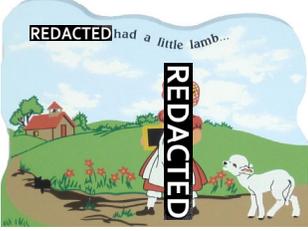


FERPA REFRESHER



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Jesh Humphrey, Vice Chancellor for Institutional Integrity and General Counsel

FERPA Basics

- **Federal law** was enacted in 1974
 - Statute 20 U.S.C. § 1232 (g)
 - Regulations: 34 CFR Part 99
- **Protects** students' education records from being disclosed without consent (unless an exception applies)
- **Permits** students to have access to their own education records

Education Records

- What is an **"education record"** according to FERPA?
 - Information that is **directly related** to the student (other than directory information) **and**
 - **Maintained** by the University

***Format:** Essentially any format that exists.

“Directly related”

Personally identifiable to the student

- Name
- Student ID number/SSN
- Any other information that would allow individuals in the university community with inside knowledge to identify the student

“Maintained”

“Virtually anything” identifiable to the student that is maintained by the university or its agents

- Handwritings
- Electronic data/email
- Film, audio tapes, CDs, etc.
- Grades, papers, etc.

What is not an education record?

- Campus police records
- Employment records (unless dependent on status as a student)
- Non-circulating faculty or staff records made for personal use
- Peer-graded assignments BEFORE collected by instructor
- Treatment records (medical/counseling)
- Certain alumni records
- Information about a student learned through personal observation and not otherwise recorded

FERPA Rights and Penalties

- > Students' rights under FERPA
 1. Right to **inspect** their education records
 2. Right to **prevent disclosure** of their education records
 3. Right to **seek amendment** to their education records
 4. Right to **be notified** of the law
 5. Right to **file a complaint** with the Department of Education

In response to an OIG review, the U.S. Department of Education's Privacy Office recently announced that instead of opening a formal investigation regarding each valid FERPA complaint - a practice that contributed to severe backlogs in the Department's FERPA case file - the Department will now dedicate investigatory resources to the highest-risk issues and take a less formal, more collaborative approach for other cases.

- > Failure to comply could result in **suspension of federal funding** (worst case)
- > No private right of action for damages under FERPA

FERPA Compliance

- ▶ University has 45 days to provide access to "education records" to students
- ▶ Student has right to "inspect and review"
 - ▶ Generally, we provide students with copies but are **REQUIRED** to do so only in limited circumstances
- ▶ Remember the law requires disclosure to the student **ONLY**
 - ▶ Other records released (except subpoenas/orders) are permissive in nature

Who is covered?

- ▶ **Living** students currently attending a school or have attended at any time in the past
- ▶ Only to information collected about them while attending
- ▶ Post-attendance information directly related to their attendance

Release of Education Records (exceptions)

- ▶ When **may** education records be released to third parties?
 - ▶ Directory information (unless privacy hold)
 - ▶ Written consent of student
 - ▶ School officials with legitimate educational interest
 - ▶ Judicial order/subpoena
 - ▶ Parents if student is dependent
 - ▶ To another university if student transfers
 - ▶ Health/safety emergency
 - ▶ Certain student disciplinary records

Directory Information

- ▶ Directory information is exempt from FERPA confidentiality requirements
- ▶ “Directory information” at most schools:
 - ▶ student’s name, local and permanent address, email address, telephone number, date and place of birth, class, major field of study, dates of attendance, enrollment status, degrees and awards (including scholarships) received, participation in officially recognized activities and sports, weight and height of members of athletic teams, and the most recent previous educational agency or institution attended.
- ▶ Students may opt out (privacy hold)

Directory Information

- ▶ Directory information is exempt from FERPA confidentiality requirements
- ▶ “Directory information” at **UNC Charlotte**:
 - ▶ student’s name, local and permanent address, email address, telephone number, date and place of birth, class, major field of study, dates of attendance, enrollment status, degrees and awards (including scholarships) received, participation in officially recognized activities and sports, weight and height of members of athletic teams, and the most recent previous educational agency or institution attended.
- ▶ Students may opt out (privacy hold)

Photographs, videos, or other media containing a student’s image or likeness and University-issued student electronic mail addresses are designated by UNC Charlotte as “limited use directory information” and generally are only available for official University use.

