

Protecting Student Privacy: Reporting Campus Crimes as an Alternative to Disclosing Student Disciplinary Records

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*Discretion will protect you, and understanding will guard you.*¹

INTRODUCTION

No longer can parents simply send their children away to college assuming they will be immune to crime because college campuses reflect the same problems and concerns found in society as a whole. In an effort to provide parents and prospective students with an informed view of campus life, many members of the press and media are seeking access to the records of university judicial procedures.² These judicial procedures allow college administrators to investigate alleged incidents and sanction students who violate the university code of student conduct or other university rules. Using the disciplinary records, the media purports to provide information about violence and crime on campus. However, colleges and universities rely on a federal privacy law to protect these records from disclosure. Citing concerns for the privacy interests of students, higher education institutions are often unwilling to release information that may directly identify students, especially victims and witnesses of crimes.

This Note will explore the contours of the debate on the release of disciplinary records by considering the arguments and interests of university officials as well as of the public and the press. Part I will review current statistics and concerns about crime on campus. Part II of this Note will address the provisions of the Federal Education Rights and Privacy Act (“FERPA”)³ along with the requirements of state open records laws as they relate to disclosure of student disciplinary records. This Part will also briefly discuss a recent lower federal court case interpreting the definition of disciplinary records under FERPA. As part of this discussion, this section will consider the arguments proffered by the press for the release of disciplinary records in addition to the privacy concerns of students. Part III will discuss the provisions of the Campus Security Act (“CSA”)⁴ and will consider its use to balance the competing interests of student privacy and public knowledge of campus crime. Although FERPA

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1. *Proverbs* 2:11 (New International Version).

2. These records are commonly referred to as “disciplinary records.”

3. 20 U.S.C. § 1232g (1994 & Supp. V 1999).

4. 20 U.S.C. § 1092(f) (1994 & Supp. V 1999).

allows institutions to release the final results of disciplinary procedures for violent crimes,⁵ this Note argues that the recent amendments to the CSA are sufficient to inform the campus community and general public about crime while maintaining, under FERPA, the privacy of students who are accused of, victims of, and witnesses to campus crime.

I. OVERVIEW OF CAMPUS CRIME

Though many college students may feel secure on campus, college campuses reflect society, including the occurrence of violent crimes. The same types of crimes occur on campus that occur in neighborhoods and on city streets, including robberies, rapes, and murders.⁶ Campus, local, and national newspapers provide almost daily reports of violence at or near the nation's colleges and universities.⁷ In a recent report to Congress about crime on campus,⁸ the Department of Education concluded that campuses are relatively safe, with a lower incidence of crime than the nation as a whole.⁹ "Though there may be fewer crimes on campuses than in the communities that surround them . . . campus crime is a compelling problem nonetheless."¹⁰ Although there are very few places in society that violence does not reach,¹¹ the majority of students on college and university campuses do not

[expect] to come under attack while at school. For many, campus is seen as a safe haven from outside violence. However, as more students fall victim to attack, we have to question whether we really are immune to crime on campus We are not, after all, too far away from the real

5. See 20 U.S.C. § 1232g(b)(6)(B) (1994 & Supp. V 1999).

6. See, e.g., *Monitoring of Student Right to Know and Campus Security Act of 1990*, 142 CONG. REC. 22376 (1996).

7. See, e.g., Editorial, *Keep Yourself Safe from U. Maryland Campus Crime Spree*, DIAMONDBACK, Sept. 21, 2000, LEXIS, News Library, UWIRE File (reporting a rape on campus during the first three weeks of the fall 2000 semester).

8. See Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1092(f)(5)(A) (Supp. V 1999) (requiring the Department of Education to review the crime statistics submitted by higher education institutions and to report its findings to Congress).

9. OFFICE OF POSTSECONDARY EDUC., U.S. DEP'T OF EDUC., *THE INCIDENCE OF CRIME ON THE CAMPUSES OF U.S. POSTSECONDARY EDUCATION INSTITUTIONS: A REPORT TO CONGRESS* 13 [hereinafter REPORT TO CONGRESS], at <http://www.ed.gov/offices/OPE/PPI/ReportToCongress.pdf> (Jan. 18, 2001). The Department warns that the statistics discussed in the report and found on its website do not directly reflect the various factors identified by the FBI as influencing the type and frequency of crimes. *Id.* at 3. Also, because the new reporting guidelines established in the 1998 amendments to the Campus Security Act were not in effect, the report only reflects statistics for calendar year 1999. *Id.* at 4.

10. Irvin Molotsky, *2 Years Late, Congress Gets Report on Crime at Colleges*, N.Y. TIMES, Feb. 26, 1997, at D23.

11. See, e.g., Stanley O. Ikenberry, *Federal Rules are Unclear*, USA TODAY, Oct. 9, 2000, at 14A.

world.¹²

Some institutions are experiencing an increase in crimes by and against students. For example, the University of Utah's crime statistics showed eleven reported forcible sexual offenses in 1999, up from six assaults in 1998.¹³ At the University of Connecticut, students reported ten sexual assaults to campus police officers, and officers acknowledged that more sexual crimes occur on campus than students report to police.¹⁴ The beating death of Eric Plunkett in his dormitory room at Gallaudet University resulted in increased campus security and limited dorm access, and the police charged another Gallaudet student with Eric's murder.¹⁵ "Murder is relatively rare at colleges: About 40 students have been murdered this year [2000], but only three (including Plunkett) have died in dormitories"¹⁶ Princeton University experienced an increase in thefts on campus, with thirty more thefts reported in 1999 than reported in 1998.¹⁷ At the beginning of the fall 2000 semester, a "crime spree" occurred at the University of Maryland, with reports of "sexual assault, armed robbery, [physical] assault, robbery at gunpoint and rape" filed within the first three weeks of the semester.¹⁸

In its first report on campus crimes in 1994, the Department of Education found that the "overall rate of violent crime on college campuses was 65 per 100,000 students" for that year.¹⁹ The Department of Education's most recent report to Congress²⁰ regarding campus crimes in 1999 showed that students were safer on campus rather than off campus.²¹ With data from nearly 6300 public and private two- and four-year colleges and universities, the report indicated that 19% of crimes by and against students occurred on campus as compared to 73% of these crimes that occurred off campus.²²

The Department of Education's statistics also revealed that homicides decreased

12. Editorial, *supra* note 7.

13. *Crime Reports Show Problems on Campus*, DESERET NEWS, Dec. 26, 2000, at B5, LEXIS, News Library, DESNWS File.

14. Jennifer Hoyt, *U. Connecticut Women's Center Battles Sexual Assault on Campus*, THE DAILY CAMPUS, Oct. 24, 2000, LEXIS, News Library, UWIRE File.

15. Donna Leinwand, *Campus Crime Underreported: Colleges Have Been Caught Misreporting Violence Statistics*, USA TODAY, Oct. 4, 2000, at 2A.

16. Patrick Healy, *College Calm Pierced by Freshman's Slaying*, BOSTON GLOBE, Oct. 7, 2000, at B4, available at LEXIS, News Library, BGLOBE File (referring to crime statistics presented by Security On Campus, Inc., a nonprofit organization that tracks crime on campus).

17. Joshua Tauberer, *Public Safety Reports Increase in Thefts on Princeton Campus in 1999*, DAILY PRINCETONIAN, Sept. 25, 2000, LEXIS, News Library, UWIRE File.

18. Editorial, *supra* note 7.

19. Molotsky, *supra* note 10.

20. See Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1092(f)(5)(A) (Supp. V 1999) (requiring the Department of Education to report crime statistics to Congress); see also REPORT TO CONGRESS, *supra* note 9 (providing campus crime statistics).

