

Legal Issues: What Can You Say?



Dr. John Wesley Lowery

University of South Carolina

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Redistributive and Protective Policy Laws

- **Redistributive policy laws** attempt to provide equity for morally desirable ends by leveling the playing field.
- **Protective policy laws** assume that government knows what is best for you and attempts to provide you protection against perceived dangers.

Redistributive and Protective Policy Laws

- | Redistributive | Protective Policy |
|--|---|
| <ul style="list-style-type: none">• 1964 Title VI• 1972 Title IX• 1973 Section 504 | <ul style="list-style-type: none">• 1974 FERPA• 1989 Drug Free Amendments• 1990 Campus Security Act• 1992 Sexual Assault Victims Bill of Rights• 1998 Higher Education Amendments |

Understanding FERPA

Family
Educational Rights
& Privacy Act of
1974



FERPA

- Originally passed in 1974
- Amended numerous times over the past 3 decades
- Significant changes were included in the Higher Education Amendments of 1998.
- Codified at 20 USC 1232(g)
- Regulations appear at 34 CFR 99
- The most recent Final Rules were published in the *Federal Register* on July 6, 2000 (pp. 41852-41863) and April 21, 2004 (pages 21669-21672).

Students' Rights Under FERPA

- Right to inspect and review educational records.
- Right to seek to amend records.
- Right to have some control over the disclosure of information from educational records.

FERPA Definitions

Under FERPA, *education record* means those records that are:

1. Directly related to the student; and
2. Maintained by educational institution or by a party acting for the institution.

“Eligible student” means a student who has reached 18 years of age or is attending an institution of postsecondary education.
(\$99.3)

Exceptions To Prior Consent

§99.31 Under what conditions is prior consent not required to disclose information?

- 99.31(a)(8)—Parents of Dependent Students
- 99.31(a)(10)—Health or Safety Emergency
- 99.31(a)(11)—Directory Information
- 99.31(a)(14)—Release to the Public
- 99.31(a)(15)—Parental Notification

Parents of Dependent Students

- (8) The disclosure is to parents of a dependent student, as defined in section 152 of the Internal Revenue Code of 1986. (§99.31)

Health or Safety Emergency

- (10) The disclosure is in connection with a health or safety emergency, under the conditions described in § 99.36.

Health and Safety Emergency

The FPCO has consistently interpreted this provision narrowly by limiting its application to a *specific situation* that presents *imminent danger* to students or other members of the community, or that requires an *immediate need* for information in order to avert or diffuse serious threats to the safety or health of a student or other individuals. . . . Any release must be *narrowly tailored* considering the immediacy or magnitude of the emergency and must be made only to parties who can address the specific emergency in question.

Directory Information

- (11) May be disclosed without prior consent and includes:
- Name, address, telephone number
 - Date and place of birth
 - Field of study
 - Most recent previous school attended
 - Dates of attendance
 - Degrees and awards
 - Participation in recognized activities and athletics
 - Height and weight of athletes
 - Class schedule and rosters

Requirements for Public Notice

- (14)(i) The disclosure, subject to the requirements in Sec. 99.39, is in connection with a disciplinary proceeding at an institution of postsecondary education. The institution must not disclose the final results of the disciplinary proceeding unless it determines that--
- (A) The student is an alleged perpetrator of a crime of violence or non-forcible sex offense; and
 - (B) With respect to the allegation made against him or her, the student has committed a violation of the institution's rules or policies.

Requirements for Public Notice (§99.31)

- (ii) The institution may not disclose the name of any other student, including a victim or witness, without the prior written consent of the other student.
- (iii) This section applies only to disciplinary proceedings in which the final results were reached on or after October 7, 1998.

Final Results

Final results means a decision or determination, made by an honor court or council, committee, commission, or other entity authorized to resolve disciplinary matters within the institution. The disclosure of final results must include only the name of the student, the violation committed, and any sanction imposed by the institution against the student. (§99.39)

Crime of Violence

Rather than relying on the definition of a “crime of violence” at 18 U.S.C. 16, the Department of Education has provided an all inclusive list of “crimes of violence”:

- Arson
- Assault offenses
- Burglary
- Robbery
- Kidnapping/abduction
- Forcible and nonforcible sex offenses
- Criminal homicide—manslaughter by negligence
- Criminal homicide—murder and nonnegligent manslaughter
- Destruction, damage, and vandalism of property (§99.39)

Alcohol or Drug Possession Disclosure (§99.31)

- (15)(i) The disclosure is to a parent of a student at an institution of postsecondary education regarding the student’s violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance if--
 - (A) The institution **determines** that the student has committed a disciplinary violation with respect to that use or possession; and
 - (B) The student is under the age of 21 at the time of the disclosure to the parent.
- (ii) Paragraph (a)(15) of this section does not supersede any provision of State law that prohibits an institution of postsecondary education from disclosing information.

