




AMERICAN UNIVERSITY

W A S H I N G T O N , D C

MEMORANDUM

TO: President's Council

FROM: Justin Perillo, Assistant General Counsel 

CC: Mary Kennard, Vice President and General Counsel

DATE: October 16, 2007

RE: Post Virginia Tech: Exceptions to FERPA

You asked for a briefing about under what conditions the Family Educational and Rights and Privacy Act ("FERPA") allows the University to notify parents of their child's alcohol and drug related Student Conduct Code violations. In addition, you asked whether FERPA has been modified in the wake of the Virginia Tech incident.

Since the Virginia Tech occurrence, there have been no revisions to FERPA. The State of Virginia and the federal government have investigated the matter. While the Department of Education is still assessing whether any changes to FERPA are needed, the federal and state reports did conclude that educational institutions have a clear misunderstanding of when FERPA permits disclosure of personal student information (which does include the option to notify parents when students, who are under the age of 21, have violated alcohol and drug policies). This memorandum will review FERPA and provide a short summary on related disclosure exceptions.

FERPA

FERPA, 20 U.S.C. 1232g, generally protects privacy rights of student education records and applies to all educational institutions that receive federal funds (including financial aid). The University adopted the Confidentiality of Student Records Policy to conform to FERPA's requirements.¹

¹ The main difference between FERPA and the University's Confidentiality of Student Records Policy is regarding the disclosure of directory information. Under FERPA, educational institutions may designate certain classes of information as "directory information" that may be released to anyone without a student's consent. Directory information may (but is not required to) include such items as the student's name, address (local, permanent, and e-mail), telephone number (local and permanent), dates of attendance at the institution, major, degrees and awards received, participation in officially recognized activities and sports, photograph, and date and place of birth, as well as other information "that would not generally be considered harmful or an invasion of privacy if disclosed." The University's Policy takes a more constrictive approach by generally only verifying directory information to third parties.

Education records are records that contain information directly related to a student and that are maintained by the University. These records include academic records, conduct files, and information about clubs and other campus activities. Under FERPA, the student has a right to access and review his/her education records. All education records are confidential and cannot be disclosed unless the student consents or the disclosure fits one of the following exceptions:

- School officials with legitimate educational interest;
- Other schools to which a student is transferring;
- Parents of a dependant student, as defined by the Internal Revenue Code;
- Specified officials for audit or evaluation purposes;
- Appropriate parties in connection with financial aid to a student;
- Organizations conducting certain studies for or on behalf of the school;
- Accrediting organizations;
- To comply with a judicial order or lawfully issued subpoena;
- Appropriate officials in cases of health and safety emergencies;
- Victims of crimes of violence or non-forcible sex offenses concerning the results of disciplinary proceedings about those incidents;
- Appropriate parties as permitted by the University's Parental Notification of Disciplinary Violations Involving the Use or Possession of Alcohol or a Controlled Substance; and
- To appropriate parties in other circumstances as required by law.

Of those exceptions to FERPA listed above, below is additional information describing the most relevant:

Disclosure between University Administrators for Legitimate Educational Interest

Under one of FERPA's many exceptions to the general prohibition against disclosure, university administrators² are free to share information from student education records with other university administrators who have "legitimate educational interests" in the information. Overall, an administrator has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibilities for the University. For example, an employee concerned that a student's statements or behavior can share relevant information with the dean of students, the judicial affairs office, the campus counseling center, the campus law enforcement unit, or other appropriate university officials whose job it is to deal with such issues.

Disclosure Related to an Emergency

The University is permitted to release information in an education record to any appropriate person in connection with an emergency "if the knowledge of such information is necessary to protect the health or safety of the student or other persons."

² A university official is defined as faculty, administrative and classified staff, administrators, trustees, students serving on official university committees or assisting another university official in performing his or her duties, and third parties with whom the university has contracted such as attorneys, auditors, or collection agents.

