

Family Educational Rights and Privacy Act and Athletics

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In 1974 the Congress of the United States passed the Family Education Rights and Privacy Act (FERPA), also known as the Buckley Amendment to guarantee accuracy and privacy of personal educational records. To best understand this important but often overlooked law, one must appreciate congressional concern for the gravity of an individual's educational records. Indeed, Congress decided to make proper maintenance of educational records a necessary condition for availability of federal funds to educational agencies and/or institutions. Administrators of institutions of higher education and public schools should recognize that failure to comply with the Buckley Amendment can bring about the same consequences--loss of federal funding-- as failure to comply with a better known federal mandate, Title IX of the Education Amendments Act of 1972. Even school officials who are familiar with FERPA cannot afford to take a casual approach to compliance. Simply establishing formal procedures in the school records office does not guarantee accuracy and confidentiality. There is no room for complacency. The opportunities for violations of the law are so pervasive as to warrant vigilance on the part of those involved in all school activities, athletics, in particular.

■ WHAT ARE THE MAIN FEATURES OF FERPA?

Purpose

FERPA provides for the student three basic rights:

- A. Right to examine his/her records (access).
- B. Right to challenge accuracy of records (correct, if necessary).
- C. Right to limit disclosure (privacy).

Scope of Coverage

To what educational agencies or institutions does FERPA apply? Any educational institution receiving funds under programs administered by the Department of Education (DOE) is covered by this Act. Furthermore, receipt of any funds by any part of an institution makes FERPA applicable to the whole institution (34 Code of Federal Regulations [34 CFR], 1992, § 99.1).

Enforcement is through the U.S. Department of Education making S 1983 action available. That is, when a violation is alleged a written complaint must be filed with the DOE describing specific allegations constituting reasonable cause. The institution must be notified of the allegations and given the opportunity to respond. An investigation ensues yielding written findings. If there are findings against an institution, a statement of compliance steps will be issued and the institution will be given a reasonable opportunity to make corrections of policies and procedures. If noncompliance persists, then steps to terminate federal funds, or a notice to cease and desist will be issued.

Definition of Educational Records

Any form of recorded information, including print, handwriting, tape, computer data, film, etc., directly related to a student and maintained by an educational institution is subject to FERPA. Noteworthy, here, is the observation that student-athletes' performances are measured and recorded using all of the forms listed above. (34 CFR § 99.3)

Just as important is an understanding of the types of records which are not subject to FERPA. Employment records at the institution which are made and maintained in the normal course of business and relate exclusively to the individual's capacity as an employee are not considered educational records. It is worth note, however, that records relating to an individual who is employed as a result of his or her status as a student are subject to FERPA. The current debate of whether an athlete receiving financial aid is an employee of the institution may determine if such records are affected by FERPA.

Records of a law enforcement unit of an educational institution which are created and maintained for purposes of law enforcement and maintained separately from educational records are not subject to FERPA protection of privacy. Indeed, an attempt to use FERPA as an excuse not to release crime data was thwarted by a recent U.S. District Court decision in the case of *Bauer v. Kincaid* (Ogg, 1991) Athletics officials, therefore, who are sensitive to the role model conflict presented by arrests of athletes cannot use the Buckley Amendment as a shield from the public media.

On the other hand, student conduct records of individual student-athletes such as those normally maintained in the Dean's office receive the protection of FERPA. Care must be taken to distinguish between arrest (crime) records and student conduct. Furthermore, to avoid a breach of privacy, student conduct records should be maintained at the appropriate student deans' offices, separate from crime records maintained by law enforcement units.

Student Inspection Rights

A basic purpose of FERPA is the student's right to inspect his/her educational records and to correct them if necessary. The student must be given access to his/her records within a "reasonable period of time, but in no case more than forty-five days." (34 CFR §99.10) Exceptions to the student's right of inspection include parents' financial records and confidential statements on admissions or employment applications to which the student has prospectively waived his/her right to

inspect. While the enterprise of athletics poses no obvious problems to the rights of inspection and correction, there is an important designation concerning shared rights between the student and parents. Until the student reaches the age of 18 years, parents share in the rights accorded students. But parents' rights become limited to inspection of a dependent student's records once the student is attending a postsecondary institution or reaches the age of 18 (34 CFR § 99.31). Clearly, FERPA emphasizes family rights until the student reaches the age of majority.

Disclosure

The most complex function of FERPA and the function fraught with opportunities for violations of compliance is that of controlling disclosure of educational records. Section 99.3 of 34 Code of Federal Regulations defines "disclosure":

"...means to permit access to or the release, transfer, or other communication of education records, or the personally identifiable information contained in those records, to any party, by any means, including oral, written, or electronic means" (p.358).