21. Associated Press, *Campus Killings Fall, but Some Crimes Rise*, N.Y. TIMES, Jan. 21, 2001, § 1, at 25.

22. REPORT TO CONGRESS, *supra* note 9, at 11.

on campuses from 1998 to 1999.²³ In 1999, assailants committed eleven homicides on campuses across the country as compared to twenty-four campus murders in 1998.²⁴ The 1998 numbers were also higher than those in 1997, during which eighteen campus homicides occurred.²⁵ Other crimes, including sexual assaults and hate crimes, did not decrease as with homicides.²⁶ Between 1997 and 1999, hate crimes increased from 1312 to 2067,²⁷ with the vast majority of these offenses being assaults.²⁸ Sexual assaults increased by 6% between 1998 and 1999, from 2337 to 2469.²⁹ However, the Department of Education indicated that the sexual assault figures might be ambiguous.³⁰ “[T]he increase [in sex offenses] could reflect improvement in the rate of reporting, rather than an increase in the incidence of sex offenses.”³¹ Robberies on campus increased from 1810 in 1997 to 1997 in 1999.³²

These current campus crime statistics are the source of concern for those seeking disclosure of disciplinary records. With the prevalence of violence on campus, proponents of releasing the records argue that the public has a right to know the nature of crimes on campus as well as the identity of the accused perpetrator. However, the accused students have a right to privacy, as well as the student victims and witnesses. Congress recognized the need for student privacy in enacting FERPA,³³ and student privacy interests remain very important. Although these campus crime statistics may be alarming to the community, the university must still protect the privacy of the students involved, as required by FERPA. The privacy of the students involved and the interests of the general community are equally important, but FERPA protects student privacy by prohibiting disclosure of the content of student education records.

II. FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT

Colleges and universities may respond to student crime as violations of student codes of conduct through their particular judicial procedures.³⁴ These judicial

23. *Id.* at 5.

24. *Id.*

25. *Id.*

26. *See* Associated Press, *supra* note 21.

27. *Id.*

28. *See id.* This increase may be partly due to more victim reports, resulting from an enhanced focus by colleges and universities on the nature and impact of hate crimes on campus, as a consequence of the hate crime spree of white supremacist Benjamin Smith during the summer of 1999. *See, e.g.,* Adam B. Ellick, *A Community in Mourning: Bloomington Turns Out to Grieve at Calling for Slain IU Student Won-Joon Yoon*, INDIANAPOLIS STAR, July 8, 1999, at B1.

29. REPORT TO CONGRESS, *supra* note 9, at 5-6.

30. *See* Associated Press, *supra* note 21.

31. REPORT TO CONGRESS, *supra* note 9, at 5.

32. *Id.* at 7.

33. *See* 20 U.S.C. § 1232g (1994 & Supp. V 1999).

34. Most colleges and universities provide each student with a copy of the Student Code of Conduct, which outlines the rights and responsibilities of students as members of the campus community. The Code also often describes the judicial procedures used by the institution when

procedures are the source of disciplinary records,³⁵ and the public, especially campus and local newspapers, are calling for universities to disclose the content of the disciplinary records to promote awareness of campus crimes.³⁶ However, university officials likely feel compelled to maintain the privacy of these records because FERPA prohibits nonconsensual disclosure of student educational records to any party besides the student or the parents of a minor student.³⁷

A. Purpose of the Statute—Protecting Student Privacy

Colleges and universities use FERPA to protect the privacy interests of students.³⁸ Enacted in 1974, the statute provides limited access to student educational records.³⁹ “The purpose of the Act is to ‘assure parents of students . . . access to their education records and to protect such individuals’ rights to privacy by limiting the transferability of their records without their consent.’”⁴⁰ The Act, which Congress adopted “without public hearings or committee study and reports,”⁴¹ mandates that institutions will not receive federal funding if they fail to comply with “certain prescribed procedures

violations of the Code occur. The disciplinary proceedings may range from an informal meeting with university administrators to a full hearing where the student can provide witnesses and have legal representation. *See, e.g.*, IND. UNIV., CODE OF STUDENT RIGHTS, RESPONSIBILITIES, AND CONDUCT (1996), available at <http://campuslife.indiana.edu/code>. A college or university may also take informal action in certain situations. For example, in rape cases, the university administration is often most concerned about protecting the victim. The alleged perpetrator may be suspended or removed from campus during the adjudication process. *See, e.g.*, Zachary R. Heineman, *Rape Reporting Remains a Delicate Balancing Act*, HARVARD CRIMSON, Sept. 18, 2000, LEXIS, News Library, UWIRE File.

35. The disciplinary records may include documents provided during a hearing as evidence, containing witness and victim statements and identities, police reports, and transcripts of recorded hearings. *See, e.g.*, IND. UNIV., *supra* note 34.

36. *See, e.g.*, *infra* text accompanying notes 70-73 (discussing the request of *The Chronicle of Higher Education*, a weekly newspaper covering issues facing colleges and universities, for disciplinary records from Miami University).

37. *See* 20 U.S.C. § 1232g(b)(1) (1994 & Supp. V 1999).

38. John E. Theuman, Annotation, *Validity, Construction, and Application of Family Educational Rights and Privacy Act of 1974 (FERPA)* (20 U.S.C.S. § 1232g), 112 A.L.R. FED. 1 (1993).

39. *Id.*

40. *United States v. Miami Univ.*, 91 F. Supp. 2d 1132, 1150 (S.D. Ohio 2000) (quoting 120 CONG. REC. 39,859, 39,862 (1974)) (omission in original) (emphasis omitted).

41. Sandra L. Macklin, *Students’ Rights in Indiana: Wrongful Distribution of Student Records and Potential Remedies*, 74 IND. L.J. 1321, 1326 (1999) (citing S. CONF. REP. No. 93-1026 (1974)); *see also* Maureen P. Rada, *The Buckley Conspiracy: How Congress Authorized the Cover-up of Campus Crime and How it Can be Undone*, 59 OHIO ST. L.J. 1799, 1804 (1998). There is little legislative history regarding the enactment of FERPA because it was passed “as a floor amendment to other educational legislation” Lynn M. Daggett, *Bucking Up Buckley I: Making the Federal Student Records Statute Work*, 46 CATH. U. L. REV. 617, 617 (1997).

allowing access by other parties.”⁴² Although the Act does not contain a preamble or statement of purpose, “the bill’s principal sponsor . . . stated that the statute was intended to redress ‘the growing evidence of the abuse of student records across the nation,’ . . . and [to] protect[] the privacy of those records.”⁴³

*B. Disciplinary Records Protected as
Education Records Under FERPA*

Disclosure of student disciplinary records may involve the privacy of students. Although a student may be guilty of a student code of conduct violation, he also has a right of privacy. “The offenders being disciplined, and often the victims of the offense, are students of the respective universities, and the matters addressed in the disciplinary records pertain to actions committed or allegedly committed by or against those students.”⁴⁴ The current debate surrounds whether FERPA protects records from college or university judicial procedures as “education records.”

1. Definition of Education Records

FERPA defines “education records” as “those 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.”⁴⁵ Records must meet both prongs of this definition to be exempt from disclosure as education records. “The definition [of education records] is . . . intentionally broad. [It] includes most information that is personally identifiable information, such as social security numbers, the student’s name, . . . or other similar information.”⁴⁶

Under FERPA, the definition of education records does not include law enforcement records maintained by college and university police departments; such law enforcement records are not subject to the privacy restrictions.⁴⁷ Although the law

42. Theuman, *supra* note 38, at 1. Specifically, FERPA provides that

[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records (or personally identifiable information contained therein other than directory information . . .) of students without . . . written consent . . . to any individual, agency, or organization

20 U.S.C. § 1232g(b)(1) (1994 & Supp. V 1999). Directory information includes a “student’s name, address, telephone listing, electronic mail address, . . . major field of study” Family Educational Rights and Privacy, 65 Fed. Reg. 41,851, 41,852-53 (July 6, 2000) (to be codified at 34 C.F.R. pt. 99).

43. Daggett, *supra* note 41, at 622 (quoting 121 CONG. REC. 13,990 (1975) (statement of Sen. Buckley)).

44. *Miami Univ.*, 91 F. Supp. 2d at 1149.

45. 20 U.S.C. § 1232g(a)(4)(A) (1994).

46. Rada, *supra* note 41, at 1807.

47. 20 U.S.C. § 1232g(a)(4)(B)(ii) (1994); *see also* Daggett, *supra* note 41, at 626-27. “Campus law enforcement records . . . are not included as part of a student’s educational record

makes no specific mention of disciplinary records, the Department of Education construed the provisions defining education records to include records from university judicial procedures.⁴⁸ Some commentators criticize the definition of “education records” outlined in FERPA for its ambiguity.⁴⁹ However, disciplinary records clearly fall within the two-prong definition of education records because they contain information related to the student and an educational agency maintains them.⁵⁰

The fact that Congress included several detailed exceptions to its definition of ‘education records’ indicates that it knew precisely what types of records it wanted included within the definition, and conversely, what types it wanted to exclude. Therefore, by failing to expressly except student disciplinary records from the definition of ‘education records,’ Congress must have intended such records to be included within the otherwise broad definition. . . . The fact that Congress has enacted various narrow provisions permitting the disclosure of student disciplinary records in limited circumstances shows that Congress obviously is concerned with

and therefore are open to public scrutiny.” 144 CONG. REC. H2984, H2984 (daily ed. May 7, 1998) (statement of Rep. Foley).

