

FERPA BASICS AND BEYOND: **The intersection between state and federal laws**

November 30, 2022

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Agenda

- FERPA Basics
 - What is an education record?
 - What is NOT an education record?
 - Who is covered?
 - Exceptions (Release of Records)
- FERPA vs. N.C. Public Records Act
 - Recent ruling in the *DTH Media Corp. v. Folt*
 - Federal vs. State laws
- FERPA vs. HIPAA
 - Intersection between FERPA and HIPAA
 - HIPAA general rules
 - What about treatment records?



Family Educational Rights and Privacy Act (FERPA) Basics





FERPA Basics- History

- *Federal law* was enacted in 1974
 - Also referred to as “Buckley Amendment”
 - 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)



FERPA Basics- Two Parts

- *Permits* the student to inspect and review their own education records and request corrections.
- *Protects* students' education records from being disclosed without consent (unless an exception applies)

FERPA Basics: 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

**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.*

FERPA Basics: Students' rights

- 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's privacy rights
 5. Right to *file a complaint* with U.S. Department of Education

- *Failure to comply* could result *in loss or suspension of federal funding* (worst case)

- No private right of action for damages under FERPA
 - If invasion of privacy, you may still have claim under state tort law



FERPA Basics

- University has 45 days to provide access to “education records” to students
- Key word “permissive”
 - Remember the law requires disclosure to the student
 - Other records released (except subpoenas/orders) are permissive in nature and “may” be provided



What is an “Education Record”?

- 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
 - Student’s name
 - Social security number
 - Student ID number
 - Student’s identity easily traceable
 - Other identifiable information





“Maintained”

- *“Virtually anything” identifiable to the student that is maintained by the university or its agents*
 - Handwritings
 - Electronic data
 - 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
- Interaction about a student learned through personal observations (i.e. “He’s a hard worker.”)



What about personal notes?

- NO, they are *not* an education record if:
 - Personal notes
 - 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





Release of Education Records (exceptions)

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

Directory Information

- Directory information is not generally considered harmful or an invasion of privacy if disclosed
- Directory information at UNC Charlotte
 - Student's name
 - Major field of study
 - Dates of attendance
 - Enrollment status
 - Degrees and awards (including scholarships) received
- Students may opt out (privacy hold)



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?

Student's Consent

- Student **consent**:
 - Must be in **writing**
 - Must be **signed and dated**
 - 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.**

Last Revised August 2, 2022

STUDENT CONSENT FOR ACCESS TO EDUCATION RECORDS
THE UNIVERSITY OF NORTH CAROLINA AT CHARLOTTE

Name of Student (Last, First, Middle Initial): _____	Student ID: _____	Date: _____
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The Family Educational Rights and Privacy Act (FERPA) affords certain rights to students concerning the privacy of, and access to, their education records. For situations not covered by the [Guest Access Portal \(GAP\)](#) (e.g., single meetings when a parent or other third party attends, when discussing records not accessible through GAP, or when discussing more detailed information than what is viewable in GAP), Students may choose to complete and submit this form allowing the release of their education records to specified third parties. Please note that while this form *authorizes* UNC Charlotte to release education records to third parties, it does not *obligate* UNC Charlotte to do so. UNC Charlotte reserves the right to review and respond to requests for release of education records on a case-by-case basis. For additional information, visit UNC Charlotte's FERPA Information page at <http://legal.charlotte.edu/legal-topics/ferpa> or the U.S. Dept. of Education's website at www.ed.gov/policy/gen/guid/fpco/ferpa/index.html.

SECTION A. Education records to be released (check all that apply):
<input type="checkbox"/> Education Records or Information NOT available through GAP (please specify): _____ _____
SECTION B. Person(s) to whom access to education records may be provided:
Name(s) of person(s) to whom access to records may be provided (use additional pages if necessary) _____ Address(es) of person(s) to whom access to records may be provided _____ Relationship to Student _____
SECTION C. Duration of release (check one):
<input type="checkbox"/> One-Time Use: This authorization can be used only once.
<input type="checkbox"/> Limited Use: This authorization expires on: _____
SECTION D. Purpose of release (check one):
<input type="checkbox"/> Family Communications
<input type="checkbox"/> Discussion with University personnel that includes third parties (parents, friends, others)
<input type="checkbox"/> Other (please specify): _____
I understand that (1) I have the right not to consent to the release of my education records, (2) I have the right to inspect any written records released pursuant to this consent, and (3) I have the right to revoke this consent at any time by delivering a written revocation to the University Registrar.
Student's Signature _____ (Date) _____

