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42<sup>nd</sup> Annual National Conference on  
Law and Higher Education  
March 4, 2021



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**Disclaimer**



- This presentation does not constitute legal advice. Consult with competent legal counsel regarding how best to address a specific situation.
- Use chat function to ask general questions and hypotheticals.
- We have a variety of stakeholders here so keep that in mind.

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**Today's Agenda**



- Why Do We Care?
- Professor Paul slips up
- Professor Ambrose adds to the mess
- Tracy's Troubles ensue
- Skirmish at the Dining Hall
- What's going on at Corona College?
- How do we avoid this next time?

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Why Do We Care?

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First, the Obvious Reason



Complying with FERPA is required by federal law

"No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents ... the **right to inspect and review** [education records]." 20 U.S.C. 1232g(a)(1).

"No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the **release of education records** (or personally identifiable information contained therein other than directory information ... **without [written consent]**." 20 U.S.C. 1232g(b)(1).

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Enforcement of Federal Law



Student Privacy Policy Office, U.S. Department of Education

"The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he [?!] has determined that compliance cannot be secured by voluntary means." 20 U.S.C. 1232g(f).

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## No Private Right of Action



*Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002)

"FERPA's nondisclosure provisions contain no rights-creating language, they have an aggregate, not individual focus, and they serve primarily to direct the Secretary of Education's distribution of public funds to educational institutions. They therefore create no rights enforceable under §1983."

Note: Individuals can file complaints with the SPPO.

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## Even More Fundamental



FERPA underscores the trust that students have in our institutions.

- Students bring their whole selves to our institutions.
- They trust that we will do right by them, and a large part of that is in not revealing their whole selves to others. They are still learning, developing, growing – and they want to be able to do that with some privacy.
- Lack of trust causes a deteriorating relationship that can affect the student long-term and result in complaints, litigation, etc.
- Keep this fundamental trust in mind as we work through our hypothetical.

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## Our Hypotheticals Today



None of this is based on a true story, but there may be some parallels with cited cases.

- Welcome to Corona College, a public institution that is the lifeblood of its hometown, Corona City.
- As an employee of Corona College, you are a benign FERPA Deity who seeks to bring a campus into compassionate and thoughtful compliance with the law.
- You seek conformity with policy through education rather than retribution.
- "FERPA Deity" falls into your job description under "Other duties as assigned"

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**Hypothetical: Professor Paul Posts Grades**

*Don't do this at home, kids.*

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**Professor Paul's Day**



**End of Semester Essays Have Been Graded!**

- Students are supposed to come to office hours to pick up their end of semester essays in a senior-level seminar called "Controversies in Contemporary Sociology"
- Professor's Paul daughter becomes sick, so he has to leave on short notice to pick her up from school
- Since students are getting ready to leave for break, he posts the semester's grade list outside his office

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**The Good and the Bad**



**Professor Paul Got It Partly Right**

- The Good: The grade list is posted according to a code students picked at the beginning of the course – not by name!
- The Bad: Professor Paul also leaves a folder outside his office that contains the graded essays, each of which has the student's name and the code at the top.

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**First, “Let It Go”**

Professor Paul's missteps likely aren't going to qualify as a pattern or practice of unauthorized disclosure. No one is losing federal funding today.

However, the institution still needs to correct these missteps.

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**The Ugly #1**



(You knew we were going there...)

- Student Hermione can't understand why she got a B. She sits on the floor and reads all the papers to figure out what she did wrong.
  - No one sees her do it.
  - No one ever complains about it.
  - Hermione tells no one.
- Is this a problem?

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**Ugly #1 - Discussion**



This is not *Owasso*

- “Education record” – Records that are (1) directly related to a student and (2) maintained by an educational agency or institution or by a party acting for the agency or institution. 34 CFR 99.3.
- Do these qualify as education records?
  - “Education record” does not include “grades on peer-graded papers before they are collected and recorded by a teacher.” Thanks, *Owasso*.
- What do we do about this?

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## The Ugly #2



Give us any chance, we'll take it...

- Student Laverne stops by to pick her paper. Her roommate, Shirley, can't stop by, so Laverne picks up hers, too. Laverne uses the code at the top of the essay to look up Shirley's grade.
- Laverne texts Shirley, "OMG you got a D!" Laverne got a C- and is feeling smug.
- Shirley's mother, who gets copies of all of Shirley's texts, calls Professor Paul on his cell phone to talk to him about Shirley's grade.
- When Shirley's mother is upset about the disclosure and the grade, what should Professor Paul say?

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## The Swiss Cheese Theory of FERPA



What passes through the holes?

