

# 7

## The Student-Institution Relationship

*Chapter 7 discusses a variety of institutional functions and services related to students, including services for students living on campus. The chapter begins with the age-of-majority concept and the state laws that establish the legal capacity of students to enter binding legal contracts (usually at age eighteen) and bestow other privileges and obligations on them. It then addresses the emergence of students' constitutional rights; analyzes the academic freedom rights of students (as compared to those of the faculty); and examines students' legal relationships with other students, with particular emphasis on peer sexual harassment. Legal aspects of admissions and financial aid are examined, with particular emphasis on nondiscrimination and affirmative action issues. The chapter then discusses the provision of various services for students—in particular, student housing, campus security, campus computer networks (with particular emphasis on free speech issues), services for international students, services for students with disabilities, and student privacy protections (FERPA)—and the differing legal issues that arise in each of these areas.*

### **Section 7.1. The Legal Status of Students**

**7.1.1. Overview.** The legal status of students in postsecondary institutions changed dramatically in the 1960s, changed further near the end of the twentieth century, and is still evolving. For most purposes, students are no longer second-class citizens under the law. They are recognized under the federal Constitution as “persons” with their own enforceable constitutional rights. They are recognized as adults, with the rights and responsibilities of adults, under many state laws. And they are accorded their own legal rights under various federal statutes. The background of this evolution is traced in

Section 1.2; the legal status that emerges from these developments, and its impact on postsecondary administration, is explored throughout this chapter.

Perhaps the key case in forging this shift in student status was *Dixon v. Alabama State Board of Education* (1961), discussed further in Section 9.3.2. The court in this case rejected the notion that education in state schools is a "privilege" to be dispensed on whatever conditions the state in its sole discretion deems advisable; it also implicitly rejected the *in loco parentis* concept, under which the law had bestowed on schools all the powers over students that parents had over minor children. The *Dixon* approach became a part of U.S. Supreme Court jurisprudence in cases such as *Tinker v. Des Moines School District* (see Section 9.4.1), *Healy v. James* (Sections 9.4.1 and 10.1.1), and *Goss v. Lopez* (Section 9.3.2). The impact of these public institution cases spilled over to private institutions, as courts increasingly viewed students as contracting parties having rights under express and implied contractual relationships with their institutions. Thus, at both public and private institutions, the failure to follow institutional policies, rules, and regulations has led to successful litigation by students who claimed that their rights were violated by this noncompliance (see Sections 7.1.3, 9.2, and 9.3).

Congress gave students at both public and private schools rights under various civil rights acts and, in the Family Educational Rights and Privacy Act (FERPA, discussed in Section 7.8.1 of this chapter), gave postsecondary students certain rights that were expressly independent of and in lieu of parental rights. State statutes lowering the age of majority also enhanced the independence of students from their parents and brought the bulk of postsecondary students, even undergraduates, into the category of adults.

Now another stage in the evolution of students' legal status has been emerging. Developments at this new stage suggest a renewed emphasis on the academic freedom of students. In classical thought on academic freedom, the student's freedom to learn is clearly recognized and considered to be at least as important as the faculty member's freedom to teach. In more modern legal developments, courts have occasionally recognized the concept of student academic freedom; in *Piarowski v. Illinois Community College*, 759 F.2d 625, 629 (7th Cir. 1985), for instance, the court noted that the term "academic freedom" is "used to denote" not only "the freedom of the individual teacher" but also "the [freedom of] the student." But most academic freedom cases have been brought by faculty members, and most academic freedom rights that courts have protected have belonged to faculty members (see especially Section 6.2). Student academic freedom issues are discussed in Section 7.1.4.

**7.1.2. The age of majority.** The age of majority is established by state law in all states. There may be a general statute prescribing an age of majority for all or most business and personal dealings in the state, or there may be specific statutes or regulations establishing varying ages of majority for specific purposes. Until the 1970s, the age of majority in most states was typically 21. But since the 1971 ratification of the Twenty-Sixth Amendment, lowering the voting age to 18, most states have lowered the age of majority to 18 or 19

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for many other purposes as well. Some statutes, such as those in Michigan (Mich. Comp. Laws Ann. § 722.52), set age 18 as the age of majority for all purposes; other states have adopted more limited or more piecemeal legislation, sometimes using different minimum ages for different purposes. Given the lack of uniformity, administrators and counsel should carefully check state law in their own states.

Laws setting the age of majority can affect many postsecondary regulations and policies. For example, students at age 18 may be permitted to enter binding contracts without the need for a cosigner, give consent to medical treatment, declare financial independence, or establish a legal residence apart from the parents. But although students' legal capacity enables institutions to deal with them as adults at age 18, it does not necessarily require that institutions do so. Particularly in private institutions, administrators may still be able as a policy matter to require a cosigner on contracts with students, for instance, or to consider the resources of parents in awarding financial aid, even though the parents have no legal obligations to support the student. An institution's legal capacity to adopt such policy positions depends on the interpretation of the applicable age-of-majority law and the possible existence of special state law provisions for postsecondary institutions. A state loan program, for instance, may have special definitions of dependency or residency that may not conform to general age-of-majority laws.

**7.1.3. The contractual rights of students.** Both public and private institutions often have express contractual relationships with students. The most common examples are probably the housing contract or lease, the food service contract, and the loan agreement. In addition, courts are increasingly inclined to view the student handbook or college catalog as a contract, either express or implied. When problems arise in these areas, the written document (or Web site), including institutional regulations incorporated by reference, is usually the first source of legal guidance.

Courts have differed over the past few decades as to whether, and in what form, a contract exists between a college and its students. Variations in contract law between states also complicate the analysis of whether, and which, documents or policies are contractually binding. The following discussion examines a variety of approaches taken by courts, and addresses the inconsistencies among states in how their courts analyze student contract claims.

Early cases involving student contract claims looked beyond written documents and found a more amorphous contractual relationship, such as that recognized in *Carr v. St. John's University, New York*, 187 N.E.2d 18 (N.Y. 1962), the modern root of the contract theory of student status. In reviewing the institution's dismissal of students for having participated in a civil marriage ceremony, the court based its reasoning on the principle that "when a student is duly admitted by a private university, secular or religious, there is an implied contract between the student and the university that, if he complies with the terms prescribed by the university, he will obtain the degree which he sought." Construing a harsh and vague regulation in the university's favor, the court

upheld the dismissal because the students had failed to comply with the university's prescribed terms. Although *Carr* dealt only with a private institution, a subsequent New York case, *Healy v. Larsson*, 323 N.Y.S.2d 625, affirmed, 318 N.E.2d 608 (N.Y. 1974), indicated that "there is no reason why . . . the Carr principle should not apply to a public university or community college."

Other courts have increasingly utilized the contract theory for both public and private institutions, as well as for both academic and disciplinary disputes. The theory, however, does not necessarily apply identically to all such situations. A public institution may have more defenses against a contract action. *Eden v. Board of Trustees of State University*, 374 N.Y.S.2d 686 (N.Y. App. Div. 1975), for instance, recognizes both an *ultra vires* defense and the state's power to terminate a contract when necessary in the public interest. ("Ultra vires" means "beyond authority"; the defense essentially says, "You can't enforce this contract against us because we didn't have authority to make it in the first place.") And courts may accord both public and private institutions more flexibility in drafting and interpreting contract terms involving academics than they do contract terms involving discipline. In holding that Georgia State University had not breached its contract with a student by withholding a master's degree, for example, the court in *Mahavongsanan v. Hall*, 529 F.2d 448 (5th Cir. 1976), recognized the "wide latitude and discretion afforded by the courts to educational institutions in framing their academic requirements." For a more recent case using a similar analysis, see *Seitz-Partridge v. Loyola University of Chicago*, 948 N.E.2d 219 (Ill. App. Ct. 2011).

In general, courts have applied the contract theory to postsecondary institutions in a deferential manner. Courts have accorded institutions considerable latitude to select and interpret their own contract terms and to change the terms to which students are subjected as they progress through the institution. In *Mahavongsanan*, for instance, the court rejected the plaintiff student's contract claim in part because an institution "clearly is entitled to modify [its regulations] so as to properly exercise its educational responsibility" (529 F.2d at 450). Nor have institutions been subjected to the rigors of contract law as it applies in the commercial world (see, for example, *Slaughter v. Brigham Young University*, discussed in Section 9.2.3).

In some instances, courts have preferred to use quasi-contract theory to examine the relationship between an institution and its students, and may hold the institution to a good-faith standard. In *Beukas v. Fairleigh Dickinson University*, 605 A.2d 776 (N.J. Super. Ct. Law Div. 1991), affirmed, 605 A.2d 708 (N.J. Super. Ct. App. Div. 1992), former dental students sued the university for closing its dental school when the state withdrew its subsidy. The university pointed to language in the catalog reserving the right to eliminate programs and schools, arguing that the language was binding on the students. But instead of applying a contract theory, the trial court preferred to analyze the issue using quasi-contract theory, and applied an arbitrariness standard:

[T]his court rejects classic contract doctrine to resolve this dispute . . . [T]he "true" university-student "contract" is one of mutual obligations implied, not in

fact, but by law; it is a quasi-contract which is "created by law, for reasons of justice without regard to expressions of assent by either words or acts" [citation omitted] . . . The inquiry should be: "did the university act in good faith and, if so, did it deal fairly with its students?" [605 A.2d at 783, 784].

The state's appellate court upheld the result and the reasoning, but stated that if the catalog was a contract (a question that the court did not attempt to answer), the reservation of rights language would have permitted the university to close the dental school.

Similarly, another New Jersey appellate court refused to characterize the student-institution relationship as contractual in a student's challenge to his dismissal on academic (as opposed to disciplinary) grounds. In *Mittra v. University of Medicine and Dentistry of New Jersey*, 719 A.2d 693 (N.J. Super. Ct. App. Div. 1998), the court stated that when the institution's action was taken for academic reasons,

[t]he relationship between the university and its students should not be analyzed in purely contractual terms. As long as the student is afforded reasonable notice and a fair hearing in general conformity with the institution's rules and regulations, we defer to the university's broad discretion in its evaluation of academic performance . . . Rigid application of contract principles to controversies concerning student academic performance would tend to intrude upon academic freedom and to generate precisely the kind of disputes that the courts should be hesitant to resolve [719 A.2d at 695, 697].

Since the student had not identified any specific rule or regulation alleged to have been violated, the appellate court affirmed the trial court's award of summary judgment to the university.

