



Confidentiality and the Educational Need to Know

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Twenty-five years ago the Family Educational Rights and Privacy Act (FERPA) was signed into law. FERPA is a privacy rights act intended to protect the privacy of student educational records. It limits the sharing of information found in students' educational records unless the written permission of the student is obtained or unless other institutional officials can demonstrate a "legitimate educational interest" or need to know. It is this concept of legitimate educational interest that has been the source of many of the on-going questions related to FERPA. Only recently has the federal government defined what is meant by "legitimate educational interest." It has been defined to mean whether the information in question "is necessary to fulfill the individual's professional responsibility (Gehring, 1997, 8)." This raises the question of how to determine when sharing information is necessary to fulfill an individual's professional responsibility. Before addressing this question, we will provide a brief overview of the act and subsequent amendments to it.

Overview to FERPA

In a sense, FERPA is a type of civil rights legislation for college students. It prescribes four basic rights of students: the right to access their educational records; the right to give consent prior to release of a record to a third party; the right to challenge records found to be inaccurate, misleading, or inappropriate; and the right to be notified of their privacy rights as guaranteed by FERPA (Weeks, 1993). These rights apply to students of any age, or former students 18 or older, at schools which receive funds directly from the United States Department of Education or which have students in attendance who receive funds through D.O.E. administered programs (such as Pell Grants and Guaranteed Student Loans).

FERPA identifies the type of educational records that are protected under this act. Designated records include instructional, supervisory, and administrative records, as well as those created or maintained by a professional or paraprofessional who is providing medical or psychological treatment to a student (American Association of Collegiate Registrars and Admissions Officers, 1990). A particularly controversial aspect of FERPA pertains to the sharing of educational records related to disciplinary action. "Disciplinary action or proceedings" are considered educational records under FERPA, "thereby preventing the disclosure of disciplinary proceedings or actions (Gehring, 1995, 6)." In 1990, the Student Right to Know and Campus Security Act amended FERPA to permit, but not require, sharing with alleged victims of a crime of violence the outcome of campus judicial proceedings against the alleged perpetrator (Gehring, 1993). In the case of sexual assault, the Sexual Assault Victim's Bill of Rights amendment to FERPA requires both the accused and the accuser be informed of the outcomes from related judicial proceedings (Gehring, 1993).

In 1998, FERPA was amended in two ways. The first amendment, contained in Section 951 of the Higher Education Amendments, allows, but does not require, institutions to disclose the name of a student found to have violated a rule related to a crime of violence or non-forcible sex offense, to disclose the type of violation committed, and the sanction imposed. (Stoner, 1998). The second change to FERPA passed in 1998 "allows institutions to disclose to parents or

guardians information regarding violations of campus rules 'governing the use or possession of alcohol or a controlled substance, regardless of whether the information is contained in the students' educational records' (Stoner, 1998, 10)." Again, while this amendment gives institutions permission to share this information, it does not require them to do so. Also, this amendment only applies to those students under the age of twenty-one.

FERPA also specifies with whom protected information may be shared. Parties with whom sharing of information is permitted include institutional employees who have a legitimate need to know, official of other institutions who have a legitimate educational interest, parents (when a student over 18 is still dependent), certain government official carrying out lawful functions, individuals who have obtained court orders or subpoenas and persons who need to know in cases of health or safety emergencies (American Association of Collegiate Registrars and Admissions Officers, 1990).

Criteria for Defining Education Need

While all of the above parameters clearly specify student rights and who may receive information, the criteria for evaluating a legitimate need to know are not spelled out in FERPA. Following are some suggestions which might help guide institutions in establishing these criteria.

Challenge and support.

One criterion for looking at educational need to know may be to rely on a concept which is part of the foundation of student development -- challenge and support. An institution may decide to share information if, and when, extending support is critical to the achievement of a student's academic goals. For example, at one institution when a student is placed on residential or social probation or suspension the student's academic advisor is notified. It is the expectation that the advisor will help students remain focused and committed to their academic goals, especially if they have been suspended from classes for a specific period of time. We would suggest that this criterion be regarded very carefully and that in this, as in all cases involving the sharing of information, information be shared judiciously.

Educational integrity.

Another criterion for sharing information might be institutional integrity. Let us use the example of a student is also an employee of the campus security department, with the job of enforcing the college's visitation policy in a residence hall. Suppose that this student was found in violation of the visitation policy by sneaking guests past another security monitor. Should the security supervisor be informed by the judicial officer of the outcome of this case? Our answer would be "yes," insofar that the student is delegated responsibility for enforcing a policy designed to ensure the safety and well-being of a large number of students, and this student has demonstrated an unwillingness to abide by the policy therefore inhibiting his (or her) ability to engender the confidence of his peers in fulfilling his duties. A condition to keep in mind here is not whether the student has been charged with a violation of college policy but whether the student has been found to have actually violated the policy.

Institutional risk management.

In addition to serving as advocates of individual students we are expected to be working in the best interest of the institution. In a situation where not informing a colleague about a student's background may create an occasion of institutional liability a staff member should consider informing his or her colleague that the potential for a difficulty situation may exist. If, for example, an education major has been found to violate the institution's sexual assault policy, has been suspended from the institution for a period of time, and has then returned to the institution it might be appropriate to inform the student's advisor of this prior to the student's continuation of studies. The sexual assault charge, if it resulted in a criminal conviction, is something that might prevent the student from completing his or her educational goals, and may also place the prospective teacher's students in potential jeopardy. In a case such as this the advisor should be informed of the student's history.

