

**OPEN RECORDS LAW AND STUDENT  
DISCIPLINARY RECORDS:  
EXPANDED MEDIA ACCESS TO  
STUDENT RECORDS**

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**16TH ANNUAL LAW & HIGHER EDUCATION CONFERENCE**  
**Clearwater Beach, Florida**  
**February 12-14, 1995**

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**I. Introduction**

- A. Originally passed as part of the Higher Education Amendments of 1974, the Family Educational Rights and Privacy Act was authored by Senator James Buckley of New York and Senator Claiborne Pell of Rhode Island.
- B. The purpose of the Act was two-fold -- to guarantee to parents and the students themselves if they were over 18:
  - 1. Access to their education records, and
  - 2. Limitation of the transferability of those records without their consent. (December 13, 1974)
- C. The Family Educational Rights and Privacy Act was not considered by Congress in the manner most legislation follows. Senators Buckley and Pell introduced the legislation as an amendment to the Higher Education Amendments of 1974 on the floor of the Senate. For this reason, there were significant problems with the legislation in the period soon after its passage.
- D. In an attempt to respond to these problems, Senators Buckley and Pell introduced amendments to the bill in December of 1974.

**II. Definition of Education Records**

- A. The term 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.
- B. The term does not include:
  - 1. Records of instructional, supervisory, and administrative personnel ancillary to those persons that are kept in the sole possession of the maker

of the record and are not accessible or revealed to any other person except a temporary substitute for a maker of the record.

2. Records of a law enforcement unit of an educational institution, but only if the education records maintained by the institution are not disclosed to the unit, and the law enforcement records are:
  - a. Maintained separately from education records;
  - b. Maintained solely for law enforcement purposes; and
  - c. Disclosed only to law enforcement officials of the same jurisdiction.

(It should be noted that the regulations regarding the status of the records of a law enforcement unit of an educational institution under FERPA are in the process of revision. The proposed changes to these regulations are described in Section D. below.)

3. Records relating to a student who is employed by an educational agency or institution that are:
  - a. Made and maintained in the normal course of business;
  - b. Relate exclusively to the individual in that individual's capacity as an employee; and
  - c. Are not available for any other purpose.
4. Records on a student who is 18 years of age or older, or is attending institution of postsecondary education that are:
  - a. Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;
  - b. Made, maintained, or used only in connection with treatment of the student; and
  - c. Disclosed only to individuals providing treatment.

C. Changes to the definition of education records proposed by the Department of Education in the December 14, 1993 issue of the *Federal Register*.

1. It has always been the position of the Department of Education that discipline records were included within this definition of education records.

2. The original version of the Buckley Amendment as passed in August 1974 clearly included within the definition of education records “verified reports of serious or recurrent behavior patterns.”

3. The Department of Education has proposed to add the following definition into the regulations for the Family Educational Rights and Privacy Act:

*Disciplinary Action or proceeding* means the investigation, adjudication, or imposition of sanction by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students of the agency or institution.

D. Additional changes proposed by the Department of Education for inclusion in the regulations for the Family Educational Rights and Privacy Act:

1. *Law enforcement unit* means any individual, office, department, division, or other component of an educational agency or institution that is authorized or designated by that agency or institution to enforce any local, State, or Federal law. A component of an educational agency or institution does not lose its status as a “law enforcement unit” if it also performs other, non-law enforcement functions for the agency or institution, including investigations of incidents or conduct that might lead to disciplinary action or proceedings against a student.

2. *Records of a law enforcement unit* means only those records, files, documents, and other materials that are --

- a. Created by a law enforcement unit;
- b. Created for a law enforcement purpose; and
- c. Maintained by the law enforcement unit.

3. *Records of a law enforcement unit* does not mean --

- a. Records relating to law enforcement that are maintained by a component of the educational agency or institution other than the law enforcement unit; and
- b. Records relating to a disciplinary action or proceeding conducted by the educational agency or institution.

4. Nothing in the Act prohibits an educational agency or institution from contacting its law enforcement unit, orally or in writing, for the purpose of

asking that unit to investigate a possible violation of, or to enforce, any local, State, or Federal law.

5. Education records, and personally identifiable information contained in education records, do not lose their status as education records and remain subject to the Act while in the possession of the law enforcement unit.
6. The Act neither requires nor prohibits the disclosure by an educational agency or institution of its law enforcement unit records.