Students have also asserted breach of contract claims when challenging dismissals or other sanctions. Traditionally, courts have typically been more deferential to institutional decisions in dismissals for academic rather than for disciplinary reasons. For example, in a misconduct case, *Fellheimer v. Middlebury College*, 869 F. Supp. 238 (D. Vt. 1994), a federal court ruled that the student handbook of a private institution was contractually binding on the college and provided the basis for a breach of contract claim. In *Fellheimer*, a student challenged the fairness of the college's disciplinary process because he was not informed of all of the charges against him. (This case is discussed more fully in Section 9.3.3 of this book.) The court rejected the college's claim that the handbook was not a contract: "While [prior cases caution courts to] keep the unique educational setting in mind when interpreting university-student contracts, they do not alter the general proposition that a College is nonetheless contractually bound to provide students with the procedural safeguards that it has promised" (869 F. Supp. at 243). The court ruled that Middlebury had breached its contract with the student because the disciplinary hearing had been flawed.

Although various courts have applied contract law principles when an institution's written materials make certain representations, they may be more

hesitant to do so if the promise relied upon is oral. In *Ottgen v. Clover Park Technical College*, 928 P.2d 1119 (Wash. Ct. App. 1996), a state appellate court affirmed the trial court's dismissal of contract and state consumer fraud claims against the college. Five students who had enrolled in the college's professional residential real estate appraiser program sued the college when a promise made by a course instructor, who was subsequently dismissed by the college, did not materialize. Although the instructor had promised the students that they would receive appraisal experience as well as classroom instruction, the opportunity for on-the-job experience did not occur. The court ruled that there was no contract between the college and the students to offer students anything but classroom education. College documents discussed only the classroom component and made no representations about the eligibility for licensure of individuals who had completed the program.

The contract theory has become a source of meaningful rights for students as well as for institutions, particularly when faculty or administrators either fail to follow institutional policies or apply those policies in an arbitrary way. Students have claimed, and courts have agreed, that student handbooks, college catalogs, and other policy documents are implied-in-fact contracts and that an institution's failure to follow these guidelines is a breach of an implied-in-fact contract (see, for example, *Zumbrun v. University of Southern California*, 101 Cal. Rptr. 499, 502 (Cal. Ct. App. 1972)). Other cases have involved student claims that the totality of the institution's policies and oral representations by faculty and administrators created an implied contract that, if the student paid tuition and demonstrated satisfactory academic performance, he or she would receive a degree. And although some public institutions have escaped liability in contract claims under the sovereign immunity doctrine (see Section 3.3 of this book), not all states apply this doctrine to public colleges (see, for example, *Stratton v. Kent State University*, 2003 Ohio App. LEXIS 1206 (Ohio Ct. App. March 18, 2003) (unpublished)).

The U.S. Court of Appeals for the First Circuit, applying Rhode Island law, provided an explicit recognition of the contractual relationship between a student and a college. In *Mangla v. Brown University*, 135 F.3d 80 (1st Cir. 1998), the court stated:

The student-college relationship is essentially contractual in nature. The terms of the contract may include statements provided in student manuals and registration materials. The proper standard for interpreting the contractual terms is that of "reasonable expectation—what meaning the party making the manifestation, the university, should reasonably expect the other party to give it" [135 F.3d at 83].

Students seeking academic accommodations may combine breach of contract claims with civil rights claims. In *Coddington v. Adelphi University*, 45 F. Supp. 2d 211 (E.D.N.Y. 1999), a student claimed that the private university and several individual administrators had violated the Americans with Disabilities Act (ADA; see Section 8.4 of this book) and breached his contract with the

university by failing to accommodate his learning disabilities. Although the court dismissed the student's ADA claim and the contract claims against individual administrators, the court rejected the university's motion to dismiss the contract claim against the university itself. Noting that the student had paid the required tuition and claimed to have relied upon "admission bulletins and other materials regarding Adelphi's programs and policies regarding students with learning disabilities" and the representations of certain administrators of his right to untimed tests and note takers, the court ruled that the student had sufficiently pleaded "the existence of a contractual agreement" with the university (but not with the individual administrators).

Although it is usually a student who relies on contractual provisions, the case of *Harwood v. Johns Hopkins*, 747 A.2d 205 (Md. Ct. Spec. App. 2000), provides an interesting example of an institution's successful use of a contract theory as a defense to a student lawsuit. Harwood, a student at Johns Hopkins University, had completed all of his degree requirements, but the degree had not yet been conferred when Harwood murdered a fellow student on the university's campus. The university notified Harwood that it would withhold his diploma pending the resolution of the criminal charges. Harwood pleaded guilty to the murder and was incarcerated. He then brought a declaratory judgment action against the university, seeking the conferral of his degree. The university argued that its written policies required students not only to complete the requirements for their degree but also to adhere to the university's code of conduct. The court ruled that, because the murder violated the university's code of conduct, the university had a contractual right to withhold the diploma.

The nature of damages in a successful breach of contract claim was addressed in a case brought under Florida law. In *Sharick v. Southeastern University of the Health Sciences, Inc.*, 780 So. 2d 136 (Fla. Dist. Ct. App. 2000), a fourth-year medical student was dismissed for failing his last course in medical school. He sued the university for breach of contract, and a jury found that the university's decision to dismiss Sharick was arbitrary, capricious, and "lacking any discernible rational basis." Sharick had sought damages for future lost earning capacity as well as reimbursement of the tuition he had paid, but the trial judge would allow the jury only to consider damages related to the tuition payments. Sharick appealed the trial court's ruling on the issue of future lost earnings. The university did not appeal the jury verdict.

The appellate court reversed the trial court's limitation of damages to tuition reimbursement. Since previous cases had established that other contractual remedies, such as specific performance and mandamus to grant a degree, were unavailable to plaintiffs suing colleges, the court stated that damages could properly include the value of the lost degree with respect to Sharick's future earnings. The Supreme Court of Florida first agreed to review the appellate court's ruling then changed its mind, leaving the appellate decision in force (*Southeastern University of the Health Sciences, Inc. v. Sharick*, 822 So. 2d 1290 (Fla. 2002)).

The contract theory of the relationship between students and institutions is still developing. Debate continues on issues such as the means for identifying

the terms and conditions of a student-institution contract, the extent to which a school catalog constitutes part of the contract, and the extent to which an institution retains implied or inherent authority (see Section 3.1) not expressed in any written regulation or policy. Also still debatable is the extent to which courts will rely on certain contract law concepts, such as the doctrines of "unconscionable" contracts and "contracts of adhesion." An unconscionable contract is one that is so harsh and unfair to one of the parties that a reasonable person would not freely and knowingly agree to it. Unconscionable contracts are not enforceable in the courts. In *Albert Merrill School v. Godoy*, 357 N.Y.S.2d 378 (N.Y. Civ. Ct. 1974), the school sought to recover money due on a contract to provide data-processing training. Finding that the student did not speak English well and that the bargaining power of the parties was uneven, the court held the contract unconscionable and refused to enforce it.

A "contract of adhesion" is one offered by one party (usually the party in the stronger bargaining position) to the other party on a "take it or leave it" basis, with no opportunity to negotiate the terms. Ambiguities in contracts of adhesion will be construed against the drafting party (in these cases, the institution) because there was no opportunity for the parties to bargain over the terms of the contract (see, for example, *Corso v. Creighton University*, 731 F.2d 529 (8th Cir. 1984)). See also *K.D. v. Educational Testing Service*, 386 N.Y.S.2d 747 (N.Y. Sup. Ct. 1976), in which the court viewed the plaintiff's agreement with Educational Testing Service to take the Law School Admissions Test (LSAT) as a contract of adhesion, but ruled it valid because it was not "so unfair and unreasonable" that it should be disregarded by use of the available "pretexts," such as a declaration that it violated public policy.

The case of *Kyriazis v. University of West Virginia*, 450 S.E.2d 649 (W. Va. 1994), is an example of a contract of adhesion that a court invalidated as contrary to public policy. In particular, the court's opinion suggests factors relevant to determining whether the bargaining powers of the parties are substantially uneven. In *Kyriazis*, the court found that the university had a "decisive bargaining advantage" over the student because (1) the student had to sign the release as a condition of sports participation and thus had no real choice; (2) the release was prepared by counsel for the university, but the student had no benefit of counsel when he signed the release; and (3) the university's student code required students to follow the directions of university representatives.

Since these contract principles depend on the weak position of one of the parties and on determinations of overall "fairness," courts are unlikely to apply these principles against institutions that deal openly with their students—for instance, by following a good-practice code, operating grievance mechanisms for student complaints (see Sections 9.1.2–9.1.4), and affording students significant opportunity to participate in institutional governance.

Although a promise to treat the other party to a contract fairly and in good faith is part of every contract (Restatement (Second) of Contracts 205 (1981)), most claims by students using this theory have been unsuccessful. For example, in *Napolitano v. Trustees of Princeton University* (discussed in Section 8.6.2 of this book), the court rejected a student's claim that withholding her degree for

one year as punishment for plagiarism was a breach of the covenant of good faith and fair dealing. Said the court: "To upset Princeton's decision here, this court would have to find that Princeton could not in good faith have assessed the penalties it did against the plaintiff" (453 A.2d at 284). Other examples of judicial rejection of these claims are *Coveney v. President and Trustees of the College of the Holy Cross*, 445 N.E.2d 136 (Mass. 1983), and *Seare v. University of Utah School of Medicine*, 882 P.2d 673 (Utah Ct. App. 1994). But if the facts demonstrate what a court may view as arbitrary or unreasonable behavior by faculty or administrators, the court may, in fact, rule that the covenant of good faith was breached (see, for example, *University of Southern Mississippi v. Williams*, 891 So.2d 160 (Miss. 2005)).

Students enrolled in programs that are terminated or changed prior to the students' graduation have found some state courts to be receptive to their claims that promotional materials, catalogs, and policy statements are contractually binding on the institution. An illustrative case is *Craig v. Forest Institute of Professional Psychology*, 713 So. 2d 967 (Ala. Civ. App. 1997), in which four students filed state law breach of contract and fraud claims against Forest. Forest, whose main campus was located in Wheeling, Illinois, opened a satellite campus in Huntsville, Alabama, and offered a doctoral degree program in psychology. Although the Huntsville campus was not accredited by the American Psychological Association, a regional accrediting association, or the state, Forest's written materials allegedly implied that its graduates were eligible to sit for licensing examinations and to be licensed in Alabama. The Alabama Board of Examiners would not allow Forest graduates to sit for a licensing examination because its regulations provided that only graduates of accredited institutions were eligible to take the examination.

The Alabama campus proved to be a financial drain on Forest, and it closed the campus before the students had completed their doctorates. Because the college was not accredited, the students were unable to transfer credits earned at Forest to other doctoral programs.

