OPEN RECORDS LAWS AND STUDENT DISCIPLINARY RECORDS: EXPANDED MEDIA ACCESS TO STUDENT RECORDS A FERPA UPDATE

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EXPANDED MEDIA ACCESS TO STUDENT RECORDS

A FERPA Update[1]

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I. FERPA AND OTHER RELEVANT LAWS OR REGULATIONS

A. RECENT AMENDMENTS TO FERPA

Several amendments to FERPA during the last few years are relevant to the issue of media access to student disciplinary records. Following is a list of those amendments as well as a brief review of the Department of Education's proposed regulations concerning public access to law enforcement unit records. At the time of the writing of this outline, the Department of Education had not issued final regulations on the topic; thus, the information provided below addresses the proposed regulations as well as describes what is known at this time about the content of the final regulations.

1. The Student Right to Know and Campus Security Act.

The Student Right to Know and Campus Security Act, P.L. 101-542, amended FERPA. The relevant portion of the Campus Security Act is codified at 20 U.S.C. § 1092(f)(7)(B)(iv), which provides in part that institutions shall adopt

> (iv) Procedures for on-campus disciplinary action in cases of alleged sexual assault, which shall include a clear statement that --

[1] This outline is intended to be an intermediate-level presentation and basic information about the Family Education Rights and Privacy Act (Buckley Amendment) is omitted.

I. the accuser and the accused are entitled to the same opportunities to have others present during a campus disciplinary proceeding; and

II. both the accuser and the accused shall be informed of the outcome of any campus disciplinary proceeding brought alleging a sexual assault.

Final regulations implementing this statutory amendment were published in the January 7, 1993 *Federal Register*. The resulting amendment to FERPA is codified at 20 U.S.C. § 1232g.(b)(6), which provides:

> (6) Nothing is this section shall be construed to prohibit an institution of post-secondary education from disclosing, to an alleged victim of any crime of violence (as that terms is defined in § 16 of Title 18), the results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime with respect to such crime.

18 U.S.C. § 16 defines a crime of violence as follows:

> (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 may be used in the course of committing the offense.

The Student Assistance General Provisions regulations were also amended in the April 29, 1994 *Federal Register*. 30 CFR § 668.47(a)(12)(vi) of those amended regulations provides that an institution's statement of policy concerning the institution's campus sexual assault programs to prevent sex offenses must include a clear statement that

(A) The accuser and the accused are entitled to the same opportunities to have others present during a disciplinary proceeding; and

(B) Both the accuser and the accused shall be informed of the outcome of any institutional disciplinary proceeding brought alleging a sex offense. Compliance with this subsection does not constitute a violation of the Family Education Rights and Privacy Act (20 U.S.C. 1232g). For the purpose of this paragraph, the outcome of a disciplinary proceeding means only the institution's final determination with respect to the alleged sex offense and any sanction that is imposed against the accused;

2. Improving America's School Act.

Improving America's School Act, P.L. 103-382, also recently amended FERPA. The FERPA amendments are included at 108 Stat. 3924 of that Act. While perhaps not directly relevant, these amendments provide that subpoenas for student records for purposes of law enforcement may now provide that the school shall not notify the student. The amendments also provide when student record information is released to a third party under a FERPA exception and the third party is directed not to disclose it, that a violation of this confidentiality by the third party must result in the institution prohibiting that party from receiving student record information for at least five years. The amendments also provide that notification of students of FERPA rights must be effective and that students can challenge their student records only on the grounds that they are inaccurate, misleading, or a violation of privacy rights and not on the grounds that they violate "other rights".

3. Higher Education Amendments of 1992.

The Higher Education Amendments of 1992, P.L. 102-325, amended FERPA and this amendment was codified at 20 U.S.C. § 1232g.(a)(4)(B)(ii), which provides that the term "education records" does not include

> (ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement.

