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FERPA 101 – FERPA AT THE UNIVERSITY OF CALIFORNIA

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FERPA 101 – FERPA at the University of California

Background

“FERPA” is the popular name for the Family Educational Rights and Privacy Act of 1974. (20 U.S.C. Section 1232g, 34 CFR 99).

UC’s systemwide FERPA policy is online at:

<http://www.ucop.edu/ucophome/coordrev/ucpolicies/aos/toc130.html>

- FERPA protects the privacy rights of students by giving college students the rights (with some exceptions) to:
 1. Control the disclosure of their “education records” to others;
 2. Inspect and review their own “education records”;
 3. Seek amendment of their “education records”;
 4. Receive annual notification of their rights under FERPA; and
 5. File complaints with the Department of Education regarding the failure of the institution to comply with FERPA.
- UC students have these rights as soon as they enroll or register with an academic program of the University. (Once a student of any age is enrolled in or registered with an institution of higher education, the FERPA rights transfer from the parent to the student.)
- UC students under the age of 18 are treated as adults for this purpose – they have the same rights as any other student once they enroll or register at UC.

What Are “Education Records”?

FERPA defines “**Education Record**” to include those records that are:

1. Directly related to a student; and
 2. Maintained by the University or by a party acting for the University.
- This definition is not limited to academic records. It also includes housing records, disciplinary records, financial aid records, and all other records directly related to a student (unless expressly carved out as an exception, discussed below).
 - The term “maintained” is not defined, but should be interpreted broadly to include all records in the possession, custody, or control of any employee or agent of the University.

FERPA defines “**Record**” as:

“any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.”

- This includes email and electronic records in any format, plus photos and video, as well as paper records.

- FERPA applies only to recorded information, and not to information based on personal knowledge or observation. So information learned only by observing the student in the classroom, in a meeting, or in student housing – and not recorded – is not protected under FERPA. (Note that other privacy rules may still apply in such cases.)
- FERPA protects Education Records and the personally identifiable information contained in those records.

Exceptions: What Records are NOT “Education Records”

There are a number of exceptions to the definition of an Education Record (note that these records may be protected by other privacy laws, just not FERPA):

1. Records that are kept in the “**sole possession**” of the maker of the record, and are not accessible or revealed to any other individual.
 - These records are usually created and used as a memory aid.
 - These records are stored in an employee’s personal working file. Records stored in files available to others do not meet this definition, even if they are not stored in a student’s “official” file.
2. **Campus Police records** which are created and maintained by campus police solely for law enforcement purposes.
 - Records shared by campus law enforcement with other campus administrators (such as housing or judicial affairs) are considered “education records.”
 - Records created for disciplinary purposes (as opposed to law enforcement purposes) are considered “education records.”
 - Records created by other campus administrators and shared with the police are considered “education records.”
3. **Employment records**, when University employment is not related to the fact that the individual is a student at the University.
 - For most student employees, their employment is related to the fact that they are students. For example, positions such as TA, GSI, and RA are all related to the employee’s student status, because non-students are not eligible for those positions. For those students, their employment records are also “Education Records.”
4. “**Treatment Records**” or health records which:

- a. Are created or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional or paraprofessional capacity, or assisting in that capacity;
 - b. Are created, maintained, or used only in connection with the provision of treatment to the student; and
 - c. Are not disclosed to anyone other than individuals providing the treatment, except that the records may be personally reviewed by a physician or other appropriate professional of the student's choice.
- For the purpose of this definition, "treatment" does not include academic and career advising, tutoring, disability management counseling, or any activities which are part of the program of instruction offered by the campuses.
 - These are commonly referred to as "Treatment Records." Despite the fact that these "Treatment Records" fall outside the definition of "Education Records" they are still subject to FERPA's restrictions on release without consent. In other words, these records cannot be released to a third party without consent except for treatment purposes, or under those circumstances where Education Records could be disclosed.
 - These "Treatment Records are not subject to FERPA's provisions granting students a right to access and/or correct their records. However, upon request, the student may have any such records reviewed by a physician of the student's choice
 - "Treatment records," like education records, are not subject to the HIPAA Privacy Rule's restrictions on use and disclosure.
 - There may be additional applicable privacy protections for student medical records and mental health records. Consult your Student Health Center/Student Counseling Center for issues related to disclosures of medical and mental health records.
5. **Applicant records** of individuals who do not enroll in or register with an academic program of the University.
 - When applicants become UC students, their applicant records retroactively become "Education Records" protected under FERPA.
 6. **Alumni Records** that are created or received by the University after an individual is no longer a student, and that are not directly related to the individual's attendance as a student.
 7. **Grades on peer-graded papers** before they are collected and recorded by a University representative (e.g. a faculty member or T.A.)