The students' claims were based on the college's alleged promises that they could obtain a doctorate at the Huntsville campus and be eligible for licensure in Alabama. The trial court granted summary judgment to the college, but the appellate court reversed. Disagreeing with a ruling by the South Dakota Supreme Court in an earlier case, *Aase v. State*, 400 N.W.2d 269 (S.D. 1987), the court ruled that "it is not clear that Forest fulfilled all of its contractual obligations to the students merely by providing them with instruction for which they had paid tuition on a semester-by-semester basis" (713 So. 2d at 973). The scope of the contract could not be determined without a trial, said the court; although Forest had pointed to language in one publication that reserved its right to modify or discontinue programs, the court stated that this language was not "dispositive" and that all relevant documents needed to be considered. The court also ruled that a trial was necessary on the plaintiffs' fraud claims.

The concept of fiduciary duty, once applied primarily in the higher education context to members of an institution's board of trustees and senior administrators, is now being discussed as a potential duty assumed by academic

advisors, particularly with respect to the relationship between a graduate student and his or her thesis advisor. *Black's Law Dictionary* defines "fiduciary" as a relationship "founded on trust or confidence reposed by one person in the integrity and fidelity of another." It does not arise from contract, and typically requires a higher standard of conduct than the contractual concept of "good faith and fair dealing." Students have attempted to use this theory to argue that a graduate student depends upon the thesis advisor for assistance and support, and that the advisor must behave with complete integrity in carrying out his or her duties and always act in the best interest of the student.

Although one trial court found that there could be a fiduciary relationship between a graduate student and his advisor (*Johnson v. Schmitz*, discussed in Section 3.3), a state appellate court has rejected that theory. In *Swenson v. Bender*, 764 N.W.2d 596 (Minn. Ct. App. 2009), a doctoral student who was enrolled at Cappella University, an all-online university, sued her former advisor for breach of a fiduciary duty. The student, Swenson, accused the advisor, Bender, an adjunct instructor at the university, of "stealing" her dissertation idea and falsely accusing the student of plagiarism. Although Bender was not the chair of Swenson's dissertation committee, Bender worked closely with Swenson and shared many ideas with her. The two had discussed collaborating on a coauthored book and article. At some point disagreement arose about how to attribute credit for theoretical constructs the two had discussed while Bender was advising Swenson on her dissertation. Swenson accused Bender of "sabotaging" Swenson's efforts to obtain the doctoral degree and of "stealing" her ideas for use on Bender's academic Web site. Bender accused Swenson of plagiarism in her dissertation. The university's academic standards committee investigated but took no position on the plagiarism accusations. The committee did conclude, however, that Bender acted unethically by developing a personal relationship with Swenson; but the committee could not determine which material in Swenson's dissertation was her own and which should be attributed to Bender. The committee, which now no longer included Bender, required Swenson to rewrite her dissertation.

Swenson sued for conversion and breach of fiduciary duty. Although the trial court ruled for Swenson on the fiduciary duty claim, it rejected her conversion claim. Bender appealed. The appellate court reversed the trial court's ruling on the fiduciary duty claim. The trial court had based its ruling on three factors underpinning the relationship between a dissertation advisor and a doctoral student: (1) the relationship of trust and deference by the student, (2) the advisor's sole duty to assist the student with the dissertation, and (3) the student's reliance on the advisor in refining the dissertation and conducting the research and writing.

The appellate court stated that a dissertation committee member, even the chair, has an "independent obligation" to the university and does not just act on behalf of the student. Furthermore, the court noted that a faculty member has an obligation to report plagiarism. Because Bender's obligations were in some respects contrary to Swenson's interests (Bender's duty to be critical of the research and writing, her obligation to report academic misconduct), the

court concluded that there could be no fiduciary duty between Swenson and Bender, and thus there was no breach.

In the context of a sexual harassment claim, however, a state's highest court approved of the use of fiduciary duty theory. See *Schneider v. Plymouth State College*, 744 A.2d 101 (N.H. 1999), discussed in Section 9.5. The court pointed to the power differential between the student and the professor, and the student's dependence upon the professor for grades, letters of reference, and other matters important to the student's academic career.

Contract law has become an important source of legal rights for students. Postsecondary administrators should be sensitive to the language used in all institutional rules and policies affecting students. Language suggestive of a commitment (or promise) to students should be used only when the institution is prepared to live up to the commitment. Limitations on the institution's commitments should be clearly noted where possible, and reservation of rights language should be used wherever appropriate. Administrators should consider the adoption of an official policy, perhaps even a "code of good practice," on fair dealing with students, and provide avenues for internal appeal of both academic and disciplinary decisions.

**7.1.4. Student academic freedom.** Student academic freedom is not as well developed as faculty academic freedom (the focus of Chapter 6), either in terms of custom or in terms of law. Nevertheless, like faculty academic freedom, student academic freedom has important historical antecedents and is widely recognized in the academic community. Moreover, since the early 1990s, developments in academia and in the courts have focused attention on the academic freedom of students and raised new questions about its status and role.

The concept of student academic freedom was imported into the United States from Europe, where, in German universities, it was known as *Lernfreiheit*, the freedom to learn. In 1915, in its foundational "General Declaration of Principles," the American Association of University Professors (AAUP) recognized *Lernfreiheit*, the student's freedom to learn, as one of the two components of academic freedom—the other being *Lehrfreiheit*, the teacher's freedom to teach (*AAUP Policy Documents and Reports* (the "Redbook") (10th ed., 2006, 291–301). In the classic "1940 Statement of Principles on Academic Freedom and Tenure," the AAUP and the Association of American Colleges and Universities, eventually joined by more than 150 other higher education and professional associations as endorsers, specifically acknowledged "the rights of the . . . student to freedom in learning" (*AAUP Policy Documents and Reports*, 3). Subsequently, in its "Statement on Professional Ethics" (promulgated in 1966 and revised in 1987), the AAUP emphasized professors' responsibility to "encourage the free pursuit of learning in their students" and to "protect their academic freedom" (*AAUP Policy Documents and Reports*, 171).

In 1967, representatives of the AAUP, the Association of American Colleges and Universities, the U.S. Student Association, the National Association of

Student Personnel Administrators, and the National Association for Women in Education promulgated a "Statement on Rights and Freedoms of Students" that was endorsed by all five organizations and various other higher education and professional associations. The Joint Statement recognizes the "freedom to learn" and the freedom to teach as "inseparable facets of academic freedom" and emphasizes that "students should be encouraged to develop the capacity for critical judgment and to engage in a sustained and independent search for truth" (*AAUP Policy Documents and Reports*, 273). The statement then elucidates "the minimal standards of academic freedom of students" that apply "in the classroom, on the campus, and in the larger community." This very helpful listing and exposition includes the freedom of "discussion, inquiry, and expression" in the classroom and in conferences with the instructor; the freedom "to organize and join associations" of students, "to examine and discuss" issues and "express opinions publicly and privately" on campus, and "to invite and to hear" guest speakers; the freedom "individually and collectively [to] . . . express views on issues of institutional policy" and "to participate in the formulation and application of institutional policy affecting academic and student affairs"; the "editorial freedom of student publications," that is, "sufficient editorial freedom and financial autonomy . . . to maintain their integrity of purpose as vehicles for free inquiry . . . in an academic community"; and the freedom, "[a]s citizens," to "exercise the rights of citizenship," such as "freedom of speech, peaceful assembly, and right of petition," both on and off campus (*id.* at 273-76). In 1992, the Joint Statement was reviewed, updated (with interpretive footnotes), and reaffirmed by an interassociation task force.

Beginning in the 1950s, the U.S. Supreme Court has gradually, but increasingly, recognized student academic freedom. In one of the earliest and most influential academic freedom cases, *Sweezy v. New Hampshire*, Chief Justice Warren's plurality opinion declared that "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die" (354 U.S. 234, 250 (1957) (emphasis added)). In subsequent years, the Court decided various cases in which it protected students' rights to freedom of speech, press, and association on campus (see, for example, *Widmar v. Vincent*, 454 U.S. 263 (1981), discussed in Section 10.1.5, and *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973), discussed in Section 10.3.5). These cases typically were based on generic First Amendment principles that apply both outside and within the context of academia (for example, the "public forum" principles used in *Widmar*) and did not specifically rely on or develop the concept of student academic freedom. In one of these cases, however, *Healy v. James*, 408 U.S. 169 (1972) (Sections 9.4.1 and 10.1.1 of this book), the Court did emphasize that, in upholding the students' right to freedom of association, it was "reaffirming this Nation's dedication to safe-guarding academic freedom" (408 U.S. at 180-81, citing *Sweezy*). Then, in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), the Court, citing both *Sweezy* and *Healy*, further linked student free expression rights with student academic freedom and provided historical context for the linkage.

*Rosenberger* involved a university's refusal to provide student activities funds to a student organization that published a Christian magazine. The Court determined that the refusal was "viewpoint discrimination" that violated the students' right to freedom of expression. (For discussion of this aspect of *Rosenberger*, see Section 10.3.2.) In supporting its conclusion, the Court reasoned:

The danger [of chilling expression] is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. See *Healy v. James*, 408 U.S. 169, 180–181 (1972); *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn. See generally R. Palmer & J. Colton, *A History of the Modern World* 39 (7th ed. 1992). The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses [515 U.S. at 835–36 (emphasis added)].

Thus, although *Rosenberger* is based on free speech and press principles like those the Court used in the earlier students' rights cases, it goes further than these cases in stressing the academic freedom context of the dispute and in emphasizing the student's freedom to learn as well as the student's more generic right to speak.

The case of *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), a mandatory student fees case coming five years after *Rosenberger*, can also be seen as a student academic freedom case. (*Southworth* is discussed in Section 10.1.3 of this book.) Justice Kennedy's majority opinion in *Southworth* did not specifically invoke academic freedom, as his previous majority opinion did in *Rosenberger*, and the students did not prevail in *Southworth* to the extent that they had in *Rosenberger*. Nevertheless, the Court made clear that the justification for subsidizing student organizations through mandatory fee allocations is to provide students "the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall" (529 U.S. at 233). A university that subsidizes student speech for this purpose, however, has a "corresponding duty" to avoid infringing "the speech and beliefs" of students who object to this use of their student fees—a duty that may be fulfilled by assuring that the mandatory fee system is "viewpoint-neutral" (*id.* at 231–33). Thus, the overall justification for the viewpoint-neutral mandatory fee system is, in effect, the promotion of student academic freedom; the university's "duty" to protect objecting students is, in effect, a duty to protect their academic freedom; and the students' right to insist on such protection is, in effect, a First Amendment academic freedom right.