Student Consent

- ▶ Must be in **writing** (electronically is okay)
- ▶ Must be **signed and dated** (electronically is okay)
- ▶ Must **specify**:
 - ▶ records to be disclosed
 - ▶ purpose of disclosure
 - ▶ Identity of person to whom the records will be disclosed
- ▶ Note: Student's **presence and lack of objection** is **not** sufficient.

Guest Access Portal

- ▶ The Guest Access Portal allows students to grant a guest, such as a parent or spouse, access to view specific pieces of their educational records in Self-Service Banner.
- ▶ Students enter first name, last name, and e-mail address for designated guests. An automatically generated e-mail is then sent to the guest to allow them to set up their account.
- ▶ Students can also set up a guest passphrase to be used when guests make information requests outside of the Guest Access Portal.

School Officials

- ▶ School officials with a **legitimate educational interest**
 - ▶ Questions to consider
 - ▶ Are they a **properly qualified** school official?
 - ▶ Have they **clearly articulated the interest**?
 - ▶ Do they **need** the information to **perform their duties**?
 - ▶ Is the interest **educationally related**?
 - ▶ Is the interest **narrow in scope**?
 - ▶ Have they **been informed** as to the **restrictions/dissemination** to others?

Other Exceptions

- ▶ Judicial order/subpoena
 - ▶ Talk to us
- ▶ Parents if student is dependent
 - ▶ Some parents can be good influences to help student succeed, so don't automatically cut off communications for fear of FERPA
 - ▶ However, if conversation gets difficult or unproductive, you can end it
 - ▶ Signed consent form permits (but does not require) you to talk with parents
 - ▶ If FERPA vs. health/safety of student, always err on side of health/safety
- ▶ To another university if student transfers
- ▶ Health/safety emergency

Student Disciplinary Records

- ▶ Disciplinary Records **without student consent** (NOTE: "may")
 - ▶ "**Crimes of Violence**" or "Nonforcible sex offense"
 - ▶ To the alleged victim (regardless of responsibility finding)
 - ▶ To the public the "final results" (if perpetrator found responsible)
 - ▶ To parents of students under 21 years old when students violate alcohol/drug related policies
 - ▶ **Release limited to:**
 - ▶ Name of the student who is the "alleged perpetrator" found responsible
 - ▶ Findings of responsible or not responsible
 - ▶ Sanctions imposed
 - ▶ **May not be disclosed**
 - ▶ Names of other students involved (victims/witnesses) without prior consent

Public Records and FERPA

- ▶ Federal law supersedes state law
- ▶ FERPA protected documents ARE STILL PUBLIC RECORDS
 - ▶ North Carolina Public Records Act states that "all documents of any type **made or received in connection with the transaction of public business** by any agency of North Carolina" is a public record
- ▶ Note: North Carolina Public Records Act treats records of University applicants (whether admitted or not) as confidential. Immediately upon attendance, those records are fully covered by FERPA.

Public Records and FERPA

- ▶ Public Records Request received by Daily Tar Heel
 - ▶ Request was for "(a) the name of any person who, since January 1, 2007, has been found responsible for rape, sexual assault or any related or lesser included sexual misconduct by any [UNC-CH] Honor Court, the Committee on Student Conduct, or the Equal Opportunity and Compliance Office; (b) the date and nature of each violation for which each such person was found responsible; and (c) the sanctions imposed on each such person for each such violation."

Public Records and FERPA

- ▶ North Carolina Court of Appeals' opinion in *DTH v. Folt*
 - ▶ Requester argued the public records law **requires** the release
 - ▶ University argued FERPA **controls** and **gives discretion** to the Universities
- ▶ Lower court holding: *Unanimous decision ordering the University to comply with requester's public records requests*
- ▶ Now pending before the North Carolina Supreme Court, and the Court has granted a stay on the release of the requested information
- ▶ Public Policy debate

Quick Hits: Emails

- ▶ Debate among different courts and states
- ▶ California District Court says "no"
 - ▶ *S.A. v. Tulare County Office of Education (2009)*
 - ▶ Held that emails "not maintained" unless printed and put in student's permanent file
 - ▶ "because this type of documentation is located in the inboxes and outboxes of recipients through a virtual realm outside the school and can be easily deleted"
 - ▶ "fleeting nature"

