

PRIVATE

In an age of social media, helicopter parents, and mental health concerns, what does student privacy even mean today?

KNOWLEDGE DOMAINS IN THIS ARTICLE



Student Behavior

Develop protocol for managing student conduct processes within the department that are consistent with institutional practices and legal requirements.

Formulate codes, policies, and regulations to ensure a safe and effective living and learning environment for occupants.

Administer processes in a way that preserves individual dignity, protects individual and community rights, and fosters learning and development.

Communicate with experts outside of the residence life office when appropriate.

MATTERS

By Alina Tugend



More than a half a century ago, the United States Congress passed a law known as the Family Educational Rights and Privacy Act (FERPA) in order to make sure that students' education records couldn't be given cavalierly to anybody who asked for them.

It was 1974, and a nation, traumatized by President Richard Nixon and the Watergate scandal, had great distrust of governments and institutions. FERPA addressed real concerns about the lack of access students and parents had to educational records and the casual way such records – including grades, teachers' comments, and psychological assessments – could be shared with anyone. The focus of the law was primarily on elementary and secondary schools, and “the inclusion of higher education was somewhat of an after thought,” wrote the authors of “Revisiting the Purpose and Effect of FERPA.” Think, they said, “how different our lives would be if higher education had not been included in the provisions.”

Indeed.

In the ensuing decades, much has changed in society, including the typical parent-child relationship, leading some higher education administrators to wonder whether the law has outlived its usefulness. “I think the underpinnings and motivations for the law are sound,” says Jacob Rooksby, dean of the School of Law at Gonzaga University in Spokane, Washington. “We’re finding there continues to be a lot of misunderstanding on how to apply it in a given context, and, in some instances, it can be used as a smokescreen for universities to withhold information that they don’t want to share.”

FERPA is not a major issue in the day-to-day running of most colleges and universities. But when there is an event – such as a suicide or a school shooting or a sexual harassment case where questions arise about who was told what when – FERPA will suddenly be in the news. This came to light in the most tragic of ways after the horrific shooting at

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Virginia Tech in 2007, when Seung-Hui Cho, a student, killed 32 people and then committed suicide. It later emerged that numerous people at the university were aware of Cho's mental instability but did not share the information with each other. In the investigations after the shooting, questions were raised about whether FERPA prevented the university from exchanging information about Cho among themselves and to outside parties. At the time, Department of Education (DOE) officials said FERPA was never intended to and did not, in fact, prevent such disclosures.

In 2009, the DOE revised the law to clarify the responsibility that university officials have to divulge such information to parents, police, and health officials if they fear the student is a danger to himself or others. Nonetheless, controversy has continued to swirl around the issue; one of the most recent to become front-page news occurred at Hamilton College in New York this spring, when a student, Graham Burton, hanged himself in his residence hall room. It was later revealed that a number of people at Hamilton knew of Burton's distress but did not disclose it to his parents. According to an article in *The New York Times*, “More than a month before his death, his adviser, Maurice Isserman, wrote the academic dean the strongest of many warnings: ‘Obviously what’s happening here is a complete crash and burn. I don’t know what the procedures/rules are for contacting parents but if this was my kid, I’d want to know.’” Hamilton officials have declined to talk about the case but did cite the constraints of FERPA at a school assembly, when students asked about Burton's parents' concerns that they had not been told about their son's psychological difficulties, according to the *Times*.

This outcome, is, of course, one of every university's fears. But too often those cases rely on hindsight. "It's easy to say the signs were there," Rooksby says, adding that it's also not always clear that contacting the parents would always be the right thing to do – in fact, sometimes it's exactly the wrong action, if the family is estranged, for example.

Victor Schwartz, chief medical officer at the JED Foundation, a nonprofit that works closely with schools and colleges on teenage mental health issues, notes that more than 10 percent of higher education students nationwide say they have serious thoughts of self-harm, and one to two percent attempt suicide. "You only hear about when things go bad, when there's a shooting or a suicide," he explains. "Schools in general are dealing with these situations effectively, but they vary widely in how knowledgeable and sophisticated they are. There are some that have extremely timid views about what can be done and are too cautious, and some are not cautious enough in contacting the family or urging the student to take a leave of absence."

And, too often, the perceived restrictions or misunderstanding of FERPA are blamed when a student life is lost, says Steven McDonald, general counsel for the Rhode Island School of Design in Providence, but the reality is "that these kinds of situations are far more difficult to diagnose and navigate than we all would like to believe. There seems to be a belief if we all just paid closer attention, they would be easy to deal with." For the most part, he adds, "our counseling and student affairs staffs are doing the best they can with an extraordinarily difficult and nuanced issue, but perfection is not attainable."