It is this amendment that has led to recent controversy concerning the inclusion of disciplinary records in the definition of the law enforcement unit records that are exempted from the Buckley Amendment's prohibition on disclosure. LeRoy Rooker, Director, Family Policy Compliance Office, U.S. Department of Education, has indicated that the Department requested this FERPA amendment because the previous provision concerning law enforcement records was impractical, because of the increasing public concern about crime on campus, and because of the potential conflicts between FERPA and state open records laws that put institutions in untenable positions. Court rulings that the Department felt influenced the public's perception concerning this issue, cases that will be discussed in this outline below in Section III, included Bauer v. Kincaid and Student Press Law Center v. Alexander.

B. RECENT PROPOSED REGULATIONS

1. August 11, 1993 Notice of Proposed Rule-Making.

The Department of Education in the August 11, 1993 *Federal Register* outlined proposed regulations for implementing the FERPA law enforcement unit amendment. During the comment period, the issue whether records of disciplinary proceedings taken against students accused of criminal and other non-academic misconduct

should be considered available to the public seemed to take precedence over the issue of law enforcement records.

The proposed regulations define a "disciplinary proceeding" as meaning the investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or a violation of the internal rules of conduct applicable to students of the agency or institution, and defines the term not to include records of the law enforcement unit of an educational agency or institution. The proposed regulations also define a "law enforcement unit" broadly as any unit that is authorized or designated by the institution to enforce the law or refer to appropriate authorities a matter for enforcement of the law. These regulations state that a component of an educational agency or institution does not lose its status as a law enforcement unit if it also performs other functions for the institution, including investigation of incidents that might lead to a disciplinary action or proceeding.

In addition, the proposed regulations define the "records of a law enforcement unit" as only those records and other materials created by that unit for that unit's purpose and maintained by that unit. Records of a law enforcement unit does not mean records relating to law enforcement that are maintained by another component of the educational agency or institution or records relating to a disciplinary action or proceeding conducted by the institution. The regulations further provide that nothing in the Act prohibits an educational institution from contacting its law enforcement unit for the purpose of asking that unit to investigate a possible violation of law and that education records do not lose their status as education records while in the possession of the law enforcement unit. Finally, the proposed regulations provide that the Act neither requires nor prohibits the disclosure by an institution of its law enforcement unit records.

2. December 14, 1993 Notice of Proposed Rule-Making.

Because of the large number of comments that certain kinds of disciplinary records should be treated the same as an institution's law enforcement unit records, the Department of Education re-issued the proposed regulations in a second notice of proposed rule-making in the December 14, 1993 *Federal Register*. The Department solicited additional comments especially from officials of educational institutions.

LeRoy Rooker in a recent presentation indicated the following:

- The challenge to the Department in issuing the final regulations is to determine whether the intent of the law enforcement unit statutory change was to exempt certain disciplinary records from FERPA.
- The regulations must be consistent with the FERPA provision that allows disclosure to an alleged victim of a crime of violence the results of any disciplinary proceedings conducted against the alleged perpetrator, as well as the Student Assistance General Provisions amendment discussed above.
- The Department expects to clarify the definition of law enforcement unit to include either units of commissioned police officers or non-commissioned security guards.
- The final regulations must address the inevitable intertwining at many institutions of the functions of the law enforcement unit and the functions of the Student Affairs office charged with administering the student discipline system.
- The final regulations are expected to allow institutions that do not have law enforcement units to publicly disclose records that relate to a criminal act by expanding the definition of law enforcement unit to any entity or individual whose function is to maintain the physical security and safety of the institution.

- The Department does not believe that the FERPA statutory authority exists to permit the non-consensual disclosure of educational records to outside law enforcement authorities except with a judicial order or lawfully-issued subpoena.

II. OPEN RECORDS LAWS

A. GENERAL BACKGROUND

Federal and state freedom of information acts, sunshine laws, public meeting laws, and open records statutes have allowed increasing public access to information during the last two decades.[2] While open meetings laws are an issue in their applicability to student disciplinary hearings, most often relevant to this inquiry are state open records statutes and this outline will focus on these laws.[3] While some generalization can be made about open records statutes, the variation among states necessitates independent analysis by each institution of the applicable law.

