

FERPA OVERVIEW

The Family Educational Rights and Privacy Act is a Federal law that protects the privacy of student education records. The law, also known as **FERPA** or the *Buckley Amendment*, applies to all schools and educational institutions that receive certain funding from the U.S. Department of Education.

Bridgewater State College (“BSC”) is subject to FERPA because BSC:

1. Provides educational instructions and/or educational services to students; AND
2. Receives federal funds through grants, cooperative agreement, contract, sub-grant, or subcontract; OR
3. Have students that receive educational purpose loans such as under a Pell Grant or Guaranteed Student Loans.

REQUIREMENTS OF FERPA

FERPA sets out requirements designed to protect the privacy of parents and students. In brief, the law generally requires an educational institution to:

1. Provide a parent access to their child's educational records;
2. Provide a parent an opportunity to seek correction of records he/she believes to be inaccurate or misleading;
3. With some exceptions, obtain the written permission of a parent before disclosing information contained in the student's educational record.

These rights transfer to the student, or former student, who has reached the age of 18 or is attending any school beyond the high school level. Students and former students to whom the rights have transferred are called “Eligible Students.”

Thus, under FERPA, most BSC students (with very few exceptions), regardless of age, location, method of attendance, or national origin are “eligible students” protected by FERPA. (See discussion below regarding “Eligible Student” under FERPA).

ELEMENTS OF FERPA

Who qualifies as an “Eligible Student” under FERPA?

- An “Eligible Student” is a student who has reached 18 years or is attending an institution of secondary education.
- Student must be or has been in attendance at BSC
- Attendance means whether in person, by correspondence, distant learning, via internet etc.
- Applies even when a student is away on a work study job

- Includes alumni (but excludes records acquired or maintained about the alumni after she is no longer a student).
- Does not include a person who has applied but has not yet attended, or who is not admitted to BSC
- May also exclude students who are non-immigrant students who are nationals from countries designated by the U.S. Attorney General. (See “Exceptions” below).

Who is a “Parent” under FERPA?

- “Parent” includes:
 - A natural parent
 - A Guardian
 - An individual acting as a parent in the absence of a parent or guardian

What Constitutes “Educational Record” under FERPA?

- Any information recorded in any way, including but not limited to
 - Handwriting
 - Print
 - Computer media
 - Video
 - Audio
 - Film
 - Microfilm
 - Microfiche
- Directly related to the student
- Maintained by BSC or by a party acting on behalf of BSC
- Includes employment records of student employees if such employment results from the person’s status as a student (e.g. teaching assistant, research assistant, graduate assistant, work study)

EXCLUSIONS AND EXCEPTIONS UNDER FERPA

Excluded Records

Educational records do not include

- Records/notes in sole possession of maker not accessible or revealed to any other person except a temporary substitute
- Medical records made or kept by a medical professional or paraprofessional, which is used only in connection with the treatment of the student, and is disclosed only to professional providing the treatment – Yet be mindful of other privacy protections such as HIPAA

- Employment records when employment is not contingent on being a student, provided the record is used only in relation to the individual's employment
- Records created and maintained by a law enforcement unit used only for that purpose, is revealed only to law enforcement agencies of the same jurisdiction, and the enforcement unit does not have access to education records
- Information on a person that was obtained when no longer a student (i.e., alumni records) and does not relate to the person as a student

Directory Information

- While information may qualify as Educational Records, no prior consent is required for information that would not generally be considered harmful or an invasion of privacy if disclosed.
- It is the obligation of each educational institution to determine what information it deems directory information.
- BSC has designated the following information as “Directory Information”:
 - A student’s name, local address, hometown, e-mail address, and telephone number (For resident students, local address is their PO Box number and residence hall. For commuting students, if no local address is available, the permanent address applies.)
 - school and major field of study
 - participation in officially recognized activities and sports
 - weight, height, and age of members of athletic teams
 - dates of enrollment
 - full-time or part-time status
 - certificates, degrees, and awards received, including Dean’s List and graduation honors
- FERPA requires that BSC notify students of what information it deems “Directory Information” (although no notice is required to former students)
- A student may formally request, in writing, that her directory information is not released without her prior consent.
- If a student so requests, the request must be placed with his record and remains in effective until revoked in writing.
- Even if such limitation is in place, the information may still be released under another exception, e.g. to school officials with legitimate educational interest

Disclosure to other School Officials at BSC

- Information contained in a student's educational record may be disclosed without prior student consent to "School Officials" who have a legitimate educational interest
- "School Official" includes:
 - People employed by BSC in administrative, supervisory, academic, research or support staff positions
 - People or companies with whom BSC has contracted such as attorneys, auditors, collection agencies, student loan clearinghouse etc.
 - University Trustees and Board members
 - Volunteers performing University sanctioned activities
 - Students serving in official university capacity such as student assistants, disciplinary or grievance committee members
- Test for "Legitimate Educational Interest" is whether the person needs the information to fulfill his professional responsibilities

Disclosure to another School where the Student Seeks or Intends to Enroll

- Disclosure may be made whether the student or the other school initiates the request
- The issue for BSC is how it verifies that a student seeks or intends to attend a school which makes the request for information
- BSC must attempt to notify the student (at the last known address) that it intends to release the information, unless:
 - The request is initiated by the student; or
 - BSC's annual notification states that it discloses information to such other school
- The student must be provided an opportunity for a hearing
- Upon request the student may have a copy of the information disclosed
- BSC can provide information to another school in which a student is also in attendance or from which the student is receiving services.