IIRIRA is not... financial aid for undocumented... passing laws allowing undocumented students to qualify for in-state tuition rates or state financial aid (see, for example, Kan. Stat. Ann. §76-731(a) 2004) (litigated in *Day v. Bond*, 500 F. 3d 1127, but without any ruling on the merits), and a 2011 California law providing that undocumented students who graduated from California high schools are eligible for state-provided financial aid (2011 Cal. Legis. Serv. 2113 (West) and 2011 Cal. Legis. Serv. Ch. 604 (A.B. 131) (Westlaw)). In other states, such as Rhode Island, the state higher education board has extended in-state tuition rates to undocumented aliens (see E. Niedowski, "R.I. Education Board OK's In-State Tuition for Undocumented Students," September 27, 2011, available at [http://articles.boston.com/2011-09-27/news/30209209\\_1\\_illegal-immigrants-tuition-rates-reward-illegal-behavior](http://articles.boston.com/2011-09-27/news/30209209_1_illegal-immigrants-tuition-rates-reward-illegal-behavior)). Other states, however, are passing laws that prohibit undocumented aliens from qualifying, on the basis of residency, for financial aid or in-state tuition rates. (See, for example, S.C. Code Ann. § 59-101-430(B).) Both types of laws are being challenged in court. And in some other states, state universities have allowed certain undocumented aliens to qualify for in-state tuition without the support of post-IIRIRA state legislation.

For information and citations on recent developments in state legislatures, Congress, and the courts, from 2005 to the present, go to <http://www.law.uh.edu/ihehg>, and click on "Downloadable Materials" in the upper right-hand corner (Web site of the Institute for Higher Education Law and Governance; recent developments compiled by Michael Olivas).

## Section 7.4. Student Housing

**7.4.1. Overview.** Postsecondary institutions with residential campuses usually have policies specifying which students may, and which students must, live in campus housing. Such regulations sometimes apply only to certain groups of students, using classifications based on the student's age, sex, class, or marital status. Institutions also typically have policies regulating living conditions in campus housing. Students in public institutions have sought to use the federal Constitution to challenge such housing policies, while students at both public and private colleges have used landlord-tenant law or nondiscrimination law to challenge housing regulations.

Challenges to housing regulations typically fall into two categories: challenges by students required to live on campus who do not wish to, and challenges by students (or, occasionally, nonstudents) who wish to live in campus housing (or housing affiliated with a college), but who are ineligible under the college's regulations. Besides these two types of challenges to student housing policies, there are also constitutional challenges to the authority of personnel of public institutions to enter student rooms without permission

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(see Section 7.4.3 of this book). In addition, there are cases concerning the potential tort liability of residential colleges and universities for foreseeable harm that occurs in a residence unit to students who live there. (See generally Section 7.6.2 of this book; and for an example in the same section, see *Knoll v. Board of Regents of the University of Nebraska*, which discusses institutional liability for an off-campus injury that occurred in a fraternity house subject to the college's student housing policies.)

An example of the first type of challenge is *Prostrollo v. University of South Dakota*, 507 F.2d 775 (8th Cir. 1974). In *Prostrollo*, students claimed that the university's regulation requiring all single freshmen and sophomores to live in university housing was unconstitutional because it denied them equal protection under the Fourteenth Amendment and infringed their constitutional rights of privacy and freedom of association. The university admitted that one purpose of the regulation was to maintain a certain level of dormitory occupancy to secure revenue to repay dormitory construction costs. But the university also offered testimony that the regulation was instituted to ensure that younger students would educationally benefit from the experience in self-government, community living, and group discipline and the opportunities for relationships with staff members that dormitory life provides. In addition, university officials contended that the dormitories provided easy access to study facilities and to films and discussion groups.

Although the lower court ruled that the regulation violated the equal protection clause, the appellate court reversed the lower court's decision. The appellate court reasoned that, even if the regulation's primary purpose was financial, there was no denial of equal protection because there was another rational basis for differentiating freshmen and sophomores from upper-division students: the university officials' belief that the regulation contributed to the younger students' adjustment to college life. The appellate court also rejected the students' challenges based on right to privacy and freedom of association. The court gave deference to school authorities' traditionally broad powers in formulating educational policy.

Conflicts about residence hall policies may also arise if there are Greek organizations with houses in which their student members wish to live. In *Illinois Beta Chapter of Sigma Phi Epsilon Fraternity Alumni Board v. Illinois State Institute of Technology*, 946 N.E.2d 1118 (Ill. App. Ct. 2011), a fraternity sought to enjoin the Institute from enforcing residence hall contracts for students who had signed housing contracts but subsequently moved into fraternity houses during their first semester on campus. (Students who moved to a fraternity house during the second semester were released from their housing contract.) The fraternity noted that a 1964 agreement with the Institute promised that the Institute would not "unreasonably refuse" to assign students to fraternity houses, and that the Institute's insistence on retaining the first-semester housing fee would have serious financial implications for the fraternity. Although the trial court granted the preliminary injunction, the appellate court reversed, stating that the dispute was not yet ripe for litigation and a breach of contract lawsuit would provide an adequate remedy for any losses incurred.

**7.4.2. Discrimination claims.** Campus housing policies also may result in discrimination claims, either from students who wish to live in campus housing or from those who do not. Although early cases involved age and sex discrimination claims, conflict more recently has involved students with disabilities and gay or transgendered students and campus housing policies.

A housing regulation that used an age classification to prohibit certain students from living off campus was at issue in *Cooper v. Nix*, 496 F.2d 1285 (5th Cir. 1974). The regulation required all unmarried full-time undergraduate students, regardless of age and whether or not emancipated, to live on campus. The regulation contained an exemption for certain older students, which in practice the school enforced by simply exempting all undergraduates 23 years old and over. Neither the lower court nor the appeals court found any justification in the record for a distinction between 21-year-old students and 23-year-old students. Though the lower court had enjoined the school from requiring students 21 and older to live on campus, the appeals court narrowed the remedy to require only that the school not automatically exempt all 23-year-olds. Thus, the school could continue to enforce the regulation if it exempted students over 23 only on a case-by-case basis.

A regulation that allowed male students but not female students to live off campus was challenged in *Texas Woman's University v. Chayklintaste*, 521 S.W.2d 949 (Tex. Civ. App. 1975), and found unconstitutional. Though the university convinced the court that it did not have the space or the money to provide on-campus male housing, the court held that mere financial reasons could not justify the discrimination. The court concluded that the university was unconstitutionally discriminating against its male students by not providing them with any housing facilities and also was unconstitutionally discriminating against its female students by not permitting them to live off campus.

The university subsequently made housing available to males and changed its regulations to require both male and female undergraduates under twenty-three to live on campus. Although the regulation was now like the one found unconstitutional in *Cooper*, above, the Texas Supreme Court upheld its constitutionality in a later appeal of *Texas Woman's University v. Chayklintaste*, 530 S.W.2d 927 (Tex. 1975). In this case the university justified the age classification with reasons similar to those used in *Prostrollo* (discussed in Section 7.4.2). The university argued that on-campus dormitory life added to the intellectual and emotional development of its students and supported this argument with evidence from published research and experts in student affairs.

In *Bynes v. Toll*, 512 F.2d 252 (2d Cir. 1975), another university housing regulation was challenged—in this case a regulation that permitted married students to live on campus but barred their children from living on campus. The court found that there was no denial of equal protection, since the university had several very sound safety reasons for not allowing children to reside in the dormitories. The court also found that the regulation did not interfere with the marital privacy of the students or their natural right to bring up their children.

Housing regulations limiting residence hall visitors have also been constitutionally challenged. In *Futrell v. Ahrens*, 540 P.2d 214 (N.M. 1975), students

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claimed that a regulation prohibiting visits by members of the opposite sex in dormitory bedrooms violated their rights of privacy and free association. The regulation did not apply to the lounges or lobbies of the dorms. The court held for the institution, reasoning that even if the regulation affected rights of privacy and association, it was a reasonable time-and-place restriction on exercise of those rights, since it served legitimate educational interests and conformed with accepted standards of conduct.

A federal court's analysis of a student's religious discrimination challenge to mandatory on-campus residency is instructive. In *Rader v. Johnston*, 924 F. Supp. 1540 (D. Neb. 1996), an eighteen-year-old first-year student at the University of Nebraska at Kearney brought a First Amendment challenge to the university's policy requiring first-year students to live on campus. Students who were nineteen, married, or living with their parents or legal guardians were expressly exempted from the policy. The rationale for the policy, according to the university, was that it "fosters diversity, promotes tolerance, increases the level of academic achievement, and improves the graduation rate of its students, [while] ensur[ing] full occupancy of . . . residence halls" (924 F. Supp. at 1543). The student contended that living in the campus residence halls would hinder the free exercise of his religion. Since he did not qualify for exemption under any of the enumerated exceptions to the residency policy, he petitioned the university for an ad hoc exemption "on the ground that his religious convictions exhort him to live in an environment that encourages moral excellence during [his] college career," and, to this end, he requested that the university "allow him to live with other students of similar faith in the Christian Student Fellowship facility, across the street from the . . . campus." The university denied the student's request, citing its rationale for the residency requirement and finding that nothing in the residence hall environment would hinder the student's practice of religion.

The court, relying on a U.S. Supreme Court decision in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (Section 1.6.2 of this book), found in favor of the student. It noted that more than one-third of first-year students had been granted exemptions from the residency requirement under both enumerated and ad hoc exemptions for nonreligious reasons, but not for religious reasons. Under *Lukumi Babalu Aye*, therefore, the university's on-campus residency policy for first-year students was not "generally applicable" or "neutrally applied" to all students and could withstand judicial scrutiny, as applied to Rader, only if the denial of his request for an exception "serves a compelling state interest." Conceding that the university's interests could be legitimate and important, the numerous exemptions undercut the university's argument that its interest was compelling. These interests therefore could not justify the resulting infringement on Rader's free exercise rights.

Students lodged a claim against Yale University that was similar to the Rader claim. This suit was dismissed by a federal district court in *Hack v. The President and Fellows of Yale College*, 16 F. Supp. 2d 183 (D. Conn. 1998), affirmed, 237 F.3d 81 (2d Cir. 2000). Yale required all unmarried freshman and sophomore students under twenty-two years old to live in campus housing.

Four Orthodox Jewish undergraduate students requested exemptions from the housing requirement because all of Yale's residence halls were coeducational, and the students stated that their religion forbade them to live in a coeducational environment. When the university refused to exempt the students from the housing requirement, they filed a lawsuit claiming that the housing policy violated the U.S. Constitution by interfering with their free exercise of religion, that it also violated the Fair Housing Act (FHA) and the Sherman Antitrust Act, and that it constituted a breach of contract.