The public's right of access to governmental information is based largely on statutory law and case law interpretation of that statutory law. The Supreme Court has held that no special constitutional right of access to the press exists to information held by the government. Pell v. Procunier, 417 U.S. 817 (1974). In that case the Court found that the proposition "that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public

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[2] It is important to note that Open Records Act issues relate to public or quasi-public entities and are inapplicable to purely private institutions.

[3] For an analysis of the Freedom of Information Act and the Federal Privacy Act, see Susman, *The Privacy Act and the Freedom of Information Act: Conflict and Resolution*, 21 J.Mar.L.Rev. 703 (Summer 1988). For a review of the elements of and variations in state open meetings laws, see Cleveland, *The Costs and Benefits of Openness: Sunshine Laws and Higher Education*, 12 J.C.U.L. 127 (1985). For an excellent summary of issues arising under open records and open meetings laws, see the NACUA outline dated October 5-6, 1990, by William R. Kauffman entitled "Recordkeeping: The Public's Right to Know v. the Individual's Right to be Left Alone -- The University's Dilemma."

generally . . . finds no support in the words of the Constitution or in any decision of this Court." 417 U.S. at 834-35.

The philosophical purpose of open records statutes is to confirm a public right of access to records of public bodies, while exempting from these disclosure requirements those records that bear on personal privacy or other matters that, for the public's best interest, should not be publicly disclosed. States vary widely on the breadth of matters that are exempted from disclosure under open records laws with most, if not all, providing a general disclosure exemption "as otherwise provided by law." This general exemption accommodates specific exclusions found in other federal and state statutory law and also, on occasion, case law that may provide additional exemptions. Some common exclusions to open records laws include library lending records; public employee personnel records; letters of reference; medical records; student records, and sometimes specifically disciplinary records; trade secrets and other confidential information provided to a public agency; research data; contract proposals and negotiations; property appraisal and feasibility studies pending final action; risk management and peer review records; confidential information provided in conjunction with licensing applications; information used in labor negotiations and collective bargaining; information protected by the attorney/client or attorney work product privilege; records relating to pending litigation or claims involving public agencies; law enforcement investigatory records; records involving confidential sources and investigative procedures; home address, telephone numbers, and photos of law enforcement agents and family members; and criminal records of juvenile offenders.

In many states the federal Freedom of Information Act served as a template for state legislation and, therefore, the case law under the federal act may be used as a reference in the absence of applicable state law. However, many state laws vary from the federal act, thus rendering that case law less relevant. Policies behind open records laws are that they

advance public participation in decision-making, protect against corruption in decision-making, develop a more consultative approach to decision-making, increase acceptance of government decisions, and provide a more informed democratic citizenry.[4]

Issues to consider in interpreting and applying state open records laws include:

1. Definitions, and in particular the definition of the public agencies to which the statute applies.
2. The rule of construction that the state court has applied to the statute. It is most often held that open records laws are given a liberal construction and exceptions to those laws are strictly construed.[5]
3. Standing to invoke the law, i.e., who may attempt to enforce the open records provision.
4. The prescribed proper form and timetable for any request.
5. The prescribed form and timetable for any response to an appropriate request.
6. The prescribed copying costs and procedures.
7. Any confidentiality provisions or exemptions.
8. The prescribed penalties or sanctions. In general, sanctions can take the form of injunctive relief, the declaration that the action taken in contravention of the laws is void, equitable relief, and civil and criminal penalties.

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[4] See generally, Cleveland, supra, note 3.

[5] See, e.g., Guy Gannett Publishing Co. v. University of Maine, 555 A.2d 470 (ME, 1989), Queen v. West Virginia University Hospitals, Inc., 365 S.E.2d 375 (WV, 1987).