Disclosure pursuant to Judicial Order or Subpoena

- In the case of a judicial order or subpoena, the student (or parent) must be notified in advance of compliance, providing an opportunity to seek a counter-order to stop the disclosure.
- Searches conducted on the basis of section 215 of the USA Patriot Act do not require prior notification. Nor do the persons affected by such a search need to be contacted subsequently to inform them of the process.
- BSC can be prohibited from providing such information to the objects of the search under section 215.

Disclosure to **Victim** of Certain Crime by the Student

- Disclosure allowed to the alleged victim of violent or non-forcible sex offense
- Disclosure can only include the final result of the disciplinary proceedings
- Disclosure of the result to the victim may occur whether or not BSC determines a violation was committed
- Disclosure of final results must include **ONLY** the student's name, the violation committed and any sanctions imposed

Disclosure in Connection with Disciplinary Proceedings

- Post October 7, 1998 disciplinary decisions may be disclosed (to persons other than the alleged victim) if:
 - It is determined that the student is the alleged perpetrator of a crime of violence or non-forcible sex offense; and
 - The student has committed a violation of BSC rules or policies
 - BSC may not disclose the name of any other student, including a victim or witness (unless such student consents)

Disclosure to Certain Officials of the United States Government

- Disclosure may be made to the Offices of the:
 - U.S. Comptroller General
 - U.S. Attorney General
 - U.S. Secretary of Education
 - State and local education officials
- Request must be for purpose of auditing or examining a state or federally supported program
- Request may also be for any reason relative to students who are non-immigrant students who are nationals from countries designated by the U.S. Attorney General

Other Allowed Disclosures

No prior consent is required for the following disclosures:

- Disclosure in connection with financial aid to the student
- Disclosure to state and local officials pursuant to statute relative to Juvenile Justice
- Disclosure to accrediting organization
- Disclosure to organization conducting study for BSC
- Disclosure to parent of a dependent student
- Disclosure in health or safety Emergency
- Disclosure to the student
- Disclosure to parent of student who violates alcohol or controlled substance

STUDENT RIGHTS UNDER FERPA

The specific rights of BSC students are:

- Students have a right to know about the purposes, content, and location of their educational records;
 - The law provides that, upon a **reasonable request**, the student is entitled to an explanation or interpretation of the records.

- Students have a right to gain access to and challenge the content of their educational records;
 - The student has a right to **access** the “educational records” within a reasonable time, but no more than 45 days of BSC **receipt** of a written request from the student.
 - While BSC is not required to provide access to records for psychological treatment, the student may have such records reviewed by a physician or other appropriate professional of the student’s choice. (See discussion below regarding “Exceptions under FERPA”).
 - If circumstances **effectively** prevent the student from exercising his right to inspect and review the records BSC **shall**
 - 1) Provide the student a copy of the records requested (for which they can impose a charge, unless the charge would prevent the student from exercising the right to inspect and review the records. There can be no charge for search and retrieval of the records); or
 - 2) Make other arrangements for the student to inspect and review the requested record

- Students have a right to have erroneous or misleading information corrected
 - BSC must decide whether to amend the record within a reasonable time after a request to do so. Nothing here requires such request to be in writing.
 - If BSC decides not to amend the record, it must inform the student of its decision and of the student’s right to a hearing. (See discussion on “Hearing to Dispute Records” below)
 - If after the hearing BSC decides not to amend the record, it must tell the student about his right to place a statement in the record commenting on the contested information. Such statement must always accompany the contested information.

- Students have a right to expect that personally identifiable information in their educational records (except to the extent such information is designated

- “Directory Information”) will be kept confidential and disclosed only with their permission or as required by law.
- Consent must be in writing, signed and dated by the student and **must**:
 - ❖ Specify the records that may be disclosed
 - ❖ State the purpose of the disclosure; and
 - ❖ Identify the party or parties to whom the disclosure may be made
 - As of May 21, 2004, final regulations now allow electronic consent and electronic signature.
 - ❖ The question for BSC is what steps it will take to ensure that the email is genuine and to authenticate the source and security of the authorization
 - At the student requests, BSC must provide her with a copy of the records disclosed. It would be expected that a charge could be imposed for such copy.
- Students have a right to file a complaint with the United States Department of Education if they believe BSC has failed to comply with the requirements of FERPA.