Instructions for completing this form:

1. The form must be fully completed and signed by the student. Records cannot be released if any section of this form is not filled out entirely.
2. Completed forms should be submitted to the Office of the Registrar in Room 141 of the King Building, or mailed to Office of the Registrar, UNC Charlotte, King 141, 9201 University City Boulevard, Charlotte, NC, 28223; or faxed to the Office of the Registrar at (704) 687-6121. Questions about this form may be directed to the Office of the Registrar at (704) 687-5505.

This information is released subject to the confidentiality provisions of appropriate state and federal laws and regulations which prohibit any further disclosure of this information without the specific written consent of the person to whom it pertains, or as otherwise permitted by such regulations.



Guest Access Portal

- Guest Access Portal allows students to give a guest (i.e. parent or spouse) access to view specific pieces of their educational records in Banner Self-Service
- Students enter first/last name and email address for designated guests. An auto-generated email is then sent to guest to allow them to set up their own account.
- Students can also set up a guest passphrase (still limited to information on view-only screens)



Guest Access Portal – What can a guest view?

- Guest Access Portal options include:
 - Student account information
 - Class registration status
 - Student Class Schedule
 - Holds
 - Mid-term and final grades
 - Transcripts
 - Financial Aid
 - ***NOTE: Guest Access Portal is NOT a blanket authorization to ALL the student's educational records.***

Release of Education Records (add in 1998)

➤ Crimes of violence exceptions

- To the alleged victim (regardless of responsibility finding)
- To the public the “final results” (if perpetrator found responsible)

Release limited to:

1. Name of the student who is the “alleged perpetrator” found responsible
2. Findings of responsible or not responsible
3. Sanctions imposed

- ***May not be*** disclosed

- Names of other students involved (victims/witnesses) without prior consent

➤ Alcohol or illegal drug violations

- To parents of students ***under 21 years*** old when students violate alcohol/drug related policies



FERPA and Public Records



FERPA and Public Records

➤ FERPA

- Federal law
- Primary purpose is to protect the privacy of student information (identifiable student information)
- Permits, but does not require, a university to disclose name, violation, and sanction of students disciplined for crimes of violence
- Prohibits university from disclosing identifiable victim or witness information

FERPA and Public Records

- North Carolina Public Records Act
 - State law
 - Requires disclosure of records made by public entities unless a specific exception applies
 - Student information (other than application information) is not a listed exception
 - Treats records of University applicants (whether admitted or not) as confidential. Once admitted, those records are fully covered by FERPA.

- Note: **FERPA** protected documents **ARE STILL A PUBLIC RECORD**

DTH Media Corp., et al v. Folt case



Background – Requested Information

- “(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 the [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 sanction[] imposed on each person for each such violation”.



Plaintiff's Argument

- N.C. Public Records Law *requires*, and FERPA *allows*, “only the disclosure of the name of the student, the violation committed, and any sanction imposed by the institution on that student upon the release of the final results of any disciplinary proceeding”.



University's Argument

- Student disciplinary records are protected by FERPA
- FERPA gives the university discretion whether to release information under the crimes of violation exception
- Releasing the information would “breach the confidentiality of the University’s Title IX process...and deter victims from coming forward”



North Carolina Supreme Court's Decision

- 4 to 3 decision
- UNC-CH must disclose the three pieces of information permitted under FERPA and required under N.C. Public Records Act
- FERPA “did not grant implied discretion to UNC-CH to determine whether to release the results of a student disciplinary proceeding”





Social Media

- What about the RISK associated with ***social media***?
 - Be careful NOT to reveal protected student information when writing a blog, tweeting, or posting to other social media outlets
 - Same rules apply, but risks are greater with social media (posts go viral, newspapers search, pay attention to online info, etc.)

