The Law of Higher Education: A Discovery Primer For Defense Counsel

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There is a popular saw that institutions of higher education operate in a separate world. The phrase "ivory tower" has a basis in fact. In Iowa and nationally there is an entire body of law – statutory, regulatory and common law, that has developed around colleges and universities. This article provides a brief overview of that law. It is intended to serve as a discovery roadmap for defense counsel handling cases that involve a college student, recent graduate or institution as a litigant.

Introduction

College students may be somewhat insulated while on campus, but they still live in the real world. As trial lawyers know, "life happens" in the real world. Defense counsel charged with defending a tort, contract or commercial claim filed by or against a college student or recent graduate may be helped or hindered by the body of law that has evolved around higher education. While it might be slightly more burdensome to conduct certain types of discovery involving students, recent graduates and institutions, this body of law also creates potentially significant evidence that might be used to defeat or reduce a claim for damages.

Student Medical Records

Many colleges and universities operate student health facilities. Whether at a simple student health clinic or an elaborate medical center, records maintained by colleges and universities are legally very different than records found at private and public hospitals and clinics.

Whenever a lawyer refers to the Health Insurance Portability and Accountability Act, this should signal that they don't know their way around collegiate health records. This is especially true if they use the mangled acronym "HIPPA" as a "hippa" is nothing but the phrase Bostonians use to describe a hippopotamus. Even if a lawyer uses the proper acronym "HIPAA" (the first "A" is for accountability) it will be informative.

Confidential college student medical records are not governed by HIPAA, they are, in fact, regulated by an entirely different statute: the Family Educational Rights and Privacy Act, or FERPA. The United States Congress enacted FERPA to protect parents' and students' "rights to privacy by limiting the transferability of their records without their consent." *United States v. Miami University,* 294 F.3d 797, 806 (6th Cir. 2002). Congress provides funds to educational institutions that comply with FERPA "on the condition that, inter alia, such agencies or institutions do not have a policy or practice of permitting the release of educational records of students without the written consent of the student and their parents. *Id.* (Quoting 20 U.S.C. §1232G(b)(1)(2000).

Though FERPA is somewhat similar to HIPAA in several respects, it also differs in important ways that relate directly to discovery involving college students and recent graduates. Student educational records can typically be obtained with a waiver. Very often when defense counsel relies upon a medical waiver to obtain a Plaintiff's medical records, colleges and universities will initially balk at providing discovery. This is generally not an attempt to be obstreperous. The institutions are concerned that they fully comply with FERPA requirements.

Of note, the U.S. Department of Education's Office for Civil Rights, the federal agency charged with overseeing many laws that apply to colleges, including FERPA and Title IX, recently signaled its intent to superimpose some HIPAA concepts in the context of FERPA. The OCR issues "Dear Colleague" letters as a means of asserting authority over colleges and universities. In a draft "Dear Colleague" letter issued August 18, 2015, the OCR signaled an intent to interpret FERPA in such a way that it would provide colleges and universities with even less flexibility. Defense counsel dealing in this area should monitor the actions of the OCR in this regard and to keep in mind its direction is intended to be guidance only.

Video Surveillance

The protections of FERPA go beyond medical records. FERPA was originally intended to protect confidential educational records. Nevertheless, it has been interpreted to protect such things as electronic communications, voice recordings and surveillance video. To qualify as an educational record, the record must contain information directly related to a student. 20 U.S.C. §1232g(a)(4)(A). Information is directly related to a student if it has a "close connection" to that student. *Rhea v. District Board of Trustees of Santa Fe College*, 109 So.3d 851, 857 (Fla. Dist. Ct. App. 2013). The Courts have held that even campus video surveillance footage might be protected under this definition. See *Bryner v. Canyons School District*, 351 P.3d 852, 859 (Utah Ct. App. 2015).

Once a document is determined to be covered by FERPA, students are entitled to access such documents. Conversely,

such documents must be protected from review by third parties. Students rights to "inspect and review" are not unlimited. Nor is the cloak of confidentiality.

Colleges and universities are entitled and indeed obligated to heavily redact documents so as to only provide a document that relates to the requesting student. This is why defense counsel might receive documents in response to a subpoena that are so heavily redacted it looks like the institution is trying to be evasive. In fact, FERPA, and the regulations and guidances issued by the United States Department of Education direct institutions to heavily redact records. The United States Department of Education's Family Policy Compliance Office has issued guidance stating that if educational records of a student contain information on "more than one student, the parent requesting access to education records has the right to inspect and review, or be informed of, only the information in the record directly related to his or her child." This directive has been interpreted to prohibit a student from obtaining a videotape picturing a fight where another student is clearly shown in the combat. See Opinion of the Texas Attorney General, OR 2006-00484 (January 13, 2006). Thus in many circumstances it might be difficult to obtain unredacted video evidence without a court order.

Records Generated by Title IX

Title IX of the Education Amendments to the 1964 Civil Rights Act was passed in 1972. Title IX was intended to prevent any form of sex discrimination in educational programs at any institution receiving federal funds. At its inception, Title IX was thought to be focused entirely upon equality in athletic programs. Over the years, beginning in 1997, the Department of Education; Office for Civil Rights has aggressively interpreted Title IX such that today it deals not only with athletics, but with sexual assault and other sexual violence in any aspect of campus life. In a 2011 "Dear Colleague" letter the OCR asserted that Title IX protections applied to all students in virtually every aspect of campus life such that today there is national upheaval regarding the role of the federal government in the interactions of collegiate students.