The objective, here, is privacy. The intention of the law is to preclude the disclosure of personally identifiable information without written consent. Such consent should be signed and dated and should specify which records which may be disclosed to whom and for what purpose.

Is there any personally identifiable information about a student which may be disclosed without consent?

Yes, FERPA permits an educational institution or agency to release "directory information" to other school officials with legitimate educational interests if the institution has given public notice to parents and eligible students about what kind of information will be released and if parents and students are given the right to refuse such disclosures.

What constitutes "directory information" for many postsecondary institutions are such items as name, address, telephone, date of birth, major, dates of attendance, degrees and awards, participation in activities and sports, and heights and weights of athletes. Remember, however, students and student-athletes may refuse to permit the release of such directory information. With the notorious inaccuracy of heights and weights of athletes published in game programs, athletes may well demand accuracy or refuse disclosure.

Other categories of educational information which can be disclosed without consent surround special situations such as health emergencies, compliance with judicial orders or subpoenas, certain federal or state agencies in connection with audits, for scientific studies when reported anonymously, and for determining eligibility for financial aid.

It can be said unequivocally that the most sensitive educational records are a student's grades, grade point averages (GPA), rank in graduating class, and standardized test scores. Even though some students may generate academic statistics worthy of pride, not every student prefers to submit their GPA's and test scores to public disclosure. The architects of FERPA were particularly concerned with guaranteeing privacy of such records.

For most students, privacy of academic records is not a problem. Those who might be interested in such records are usually a few very familiar friends and family who have a legitimate, personal, and supportive interest in the particular student. Furthermore, the risks of unwarranted disclosure of a student's sensitive academic records by prospective employers or graduate school admissions reviewers is small. However, for a certain class of students—athletes—privacy of academic records is at great risk. There is a special vulnerability of athletes' education records at both secondary schools and postsecondary institutions because of (a) the contingency of athletic eligibility upon academic credentials, and (b) the insatiable appetites of the general public and the sports media for athletic minutia. For example, the following recent newspaper column excerpt (Katz, 1994) aptly demonstrates that vulnerability:

“...The Lobos are one scholarship over their present limit, but it might not matter.

The 6-foot-9, 217-pound () has six weeks left of high school to ensure he has the required 2.0 in his core curriculum classes. () also needs to pass his standardized test score to be eligible. He got a 15 in the only attempt at the American College Test (ACT). The NCAA requires a minimum score of 17.”

The column continued by quoting remarks by the athlete and his high school coach about his alternatives of either attending a junior college or attending as a partial qualifier should he fail to qualify for initial National Collegiate Athletic Association (NCAA) eligibility.

There are several points worthy of notice about the column above. First, the column appeared in a newspaper with an average daily circulation of over 130,000 located over 700 miles from the student's home. Next, the writer not only provided the most sensitive education records, but also provided an interpretation of applicable NCAA criteria for participation eligibility. Finally, although the summary quotes of the student about his future would imply consent for at least that portion of the story, what does this article reveal about the privacy of education records of this high school athlete?

Indeed, the recruitment process of high school athletes by college coaches is a veritable minefield of FERPA violations. Secondary school officials charged with the keeping of student educational records may freely provide information to college athletic recruiters as they would respond to a request from any other official of a postsecondary institution. The added public interest in a recruited athlete, however, proportionately elevates the risk of a breach of privacy such as that cited in the case above.

Moreover, following such disclosures, coaches talk freely among colleagues about individual prospective athlete's educational records. Because many prospective student athletes are recruited by coaches from more than one college, a prospect with poor academic credentials will soon be labeled “nonqualifier”, “PQ” (partial qualifier) if he/she does not meet NCAA criteria for eligibility. Even more cruel are labels such as “special ed” for a prospect unable to carry a regular or college preparatory curriculum. Labeling is, for the most part, unintentional and a natural outcome of casual talk among recruiters about particular athletes.

Consequently, Tener (1992) suggests that few athletes and their parents know their rights under the FERPA, and few coach/recruiters know their obligations to

protect the privacy of prospective athletes' high school records. Protection would be enhanced, says Tener, if school districts would establish a policy on how, to whom, and what information can be made accessible. Other important suggestions include giving parents and students access to review educational records kept by the school district, evaluating any and all outside individuals or agencies who seek student information, and seeking permission in writing before disclosing any information that will be released to outside agencies.