48. *Miami Univ.*, 91 F. Supp. 2d at 1151-52.

The Department of Education’s interpretation of FERPA . . . also supports the conclusion that student disciplinary records are “education records” within the meaning of FERPA. . . . The Department of Education, which is the agency responsible for administering and enforcing FERPA, stated during regulatory proceedings that it interprets ‘education records,’ as defined in FERPA, to include student disciplinary records:

The Secretary [of the Department of Education] remains legally constrained to conclude that records of an institution’s disciplinary action or proceeding are ‘education records’ under FERPA, not law enforcement unit records, and that excluding these records from the definition of ‘education records’ can be accomplished only through a statutory amendment of FERPA by Congress. . . . [A]ll disciplinary records, including those related to non-academic or criminal misconduct by students, are ‘education records’ subject to FERPA. . . . Although the Secretary is equally concerned with the problem of crime on campus, it is clear that only Congress has the authority to change the statutory provisions of FERPA to permit disclosure of disciplinary records without prior consent.

Id. (quoting Rules and Regulations, Department of Education, 60 Fed. Reg. 3464, 3465 (Jan. 17, 1995)).

49. *See, e.g., Rada, supra* note 41, at 1802; *see also* *Bauer v. Kincaid*, 759 F. Supp. 575, 591 (S.D. Mo. 1991).

50. *See* 20 U.S.C. 1232g(a)(4)(A) (1994); *see also* *Miami Univ.*, 91 F. Supp. 2d at 1149; Kristin Carlisle, *Names of Student Suspects May Now be Publicized*, DAILY TEXAN, July 10, 2000, LEXIS, News Library, UWIRE File (“Previously, FERPA regulated the release of educational records, but the law has now expanded to include disciplinary and criminal records of students.”).

protecting the privacy of disciplinary records. More importantly, it indicates that Congress must have intended FERPA to prohibit the release of student disciplinary records; otherwise it would be unnecessary for Congress to enact statutory exceptions permitting their limited disclosure.⁵¹

The most recent court decision concluded that the umbrella of educational records included disciplinary records.⁵² Prior case law came to the opposite conclusion, finding disciplinary records outside the scope of educational records covered by FERPA.⁵³ The first case in a line of decisions addressing the release of disciplinary records to the press was *Bauer v. Kincaid*.⁵⁴ The court in *Bauer* held that FERPA did not exempt disciplinary records from disclosure under the state open records law because disciplinary records were not education records.⁵⁵ Following *Bauer*, other cases also found disciplinary records outside of the definition of education records under FERPA.⁵⁶ “These cases rely, at least in part, on the premise that school records are not ‘education records’ for purposes of FERPA unless they contain academic or other educationally-related information.”⁵⁷

However, the court in *United States v. Miami University*,⁵⁸ the most recent case construing FERPA, found that “[i]nterpreting the term ‘education records’ so as to not include disciplinary records would permit public disclosure of such records and would lessen students’ privacy rights under FERPA. This would undermine one of the stated purposes of FERPA, as it would allow universities to release students’ disciplinary

51. *Miami Univ.*, 91 F. Supp. 2d at 1151 (citing 20 U.S.C. § 1232g(b)(6)(B) (1994)) (referring to the 1998 amendments to FERPA that allow for disclosure of the final results of disciplinary proceedings for alleged perpetrators of a crime of violence or a nonforcible sexual assault).

52. *Miami Univ.*, 91 F. Supp. 2d 1132.

53. See *Bauer*, 759 F. Supp. 575 (holding that disciplinary records are not equivalent to education records under FERPA); *Miami Student v. Miami Univ.*, 680 N.E.2d 956 (Ohio 1997) (same); *Kirwan v. Diamondback*, 721 A.2d 196 (Md. 1998) (same); *Red & Black Publ’g Co. v. Bd. of Regents*, 427 S.E.2d 257 (Ga. 1993) (same).

54. 759 F. Supp. 575 (S.D. Mo. 1991).

55. *Id.* See also *infra* notes 77-82 and accompanying text (addressing state open records laws).

56. See *Miami Student*, 680 N.E.2d 956 (holding that disciplinary records are not equivalent to education records under FERPA); *Kirwan*, 721 A.2d 196 (same); *Red & Black Publ’g*, 427 S.E.2d 257 (same).

57. *Miami Univ.*, 91 F. Supp. 2d at 1149 n.17 (citing *Bauer*, 759 F. Supp. at 591; *Kirwan*, 721 A.2d at 204; *Miami Student*, 680 N.E.2d at 959; *Red & Black Publ’g*, 427 S.E.2d at 261). “With all due respect to these courts, this Court refuses to adopt such a narrow interpretation of FERPA’s definition of ‘education records.’ None of the . . . decisions provided any reasoning for their narrow interpretation of FERPA, and this Court fails to see how such a limited meaning of ‘education records’ can be discerned from the plain language [of the statute].” *Id.* at 1149 n.17.

58. 91 F. Supp. 2d 1132 (S.D. Ohio 2000).

records without consent.”⁵⁹

The United States sued Miami University and the Ohio State University for violations of FERPA;⁶⁰ these violations resulted from the disclosure of student disciplinary records containing personal information about the accused, victims, and witnesses, without the consent of the students or their parents, as required by FERPA.⁶¹ *Miami University* possibly introduced a new trend in the release of student disciplinary records. Contrary to prior court decisions, the United States District Court for the Southern District of Ohio determined that disciplinary records fall within the category of educational records, as defined by FERPA.⁶²

This case arose from an Ohio Public Records Act⁶³ request by *The Miami Student*, the Miami University campus newspaper, for records from university judicial procedures.⁶⁴ After initially refusing to release the disciplinary records, the university eventually provided the requested information.⁶⁵ In an attempt to comply with FERPA, Miami University released the records without personally identifiable information, such as the name, age, and gender of the accused, in addition to the “date, time and location of the incidents giving rise to the disciplinary charges.”⁶⁶ However, the campus newspaper wanted complete copies of the disciplinary records, with only names and identification numbers removed.⁶⁷

The Ohio Supreme Court, holding that FERPA was not applicable to student disciplinary records, compelled the university to release the records to the newspaper.⁶⁸ “Specifically, the [state supreme] court concluded that student disciplinary records are not ‘education records’ as defined in FERPA because disciplinary records ‘do not contain educationally related information, such as grades or other academic data, and are unrelated to academic performance, financial aid, or scholastic performance.’”⁶⁹ Based on the Ohio Supreme Court decision, *The*

59. *Id.* at 1150.

60. *Id.* at 1134.

61. *Id.*; see also 20 U.S.C. § 1232g(b)(1) (1994 & Supp. V 1999). The Department of Education sought an injunction to preclude both universities from disclosing the records to the press. *Miami Univ.*, 91 F. Supp. 2d at 1134. The Ohio Supreme Court addressed this same issue with a different result. *Miami Student*, 680 N.E.2d 956 (holding that university judicial records are not education records under FERPA and granting the campus newspaper access to the disciplinary records).

62. *Miami Univ.*, 91 F. Supp. 2d at 1151. See generally, Richard T. Olshak, Letter to the Editor, *Publicizing Campus Disciplinary Hearings*, CHRON. OF HIGHER EDUC., May 12, 2000, at B13, LEXIS, News Library, CHEDUC File (“This decision serves to remind journalists . . . that the campus disciplinary process exists for the benefit of the campus community and should not cater to the journalistic appetite for sensationalism.”).

63. OHIO REV. CODE ANN. § 149.43 (Anderson 2000) (discussing the availability of public records).

64. *Miami Univ.*, 91 F. Supp. 2d at 1135.

65. *Id.*

66. *Id.* (citing *Miami Student*, 680 N.E.2d at 957).

67. *Id.*

68. *Miami Student*, 680 N.E.2d 956, 959 (Ohio 1997).

69. *Miami Univ.*, 91 F. Supp. 2d at 1135 (quoting *Miami Student*, 680 N.E.2d at 958-59).