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## Considering Release



- 1
  - Do you have consent OR
  - Does an exception exist?
- 2
  - Does your policy allow release &
  - Does your annual notice allow release?
- 3
  - Are you releasing to the student? RIGHT TO INSPECT
  - Are you releasing under FOIA? REQUIRED TO RELEASE
  - If neither, are you required to release by another law (e.g. Title IX)?

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**Just Because You Can, Doesn't Mean You Should**

So let's go back to Shirley's Mom...

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**The Ugly #2 – Discussion (cont.)**



We're gonna make it!

- Can Professor Paul talk to Shirley's mother about the grade?
  - Do we have consent? (Assume no. Shirley doesn't even know her mother still gets her texts...)
  - Do we have another exception that would allow for disclosure?
  - Does your policy/annual notice allow for the exception to be used? (Assume it's totally in line with FERPA for today.)
  - Do we have to release to Shirley's Mom for any reason?
  - What should Professor Paul tell Shirley's Mom?

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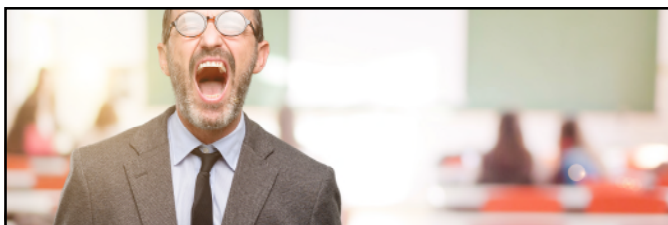
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**Hypothetical: Angry Ambrose (Professor)**

*When a FERPA violation hits the Internet*

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### Professor Ambrose's Day



There is no love lost between these two tenured professors.

- Prof. Ambrose walks by Prof.'s Paul's office and sees the folder.
- Prof. Ambrose reviews the essays in the folder because he's curious as to what his students are up to. (They both teach sociology.)
- Prof. Ambrose finds an essay that received an A that espouses some pretty "outrageous" ideas--according to Prof. Ambrose, who doesn't teach this particular class anymore for good reason.
- Prof. Ambrose takes pictures of the essay and posts them to his blog. He redacts the name at the top...

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### Professor Ambrose's Day Part 2



Grab your coffee.

- ...but doesn't realize that on page 2 of the essay, it talks about the student's current term as the Student Senate President, which means it must be written by a student named Tracy.
- Prof. Ambrose posts about how Prof. Paul has been "inciting outrageous rhetoric" in his students, as shown by the positive comments on this "dangerous, disgusting" piece of student work.
- A group of students starts a social media movement to remove Tracy from office.

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### Angry Ambrose – Discussion



This will likely not go well for him.

- Does redacting the name save Prof. Ambrose from a violation?
- What if this is a public institution? How does this figure into free speech rights? Academic freedom?
- See *Wozniak v. Adesida*, 368 F. Supp. 3d 1217 (C.D. Ill. Sept. 28, 2018), *affirmed* 932 F.3d 1008 (CA 7, Aug. 6, 2019)

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**Hypothetical: Tracy's Troubles**

*How does this affect our student?*

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**Tracy's Day**



**Tracy can't go home, but she can't stay here.**

- Tracy sees Prof. Ambrose's post and learns that:
  - Prof. Ambrose apparently thinks she is an awful human being – and he's supervising her Honors Thesis.
  - A Change.org petition is requesting her removal from Student Senate President. It has 800 signatures already.
  - A new group called "Students Against Tracy" is plotting a protest before lunch.
  - Tracy's significant other is breaking up with her.
  - Her flight home has been canceled, and she can't get there for another week.

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**Tracy's Day (cont.)**



**Time to get Tracy some help.**

- Tracy tells the Student Senate advisor that she's contemplating suicide. The advisor gets Tracy right in to see a college counselor.
- The counselor doesn't believe Tracy is suicidal but is deeply concerned about her current mental status.
- The "Students of Concern" team meets that afternoon and discusses Tracy. Tracy's new counselor is on the team.

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### Tracy's Day - Discussion



#### Who can say what to whom?

- What can the counselor share at the meeting, if anything?
- Can the team communicate information about Tracy's emotional state to:
  - The Student Senate advisor (a staff member)?
  - The Dean of Students?
  - The Provost?
  - Professor Ambrose?
  - Tracy's roommate?
  - Tracy's parents?
  - Campus Safety?

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### Counselor?



#### Nope, nope, nope.

- "Education records" does not include "treatment records", so FERPA doesn't apply to protect from disclosure.
- HIPAA might not apply either, depending on things like whether the counseling center electronically bills insurance companies. But if it does, it doesn't allow the disclosure unless there is
- If nothing else, counselor-patient privilege will protect the conversation and the records. See state law for the requirements.
  - May have a duty to warn if there is imminent danger to the patient or others.