III. The Family Educational Rights and Privacy Act requirements:

A. Each institution must have a policy regarding how the institution meets the requirements of the Act. This policy must include:

1. How the institution informs parents and eligible students of their rights.
2. How a parent or eligible student may review education records.
3. A statement that personally identifiable information will not be released from an education record without the prior written consent of the parent or eligible student.
4. How the institution defines legitimate educational interest.
5. A statement that a record of disclosures will be maintained and that a parent or eligible student may review that record.
6. A specification of what the institution considers to be directory information.
7. A statement that the institution permits a parent or eligible student to request a correction to the education record, to obtain a hearing to challenge the content of a student's education record, and to add a statement to the record.

B. The rights of a parent or eligible student to inspect or review education records.

1. The institution shall allow a parent or eligible student to review the student's education record.
2. The institution shall comply with a request for access to records within a reasonable period of time and in no more than 45 days after the request is received.
3. The institution shall respond to reasonable requests for explanations and interpretations of the record.

4. The institution shall give a parent or eligible student a copy of the records if failure to do so would effectively prevent the parent or eligible student from exercising the right to inspect and review the records.
  5. The institution shall not destroy any education records if there is an outstanding request to inspect and the review the records under FERPA.
  6. The institution is not required to release treatment records to the student, but the student may have those records reviewed by a physician or other appropriate professional of the student's choice.
- C. Limitations on the rights of a parent or eligible student to inspect or review education records.
1. If the education records of a student contain information on more than one student, the parent or eligible student may inspect, review, or be informed of only the specific information about the student.
  2. An institution does not have to permit a student to inspect or review education records which are:
    - a. The financial records of his or her parent, or
    - b. Confidential letters and confidential statements of recommendation.
- D. Procedure for amending an education record:
1. If a parent or eligible student believe that the education records pertaining to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy or other rights, he or she may ask the institution to amend the record.
  2. The institution shall decide whether to amend the record within a reasonable time after the institution receives the request.
  3. If the institution decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and his or her right to a hearing under the law.
  4. The complaint procedures:
    - a. The written complaint must contain specific allegations of fact giving reasonable cause to believe that a violation of the Act or this part has occurred.

- b. The Office investigates each timely complaint to determine whether the educational agency or institution has failed to comply with the provisions of the Act or this part.
  - c. A timely complaint is defined as an allegation of the Act that is submitted to the Office within 180 days of the date of alleged violation or of the date that the complainant knew or reasonably should have known of the alleged violation.
  - d. The Office extends the time limit in this section if the complainant shows he or she was prevented by circumstances beyond the complainant's control, or for other reasons considered sufficient by the Office.
  - e. Written complaints should be send to the following address:  
Family Policy Compliance Office  
Office of Human Resources and Administration  
U.S. Department of Education  
600 Independence Ave.  
Washington, DC 20202-4605
5. The Family Policy Compliance Office shall:
- a. Notify the complainant and the educational agency in writing if it initiates an investigation of a complaint. The notice to the educational agency or institution shall:
    - (1) Include the substance of the alleged violation, and
    - (2) Ask the agency on institution to submit a written response to the complaint.
  - b. Notify the complainant if it does not initiate an investigation of a complaint because the complaint fails to meet the requirements.
- E. Disclosure of personally identifiable information from education records
- 1. Except as noted in Section F below, an institution shall obtain the written consent of a parent or eligible student before it discloses personally identifiable information from the student's education records.
  - 2. The written consent must include:
    - a. The specific records that may be disclosed,
    - b. The purpose of the disclosure, and

- c. The party or class of parties to whom the disclosure may be made.
3. When disclosure is made:
    - a. If a parent or eligible student requests, the institution shall provide him or her with a copy of the records disclosed.
    - b. If a parent of student who is not eligible so requests, the institution shall provide the student with a copy of the records disclosed.
- F. An institution may disclose personally identifiable information from education records of a student without prior written consent if the disclosure meets one or more of the following criteria:
1. The disclosure is to other school officials, including teachers within the institution, whom the institution have determined to have legitimate educational interests.
  2. The disclosure is to officials of another school, school system, or postsecondary institution which the student seeks or intend to enroll.
  3. The disclosure is to authorized representatives of:
    - a. The Comptroller General of the United States,
    - b. The Secretary of Education, or
    - c. State or local educational authorities.
  4. The disclosure is in connection with financial aid for which the student has applied or which the student has received.
  5. The disclosure is to state and local officials or authorities, if a state statute adopted before November 19, 1974 specifically requires disclosures to those officials and authorities.
  6. The disclosure is to organizations conducting studies for or on behalf of educational agencies or institutions.
  7. The disclosure is to accrediting organizations to carry out their accrediting functions.
  8. The disclosure is to parent of dependent student as defined by the Internal Revenue Service.
  9. The disclosure is to comply with a judicial order or lawfully issued subpoena.



