

STATE OF TENNESSEE

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Opinion No. 08-099

Validity of legislation requiring postsecondary schools to notify parents of drug or alcohol violations

QUESTIONS

1. Does Senate Bill 4108/House Bill 4088 (SB4108/HB4088), which requires public institutions of higher education to notify parents or legal guardians of student drug or alcohol disciplinary violations, conflict with the federal Family Educational Rights and Privacy Act (FERPA) and the regulations thereunder, any other federal or state statute, or any provision of the United States Constitution or Tennessee Constitution? Would SB4108/HB4088 violate FERPA with regard to the discretionary authority provided to postsecondary institutions?

2. Does FERPA apply uniformly to both public and private postsecondary institutions? Has FERPA ever treated private colleges and universities differently than public institutions with regard to parental notification?

3. Since its original enactment in 1974, has FERPA included the “discretionary authority” given to postsecondary institutions with regard to parental notification in the case of alcohol or drug-related crimes or institutional policy violations? Since FERPA’s original passage in 1974, have the states ever been permitted, authorized, or through interpretation allowed to further restrict the rights and authorities as otherwise stated in the federal act?

OPINIONS

1. SB4108/HB4088 does not conflict with FERPA. Nor do the provisions of this bill appear to violate any state or federal statutes, or the provisions of the United States Constitution or the Tennessee Constitution.

2. It appears that FERPA has always been applicable to any postsecondary institution that receives federal funds, regardless of that institution’s status as “public” or “private.”

3. With regard to the issue of the mandatory disclosure to parents when a student has received discipline in connection with drug or alcohol use, prior to the 1998 amendment to FERPA that added subsection (i), disclosure of disciplinary sanctions imposed upon a postsecondary student to that student’s parents would have been prohibited without the student’s written consent. As to the broader question of whether the states have been allowed to further restrict the rights and authorities as otherwise stated in FERPA, this act provides a minimum level of protection for the confidentiality of educational records. State laws that are more restrictive than the provisions of

FERPA in terms of protecting the confidentiality rights of postsecondary students and their parents would likely be upheld provided they did not conflict with any specific terms of FERPA.

ANALYSIS

1. Senate Bill 4108/House Bill 4088 would amend Tennessee Code Annotated, Title 49, Chapter 7, Part 1, by adding the following language as a new, appropriately designated section:

§ 49-7-1__. A public institution of higher education shall notify a parent or legal guardian of a student under twenty-one (21) years of age, if the student has committed a disciplinary violation with respect to the use or possession of alcohol or a controlled substance that is in violation of any federal, state, or local law, or of any rule or policy of the institution.

FERPA, the Family Educational Rights and Privacy Act (20 U.S.C. § 1232g), was enacted by Congress to protect the privacy rights of students and their parents with regard to educational records.¹ FERPA conditions federal funding to educational institutions on the requirement that such institutions not have a “policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of [the students or] their parents[.]” 20 U.S.C. § 1232g(b)(1).² Under FERPA, no funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information contained in education records, except as permitted in FERPA itself.³

Subsection (i) of FERPA states as follows:

(i) Drug and alcohol violation disclosures

(1) In general

Nothing in this Act or the Higher Education Act of 1965 [20 U.S.C.A. § 1001 et seq.] shall be construed to prohibit an institution of higher education from disclosing, to a parent or legal guardian of a student, information regarding any violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the

¹Congress’ stated reason for enacting FERPA was “to protect [parents’ and students’] rights to privacy by limiting the transferability of their records without their consent.” Joint Statement, 120 Cong. Rec. 39858, 39862 (1974).

²*U.S. v. Miami University*, 294 F.3d 797, 806 (6th Cir. 2002); *see also Doe v. Woodford County Bd. of Ed.*, 213 F.3d 921, 926-27 (6th Cir. 2000).

³20 U.S.C. § 1232g(b)(2); *Miami University, supra*.

use or possession of alcohol or a controlled substance, regardless of whether that information is contained in the student's education records, if--

(A) the student is under the age of 21; and

(B) the institution determines that the student has committed a disciplinary violation with respect to such use or possession.

(2) State law regarding disclosure

Nothing in paragraph (1) shall be construed to supersede any provision of State law that prohibits an institution of higher education from making the disclosure described in subsection (a) of this section.

The express terms of this portion of FERPA, therefore, specifically permit the disclosure of the information described in SB4108/HB4088. Accordingly, the proposed legislation does not conflict with the provisions of FERPA.

At the state level, Tenn. Code Ann. § 10-7-504(a)(4) addresses the confidentiality of higher education student records. Subsections (a)(4)(A) through (E) provide that such records shall, in general, be treated as confidential in conformity with the requirements of FERPA. Subsection (a)(4)(F), in turn, sets forth an exception taken from the above-quoted provision of FERPA regarding disclosure of records to parents of students receiving alcohol and drug-related discipline:

(F) Notwithstanding the provisions of subdivision (a)(4)(A) to the contrary, unless otherwise prohibited by FERPA, an institution of higher education shall disclose to a parent or legal guardian of a student information regarding any violation of any federal, state, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance, regardless of whether that information is contained in the student's education records, if:

(i) The student is under the age of twenty-one (21);

(ii) The institution determines that the student has committed a disciplinary violation with respect to such use or possession; and

(iii) The final determination that the student committed such a disciplinary violation was reached on or after October 7, 1998.

Tenn. Code Ann. § 10-7-504(a)(4)(F). Thus, it appears that SB4108/HB4088 conforms with existing state law, insofar as its terms closely parallel the provisions of this statute.