Students **do not** have a right to see:

- Financial information about parents
- Confidential letters and recommendations placed in student’s file before 1/1/75
- Confidential letters, statements or similar material, associated with admissions, employment, job placement or honorary recognition to which a student has waived rights of inspection and review
 - The waiver must have been in writing and signed by the student
 - If the student waived right of inspection and review, he may request, and BSC must give him, the names of the individuals who provided the confidential letters etc.
 - The student may revoke his waiver in writing, but such revocation is applicable only to any action or information occurring after the revocation.
- Portions of the student’s educational records containing information about other students

PARENTS’ RIGHTS UNDER FERPA

Notwithstanding the transfer of FERPA rights from parents to a BSC student, parents continue to have certain rights under FERPA. Those rights include:

- To expect confidentiality of certain information about them, such as income tax returns and financial information;
 - The law does not specify that the parent has the right to access this information from the student records

- Therefore, it would be advisable to not provide this information even if requested to do so by the parent.
- Access to student information of their child in the event of the student’s disability, incapacity or emergency, or as authorized by the student.
 - Access should be measured in this situation. Proper evidence of incapacity should be obtained.
 - Be aware of any evidence that the requesting parent is not so entitled, such as court order or legally binding document (such as in a divorce).
- Access to Educational Records of the student where the student qualifies as a dependent student, as defined in section 152 of the Internal Revenue Code of 1986 (See Exceptions discussion)
- Access to Educational Records of a minor student (under 21) who BSC determines has violated a law, rule or policy governing the use of alcohol or narcotics – **BSC may not disclose the information if the student is 21 or older at the time of the request for disclosure**
- As with all other requestors, access to “Directory Information”.

ADDITIONAL REQUIREMENTS IMPOSED UPON BSC BY FERPA

FERPA imposes additional requirements on BSC as follows:

- Annual Notification
 - Must contain students’ rights under FERPA
 - Must describe procedure for exercising right to review and inspect record
 - Must describe procedure for requesting amendment to record
 - By any means reasonably likely to inform the students
- Hearing to dispute record
 - Hearing must be within a reasonable time after receipt of such request
 - Student must receive timely notice of date, time and place of the hearing
 - Hearing may be conducted by anyone who does not have a direct interest in the outcome
 - Student must have fair opportunity to present evidence and may be represented by anyone, including an attorney, at his own expense
 - BSC must make timely written decision after hearing
 - Decision must be based solely on the evidence presented at the hearing and must include a summary of the evidence presented
- Record Keeping
 - The only specific record keeping requirement appears in 34 USC § 99.32
 - BSC is required to maintain a record of each request for access, and each disclosure of personally identifiable student information
 - Yet this requirement is not applicable where the disclosure was to, or the request came from any of the parties allowed to have access (e.g. the student, person authorized by the student, authorized school official etc.
 - Therefore, it would appear that the section requires the school to maintain a record when its action would be considered a violation of FERPA

- Since BSC would need records in a student hearing, to answer a complaint, to prove student approval to release records, to show that a student demanded to not have directory information disclosed etc., it would be advisable to maintain all pertinent records of requests and disclosure.
- Conditions on Redislosure
 - Disclosure of personally identifiable information can only be made on the condition that the party will not disclose the information to any other party without the prior consent of the student, and will use the information only for the purpose requested
 - Practical application of this requirement suggests that BSC somehow notify parties of this requirement.
 - In any event, BSC should have its representatives – attorney, collection agencies, agents etc. – acknowledge this limitation

FERPA PROCEDURE AND ENFORCEMENT

- Student can file written complaint regarding a violation with the Family Policy Compliance Office at U.S. DOE within 180 days of the violation
- Complaint must contain specific allegations of violation
- DOE notifies BSC and requests a response
- DOE investigates complaint
- DOE provides written notice of its findings
- IF BSC is in violation, DOE specifies steps and time limits in which to cure violation
- If BSC does not comply within time limits DOE may
 - Withhold payments under any applicable program
 - Issue a complaint for cease-and-desist order
 - Terminate BSC eligibility to receive funding under any applicable program
- After a variety of differing court decisions, it is now settled that FERPA does not create a private cause of action for students or parent. Therefore, students cannot maintain a private lawsuit against BSC for alleged violations of FERPA

FREQUENTLY ASKED QUESTIONS

The questions appearing below have been reprinted with permission from the Catholic University of America Office of General Counsel. Answers have been adopted and in some cases changed/updated by the author

- I. Definition of Education Record
- II. Disclosure to the Student pursuant to the Student's Request
- III. Disclosure to a Third Party with the Student's Consent
- IV. Disclosure without Consent to a Third Party
- V. Legitimate Educational Interest
- VI. Directory Information
- VII. Pursuant to Judicial Order
- VIII. Release to Parents without a Student's Consent
- IX. Corrections to the Record
- X. Digital Issues

I. Definition of Education Record

Q Are the employment records of a student employee governed by FERPA?

A Student employment records are part of education records only if the employment is dependent on the student's status as a student. Therefore, records of graduate teaching or research assistants, work-study students, etc., *are* education records, *not* regular employment records and FERPA clearly applies. Access to and release of those records are governed by FERPA.

Q Are medical records covered under FERPA?

A Records made or maintained by a physician, psychiatrist, psychologist, or other paraprofessional, if the records are used only for treatment of a student and made available only to those persons providing the treatment, are not considered education records under FERPA. These records are governed by strict confidentiality provisions of other laws, as well as canons of professional ethics. Note that once such medical records are disclosed to someone other than "those persons providing treatment," then the records are no longer considered medical records that are excluded from FERPA, and the student is entitled to access to the records.