10. The disclosure is in connection with a health or safety emergency.
11. The disclosure is information the institution has designated "directory information."
12. The disclosure is to the parent of a student who is not an eligible student or to the student.
13. The disclosure is to an alleged victim of any crime of violence of the results of any disciplinary proceeding conducted by an institution of postsecondary education against the alleged perpetrator of that crime with respect to that crime. 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.

IV. Role of the Department of Education's Family Policy Compliance Office in the enforcement of FERPA

- A. The Department of Education's Family Policy Compliance Office is responsible for investigating, processing, and reviewing complaints and violations of FERPA and providing technical assistance to colleges and universities to ensure compliance.
- B. If the Family Policy Compliance Office receives a complaint which contains a specific allegation of fact and provides reasonable cause to believe that a violation of FERPA has occurred, the Office will investigate the complaint. If the Office determines that the college or university did violate FERPA, the institution and the complainant are informed and the college or university is advised of the steps which need to be taken to ensure compliance. The investigation continues until compliance is achieved.
- C. However, were an institution to refuse to comply with the provisions of the Family Educational Rights and Privacy Act, the Department of Education has the authority :

1. to withhold further payments under any applicable program to the institution,
  2. to issue a complaint to compel compliance through a cease-and-desist order, or
  3. to terminate the institution's eligibility to receive funding under any applicable program to the institution.
- D. The Family Policy Compliance Office has never initiated proceedings which resulted in a college or university to lose any portion of its Federal funding for non-compliance. Historically, the mere threat of the loss of Federal funds has been sufficient to ensure compliance.
- E. No private right to action is created under FERPA.
- V. The Position of the Association for Student Judicial Affairs on the Notice of Proposed Regulations for the Family Educational Rights and Privacy Act of 1974 (based upon ASJA's February 13, 1994 letter to LeRoy Rooker)
- A. The original legislation included a "laundry list" of records intended to be protected from disclosure under FERPA. That original list included "...verified reports of serious or recurrent behavior patterns" (1974 U.S. Code Cong. & Admin. News, 2133) indicating the intent of Congress to include disciplinary records as information institutions cannot disclose without the student's written consent. On December 31, 1974, FERPA was amended to substitute the generic term "education records" for the previously enumerated data (1974 U.S. Code Cong. & Admin. News, 6794). Thus, ASJA believes that the term "education records" includes "verified reports of serious or recurrent behavior patterns" and that education records are not restricted to academic data. Furthermore, Congress exempted from the term "education records" specific records which did not include disciplinary records. Certainly, had Congress intended to exempt disciplinary records they would have listed them along with the other records not included in the term "education records."
  - B. ASJA is deeply concerned about the profound negative impact that permitting the release of student disciplinary records to the public would have on the administration of campus judicial affairs, the ability to maintain good order and discipline on campus and the promotion of responsible citizenship.

- C. Disciplinary proceedings on college and university campuses are administrative hearings through which judicial affairs professionals attempt to maintain the orderly operation of the institution and teach ethical and cultural values. In pursuit of this mission, we hold students to a higher standard of behavior than individuals are held to in the larger society.
1. ASJA does not view the campus judicial systems as a substitute for criminal or civil proceedings.
  2. The courts have traditionally supported this view:  
"The attempted analogy of student discipline to criminal proceedings against adults and juveniles is not sound" (General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133).
  3. Students who violate criminal statutes as well as a college or universities' rules of conduct are subject to criminal prosecution and those records are open to the public.
  4. Under recent legislation [Campus Security Act, 20 U.S.C. 1092 (f)] members of the campus community are alerted whenever there is a danger of a violent crime, and victims may be informed of the outcome of the proceedings against the perpetrator. There is no need to make the records of campus hearings open to the public.
- D. In addition, because campus judicial proceedings are not criminal in nature, many colleges and universities have, and use, a much lower standard of proof for much higher standards of behavior. Students are therefore, much more likely to be found in violation of a college or universities' rules than they are to be found guilty of criminal charges. This situation provides colleges and universities more opportunities to use the disciplinary process as a teaching method. While students are punished, that punishment is in furtherance of the college or university's teaching mission. The most severe punishment a college or university can inflict is separation from the institution.
- E. Because campus judicial procedures are not criminal in nature, students generally do not have a right to be represented by counsel and do not generally enjoy the right to be free from self incrimination or a host of other rights enjoyed by individuals in criminal proceedings. Since students do not generally enjoy these rights in campus

judicial proceedings, it would seem to be unfair to open the records of such proceedings to the public.

