FERPA: A Practical Guide

THE UNIVERSITY OF MICHIGAN COLLEGE OF PHARMACY AUGUST 27, 2012

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AGENDA

- GENERAL OVERVIEW OF FERPA
- UNIVERSITY OF MICHIGAN'S POLICY
- HIPAA AND FERPA INTERSECTION
- CASE SCENARIOS
- PRACTICAL APPLICATIONS
- DISCUSSION

OPURPOSE

OMAIN PROVISIONS

•KEY TERMS

• AMENDMENTS





O PURPOSE

OMAIN PROVISIONS

OKEY TERMS

O AMENDMENTS

FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT

20 U.S.C. § 1232 (g)

A federal *student education records* law passed by Congress in
1974 that applies to *educational agencies and institutions*

- Enforced by Department of Education's Family Policy Compliance Office (FPCO)
- Penalty for noncompliance is substantial



OPURPOSE

OMAIN PROVISIONS

OKEY TERMS

AMENDMENTS

MAIN PROVISIONS

Grants college and university students the following key rights:

- Right to *annual notification* of University's FERPA policy
- Right of access to own education records
- Right to seek amendment/ correction of own education records
- Right to *confidentiality* of personally identifiable information in own education records
- Right to *file a complaint* with FPCO for alleged violations



O PURPOSE

OMAIN PROVISIONS

OKEY TERMS

Two Main Goals of FERPA

- 1. ACCESS: Guarantees students access to their own educational records; and
- 2. PRIVACY: Prevents unauthorized disclosure of educational records



O PURPOSE

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ACCESS

- Students have right to inspect and review their own education records
- University must respond to request for inspection within a reasonable time but no later than 45 days
- Prohibits University from deleting or destroying records while access request is pending
- Unlike FOIA, can't charge for time spend collecting documents
- We can charge for copies but do not



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PRIVACY

- Student's written consent required before disclosure to third parties
- Third party recipients must agree not to re-disclose
- University must keep a record of all third party requests and disclosures
- Allows for non-consensual disclosure in certain limited circumstances



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Permissible Non-consensual Disclosures

- Internal sharing for *legitimate educational reasons*
- Health and Safety Emergencies
- Judicial orders, subpoenas, search warrants
- Directory Information
- Outcome of disciplinary process involving violent crimes to the complainant



• PURPOSE

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Educational agency or institution

Any public or private agency or institution that receives federal funds from the Department of Education that either:

- Provides educational services or instruction; or
- Directs or controls public elementary, secondary or postsecondary educational institutions



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Student

Any person who attends an educational agency or institution for whom educational records are maintained.

Includes: International students and scholars

Excludes: applicants denied admission, alumni, deceased students



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Educational Record

Information recorded in any form that

- (1) contains information directly related to a student; and
- (2) is maintained by an educational agency/institution or by a person acting for such agency or institution.

The following types of documents are not an educational record:

- Personal notes
- Law enforcement records (DPS)
- Employment records
- Treatment records*
- Alumni records
- Peer-reviewed course work



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Treatment Records

Records on a student who is 18 years of age or older, <u>or is attending an institution of postsecondary education</u>, that are:

- (i) Made or maintained by a <u>physician</u>, <u>psychiatrist</u>, <u>psychologist</u>, <u>or other</u> <u>recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;</u>
- (ii) Made, maintained, or used <u>only</u> in connection with treatment of the student; and
- (iii) <u>Disclosed only to individuals providing</u>
 <u>the treatment</u>. For the purpose of this
 definition, "treatment" does not include
 remedial educational activities or activities
 that are part of the program of instruction at
 the agency or institution



• PURPOSE

OMAIN PROVISIONS

OKEY TERMS

Personally identifiable information

Information that alone or in combination with other data linked to a specific student that would allow a reasonable person to identify the student with reasonable certainty. Examples:

- Personal identifiers name, names of family members, addresses, SSN, student ID number, biometric data
- Indirect personal identifiers birth date, place of birth, mother's maiden name



OPURPOSE

OMAIN PROVISIONS

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AMENDMENTS

Directory Information

General information about a student that is made available to the public that is not considered an invasion of privacy to disclose.

Students have the right not to have their directory information made available to the public.



OPURPOSE

OMAIN PROVISIONS

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• AMENDMENTS

Disclosure

To permit access to, release, transfer or otherwise communicate *personally* identifiable information contained in a educational record by any means to anyone **EXCEPT** when providing the information to the party that either provided the record or created the record.



OPURPOSE

OMAIN PROVISIONS

OKEY TERMS

OREGULATORY UPDATES

2010 Regulatory Updates

Attendance

- Health and Safety Emergencies
- Internal Safeguards to protect privacy of educational records



OPURPOSE

OMAIN PROVISIONS

OKEY TERMS

○ REGULATORY UPDATES

2011 Regulatory Updates

- New Definitions
 - "authorized representative"
 - •"education program"
 - "directory information"
- New permissible non-consensual disclosure provisions

 New DOE investigation and enforcement procedures



OPURPOSE

OMAIN PROVISIONS

OKEY TERMS

○ REGULATORY UPDATES

2011 Regulatory Updates

Permissible non-consensual disclosures now include:

- Broadening of the studies exception
- Broadening of the audit and evaluation exception
- Clarification of directory information

Maize and Blue Rehabilitation Center, a private non-profit organization, has an affiliation agreement with the U-M School of Social Work to provide clinical supervision of social work student interns completing their required practicum experience. Is MBRC required to comply with FERPA?