Chronicle of Higher Education, a weekly newspaper that covers issues related to colleges and universities, requested student disciplinary records from Miami University and the Ohio State University.⁷⁰ Miami University then contacted the U.S. Department of Education regarding the perceived conflict between the Ohio Public Records Act, which requires disclosure of public records not specifically exempted, and FERPA, which prohibits disclosure of student education records.⁷¹ Despite the Ohio Supreme Court's decision, the Department of Education, in a letter to Miami University, stated its belief that the definition of "education records" encompasses disciplinary records.⁷² The United States Supreme Court denied the university's petition for certiorari to resolve the conflict between the Ohio Supreme Court and the Department of Education.⁷³

The issue before the court in *Miami University* was whether student disciplinary records qualified as "education records" under FERPA and received "protect[ion] from public disclosure absent statutory exception."⁷⁴ Since the case involved the interpretation of a federal statute, the Ohio Supreme Court's decision "[did] not dictate the [Federal District] Court's decision in this matter. It is axiomatic that a federal court's interpretation of federal law takes precedent [sic] over that of a state court."⁷⁵ The court also noted that

there is no conflict between Ohio law and federal law that would affect the outcome of this case The Court is merely interpreting a federal law as it relates to the case or controversy before it. This Court's decision in no way limits or otherwise affects Ohio's Public Records Act, because that Act does not require disclosure of "[r]ecords the release of which is prohibited by . . . federal law."⁷⁶

Each state has laws that require public agency records to be open for public inspection. States may refer to them as freedom of information, sunshine, or open records laws.⁷⁷ These laws may have implications for disciplinary records protected by FERPA. Some state open records laws provide an explicit exception for federal laws. These state laws indicate that government agencies do not have to disclose records that would otherwise be public records if a federal law prohibits this

70. *Id.*

71. *Id.*

72. *Id.*

73. *Miami Student v. Miami Univ.*, 522 U.S. 1022 (1997) (denying certiorari for *Miami Student v. Miami Univ.*, 680 N.E.2d 956 (Ohio 1997)). See generally Kit Lively, *Supreme Court Rejects Appeal of Order that Miami U. Release Disciplinary Records*, CHRON. OF HIGHER EDUC., Dec. 19, 1997, at A32, LEXIS, News Library, CHEDUC File (discussing the impact of the U.S. Supreme Court's denial of certiorari).

74. *Miami Univ.*, 91 F. Supp. 2d at 1147.

75. *Id.* at 1148 (citing *Kuhnle Bros., Inc. v. County of Geauga*, 103 F.3d 516, 520 (6th Cir. 1997)).

76. *Id.* at 1148 n.15 (omission and alteration in original) (citing OHIO REV. CODE ANN. § 149.43(A)(1)(q) (Anderson 1999)).

77. See, e.g., Daggett, *supra* note 41, at 650.

disclosure or considers the records confidential.⁷⁸

Other state laws require the release of records except as required by statute or law, with no specific indication of the source of those statutes or laws.⁷⁹ In these

78. See ALASKA STAT. § 40.25.120(a)(4) (Michie 2000) (“Every person has a right to inspect a public record . . . except . . . records required to be kept confidential by a federal law”); CONN. GEN. STAT. ANN. § 1-210(a) (West Supp. 2001) (“Except as otherwise provided by any federal law . . . all records . . . shall be public records”); IDAHO CODE § 9-340A(1) (Michie Supp. 2001) (“The following records are exempt from disclosure[:] . . . [a]ny public record exempt from disclosure by federal or state law or federal regulations to the extent specifically provided for by such law or regulation.”); 5 ILL. COMP. STAT. ANN. 140/7(1)(a) (West Supp. 2001) (“The following shall be exempt from inspection and copying . . . [i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations adopted under federal or State law.”); IND. CODE ANN. § 5-14-3-4(a)(3) (Michie Supp. 2000) (“The following public records are excepted . . . and may not be disclosed by a public agency[:] . . . [t]hose required to be kept confidential by federal law.”); KAN. STAT. ANN. § 45-221(a)(1) (2000) (“[A] public agency shall not be required to disclose . . . [r]ecords the disclosure of which is specifically prohibited or restricted by federal law”); KY. REV. STAT. ANN. § 61.878(1)(k) (Michie Supp. 2000) (“The following public records are excluded[:] . . . [a]ll public records or information the disclosure of which is prohibited by federal law or regulation”); MINN. STAT. ANN. § 13.03(1) (West Supp. 2001) (“All government data . . . shall be public unless classified by . . . federal law . . . as private or confidential.”); N.J. STAT. ANN. § 47:1A-2 (West 2000) (“Except as otherwise provided [by] . . . any federal law . . . all records . . . shall . . . be deemed to be public records.”); OHIO REV. CODE ANN. § 149.43(A)(1)(v) (Anderson Supp. 2000) (“‘[P]ublic record’ does not mean . . . [r]ecords the release of which is prohibited by . . . federal law.”); OR. REV. STAT. § 192.502(8) (1999) (“The following public records are exempt from disclosure[:] . . . [a]ny public records or information the disclosure of which is prohibited by federal law or regulations.”); R.I. GEN. LAWS § 38-2-2(4)(i)(S) (Supp. 2000) (“[T]he following records shall not be deemed public . . . [r]ecords . . . required to be kept confidential by federal law”); UTAH CODE ANN. § 63-2-201(6)(a) (1997) (“[D]isclosure of records to which access is governed or limited pursuant to . . . federal statute . . . including records for which access is governed or limited as a condition of participation in a . . . federal program or for receiving . . . federal funds, is governed by the specific provisions of that statute, rule, or regulation. ”).

79. See ALA. CODE § 36-12-40 (Michie 1991) (“Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute.”); ARK. CODE ANN. § 25-19-105(a) (Michie Supp. 2001) (“Except as otherwise specifically provided . . . by laws specifically enacted to provide otherwise, all public records shall be open”); CAL. GOV’T CODE § 6253(b) (West Supp. 2001) (“Except with respect to public records exempt from disclosure by express provisions of law, each state . . . agency . . . shall make the records promptly available”); COLO. REV. STAT. ANN. § 24-72-203(1)(a) (West 2001) (“All public records shall be open for inspection by any person . . . except as provided . . . by law”); DEL. CODE ANN. tit. 29, § 10002(d)(6) (2000) (“[T]he following records shall not be deemed public: . . . [a]ny records specifically exempted from public disclosure by statute or common law”); D.C. CODE ANN. § 1-1524(a)(6) (1999) (“The following matters may be exempt from disclosure[:] . . . [i]nformation specifically exempted from disclosure by statute”); FLA. STAT. ANN. § 119.07(2)(a) (West Supp. 2001)