Q Are statements by student witnesses gathered in connection with a university investigation included in FERPA's definition of "education records"?

A Depending on the nature of the university's investigation, the documents might well be considered education records. FERPA defines this term very broadly, to constitute "those records . . . which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution . . ." 20 U.S.C. § 1232g(a)(4)(A). There is no requirement that the records be related to the student's education. There is an exception, however, for "records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement." 20 U.S.C. § 1232g(a)(4)(B)(i). Thus, if the investigation was conducted by a campus police department *and* the purpose of the investigation was to enforce the law, rather than to pursue an internal disciplinary proceeding, the records in question would not be "education records" under FERPA.

Q *Is a student's assignment (written or perhaps a video production), once handed in to a professor, an education record protected by FERPA?*

A In a September 1, 1993, opinion letter to the American Library Association, LeRoy Rooker, the Director of the Family Policy Compliance Office, stated the following:

"Generally, any written examination or paper that is prepared by a student and that reveals or discloses a student's identity would be considered an 'education record' under [the regulatory] definition (so long as it is maintained by the institution). That is, in ordinary circumstances FERPA prevents an institution from disclosing or publishing a student's written examination or paper without prior written consent, except in accordance with the specific exceptions set forth in 34 C.F.R. § 99.31." 34 CFR 99.31 lists a number of exceptions, including disclosure to other school officials with a legitimate educational interest; disclosure in connection with financial aid for certain purposes; stated and local educational authorities; and to accrediting organizations among others.

Q *Are "outgoing" letters of recommendations for current students education records? Even if not so defined, can the recommendation include personally identifiable information (such as grade in a specific course) without getting the student's written consent to the disclosure?*

A We advise obtaining written consent for the release of education data in letters of recommendation. One practical way to avoid requiring written consent may be to have the faculty member give the letter of recommendation to the student and to let the student release the data to the prospective employer. Obviously, this approach may raise other concerns, and is not an option in many situations.

Q *When are application materials of students protected under FERPA?*

A FERPA defines student as any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records. 34 CFR § 99.3. In interpreting this definition with respect to

application materials, the Family Policy Compliance Office (FPCO) has generally taken the position that records sent by the student to the university are not protected as education records unless/until the student matriculates. In contrast, because records about a student sent directly from the high school to the university would be covered as education records by virtue of their status as records of the high school, the FPCO views these materials as covered under FERPA regardless of whether or not the student matriculates. Finally, The FPCO has stated that educational testing agency records sent about a student would not be protected unless the student matriculates, as the student was not in attendance at the agency, and thus the FERPA confidentiality provision did not attach at the time of taking the test, unlike the case with records created by a high school. (See Jan. 30, 2001 FPCO opinion letter to Bill Reedy, Vermont Department of Education for definition of educational agency or institution.)

A videotape made by the university of an audition required as part of the application process for the School of Music is not an education record unless/until the student matriculates. The School is advised to make prospective applicants aware that the videotape will be made and used for admission and financial aid decisions only.

Q If a record is not protected by FERPA, does this mean the record is not confidential?

A Not necessarily. It is important to realize that other laws and BSC policies may govern the release of records that are not education records. For example, employment records may be protected by personnel policies and medical records may be protected by federal or state law.

Q Are records of campus disciplinary proceedings protected under FERPA?

A Yes. Narrow exceptions exist, however, *permitting* results of a disciplinary proceeding to be disclosed to the victim of a crime of violence, and *requiring* (under the Student Right-to-Know and Campus Security Act) results of a disciplinary proceeding to be disclosed to a victim and the accused when the proceeding involves a sex offense.

Q Do any special rules apply to transcripts or social security numbers?

A Yes. Although FERPA does not address transcripts separately, registrars are very careful about release of transcripts ... and an official transcript is issued only when requested by the student in writing. Parents of dependent students may obtain transcripts without written permission from the student. Social Security numbers are personally identifiable and contain private information. They must be treated as education records.

II. Disclosure to the student pursuant to the student's request

Q This is a question regarding letters of recommendation in a student's file and whether we will give the student a copy or forward the copy to Law School Admissions Committee (LSAC) of another school. Must we (or even may we) give a copy a. to the student or b. to LSAC or any other outside entity that the student designates?

A. As to this specific former student, the letter of recommendation is an "education record" and therefore the student has a right to see it. Further, documents can be confidential (and thus not disclosed to the student) only if the student has waived access to the letter in writing. So, the first thing is to check and see whether the student waived access to the letter. If he did, he can't see it; he'll have to ask the author for another letter or have the author provide written or email notice to us directly (not through the student) that it's ok to give the student a copy of the letter. Likewise, if he did waive access, we can't provide the letter to any other outside entity, such as LSAC, without the author's written permission to specifically disclose the letter to that entity. If the student did not waive access to the letter, he's entitled to a copy. In that case, whether you want to forward it to others on his behalf is up to you -- I'd just send him the copy and let him do with it what he wants.