Title IX requires an institution to stop sexual harassment, prevent further occurrences and remedy its effects. 34 CFR §106.3 (2013). Dear Colleague letter, April, 2011. It is extremely difficult to obtain records related to Title IX investigations. See *Nancy Chi Cantalupo, Burying Our Head in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 Loyola Univ.. Chi. L.J. 205, 235 (2011). Nevertheless, with Title IX creating a virtual cottage industry among plaintiffs' lawyers, personal injury plaintiffs who asserted Title IX charges while in school will typically generate substantial medical records both on and off campus.

Defense counsel should become generally familiar with the parameters of Title IX because it has asked colleges to maintain voluminous records regarding student interactions on campus. The law has caused institutions to create apparatus designed to report sexual violence, provide training on sexual assault, offer victim and survivor services, conduct investigation and hold on-campus hearings. Much of this information may be discoverable.

Violence Against Women Act of 1994

The Violence Against Women Act of 1994 (VAWA) is a federal law designed to enhance the investigation and prosecution of violent crimes against women. See Title IV, § 40001. Though aimed at domestic and sexual violence, VAWA has comprehensive applications in the collegiate setting.

As part of the Violence Against Women Reauthorization Act, (VAWRA), the Campus Sexual Violence Elimination Act (Campus SAVE Act) codified directions from the OCR. See Pub. L. No. 113-4 §304, 127 Stat. 54, 89-92 (2014). The law requires institutions to generate numerous documents, including annual reports on violence and stalking that defense counsel may find useful.

Clery Act Documents

The "Jeanne Clery Disclosure Of Campus Security Policy and Campus Crime Statistics Act" is commonly referred to as the "Clery Act." 20 USC §1092(F)(1)-(15) (2013). It is a federal law that requires colleges and universities to disclose campus security information, including crime statistics, for the campus and surrounding neighborhoods. The law requires covered institutions to immediately report violent crimes, including sex offenses. The institution has to report who was involved, what occurred, where it happened, when it happened and how it happened. The law has been interpreted to cover burglary, motor vehicle theft, arson, dating violence, stalking, liquor law violations, drug abuse violations and weapons violations.

The law requires most institutions to create a daily crime log and an annual security report. The security report is released annually and contains at least three years worth of reported crimes occurring on or near campus. See *Summary of Clery Act, CLERY CTR.* http://clerycenter.org.

Discovery of VAWA and Clery Records

Again, colleges and universities are extremely cautious about responding to demands for records that might be protected by VAWA or Clery Act dictates that colleges and universities maintain the confidentiality of personally-identifying victim information. Thus, an institution will heavily redact any records that might be covered by VAWA. See 42 U.S.C. §13925(b)(2). This restriction is not absolute. VAWA provides that personally-identifying information can

be released upon the "informed" written consent of the victim. Thus, a standard subpoena or discovery order should suffice.

Like VAWA, the Clery Act protects personally-identifying victim information. Reports dictated under the Clery Act are not to include victim-identifying information. See 34 C.F.R. §668.46(c)(5). The commentary on the regulations notes that "although reporting a statistic is not likely, of itself, to identify the victim, the need to verify the occurrence of the crime and the need for additional information about the crime to avoid double counting can lead to identification of the victim." 64 Fed. Reg. at 59063 (November 1, 1999).

CONCLUSION

Conducting discovery involving litigation with college students and recent graduates can be frustrating. However, once defense counsel knows the applicable laws and understands the breadth and scope of the information and documents generated under these laws, maneuvering around confidentiality requirements is difficult – but not impossible. The fruits of this hard work can sometimes be extremely rewarding.

YOUNG LAWYER PROFILE

In every issue of *Defense Update*, we will highlight a young lawyer. This month, we get to know Joshua J. McIntyre, Lane & Waterman LLP, in Davenport.

Josh McIntyre is a senior associate at Lane & Waterman LLP, where he practices primarily in the areas of intellectual property, information technology, and legal malpractice defense, including matters concerning computer fraud, data privacy, electronic discovery, domain names, and trade secrets. Raised in a military family, Josh lived in Wisconsin, Michigan, and Alaska before attending high school in Kewanee, Illinois. He graduated from Saint Ambrose University in 2008 with degrees in Computer Investigations and Economics. He earned his law degree and a certificate in Information Technology Law from the DePaul University College of Law in 2011, where he also served as an editor for the DePaul Law Review.

Josh sits on the IDCA's Employment Law and Professional Liability Committee and serves as assistant coach to the Saint Ambrose University mock trial team and a member of the university's scholarship fund-raising committee. He has written articles for the *Defense Update*, the *DePaul Law Review*, and the treatise *McGrady on Social Media,* earning citations in numerous works on data privacy, including Privacy and Data Protection in Business (LexisNexis 2012) and The Oxford Handbook of Internet Studies. Josh resides in Davenport with his wife, Ann, and enjoys travel and great fiction.