- F. The campus judicial process does not have the right to subpoena witnesses or compel testimony. Colleges and universities must rely on the moral character of students to be witnesses in campus proceedings. It is also a part of the teaching process to convince students to come forward and provide evidence against their peers. If disciplinary records and hearings were to be open to the public, students would seldom testify and colleges and universities would lose that "teachable moment." Many students are in a transitional stage between adolescence and adulthood and providing them with the protection of nondisclosure while teaching them the ethics and values of our culture so to prepare them for responsible citizenship seems a small price to pay.
  - G. It is ASJA's belief that the release of student disciplinary records to the public would compromise the fundamental educational mission of the campus judicial process. One of the reasons that campus judicial systems have been effective in responding to violations of institutional policy is the protection afforded to all students involved in these proceedings by the Family Educational Rights and Privacy Act. ASJA fears that the release of these records would substantially hamper colleges and universities' efforts to respond to a wide variety of campus problems.
  - H. ASJA also addressed this issue in a resolution passed at the 1994 Association for Student Judicial Affairs which appears in Appendix A.
- VI. The Position of the American Council on Education concerning the proposed changes to the Family Educational Rights and Privacy Act of 1974 (based upon the American Council on Education's February 14, 1994 letter to LeRoy Rooker)
- A. The American Council on Education provided these comments on behalf of 14 national organizations including the National Association of Student Personnel Administrators.
  - B. The American Council on Education supported the proposed regulations which the Department of Education issued on December 14, 1993. The organization opposed the interpretation that records of campus disciplinary records, included those for conduct which could be construed to have been a breach of criminal law, are not education records and supported the Department of Education's traditional position.

- C. The American Council on Education made the following analogy to campus disciplinary procedures:  
“When institutions of higher education wish to treat breach of their rules and regulations as an internal matter, they do so by convening a disciplinary body to investigate and resolve the case. The discretion to treat conduct as a breach of an internal rule (even when it may be a violation of a criminal law) is an important attribute which academic institutions share with public and private organizations of all types. Colleges and universities should not be singled out by regulation to treat every institutional rule as a crime, when a crime could be alleged, any more than a business corporation, church, country club, or family. Institutions also use internal procedures to respond to infractions of institutional policy committed by employees. These records are considered personnel records and are not a matter of public record.
- D. The American Council on Education also expressed concern about the potential impact on campus judicial affairs, if campus disciplinary records were not protected under FERPA. If campus disciplinary records were considered public, campus judicial affairs professionals would encounter unwilling victims, reluctant witnesses, and increased resistance on the part of accused offenders to admit the wrongdoing.
- E. The American Council on Education also questioned if the Department of Education had the regulatory scope to include any campus disciplinary records with the definition of law enforcement records.

VII. For additional information, please contact:

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## REFERENCES AND RESOURCES

- Family Educational Rights and Privacy; Second Notice of Proposed Rulemaking. (1993, December 14). *Federal Register*, 58, pp. 68298-65300.
- Family Educational Rights and Privacy; Notice of Proposed Rulemaking. (1993, August 11). *Federal Register*, 58, pp. 42836-42837.
- Family Educational Rights and Privacy; Rule. (1993, January 7). *Federal Register*, 58, pp. 3188-3189.
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- Family Educational Rights and Privacy Act of 1974. (1974, December 13) *Congressional Record*, pp. 39858-39864.
- Family Educational Rights and Privacy Act of 1974. (1974, November 19) *Congressional Record*, pp. 36528-36535.
- Hollander, P.A. (1992, Fall). Student Records. In W. Bryan & R. Mullendore (Eds.), *Rights, Freedoms, and Responsibilities of Students*, (49-59). *New Directions for Student Services*, 59. San Francisco, CA: Jossey-Bass Publishers.
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- Weeks, K. M. (1993). *Complying with Federal Law: A Manual for College Decision Makers*. Nashville, TN: College Legal Information, Inc.