Scott Schneider, a lawyer at the law firm Husch Blackwell who represents universities in legal matters, says there is no doubt in his mind that "if there was ever a situation where I had concern



Facts About FERPA

FERPA only applies to written education records (grades, tuition, and disciplinary hearings, for example), not conversations or observations. As the Department of Education notes, "FERPA generally prohibits the improper disclosure of personally identifiable information derived from education records. Thus, information that an official obtained through personal knowledge or observation, or has heard orally from others, is not protected under FERPA. This remains applicable even if education records exist which contain that information . . ." Students can also waive some or all of their rights to FERPA.

There are numerous exceptions to FERPA, when universities have the choice – but not the obligation – to release information. Those exceptions can come into play if the student is a tax dependent, poses a risk in terms of health and safety to himself or others, has been put on academic probation or suspended, or has a drug or alcohol violation.

A higher education institution that has been found to violate FERPA can have its federal funds withdrawn, but that has never happened once in the law's 54-year history, says Frank LoMonte, director of the Brechner Center for Freedom of Information, a think tank. "At times the DOE has sent letters to a university, saying if you release x document, you will be in violation of FERPA," he says. "FERPA now is not meant for a single slip, but if a university had a total and complete break-down of all its information and willy-nilly started posting transcripts on line."

One cannot sue in a court of law under FERPA; any complaints must be filed with the Office for Civil Rights in the U.S. Department of Education. Lawsuits have been brought in the case of schools' failure to disclose, but these are brought under claims of negligence.

about the safety of a student or faculty and where there was a competing concern about FERPA, my concern about safety and security would trump any concerns about FERPA. In general, universities are much more informed about health and safety exceptions than ever before, but there are tons of universities and there's always going to be outliers."

The law has come to the forefront more recently in cases involving accusations of sexual assault. As just one example, last year a state court judge sided with the University of Kentucky against its independent student newspaper, the *Kentucky Kernel*, which had requested documents involving the dismissal of a former professor alleged to have sexually assaulted and harassed students. Initially, the state's attorney general said the university had to release redacted versions of the records in compliance with the state's open records laws. Since the university could not appeal the decision, it sued the student newspaper, and the judge ruled that, under FERPA, the university did not have to release records regarding allegations. Critics have argued, according to *Inside Higher Ed*, that "the lawsuit is just the latest example of colleges hiding behind student privacy laws to protect their image and reputation." In September, the state's Court of Appeals heard the *Kernel's* appeal of the ruling.

FERPA is part of the problem that can cause confusion in Title IX cases, Rooksby says, but certainly not all of it. "There is needed a national law focused on how sexual assault matters should be handled on college campuses." Frank LoMonte, director of the think tank the Brechner Center for Freedom of Information, says that colleges and universities all too

often wrongly use FERPA to avoid giving journalists and others access to records they should legitimately get. He thinks there are a number of reasons for this. "People have received really terrible training on

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what is and what is not covered by FERPA. It is often oversimplified by people who haven't done the legal research." In addition, he notes, "The law itself is really hard to understand and unclear and there's some crazy off-the-wall court interpretations that expand FERPA in irrational ways." But colleges do understand that you have to act in extreme ways to be penalized by FERPA, and "for them to wave it around is just bad faith."


Rooksby agrees that this can sometimes be the case. "Institutions face more freedom and choice than they may wish to portray to students, to the media, to the public," he explains. "It's much more convenient to say a law with an acronym that nobody knows what it stands for prevents the release of certain information, when really what they mean is, 'we're deciding not to release the information.' Institutions may not want it to be known they've actually made that choice."

Not surprisingly, some disagree. "That's a cynical take and doesn't comport with day-to-day realities," Schneider says. "There are a lot of times I imagine a university wants to share information because it adds meaningful perspective – it explains why an action was taken, and it might put the university in a more flattering light. Lots of times universities are clamoring to provide additional context, and sometimes it's the role of the lawyer to say we can't because we can't divulge education records."

While mental health and Title IX questions can be among the most difficult for university officials, other issues that seem more mundane are rarely addressed, such as core record management. "Particularly with the rise of digital technology, there are many different areas on campus

managing lots of records,” says Peter F. Lake, a director of the Center for Excellence in Higher Education Law and Policy at Stetson University College of Law in Gulfport, Florida. “You run into how well trained are the personnel managing these records regarding FERPA. Some people are a lot better trained than others. It opens the opportunity to vastly more compliance errors.”

