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Six Things You Should Know About FERPA Privacy, Student Records, and the Law

From time to time, the AAUP staff receive questions related to the Family Education Rights & Privacy Act (FERPA). Deborah Herman (AAUP-UC Chapter executive director) has asked me to write an overview of this legislation, to help clarify its intent and scope. While FERPA does provide important privacy protections for students, you should always take with a grain of salt any assertions—by students, parents, or administrators—that “we must do X because of FERPA” or “I can’t reveal that information to you because of FERPA.” In general, the scope of FERPA is nowhere near as sweeping as what some folklore has led many to believe.

FERPA is a federal statute that governs the privacy of student records.¹ In a nutshell, FERPA gives students the right to review their educational records, to request amendment to records they believe are inaccurate, and to limit disclosure of those records.

However, unless a student actively exercises the right to limit disclosure, FERPA allows the disclosure of directory information, such as a student’s name, mailing address, phone number, email address, major, degrees, honors, and awards received. Absent proper consent, FERPA prohibits the disclosure of education records and personally identifiable information. “Personally identifiable information” includes information such as social security

numbers, date of birth, and gender/race/ethnicity. “Education records,” such as a student’s class schedule, grades, GPA, academic standing, and academic transcripts, may not be released. A “FERPA Reference Sheet for Faculty” on the University’s website (http://www.uc.edu/REGISTRAR/documents/FERPA_Faculty_Reference_Sheet.pdf), provides a basic overview.

As noted above, FERPA is a complicated and often misunderstood statute. Here are some “do’s and don’ts” that may be helpful in understanding faculty responsibilities under FERPA:

Disclosure to Parents: A Tricky Issue

All rights afforded under FERPA transfer from parents to the student when the student enters the university. However, FERPA provides ways in which postsecondary institutions may share information with parents without the student’s consent. For example, FERPA permits universities to disclose educational records to parents if the student is a dependent for income tax purposes.

Faculty should not make that determination. More information about disclosure to parents can be found at the Education Dept. website, <http://www.ed.gov/print/policy/gen/guid/fpco/brochures/postsec.html>.

Sign-In Sheets and E-Mail Addresses

Instructors May Include in a Classroom Roll Call or Sign-in Sheet the Names of Students Who Have Opted Out of Directory Information Disclosures. The E-mail Address of a Student Who Has Opted Out of Directory Information Disclosures May Be Disclosed to Other Students in an On-line Class.

FERPA and its interpreting regulations do not address whether parents and students may prevent school officials from identifying the student by name in a directory or sign-in sheet, or disclosing the student's electronic identifier or institutional e-mail address *in class*.

Proposed regulations would provide that the right to opt out of directory information disclosures cannot prevent an educational agency or institution from disclosing (or requiring a student to disclose) the student's name, electronic identifier, or institutional e-mail address in a class in which the student is enrolled.²

Proposed regulations clarify that "the right to opt out of directory information disclosures does not include a right to remain anonymous in class . . ."³ FERPA may not be used to impede routine classroom communications and interactions by preventing an instructor from identifying a student by name in class, whether the class is held in a specified physical location or on-line through electronic communications. Regardless of a student's block on directory information disclosures, a professor "may call students by first and last name in class and require students to place their names on a sign-in sheet circulated in class, whether the class is conducted in person or on-line. Because students generally do not have face-to-face communications in on-line classes (or in an on-line component of traditional classes), schools may also disclose or require students to disclose a unique electronic identifier or e-mail address used for students to communicate with one another for on-line class work. This could be either an e-mail address assigned by the institution or one selected by the student for this purpose."⁴

This provision is "strictly limited to information needed to identify and enable students to communicate in class, i.e., the student's name,

unique electronic identifier, and institutional e-mail address."⁵ It provides no authority to disclose any directory information *outside* of the student's class.

Furthermore, other kinds of directory information, including a student's home or campus address, telephone listing, or personal e-mail address not used for class communications, may not be disclosed, even within the student's own class, if the student has exercised the right to opt out of directory information disclosures.

Peer Grading Does Not Violate FERPA

The U.S. Supreme Court held in *Owasso Indep. School Dist. No. 1-011 v. Falvo*, 534 U.S. 426 (2001) that peer grading does not violate FERPA. At least until the point when the instructor's grades are recorded, peer-graded items do not constitute education records protected by FERPA for the following reasons:

(1) In 1232g(a)(4)(A), FERPA provides that items are education records only if they "are maintained by an educational agency or institution or by a person acting for such agency or institution."⁶

(2) The peer-graded items are not "maintained" within the meaning of 1232g(a)(4)(A). The Court reasoned that the score on a student-graded assignment is not "contained" in the educational record or maintained by the instructor until the instructor records the grade.⁷

(3) A peer-grader is not "a person acting for" an educational institution, within the meaning of 1232g(a)(4)(A). Correcting a classmate's work can be as much a part of the assignment as taking the test itself. Furthermore, even if students might be acting for the instructor when they correct an assignment, that is different from saying that they are acting for the educational institution in maintaining it.⁸

The Supreme Court noted that a contrary result would have imposed substantial burdens on teachers across the country, and would create a federal power to exercise minute control over specific teaching methods and instructional dynamics in classrooms throughout the country.⁹

Teacher Employment Records **FERPA Does Not Cover Employment Records Directly Related to Teachers and Only Tangentially Related to Students**

Under FERPA, the term “education records” does not include employment records of the University’s employees maintained in the normal course of business. Specifically, 20 U.S.C. § 1232(g)(4)(B) states that “education records” does not include “records made or maintained in the normal course of business which relate exclusively to such person in that person’s capacity as an employee and are not available for use for any other purpose.”