While FERPA allows individual postsecondary institutions “discretion” as to whether such institutions will require notification to parents in the event a student receives drug or alcohol-related discipline, FERPA also provides that states have discretion to enact laws regarding student educational records, provided those laws do not conflict with the requirements of FERPA.⁴ FERPA, therefore, does not prohibit states from enacting laws that require mandatory notification to parents, thereby removing the discretion of individual postsecondary institutions regarding notification. Enactment of SB4108/HB4088 would simply mean that the General Assembly has exercised the discretion permitted in subsection (i) of FERPA. Nowhere in FERPA is such a state law prohibited. Or, to put it another way, nowhere in FERPA is there a provision requiring states to preserve the discretion of individual postsecondary institutions as to whether parental notification shall be institutional policy.

Finally, with regard to whether SB4108/HB4088 violates the United States Constitution or the Tennessee Constitution, a review of the cases addressing constitutional privacy rights does not suggest that a postsecondary student whose drug or alcohol-related disciplinary records are disclosed solely to that student’s parents pursuant to either SB4108/HB4088 or the already-existing Tenn. Code Ann. § 10-7-504(a)(4)(F) would have a meritorious constitutional claim.⁵ Consequently, SB4108/HB4088 does not appear to run afoul of the provisions of either the United States Constitution or the Tennessee Constitution.

2. It appears that FERPA, by its own terms, has always been applicable to any postsecondary institution that receives federal funds, regardless of that institution’s status as “public” or “private.”⁶ Subsection (a)(4)(A) of FERPA (20 U.S.C. § 1232g) states: “For the

⁴Subsection (i) of FERPA, quoted above, provides in paragraph (1) that FERPA shall not be interpreted so as to prohibit notification to parents by institutions, while paragraph (2) provides that paragraph (1) shall not be interpreted to supersede any state law that prohibits disclosures under subsection (a) of FERPA.

⁵See generally *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977); *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); *Lambert v. Hartman*, 517 F.3d 433, 440-46 (6th Cir. 2008); *Bloch v. Ribbar*, 156 F.3d 673, 683-87 (6th Cir. 1998); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1061-67 (6th Cir. 1998).

Regarding privacy under the Tennessee Constitution, see generally *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1, 10-15 (Tenn.2000), *McNiel v. Cooper*, 241 S.W.3d 886, 895-98 (Tenn. Ct. App. 2007); *Henderson v. City of Chattanooga*, 133 S.W.3d 192, 209-13 (Tenn. Ct. App. 2003); *Campbell v. Sundquist*, 926 S.W.2d 250, 258-65 (Tenn. Ct. App. 1996).

⁶See, e.g., Pub.L. 93-380, Title V, § 513(a), Aug. 21, 1974, 88 Stat. 571, and amended Pub.L. 93-568, § 2(a), Dec. 31, 1974, 88 Stat. 1858.

purposes of this section, the term ‘educational agency or institution’ means any public or private agency or institution which is the recipient of [federal] funds under any applicable program.”⁷

3. With regard to the issue of mandatory disclosure to parents when a student has received discipline in connection with drug or alcohol use, prior to the 1998 amendment to FERPA that added subsection (i)⁸ (quoted above), it is likely that FERPA would have been interpreted to prohibit disclosure of postsecondary students’ disciplinary sanctions for drug and alcohol offenses to their parents, absent consent of the student. Subsection (d) of FERPA, which was included in the original 1974 legislation,⁹ provides that, when a student attains the age of 18 years or is attending an institution of postsecondary education, “the permission or consent required of and the rights afforded to the parents of the student shall thereafter only be required of and accorded to the student.” Under this provision, FERPA rights transfer to the student (referred to as an “eligible student”) when he or she reaches the age of 18 or attends a postsecondary institution. Therefore, the “eligible student,” and not the parent, may access, seek to amend, and consent to disclosures of his or her educational records.¹⁰

Consequently, prior to the 1998 amendment that added subsection (i), disclosure of disciplinary sanctions imposed upon an “eligible student” to that student’s parents without the student’s written consent would have been prohibited. While FERPA appears to have been silent regarding disclosure of student drug or alcohol violations to parents prior to 1998, any state law permitting such disclosure would have conflicted with FERPA.

As to the broader question of whether the states historically have been allowed to further restrict the rights and authorities as otherwise stated in FERPA, it is difficult to provide a definitive answer to this inquiry. FERPA may be viewed as a federally-imposed minimum level of protection for students’ and parents’ privacy rights in educational records, beneath which state laws may not fall. In general, however, state laws that are more restrictive than the provisions of FERPA, where “restrictive” is taken to mean “more protective” of the confidentiality rights of postsecondary

⁷Subsection (a)(4) was added to the original 1974 FERPA legislation as part of Pub.L. 93-568, which included a number of amendments to FERPA. Like the original legislation, Pub.L. 93-568 was also enacted in 1974.

⁸Pub. L. 105-244 (referred to as the “Higher Education Amendments of 1998”), § 952. *See also* House Conference Report No. 105-750, 105th Cong., 2nd Sess. 1998, 1998 U.S.C.C.A.N. 404, Sept. 25, 1998, p.407 (“The Senate bill, but not the House bill, provides an assurance that the Higher Education Act shall not be construed to prohibit an institution of higher education from disclosing information regarding violations of law regarding alcohol and drugs to the parents of under-age students. The House recedes with an amendment to add ‘or legal guardian’ after ‘parent’, to include violations of any rule or policy of the institution if the institution has determined the student has committed a disciplinary violation, and to include language regarding State law regarding disclosure.”).

⁹Pub. L. 93-380 (1974 HR69) Sec. 438(D).

¹⁰*See* 34 C.F.R. §§ 99.3 and 99.5(a).

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students and their parents, would likely be upheld provided they did not conflict with any specific terms of FERPA.

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