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### FERPA – Health and Safety



#### This exception is not as broad as you think.

- Schools can disclose personally identifiable information from education records in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or others. 34 C.F.R. 99.36(a)
  - "Totality of the circumstances"
  - "Articulable and significant threat" – write it in the access log
- Preamble to the regulations suggest there must be an "actual, impending, or imminent emergency" where a student "may harm himself or others at any moment." This does not mean "threat of a possible emergency for which the likelihood of occurrence is unknown." 73 F.R. 74838 (Dec. 9, 2008)

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## So, Back to that List



### What would we say?

- Can the team communicate information about Tracy's emotional state to:
  - The Student Senate advisor?
  - The Dean of Students?
  - The Provost?
  - Professor Ambrose?
  - Tracy's roommate?
  - Tracy's parents?
  - Campus Safety?

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## School Officials



### Always OK with a "legitimate educational interest"

- Disclosure is to other school officials
- Disclosure is to contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions
  - Must perform a service/function for which the institution would otherwise use employees
  - Must be under the direct control of the institution with respect to the use and maintenance of education records
  - Must be subject to redisclosure requirements

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## What other choices do we have?



### How can we involve Tracy in her own care?

- The team might approach this issue with Tracy's full buy-in! This is permissible with consent!
- **Under FERPA, consent must be signed and dated** (can be electronic)
  - Specify the records that may be disclosed
  - State the purpose of the disclosure
  - Identify the party or class of parties to whom the disclosure may be made
  - 34 CFR 99.30

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**Hypothetical: Skirmish at the Dining Hall**

*When things go bad, who gets to see the footage?*

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**Chief Hart's Day**



*The Chief of Campus Security never rests.*

- During a student protest at the dining hall, a skirmish breaks out. The person at the center of the skirmish leaves with a bloody nose before anyone can help her. The skirmish is now over.
- Someone calls the local police, and someone else calls Campus Security.
- Chief Hart pulls the security footage from four angles.
- The police want to see the footage. Can Chief Hart show it to them?

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**No Consent, No Exception?**



*Show me your warrant!*

- There is no ongoing health or safety emergency.
- We have no consent. (We don't even know who to get consent from yet.)
- We have no subpoena or court order.

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### What if Chief Hart was there?



Can the police ask Chief Hart what happened?

- "FERPA does not prohibit a school official from releasing information about a student that was obtained through the school official's personal knowledge or observation, rather than from the student's education records." (Caveat: This doesn't apply when talking about a disciplinary determination that the school official made.)
- See "School Resource Officers, School Law Enforcement Units, and the Family Educational Rights and Privacy Act," U.S. Department of Education Privacy Technical Assistance Center, February 2019

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### Chief Hart's Following Week



Thanks to YouTube, all is known

- A YouTube video shows the assault and identifies all the perpetrators. The police have pressed charges against five students for assault and other related crimes. Tracy is the primary victim, although others got injured in the skirmish.
- Corona College has referred all five students to the disciplinary process.
- The defense lawyer for one of the defendant students wants to see the school's videos and has consent from her client.
- Can Chief Hart show the videos to the defense lawyer?

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### The Rule about Videos



Is it "directly related" to the student?

- Factors to consider:
  - Is the video being used for disciplinary action against the student, or is the student the victim in the video?
  - Does the video show the student in violation of policy or law?
  - Does the video show the student getting injured, attacked, victimized, ill, or having a health emergency?
  - Is the video specifically focusing on the student?
  - Is the video of actual student records?

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### So... What?



It's the record of Tracy -- and the "Dining Hall Five"

The lawyer can watch the videos of her client's involvement. Redact other faces if feasible – and if it doesn't take away the context of the client's involvement.

Can we give her copies? "FERPA does not generally require the [College] to provide copies of education records to ... eligible students. That said, it would not violate FERPA for the [College] non-consensually to disclose to an eligible student ... copies of education records that the eligible student ... otherwise would have the right to inspect and review under FERPA." *Letter to Wachter*, U.S. Dep't of Educ. (Dec. 7, 2017)

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### The Best Guidance on Videos



This stuff is complicated. Read up.