The court dismissed the students' constitutional claims, ruling that Yale was a private university and not subject to constitutional restrictions. The students had claimed that, because the governor and lieutenant governor of Connecticut were ex officio members of Yale's governing body, the university was a state actor. Citing *Lebron v. National Passenger R.R. Corp.*, 513 U.S. 374 (1995) (Section 1.5.2 of this book), the court ruled that having two public officials on a governing board of nineteen was insufficient under the test articulated in *Lebron* to constitute state action. The court then ruled that the plaintiffs did not have standing to sue under the Fair Housing Act because Yale had not refused to provide housing to the students on the basis of their religion; it had provided them housing that they had paid for, but in which they refused to live.

With respect to the antitrust claim, the court ruled that the students' complaint had not specifically stated whether the tying market that Yale was alleged to be attempting to monopolize was "a general university education or an Ivy League education" (16 F. Supp. 2d at 195). Furthermore, said the court, the plaintiffs had not identified the relevant market at issue; substitutes for Yale's campus housing could be obtained by attending a different university. Despite the plaintiffs' attempt to argue that the outcome in the Hamilton College antitrust case (Section 10.2.2) protected their claim against dismissal, the court responded that the Hamilton College case merely established that a private college affected interstate commerce, and that the plaintiffs' failure to define the relevant market alleged to be monopolized by Yale doomed their complaint to failure.

Federal civil rights regulations limit administrators' authority to treat students differently on grounds of race, sex, age, or disability. The Title VI regulations (see Section 11.5.2) apparently prohibit any and all different treatment of students by race (34 C.F.R. §§ 100.3(b)(1)–(b)(5), 100.4(d)). The Title IX regulations (see Section 11.5.3 of this book) require that the institution provide amounts of housing for female and male students proportionate to the number of housing applicants of each sex, that such housing be comparable in quality and in cost to the student, and that the institution not have different housing policies for each sex (34 C.F.R. §§ 106.32, 106.33). Furthermore, a provision of Title IX (20 U.S.C. § 1686) states that institutions may maintain single-sex living facilities.

Title IX's recognition that single-sex residence halls do not discriminate on the basis of sex was important to the outcome of a discrimination claim brought under the District of Columbia's Human Rights Act. In 2011, the president of Catholic University announced that the university would require

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first-year students to live in single-sex residence halls. The justification for this policy change was that the university administration believed the policy would reduce binge drinking and sexual promiscuity among first-year students. John Banzhaf, a professor at George Washington University Law School, filed a sex discrimination complaint with the District of Columbia's Office of Human Rights. That agency dismissed the complaint, ruling that single-sex residence halls do not violate the D.C. law's prohibition on sex discrimination because the university treated men and women the same. In *Banzhaf v. Garvey*, Docket No. 11-343-EI (D.C. Office of Human Rights, Nov. 29, 2011), the agency reasoned that if Banzhaf's interpretation of the law were credited, the university could not maintain single-sex restrooms, locker rooms, or athletic teams.

The regulations for Section 504 of the Rehabilitation Act on discrimination against people with disabilities (see Section 11.5.4 of this book) require institutions to provide "comparable, convenient, and accessible" housing for students with disabilities at the same cost as for nondisabled students (34 C.F.R. § 104.45). The regulations also require colleges to provide a variety of housing and that students with disabilities be given a choice among several types of housing (34 C.F.R. § 104.45(a)).

In *Fleming v. New York University*, 865 F.2d 478 (2d Cir. 1989), a graduate student who used a wheelchair claimed that the university overcharged him for his room, in violation of Section 504 of the Rehabilitation Act. The trial court dismissed his claim, and the appellate court affirmed. The student had requested single occupancy of a double room as an undergraduate; the university charged him twice the rate that a student sharing a double room paid. After intervention by the U.S. Office for Civil Rights, the university modified its room charge to 75 percent of the rate for two students in a room.

When the student decided to enroll in graduate school at the university, he asked to remain in the undergraduate residence hall. The university agreed and charged him the 75 percent fee. However, because of low occupancy levels in the graduate residence halls, graduate students occupying double rooms there were charged a single-room rate. When the student refused to pay his room bills, the university withheld his master's degree. The court ruled that the student's claim for his undergraduate years was time barred. The claim for disability discrimination based on the room charges during his graduate program was denied because the student had never applied for graduate housing; he had requested undergraduate housing. There was no discriminatory denial of cheaper graduate housing, the court said, because the student never requested it.

But in *Fialka-Feldman v. Oakland University Board of Trustees*, 678 F. Supp. 2d 576 (E.D. Mich. 2009), the plaintiff, a student with cognitive disabilities, was enrolled at the university in a non-credit continuing education program. He applied to live in on-campus housing, but his application was denied because he was not enrolled in a degree-granting program, which was required by the university's housing policy. The plaintiff sued under the Fair Housing Act, the Americans with Disabilities Act (ADA), and Section 504 of the Rehabilitation Act. The plaintiff later dropped his claim under the Fair Housing Act.

The university defended its policy, stating that the plaintiff was not a "qualified" student with a disability because he was not enrolled in a degree-granting program. The plaintiff argued that it was his cognitive disability that prevented him from pursuing a degree, and therefore the disability itself was the reason he was not permitted to live in campus housing. Although the university argued that allowing non-degree students to live in campus housing would defeat the academic purpose of such housing, the court characterized the plaintiff's request as a waiver of the housing policy for him alone rather than a change to the housing policy for all non-degree students. The court concluded that the university's refusal to engage in the interactive process required by the ADA and Section 504 violated these laws, and awarded summary judgment to the plaintiff. The court awarded summary judgment to the university on the plaintiff's disparate treatment claim, noting that he had been denied campus housing not because of his disability, but because of his enrollment status. The university appealed the summary judgment ruling; the appellate court ruled that since the student had completed the program and did not intend to return for more education, the appeal was moot. The appellate court vacated the judgment below (639 F.3d 711 (6th Cir. 2011)).

Students with disabilities may ask to bring service animals or comfort animals to campus and ask that they reside with them in their residence hall room (and perhaps accompany them to class). Under Titles II and III of the ADA, public colleges and private colleges that are "places of public accommodation" must modify their policies and practices to accommodate the use of a service animal by a person with a disability. The Department of Justice, which enforces Titles II and III of the ADA, defines a service animal as "any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability" (28 C.F.R. §35.104). Comfort animals are not included within the definition of service animal. Section 504 also requires recipients of federal funds to permit "dog guides" in campus buildings (34 C.F.R. § 104.44(b)).

The Fair Housing Act defines an "assistance animal" more broadly than the ADA's definition of a "service animal," and includes "emotional support" animals within its definition (73 Fed. Reg. 63836 (October 27, 2008)). The institution is allowed to require students requesting housing for an assistance animal to provide medical documentation that the animal "alleviates at least one of the identified symptoms or effects of the existing disability" (73 Fed. Reg. 63835). The Fair Housing Act regulations include college residence halls within their definition of "dwelling unit" (24 C.F.R. §100.201); although there have been few judicial rulings on the application of the Fair Housing Act to campus residence halls, the Department of Housing and Urban Development has indicated an intention to pursue enforcement actions in academe and initiated one action, which was settled, against Millikin University (*United States v. Millikin University*, FHEO No. 05-06-0829-8 (September 18, 2009)).

In late 2011, the U.S. Department of Justice filed a lawsuit against the University of Nebraska at Kearney, stating that the university's denial of the request of a student with a psychological disorder to keep a therapy dog in her

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apartment, owned by the university, violated the Fair Housing Act. In *United States of America v. University of Nebraska at Kearney*, 2013 U.S. Dist. LEXIS 56009 (D. Neb. Apr. 19, 2013), the trial court denied the university's motion for summary judgment, concluding that the antidiscrimination provisions of the Fair Housing Act apply to university housing. And in *Velzen v. Grand Valley State University*, 2012 U.S. Dist. LEXIS 145666 (W.D. Mich. October 10, 2012), a student was prescribed an "emotional support" animal to help control her depression. When Velzen asked that she be allowed to keep her guinea pig in her residence hall apartment, the request was denied because the animal did not meet the definition of "service animal" in that it was not trained to do work or perform tasks. The lawsuit sought injunctive relief and compensatory damages. Although the university asked the court to dismiss all of the claims, the plaintiffs' claims for injunctive relief under the Fair Housing Act and the compensatory damage claim for failure to accommodate under the Rehabilitation Act survived dismissal. The case was settled in 2013.

State laws may have broader definitions of "service animal" than the federal definition, so counsel should refer to state as well as federal law in this regard.

Another group protesting discrimination in housing policies are same-sex couples. These couples have claimed that because they are not allowed to marry, they are unfairly excluded from a benefit extended to married students. Furthermore, since many colleges and universities prohibit discrimination on the basis of sexual orientation, gay couples have argued that denying them housing violates the institution's nondiscrimination regulations. Several universities, including the University of Pennsylvania and Stanford University, have provided university housing to unmarried couples, including those of the same sex.

In *Levin v. Yeshiva University*, 691 N.Y.S.2d 280 (Sup. Ct. N.Y. 1999), affirmed, 709 N.Y.S.2d 392 (N.Y. App. Div. 2000), affirmed in part and modified in part, 96 N.Y.2d 484 (N.Y. 2001), a same-sex couple who were medical students at the university wished to live in university housing that was reserved for married students, their spouses, and dependent children. The medical school required proof of marriage in order for spouses to live with students in campus apartments. The plaintiffs had been offered student housing but were not permitted to live together. They argued that they were in a long-term committed relationship and that the medical school's housing regulations violated the New York State Roommate Law (N.Y. Real Prop. Law § 235-f) and the New York State and New York City Human Rights Laws (N.Y. Exec. Law §§ 296(2-a), 296(4), 296(5); N.Y.C. Admin. Code § 8-197(5)), because the regulations discriminated against the plaintiffs on the basis of their marital status. They also argued that the housing regulations had a discriminatory impact upon them because of their sexual orientation.

The trial court rejected all the plaintiffs' claims. Regarding marital status discrimination, the court cited New York case law that permitted landlords to "recogniz[e] the institution of marriage and distinguish between married and unmarried couples" (691 N.Y.S.2d at 282). The plaintiffs were not denied housing by the medical school, said the court; they were provided the same type of

housing for which other single students were eligible. Furthermore, New York appellate courts had ruled that a domestic partnership was not a marriage for purposes of health benefits for public school teachers. Regarding the disparate impact claim, the court repeated that the plaintiffs had been given housing by the medical school and that Yeshiva University was not responsible for the fact that they could not marry.

