

Commentary

<http://chronicle.com/weekly/v55/i22/22a07201.htm>

From the issue dated February 6, 2009

Student-Privacy Rules Show a Renewed Trust in Colleges

By PETER LAKE

New regulations go into effect this month for the Family Rights and Privacy Act, known as Ferpa, which governs the privacy of student records. Those regulations, announced in December by the Department of Education, empower colleges to act appropriately and decisively to protect the health and safety of students and others. They also signify a new relationship between colleges and the federal government.

The most significant features of the revised regulations relate to a health-and-safety exception that is part of Ferpa. The exemption provides that otherwise protected student information may be divulged "in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals."

In the past, colleges have grappled with how to define an emergency, and the law has implied that only an extreme situation could trump student privacy. The new rules try to strike a better balance between privacy and safety: Colleges may now disclose information about someone if "there is an articulable and significant threat to the health or safety of the student or other individuals."

It is tempting to characterize the new regulations as the "Virginia Tech revisions" — which to some extent they are. Student safety versus privacy issues came to the forefront nationally in 2007, after a mentally disturbed student went on a shooting spree at Virginia Tech. Major national and state reports following that event reflected widespread concern among college administrators that the privacy aspects of Ferpa prevented them from sharing information about potentially troubled students. The new regulations explicitly give colleges more discretion in such situations, deferring to administrators' judgments as to what constitutes an emergency, what information they can provide, and to whom.

But the new Ferpa regulations are more than a response to the killings. They demonstrate that colleges have earned a new level of trust with federal regulators, and they portend greater support from, and

cooperation with, the Education Department. Indeed, they mark a defining moment in American higher-education history, perhaps as significant as the passage of Ferpa itself, in 1974.

Ferpa is a pillar in the panoply of federal laws protecting basic civil rights and is essential if other civil-rights laws are to have full meaning and effect. Before the 60s and 70s, many colleges kept records in ways that would be considered primitive today, often without professional staff. An evil Dean Wormer could create secret files or selectively disseminate information about students without their knowledge or consent. All the dean had to do was insinuate that a student was a member of the Students for a Democratic Society to poison that student's future.

In some instances, higher education broke its sacred compact with students and society. It wasn't uncommon for students to be dismissed summarily just because they exercised basic constitutional rights of speech, assembly, and protest. Consider the fate of the student plaintiffs in *Dixon v. Alabama* (1961), who were thrown out of college because they peacefully protested segregationist policies and practices.

Ferpa was created to support other civil-rights laws in rectifying such wrongs. The statute stands as one of the great success stories in the civil-rights movement, even though it is rarely mentioned in the same breath with Title IX or *Healy v. James* (which in 1972 granted public-college students broad associational rights, including the right to form groups and be free from disciplinary action for membership in a group), for example. Remember, if not for Ferpa, *Healy's* pronouncements of associational freedoms would be largely aspirational — a wicked whisper from an administrator would still be enough to undo a student's career.

Congress realized that, without something like Ferpa, other civil-rights laws — nondiscrimination, free speech, and the like — could easily be undermined. Legislators also recognized that a college could sidestep Ferpa by falsely or unnecessarily claiming a health-and-safety emergency. So Congress called upon the secretary of education to create a regulatory climate in which colleges would not abuse the health-and-safety exception.

The legislation changed an entire culture of records management on campuses. With Ferpa, professional registrars achieved hegemony, which made life for the remaining administrators who opposed civil rights much harder. Ferpa's flashlight drove dark practices to the margin, making the need for strict regulatory oversight far less necessary.

Yet a somewhat weird era of federal privacy-law regulation ensued after Ferpa's passage, lasting over three decades. The Education Department made no effort to enforce "violations" relating to health and safety. But, as its compliance office wrote in a letter of guidance to the Alabama Department of Education in 2004, disclosures of student information should be "narrowly tailored" and occur only when a "specific situation presents imminent danger or threat." That sounded ominous, especially when taken out of context.