B. SPECIFIC OPEN RECORDS STATUTES

Below is a general summary of the open records laws in Georgia, Louisiana, Missouri, and Oklahoma, the states giving rise to the recent cases described in Section III of this outline.

1. Georgia: Inspection of Public Records, Ga.Code § 50-18-70, et seq.

The Georgia Open Records Law provides a very broad definition of "public record" to include essentially any document or information prepared, maintained, or received in the course of the operation of a public office or agency. "Agency" is defined as any governing body of an agency or any committee thereof.

The Georgia statute provides that all public records of an agency, except those which by order of a court of this State or by law are prohibited or specifically exempted from being open to inspection by the general public, shall be open for personal inspection by any citizen of this State at a reasonable time and place and that those in charge of such records shall not refuse this privilege to any citizen.

The statute provides for numerous exemptions, including records "specifically required by the federal government to be kept confidential". It has been held that the purpose of the open records act in Georgia is to encourage public access to government information and to foster confidence in the government's openness to the public. McFrugal Rental of Riverdale, Inc. v. Garr, 418 S.E.2d 60 (Ga. 1992). It has also been held that any purported statutory exemption from disclosure under the open records act must be narrowly construed. Hardaway Co. v. Rives, 422 S.E.2d 854 (Ga. 1992). The Court in the Hardaway case outlined three steps in open records act analysis. The Court in that case stated that the first inquiry is whether the records are public records; if they are, the second inquiry is whether they are protected from disclosure under the list of exemptions or under any other

statute; if they are not exempt, then the question is whether they should be protected by court order, but only if there is a claim that disclosure would invade individual privacy.

Courts in Georgia have held that applications submitted by candidates for the position of a state university president were not exempt from disclosure, Board of Regents v. Atlanta Journal, 378 S.E.2d 305 (Ga. 1989); that records relating to the assets, liabilities, income, and expenses of a state intercollegiate sports program prepared by employees of a private athletic association are public records and subject to the open records act, Macon Tel. Publishing Co. v. Board of Regents, 350 S.E.2d 23 (Ga. 1986); and that University of Georgia athletic records such as contracts between coaches and suppliers of equipment, information related to radio and television broadcasts, and initial reports prepared by coaches of outside income were all public records subject to the open records act, Dooley v. Davidson, 397 S.E.2d 922 (Ga. 1990). In Dooley, however, the Court also held that contracts between individual coaches and outside entities to make speaking appearances or to provide commentary during certain broadcasts were not public records where there was no evidence the documents related to athletic events involving the University.

2. Louisiana: Public Records, La.R.S. 44:1 et seq.

Louisiana's Public Records Act defines records subject to that Act very broadly as records of almost every type having been used, being in use, or prepared, possessed, or retained for use in the conduct, transaction, or performance of any business, transaction, work, duty, or function which was conducted, transacted, or performed by or under the authority of the constitutions or laws of this State, or by or under the authority of any ordinance, regulation, mandate, or order of any public body, or concerning the receipt or payment of any money received or paid by or under the authority of the constitution or the laws of this State.

"Public body" is defined as any branch, department, office, agency, board, commission, district, governing authority, political subdivision, or any committee, subcommittee, advisory board, or task force thereof, or any other instrumentality of the State, parish, or municipal government, including a public or quasi-public non-profit corporation designated as an entity to perform a governmental or proprietary function. The statute provides in § 32 that custodians shall present any public record to any person of the age of majority who so requests.

Louisiana has numerous specific exemptions from its Public Records Act, some of which are rather curious, such as any records, books, or letters ordinarily kept in the custody or control of the Governor in the usual course of the duties and business of his office.

Louisiana courts have held that the Louisiana Act was intended to implement the inherent right of the public to be reasonably informed as to the manner, basis, and reasons upon which governmental affairs are conducted, Trahan v. Larivee, 365 S.2d 294 (La.App. 1978) writ denied, 366 S.2d 564. In addition, it has been held that the student government organization, as an ultimate recipient of public funds in the form of tuition fees, fell within the portion of the Act defining "public records" as all records relating to receipt or payment of any money received or paid by or under the authority of the constitution or laws of this State. Carter v. Finch, 322 S.2d 305 (La.App. 1975) writ denied, 325 S.2d 277.