“If the person who has custody of a public record contends that the record . . . is exempt from inspection . . . he . . . shall state the basis of the exemption . . . including the statutory citation to an exemption created or afforded by statute”; GA. CODE ANN. § 50-18-70(b) (Supp. 2001) (“All public records of an agency . . . except those which . . . by law are prohibited or specifically exempted from being open to inspection by the general public, shall be open”); LA. REV. STAT. ANN. § 44:31(B)(1) (West Supp. 2001) (“Except as otherwise . . . specifically provided by law . . . any person . . . may inspect . . . any public record.”); ME. REV. STAT. ANN. tit. 1, § 408 (West 1964) (“Except as otherwise provided by statute, every person shall have the right to inspect and copy any public record”); MD. CODE ANN., STATE GOV’T § 10-613(a) (1999) (“Except as otherwise provided by law, a custodian shall permit a person . . . to inspect any public record”); MASS. ANN. LAWS ch. 4, § 7 (Law. Co-op. 1997) (“‘Public records’ shall mean all . . . materials . . . unless such materials . . . fall with the following exemptions in that they are: . . . specifically or by necessary implication exempted from disclosure by statute”); MICH. COMP. LAWS ANN. § 15.243(13)(1)(d) (West Supp. 2001) (“A public body may exempt from disclosure as a public record under this act: . . . [r]ecords or information specifically described and exempted from disclosure by statute.”); MO. ANN. STAT. § 109.180 (West 1997) (“Except as otherwise provided by law, all state . . . records . . . shall . . . be open for a personal inspection by any citizen of Missouri”); MONT. CODE ANN. § 2-6-102(1) (1999) (“Every citizen has a right to inspect . . . a copy of any public writings of this state, except . . . as otherwise expressly provided by statute.”); NEB. REV. STAT. ANN. § 84-712(1) (Michie 2000) (“Except as otherwise expressly provided by statute, all . . . persons interested in the examination of public records . . . are hereby fully empowered”); NEV. REV. STAT. ANN. 239.010(1) (Michie 2000) (“All . . . public records of a governmental entity, the contents of which are not otherwise declared by law to be confidential, must be open at all times”); N.H. REV. STAT. ANN. § 91-A:4(I) (Supp. 2000) (“Every citizen . . . has the right to inspect all public records . . . except as otherwise prohibited by statute”); N.M. STAT. ANN. § 14-2-1(A)(8) (Michie Supp. 2001) (“Every person has a right to inspect any public records of this state except . . . as otherwise provided by law.”); N.Y. PUB. OFF. LAW § 95(6)(a) (1988) (“Nothing in this section shall require an agency to provide a data subject with access to . . . personal information to which he or she is specifically prohibited by statute from gaining access”); N.C. GEN. STAT. § 132-1(b) (2000) (“[T]he people may obtain copies of their public records and public information . . . unless otherwise specifically provided by law.”); N.D. CENT. CODE § 44-04-18(1) (1999) (“Except as otherwise specifically provided by law, all records of a public entity are public records”); OKLA. STAT. ANN. tit. 51, § 24A.5(1) (2001) (“The Oklahoma Open Records Act . . . does not apply to records specifically required by law to be kept confidential”); 65 PA. CONS. STAT. ANN. § 66.1(2) (2000) (“‘Public Record’ . . . shall not include any record . . . access to or the publication of which is prohibited, restricted or forbidden by statute”); S.C. CODE ANN. § 30-4-40(a)(4) (Law. Co-op. 1991 & Supp. 2000) (“A public body may but is not required to exempt from disclosure . . . [m]atters specifically exempted from disclosure by statute or law.”); S.D. CODIFIED LAWS § 1-27-3 (Michie 1992) (“Section 1-27-1 [allowing public records open to inspection] shall not apply to such records as are specifically enjoined to be held confidential or secret by the laws requiring them to be so kept.”); VA. CODE ANN. § 2.2-3700(B) (Michie 2001) (“[N]o record shall be withheld . . . unless specifically made exempt pursuant to . . . specific provision of law.”); WASH. REV. CODE ANN. § 42.17.260(1) (West 2000) (“Each agency . . . shall make available for public inspection . . . all public records,

situations, the Supremacy Clause of the United States Constitution⁸⁰ would likely allow FERPA, as a federal law, to preempt the state open records law, permitting universities to maintain the privacy of disciplinary records. A few states specifically mention FERPA as a limit on the availability of public information or indicate that student education records are confidential,⁸¹ whereas one state does not provide an explicit exemption.⁸²

In construing FERPA, the court in *Miami University* found that “[o]ne of the requirements of FERPA is that educational institutions not adopt a policy or practice of permitting the release of education records or personally identifiable information contained therein, except as permitted under the statute.”⁸³ In response to *The Chronicle of Higher Education’s* argument that “FERPA does not *prohibit* schools and institutions from releasing ‘education records,’ but rather, it merely authorizes the Department of Education to withdraw funding from any school or institution that chooses to release such records,”⁸⁴ the court stated:

Two factors support the conclusion that FERPA imposes a direct obligation on universities not to disclose “education records.” First, many of FERPA’s enforcement provisions would be unnecessary if the statute did not *prohibit* certain behavior. . . . Second, several federal courts, in the context of § 1983 actions, have held that FERPA creates federal rights and

unless the record falls within the specific exemptions of . . . [another] statute which exempts or prohibits disclosure of specific information or records.”); W. VA. CODE ANN. § 29B-1-4(5) (Michie 1998) (“The following categories of information are specifically exempt from disclosure under the provisions of this article [Public Records]: . . . [i]nformation specifically exempted from disclosure by statute”); WIS. STAT. ANN. § 19.35(1)(a) (West Supp. 2000) (“Except as otherwise provided by law, any requester has a right to inspect any record.”); WYO. STAT. ANN. § 16-4-202(a) (Michie 2001) (“All public records shall be open for inspection . . . except . . . as otherwise provided by law”).

80. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

81. See IOWA CODE ANN. § 22.7(1) (West Supp. 2001) (“The following public records shall be kept confidential[:]. . . . [p]ersonal information in records regarding a student, prospective student, or former student maintained, created, collected or assembled by or for a school corporation or educational institution maintaining such records.”); TENN. CODE ANN. § 10-7-504(a)(4) (Supp. 2000) (“The records of students in public educational institutions shall be treated as confidential.”); TEX. GOV’T CODE ANN. § 552.026 (Vernon 1994) (“This chapter [Open Records] does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974”).

82. See ARIZ. REV. STAT. ANN. § 39-121.02 (West 1996) (discussing the right to appeal a denial of access to public records).

83. *U.S. v. Miami Univ.*, 91 F. Supp. 2d 1132, 1144 (S.D. OH 2000) (citing 20 U.S.C. § 1232g(b)(2) (1994)).

84. *Id.* at 1144 (emphasis in original).

imposes mandatory obligations and restrictions on educational institutions.⁸⁵

Ultimately, the court determined that disciplinary records fall within the scope of education records as defined in FERPA.⁸⁶ Based on the definition of education records in FERPA and the construction of the statute by the Department of Education,⁸⁷ education records include disciplinary records.⁸⁸ Hopefully this decision signals a shift toward protecting the privacy of students while still addressing the concerns of the public.⁸⁹

2. 1998 Amendments to FERPA

85. *Id.* at 1145 (emphasis in original). In discussing whether the Department of Education can bring lawsuits against institutions for violating the privacy provisions of FERPA, the court noted:

Without the ability to file lawsuits in federal court, the Department is left without a meaningful remedy by which to accomplish FERPA's purpose; the primary remaining enforcement mechanism would be withdrawal of funding to any educational institution that violates FERPA. Such a harsh remedy would serve as a significant financial blow to universities and other institutions, and potentially could cause a decrease in the level of education. In the long-run, the students attending these institutions and their parents—the parties whom FERPA was intended to protect—would be the ones most penalized by such action.

Id. at 1140. For further discussion of the use of FERPA in § 1983 actions, see *Cullens v. Bemis*, No. 92-1582, 1992 U.S. App. LEXIS 30892, at *3 (6th Cir. Nov. 18, 1992) (“FERPA itself does not give rise to a private cause of action, but does create an interest that may be vindicated in a § 1983 action.”); *Achman v. Chisago Lakes Indep. Sch. Dist.*, 45 F. Supp. 2d 664, 674 (D. Minn. 1999) (“[T]he Court concludes that FERPA section 1232g(b)(1) creates a federal right that is enforceable through section 1983 actions.”).

86. See *Miami Univ.*, 91 F. Supp. 2d at 1148. The decision in *United States v. Miami University* finds support in *DTH Publishing Corp. v. University of North Carolina*, 496 S.E.2d 8, 13 (N.C. Ct. App. 1998) (holding that FERPA allows the university to close judicial proceedings despite a state open meetings law). See also Kit Lively, *N.C. Court Lets Colleges Close Judicial Hearings*, CHRON. OF HIGHER EDUC., Feb. 27, 1998, at A38, LEXIS, News Library, CHEDUC File.

87. *Miami Univ.*, 91 F. Supp. 2d at 1135-36.

88. This conclusion is drawn based on the language of FERPA—the definition of education records includes “materials which . . . contain information directly related to a student . . .” 20 U.S.C. § 1232g(a)(4)(A)(i) (1994).

89. See, e.g., Patrick Healy, *Judge Rules that Colleges Can't Release Files from Student Judicial Proceedings*, CHRON. OF HIGHER EDUC., Mar. 31, 2000, at A40, LEXIS, News Library, CHEDUC File (“Universities would violate federal privacy law if they gave explicit information about confidential campus disciplinary proceedings to reporters who request such details under state open-records laws . . .”).