Disclosure of Education Records – When is Disclosure Permitted?

Disclosure of information from Education Records is permitted where:

- The information is not “personally identifiable”;
- The information is “directory information” and the student has not blocked the release of the information;
- The student has consented to the disclosure;
- The disclosure is to the student herself; or
- A statutory exception applies (e.g. health and safety emergency, financial aid, subpoena, etc.).

When is Information “Personally Identifiable”?

FERPA protects against the improper disclosure of “Personally Identifiable” information. Aggregate information, or de-identified information, is not protected under FERPA.

FERPA defines “Personally Identifiable” as including, but not limited to—

- (a) The student's name;
 - (b) The name of the student's parent or other family members;
 - (c) The address of the student or student's family;
 - (d) A personal identifier, such as the student's social security number, student number, or biometric record;
 - (e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;
 - (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or
 - (g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.
- Just because information is “personally identifiable” does not necessarily mean it cannot be disclosed. Personally identifiable information is divided into directory information (generally disclosable) and confidential information (only disclosable with consent or pursuant to a FERPA exception).
 - In order to determine whether information is “Personally Identifiable,” the University must consider the effect of other information that has been publicly released, and other reasonably available information. The combination of two pieces of information, each de-identified, can sometimes identify a student.
 - Information containing “small cell sizes” must be carefully reviewed before disclosure in order to determine whether it has been sufficiently de-identified.

- The University must consider whether a “reasonable person in the school community” would be able to identify the student.
- The University should also consider whether the person asking for information may have additional knowledge about the identity of the student.
- “Personally Identifiable” information includes a student’s Social Security Number, student ID number, or partial versions of those numbers. Grades cannot be posted by SSNs, partial SSNs, student ID numbers, or by alphabetical order of students in the class. Grades may only be posted using unique, randomly assigned numbers that only the instructor and student know.

What is Considered “Directory Information” and How is it Treated?

FERPA defines “Directory Information” as information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.

FERPA includes a suggested list, but allows colleges and universities to create their own definition of what is included as “Directory Information.” UC’s systemwide policy follows the suggested FERPA list fairly closely, and includes a student's:

name, address (local and/or permanent), e-mail address, telephone numbers, date and place of birth, field(s) of study (including major, minor, concentration, specialization, and similar designations), dates of attendance, grade level, enrollment status (e.g., undergraduate or graduate, full time or part time), number of course units in which enrolled, degrees and honors received, the most recent previous educational institution attended, photo, participation in officially recognized activities, including intercollegiate athletics, and the name, weight, and height of participants on intercollegiate University athletic teams.

- Individual UC campuses can include some or all of these items to create their own list of Directory Information, but they may not include additional information that is not in the systemwide list.
- To take advantage of this exception, the campus must first give its students notice of the information it has designated as “Directory Information” and an opportunity to “opt out” or “block” release of their directory information.
- Students may not use the right to block the release of their directory information to prevent the University from disclosing information according to other FERPA exceptions. In other words, a student does not have the authority to prevent the University from sharing information under the “legitimate educational interest” exception or the “health and safety emergency” exception (or any other exception).
- Students may not use the right to block the release of their directory information to keep the University from disclosing (or requiring the student to disclose) the student’s name,

identifier, or University email address in a class. This includes online classes and online workspaces in other classes, as well as in-person classes.