## APPENDIX A

### FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT

**WHEREAS**, the Family Educational Rights and Privacy Act of 1974 was intended to guarantee students the right of access to their education records and to protect them from inappropriate release of those records; and

**WHEREAS**, the original legislative intent of the Family Educational Rights and Privacy Act of 1974, as expressed in the plain language of the legislation, was to include within the definition of education records any record maintained by an educational agency, institution, or person acting for such agency or institution which contained information directly related to the student; and

**WHEREAS**, the student disciplinary records should clearly be included within this definition of education records; and

**WHEREAS**, the Georgia Supreme Court has recently ruled in *Red & Black Publishing Company v. The Board of Regents* [427 S.E.2d 257 (Ga. 1993)] that records maintained by judicial affairs professionals in the State of Georgia are available to requesting parties under Georgia's "Open Records Act" notwithstanding the privacy protections of the Family Educational Rights and Privacy Act of 1974, and notwithstanding the federal regulatory agency's view that the specific records in issue in that case were within the federal act's coverage; and

**WHEREAS**, some groups, including the Student Press Law Center, are seeking to extend this decision to other states; and

**WHEREAS**, the recent Notices of Proposed Rulemaking concerning amendments to the Family Educational Rights and Privacy Act of 1974 contained in the Higher Education Amendments of 1992 support the interpretation that discipline records are education records; therefore be it

**RESOLVED**, that the Association for Student Judicial Affairs fundamentally opposes the position taken by the Georgia Supreme Court in *Red & Black Publishing Company v. The Board of Regents* and any efforts to apply this decision in other states; further be it

**RESOLVED**, that the Association for Student Judicial Affairs strongly supports the position taken by the Department of Education in its recent Notices of Proposed Rulemaking concerning amendments to the Family Educational Rights and Privacy Act of 1974 contained in the Higher Education Amendments of 1992 which reaffirms the original intent of the legislation.

## **APPENDIX B**

### **The Family Educational Rights and Privacy Act and Student Disciplinary Records**

The Family Educational Rights and Privacy Act (FERPA) has been a source of conflict and confusion since its passage in August 1974 (for pertinent citations, see "References and Resources," below). The conflict has become more intense in recent years as the media and higher education have battled over access to student disciplinary records. At least for the present, the Department of Education's current interpretation of student disciplinary records as falling within the protections of FERPA seems likely to stand.

#### **Legislative History of FERPA**

FERPA was passed as part of the Higher Education Amendments of 1974. The legislation was introduced by the authors, Senators James Buckley and Claiborne Pell, but did not go through the typical legislative hearing process.

FERPA was developed for the purpose of providing the following rights for parents of student or the students themselves if they are 18:

- To guarantee students access to their education records; and
- To protect students' privacy by limiting the transferability of their records without their consent.

The legislation also provides a mechanism for students to correct inaccurate information contained in their education records.

Under the Buckley Amendment as amended in December 1974, education records refers to records, files, documents, and other materials which:

- Contain information directly related to a student; and
- Are maintained by an educational agency or institution or by a person acting for such agency or institution.

#### **Changes to FERPA in the Student Right-to-Know and Campus Security Act of 1990**

FERPA was amended by the Student Right-to-Know and Campus Security Act of 1990 to allow campus judicial officers to inform the victims of an alleged "crime of violence" of the



outcome of campus disciplinary proceeding against the accused. Title 18, Section 16 of the United States Code provides the following definition of a "crime of violence":

- 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
- 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.

One of the changes to the Student Right-to-Know and Campus Security Act of 1990 (part of the Higher Education Amendments of 1992) built upon this exemption by **requiring** colleges and universities to inform the accuser in an alleged sexual assault case of the final outcome of campus disciplinary proceeding and any sanction imposed against the accused student.

### **Changes to FERPA in the Higher Education Amendments of 1992**

FERPA was further amended in 1992 by the Higher Education Amendments to exclude from the protection of the legislation most campus law enforcement records. On August 11, 1994, the Family Policy Compliance Office published a Notice of Proposed Rulemaking in the *Federal Register* to implement this change. The following definition was added to the specific exclusions to the FERPA included in the regulations:

- Records of the law enforcement unit of an educational agency or institution.

Records of the law enforcement unit include only those records which are created by a law enforcement unit *for a law enforcement purpose*, and maintained by the law enforcement unit. For example, a criminal incident report prepared by a campus law enforcement unit regarding a theft from the University Bookstore by a student prior to this change would be considered an education record protected under FERPA. This means FERPA could not be used to deny press access to the report.

The Notice of Proposed Rulemaking also distinguished between disciplinary records and law enforcement unit records. Records of disciplinary actions or proceedings remain protected education records. Such actions and proceedings are defined as:

- the investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to the students of the agency or institution.