Finally, the court rejected the claim under New York's Roommate Law that allows tenants to live with their spouses and children, or with friends of their own choosing. This law was not intended to cover college housing, according to the court, because college housing is short term, available only as long as the tenants are students, provided as a benefit and a convenience to students, and offered at below-market rates.

The students appealed, and although the appellate court affirmed the trial court's ruling in all respects, the students' subsequent appeal to New York's highest court was somewhat more successful. Although the high court affirmed the lower courts' rulings on marital status discrimination, the high court also reinstated the plaintiffs' cause of action claiming that the housing policy had a disproportionate impact on homosexuals, a potential violation of New York City's Human Rights Law. (Same-sex marriage is now legal in the state of New York, so the reasoning of this case will no longer apply to same-sex couples in those states that recognize same-sex marriages.)

Housing for transgender students has raised numerous practical issues on campus. Many colleges assign same-sex roommates, which may pose a problem for students in transition to a different gender. Locker rooms and restrooms are single-sex, which also may pose problems for students either in transition or who have completed the transition to the other gender. Particularly for those institutions that have added "gender identity or expression" as a category that is protected under their nondiscrimination policy (whether or not state law provides similar protection), housing and similar sex-related assignments may need to be rethought.

What is the responsibility—and potential legal liability—of an institution when a nonstudent who resides on campus engages in harassing or discriminatory behavior toward a student (or employee)? The New Jersey Supreme Court addressed that issue in *Godfrey v. Princeton Theological Seminary*, 952 A.2d 1034 (N.J. 2008). In *Godfrey*, two students at a private religiously affiliated institution sued the seminary under both Title IX and the New Jersey Law Against Discrimination, which forbids discrimination on the basis of sex in places of public accommodation. The students alleged that a tenant who lived in one of the seminary's housing units on campus, who was neither a student nor an employee, had stalked them, attempted to coerce them into a social relationship, and engaged in other behaviors that were annoying and bothersome. The students argued that the seminary had not responded appropriately to their complaints, first telling them that it was a police matter and not the seminary's responsibility, and later warning them that they could be liable for defamation if they persisted in complaining about the tenant's behavior to seminary authorities.

The court did not address whether the state nondiscrimination law's definition of "place of public accommodation" applied to a religiously affiliated or maintained by a bona fide religious or sectarian institution" (N.J. Stat. Ann. § 10:5-5(1)), because the trial and appellate courts had determined that the behavior complained of by the students did not meet the "severe or pervasive" requirement of the Court's earlier jurisprudence on sexual harassment. The trial and appellate courts had also found that the seminary's response to the students' complaints was not deliberately indifferent, and thus their Title IX claim failed as well. The New Jersey Supreme Court did, however, comment that had the behavior been more severe, or more pervasive, liability might have been found, and criticized the seminary for what the court perceived as an inadequate response to the students' concerns.

Counsel might consider reviewing their institution's policy against harassment to ensure that it applies to harassment of a student or employee by individuals who are not students or employees but who are on campus because of either a relationship with a student (for example, a student's spouse or partner living in on-campus housing) or because they are a vendor or independent contractor. Other types of individuals whose behavior might cause liability for institutions include individuals attending summer or winter break programs (such as programs for alumni) or guest lecturers who are housed on campus during their visit. The defendant seminary in *Godfrey* appeared reluctant to take action against the alleged harasser because he was neither a student nor an employee; under both Title IX and state nondiscrimination laws, this may not be an adequate defense to a claim of harassment.

Taken together, these cases indicate that the courts afford colleges some leeway in regulating on-campus student housing. An institution may require some students to live on campus; may regulate living conditions to fulfill legitimate health, safety, or educational goals; and may apply its housing policies differently to different student groups (as long as it does not violate the nondiscrimination laws). If students are treated differently, however, the basis for classifying them should be reasonable. The cases above suggest that classification based solely on financial considerations may not meet that test. Administrators should thus be prepared to offer sound nonfinancial justifications for classifications in their residence rules—such as the promotion of educational goals, the protection of the health and safety of students, or the protection of other students' privacy interests.

**7.4.3. Searches and seizures.** The Fourth Amendment secures an individual's expectation of privacy against government encroachment by providing that

the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

and scholars, and a more comprehensive and frequently updated reference on federal requirements for students and visitors.

Due to SEVIS and the expanded reporting requirements for institutions, as well as the increased access of federal investigators to information concerning international students, their privacy has been a growing concern. While the Family Educational Rights and Privacy Act (FERPA) (Section 7.8.1 of this book) continues to protect the privacy of international students' student records, the federal government may now waive some FERPA requirements as needed to operate SEVIS (see Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), section 641(c)(2), 8 U.S.C. § 1372(c)(2)), and to fight terrorism (see USA PATRIOT Act, section 507, 20 U.S.C. § 1232g(j)).

## ***Section 7.8. Student Records***

***7.8.1. Family Educational Rights and Privacy Act (FERPA).*** The Family Educational Rights and Privacy Act of 1974 (20 U.S.C. § 1232g), popularly known as FERPA (or sometimes as the Buckley Amendment, after its principal senatorial sponsor), places significant limitations on colleges' disclosure and handling of student records. The act and its implementing regulations, 34 C.F.R. Part 99, apply to all public and private educational agencies or institutions that receive federal funds from the U.S. Department of Education or whose students receive such funds and pay them to the agency or institution (34 C.F.R. § 99.1). While FERPA does not invalidate common law or state statutory law applicable to student records (see Section 8.8.2), the regulations are so extensive and detailed that they are the predominant legal consideration in dealing with student records.

FERPA establishes three basic rights for college students: the rights (1) to inspect their own education records; (2) to request that corrections to the records be made if the information in them was recorded inaccurately (and, if the school refuses, the right to a hearing by the school to determine whether the records should be corrected); and (3) to restrict the access of others (in some cases including even the students' own parents<sup>12</sup>) to personally identifiable records unless one of a number of enumerated exceptions is at issue. The regulations also require colleges to notify students annually of their rights under FERPA, and they provide a procedure for complaints to be filed with the Department of Education if a student believes that the college has not complied with FERPA.

The Family Policy Compliance Office (FPCO) of the Education Department is charged with the development, interpretation, and enforcement of FERPA regulations. The FPCO maintains a Web site that provides an overview of FERPA at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html>. The Web site also contains the FERPA regulations at <http://www2.ed.gov/policy/gen/reg/ferpa/index.html>.

The education records that are protected under FERPA's quite broad definition are all "those records that are (1) [d]irectly related to a student; and (2) [m]aintained by an educational agency or institution or by a party acting for the agency or institution" (20 U.S.C. § 1232g(a)(4)(A); 34 C.F.R. § 99.3).<sup>13</sup> This section of the regulations contains six exceptions to this definition, which exclude from coverage certain "sole possession" records of institutional personnel, certain campus law enforcement records, certain student employment records, certain records regarding health care, "records [such as certain alumni records] created or received . . . after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student," and grades on certain peer-graded papers. There is also a partial exception for "directory information," which is exempt from the regulations' nondisclosure requirements under certain conditions (34 C.F.R. § 99.37).

Following a flurry of litigation concerning access by the press to campus law enforcement records involving students (considered, under FERPA's earlier definition, to be student education records and thus protected), Congress passed the Higher Education Amendments of 1992 (Pub. L. No. 102-325, codified at 20 U.S.C. § 1232g(a)(4)(B)(ii)), which amended FERPA to exclude from the definition of "education records" records that are both created and maintained by a law enforcement unit of an educational agency or institution at least in part for the purpose of law enforcement. This change enables institutions, under certain circumstances, to disclose information about campus crime contained in law

<sup>12</sup>If a student is a dependent for federal income tax purposes, the institution may, but is not required to, disclose the student's education records to the student's parents.

<sup>13</sup>It is important to recognize that the definition of "education record" is far broader than just a record of grades or other "educational" or "academic" information. For example, student course evaluation scores for courses taught by graduate students fall within the definition of "education record." Therefore, posting student course evaluation scores for these instructors, either physically or electronically, would constitute a disclosure of education records if the student had not

enforcement unit records to parents, the media, other students, and other law enforcement agencies. Regulations specifying institutional responsibilities with respect to law enforcement records under FERPA are codified at 34 C.F.R. § 99.8.

Although FERPA provides substantial protection for the privacy of student records, it has been amended numerous times to address public (and parental) concerns about campus safety and the shield that FERPA provided to alleged student perpetrators of violent crimes, as well as various other issues and concerns. FERPA regulations currently list sixteen exceptions to the requirement of prior consent before the release of a personally identifiable education record (34 C.F.R. § 99.31). Several of these exceptions are discussed below.

In one such instance, the Education Department revised the FERPA regulations to clarify the definition of a disciplinary record and to specify the conditions for its release. Disciplinary records generally are considered "education records" and are thus subject to FERPA's limitations on disclosure. However, the revised regulations permit the institution to disclose to the victim of an "alleged perpetrator of a crime of violence or non-forcible sex offense" the "final results" of a disciplinary proceeding involving the student accused of the crime (34 C.F.R. § 99.31(a)(13)). The regulations also allow the institution to disclose the "final results" of such a disciplinary proceeding to the general public if the institution determines that the student has violated one or more institutional rules and policies. (The victim may be informed regardless of the outcome.) Under either exception, the institution may not disclose the names of other witnesses, including the alleged victim, without the relevant student's or students' consent (34 C.F.R. § 99.31(a)(14)). Furthermore, the regulations prohibit institutions from requiring students to sign a nondisclosure or confidentiality agreement when the institution informs a student victim of an alleged act of violence or non-forcible sex offense of the outcome of a disciplinary proceeding (34 C.F.R. § 99.33(c)). Because of the specificity of these exceptions to the nondisclosure rule, most disciplinary records will still be protected by FERPA and may be disclosed only with permission of the student.

FERPA permits disclosure to teachers and other school officials at other institutions of information about a disciplinary action taken against a student for behavior that posed a significant risk to the student or to others (34 C.F.R. § 99.31(a)(2)). FERPA also permits an institution to disclose information otherwise protected by FERPA in order to comply with a judicial order or a lawfully issued subpoena, as long as either the institution makes a "reasonable effort" to notify the student of the order or subpoena in advance or the subpoena is for law enforcement purposes and prohibits disclosure on its face (34 C.F.R. § 99.31(a)(9)(ii)).

The USA PATRIOT Act (Pub. L. No. 107-56; 115 Stat. 272, October 26, 2001) amended FERPA to permit an institution to disclose, without informing the student or seeking the student's consent, information about the student in response to an *ex parte* order issued by a court at the request of the U.S. Attorney General or his designee. To obtain such a court order, the Attorney General must demonstrate the need for this information in order to further the investigation or prosecution of terrorism crimes as specified in 18 U.S.C.



codified at 20 U.S.C. § 1232g(b)(7). Interpretive guidance regarding this legislation and its implications for colleges may be found at <http://www2.ed.gov/policy/gen/guid/fpco/hottopics/ht10-24-02.html>.