Q A student has requested to review her records, a term I read to be defined very broadly, to include not only her "official" record, maintained by the dean's office in her school, but also files maintained by individuals, and a lot of other things in writing about her created by employees of the institution. In this case, the files in question contain some highly critical comments by faculty in the form of letters to the dean, and to faculty committees charged with reviewing her progress toward her (Ph.D.) degree. Must these documents be released to the student?

A Unless these are letters of recommendation, used only for the intended purpose, and as to which the student waived her right of review, or notes maintained by the writer and not shown to anyone else or placed in the student's file, she's entitled to see those letters.

Q A student at a private university requests a copy of the tape recording of his own recently concluded disciplinary hearing. The University Code of Conduct states that hearings are tape recorded but is silent on their use and availability. Is the tape recording an "education record" requiring the University to give the student a copy? If it is, must the University erase testimony from another student because that testimony is also considered part of that student's education record, or require the requesting student to obtain a subpoena?

A FERPA applies to electronic records as well as paper ones (see 34 CFR 99.3), and (putting aside the possible implications of the *Owasso* case,) your tape is therefore an "education record" as long as it is "directly related to a student" (which basically means is personally identifiable to a student) and you "maintain" it, which seems likely. If so, FERPA gives the student the right to **review** the tape, but **not** to a copy of it, unless "circumstances effectively prevent the . . . student from exercising the right to inspect and review" (see 34 CFR 99.10), as, for example, if the student has moved across country. Ordinarily, you must redact information that is personally identifiable to other students before allowing the student to review the tape (see 34 CFR 99.12), but FERPA does not "override any federally protected due process rights" that the student may have to that other information (see *Revised OCR Sexual Harassment Guidance*. See also 8/31/94 FPCO letter to Pete Swan at p. 225 of the NACUA FERPA Compendium (2d ed.); 2/10/95 FPCO letter to Hugo Sonnenschein, id. at p. 339 ; and follow-up letter, id. at p. 346.

Q *If a career center offers a letter of recommendation service (basically holding copies of recommendations and then mailing them out to the institution specified by the student) would the career center violate FERPA by requiring students to waive their rights to review the records as a condition to using the service provided?*

A Schools may require a student to waive his/her right to inspect and review letters of recommendation. While FERPA generally applies to these records, there is an exception for the right to inspect and review the letters in section 99.12(b)(2) of FERPA.

III. Disclosure to a Third Party with the Student's Consent

Q *What rights does FERPA give to students?*

A FERPA grants students the right to inspect and review their records, except for those portions of the record that are not considered "education records." For example, a student would not have a right to review his or her medical records, as these are not covered under FERPA. . . . The student is not allowed access to those portions of a record that contain information about students other than the requesting student, to financial records of the student's parents submitted in confidence, and to confidential letters of recommendation to which the student has waived access. The student is also **not** allowed access to records connected with an application to attend the University or a component unit of the University if that application is denied.

Q *What if I receive a fax from a student asking me to send records? Do I need an original ink signature?*

A The Regulation is silent as to whether original requests are required. However, under recent amendments, electronic mail and electronic signature is an acceptable form. An advisable policy may be to require original written request and signature along with the faxed copy.

Q *Does FERPA require the disclosure of records in the following situation: two students are named in one record, and the disclosure of the record would identify each student even with the redaction of names, addresses, and other identifiable information?*

A The Family Policy Compliance Office has advised that if a misconduct record that involved two students must be disclosed to Student A, when disclosure would necessarily reveal information about Student B, even when the name of Student B was redacted, the best choice is to err on the side of privacy for the Student B rather than provide access to Student A. The regulation at 34 C.F.R. § 99.12(a) allows oral disclosure of the information to the student, and this is an alternative where redaction might not be feasible.

Q *A student who has dropped out of a graduate program wants copies of all e-mail received by or sent from his student e-mail account. Should he get them?*

A Routine e-mail probably falls outside of FERPA. Individual messages, such as a post between a professor and a student discussing course performance, may qualify, due to content of the record rather than its form. Anticipated advice from the Family Policy Compliance Office may clarify this in the near future.

Q *Does an undergraduate who applies to graduate school at the same institution have access to his application file?*

A The applicant is not considered a "student" in the graduate school until he or she is accepted and enrolled. In the interim, the application file is not an education record under FERPA.

Q *May a faculty member refuse to provide a copy (as opposed to merely allowing a review) of a final exam to a student who has made an inspection request under FERPA?*

A The main provision governing this issue is 34 C.F.R. § 99.10(a) which provides that a student must be given an opportunity "to inspect and review the student's education records." However, section 99.10(d) provides that if -- and apparently only if -- "circumstances effectively prevent the . . . student from exercising the right to inspect and review the student's education records, the educational institution . . . shall (1) provide the . . . student with a copy of the records requested; or (2) make other arrangements for the . . . student to inspect and review the records under this section." This exception has been applied primarily in circumstances in which the student is a considerable geographical distance from campus and, even then, the student is not entitled to a copy if you can make "other arrangements."