In a relatively recent case, *Ellis v. Cleveland Municipal School Dist.*, 309 F. Supp.2d 1019 (N.D. Ohio 2004), a court addressed whether a school district could be required to produce student witness statements concerning altercations between substitute teachers and students. The court stated that “FERPA applies to the disclosure of student records, not teacher records” and “Congress did not intend FERPA to cover records directly related to teachers and only tangentially related to students.” Thus, while the student witness statements, for instance, clearly involved students, the records themselves were directly related to the activities and behaviors of teachers, and were not governed by FERPA. While a teacher’s disciplinary records and/or records containing allegations of teacher misconduct are not covered by FERPA, student disciplinary records are “educational records” within the meaning of FERPA. *Ellis*, 309 F. Supp.2d at 1023, n.2.

Emergency Disclosures
You May Release Personally Identifiable Information From an Educational Record to an Appropriate Person in Connection with an Emergency If Knowledge of the Information is Necessary to Protect the Health or Safety of the Student Or Other Individuals

In discussions following the tragic shootings at Virginia Tech, a consistent theme emerged: confusion and differing interpretations about state and federal privacy laws and regulations can impede appropriate information sharing. There were concerns and confusion about the potential liability of teachers, administrators, or institutions that could arise from sharing information, or from not sharing information, under privacy laws, as well as laws designed to protect individuals from discrimination on the basis of mental illness. These fears and misunderstandings limited the transfer of information in more significant ways than is required by law.¹⁰

Under “the health and safety exception” of FERPA, an educational institution may disclose personally identifiable information from education records without prior written consent in connection with an emergency to appropriate persons. The knowledge of such information must be necessary to protect the health or safety of the student or other persons. Educational institutions also may disclose information about disciplinary action taken against a student for conduct that posed a significant risk to the safety of that student, other students, or other members of the school community, if the disclosure is to instructors who have a legitimate educational interest in the behavior of the student. However, the health and safety exception does not allow disclosures on a routine, non-emergency basis. For example, it does not permit a school district to routinely share its student information database with the local police department.¹¹

Proposed regulations would remove the language requiring strict construction of the health and safety exception. If the educational agency or institution determines there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health and safety of the student or other individuals. If, based on the information available at the time of the disclosure, there is a rational basis for disclosure, the Department will not substitute its judgment for that of the educational institution.¹²



FERPA Does Not Create a Private Right of Action to Sue the University or Faculty

*Institutions that systematically violate FERPA are subject to sanctions from the United States Department of Education (DOE), which has the power to remove federal funding. According to the Department’s Family Policy Compliance Office, no college has ever been sanctioned under the law.*¹³ While it is true that, potentially, instructors may be subject to discipline for violating the University’s FERPA policy, students and parents cannot use FERPA to sue instructors. Students and their families are free to complain in the hope the Department of Education will investigate.

However, the Secretary of DOE may take no action against the university unless it determines that the university has a *policy or practice* of violating FERPA, and then only if “compliance cannot be secured by voluntary means.”¹⁴

Some students and their parents have objected that these possible sanctions have no teeth. They have argued that a private right to sue should be available as an additional way to enforce the Act. Some students have argued that violations of the Act create a federal civil rights claim under 42 U.S.C. § 1983. The U.S. Supreme Court shut down that avenue in *Gonzaga University v. Doe*, finding that a student may not sue a private university for damages under § 1983 to enforce provisions of the Act.¹⁵

After *Gonzaga*, Congress considered but has *not* adopted legislation that would have modified FERPA to provide parents and students the right to sue institutions for disclosure of information that ends up harming the student. University administrators have argued the legislation would expose their institutions to frivolous lawsuits and the additional cost of litigation or settlements.

The national AAUP staff in Washington, D.C. do keep an eye on pending legislation regarding FERPA and lobby against any new provisions that would place an undue burden on faculty. If you encounter situations here on campus that involve FERPA, feel free to contact the AAUP Chapter office at 556-6861 for clarification or assistance.

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¹ The statute is in the United States Code at 20 U.S.C. 1232g and 1232h.

The regulations are in the Code of Federal Regulations at 34 C.F.R.

Part 99.

² Federal Register (March 24, 2008), Vol. 73, No. 57, p. 15590. 34 CFR

Part 99, Family Educational Rights and Privacy; Proposed Rule.

Retrieved July 24, 2008 from <http://www.ed.gov/legislation/FedRegister/proprule/2008-1/032408a.html>.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Owasso Independent School District No. 1-01 v. Falvo*, 534 U.S. 426, 432-3 (2002).

⁷ *Id.*

⁸ *Id.* at 433-4.

⁹ *Id.* at 434.

¹⁰ *Supra* note 2 at 15589.

¹¹ *Id.*

¹² *Supra* note 2 at 15589 and 15601.

¹³ Briton White, 2007 *BYU Educ. & L.J.* 321, 338-9 (citing Michael Arnone,

Congress Weighs Changes in Key Student-Privacy Law, *Chron. Higher*

Educ., Oct. 2, 2003, at A22); Steven J. McDonald, The Family Rights

and Privacy Act: 7 Myths – and the Truth, *Chron. Higher Educ.*, April

18, 2008.

¹⁴ See 20 U.S.C. §§ 1232g(b)(1) and 1232h(e)(2).

¹⁵ *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).