A major change to FERPA now allows higher education institutions to disclose to the public the final results of disciplinary proceedings if “[t]he student is an alleged perpetrator of a crime of violence or non-forcible sex offense[] and . . . [w]ith respect to the allegation made against him or her, the student has committed a violation of the institution’s rules or policies.”⁹⁰ “Increasing crime on college campuses, . . . coupled with the demand from campus safety groups for greater access to campus crime information, prompted Congress in 1998 to allow schools to release the names of students found guilty of crimes of violence.”⁹¹ Also, FERPA allows higher education institutions to disclose the final outcome of judicial procedures against alleged perpetrators to their crime victims.⁹² This provision was added in 1990 in response to the enactment of the Campus Security Act of 1990.⁹³

Although the press may view this 1998 amendment as a victory, it does not *require* colleges and universities to disclose the final results of judicial procedures, rather

90. Family Educational Rights and Privacy, 65 Fed. Reg. 41,851, 41,853 (July 6, 2000) (to be codified at 34 C.F.R. pt. 99). An “alleged perpetrator of a crime of violence” is defined as “a student who is alleged to have committed acts that would, if proven, constitute . . . [a]rson[, a]ssault offenses[, b]urglary[, c]riminal homicide, . . . [r]obbery[, and f]orcible sex offenses.” *Id.* at 41,853-54. An “[a]lleged perpetrator of a nonforcible sex offense means a student who is alleged to have committed acts that, if proven, would constitute statutory rape” *Id.* at 41,854. “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.” *Id.* The Department of Education believes that the definition of final results “will benefit students who have been victims of violent crimes and non-forcible sex offenses” since “[i]nstitutions will not be able to claim that FERPA allows them to release results of disciplinary proceedings only after all internal reviews and appeals have been exhausted.” *Id.* at 41,861.

The Department of Education provides guidance to colleges and universities in applying the definition of “alleged perpetrator” to specific situations:

In order to determine if someone is an alleged perpetrator, institutions should look at allegations made as part of the disciplinary proceeding. These allegations can be made by a victim, a third-party witness, or by the institution. These allegations can be made at any time during the disciplinary proceeding, beginning from the time that an initial complaint or a charge is filed, until the final result is reached. This disciplinary process is not related to criminal proceedings. The institution does not need to refer the matter to the police or await any criminal proceedings in order to consider a student an alleged perpetrator of a crime of violence or non-forcible sex offense.

Id.

91. Christina Denardo, *Syracuse U. Declines Releasing Student Disciplinary Records*, DAILY ORANGE, Apr. 20, 2000, LEXIS, News Library, UWIRE File.

92. See 20 U.S.C. § 1232g(b)(6)(A); Family Educational Rights and Privacy, 65 Fed. Reg. at 41,853; see also *Security On Campus, Inc.: New Federal Rules Will Shed More Light On Campus Crime*, PR Newswire, July 7, 2000, LEXIS, News Library, PRNEWS File; Carlisle, *supra* note 50.

93. Daggett, *supra* note 41, at 621. See also *infra* text accompanying notes 112-19 (discussing the Campus Security Act).

“disclosure is *permissive*.”⁹⁴ The Department of Education encourages institutions to consult “with their own counsel . . . regarding whether their State open records law requires disclosure of the final results of disciplinary proceedings in which a student is found to be an alleged perpetrator of a crime of violence.”⁹⁵ If the state open records laws require disclosure of the final results, then “FERPA does not prevent that disclosure.”⁹⁶ The Department of Education does not indicate that, even with state open records laws, a college or university may disclose the entirety of disciplinary records, rather it only makes reference to the final results of disciplinary proceedings. A review of the language of state open records laws indicates that most states have an exemption from the law if a federal law or another statute requires the public record to remain confidential.⁹⁷ A university may argue that because the FERPA disclosure of final results is permissive, then the exemption applies and the records remain confidential at the discretion of the appropriate university officials.

But even with these changes, a university may only disclose “the name of the student [charged with violating the university code of student conduct], the violation committed, and any sanction imposed by the institution on that student”⁹⁸ For example, an institution may simply disclose the “letter of final determination” including the name of the alleged perpetrator, the violation, and the sanction, provided that it redacts all other “personally identifiable information that is directly related to the accused student or to any other student.”⁹⁹ Some colleges and universities may

94. Family Educational Rights and Privacy, 65 Fed. Reg. 41,851, 41,860 (July 6, 2000) (to be codified at 34 C.F.R. pt. 99) (emphasis added).

95. *Id.*

96. *Id.*

97. *See supra* notes 77-82 and accompanying text (discussing state open records and laws).

98. 20 U.S.C. § 1232g(b)(6)(C)(i) (1994 & Supp. V 1999). This disclosure may not include the name of any other student involved without that student’s written consent. *Id.* § 1232g(b)(6)(C)(ii). “Violation committed” refers to the sections of the institutional student code of conduct or other rules that the alleged perpetrator violated and “any essential findings supporting the institution’s conclusion that the violation was committed.” Family Educational Rights and Privacy, 65 Fed. Reg. 41,851, 41,854 (July 6, 2000) (to be codified at 34 C.F.R. pt. 99). In defining the various elements of the FERPA amendments, the Department of Education expressed a concern about “violence on campus. We recognize the need for students to be aware of how an institution responds to these incidents.” *Id.* at 41,861.

99. Family Educational Rights and Privacy, 65 Fed. Reg. 41,851, 41,861 (July 6, 2000) (to be codified at 34 C.F.R. pt. 99). The Department of Education also indicated that

[s]everal commenters suggested that the final results of disciplinary proceedings be released in the form of an updated crime log. Because the release of this information is discretionary under FERPA, we agree with these commenters that the release of an existing crime log, as required by the campus security regulations [Campus Security Act], may be a satisfactory way to disseminate this information. It is worth noting that a crime log contains any crime reported to campus police or a campus security department, rather than only crimes of violence or non-forcible sex offenses. The release of a campus crime log, however, will not disclose some information that is permitted to be disclosed under FERPA.

choose not to disclose the final results of disciplinary proceedings as permitted under FERPA; however, others may simply release portions of the information.¹⁰⁰

The conflict over the release of names often pits college administrators—who say opening up disciplinary records violates students' privacy with few benefits for the community—and freedom of information advocates who say access to those records provides a better picture of campus crime and ensures a fair judicial process.¹⁰¹

In his statement regarding the amendments to FERPA, Representative Thomas Foley expressed his belief that “there should be a balance between one student’s right of privacy to another student’s right to know about a serious crime in his or her college community.”¹⁰² Representative Foley also stated that “many colleges and universities have learned to circumvent crime reporting requirements by channeling felonies and misdemeanors into their confidential disciplinary committees which continue to be protected by FERPA.”¹⁰³

Additionally, Representative Foley indicated that the FERPA amendments “would remove the Federal protection that disciplinary records enjoy and make reporting subject to the State laws that apply.”¹⁰⁴ However, this statement is not accurate if one closely reviews the language of the majority of state open records laws, which provide an exemption for records considered confidential under federal laws or other statutes.¹⁰⁵ On the other hand, Representative Foley seems to agree that FERPA protects disciplinary records from disclosure as education records—and even after the recent amendments to FERPA, the final results of disciplinary procedures are not subject to *mandatory* disclosure.¹⁰⁶ The 1998 amendments to FERPA simply provide

Specifically, a campus crime log does not contain the names of alleged perpetrators of crimes of violence or non-forcible sex offenses. Rather, a campus crime log includes the nature, date, time and general location of each crime and the disposition of the complaint, if known. (20 U.S.C. 1092(f)(4)(A)(i) and (ii) [(1994 & Supp. V 1999)]). Final results that can be disclosed under FERPA, however, concern the name of the student, the disciplinary violation that the student committed, and the disciplinary sanction imposed on the student.

Id. “Personally identifiable information” includes “[a] list of personal characteristics that would make the student’s identity easily traceable[] or . . . [o]ther information that would make the student’s identity easily traceable.” 34 C.F.R. § 99.3 (2000).

100. For example, the Office of Judicial Affairs at Syracuse University, a private university, releases a quarterly report outlining the offenses committed and sanctions provided, without releasing the names of the alleged perpetrator. Denardo, *supra* note 91.

101. *Id.*

102. 144 CONG. REC. H2984, H2984 (daily ed. May 7, 1998) (statement of Rep. Foley).

103. *Id.* However, under the 1998 amendments to the Campus Security Act, colleges and universities must also release information from officials that administer the disciplinary proceedings. *See infra* notes 134-37 and accompanying text.

104. 144 CONG. REC. H2984, H2984 (daily ed. May 7, 1998) (statement of Rep. Foley).

105. *See supra* notes 77-82 and accompanying text (discussing state open records laws).