3. Missouri: Mo.Rev.Stat. § 109.180.

Missouri's Act is a very short statement providing that, except as otherwise provided by law, all state, county, and municipal records kept pursuant to statute or ordinance, shall at all reasonable times be open for personal inspection by any citizen of Missouri. There are no specific exemptions listed and very little case law defining or applying the Act.

4. Oklahoma: Okla.Stat. tit. 51, § 24A.1., et seq.

The Oklahoma Open Records Act states in § 24A.2. that the purpose of the Act is to ensure and facilitate the public's right of access to and review of government records so they may efficiently and intelligently exercise their inherent political power.

The Act defines "record" broadly to include almost any document or other recording created by, received by, under the authority of, or coming into the custody, control, or possession of public officials, public bodies, or their representatives in connection with the transaction of public business, the expenditure of public funds, or the administering of public policy.

"Public body" is also defined broadly to include, but not be limited to, any office, department, board, bureau, commission, agency, trusteeship, authority, council, committee, trust, county, city, village, town, township, district, school district, beer board, court, executive office, advisory group, task force, study group, or any subdivision thereof, supported in whole or in part by public funds or entrusted with the expenditure of public funds or administering or operating public property and all committees or subcommittees thereof.

The Oklahoma statute includes several specific exemptions, including exemptions for any records specifically required by law to be kept confidential. Section 24A.16. of that statute also provides specific exemption for education records and materials. Individual student records, teacher lesson plans, tests, and other teaching materials, and personal communications concerning individual students specifically may be kept confidential.

Oklahoma courts have held that in applying the Open Records Act disclosure is to be favored over a finding of an exemption and the party urging the exemption will have the burden of proof to show the applicability of such an exemption. Tulsa Tribune Co. v. Oklahoma Horseracing Commission, 735 P.2d 548 (Ok. 1986). In addition, in Tulsa

Tribune, the Court held that an individual whose interests are affected by a request for disclosure must be given notice of the determination made by the public body regarding the information requested and an opportunity to present written objection to release of the information, to be filed with the public body within a reasonable time following that notification.

C. CASES PRIOR TO LAW ENFORCEMENT UNIT AMENDMENT

1. Bauer v. Kincaid, 759 F.Supp. 575 (W.D.Mo. 1991).

In this case, plaintiff, Tracy Bauer, Editor-in-Chief of the Southwest Missouri State University student newspaper sued the University and various university administrators because of their refusal to release to her copies of incident reports prepared by the University Safety and Security Department concerning the investigation of suspected criminal activity on campus. Plaintiff claimed that she was entitled to the incident reports pursuant to the Missouri sunshine law, and that the refusal violated her rights of free speech, free press, and equal protection under the First and Fourteenth Amendments, and that it served to classify her as a student and to deny that class of students equal police protection. The University argued that FERPA prohibited and prevented it from releasing the incident reports and that as such it operates as an exception to the Missouri sunshine law. Plaintiff argued in the alternative if FERPA imposes a penalty for disclosure of student security and crime reports, then FERPA creates an irrational classification in violation of the equal protection component of the due process clause of the Fifth Amendment, and thus is unconstitutional.

The Court in Bauer held for plaintiff, construing the Missouri sunshine law to apply to the records of the University's Safety and Security Department because those records were under the legal control of the Board of Regents, which was clearly subject to that law. The Court rejected an argument by the University contending that statutory

vesting of governing authority in the Board of Regents does not mean that lower levels in the organization that were not vested with the power to govern are subject to the sunshine law. The Court found that the policies of the University are subject to the general control and management of the Board of Regents, and by necessity the University's policies include the operation of the Department of Safety and Security and its policies. The Court noted that the purpose of the sunshine law would be thwarted if a public governmental body could merely create an intermediary reporting level and then authorize an administrative entity to report only at that level in order to shield sensitive information from disclosure under the sunshine law.

