

Complying With the Congressional Mandates and the Practice of Student Affairs

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Legislative issues have had a significant impact on student affairs in recent years. This trend seems likely to continue and accelerate over the coming decade. Student affairs professionals must attend to such issues while becoming pro-active in their approach to legislative activities related to higher education. At a time when many question the meaning of higher education, student affairs professionals can have a leading role in announcing the theory and practice of student development, its role in the education of students and the appropriate nexus between policy and developmental practice.

There are a variety of factors which impact policy development in student affairs. In recent years, federal legislation has played an increasingly larger role in student affairs decision making. There have been two general types of federal legislation which have affected higher education: legislation which requires that particular policies be developed and dictates certain aspects of those policies; and second, legislation which prohibits certain forms of discrimination. This article will focus its attention upon the former of these two classes of legislation, characterized by Dr. Don Gehring (1994) as "protective policy laws" (p. 67).

The modern history of federal regulation of higher education can be traced to the passage of the Higher Education Act of 1965 (17 U.S.C. SIOI et seq.). In the thirty years since the passage of what remains the single broadest legislation impacting higher education, colleges and universities have experienced a continual increase in the regulation of higher education by the federal government (Coomes, 1994). Ernst Benjamin (1994) has warned that if this trend is allowed to continue that "The state and federal governments will regulate almost every aspect of higher education" (p. 34). In the area of protective policy laws, there has been a significant increase since 1989 with the passage of the Drug Free Schools and Communities Act of 1989 (20 U.S.C. § 1145) and the Student Right-to-Know and Campus Security Act of 1990 as well as the

Amendments to that legislation passed in 1992 (20 U.S.C. S 1092). An early example of protective policy laws was the Family Educational Rights and Privacy Act of 1974 (20 U.S.C. § 1232). Buchanan (1993) commented on the irony of the last two decades, as many industries benefited from significant governmental deregulation, higher education experienced a continual increase in federal control over colleges and universities that have traditionally experienced significant autonomy.

Congress has typically utilized its Constitutional authority for spending federal funds for the welfare of the United States to regulate higher education. This is often referred to as the 'spending power.' Congress establishes compliance with federal legislation as a condition for receiving any federal funding for higher education (Kaplin, 1985). Many have been critical of Congress' use of the spending power to regulate higher education. In 1975, Kingman Brewster, then President of Yale University, provided the following analogy for use of the spending power, "Now that I have bought the button, I have a right to design the coat" (p. 105). Brewster singled out the recently passed Family Educational Rights and Privacy Act as the farthest outreach of the spending power. One can only wonder how Brewster would have viewed the Drug Free Schools and Communities Act and the Student Right-to-Know and Campus Security Act.

The Family Educational Rights and Privacy Act of 1974

The Family Educational Rights and Privacy Act of 1974 (FERPA) was designed to guarantee students access to their education records, to protect their rights to privacy by limiting the transferability of the records without their consent, and to provide a mechanism for correcting inaccuracies in their education record. For the purposes of FERPA, an education record is defined as a record that is: (a) Directly related to the student; and (b) maintained by educational institution or by a party acting for the institution (34 C.F.R. § 99).

The Family Educational Rights and Privacy Act of 1974 serves as a chilling example of the legislative process gone awry. Passed as an amendment to the Elementary and Secondary Act of 1974, FERPA did not go through the normal legislative process and was the source of significant problems and confusion after its passage (Knight, 1977).

Four months after its passage, Senators Buckley and Pell, the legislation's authors, were forced to amend the legislation to respond to concerns raised by educators. These revisions have also contributed to further confusion about the requirements of the legislation. The original legislation included a grocery list of specific records to be protected. However, the revisions introduced in December 1974 replaced this grocery list with the phrase "education record" described above. This provides the Department of Education some flexibility to the records which are to be included under the protection of the legislation, but this has also proven a source of controversy. In recent years, the media and student affairs professionals have debated the appropriateness of including student

disciplinary records within the definition of education records under the law.

The Student Right-to-Know and Campus Security Act of 1990 amended FERPA to allow colleges and universities to inform the victim of an alleged crime of violence of the outcome of any student disciplinary proceedings against an alleged perpetrator. Title 18, Section 16 of the United States Code provides the following definition of crime of violence: (a) An offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another; or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another person may be used in the course of committing the offense.