The key to success in dealing with FERPA is a thorough understanding of the implementing regulations. Administrators should keep copies of the regulations at their fingertips and should not rely on secondary sources to resolve particular problems. Counsel should review the institution's record-keeping policies and practices, and every substantial change in them, to ensure compliance with the regulations. Administrators and counsel should work together to maintain appropriate legal forms to use in implementing the regulations, such as forms for a student's waiver of his or her rights under the act or regulations, forms for securing a student's consent to release personally identifiable information from his or her records (34 C.F.R. § 99.30), and forms for notifying parties to whom information is disclosed of the limits on the use of that information (34 C.F.R. § 99.34). Questions concerning the interpretation or application of the regulations may be directed to the Family Policy Compliance Office at the U.S. Department of Education.

In 2002, the U.S. Supreme Court ruled that there is no private right of action under FERPA, putting an end to more than two decades of litigation over that issue. In *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the Court ruled 7 to 2 that Congress had not created a private right of action under FERPA and also ruled that the law created no personal rights enforceable under 42 U.S.C. § 1983. Doe, a former education student at Gonzaga University, a private institution in the state of Washington, had sued Gonzaga in state court, alleging violation of his FERPA rights for a communication between a university administrator and the state agency responsible for teacher certification. In that communication, the university administrator alleged that Doe had committed certain sex-based offenses against a fellow student, despite the fact that the alleged victim had not filed a complaint and no determination had been made as to the truth of the allegations, which the administrator had overheard from a third party. Doe also sued Gonzaga and the administrator under tort and contract theories. A jury found for Doe, awarding him more than \$1 million in compensatory and punitive damages, including \$450,000 in damages on the FERPA claim.

The Washington Court of Appeals reversed the outcome at the trial level, but, in *Doe v. Gonzaga University*, 24 P.3d 390 (Wash. 2001), the Washington Supreme Court reversed yet again, ruling that, although FERPA did not create a private cause of action, its nondisclosure provisions provided a right enforceable under 42 U.S.C. § 1983. Since the lower courts were divided as to the existence of FERPA's enforceability under Section 1983, the U.S. Supreme Court granted certiorari to resolve the conflict.

The Court compared the language of FERPA with that of Titles VI and IX (discussed in this book, Sections 11.5.2 and 11.5.3 respectively), which provide that "no person" shall be subject to discrimination. In FERPA, however, Congress focused on the obligation of the Secretary of Education to withhold federal funds from any institution that failed to comply with the law's nondisclosure provisions. This language, said the Court, did not confer the type of "individual entitlement" that can be enforced through Section 1983,

citing *Cannon v. University of Chicago*, 441 U.S. 677 (1979), a case that found a private right of action under Title IX. Furthermore, said the Court, FERPA provides for penalties for institutions that have a "policy or practice" of permitting the release of education records, rather than penalties for a single act of noncompliance. In addition, the court noted, FERPA's creation of an administrative enforcement mechanism through the Secretary of Education demonstrates that Congress did not intend for the law to create an individual right, either under FERPA itself or through Section 1983. The Court reversed the Washington Supreme Court's ruling on the FERPA claim.

FERPA itself does not prohibit the practice of using Social Security numbers as identifiers, but it does regulate their disclosure. The Family Policy Compliance Office has taken the position that the use of even partial Social Security numbers to publicly post student grades is a FERPA violation (Family Policy Compliance Office, "Letter re: Hunter College" (May 29, 2001), available at <http://www.ed.gov/policy/gen/guid/fpco/doc/hunter.doc>). A New York law prohibits any public or private school or university from displaying a student's Social Security number for posting of grades, on class rosters, on student identification cards, in student directories, or for other purposes unless specifically authorized or required by law.

Although students do not have a private right of action under FERPA, they may, as in *Gonzaga*, still be able to state negligence claims for alleged FERPA violations. For example, in *Atria v. Vanderbilt University*, 142 F. App'x 246 (6th Cir. 2005) (unpublished), a professor distributed graded exams to students by leaving them stacked on a table outside the classroom. The exam sheets contained the students' names and Social Security numbers. The plaintiff, a pre-med student, obtained his graded exam several days later in class and asked that it be regraded because it appeared that some correct answers had been marked wrong. The professor had kept photocopies of the exam answer sheets, and noted that the version of the answer sheet that the student submitted differed from the photocopy. He accused the student of academic misconduct (changing some of the answers from wrong to correct), and the student was disciplined. The student argued that another student must have taken his answer sheet, changed some of the answers, and returned it to the pile outside the classroom. Although the trial court awarded summary judgment on the negligence claim and a breach of contract claim, the appellate court reversed, ruling that both must be tried to a jury because a jury could find that the professor's method of returning the exam answer sheets could have permitted tampering by other students.

**7.8.2. State law.** In a majority of states, courts now recognize a common law tort of invasion of privacy, which, in some circumstances, protects individuals against the public disclosure of damaging private information about them and against intrusions into their private affairs. A few states have similarly protected privacy with a statute or constitutional provision. Although this body of law has seldom been applied to educational record-keeping practices, the basic legal principles appear applicable to record-keeping abuses by postsecondary institutions. This body of right-to-privacy law could protect

students against abusive collection and retention practices where clearly intrusive methods are used to collect information concerning private affairs. In *White v. Davis*, 533 P.2d 222 (Cal. 1975) (see Section 11.1.3), for example, the court held that undercover police surveillance of university classes and meetings violated the right to privacy because "no professor or student can be confident that whatever he may express in class will not find its way into a police file." Similarly, right-to-privacy law could protect students against abusive dissemination practices that result in unwarranted public disclosure of damaging personal information.

In addition to this developing right-to-privacy law, many states also have statutes or administrative regulations dealing specifically with record keeping. These include subject access laws, open records or public records laws, and confidentiality laws. Such laws usually apply only to state agencies, and a state's postsecondary institutions may or may not be considered state agencies subject to record-keeping laws. Occasionally a state statute deals specifically with postsecondary education records. A Massachusetts statute, for instance, makes it an "unfair educational practice" for any "educational institution," including public and private postsecondary institutions, to request information or make or keep records concerning certain arrests or misdemeanor convictions of students or applicants (Mass. Gen. Laws Ann. ch. 151C, § 2(f)).

Since state laws on privacy and records vary greatly from state to state, administrators should check with counsel to determine the law in their particular state. And because state open records requirements may occasionally conflict with FERPA regulations, counsel must determine whether any such conflict exists. Although there have been several cases involving the conflict between FERPA's confidentiality requirements and the demands of state public records laws, there is little agreement as to how a public institution can comply with both laws.

A few state courts have ruled that public records laws trump the confidentiality provisions of FERPA. Although the changes to FERPA made by the 1998 Higher Education Amendments allow colleges to release limited information concerning the outcomes of student disciplinary hearings (Section 7.8.1), the law still does not provide for the complete release of transcripts, documentary evidence, or other records that meet FERPA's definition of "education records." Thus, the outcomes in the cases discussed below are still relevant to college administrators, who—until such time as FERPA is once again amended—may have to walk a tightrope in attempting to comply with conflicting state laws regarding public records and public meetings.

In a case whose rationale is similar to the *Red & Black* case (cited in Section 7.8.1), a Connecticut appellate court addressed a claim under Connecticut's Freedom of Information law that audiotapes of a student disciplinary hearing were public records and thus subject to disclosure. In *Eastern Connecticut State University v. Connecticut Freedom of Information Commission*, No. CV96-0556097, 1996 Conn. Super. LEXIS 2554 (Conn. Super. Ct. September 30, 1996), a faculty member who had filed disciplinary charges against a student enrolled in his class requested audiotapes of the hearing that had been held to adjudicate those

charges. The college refused, citing FERPA's provision that protects records of disciplinary hearings from disclosure unless the student consents. Although the state Freedom of Information Commission (FOIC) found the hearings to fall squarely within FERPA's protection, it also found that the faculty member had a legitimate educational interest in the student's behavior and thus was entitled to the information under another FERPA provision (20 U.S.C. § 1232g(h); 34 C.F.R. § 99.3). The court held that FERPA did not prevent a state legislature from enacting a law providing for access to public records, and that FERPA does not prohibit disclosing the student records, but that nondisclosure is "merely a precondition for federal funds." Taken to its logical conclusion, this ruling would elevate the interest of the public in access to public records over the ability of the state institution to be eligible to receive federal funds.

A second state court differed sharply with the result in the *Eastern Connecticut State University* case. In *Shreveport Professional Chapter of the Society of Professional Journalists v. Louisiana State University*, No. 393, 334 (1st Judicial Dist. Ct. Caddo Parish, La., March 4, 1994) (unpublished opinion at 17), the court found that the results of a disciplinary hearing concerning theft of student government funds by student government members were education records (protected by FERPA) and not law enforcement records (not protected by FERPA). The court rejected the plaintiffs' claim that FERPA did not prohibit disclosure of disciplinary hearing records, stating: "[T]he intent of Congress to withhold millions of federal dollars from universities that violate [FERPA] is ample prohibition, regardless of how the word 'prohibit' is construed by the plaintiffs." Although the court determined that the disciplinary hearing records fell within the scope of the state's public records act, the court ruled that, given FERPA's requirements, the state constitution provided for an implied exception in the law for college disciplinary hearings. Distinguishing *Red & Black Publishing* on several grounds, the court held that the records should not be disclosed.

Despite the clarity of the FERPA regulations that include disciplinary records within the definition of education record, it took a lengthy legal battle pitting state courts against their federal counterparts to result, eventually, in a determination that FERPA privacy protections trumped state open records laws. In the state court litigation, the Supreme Court of Ohio held in *State ex rel Miami Student v. Miami University*, 680 N.E.2d 956 (Ohio 1997), that university disciplinary records are not education records under FERPA. The editor of the university's student newspaper had sought student disciplinary records, redacted of the students' names, Social Security numbers, student identification numbers, and any other information that would identify individual students. The university provided the information but, in addition to the redactions that the editor had agreed to, also deleted information on the sex and age of the accused individuals; the date, time, and location of the incidents; and memoranda, statements by students, and the disposition of some of the proceedings. The editor sought a writ of mandamus from the state supreme court requiring disclosure of those records. The majority opinion did not cite or analyze any of the implementing regulations. Instead, the opinion cited the *Red & Black* case and held that disciplinary records could be disclosed without violating FERPA

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because they were not related to "student academic performance, financial aid, or scholastic probation." Noting that the public records act was intended to be interpreted broadly, the court also noted that crime on campus was a serious problem and that the public should have access to the information requested by the student editor.