The Court further found that the incident reports at issue satisfied the requirements of the FERPA exception for law enforcement records, and thus rejected the argument that their disclosure was prohibited by other federal law thus creating an exception to the sunshine law. In the alternative, the Court found should FERPA be interpreted to impose a penalty for the release of these incident reports, that FERPA was itself unconstitutional because that penalty would not further the federal policy of protecting educationally-related privacy interests of students, which was the only rational basis for the prohibition on disclosure.

2. Student Press Law Center v. Alexander, 778 F.Supp. 1227 (D.D.C. 1991).

In this case, the Court preliminarily enjoined the Department of Education from withdrawing federal funding from a university for disclosing to the public personal information contained in campus police reports. The Court found that the plaintiffs, who were student journalists, were likely to succeed on the merits of their claim that the provision of the Act authorizing withdrawal of funds violated their First Amendment right to receive information. The Court held that the plaintiffs did not demonstrate a significant likelihood of success on the merits of their equal protection claim because plaintiffs' did not

assert that they suffered any restrictions that also did not apply to the public as a whole. However, the Court found that the plaintiffs did demonstrate a greater likelihood of success on the merits of their First Amendment claim. Noting that the right to receive information is an inherent corollary of the rights of free speech and press guaranteed by the Constitution, the Court held that the Department of Education did not offer any rational justification for preventing universities from disclosing the names of students involved in criminal activity. Although it noted that the right to receive information is not as broad as the right of free speech from which it extends, the Court held that the government still must assert some interest that outweighs the public's First Amendment right to receive the information. In balancing rights of privacy against rights of access, the Court found that in this case no legitimate privacy interest existed in arrest records and, furthermore, that the public's interest in greater access to information is at its highest in matters of their own personal safety and prevention of crime.

D. MORE RECENT CASES

1. The Red and Black Publishing Co., Inc. v. Board of Regents, 427 S.E.2d 257 (Ga. 1993).

In this case the University of Georgia student newspaper brought an action for injunctive relief against the Board of Regents, the University President, and others, seeking access to records and disciplinary proceedings of the University's Student Organization Court. The newspaper brought the action after it was denied access to Organization Court records and proceedings involving hazing charges against two fraternities. The Court determined that the Organization Court was subject to the open records and open meetings laws because it was simply an organization that was carrying out some of the duties and policies of the Board of Regents, which clearly was an agency governed by those statutes. The Court held that the Board of Regents governs the

University and delegates to the University the formulation of the rules and regulations concerning the discipline of students and student social organizations. While agreeing with the lower court that perhaps the Organization Court does not fit within the literal language of the Open Meetings Act in that it was not a committee of any members of the governing body, the Court held that nevertheless the Organization Court stood in the place of and was equivalent to the Board of Regents and the University under the Open Meetings Act. The Court stated because the Organization Court was a vehicle by which the University carried out its responsibilities, as directed by the Board of Regents, to regulate social organizations, that having delegated official responsibility to the Organization Court, the Board of Regents could not hide behind meetings at which official action was taken on its behalf and for which they are responsible by contending that the group that takes the action are not official members of the Board of Regents.

The University in this case conceded that the records of the Organization Courts were public records under the Open Meetings Act, but argued that FERPA required that the records qualified for an exemption. The Court reserved the "serious question" whether Buckley qualified as an exemption since the Buckley Amendment does not prohibit disclosure of records but simply threatens the penalty of withdrawal of federal funds for this disclosure. Nevertheless, assuming without deciding that the threat of withdrawal of federal funding is equivalent to the prohibition of disclosure, the Court found that the documents sought were not education records within the meaning of the Buckley Amendment. The Court noted that while the records in question are similar, they are not the same as those maintained solely for law enforcement purposes that were expressly excluded from the Buckley Amendment's purview. Nevertheless, the Court found that the records also were not of the type that the Buckley Amendment is intended to protect, i.e., those related to individual student academic performance, financial aid, or scholastic probation. In addition,

the Court noted that the Buckley Amendment specifically provides that the sanction of loss of federal funding does not occur when the institution furnishes information in compliance with a judicial order. With rather convoluted logic the Court found that because the trial court had ordered the records released, the disclosure was appropriate.

