unresolved. "This controversy is illustrated by a 1993 case in which the University of Georgia's student newspaper tried to obtain the records of a

campus disciplinary hearing involving hazing allegations against two fraternities."[52]

In *Red & Black Publishing Company v. Board of Regents*, the court ruled that campus disciplinary hearing records are not "educational records", and therefore are not protected from release by FERPA. It concluded that these disciplinary hearings are more like those records kept by law enforcement agencies which Congress has specifically exempted from FERPA protection.

This current debate focuses on whether these campus disciplinary hearings should be kept confidential according to the protection of all other campus records. One argument stems from the idea that the public has a right to know about campus crimes. Releasing the information insures equal treatment for all students committing similar offenses. Also, this helps prevent universities from keeping campus crime proceedings on campus, simply to avoid bad press. On the opposing side, some would contend that releasing information regarding these crimes would prevent some students from filing allegations. The publicity may also change the purpose of these hearings, which is to educate and guide students, to merely doling out punishments.

The Student-Right-To-Know and Campus Security Act includes permission for universities and colleges to let accusers know the outcome of student disciplinary hearings. The Ramstas Amendment includes a requirement for both the accuser and the accused to be notified of the outcome of student disciplinary hearings which involve an alleged sexual assault. In 1995, however,

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[52] see reference cited in n. 21.

the U.S. Department of Education clarified its stance on student disciplinary hearings, by granting them full FERPA protection under new regulations. The Department resolved the discrepancy these new provisions entailed in considering the Red & Black decision by stating that in Red & Black the records were of student organizations not of individual students.[53]

In conclusion, the United States Department of Education interprets the law to allow for disclosure of student disciplinary hearings to accusers, but forbids public dissemination of these records. The department acknowledged public pressure for full disclosure of these records in the interest of public safety, and offered to work with Congress to amend FERPA further. This is to be done in the interest of balancing student privacy interests with the public right to broader access to campus crime information.

Conclusion

With regard to the protection of campus crime information, the application of FERPA has been proven to violate both the First and Fifth Amendments of students. By not releasing this information, campus administrators hinder the jobs of journalists, both student and professional-level, by not adhering to their guaranteed right to freedom of speech. Perhaps more importantly the use of the Buckley Amendment to shield campus criminals places the entire student body at a higher risk for becoming a victim than an average United States citizen faces by not granting them equal protection rights. Campus crime information

[53] *Red & Black Publishing Co. v. Board of Regents*. 427 S.E.2d. 257 Ga., (1993).

has been found to not be an "educational record" and is therefore excluded from the regulations of FERPA. The ideology which remains unresolved however is the extent to which campus crime information is excluded from FERPA. More specifically, are student disciplinary hearing records "educational records" and therefore granted protection under FERPA?

What is now being suggested for legislators is to continue the trend of eliminating laws which designate students as a separate class of citizens. If a student commits a crime which would be considered newsworthy in a society outside of the campus sphere, then the students rights to privacy should be subjected to the same alterations as are the privacy rights of an average citizen. This, of course, should be considered even during student disciplinary hearings.

The recent decision to grant full FERPA protection to these hearings indicate that at the present time these proceedings are "educational records," but it is important to remember government action takes time. The amendments which have currently determined campus crime incident reports to be excluded from FERPA's protection were twenty years in the making, but now current regulations concerning campus crime records, now have student interest as a top priority. The recent commitment of the Department of Education to work alongside Congress in an effort to act in accordance with the interests of students, combined with current perceptions and fear of campus crimes lead to the conclusion that the evolution of FERPA provisions concerning campus crime may soon be complete.

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