106. *See supra* text accompanying note 94.

an opportunity for universities to serve the interest of community awareness in campus crime while maintaining the general rule that education records, including disciplinary records, are confidential.¹⁰⁷ Higher education institutions that are confronted with the dilemma of choosing between violating FERPA and violating an open records law should consider how the Campus Security Act can provide an alternative that protects the privacy of students involved while informing the community about crime.

III. CRIME AWARENESS AND CAMPUS SECURITY ACT OF 1990

A. Purpose of the Statute—Informing the Campus Community and the Public About Crime on Campus

Assailants victimize students on campus at an alarming rate.¹⁰⁸ “Campus crime leaves an indelible mark on its victims, their families, and university and college communities[.]”¹⁰⁹ but “[m]ost of us think of colleges and universities as tranquil and idyllic places. Many times they are. But college campuses are not walled off from the broader community.”¹¹⁰ Although many students feel safe on their college campuses, they are still at risk of becoming a victim of a crime because campuses and their neighboring areas are just as susceptible to crime as any other location.¹¹¹ The demand for release of disciplinary records likely results from increased reports of crime on campus, with particular concern for violent crimes such as murder and sexual assault.

Congress enacted the Campus Security Act (“CSA”)¹¹² in large part due to the efforts of Howard and Connie Clery of Pennsylvania, who rallied for the law after their daughter, Jeanne, was raped and killed by a fellow student in her dorm room at Lehigh University.¹¹³ Jeanne’s attacker entered the dorm through a side door that had been propped open, likely by fellow dorm residents who were unaware of the dangers.¹¹⁴ After Jeanne’s death in 1986, the Clerys learned that thirty-eight violent crimes occurred on the Lehigh University campus in the previous three years.¹¹⁵ In response to these unpublicized crimes, the Clerys lobbied Congress for “campus crime

107. *See supra* note 98 (supporting the proposition that disciplinary records fall under the definition of education records).

108. *See e.g.*, Business Publishers, Inc., *Campus Crime*, available at <http://www.bpinews.com/edu/pages/cc.htm> (last visited Sept. 10, 2001) (“For every 1,000 students on campus, there will be 26 crimes committed annually. Violent crimes are committed 12 times a day on college campuses across the country.”).

109. Michael C. Griffaton, *Forewarned is Forearmed: The Crime Awareness and Campus Security Act of 1990 and the Future of Institutional Liability for Student Victimization*, 43 CASE W. RES. L. REV. 525, 526 (1993).

110. *Student Right-to-Know and Campus Security Act—Conference Report*, 136 CONG. REC. 33,430, 33,431 (1990) (statement of Sen. Kennedy).

111. *See id.* (statement of Sen. Gore).

112. 20 U.S.C. § 1092(f) (1994 & Supp. V 1999).

113. Leinwand, *supra* note 15, at 2A.

114. *Id.*

115. *Id.*

disclosure and prevention laws” and founded a nonprofit organization that focuses on campus safety issues.¹¹⁶ “This brave couple, instead of hiding in their sorrow, . . . waged a national campaign to strengthen security on college campuses and prevent other parents from suffering the loss of a beloved child.”¹¹⁷ Representative Goodling from Pennsylvania, the original sponsor of the Act, stated that “[t]he intent of the legislation was and is to assist students in making decisions which affect their personal safety.”¹¹⁸ Together, the 1998 amendments to the CSA, emphasizing improved campus crime reporting, are named “The Jeanne Clery Act.”¹¹⁹

The General Accounting Office found that twenty-three of the twenty-five colleges audited in 1997 to determine their compliance with the CSA did not properly report crime statistics, especially in the areas of rape and assault.¹²⁰ Congress, aware of the need to revise and strengthen the CSA, amended the statute in 1998.¹²¹ Under the CSA, colleges and universities who receive federal financial assistance must report crimes from the three most recent years to the Department of Education in the following categories: murder and manslaughter, sex offenses, robbery and burglary, aggravated assault, motor vehicle theft, arson, and arrests or referrals to university judicial procedures for alcohol, drug, or weapon possession violations.¹²² Additionally, schools must also indicate their “reporting procedure” and crime prevention policies.¹²³ The amended Act requires institutions to report crimes that occur in areas around or near campus, even if the university does not own the property.¹²⁴ In addition, colleges and universities must report all criminal complaints,

116. *Id.* The organization is called Security on Campus, Inc. The website for the organization is <http://www.soonline.org/> (last visited Sept. 10, 2001). The site provides various links to laws and cases involving campus security as well as resources for those interested in learning more about campus crimes and prevention.

117. *Conference Report on S. 580, Student Right-To-Know and Campus Security Act*, 136 CONG. REC. 32,415, 32,416 (1990) (statement of Rep. Goodling) [hereinafter *Conference Report*].

118. *Id.*

119. Leinwand, *supra* note 15. See 20 U.S.C. § 1092(f)(15) (1994 & Supp. 1998) (stating the full name of the act as the “Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act”).

120. See General Accounting Office, *Campus Crime: Difficulties Meeting Federal Reporting Requirements*, Report to Congressional Requesters, Mar. 11, 1997, at 8, LEXIS, News Library, GAORPT File; see also Leinwand, *supra* note 15.

121. 20 U.S.C. § 1092(f) (1994 & Supp. V 1999).

122. 20 U.S.C. § 1092(f)(1)(F)(i) (1994 & Supp. V 1999). Campus police departments must also indicate if assailants committed any of the above-mentioned crimes based on the race, gender, sexual orientation, religion, or disability of the victim. *Id.* § 1092(f)(1)(F)(ii) (1994 & Supp. V 1999).

123. Leinwand, *supra* note 15.

124. 20 U.S.C. § 1092(f)(1)(F) (1994 & Supp. V 1999). This is a change from the original Act, where the sponsor stated an intent to include only campus buildings:

[W]e were also able to limit reporting requirements to those crimes which actually take place on property owned or controlled by the college or university and used for educational purposes. The Senate bill called for the reporting of all crimes

even those that are not proven.¹²⁵ However, college administrators may be reluctant to disclose all crimes, especially those unsubstantiated, because “statistics spiked with unfounded allegations will make their generally safe environs seem more dangerous than they really are.”¹²⁶

Once received from institutions, the Department of Education makes the crime statistics available through its website.¹²⁷ In a letter to college and university presidents, the Department of Education indicated that the purpose of the crime statistics is “to give prospective and current students information to help them make decisions about their potential or continued enrollment in a postsecondary institution. Prospective and current students, staff, and the public use the information to assess an institution’s security policies and the level and nature of crime on its campus.”¹²⁸ Additionally, by gathering the crime statistics, institutions will be better able to identify and address safety concerns.¹²⁹

The amended Campus Security Act also requires higher education institutions to maintain an up-to-date public log of crimes reported to campus police officials.¹³⁰ This

against students, no matter where they took place. Considering the fact that our goal is to provide students with information on crimes on their campus, the inclusion of all information on crimes against students would have skewed the data reported to students in such a manner that they would never know if their school's security system was effective in protecting students.

See Conference Report, supra note 117 (statement of Rep. Goodling).

125. Leinwand, *supra* note 15. *See* REPORT TO CONGRESS, *supra* note 9, at 2 (“The statistics represent *alleged* criminal offenses *reported* to campus security authorities or local police agencies. *Therefore, the data collected do not necessarily reflect prosecutions or convictions for crime.*” (emphasis in original)).

126. Leinwand, *supra* note 15. Even so, “[t]here is absolutely no incentive for colleges and universities to skirt the spirit or letter of the Clery Act. More than risking bad publicity, they risk significant legal liability and the potential loss of federal student aid.” Ikenberry, *supra* note 11, at 14A; *see also* Griffaton, *supra* note 109 (discussing institutional liability for crimes committed against students).

127. 20 U.S.C. § 1092(f)(5)(B) (1994 & Supp. V 1999). *See also* Office of Postsecondary Education Campus Security Statistics Website, <http://www.ope.ed.gov/security> (last visited Sept. 10, 2001). The website contains a searchable database of crime statistics from over 6000 colleges and universities. *See id.* However, the information provided on the website does not indicate if the listed crimes were prosecuted or if alleged perpetrators were convicted. *See* Associated Press, *supra* note 21.

128. A. Lee Fritschler, *July 2000 Dear Colleague Letter*, Department of Education, available at <http://www.ed.gov/offices/OPE/PPI/Fritschlerletter.pdf> (last visited Sept. 10, 2001).