This definition of disciplinary actions or proceedings and the inclusion of these records within FERPA's protections proved controversial with the media, especially the campus press.

The FERPA Policy Compliance Office found it necessary to publish a second Notice of Proposed Rulemaking in the *Federal Register* on December 14, 1993, in order to solicit additional comment. Many in student affairs, especially student judicial affairs, praised the proposed regulations as originally proposed. The media strongly opposed them, and sought to exclude student disciplinary records from the protections of FERPA.

The Department of Education has yet to publish the final regulations resulting from the Notices of Proposed Rulemaking. There is no reason to believe, however, that the Department has changed its traditional view that student disciplinary records must be treated as education records--and are therefore not open to the press without the consent of the accused student

### **State Open Records Laws versus FERPA**

In recent years, lawsuits have been filed in several states to force colleges and universities to release student disciplinary records under state open record laws. A driving force in these cases has been the Campus Courts Task Force, a group of professional press and academic organizations. According to Carolyn Carlson, former chair of the Campus Courts Task Force, the Task Force was formed to challenge the secrecy shrouding crime on campus, and to try to remove legal barriers to access to information about the nature and extent of campus crime.

The first case to successfully force a college or university to release student disciplinary records under state open records law was *The Red & Black Publishing Company, Inc. v. The Board of Regents* 427 S.E.2d. 257(Ga. 1993); see *Synfax Weekly Report*, "Georgia Supreme Court mandates open disciplinary proceedings", 93.65, March 18, 1993, p. 64. In that case, *The Red & Black*, the University of Georgia's student newspaper, was able to convince the Georgia Supreme Court to grant public access to student disciplinary records related to alleged hazing by a student organization. Subsequently, this decision has been applied to all student disciplinary records at public colleges and universities in Georgia.

The *Red & Black* case, and series of further decisions by the Supreme Court and Attorney General of the State of Georgia have had a profound impact upon the daily practice of student judicial affairs at the University of Georgia. Bill Bracewell, Director of Judicial Programs at the University of Georgia, provided the following observation in a December 1994 interview for this article:

The University of Georgia, like every other institution of higher education, built a system to respond to students who allegedly violated campus conduct regulations. This system provided complaining parties and accused students an opportunity to meet in the presence of an impartial hearing body to describe the

incident in question. This meeting was held in private, and the records generated by this process were, it was believed, protected by FERPA. Openness and frankness characterized the proceeding, as reflected in the records.

The *Red & Black* decision has produced two significant results. First, most complaining parties do not wish to participate in a hearing. The individuals report incidents to the University, but when told that the matter needs to be referred to a hearing they often decline to pursue it any further. Without their participation, the University can not meet its obligation of determining by clear and convincing evidence whether a university rule was violated.

Second, the hearings are which are held become shallow. Members of the hearing panel or the administrative hearing officer are reluctant to ask questions which might expose a personal matter, for fear it will be printed in the paper. Many of the details which give context to the incident and lead to sound decisions in terms of student development are not discussed.

The University continues to work to find ways to respond to student misconduct in a way that is educational and fair. The presence of undergraduate student reporters makes this task very difficult.

A similar law suit was filed against Louisiana State University - Shreveport regarding the release of student disciplinary records. However, at the trial court level, the court ruled the records should not be released under Louisiana's open records law citing the protections afforded to the records by FERPA, and the Louisiana's Constitution. The decision in this case is currently under appeal. A lawsuit has been also filed against Southeastern Louisiana University regarding the release of student disciplinary records. However, that case has been postponed pending the outcome of the appeal in the Louisiana State University - Shreveport case.

## **Conclusion**

Higher education administrators and members of the media are going to continue to disagree about access to student disciplinary records, even if--as expected--the Department of Education reaffirms its traditional position that student disciplinary records and proceedings remain protected under the Family Educational Rights and Privacy Act. Given continued pressure to release more information about the nature and extent of campus crime, and the traditional journalistic distrust of any kind of secrecy, campus officials need to do more to inform journalists and the public about the value of confidentiality in proceedings designed, at least in part, to promote student moral development. It would also seem wise for institutions to explore

mechanisms to share information regarding the nature and outcome of student disciplinary proceedings without violating FERPA, in an effort to educate the media and communities about their student judicial systems.

### References and Resources

- Family Educational Rights and Privacy; Second Notice of Proposed Rulemaking. (1993, December 14). *Federal Register*, 58, pp. 68298-65300.
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This article originally appeared in the Winter 1995 issue of *Synthesis: Law and Policy in Higher Education* published by the College Administration Press, Inc.