Q A doctoral student has asked to review memoranda between faculty members and administrators concerning her comprehensive exams. Among the documents responsive to this request are documents in which faculty members discuss the student's exams but then go on to discuss unrelated topics, including commentary critical of other faculty members and administration. Keeping in mind that FERPA defines an education record as a record directly related to a student, should the department: (a) refuse to produce those documents that include discussions of other topics because the entire document is not directly related to the student, (b) redact the unrelated topics from the documents and produce the portions relating to the student, or (c) produce the entire document?

A Option (a) would violate FERPA. Option (b) will fully satisfy FERPA's disclosure requirement.

Q In the law school, when students come to the faculty office and ask to see their exam paper (which they are allowed to do), does the record custodian have to ask them for an ID?

A The safe answer would be yes. However, law students are bound by the ABA's Rules of Professional Conduct for Law Students. Thus when law students log in to see an exam, list the date, and their confidential exam number, they are presumed to be truthful in representing that they have the right to see a particular exam. Furthermore, the exam number process would make it difficult to fraudulently obtain the exam of another student.

Q If a student requests a copy of a transcript from another institution that happens to be in our university's file, does the student have a right to a copy of that transcript?

A You can choose to give a student a copy of that transcript, but to prevent possible misuse, it is recommended that the transcript from the other institution be stamped "Not an official copy." The institution only needs to give the student an opportunity to review and inspect records, and thus they are not entitled to an actual copy, unless failure to honor the request for the copy would deprive them of the right to view the record. AACRAO recommends telling the student to make their transcript request directly to the original institution. *Guidelines for Postsecondary Institutions for Implementation of the Family Educational Rights and Privacy Act of 1974 as Amended*, rev. ed. 1998, American Association of Collegiate Registrars and Admissions Officers. The reasons for this recommendation are to prevent fraud, and as a professional courtesy to institutions that may not be issuing a transcript to a student who has a delinquent account.

Q May I charge a copying fee for the student record?

A Yes, in response to an authorized request for a copy of a student's education records, you may charge a reasonable fee for the copy. However, a fee cannot be imposed if such fee would effectively deny a person access and review of his records.

Q How can the staff of Student Accounts verify that they are speaking with a particular student when the conversation is on the telephone as opposed to in person?

A The office should work out some protocol whereby you ask enough questions of the student on the phone to satisfy you that you are speaking with the student and not with someone else - such as social security number, home address, major course of study, or other specific information that the student would know.

Q What limits apply to subsequent disclosure of the educational record information once the information has been disclosed to someone other than the student?

A Records may be disclosed to a party *outside* the institution only if the student has given written permission for the additional disclosure, or if it meets one of the provisions under FERPA for disclosure. In addition, the party to whom the records are transmitted should be notified of the obligation to not further disclose the records. Internally, a subsequent disclosure may occur if a legitimate educational interest exists, or if written permission has been obtained. This limitation does not apply to directory information.

Q Do you need to require an original signature on a FERPA request for records?

A The important determination is not whether the signature is original or not, but rather whether the signature meets the requirement of reasonably verifying that the student is the one making the request or giving authorization, e.g. for release of records. If the "signature" (original, copied or faxed) is suspicious, then the institution should take steps to verify it before release.

IV. Disclosure without Consent to a Third Party

Q What should I do if someone calls from the media and asks for a copy of a student's transcript from her college years at the university?

A FERPA protects former students as well as current students and, thus, this information could not be released without written permission from the student.

Q Is there any exception to the FERPA privacy restrictions for foreign students when the inquiry relates to their application for admission? For example, what about a long distance telephone call from a friend or relative calling on behalf of a prospective student (because the applicant may not speak English very well) asking for information about the status of the student's application?

A FERPA regulations suggest that there is no exception for foreign nationals. (Note that immigration law requires reporting certain information to the INS.) However, FERPA does not apply to prospective students who have not yet been admitted and thus nothing in FERPA prevents the institution from disclosing whether or not the foreign national has been admitted.

Q Does FERPA permit us to disclose education records to the spouse of a student? If so, under what statutory or regulatory authority?

A There are no spousal exceptions or rights under FERPA. In other words, the spouse has no right to the student's records.

Q Can professors require that student papers be submitted electronically to a commercial website to see if they are plagiarized? The paper being checked will also be stored in the web site's electronic data bank, and future papers will be checked against it.

A The commercial vendor is probably acting as an agent of the university in performing this service. This is most likely allowable under FERPA. Consider having students sign consent to have their papers turned over to the service.

Q Under the USA PATRIOT ACT provisions applicable to FERPA, can a school disclose student records without the student's consent in a situation where it believes, for example, that a chemistry student may be acquiring dangerous and volatile chemicals and the school wants to share with the FBI some of the emails the school exchanged with the student regarding these acquisitions?