2. Shreveport Professional Chapter of the Society of Professional Journalists and Michelle Millhollon v. Louisiana State University, et al. (La.Dist.Ct. March 4, 1994) (unpublished).

In this case an LSU campus newspaper reporter sued for the release of the results of a disciplinary hearing held by the Student Affairs Committee. The request for records pertaining to an alleged theft of funds by two student government members was denied. While agreeing that the records fell within the definition of public records under the Louisiana Public Records Law, the University contended that FERPA prevented their release. The Court agreed that the requested documents were public records under the Louisiana statutes and therefore should be open to public access unless an exemption exists. The Court distinguished the facts of the case from those in Red and Black, noting that LSU keeps all of its records together for the purpose of having a complete student file, in contrast to the University of Georgia, which maintains separate files for student affairs and criminal activities. The Court also noted that, unlike the Georgia case in which the Court concluded that the Organization Court's hearings were quite similar to those in a criminal case, it was clear from the testimony that LSU disciplinary proceedings were not analogous to criminal court proceedings. In addition, the Louisiana Court disagreed with the holding in Red and Black that the trial court order granting access to the records satisfied the FERPA exemption concerning judicial orders. The Louisiana Court stated that simply because the court has the power to release a document, such action will not haphazardly be administered without a compelling reason. Finally, the Court held that when the meetings

of the LSU Student Affairs Committee involved disciplining students who had been accused of wrongdoing within the confines of the University's policies, there is no compelling public interest that would allow any person access to these documents that are sensitive and potentially embarrassing to the parties involved.

3. Stephen Selkirk v. University of Oklahoma, Case No. CJ94-1514BH (Okla.Dist.Ct. November 7, 1994) (unpublished).

In this case the Court found that all records, files, documents, and materials that pertain to a campus disciplinary action are by definition education records. Further, the Court held that the Student Right to Know and Campus Security Act is restrictive in its terms and allows only the disclosure of "results" of a disciplinary proceeding conducted by the institution and then only to the alleged victim of a crime of violence. In so finding, the Court granted the University of Oklahoma's motion to dismiss a case brought by a student to obtain the release of the names of six fraternity members disciplined for vandalism of an Indian tepee on campus.

In reaching its determination, the Court referenced an opinion letter from LeRoy Rooker of the Department of Education confirming that records of campus disciplinary actions are education records under FERPA and thus may not be disclosed without the prior written consent of the student(s). Mr. Rooker's letter also referenced the Student Right to Know and Campus Security Act, but simply stated its provisions concerning release of the outcome of any campus disciplinary proceeding brought alleging a sexual assault as well as its original language that mandates the release of the results of a disciplinary proceeding to an alleged victim of a crime of violence. Mr. Rooker's letter concluded that "therefore an institution may disclose information relative to a disciplinary hearing to the alleged victim of a crime of violence but not to the campus community at

of the provision and limited the disclosure to the "results" of the disciplinary hearing. The Oklahoma open records law was not referenced at all in the brief opinion.

III. ACCESS TO STUDENT DISCIPLINARY RECORDS

A. APPLICATION OF FERPA

At the time this outline was being prepared the final Department of Education regulations were not published and thus it was unclear what precise issues they will raise when they are published. Even if FERPA allows release of student disciplinary records, it is important to remember that it does not require disclosure and thus the decision concerning disclosure and the applicability of open records laws will still remain with the college or university. In fact, in that case, the decision may be a tougher one to make since FERPA will not be available as an automatic excuse. Thus, discussion of the balancing of the interests involved — public right of access, the efficient operation of our public institutions, and individual privacy rights — offers the most thoughtful and sure pathway to a lasting resolution.