The U.S. Supreme Court denied certiorari in the *Miami Student* case (522 U.S. 1022 (1997)). The U.S. Education Department then brought a claim in a federal district court in Ohio, seeking to enjoin the colleges (Ohio State University was also affected by the state court decision) from complying with the state supreme court's ruling to release the disciplinary records. The federal court issued the requested injunction, stating that the disciplinary records at issue clearly met the FERPA definition of "education records" and that the Ohio Supreme Court's interpretation of FERPA as pertaining only to academic records was incorrect (*United States v. Miami University*, No. C2:98-0097 (February 12, 1998)).

The federal district court then permitted the addition of the *Chronicle of Higher Education* as a codefendant to argue that disciplinary records are law enforcement records, rather than education records, and that FERPA does not preempt the Ohio Public Records Act. The *Chronicle* asked the court to dismiss the Education Department's lawsuit for lack of subject matter jurisdiction, arguing that the department lacked standing to bring the action. The trial court ruled that FERPA expressly gave the Secretary of Education standing to enforce the law (20 U.S.C. § 1232g(f)), including enforcement by litigation (*United States of America v. The Miami University and The Ohio State University*, 91 F. Supp. 2d 1132 (S.D. Ohio 2000)). Additionally, said the court, the Secretary of Education had the authority to sue the recipients of federal funds to force them to comply with the terms of funding programs, one of which is compliance with FERPA. And, third, the court rejected the *Chronicle's* argument that FERPA does not prohibit colleges from releasing education records, but rather merely authorizes the Department of Education to withdraw federal funding from an institution that does not comply with FERPA. The court stated that the inclusion in the statute of several enforcement mechanisms, in addition to termination of funds for FERPA violations, demonstrated that Congress intended that the law apply directly to colleges. The federal district court also made an explicit ruling that student disciplinary records are education records under FERPA. Denying the *Chronicle's* motion to dismiss and awarding summary judgment to the Department of Education, the federal court issued a permanent injunction against Miami University and Ohio State University, forbidding the further release of student disciplinary records.

The intervening party, the *Chronicle of Higher Education*, appealed, and the U.S. Court of Appeals for the Sixth Circuit affirmed (294 F.3d 797 (6th Cir. 2002)). The *Chronicle* asserted that the Department of Education lacked standing to bring the action seeking to enjoin the release of the records, challenged the lower court's ruling as an implicit decision that FERPA preempts state open records laws, and asserted that the lower court was incorrect in ruling that disciplinary records were education records within the meaning of FERPA. The *Chronicle* also argued that FERPA violates the First Amendment because it limits access to otherwise publicly available records.

The appellate court ruled that the Department of Education had standing to seek the injunction on the same grounds that the trial court had relied upon. Furthermore, said the court, the Ohio Supreme Court's ruling that disciplinary records were not education records was incorrect; despite that ruling, the Ohio court had allowed Miami to redact all personally identifiable information from the records before disclosing them, an action that complied with FERPA's requirements. The federal appellate court relied on the specific, limited discipline-related exceptions to FERPA's prohibition against disclosure of education records to conclude that disciplinary records were, in fact, still included within the law's definition of education record, a result that supports the position of the FPCO. With respect to the First Amendment claim, the court explained that student disciplinary proceedings were not criminal trials, and therefore, jurisprudence related to the public's access to criminal trials was not applicable to disciplinary hearings in which students lacked the panoply of protections available to litigants in the courts. Student disciplinary hearings at both universities were closed to the public, and press or public access to such hearings would complicate, not aid, the educational purpose that the hearings were designed to further. The court rejected the *Chronicle's* First Amendment claims. The court noted that the *Chronicle* could request student disciplinary records from which all individually identifying information had been redacted, as FERPA would not prohibit the release of such information.

Despite the first ruling of the federal trial court in the *Miami University* case (enjoining the release of the records prior to trial), the Court of Appeals of Maryland followed the lead of the Ohio Supreme Court. In *Kirwan v. The Diamondback*, 721 A.2d 196 (Md. 1998), the Maryland court ruled that Maryland's Public Information Act (Maryland Code § 10-611-28) authorizes the disclosure of information sought from the university by the student newspaper. The newspaper was seeking correspondence and parking violation records involving the basketball coach and several student players, which the university refused to provide. The university asserted that the parking violation records related to the coach were personnel records, which the law exempted from disclosure, and that the parking violation records related to the students were education records, protected from disclosure by FERPA. The court rejected both of the university's defenses.

The court held that the parking violation records of the student athletes were not education records because Congress had intended only that records related to a student's academic performance be covered by FERPA. The court held that a broad definition of "education record" would enable an educational institution to operate "in secrecy," thus "keeping very important information from other students, their parents, public officials, and the public" (721 A.2d at 204). The court upheld the ruling of the trial court that the university was required to release the information sought by the student newspaper.

But another state appellate court has ruled that, despite its finding that the "Undergraduate Court" at the University of North Carolina was a "public body" under North Carolina's Open Meetings Law (N.C. Gen. Stat. §§ 143-318.9 et seq.), that body was entitled to hold closed disciplinary hearings in order to

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comply with the dictates of FERPA. In *DTH Publishing Corp. v. The University of North Carolina at Chapel Hill*, 496 S.E.2d 8 (N.C. Ct. App. 1998), the court applied language in the Open Meetings Law that allowed a public body to hold a closed session, if it was necessary, to prevent the disclosure of information that is "privileged or confidential." The university had argued that FERPA's prohibition of the nonconsensual release of personally identifiable student records rendered the records of student disciplinary hearings "privileged and confidential" for the purposes of state law. The court distinguished the *Miami Student* state case, noting that the Ohio court had ordered only the release of "statistical data" from which student names had been deleted, and which included the location of the incident, age and sex of the student, nature of the offense, and the type of discipline imposed, but had not ordered the release of records from specific disciplinary hearings. The court also rejected arguments by the student newspaper that the state and federal constitutions required that judicial proceedings be open to the public, stating that the Undergraduate Court was not the type of court contemplated by these constitutions, and that there was no history at the university of open disciplinary hearings.

In *Caledonian-Record Publishing Company, Inc. v. Vermont State College*, 833 A.2d 1273 (Vt. 2003), Vermont's highest court was asked to decide whether the press could have access to the daily security logs, student disciplinary records, and student disciplinary hearings at Lyndon State College and the entire Vermont State College System under the state's Open Meeting Law and Public Records Act. The colleges provided the daily security logs compiled by their campus police departments, but refused to provide the requested student disciplinary records or to allow access to student disciplinary hearings.

The court found that Vermont's Public Records Act exempts "student records at educational institutions funded wholly or in part by state revenue" (1 Vt. Stat. Ann. § 317(c)(11)) from disclosure. Because the plaintiffs had stated that they did not want to attend the hearings, but only to have access to the minutes or other records of the hearings, the court did not reach the issue of whether the media should be allowed to attend student disciplinary hearings. It also found that minutes or other records documenting the proceedings and outcome of student disciplinary hearings also fit the definition of "student records" and thus were exempted from disclosure.

In 2011, two public universities defended against claims that state open records laws trump FERPA and require disclosure of education records. In *Chicago Tribune Co. v. University of Illinois Board of Trustees*, 781 F. Supp. 2d 672 (N.D. Ill. March 7, 2011), *vacated*, 680 F.3d 1001 (7th Cir. 2012), a newspaper claimed that the state's Freedom of Information Act required the University of Illinois to disclose a list of applicants and their test scores and grade point averages, the names of their parents, and the name of anyone who intervened on the applicants' behalf after a scandal involving a "clout list" of applicants who received favored treatment was discovered. The open records law exempts the release of information that is "specifically prohibited from disclosure by federal . . . law or rules and regulations implementing federal . . . law" (5 Ill. Comp. Stat 140/7(1)(a)). The newspaper argued, among other claims,

that FERPA does not prohibit the release of education records. Because the university had asserted that FERPA did not allow such a release, the litigation was brought in federal court.

The trial court ruled for the newspaper. The judge noted that FERPA does not "forbid Illinois officials from taking any action," but "sets conditions on the receipt of federal funds" and "imposes requirements on the Secretary of Education to enforce the spending conditions by withholding funds in appropriate situations." Although the court nodded toward the "potential privacy interests implicated by the Tribune's request," it noted that it was construing the exemptions to the state's Freedom of Information Act narrowly, and awarded summary judgment to the newspaper. The university appealed this ruling, and the appellate court vacated the trial court's judgment, ruling that the case should have been brought in state court because interpretation of the state's freedom of information law was a state, not a federal, matter.

In Arizona, a state trial court ruled that Pima Community College had to turn over written communications regarding Jared Lee Loughner, a former student who shot and killed or wounded several people in Tucson, Arizona, including Representative Gabrielle Giffords. In *Phoenix Newspapers Inc. v. Pima Community College*, Case No. C20111954 (Ariz. Super. Ct., Pima County May 17, 2011), the court parsed the meaning of language in FERPA that defines education records as those "maintained by an educational agency or institution." The court ruled that e-mail messages sent and received by college staff members regarding Loughner were not "maintained" by the college because "documents are not 'maintained' by an educational institution under FERPA unless the institution has control over the access and retention of the record. Simply because emails exist on a central server and in inboxes at some point does not classify those documents as education records . . . If emails can be removed from the database in question simply by the account holder deleting the email from their inbox then emails that happen to remain on the server by no action of the educational institution are not maintained by the school" (sl. op. at 3). This ruling was not appealed, but has been criticized and is not consistent with FPCO guidance.

Federal and state courts have addressed the question of whether an education record that would otherwise be protected by FERPA loses that protection if identifying information about the student(s) is redacted. The courts have concluded that, if sufficient such redaction is done, FERPA does not apply because it no longer contains "information directly related to a student." See, for example, *United States v. Miami University*, 294 F.3d 797 (6th Cir. 2002); *Osborn v. Board of Regents of University of Wisconsin System*, 647 N.W.2d 158, 168 n.11 (Wis. 2002); *Unincorporated Operating Div. of Indiana Newspapers, Inc. v. Trustees of Indiana Univ.*, 787 N.E.2d 893 (Ind. Ct. App. 2003); and *Board of Trustees v. Cut Bank Pioneer Press*, 160 P.3d 482 (Mont. 2007). The FERPA regulations now expressly state this same principle (34 C.F.R. § 99.31(b)(1)).

Despite the outcome in the *Miami Student* case, it appears that the clash between open records laws and FERPA will continue, and outcomes may differ from state to state unless the U.S. Supreme Court resolves the conflict.

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