

# Legal Whack-A-Mole: Addressing the Pesky Student Issues that Inevitably Pop Up

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## Agenda

- ▶ FERPA overview
- ▶ FERPA scenarios
- ▶ First Amendment overview
- ▶ Free expression scenarios



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## FERPA Overview

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### Family Educational Rights and Privacy Act (FERPA)

- ▶ Federal law enacted in 1974
- ▶ Protects students' education records from being disclosed without consent (or other exception)
- ▶ Permits a student to access his/her own education record
- ▶ University Policy 402, Student Records
  - ▶ <http://legal.uncc.edu/policies/up-402>
  - ▶ also, short training module on OLA website



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### Family Educational Rights and Privacy Act (FERPA)

- ▶ "Education record" is any record that is:
  - ▶ Directly related to the student and
  - ▶ Maintained by the university
- ▶ Examples include:
 

▶ Personal information (that's not directory information)	▶ Disciplinary issues
▶ Grades	▶ Immunization records, CBCs, etc.
▶ Schedules	▶ Written communications with or about a student
▶ Disability status	



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### Family Educational Rights and Privacy Act (FERPA)

- ▶ NOT education records:
  - ▶ campus police records
  - ▶ employment records (unless dependent on student status)
  - ▶ peer-graded assignments BEFORE collection
  - ▶ treatment records (medical/counseling)
  - ▶ certain alumni records
  - ▶ your observations about a student



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### Family Educational Rights and Privacy Act (FERPA)

- ▶ NOT education records (cont'd):
  - ▶ 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

\* If your notes are stored on shared drives, in office file rooms, or in a software system that is accessible by others, they do not meet the personal notes exception.

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### Family Educational Rights and Privacy Act (FERPA)

- ▶ Student may consent to the disclosure of education records
  - ▶ Guest Access Portal OR
  - ▶ Electronic or paper form
- ▶ Student's presence and lack of objection is not sufficient.




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### Family Educational Rights and Privacy Act (FERPA)

- ▶ Acceptable electronic consent
  - ▶ An email from the student's official UNC Charlotte email address
  - ▶ Consent provided through the Guest Access Portal
  - ▶ Any paper or online form that includes:
    - ▶ A handwritten signature on a document, including when the entire document is scanned or faxed to the university
    - ▶ A graphic image of a signature placed on a document using secure software that verifies the identity of the user on the other end (e.g. DocuSign)
    - ▶ Marks, initials, or checkboxes provided through an online form that is accessible only after inputting one's NinerNet credentials and is tied to that individual's NinerNet account (for student or employee signatures)

\* More information is available at <https://legal.unccl.edu/legal-topics/contracts/guidelines-accepting-digital-or-electronic-signatures>

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## Family Educational Rights and Privacy Act (FERPA)

- ▶ Exceptions:
  - ▶ To university officials if legitimate educational interest
  - ▶ To parents if student is dependent
  - ▶ To another university if student transfers
  - ▶ Health/safety emergency
  - ▶ Judicial order/subpoena
  - ▶ Certain disciplinary information
    - ▶ crimes of violence (just victim or victim and public) or
    - ▶ alcohol/drug violations (if responsible)

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## FERPA Overview

- ▶ Exceptions (cont'd):
  - ▶ Directory information = information not generally considered harmful or an invasion of privacy if shared
    - ▶ Unless privacy hold (on file with Registrar)
    - ▶ At UNC Charlotte (UP 402), directory information is only:
      - ▶ Student's name
      - ▶ Major field of study
      - ▶ Dates of attendance
      - ▶ Enrollment status
      - ▶ Degrees and awards (including scholarships) received

\* Student images (photos, videos, etc.) and student email addresses are only considered directory information if they are: (1) used in official University publications/websites or (2) required to be disclosed via contract.

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## FERPA Scenarios

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### Scenario

The psychology department plans to host an event for senior psychology majors. Students can visit with a variety of potential employers as well as vendors who want to showcase the latest technology that can aid the students' future practice.