Important to note about this change is that it does not require colleges and universities to release information regarding the outcome of student disciplinary proceedings. Rather, this legislation allows colleges and universities to evaluate the issues related to the release of student disciplinary records to alleged victims and develop an appropriate institutional policy regarding the release of this information.

The Student Right-to-Know and Campus Security Act of 1990 was amended by the Higher Education Amendments of 1992. The amending legislation was originally introduced as the Campus Sexual Assault Victims' Bill of Rights Act. Building upon the FERPA amendment from two years earlier, the legislation requires colleges and universities to inform the victim of an alleged sexual assault of the outcome of any student disciplinary proceedings against an alleged perpetrator. This change is important because it requires colleges and universities to establish a particular policy related to the release of the student disciplinary proceeding outcome to a victim of an alleged sexual assault rather than allowing colleges and universities to establish their own policy.

The Higher Education Amendments of 1992 also amended FERPA to specifically exclude campus law enforcement records from the protections of FERPA. This change to FERPA would prove a source of significant conflict over the next several years. On August 11, 1993, the Department of Education released a Notice of Proposed Rulemaking in the Federal Register to implement the changes to FERPA included in the Higher Education Amendments of 1992. This Notice of Proposed Rulemaking sought to exclude from the definition of education records the records of a law enforcement unit and provided a definition of these units. However, there was another aspect of this Notice of Proposed Rulemaking which would garner a significant portion of the attention. The Department of Education proposed revising the definition of education records by adding a new definition for a disciplinary action or proceeding. The Notice of Proposed Rulemaking provided the following definition of a disciplinary action or proceeding:

Disciplinary action or proceeding means the investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of internal rules of conduct applicable to students of the agency or institution (p. 42837).

On December 14, 1993, the Department of Education published a second Notice of Proposed Rulemaking regarding the proposed changes to FERPA, requesting additional comments primarily on the issue of whether student disciplinary records should be included within the definition of education records under FERPA. The deadline for these comments was February 14, 1994. Several higher education professional organizations, including the American Council on Education and the Association for Student Judicial Affairs, and numerous student affairs professionals would share their feedback with the Department of Education regarding these proposed rules. The majority of these student affairs professionals and organizations supported the position taken by the Department of Education, which viewed student disciplinary records as education records under the law. In addition, numerous members of the media would also respond to the request with comments opposing this position.

The issues addressed by these Notices of Proposed Rulemaking were in the forefront of discussions among both student judicial affairs professionals and the media in the aftermath of the Georgia Supreme Court's ruling in *Red and Black Pub. Co., Inc. v. Board of Regents* (1993). Under the Georgia Supreme Court's ruling in this case, the University of Georgia was ordered to allow the *Red and Black*, the University of Georgia's student newspaper, access to hearings of that institution's Student Organization Court and all accompanying documentation under the provisions of Georgia's Open Records Act. Later that year, this decision was extended to include all student discipline cases heard at the University of Georgia. This decision would have a significant negative impact on the administration of student discipline at the University of Georgia. According to Bill Bracewell, Director of Judicial Programs, this decision would substantially diminish the educational opportunities present within the administration of student discipline at Georgia (Lowery, 1995; Shea, 1994).

After the *Red and Black* decision, the media sought to apply this decision in another state. *The Shreveport Professional Chapter of the Society of Professional Journalists and Michelle A Millhollon v. Louisiana State University in Shreveport* (1994) was the first case to attempt to extend this decision outside of Georgia. In this case, the plaintiffs sought under Louisiana's Public Records Law to force Louisiana State University in Shreveport to release certain records related to discipline proceedings against several student government officers accused of embezzlement. The plaintiffs' argument was based to a great extent upon the Georgia Supreme Court's ruling in *Red and Black*. Judge Crichton determined that these records fell under Louisiana's Public Records Law. However, he rejected the reasoning of the Georgia court in *Red and Black* and cited the protections of FERPA and Louisiana's Constitution in refusing to order the records' release. Judge Crichton indicated that the 'disclosure of the requested records would be deleterious to LSU-S [Louisiana State University in Shreveport], its students and would be inconsistent with the objectives of the maturation and educational process.' The Shreveport Professional Chapter of the Society of Professional Journalists and Michelle Millhollon appealed Judge Crichton's decision. However, a motion was filed on March 31, 1995 by the

plaintiffs in this case with the Appeal Court requesting that the appeal be dismissed. The Appeal Court granted this surprising motion, dismissing the plaintiffs' appeal. It seems unlikely that a similar lawsuit pending against Southeastern Louisiana University will be pursued further at this time.