Quick Hits: Emails

- ▶ Ohio Supreme Court says “yes”
 - ▶ *State ex rel. ESPN vs. Ohio State University, et al. (2012)*
 - ▶ Education records applies to all records that “contain information that is directly related to students” and “that are maintained by the University”
 - ▶ Court basically concluded the e-mails contained information about the student and were maintained by the University then they are protected under FERPA
 - ▶ Note: Ohio State retained their staff emails in a centralized location
- ▶ At UNC Charlotte:
 - ▶ “yes”
 - ▶ Public Records Act
 - ▶ Discoverable in lawsuit

Quick Hits: Treatment Records

- ▶ Treatment Records under FERPA
 - FERPA excludes “treatment records” from the definition of “education records”
 - Records on a student 18 years or older
 - Attending a postsecondary institution
 - Made or maintained by a physician, psychiatrist, or other medical doctor/counselor ONLY in connection with the provision of treatment to the student
 - ARE NOT available to anyone other than persons providing such treatment, except to the extent they can be reviewed by a physician or other appropriate professional of the student’s choice

Quick Hits: Letters of Recommendation

- ▶ With written consent:
 - ▶ Permitted to disclose information from education records
 - ▶ to person/entity specified on consent form
 - ▶ for the purpose specified on consent form
- ▶ Remember that if the student does not affirmatively waive his/her right to inspect, student has can review the recommendation you write about him/her

Quick Hits: Letters of Recommendation

- ▶ Without written consent:
 - ▶ “He’s a hard worker” = **okay** (based on your perception, not based on records maintained by university)
 - ▶ “As his academic advisor, I’ve noticed that he is a hard worker” = **not okay** (advisor relationship with student is not directory information)
 - ▶ “He is a hard worker; that’s why he got three A’s this semester.” = **not okay** (grades are education records)

Quick Hits: Personal Notes

- ▶ Personal notes are **not** education records if:
 - ▶ In the **sole possession** of the maker,
 - ▶ Are used **only** as a **personal memory aid**, and
 - ▶ Are **not accessible** or **revealed** to any other person **except** a **temporary substitute** for the maker of the record

Scenario #1

- ▶ “My son Bobby is dually enrolled in his high school and UNC Charlotte. I am able to see his grades from PowerSchool through his high school, but can’t see the grades from his classes at UNC Charlotte. Please send me all his grades that he has received at UNC Charlotte.”
 - ▶ **May the parent obtain the records without a written consent?**
 - FERPA rights transfer to the student attending a postsecondary institution AT ANY AGE. Though, the two schools can exchange information on the student while the student attends both high school and postsecondary institution.
 - ▶ **Does it make a difference if son is 17 vs. 18 years old?**
 - If student under 18 years old, the mom still has FERPA rights at the high school and may also inspect and review any records that are sent from the university to the high school.
 - ▶ **What if a student is a dependent?**
 - If student is a dependent on mom’s tax return, then yes. At UNC Charlotte, a parent must fill out a “Dependent Student Verification” form.

Scenario #2

▶ A frantic dad calls the Dean of Students Office. He demands a copy of his daughter's disciplinary file because he received a letter from the Dean of Student informing him that his daughter was charged for a violation of our alcohol policy. He informed you that his daughter said someone just gave it to her to hold and that she didn't drink anything. Now he is demanding her entire student disciplinary file.

Scenario #3

▶ A faculty member receives a call from CMPD asking whether a student was in class on Thursday.
▶ What if the call comes from PPS?

Scenario #4

▶ A faculty member wants to submit student's paper to VeriCite, a plagiarism detection service. Under what conditions can she do so?
▶ What if the student refuses to consent?

Resources

- ▶ Office of Legal Affairs - x75732
- ▶ Office of the Registrar - x75505
- ▶ <http://legal.uncc.edu/legal-topics/ferpa>
- ▶ <http://registrar.uncc.edu/guest-access-portal-and-ferpa>
- ▶ <https://legal.uncc.edu/legal-topics/classroom-policies-and-practices/suggested-syllabus-policies-notice>

Questions?