- The University may not disclose or confirm directory information without the student's consent if a student's social security number or other non-directory information is used, alone or combined with other data elements, to identify or help identify the student or the student's records.
 - In other words, if a potential employer wants to confirm a student's dates of attendance and submits the student's SSN, the University may not use the SSN to help identify the student – to do so would confirm the SSN, which is not directory information.
- Disclosure of directory information about former students should be based on the last written notification received by the campus at the time they were students. For students who attended before February 1, 1977, the directory information shall be limited to former students' registration, dates of attendance at the University, degrees granted, and dates on which degrees were conferred.

What are the Requirements for Student Consent to Disclosure?

In order for a student's consent to be valid, it must be a signed and dated written consent that specifically identifies:

- (1) the records to be disclosed;
 - (2) the purpose of the disclosure; and
 - (3) the party or class to whom disclosures are to be made
- The consent must include a signature, but it need not be an original (i.e. fax is acceptable).
 - FERPA permits electronic consent to substitute for an actual signature, where the method used "identifies and authenticates a particular person as the source of the electronic consent" and "indicates such person's approval of the information contained in the electronic consent." Appropriate authentication procedures are required; a regular email would not satisfy this requirement.
 - Note that this authentication requirement (for student consent to disclose to a third party) is more protective than the authentication required for disclosing the student's information to the student herself.

What are the Statutory Exceptions that Allow Disclosure?

FERPA lists a number of situations where the University is permitted to release personally identifiable information from education records, without the student's consent.

- Note that these exceptions are **permissive, not mandatory**. This means that even if one of the following circumstances applies, the University is not legally required by FERPA

to make the disclosure. (Subpoenas, court orders, or other laws may require disclosure, but FERPA does not.)

- Each of these exceptions is independent of the others. If you can find one that applies to your situation, it doesn't matter whether that situation also would qualify under any of the others. For example, if the campus police have a "legitimate educational interest" in certain records, you need not also determine whether the "health and safety" emergency exception applies.
- Note that UC's systemwide policy does not permit disclosure under certain situations where FERPA would allow it. This is for a variety of policy and legal reasons. Most notably, FERPA would permit disclosure to parents of financially dependent students, but UC's systemwide policy does not allow such disclosures.
- The University must use reasonable methods to authenticate the identity of any parties to whom they disclose personally identifiable information. "Reasonable methods" include but are not limited to: PINs; passwords; personal security questions; "smart cards"; biometric indicators; or other factors known or possessed only by the user.

Disclosure to third parties without student consent is permitted under the following circumstances:

1. To campus and University officials who have been determined to have "**legitimate educational interest**" in the records. An employee or agent of the University has a "legitimate educational interest" if the record is relevant and necessary to the accomplishment of their official University responsibilities.
 - FERPA is not intended to curtail ordinary University operations, and should not be used as an excuse to block the internal flow of information for official University purposes.
 - "Campus and University officials" include: University employees and board members.
 - "Campus and University officials" also include outside vendors or other agents of the University, where: (a) the University is outsourcing its functions; (2) the outside party is under the direct control of the University with respect to the use and maintenance of records; and (3) the outside party may not disclose the information to any other party without the student's consent, and may not use the information for any purpose other than the purpose for which the disclosure was made.
 - The "legitimate educational interest" does not require that the interest be purely "educational" or academic – any appropriate University function may serve as the basis for this exception, including appropriate disclosures to judicial affairs or campus police.
 - Reasonable physical, technological or administrative methods must be used to ensure that campus or University officials obtain access to only those education records in which they have legitimate educational interests.