In an effort to pursue access to student disciplinary proceedings, the Society of Professional Journalists, as well as numerous other professional press and academic organizations, established the Campus Courts Task Force in September 1993. It was the belief of the Campus Courts Task Force and its Chair, Carolyn Carlson, that colleges and universities used student disciplinary proceedings to hide campus crime from students, faculty, parents, alumni, and others. The Campus Courts Task Force heralded the *Red and Black* decision nationwide as a sign that access to student disciplinary proceedings were sure to follow across the country. The Campus Courts Task Force remains dedicated to the exclusion of student disciplinary records from the protections of FERPA and increased media access to student disciplinary proceedings.

When the Department of Education published Final Regulations in the *Federal Register* on January 17, 1995, the Secretary of Education issued regulations which continued the Department's traditional view of student discipline records as education records under the law. However, these regulations have done little to permanently settle the issue of the student discipline records and their status under FERPA. The Secretary of Education indicated that he had contacted Congress to inform them of the need to address the issue of public access to disciplinary records concerning criminal and other non-academic misconduct. To that end, Secretary Riley sent letters to Senator Kassenbaum, Senator Kennedy, Representative Goodling, and Representative Clay on January 10, 1995, indicating that Congress needed to address this issue and offering the Department of Education's assistance in drafting appropriate changes.

In developing institutional policies to comply with FERPA, it is important for student affairs administrators to recognize that federal legislation requires colleges and universities to establish a policy regarding student records. However, the legislation does provide institutions some latitude in developing a student records policy which is consistent with the institution's values. For example, an institution may elect to view all students as dependent students unless the student informs the institution that they are independent. By viewing students as dependents of their parents, the institution may elect to inform the parents of the outcome of disciplinary proceedings against the student without their consent. It is also important to consider the only enforcement mechanism which the Department of Education may utilize against colleges and universities - loss of federal funding. In fact, the Department of Education has never initiated proceedings against a college or university for failure to comply with FERPA. (L. S. Rooker, personal communication, November 7, 1994)

The Student Right-to-Know and Campus Security Act

If FERPA is the early example of protective policy laws, the Student Right-to-

Know and Campus Security Act of 1990 is the most recent and most directly focused on student affairs. The focus of the legislation was three-fold: information regarding graduation rates, campus security information, and student loan default rates. This article will focus its attention upon Title 11 of the legislation, Crime Awareness and Campus Security. Passage of this legislation was spearheaded by Howard and Connie Cleary of Security on Campus, Inc. Security on Campus was founded by the Clearys in 1987 after the murder of Jeanne Cleary at Lehigh University by a fellow student, and a subsequent lawsuit against the University by her parents.

The central provision of Title 11 of this legislation was the requirement that colleges begin to collect and publish annually, beginning September 1, 1992, crime statistics for the following criminal offenses on campus: murder, rape, robbery, aggravated assault, burglary, motor vehicle theft, liquor law violations, drug abuse violations, and weapons possession. The legislation also required that colleges and universities publish information regarding a variety of campus security policies. The legislation required colleges and universities to provide all current students, faculty, and staff with copies of its annual security report. The legislation further required that the copies of the annual security report be made available upon request to any applicant for enrollment or employment. Many have seriously questioned the value of the statistics which are required by this legislation and how accurately the statistics represent the problem of crime on campus (Palmer, 1993).

One of the most frustrating aspects about the history of the Student Right-to-Know and Campus Security Act of 1990 is the failure of the Department of Education to provide higher education with final regulations implementing this legislation. The legislation required the first campus security report to be published by September 1, 1992. However, it was not until April 29, 1994 that the Department of Education published final regulations for the implementation of Title 11. To date, final regulations have not been issued for Titles I or III of the legislation. Prior to publication of the final regulations, the Department of Education issued several "Dear Colleague" letters to provide guidance to colleges and universities in the publication of security reports pending final regulations. Unfortunately, this information caused significant confusion in the minds of college administrators and created as many questions as it answered (Lederman, 1993, 1994). In fact, the final regulations would prove to be a source of significant confusion as well.