Concerns for Intercollegiate Athletics

Following recruitment and matriculation in a postsecondary institution, the athlete still maintains rights of privacy guaranteed by FERPA. Unfortunately, postsecondary institutions which ostensibly take a more serious approach to FERPA compliance often let caution slip when dealing with athletes. For instance, educational records are publicized freely along with academic awards on assumption, rather than the written consent of the athlete. Educational records appearing in media biographical summaries for individual athletes similarly are published on assumption of the athlete's consent. As a general practice, athletes are not given the opportunity to refuse such disclosures. (Why, you ask, would an athlete refuse biographical information? If he/she were a partial qualifier the athlete may not want to disclose. If the football offensive lineman weighs over 300 pounds, he may be sensitive about the media guide and program publishing it.)

On the other hand, when campus events begin to sour, such as recruiting and academic scandals, institutions have unsuccessfully used FERPA to avoid disclosure of educational records of athletes. For example, in 1984 the University of Illinois was ordered to release to the campus newspaper documents describing an NCAA inquiry into the university's athletic recruiting practices (Kaberon, 1984). A Champaign County Associate Judge Jack R. DeLaMar ruled in the case of *Illini Media Co. v. The Board of Trustees of the University of Illinois, et al.*, that with deletions of some personal information about personal information about several student-athletes, all documents should be released to the Daily Illini. Furthermore, Judge DeLaMar ruled that because the case bears upon the public duties of public employees (coaching staff) it is not excluded from disclosure by either state or federal law (Kaberon, p. 10).

A similar incident at the University of New Mexico in January of 1993 occurred when the campus newspaper published the previous semester's grades and GPA's of the prominent players on the men's basketball squad. University officials bitterly denounced the disclosures as both an immoral invasion of the players' privacy and as violations of the Buckley Amendment. The campus newspaper defended the disclosures on the basis that the players' tuition scholarships were funded by state appropriations, thereby establishing a compelling public interest in the athletes' grades. Although no court action was filed, it is expected that courts will eventually decide the legality of such disclosures.

Might the athletes be successful in seeking private action against those responsible for such disclosures? Wong and Magnus (1993) report of a similar case, *Bilney v. Evening Star Newspaper Co.* [406 A.2d 652 (Md. Ct. App. 1979)] where members of the University of Maryland men's basketball team brought suit against

two newspapers that published articles revealing the threat to eligibility of the players academic standing. Because the newspapers claimed they received the information from an anonymous source, the courts determined that the reporters and publishers had not invaded the athletes' privacy since they did not personally access the players' confidential records. Furthermore, because of the widespread public interest in Maryland basketball, the players were deemed public figures. Wong and Magnus conclude that athletes as public figures have difficulty winning an invasion of privacy action (p.14).

■ CONCLUSION

Congressional concern for the accuracy, accessibility, and privacy of school-generated educational records spurred the creation of FERPA in 1974. The level of congressional concern was great enough to include the loss of federal funding as a penalty to those institutions who fail to comply.

Consequently, schools and colleges develop formalized and official procedures for generating and maintaining educational records. Despite such deliberate measures, confusion exists about the application of FERPA to athletes and the enterprise of athletics. For instance, do personal conduct records of athletes constitute educational records subject to FERPA regulations? Yes, when such records are generated and maintained by institutional counselors and deans. However, an attempt to use FERPA privacy regulations to suppress from the public media crime data such as arrests of student-athletes has not been upheld in court.

The more pressing issue involving athletics surrounds the many opportunities to violate the privacy of an athlete's educational records. The violations may run the gamut from the publishing of academic honors without the athlete's consent to leaking information about a recruit's academic credentials.

High school athletes and their families should be wary of revelations of sensitive educational records such as GPA's, standardized test scores, and core credits appearing in local or national media. The intense competition among college athletic recruiters trying to solicit the services of the same athlete have lead to indiscretions. Parents and athletes must know their rights and coach/recruiters should know their obligations to protect the high school athlete's privacy.

Intercollegiate athletes face similar challenges of accuracy and privacy of educational records. Indeed, the challenges may be greater in light of more pervasive media attention and coverage. NCAA inquiries of possible violations of recruiting or eligibility rules attract extraordinary public interest. Disclosures in such investigations where public duties of public employees are examined have withstood court challenges based upon FERPA regulations. And, finally, the issue of the compelling public interest in the academic progress of athletes on scholarships supported by public funds versus the individual athlete's right to privacy under FERPA may yet be decided in court.

References

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- Family Educational Rights and Privacy Act of 1974, Pub. L. No 93-568, as amended, 20 U.S. C. § 1232g as described in
- 34 CFR (Code of Federal Regulations) Part 99, US 99.199.67.
- 42 U.S.C. § 1983 describes federal guidelines for civil rights complaints and investigations.

Court cases

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