- Determinations as to whether the legitimate educational interest requirement is satisfied shall be made by the head administrator of the unit retaining the information. The campus Registrar is the designated FERPA officer and should coordinate such determinations, in consultation with the Office of the General Counsel as needed.
2. To other educational institutions in which a student seeks or intends to enroll, or is currently enrolled, so long as the disclosure is for purposes related to the student's enrollment or **transfer**.
 - The campus must provide annual notification of this disclosure policy, or else a reasonable attempt must be made to notify individual students about whom information is disclosed.
 - This permits disclosure of academic records, disciplinary records, and any other "Education Record" that is related to the student's enrollment or transfer.
 3. To authorized representatives of the Comptroller General, Attorney General, Secretary of Education, or state or local educational authorities, in connection with an **audit or evaluation** of federal- or state-supported education programs, or with the enforcement of or compliance with federal legal requirements, relating to those programs.
 - Information collected under this exception must be protected so that individuals are not personally identifiable other than to the "authorized representatives", and the information must be destroyed when no longer needed.
 4. In connection with **financial aid** for which a student has applied or which a student has received, where the disclosure is for the purpose of determining the student's eligibility for, the amount of, or the conditions for the aid, or to enforce the terms and conditions of the aid.
 - Such information shall be disclosed to donors only if the conditions of the gift or award expressly require that the information be disclosed.
 5. To organizations conducting **research** studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and or improving instruction.
 - The studies must not permit the personal identification of students and/or their parents by individuals other than representatives of the organization
 - The information must be destroyed when no longer needed for the purposes for which the study was conducted.
 - The University must enter into a written agreement with the organization specifying the purpose, scope and duration of the disclosure, that the organization may not redisclose or misuse the information, and that the information will be destroyed when it is no longer needed for the study.

- The University is not required to initiate the study or agree with or endorse the conclusions or results of the study. But the study must be of interest to the University, and not only of individual interest to the researcher.
6. To **accrediting organizations** in order to carry out their accrediting functions.
 7. To comply with a lawfully issued judicial order or **subpoena**. The University must make a reasonable effort to notify the student in advance of the disclosure of the record unless it is a grand jury or other law enforcement subpoena that orders nondisclosure.
 - Where possible, the University's rule of thumb is to provide ten days notice to students in advance of releasing their information. Where that is not possible, a shorter time period is acceptable, but all reasonable measures should be taken to ensure that students receive the notice in advance of the University's compliance (e.g. using email rather than postal mail).
 - The purpose of the notification is to allow the student to seek legal protection against the subpoena. The University is not obligated to seek legal protection on the student's behalf, and should comply with the subpoena if the student fails to take the required legal action.
 - Note that for California state court subpoenas, if the student is not a party to the litigation, she needs only to serve a written objection on the University and the subpoenaing party to object to the subpoena; she does not need to file a motion with the Court.
 - In addition, the University may disclose to the court, without a court order or subpoena, a student's education records that are relevant for the University to proceed with a legal action against that student, either as a plaintiff or as a defendant.
 8. To appropriate parties, including parents of a student, in connection with a **health or safety emergency** if knowledge of the information is necessary to protect the health or safety of the student or other individuals.
 - The threat of harm must be "articulable and significant," and the University must create a record of the basis for disclosure.
 - The University may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals.
 - Information can be disclosed to any person with the ability to assist in the situation, including but not limited to parents, law enforcement agencies, campus or University officials, next-of-kin, emergency contacts, spouse/partner, or other educational institutions.
 - If, based on the information available at the time of the determination, there is a rational basis for the determination of a health or safety emergency, the Department of Education will not second-guess the University's determination.

- Changes to this provision have eliminated the former “strict construction” requirement, and provide the University more leeway in determining that an emergency exists.
9. To the alleged victim of an alleged forcible or nonforcible **sex offense**. The scope of the information to be provided is: 1) the University's final determination with respect to the alleged sex offense, and 2) any sanction that is imposed against the alleged offender.
- Note that this disclosure is *mandatory* pursuant to other federal laws. The University may not require the alleged victim to maintain the information in confidence.
10. Information concerning **sex offenders** and other individuals, where the information was provided to the University under federal sex offender registration and disclosure requirements.
11. To a person or entity that is **identified as the party that provided or created the record**.
- For example, the University may disclose a student’s high school transcript to the high school identified on the transcript in order to determine whether the transcript is legitimate. In that example, the high school is identified as having created the record.
 - This is not technically an “exception” to FERPA; it is defined as not being a “disclosure” for purposes of FERPA, so no consent or exception is required.

Can Recipients of Education Records Rediscover the Information?