A federal Ferpa army camped on the law side of the college river, even though its generals stated a

desire for peace and did, well, almost nothing except occasionally put the army on maneuvers by providing "guidance." Level-headed lawyers realized that the signal from the regulators was subtle but clear: "We are not allowed to completely trust you yet, but we are not looking for trouble unless you want to bring it." It takes training and experience, or a certain persona, however, to maintain coolness in such a situation. Legions of administrators predictably overreacted and invented their own versions of Ferpa to avoid war with the government. Because most of those self-inflicted protocols protected student privacy far too much, not too little, regulators had no requirement, or even occasion, to intervene under Ferpa.

The pronouncement of the Supreme Court in *Gonzaga v. Doe*, in 2002, that there is no private cause of action under Ferpa presumably should have given administrators a better perspective on federal privacy law. *Gonzaga* clarified that no one would have a right under Ferpa to sue for money damages; the only remedy under the law was administrative: modest fines, not millions of dollars and bringing in plaintiffs' lawyers. But even a small specter of regulatory enforcement was enough to perpetuate misperceptions. Regulators before and after Virginia Tech attempted to make their policy of benign nonintervention clear, but most colleges could not hear the message for its subtlety.

The new regulations end this odd chapter in federal privacy law. The federal army has withdrawn and will reassemble only if a college is egregiously noncompliant. Before disclosure, a college must now identify only an articulable threat that need not be imminent, just significant — like a menacing statement to others, or the availability of a weapon.

That means colleges should not make disclosures regarding insignificant threats. Administrators should not feel the need to call a parent every time a student sends a mean-spirited text message. A certain amount of conflict and nastiness is inherent to higher learning — a rule of reason applies when a situation rises to a sufficient level of concern to merit a warning. It also means that if a threat is articulable, we should articulate it, as in write it down, even notationally. Most important, under the new regulations, the Education Department will not investigate a college further or substitute its judgment — at all, ever, they mean it! — if there is a rational basis for the articulated, significant threat.

If administrators are casting runes to determine who is at risk, then federal fines may follow, but even a hunch about students at risk might be enough when properly articulated. The law does not require that you articulate the dominant reason or all of the reasons for concerns about a student, just one articulable reason with a rational basis. Fear itself might not be rational, but there is a rational basis for concern about a student who writes threats in a term paper, for example.

Colleges should celebrate the new regulations as a moment of redemption. A new era of trust has emerged. The test that the Education Department has adopted shows deference and respect. Ferpa emerged in a climate of mistrust and misdeeds. The new regulations signal that its privacy provisions no longer exist primarily as a watchdog to protect other civil-rights laws. Ferpa is now free to evolve into a more facilitative law, under which colleges and the government work together to improve what happens on campuses.

The new regulations support collaborative learning strategies by even more clearly defining the meaning of educational records in peer-reviewed work — supporting a Supreme Court decision in *Owasso Independent School District v. Falvo* (2002) that usual practices of peer grading don't violate Ferpa. Professors may use peer-graded exercises without fretting whether students will complain to the government that other students have seen their peer assessments. In addition, the regulations, recognizing that colleges increasingly outsource many functions, provide a structure for sharing information with independent contractors.

Ferpa was never intended to impede the reasonable flow of information when student health and safety are at risk. Now that a period of testing has passed, colleges and federal regulators are freer than ever to develop practices and rules that will make institutions as secure as possible. Of course, with trust and freedom comes responsibility: The burden of exercising judgment to make campuses safe now falls more heavily than ever upon college officials. Before the new regulation, many institutions saw their burden under Ferpa primarily as one of compliance and avoiding legal trouble. Now carrying out Ferpa lies primarily in the hands of frontline administrators. For example, residence-hall staff members dealing with a troubled student at 3 a.m. must decide whether to call a parent or not. The balance between privacy and well-being now lies in their hands.

Still, American higher education should recognize that in the eyes of the federal government, if only with respect to student privacy, it has been redeemed. Such moments are rare in law, society, and in education.

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Volume 55, Issue 22, Page A72

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