*Letter to Wachter Regarding Surveillance Video of Multiple Students*, December 2017

*FAQs on Photos and Videos Under FERPA*

Both can be found at <https://studentprivacy.ed.gov>

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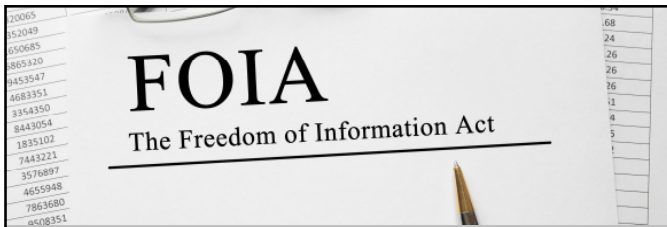
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Hypothetical: What is going on at Corona College?

Now everyone is involved...

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### Peggy's Day



Peggy's job is to disclose things to the media. But not ALL THE THINGS.

- Peggy is the VP of Communications. She loves Corona City's newspaper reporters.
- She does not love the social media ruckus about the five football players who were suspended for assault two weeks before their Bowl Game.
- She also does not love the social media ruckus about the three-time state champ tennis player, Tracy, who has suddenly dropped out and is suing Corona College for violation of her privacy rights.

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### Questions from Peggy



Everyone wants everything now

- Can I disclose that the Dining Hall Five have been suspended?
- Can I disclose that Tracy has left the institution?
- Can Andi the Athletic Director tell everyone that the Dining Hall Five are "good kids"?

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### Suspension Disclosure



Yes you can (under these circumstances)

- You may, without consent, disclose that the five students committed assault under the policy and were sanctioned to a semester suspension.
- To disclose, must be:
  - In connection with a disciplinary proceeding
  - Student allegedly perpetrated a crime of violence or non-forcible sex offense
  - With respect to that allegation, the student committed a violation of the institution's rules or policies

See 34 CFR 99.31(a)(14), 99.39.

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### Departure Disclosure



Yes you can (under these circumstances)

- You may, without consent, disclose that Tracy is no longer enrolled in the institution – as long as “dates of attendance” is properly listed in the policy and annual notice under your definition of “directory information”
  - Directory information may be

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### “Good Kids” Disclosure



Uh...

- Andi the Athletic Director *may* disclose information based on her own personal observations
- “Just because you can doesn’t mean you should”
- Andi is why we have policies about who can speak to the press.
- An official social media policy probably isn’t a bad idea either...

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### Peggy’s Day Part 2



Channel 10 has the scoop

- As Peggy is writing her press release that says virtually nothing, she sees Channel 10 interviewing Tracy.
- Tracy tells the news that Professor Paul and Professor Ambrose are conspiring against her.
- Professor Paul calls and wants Peggy to set the record straight.
- Can she?

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### Batting Clean-Up?



Nope

- "While we understand that the University is facing extensive media scrutiny on an issue that implicates its core legal obligations to its student body, we are concerned about the ramifications to student privacy that would result from the extension of the doctrine of implied waiver of the right to consent to situations in which a student shares information with the media."
  - *Letter to Herring*, U.S. Dep't of Educ. (July 2, 2015)

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### Peggy's Day Part 3



But wait, there's more!

The newspaper is calling. They are making a FOIA request for:

- Professor Ambrose's disciplinary file (which contains statements from Tracy)
- Disciplinary records of the Dining Hall Five (which contains statements from multiple students)

When Peggy murmurs about FERPA, the reporter says, "Don't worry – just redact all the names."

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### The Rule on Redactions



Sometimes, you can't even redact it.

An institution can release records without consent if it has **removed all personally identifiable information** and has made a reasonable determination that a student's identity is not personally identifiable, **whether through single or multiple releases, and taking into account other reasonably available information.** 34 CFR 99.31(b)(1).

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## Employment Records



Alert: Interesting court decisions ahead!

Some courts hold that if a student provides a statement in an employee's disciplinary file, that statement is not "directly related" to the student and can be released as an employee record.

Tracy might be surprised to learn that this isn't directly related to her, don't you think?

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Hypothetical: How do we avoid this next time?

Let's talk about a battle plan for calm.

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## Training



You knew it had to start here, right?

- All employees should be trained
- All volunteers should be trained if they deal with students
- SPPO provides a 35-45 minute online course for free called "FERPA 101: For Colleges & Universities"

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### Policy/Annual Notice



They are up to date and match, right?

- Check to make sure your policy is up to date
- Check to make sure your annual notice matches the policy
- Check to make sure your annual notice actually goes out annually

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### Contracts



Make your vendors "school officials" if they receive student records

- Reputable vendors have FERPA provisions in their agreements – or will add them on request
- They should be training their employees too!

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### More Resources



Check them out!

- <https://studentprivacy.ed.gov> – Student Privacy Policy Office website
- <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html> – U.S. Department of Education FERPA website

If you are looking for a deep dive, join me and the Center for Excellence in Higher Education Law & Policy starting next week!

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Questions?

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