When Education Records are disclosed, the recipient of the information must be informed that the information may not be further disclosed without written consent of the student, and that the recipient may use the information only for the express purposes for which the disclosure was made.

- These requirements do not apply to disclosures made pursuant to court orders or to lawfully issued subpoenas, so long as the party makes a reasonable attempt to notify the students in advance of compliance.
- These requirements also do not apply to disclosures to the student herself, disclosures to the alleged victim of a sex offense, or to disclosures of directory information.

How do Students Get Access to Their Own Records?

FERPA generally gives students the right to inspect and review their own education records.

- The University must provide access to the records within 45 days of a request.
- The University must respond to reasonable requests for explanations and interpretations of the records.

- FERPA does not require the University to provide *copies* of records to the student, unless “circumstances effectively prevent” the student from exercising the right to inspect (for example, living far away from any UC campus).
- The University must use reasonable methods to authenticate the identity of any parties to whom they disclose personally identifiable information, including students who are requesting their own records.
 - o “Reasonable methods” include but are not limited to: PINs, passwords, personal security questions; “smart cards”; biometric indicators; or other factors known or possessed only by the user. A student ID number is acceptable for this purpose unless there is reason to believe that additional authentication measures are required.

There are several **exceptions** to the right of inspection:

1. If the requested records contain information about more than one student, the requesting student may have access only to those portions pertaining to herself.
2. Students do not have the right to inspect financial records of their parents.
3. Students do not have the right to inspect confidential letters and statements of recommendation, if the student has waived the right to review and inspect those documents.
4. Students do not have the right to inspect their “Treatment Records.” However, upon request, the student may have any such records reviewed by a physician of the student’s choice.
5. Students do not have the right to inspect attorney-client privileged information.
6. Students do not have the right to inspect records that are excluded from the definition of “education records,” including “sole possession” records, law enforcement records, etc.

How Do Students Request Corrections in their Education Records?

If a student believes that information contained in her education records is inaccurate or misleading, or otherwise in violation of their right of privacy, she may request that her records be corrected.

- This provision can only be used to correct inaccurate records; it is not intended to allow students to challenge grades or the results of disciplinary actions, other than to make a claim that they were inaccurately recorded.
- If the student’s request for correction is granted, the records shall be corrected within a reasonable period of time following receipt of the request. If the student’s request is denied, they shall be informed of the refusal and advised of their right to a hearing.

- If the student requests a hearing, it must meet the following minimum requirements:
 - a. It must be held within a reasonable time after the request;
 - b. The student must be provided reasonable notice of the date, time, and place;
 - c. The individual conducting the hearing must not have a direct interest in the outcome;
 - d. The student must have a “full and fair opportunity” to present his or her case and may be assisted or represented by others, including an attorney; and
 - e. The decision must be in writing, rendered within a reasonable time after the hearing, and based solely on the evidence presented at the hearing, and it must include a summary of the evidence and the reasons for the decision.
- If, as a result of the hearing, the University agrees with the student, it must amend the record and notify the student in writing.
- If the University does not agree, it must advise the student that he or she may place a written statement in the file commenting on the contested information and/or stating the nature of the disagreement. If the student chooses this option, the statement must be maintained with the contested information and disclosed in conjunction with any subsequent release of the contested information.

Record-Keeping

The University generally must maintain a record of each release of personally identifiable information from a student’s education records.

- This record must include, the date of the disclosure, the identities of the recipients and the basis for release of the information. It also must be maintained with the student’s education records for as long as those records are themselves maintained.
- Exceptions to this requirement include: internal disclosures to a University official, to a student accessing their own records, a person with written consent, a person requesting directory information, and disclosures in connection with a grand jury or other law enforcement subpoena prohibiting disclosure of its existence or contents.

Additional Resources

If you have questions about FERPA, contact your campus Registrar, your campus counsel, or the Office of the General Counsel.

The UC systemwide FERPA policy is available online at:

<http://www.ucop.edu/ucophome/coordrev/ucpolicies/aos/toc130.html>

For additional information please contact Maria Shanle at (510) 987-9845