- ▶ Several vendors want the email addresses of the students who will be attending the event to provide them information ahead of time and encourage the students to stop by their tables. Can you provide those?
- ▶ Several potential employers plan to ask the students that visit their tables to provide their GPAs. Is that permissible?
- ▶ The department wants to include pictures of the event on its website, which will likely include students and faculty as well as employers and vendors. Is that okay?
- ▶ One vendor asks if it can include some of the pictures the university takes at the event on its website. Is that okay?

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### Scenario

One of your students has been placed in an internship with an off-campus facility as part of the practical experience required for her degree.

- ▶ The facility needs a clean criminal background check and a clean drug screening for the student before she begins her internship. Can the university share that information with the facility?
- ▶ Your facility liaison tells you that the facility might be interested in hiring the student when she graduates. You know that the student is currently failing a required class and will not be able to graduate if she does not raise that grade. What can/should you share with the facility?
- ▶ At a check-in, the student mentions to you that an employee at the facility pays a lot of attention to her, including making multiple comments about her physical attractiveness. It sort of creeps her out. With whom can/should you share this information?
- ▶ Your next door neighbor also works at that facility and asked you if any of your students are interning there this semester. What can you tell him?

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### Take Aways

- ▶ Limited use directory information (pictures and email addresses) can only be disclosed if you comply with the policy requirements (UP 402)
- ▶ FERPA governs all the student information an academic department collects, even if it looks medical (immunization records, drug screen records, etc.)
- ▶ FERPA requires either:
  - ▶ Written consent from each student, or
  - ▶ Provision in an agreement that the other party is considered a university official and agrees to comply with the requirements of FERPA, or
  - ▶ Another exception
- ▶ Even with consent, a contract provision, or an exception, you should not disclose more information than is necessary

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## First Amendment

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## First Amendment

- ▶ "Congress shall make no law . . . abridging the freedom of speech"
- ▶ As a public institution, UNC Charlotte must comply with the First Amendment with respect to students, faculty, staff, and the public
  - ▶ But the rules are different depending on the constituency and the forum
- ▶ Speech can be:
  - ▶ What someone says (in class, at SoVi, at BOT meeting, etc.)
  - ▶ What someone wears
  - ▶ What someone writes/posts (on bulletin boards or online)
  - ▶ What someone does (displays flag, gives middle finger, etc.)




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## First Amendment

- ▶ Legally, speech/expression is generally protected
  - ▶ "The Government has an interest in preventing speech expressing ideas that offend. And, as we have explained, that idea strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" *Matal v. Tam* (2017)
- ▶ Practically, being exposed to a variety of viewpoints and engaging in debate are invaluable to a healthy academic environment

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### First Amendment

- ▶ Unprotected speech
  - ▶ True threats
  - ▶ Fighting words\*
  - ▶ Speech that incites imminent lawless action
  - ▶ Obscenity/child pornography
  - ▶ Unlawful harassment
  - ▶ Defamation



\* so narrow that it's almost no longer an exception

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### First Amendment

- ▶ The university can make content-neutral rules governing the time, place, and manner of speech, such as:
  - ▶ No disruption of normal university function, including classes
  - ▶ No vandalism/destruction of property
  - ▶ No posting signs on walls of university buildings except in specified places
  - ▶ No using sound amplification
- ▶ The rules also have to be narrowly tailored to serve a significant government interest and leave open alternative channels for speech.

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### First Amendment

- ▶ Traditional public forum (e.g. streets, sidewalks, Belk plaza, CHHS/COED plaza)
  - ▶ Reasonable time, place, and manner restrictions
  - ▶ Content-neutral, viewpoint-neutral
- ▶ Limited public forum (e.g. university website, SGA meeting)
  - ▶ Reasonable time, place, and manner restrictions
  - ▶ Specified topic or specified invitees, viewpoint-neutral
- ▶ Nonpublic forum (e.g. classrooms, staff meetings, offices)
  - ▶ May or may not be permitted to speak
  - ▶ Restrictions still must be viewpoint-neutral

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# First Amendment Scenarios

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Scenario



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Questions?

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