Many say that training is needed not just in record keeping but simply in communicating with outside parties, particularly parents. “Folks might not have as much confidence or practice in talking to parents,” says John Piga, associate dean of student affairs and director of the residential center



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... THE HIGH COST OF COLLEGE NOW HAS CHANGED THE DYNAMIC BETWEEN PARENTS AND HIGHER EDUCATION INSTITUTIONS.

at Bentley University in Waltham, Massachusetts. “The first time you get a call like that and you’re not accustomed to that, it can sometimes scare administrators, and I think sometimes they mistakenly use FERPA as a rationale not to share information.” For example, the university’s career placement office is seeing “a higher uptick in parental calls about job placements” says Erin Kelley, the university’s director of student conduct and student development. They call the career placement office for all sorts of reasons, but sometimes it’s to check if their child really showed up for a job interview when she said she did.

So, what should the administrator do then? “The initial suggestion to the parent would be to go back and talk to the student,” Kelley says. “We would encourage the parent to be patient and tell them this is a time of high stress for their child. There are ways you can coach a parent and coach a student to get

where they need to be.” The career placement office concerns, among other issues, spurred a meeting with the university’s officials, counselors, and the general counsel over the summer about FERPA. The meeting, Piga notes, “was a recognition within student affairs that some are more comfortable with communications with parents, and there are still pockets that are less comfortable. Different institutions have had different views of FERPA, and that can apply in an individual institution on the micro level, depending on the department.”

But even if FERPA does ban an official from revealing information – such as telling an anxious parent her daughter’s grades – the conversation with a parent does not need to end. “I never say FERPA doesn’t allow me to do that,” says Susan Lantz, vice president for student life at Susquehanna University in Selinsgrove, Pennsylvania. “I can listen, I can talk to them about policies and procedures. I can say, ‘This is how I might help your son or daughter through.’ I can give a lot of information without compromising FERPA in any way. Then we can brainstorm together.”

As Piga and many others note, while FERPA hasn’t changed, the relationship between parents and children has dramatically. One senior student life administrator noted that “the students who fought for privacy in the ‘80s are the parents who now want to continue to be engaged in

the well-being of their teenagers and want to be kept informed.” That has led to “a real challenge for universities – to balance FERPA requirements with maintaining good relationships with parents,” Lantz says. “It’s a stark difference between high school, where parents had access to every portal to see homework” and college, where they don’t.

In addition, the high cost of college now has changed the dynamic between parents and higher education institutions. “When FERPA was passed, education was relatively cheap,” Lake says. “When bearing the brunt of \$200,000 or more for a college degree, you want to know what’s in the refrigerator.” And it’s not just parents – it’s the children too. “Our students are incredibly close to their parents,” Lantz says. “Often they’re not even out of my office before they’re calling their father or mother. Or while they’re still in my room, they will call and ask me, ‘tell my mom what you said.’” Or as Lake notes, “I’ve seen law students take their parents to their first law job interview.”

So, should FERPA be revisited or scrapped altogether? LoMonte knows where he stands. “I honestly don’t see the need for a federal student privacy statute. The states are fully capable of taking care of themselves.

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The vast majority of states have a catch-all exemption saying that agencies can refuse your request if it would unduly invade personal privacy.”

Others are not so sure, agreeing that maybe it is time for revisions, but not for complete abolishment. “For me, FERPA is a tool to help students realize their independence and to start taking responsibility for themselves,” says Lantz. “For that reason, FERPA is very helpful.” And Schwartz says that, with all the misperceptions and misunderstandings of the law, it “gives you the outer boundaries of what to do. Within that hopefully what we’re trying to do is get people to make thoughtful decisions based on the particulars of that case, and the fact is if you do that you’ll probably be within the guardrails of the legal boundaries.” ■

Alina Tugend is a freelance writer whose work has appeared in The New York Times, The Atlantic, The Chronicle of Higher Education, and other publications.

■ RESOURCES

Anemona Hartocollis, “His College Knew of His Despair. His Parents Didn’t, Until It Was Too Late,” *The New York Times* (May 12, 2018).

Jake New, “Protecting Student Privacy, or Reputation?” *Inside Higher Ed* (January 25, 2017).

Karen J. Stone and Edward N. Stoner II, “Revisiting the Purpose and Effect of FERPA,” Stetson University College of Law 23rd Annual National Conference on Law and Higher Education (February 2002).

U.S. Department of Education, *FERPA General Guidance for Students* (2015).

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