Written Consent

A signed and dated written consent is required before disclosing personally identifiable information from a student’s education record except as provided for in the FERPA regulations (§ 99.31). The consent must:

1. Specify the records that may be disclosed;
2. State the purpose of the disclosure; and
3. Identify the party or class of parties to whom the disclosure may be made.

FERPA and Health Insurance Portability and Accountability Act of 1996 (HIPAA)

FERPA & HIPAA

We have excluded education records covered by FERPA, including those education records designated as education records under Parts B, C, and D of the Individuals with Disabilities Education Act Amendments of 1997, from the definition of protected health information. For example, individually identifiable health information of students under the age of 18 created by a nurse in a primary or secondary school that receives federal funds and that is subject to FERPA is an education record, but not protected health information. Therefore, the privacy regulation does not apply. We followed this course because Congress specifically addressed how information in education records should be protected in FERPA.

Resource: <http://www.hhs.gov/ocr/hipaa/>

FERPA & HIPAA

While we strongly believe every individual should have the same level of privacy protection for his/her individually identifiable health information, Congress did not provide us with authority to disturb the scheme it had devised for records maintained by educational institutions and agencies under FERPA. We do not believe Congress intended to amend or preempt FERPA when it enacted HIPAA.

Resource: <http://www.cms.hhs.gov/hipaa/>

Gonzaga University v. Doe, 536 U.S. 273 (2002)

The Supreme Court ruled that FERPA does not create a private right of action and violations of FERPA **do not** create a federal right enforceable under 42 U.S.C. §1983.

FERPA

Questions concerning FERPA may be directed to:

Family Policy Compliance Office

U.S. Department of Education

600 Independence Avenue, S.W.

Washington, D.C. 20202-4605

(202) 260-3887

<http://www.ed.gov/policy/gen/guid/fpco/index.html>

ferpa@ed.gov

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act

Jeanne Clery (1966-1986)



Raped and Murdered by a fellow student in her residence hall room on April 5, 1986 at Lehigh University.

• Joseph M. Henry was able to enter Jeanne's residence hall room through a series of residence hall doors propped open with pizza boxes.

• Joseph M. Henry was originally convicted and sentenced to death. Several years ago, the death penalty was overturned, but that decision is under appeal.

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act

- Originally passed in 1990 as part of the Student Right-to-Know and Campus Security Act.
- Amended in 1992 and 1998 by the Higher Education Amendments.
- Codified at 20 USC 1092f
- Regulations appear at 34 CFR 668.46
- The two most recent Final Rules were published in the Nov. 1, 1999 *Federal Register* (pp. 59060-59073) and Oct. 31, 2002 *Federal Register* (pp. 66519-66521).

Campus Security Act

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act requires that all institutions of higher education which receive federal financial assistance produce an annual security report which is distributed to all current students and employees and a summary of which is available to all prospective students and employees.

Annual Security Report

The Annual Security Report Must Contain:

- Procedures to report crimes;
- Policies for responding to these reports of crimes;
- Policies for making timely warning reports to members of the campus community.
- The policies for collecting crime statistics.
- A list of the university officials to whom crimes should be reported.
- Security of and access to campus facilities;

Annual Security Report

The Annual Security Report Must Contain:

- Arrest authority of campus police;
- Policies to encourage prompt reporting of crimes;
- Policies, if any, to encourage pastoral counselors and professional counselors, to inform the persons they are counseling of any procedures to report crimes on a voluntary, confidential basis for inclusion in the annual disclosure of crime statistics.
- Programs to inform about crime and take personal responsibility for safety;
- Programs on crime prevention.