A An excellent answer to this question, suggested by FERPA expert Steve McDonald, legal counsel at the Rhode Island School of Design, is that while the USA PATRIOT act exception to FERPA requires a court order (and so wouldn't be of much immediate import in this situation), the health and safety emergency exception to FERPA might be useful. There's a good discussion of its applicability in this context at http://www.ed.gov/offices/OM/fpco/pdf/ht_terrorism.pdf. (See also the Family Policy Compliance Office "Dear Colleague" letter from April 2002.) Also note that if the information came to the school official through some other source, such as the official's personal knowledge of ads the student had posted on a website, then while the emails would be education records under FERPA, the "information" in the mind of the official would not be an education record and could be disclosed.

Q Does the FERPA exception to the consent requirement for information related to financial aid apply in the case of financial aid received from a foreign government? For example, Canadian financial aid agency requests information from a US institution regarding students who have received aid from the agency.

A As long as it meets the provision in 99.31(a)(4)(ii) - that is, it is truly "aid" and is conditioned on the student's attendance at the school. If they have to make a certain grade, then that counts, too.

V. Legitimate Educational Interest

Q May a career counselor have access to a student database that contains records on students other than the students to whom the counselor is providing guidance?

A You may, consistent with FERPA, be able to permit access to the entire database for the counselor, provided that he/she is instructed not to access records of any student other than those who have given consent.

FERPA prohibits an institutional policy of "releasing" information, which does not necessarily include mere accessibility. Under FERPA, an official of an institution who has access to all student records (such as the Registrar) does not have the right to browse records that he/she has no job-related reason to view. It is the actual perusal of the record, not simply the ability to access it, that triggers FERPA. Obviously, there are concerns whenever any person has the potential to see records that he/she should not be looking at, but some level of trust has to exist in any system of confidential recordkeeping.

Q What is a "legitimate educational interest"?

A A school official has a legitimate educational interest if the official is performing a task that is specified in his or her position description or contract agreement, performing a task related to a student's education or to discipline of a student, providing a service or benefit related to the student or student's family, or maintaining the safety and security of campus. An example would be an academic advisor to a student reviewing the student's record on what courses have been completed. This is related to the task of advising the student. The advisor would not be authorized to view records that are not relevant to the task at hand.

Q My computer grants me access to student records. Does this mean I am authorized to view all the available records and do not need to follow FERPA?

A No. The confidentiality provisions of FERPA still apply, and a school official should only access a student's record if a legitimate educational interest exists with respect to that student, and only as to those portions necessary.

VI. Directory Information

Q Does FERPA require the release of directory information?

A FERPA does not require the release of directory information, but allows the university to designate certain information as information that may be released without seeking written permission of the student. Each student must be given an opportunity to determine whether they do not want any directory information released. Thus, before releasing directory information on a student, record custodians need to check its database to see if a file is flagged for non-release of directory information when responding to requests for same.

Q I have received a request to release a list of all law students to a professional organization soliciting memberships and subscriptions. The organization promises not to release the list or sell it to any for-profit agencies. Can a list be released?

A As a legal matter, a list with directory information only, can be released except for the names of those students who have requested that not even directory information be released. To whom the university releases such lists is a policy question. It certainly seems reasonable to release a list to the non-profit professional association for a graduate discipline that wishes to use the list to advertise their organization to students in that discipline.

Q We have received a request from the NAACP for a printout of all students who are African-America. May we comply with this request?

A No. Race is not considered directory information, and release of this information, even for a benign purpose, would violate the law (*Brown v. City of Oneonta*, 106 F. 3d 1125 (2nd Cir. (1997))).

Q What are the rights of alumni with respect to holds on directory information?

A The key here is when the request is made. If a student, within the specified time period during his or her last opportunity as a student in attendance, requests under section 99.37 that directory information not be disclosed (i.e., the request is made while the person is still enrolled as a student), the institution must honor that request until otherwise notified. Thus, the student's request for non-disclosure must be honored even once the student graduates. For example, if the alumni office wants to disclose some of the former student's "directory information," it may not do so. However, an institution is not required by FERPA to honor a request by a former student that directory information not be disclosed when that request is made after the person is no longer an enrolled student and is made in the person's status as an alumnus. Further, the directory information provision does not apply to former students who attended institutions prior to

the passage of FERPA in 1974, because they could not have such a hold in place on their records (i.e., the right to have non-disclosure didn't exist at the time they were a student).

VII. Pursuant to Judicial Order

Q Once the institution has complied with a subpoena for law enforcement purposes, where does the institution store the subpoena itself? Should the subpoena be kept in the student file (where the student could eventually see it) or should the subpoena be forever kept separate? Should the subpoena be kept separate for a period of time with eventual placement in the student file?

A It is advisable that subpoenas are handled by qualified and authorized personnel and stored by such personnel, along with related documents (e.g., correspondence related to the subpoena). The subpoena should not be placed in the student's file.

VIII. Release to Parents without a Student's Consent

Q Does FERPA prevent the release of information that is not gleaned from the student's education record? For example, a resident assistant advises the Vice President for Student Life that a student has attempted suicide. Can the VP relay this information to the student's parents?

A This information did not come from the student's written education record and thus is not covered by FERPA. An independent analysis separate from the FERPA analysis must be conducted before relaying information about students that might be considered confidential or sensitive. Note also that an educational agency or institution may disclose personally identifiable information from an education record to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

Q If a parent calls me up on the phone to discuss how his child is doing in my class, should I ask them for a copy of their tax return before talking to them?