129. REPORT TO CONGRESS, *supra* note 9, at 1. For example, institutions may notice crime trends in certain areas of campus, resulting in better lighting or increased police security.

130. 20 U.S.C. § 1092(f)(4)(A) (1994 & Supp. V 1999). The log must include the “nature, date, time, and general location of each crime . . . and the disposition of the complaint, if known.” *Id.* § 1092(f)(4)(A)(i)-(ii). Officials must disclose crimes “within two business days of the initial report . . .” *Id.* § 1092(f)(4)(B)(i). The log does not include crimes reported to other campus officials outside of the campus police department.

crime log may be an alternative to disclosing disciplinary records, and it may also serve as an alternative to releasing the final results of disciplinary procedures under FERPA because the log is open to the public.¹³¹ The CSA does not require campus security officials to log crimes immediately if disclosure would violate a law or if disclosure would “jeopardize the confidentiality of the victim . . . [or] [i]f there is clear and convincing evidence that the release of such information would jeopardize an ongoing criminal investigation or the safety of an individual, cause a suspect to flee or evade detection, or result in the destruction of evidence”¹³² Additionally, institutions must warn the campus community in a timely manner if crimes threaten other students and staff members.¹³³

In expanding the scope of the reporting provision, Congress specifically included crimes reported to nonpolice officials.¹³⁴ To comply with the Campus Security Act, administrators “must survey campus organizations, local police, rape crisis centers and dorm leaders for alleged crimes that might not have been reported to campus police.”¹³⁵ The Act also requires the reporting of crimes reported to “campus security authorities.”¹³⁶

To determine if an institution must collect crime statistics from a particular employee or official, . . . an institution must first determine if that official is a campus security authority. In addition to campus law enforcement staff, a campus security authority is someone with “significant responsibility for student and campus activities.” Absent this responsibility, an employee is not a campus security authority.¹³⁷

Colleges and universities that understate crime statistics are subject to a \$25,000 fine for each crime inaccurately reported or not reported at all.¹³⁸ The government has accused some universities of not complying with the Campus Security Act’s crime reporting statistics,¹³⁹ and Mount St. Clare College in Iowa was the first institution

131. See *supra* note 90 and accompanying text (discussing the amendment to FERPA allowing the release of the final results of university judicial proceedings).

132. 20 U.S.C. § 1092(f)(4)(B)(i), (iii) (1994 & Supp. V 1999).

133. 20 U.S.C. § 1092(f)(3) (1994 & Supp. V 1999).

134. Student Assistance General Provisions, 64 Fed. Reg. 59,060, 59,063 (Nov. 1, 1999) (to be codified at 34 C.F.R. pt. 668.46).

135. Leinwand, *supra* note 15.

136. 20 U.S.C. § 1092(f)(1)(F)(i) (1994 & Supp. V 1999).

137. Student Assistance General Provisions, 64 Fed. Reg. 59,060, 59,063 (Nov. 1, 1999) (to be codified at 34 C.F.R. pt. 668.46).

138. Leinwand, *supra* note 15. Some also argue that higher education institutions may be liable for failing to prevent victimization of students that may be foreseeable from campus crime statistics. See also Griffaton, *supra* note 109, at 533 (“The reality of campus crime and student naivete, have increased the threat of liability for colleges and universities if they fail to protect their students from victimization.”).

139. The Sacramento Bee published reports that the University of California was not complying with the Campus Security Act by only reporting sexual assaults that students reported directly to campus police. See, e.g., Andrea O’Brien, *UC Task Force to Address*

ordered to pay the \$25,000 fine “for . . . a history of deception in its crime reports.”¹⁴⁰ In response to the fine, the college filed an administrative appeal based on its different interpretation of the reporting requirements.¹⁴¹

*B. Protecting Student Privacy Under FERPA While
Informing the Public About Campus Crime*

Enhanced enforcement of the CSA weakens the argument for full disclosure of disciplinary records because the media can simply access the crime statistics from the Department of Education website and provide the public with the same information it would provide from the judicial procedure records. “[S]tudent and professional journalists will have new tools to access campus crime records.”¹⁴² The same information available from the disciplinary records will be available through the campus crime statistics because the amended CSA includes reports from various arms of university administration. This website contains submitted crime statistics from all colleges, universities, and trade schools in the country that participate in federal financial assistance programs,¹⁴³ so there will be no need for the press to directly request additional information from the institutions.

The reporting requirements of the CSA serve the interests of all involved. The disciplinary records of students can remain private while the public has access to campus crime statistics through the website.

FERPA is not a barrier to complying with the disclosure requirements of the campus security regulations. It does not prevent the disclosure of statistical information; it does not interfere with the timely warning provision; it specifically allows for disclosure of the results of disciplinary hearings to victims of violent crimes; and, it does not relieve an institution from complying with the reporting requirements of the campus security regulations when the institution refers a matter to a disciplinary committee, rather than the campus security office.¹⁴⁴

The crime statistics reported under the CSA now include information from

Questionable Rape Data, DAILY CALIFORNIAN, Oct. 3, 2000 LEXIS, News Library, UWIRE File; Roya Aziz, *UC-Davis Officials Respond to Sacramento Bee Sexual Assault Articles*, THE CALIFORNIA AGGIE, Sept. 28, 2000, LEXIS, News Library, UWIRE File.

140. Leinwand, *supra* note 15.

141. *Id.*

142. S. Daniel Carter, *Covering Crime on College Campuses; Regulations on Reporting Campus Crime*, THE QUILL, Sept. 1, 2000, at 32, LEXIS, News Library, ASAPII File.

143. *Id.*

144. *Testimony on the Campus Security Act Before the S. Subcomm. on Labor, Health and Human Services and Education of the S. Appropriations Comm.*, 105th Cong. (1998) (statement of David A. Longanecker, Assistant Secretary for Postsecondary Education, Department of Education), available at <http://www.ed.gov/offices/OPE/PPI/testify.html> (last visited Sept. 10, 2001).

university disciplinary procedures,¹⁴⁵ so there is no interest served by disclosing the disciplinary records. Journalists or other members of the public can gather information from the Department of Education website or even the police crime logs. Either alternative will maintain the privacy of the accused students, victims, and witnesses to the greatest extent possible while informing the public about crime.

Universities receive no benefit from failing to disclose crime. Despite accusations that universities are only interested in their reputation, the amended Campus Security Act provides a monetary fine for each crime incorrectly reported—up to \$25,000.¹⁴⁶ Additionally, universities are subject to loss of government-sponsored financial assistance as well as liability for student crime.¹⁴⁷ By allowing universities to use the CSA for comprehensive reporting of campus crime statistics, the government can serve the interest in public awareness of crime on campus through accurate and complete reports. The members of the press will have access to these statistics through the Department of Education website, thereby removing their claims to disclosure of student disciplinary records.

CONCLUSION

Student disciplinary records are educational records that should remain confidential under FERPA. The interest in public awareness of crimes committed on or near campus is laudable. However, disclosing student disciplinary records is not the best way to serve this interest. College and university disclosure of campus crime rates, as required by the CSA, is sufficient to address these interests without impinging students' right of privacy. The same information that members of the press may gain from the disciplinary records is available through the crime statistics prepared by institutions under the CSA. These statistics include not only crimes reported to campus police, but also crimes reported to various university administrators and officials, including the campus offices that handle student discipline.

An alternative to releasing disciplinary records is for universities to comply with the CSA and to submit accurate crime statistics to the Department of Education, where they will be accessible to the general public, including the press. Congress has sought to address the competing interests of those seeking the records and those seeking to maintain the confidentiality of the records. One compromise has been amendments to FERPA allowing for disclosure of the final results of disciplinary records for violent crimes, but since this release is not mandatory, institutions can still serve the privacy interests of students while informing the public about crimes through the crime reporting provisions of the CSA. Another compromise comes in the form of amendments to the CSA, which now requires a public crime log as well as reports to Congress about the current status of campus crime statistics. Together, these amendments support the proposition that universities should not generally release disciplinary records, unless otherwise allowed by law. The campus community will receive information about violent crimes while accused students, victims, and

145. See *supra* notes 134-37 and accompanying text.

146. See 20 U.S.C. § 1092(f) (1994 & Supp. V 1999); see also § 1094(c)(3)(B)(i)(13); Leinwand, *supra* note 15.

147. See *supra* note 126; see also *supra* note 138.

witnesses will still maintain their privacy.