Annual Security Report

- Policy on enforcement of underage drinking;
- Policy on enforcing drug laws;
- A description of drug and alcohol education programs;
- Policy for monitoring and recording criminal activity at off-campus locations of recognized student groups.

Annual Security Report

Sexual Assault Victim's Bill of Rights amended the Campus Security Act to require a policy statement to be added to the Security Report which includes:

- Educational programs to promote rape awareness;
- Procedures to follow if a sex offense occurs;
- Option to notify local law enforcement/will assist;
- Notice of victim services;
- Will change academic and living conditions if asked;
- Procedures for campus discipline/assistance/outcome
- Sanctions that may be imposed.

Crime Statistics

The Annual Security Report must include the statistics three most recent calendar years concerning the occurrence on campus, in or on noncampus buildings or property, and on public property of the following crimes that are reported to local police agencies or to a campus security authority:

Crime Statistics

1. Criminal homicide:
 - (A) Murder and nonnegligent manslaughter.
 - (B) Negligent manslaughter (beginning with 1999)
2. Sex offenses:
 - (A) Forcible sex offenses
 - (B) Nonforcible sex offenses
3. Robbery
4. Aggravated assault
5. Burglary
6. Motor vehicle theft
7. Arson (beginning with 1999)

Crime Statistics

Arrests for liquor law violations, drug law violations, and illegal weapons possession.

Statistics for persons (includes both students and employees) who were not arrested but were referred for campus disciplinary action for liquor law violations, drug law violations, and illegal weapons possession (beginning with 1999).

Tort Liability and Notifying Parents

Recent Cases

Jain v. Iowa, 617 N.W.2d 293 (Iowa, 2000).

Schieszler v. Ferrum College, 233 F. Supp. 2d 796 (W. D. Va. 2002).

Notifying Parents in Suicide Cases

From a legal standpoint, the safest course is to notify the family of a genuinely suicidal student unless previously known indicators, like a history of child abuse, suggest that parental notification would be harmful. Sometimes it just comes down to picking your lawsuit. A student's suit for invasion of privacy is, by most any reckoning, preferable to a suit over a suicide. Be ready, however, for the unexpected. One college, after making the decision to contact the family of an international student, ran into the unanticipated difficulty that the overseas parents did not speak English. (Franke, 2004, p. B19)

Resources on Responding to Student Suicide

Franke, A. H. (2004, June 25). When students kill themselves, colleges may get the blame. *Chronicle of Higher Education*, pp. B18-B19.

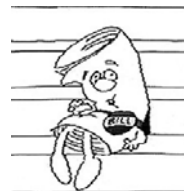
The Jed Foundation <http://jedfoundation.org/>

Lake, P., & Tribbensee, N. (2002). The emerging crisis of college student suicide: Law and policy responses to serious forms of self-inflicted injury. *Stetson Law Review*, 32, page 125-157.

Suicide Prevention

<http://www.couns.uiuc.edu/brochures/suiprev.htm>

Parents and the 108th Congress: A Legislative Watch List



Parents and the 108th Congress

- **Bryan's Law** (H.R. 1843)
- **Student Privacy Protection Act of 2003** (H.R. 1848)
- **Suzanne Lyall Campus Safety Act** (H.R. 4340)
- **Garrett Lee Smith Memorial Act** (S. 2634 and H.R. 4799)

Parents and the 108th Congress

- **College Access and Opportunity Act of 2004** (H.R. 4283)
 - Section 490 (c) Reports on Disciplinary Proceedings

Internet Resources

- **NASPA Public Policy Division**
www.naspa.org/publicp/about.cfm
- **Security on Campus, Inc.**
www.securityoncampus.org
- **Campus Legal Information Clearinghouse**
<http://counsel.cua.edu>
- **Thomas: Library of Congress**
<http://thomas.loc.gov>
- **Department of Education**
www.ed.gov
- **Information for Financial Aid Professionals**
<http://ifap.ed.gov>
- **United States Code**
www4.law.cornell.edu/uscode/
- **Campus Security Info**
www.ed.gov/offices/OPE/PPI/security.html



For more information contact:

Dr. John Wesley Lowery

Assistant Professor of Higher Education and Student Affairs

Department of Educational Leadership & Policies
University of South Carolina

Wardlaw College, Room 318

Columbia, SC 29208

803-777-4158 office

803-777-3090 fax

jlowery@gwm.sc.edu