It is likely, whatever regulations are released, that issues of their interpretation and application will also be raised and may necessitate a shift in procedures and policies on campuses for handling student disciplinary matters.

B. APPLICATION OF OPEN RECORDS LAWS

Whatever the reach of FERPA, the issue will still exist in each state whether FERPA, even if it threatens penalties for disclosure of student disciplinary records, qualifies as a "exemption" under that state's open records laws.

The issue also may still exist whether student disciplinary bodies qualify under state open records laws as agencies or committees that are subject to those laws.

In addition, in each case there may still exist issues of standing, procedural compliance, other exemptions that are applicable to the matter, and compelling policy reasons that the balance of personal privacy, public process, or other public interest against the public right to know should be tilted in one direction or the other.

C. POLICY CONSIDERATIONS CONCERNING ACCESS

A list of various arguments that have been presented in favor of disclosure of records are listed below to stimulate a thoughtful approach to the issue.

1. Arguments presented against public access or disclosure:

- Policies regarding student conduct enforced through disciplinary proceedings are not an extension of the university's law enforcement activities. Many of these policies are developed not to protect potential victims but rather to inculcate a sense of responsibility and respect for others.
- Release of records of disciplinary proceedings could destroy the effectiveness of these policies and make students reluctant to speak forthrightly, accept responsibility, or agree to seek help for personal problems.
- The potential of disclosure necessarily constrains the nature of free and open discourse generally.
- The constraints created by potential disclosure can change a decision-making process by altering when decisions are made, who makes the decision, what decisions are made, and why they are made.

- The application of open meetings and open records laws have additional administrative costs and burdens because of notice requirements, transcription requirements, etc.
- Application of open records laws can encourage mediocrity because conservative and safe solutions are favored over new and creative ones.
- Disclosure can open a university up to other potential liabilities such as liability for invasion of personal privacy, defamation, infliction of emotional distress, breach of contract, and fraudulent misrepresentation.
- Proceedings generally use a much lower standard of proof for higher standards of behavior because they are not criminal in nature. Opening these records to public scrutiny could result in equating these proceedings to a criminal proceeding, thus requiring a higher standard of proof, lower standards of behavior, and the transformation of the hearings to mini-trials subject to rules and procedures defined by a state criminal system.
- Students do not have a right to counsel in most disciplinary proceedings and opening the records to the public may not be fair to an unrepresented student.
- The disciplinary panel usually does not have the right to subpoena witnesses or compel testimony and must rely on the integrity of student witnesses. Opening these proceedings to the

public could undermine the effectiveness and educational value of the proceeding.

- Regardless whether disciplinary records are open, most institutions publish the conduct and results of the proceedings in summary form to alert people to campus problems.
- If disciplinary hearings are open to the public, many students who now come forward would refuse to participate, which could prevent many instances such as date rape and sexual assault from ever being reported.

2. Arguments presented in favor of disclosure and openness of student disciplinary records:

- Public access to these hearings allows the public to evaluate the expenditure of public funds in the efficient and proper functioning of the institution.
- Disclosure would protect against corruption of the disciplinary process and increase public confidence in that process.
- Opening disciplinary records would undermine unsubstantiated rumors and allow the most accurate version of an incident to be made readily available. Such disclosure would deter victim and offender from disclosing biased or personal versions of an incident and promote only the disclosure of accurate charges.
- Open disclosure would serve as a deterrent because potential offenders would know prior to an offense that their identities could be publicly disclosed.

- Non-disclosure of disciplinary records is inconsistent with our educational goal of treating students as adults and holding them fully responsible for the consequences of their behavior.
- If disciplinary records are not disclosed, persons who commit crimes on campus may be treated differently from someone who commits the crime in the general public.