A FERPA, as noted above, does not prevent a general conversation about the student covering topics about which you have general knowledge. Two caveats, however. First, you should obtain enough information from the parent to verify that you are indeed talking to who you think you are talking to. You can always take a phone number and return the call if you need extra time to make this verification. Second, to the extent you are releasing information from the education record rather than from your personal knowledge, then you must verify the child is a dependent. Assistance on verifying dependency is available from the Registrar or the General Counsel. Note that release to the parents is always discretionary on the part of the institution, and no "right to access" exists for the parents of a dependent student at the postsecondary level.

Q Can an institution permit students and their parents to have electronic access to their school records by giving students and parents an access code consisting of the student's social security number plus a PIN which the institution initially establishes as the student's birth date? Students are advised that if they wish they can change the PIN so that only they (the students) have electronic access to their records.

A Automatic access for parents is not advised. If a parent sends or faxes a copy of their most recent income tax return verifying that the student is a dependent, then the university may grant the parent access to the student's records. With respect to PIN numbers, the computer system at the university should generate a unique number for the student, and only the student should have access to that number. The University should not give out PINs over the phone, as it is too difficult to verify identity in this manner.

Q If high school students enroll in distance education courses through the university to obtain high school credit, are those students considered "eligible students" under FERPA such that their consent is required to release their grades and other records held by the university to parents and other requestors? Is the fact that they are receiving high school credit (as opposed to college credit) relevant?

A Regardless of the age of the student, the fact of enrollment in higher education is what determines what rules apply. Parents of the minor aged students who enroll with a college (either for college or high school credit) do not have automatic access to the student records as they do in the Elementary and Secondary years. The higher education institution needs to have students sign release forms allowing the parent to be advised of grades or show proof of dependency (tax).

IX. Corrections to the Record

Q If the student does not agree with the accuracy of the records, does the student have any recourse?

A The student needs to make a request to the appropriate official at the school to amend the records. If that request is denied, then the student is afforded a hearing under FERPA to challenge what he or she believes is a violation of his or her privacy rights, or to ask for a correction of an inaccurate or misleading record. The challenge may only be made to the correctness of the grade, and not the appropriateness of a grade. In other words, FERPA does not provide a cause of action or right to a hearing with respect to grades unless the basis for the challenge is ministerial error.

X. Digital Issues

Q Can a student provide a FERPA waiver to release records via email?

A While email is now acceptable, the general consensus at this time is that a simple email would not suffice under FERPA as written consent for the release of education records. Electronic signature is acceptable on a detailed email request. See the final guidance on electronic signatures issued by the Family Policy Compliance Office, effective May 21, 2004.

Q Do FERPA restrictions apply to foreign nationals who are taking e-courses from a University while residing in their home country? We have requests from foreign governments and/or corporations who are paying for their employees to take such courses, and would like the University to provide information on grades/progress.

A Nothing in FERPA draws distinctions based on the location of the student. If the student is in attendance or has been in attendance at the institution ("attendance" not having a physical presence component), he/she is covered. Let these employers know that they may require employees to sign a privacy release for educational records as a condition for employer payment for the courses. FERPA does not permit educational institutions to require students to waive their rights as a condition of attendance, but it does not apply to employers who wish to impose such a requirement.

Q Our Student Records Office is contemplating allowing students/alumni to order and pay for transcripts over the web so long as the name on the credit card is the same as the name on the transcript (or there is a change of name form completed in the file for individuals who have gotten married or divorced or otherwise changed their name since attending the university). Currently, transcripts can be ordered in person or by mail, but

a signature is required. Is anyone currently allowing ordering of transcripts with electronic payment, or considering it, and are there any thoughts on FERPA implications?

A This use of technology is compliant with FERPA if the transcript is being sent to the student and not to a third party. Current FPCO interpretation of FERPA is that in order to send information to a third party, a student signature is required. The university should have system in place to make sure person ordering the transcript is actually the student.

Q *Campus Programs has a message they want to send out to all students, and they ask the Systems Administrator to provide e-mail addresses for all students. What precautions should be taken in this instance to make sure there is FERPA compliance?*

A If the list message is to reach all students, the person sending out the list should be reminded about the provisions in FERPA and university policy for placing a hold on directory information, which may include e-mail addresses if e-mail addresses are identified as directory information under the university student records policy. If e-mail is directory information, it does not matter if the e-mail addresses of the student recipients appear on the list along with the message as long as no student on the list requested a hold on such directory information. If the e-mails are not identified in the policy as directory information, the e-mail address may be considered personally identifiable information that is not subject to release without written permission from the student.

Q *The Assistant Dean of the Law School wants to post live streaming video of the Atrium of the Law School on the Law School's web site. Students routinely spend time hanging out in the Atrium. Is there a FERPA privacy issue here?*

A As long as the School is not maintaining a record of this video, it would not be an education record under FERPA. Common law privacy principles or state privacy law might apply, and the best approach would be to give all Law School students (or others who might utilize the Atrium) notice of the practice of streaming this video on the web.