FERPA v. HIPAA





FERPA and HIPAA – Federal Law

- FERPA – applies to all records regarding a student, maintained by a school receiving funds from the U.S. Department of Education, including medical records
 - Generally prohibits disclosure without student’s FERPA-compliant written consent (some limited exceptions)
- HIPAA – “Health Insurance Portability and Accountability Act” – standards for protecting and sharing a person’s PHI (protected health information)



HIPAA –General Rules

- Expressly excludes records covered by FERPA from its definition of PHI—meaning those records must be treated as FERPA rather than HIPAA records
- Like FERPA, HIPAA generally prohibits disclosure to third parties without the patient’s prior “authorization.” Note that the HIPAA-compliant authorization form differs from the FERPA-compliant written consent.
- If campus health center provides medical services to staff, faculty or non-students, then their health records may be subject to HIPAA, if the health center electronically bills the patients.



FERPA v. HIPAA

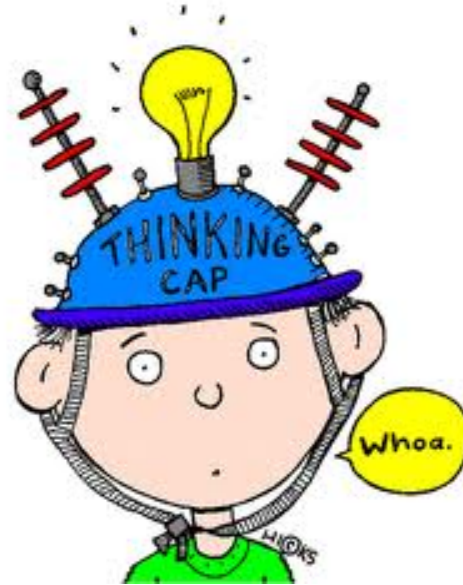
- Treatment Records under FERPA
 - FERPA ***excludes*** “treatment records” from the definition of “education records”
 - Records on a student 18 years or older
 - Attending a postsecondary institution
 - Made or maintained by a physician, psychiatrist, or other medical doctor/counselor **ONLY** in connection 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

May a student request their “treatment record”?

- Treatment Records by definition are not available to anyone other than the student’s treating physician or provider
- University not prevented from disclosing to student
- Remember! Once released to the student, treatment records become “education records” and FERPA rules apply



SCENARIOS



Scenario #1

- *I am a student at UNC Charlotte and I would like to request my entire medical file, including any reports, scans, notes, etc. for my visits between May 1, 2018 through May 15, 2018.*
 - FERPA excludes the “treatment records” from its definition of “education record.” If the records were only used for treatment, the university may deny access without violating FERPA.
 - The release of the records to the student outside the treatment context would convert the records into “education records.”

Scenario #2

- *Disability Services receives a counseling record from a provider regarding a student seeking an accommodation. Is that letter FERPA protected?*
 - ***Yes, remember once the medical record is part of a student education record, it is FERPA protected.***



Scenario #3

- *An upset mom calls Niner Central demanding to know her son's grades because she pays his tuition.*
- ***Can you provide this information to the parent?***
 - It depends. If the student has set up a guest access for the mom (that includes the grade screens) and the mom provides you with the passcode phrase, then mid-term and final grades can be provided. If there's no guest access or other FERPA consent on file, then you cannot provide the information.



Scenario #4

- *A frantic dad calls the Dean of Students office. He demands a copy of his daughter XXXX's disciplinary file because he received a letter from the Dean of Student informing him that his daughter was charged for a violation of alcohol. 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.*
 - ***Can you provide him the file since he is the parent and already knows about the violation?***
 - Not unless the student signed a written consent allowing her dad to obtain these specific records requested
 - FERPA permits disclosure of certain information for students under 21 regarding drug/alcohol violations but that doesn't give parent access to everything



Scenario #5

- *You receive a call from a local law enforcement agency asking for a copy of a student's class schedule on Thursdays because they are investigating a matter involving this student.*
- ***Are you permitted to release the class schedule for any time or date?***
 - No, unless you receive a lawfully issued subpoena or official court order.
 - ***What if the call is from our university PPS?***



Scenario #6

- *You work in the Registrar's Office at UNC Charlotte. Your son and his best friend Tim attend UNC Charlotte. Both your son and his friend are in the same class. Your son told you he received a "C" on his research paper. You have access to Banner and decide to see what Tim received on his paper to compare.*
 - ***Is this legitimate educational interest?***
 - *NO!*
 - *Curiosity is not legitimate and not information needed to perform your duties.*



Questions?