Health and safety emergencies.

FERPA does state that institutions may disclose identifiable information to appropriate third parties in situations where there is imminent risk of danger to others, and the information to be shared is vital to the ability to protect the student or others. In many respects this criterion would apply to the scenario described above about a student in a security job. On its own, whether a health or safety emergency exists is a basis for deciding whether to share information under the legitimate educational need to know clause.

The "Special Case" of Counseling Services

Counseling services -- as well as health and disabled student services -- face some additional considerations related to the sharing of information. In general counseling services need to maintain a higher level of confidentiality than do most other areas within the institution. To a great extent this need is based on mandates beyond FERPA which apply to counseling centers and mental health professionals. Standards related to the functioning of counseling service units, such as those outlined by the Council for the Advancement of Standards (1998) and the International Association of Counseling Services, Inc. (1991), state that counseling centers must maintain strict confidentiality of all information -- including identity -- related to students who are utilizing services of that center. In addition, individual professionals who work in these centers are guided in their professional behavior by the ethical standards of organizations to which they belong (e.g., American Psychological Association, American Counseling Association) and -- in the case of those professionals who are licensed -- by the legal requirements of their licensing jurisdiction.

As with FERPA there are some common exceptions in which confidentiality should not be maintained. These most typically involve situations in which there is a need to protect a client's safety, a duty to warn clearly identifiable, potential victims of a client's intent to harm them and reports of suspected child abuse. However, there are also definite parameters set around to whom information should be released. Reflecting both the paramount importance that confidentiality plays in the counseling relationship and the general principle of following the least restrictive/potentially damaging option, information which the client has not asked to have released should be shared only with the person or agency who is most able to provide an appropriate, direct response to the situation. For example, in the case of a student who is assessed and found to be at high risk for suicide information should be shared with the party(ies) who would have the legal authority to hold and hospitalize the student against his or her will. Chief student affairs officers, directors of residence life, advisors and other institutional staff are rarely the parties holding such authority and thus not individuals with whom this information should be shared.

Where To Go From Here

Understandably, balancing the myriad -- and sometimes conflicting -- needs of different members of a campus community can be a challenging proposition. Clarifying in advance who will and will not be privy to information, why those parameters exist and how staff can work as collaboratively as possible helps to ameliorate an inherently difficult process. When key staff have the opportunity to discuss these issues with each other the potential for resentment and frustration are minimized, and it becomes possible to lay out guidelines which will help staff move through handling complicated situations when they arise.

Following are several case studies which embody the issues discussed in this article. We recommend that those people on your campus who would likely be involved with such situations come together and discuss these cases. Each of these cases raises different and somewhat challenging issues, and there is no clear right or wrong response. Hopefully the process of discussing the cases in a setting which cuts across areas of responsibility will create a framework for dealing collaboratively with similar situations. This discussion can then lay the foundation for developing institutional criteria and procedures for dealing with questions related to confidentiality and the educational need to know.

Case Studies

A student is in hot water with the Dean of Students, having been suspended for deliberately disabling the fire alarm system of the residence hall in which he lives. The father of the student calls the Dean and wants to know "what the hell is going on up there?" Can the Dean speak to the father about the disciplinary action that has been taken by the college against his son? Who should the Dean have informed about this disciplinary action? Who should not have been informed?

Five suitemates of a resident student approach the director of residence life demanding that they be informed about what is being done to help their suitemate who has anorexia nervosa. The students demand that the college take control of the situation and suspend the student from the residence halls so she can get the help that they think she needs. Can

the director of residence life inform these students about the kind of help the student with anorexia is getting from the college? Who should the director of residence life notify? Who should not be notified?

A graduate student with multiple physical and psychological disabilities shares with the counselor she has been seeing in the university counseling center that she believes that both her academic department and the disabilities services office have been incompetent and negligent in responding to her needs. The disabilities services office is a sub-unit of the counseling center. The student reports her intention to file a law suit against these areas if her demands for service are not met. The student has a history of filing lawsuits and her counselor believes that she will follow through on this threat. Can the counselor inform the disabilities services office of this threat? The academic department? The university attorney?

A first-year student who was academically dismissed after her first semester and readmitted through a special, academic support program is continuing to experience severe academic difficulties and is also considered by others to be quite bizarre. She frequently misses classes and meetings, was failing in all of her classes at mid-semester, and interpersonally is highly attention-seeking, socially inappropriate and frequently reports on events and experiences which are likely to be untrue. This student has seen a counselor on several occasions, and the counselor believes her to be experiencing a serious mental disorder. The director of the academic support program contacts the counselor seeking input on the student's likelihood of achieving academic success. What information should the director of the program share with the student's counselor? Can the counselor share impressions or suggestions with the program director?

A former student who had been academically dismissed from the institution one year prior arrives the day of graduation with her family, in rented academic attire, and becomes physically sick when her family members discover that her name is not included among the list of graduates in the commencement program. The parents of the former student demand to see a high ranking college official to find out what is going on. Can the high ranking college official inform the parents of why the student is not eligible for graduation? Who should inform the parents of what happened?

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