In 1991, Representative Jim Ramstad introduced the Campus Sexual Assault Victims' Bill of Rights Act (H.R. 2363) with the support of Security on Campus, Inc. Senators Joseph Biden and Arlen Specter introduced similar legislation in the Senate later that year (S. 1289). The Campus Sexual Assault Victims' Bill of Rights Act, as introduced, required colleges and universities to develop a written policy establishing a campus sexual assault victims' bill of rights. However, the legislation would be changed drastically before its passage in 1992. The Campus Sexual Assault Victims' Bill of Rights was ultimately passed the following year as a floor amendment to the Higher Education Amendments of 1992. The focus

of the legislation would shift significantly from requiring colleges and universities to establish specific rights for campus sexual assault victims to amending the Student Right-to-Know and Campus Security Act by requiring additional information regarding campus policies on sexual assault. The final version of the legislation did require colleges and universities to afford the victims of sexual assault several specific rights, including: the right to be informed of the final outcome of any student disciplinary proceedings alleging a sexual offense against the accused student; the right to receive assistance from the institution in changing academic and living situations, if requested and reasonably available; and the same opportunities to have others present as the accused student during a student disciplinary hearing alleging a sexual offense. The legislation also replaced the reporting of statistics for the crime of Tape with reporting for sexual offenses, forcible and non-forcible. The final regulations for the Campus Sexual Assault Victims' Bill of Rights Act were published in conjunction with the final regulations for the Crime Awareness and Campus Security provisions of the Student Right-to-Know and Campus Security Act (Student Assistance General Provisions, 1994).

One of the most frustrating aspects of the legislative and regulatory history of this legislation was the failure of the Department of Education to release final regulations implementing the legislation for almost four years after its passage, after colleges and universities had been required to produce two annual security reports. Colleges and universities were forced to try to interpret confusing and sometimes contradictory preliminary information from the Department of Education. Administrators were given one important piece of advice -- make a "good faith" effort to comply with the spirit of the legislation. However, the form which the original legislation took was beneficial to colleges and universities by allowing them to develop policies regarding campus security which met their institutional needs. The legislation required colleges and universities to develop and publicize various policies related to campus security, but to a great extent the legislation did not specify what those policies must say. Interestingly, the original form of the Campus Sexual Assault Victims' Bill of Rights Act required colleges and universities to develop policies and dictated what rights must be included in those policies. Fortunately, prior to passage, the legislation was amended and took a form closer to that of the Crime Awareness and Campus Security provisions of the Student Right-to-Know and Campus Security Act.

Given that legislative issues have had a significant impact on student affairs, especially since 1974, and this trend seems likely to increase in the coming decade, student affairs professionals must continue to focus their attention upon the impact of this legislation on student affairs practice (Gehring, 1993). It is vital for student affairs professionals to make a fundamental shift in their approach to the legislative process. In the past, student affairs professionals and, to a lesser extent, higher education, have waited until after legislation was passed and regulations were proposed to become involved in the legislative process. This regulatory focus is doomed to partial failure from the outset. It is

incumbent upon the student affairs profession to adopt a policy of legislative activism rather than the current system of regulatory reactivism. Once legislation is passed and regulations are enacted, colleges and universities have a legal obligation to comply (Ogle & Schuh, 1994). It is a far more productive use of our resources to attempt to shape the legislation passed by Congress than to attempt to eliminate or dilute problematic requirements when the Department of Education seeks to develop regulations. Our profession must learn the lessons which the history of legislation like FERPA and the Campus Security Act have to teach. In the words of Dr. Charles Witten, Dean of Students at the University of South Carolina in the 1960s and early 1970s, "How the hell can you know where you're going, if you don't know where you've been?"

In recent years, there has been an erosion of our society's traditional view of higher education and higher education professionals. A variety of problems and scandals have led many to question the ability of higher education to govern itself without governmental involvement. The ability of the student affairs profession to respond to this loss of credibility has been negatively impacted by an identity crisis within our profession which has plagued student affairs since the earliest history of the profession (Fenske, 1989). This lack of identity has contributed to an unwillingness on the part of many student affairs professionals to become involved in the legislative process and educate our legislators and others about the student affairs profession.

It is clear that professional organizations, whether those general in purpose such as the National Association for Student Personnel Administrators (NASPA) and the American College Personnel Association (ACPA), or those specific in purpose, such as the Association of College and University Housing Officers - International (ACUHO-I) and the Association for Student Judicial Affairs (ASJA), must take leadership roles in developing and executing this legislative activism. It is also important for student affairs professionals to become involved in the legislative process by staying informed about legislation which has an impact upon higher education and student affairs; to contact their elected representatives to educate them about their views on these issues; and to respond to requests for comments on federal regulations.

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