This exception has been construed to circumstances involving imminent, specific threats to health and safety. Students may present such an emergency if their behavior indicates they are a threat to themselves or others. For example, the Department of Education had advised that when a student makes suicidal comments, engages in unsafe conduct (such as playing with knives or lighters), or makes threats against another student, the student's conduct can amount to an emergency, and, thus the University may disclose the information to a third party.

Parental Notification of Drug and Alcohol Violations of the Student Code

In 1998, the Higher Education Reauthorization Act amended FERPA by permitting educational institutions to notify parents when students, who are under the age of 21, have violated the University's alcohol and drug policies.

The University's Parental Notification Policy states that the University "will generally notify parents or guardians of students' [who are under 21] misconduct related to alcohol or controlled substances when: (1) A student's violation of the University's alcohol or drug policies is judged by the dean of students to be egregious, to indicate that the student's health or safety may be at risk, or that the student may have placed others at risk. (2) A student's violation of the University's alcohol or drug policies results in a student's removal from the residence halls, or suspension, or expulsion from the University. (3) A student is found responsible for a violation of the University's drug policies or for a second violation of the University's alcohol or drug policies, however minor, and all subsequent violations of alcohol or drug policies." This approach is consistent with FERPA and the University's Confidentiality of Student Records Policy.

Disclosure Pursuant to a Subpoena or Court Order

Another exception to the consent requirement is that FERPA permits an educational institution to comply with a duly issued law enforcement subpoena or court order. The general rule is that upon receipt of a subpoena or court order, the educational institution is required to notify the student. FERPA permits compliance with a subpoena (i.e., a grand jury subpoena) that by its terms does not permit prior notification to the student.

Disclosure Related to a Terrorism Investigation

The USA PATRIOT Act amended FERPA to add a new section on "Investigation and Prosecution of Terrorism." Basically, FERPA permits the U.S. Attorney General or a federal officer or employee designated by the Attorney General to apply for an *ex parte* order that permits the collection and use of education records that are "relevant to an authorized investigation or prosecution" of an act of domestic or international terrorism. The *ex parte* order does not require a showing of probable cause, it must simply certify "that there are specific and articulable facts giving reason to believe that the education records are likely to contain information" relevant to the authorized investigation.

Disclosure to Victims of Crimes of Violence or Sex Offenses

FERPA permits disclosure to an alleged victim of any crime of violence or non-forcible sex offense of the final results of any disciplinary proceeding conducted by an educational institution against the alleged perpetrator of that crime with respect to that crime. In this circumstance, the

institution may disclose the final results of the disciplinary proceeding to the individual, regardless of whether the institution concluded a violation was committed.

Information Not Covered by FERPA

The following information is not protected by FERPA and permits the University's disclosure without the permission of the student.

Public Safety Records

FERPA specifically states that records created and maintained by campus law enforcement for law enforcement purposes are not covered by FERPA. For example, Public Safety conducts an investigation related to a student stabbing another student and creates a record for law enforcement purpose of investigating a potential crime. This information is not protected by FERPA and the University can disclose to third parties.

Observations

Since FERPA only protects information contained in an education record, nothing prohibits a university administrator from disclosing to a third party information that is based on that the administrator's personal knowledge or observation and not from an education record. For example, if a university administrator develops a concern about a student based on the administrator's observations of or personal interactions with the student, the administrator may disclose that concern to anyone without violating FERPA.

CONCLUSION

One lesson learned from the Virginia Tech incident is that FERPA should not be viewed as a serious impediment to the sharing of student information among campus officials or appropriate third parties when there is a legitimate concern regarding campus safety. FERPA has several exceptions that allow the University to disclose a student's education record without his/her consent. One exception allows the University to notify parents when students, who are under 21, have violated the University's alcohol and drug policies. The University's Confidentiality of Student Records Policy has incorporated all of FERPA's disclosure exceptions.

In addition, the Office of General Counsel, in conjunction with the Registrar's Office, should provide a refresher course to the campus community about what information the University is permitted to disclosure under FERPA. In addition, I will monitor the congressional record for any changes to FERPA.