- 1. Yes because MBRC is supervising U-M students as part of its educational program.
- 2. No because MBRC is a private entity and is not a covered entity under FERPA. U-M is required to comply with FERPA but not MBRC who is not maintaining educational records.

ANSWER: YES

After failing his prelims, a graduate student requests to see the evaluation forms completed by the members of his dissertation committee. After the prelims, the evaluation forms are provided to the associate dean for graduate affairs. The members of the dissertation committee meet with the student individually to give him feedback but decline to provide their evaluation forms and asks the associate dean not to do so because of the frankness of some of the written comments. Is the graduate student entitled to review the evaluation forms?

- 1. Yes
- 2. No

ANSWER: YES

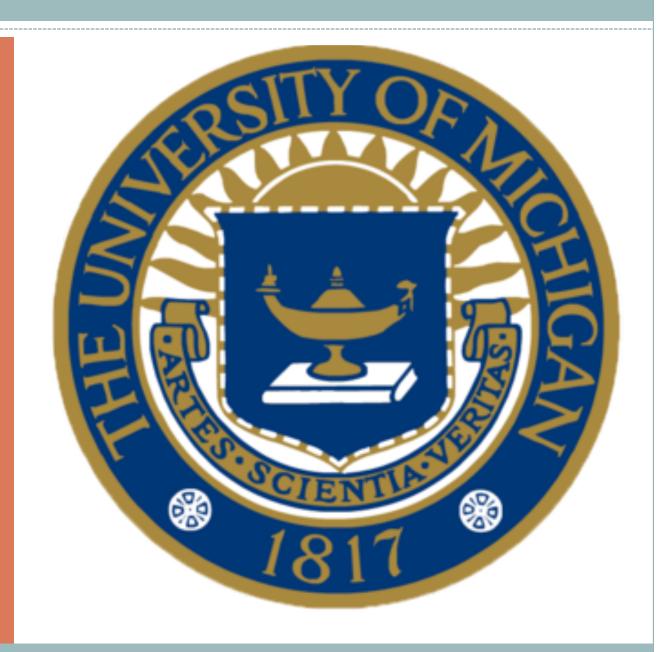
Is it a violation of FERPA to allow students to participate as panelist on student disciplinary boards without the accused student's consent?

- 1. Yes because FERPA gives students an expectation of privacy in their student records, including student disciplinary records.
- 2. No because the students on the disciplinary boards are considered school officials for the purpose of implementing codes of conduct.

ANSWER:

NO

Of of Michigan's Student Rights and Records Policy



Student Rights and Records Policy

- Maintained by the Office of the Registrar
- Available at:

http://ro.umich.edu/ferpa/

- Revised in September 2010
- Website also includes FERPA Q&A, definition of directory information and information on opt-out procedures

Student Rights and Records Policy

U-M's FERPA policy provides students with more confidentiality than the law requires.

- U-M does not disclose education records to parents even if the student is a dependent for federal tax purposes
- U-M does not regularly inform parents of students under the age 21 of alcohol or drug violations or any disciplinary action

Is a student's official U-M email address considered directory information under U-M's policy?

1. YES

2. NO

ANSWER:

NO

Is a student's official University photograph (student ID photo) considered directory information under U-M's Policy?

1. YES

2. NO

ANSWER:

NO

Is a student's dates of enrollment considered directory information under U-M's policy?

1. YES

2. NO

ANSWER:

YES

Can you use the photos to create a photo directory for your class?

1. YES

2. NO

ANSWER:

YES

Can you distribute a class roster with student photos and email addresses on it to all the students in the class?

1. YES

2. NO

ANSWER:

No

• General Overview

⊙Intersection of HIPAA and FERPA



O General Overview

• Intersection of HIPAA and FERPA

Health Insurance Portability and Accountability Act of 1996

- Sets a national "floor" for privacy and security standards
- Defines when PHI may be used or disclosed.
 A covered entity may not use or disclose PHI, except either:
 - (1) as the Privacy Rule permits or requires; or
 - (2) as individual (or individual's personal representative) authorizes in writing
- Affords patients certain rights
 - Right to paper copy of the Notice of Privacy Practices
 - Right to inspect and copy records
 - Right to request an amendment
 - Right to an accounting of disclosures
 - Right to complain & receive response
- Generally applies a "minimum necessary" principle such that a covered entity must make reasonable efforts to use, disclose, and request only minimum amount of PHI need to accomplish intended purpose of use
- Imposes certain minimum security safeguard expectation



OGeneral Overview

⊙Intersection of HIPAA and FERPA

HIPAA Covered Entity

Healthcare Provider*
who also electronically transmits
health information in certain
transactions

Health Plan

Healthcare Clearinghouse



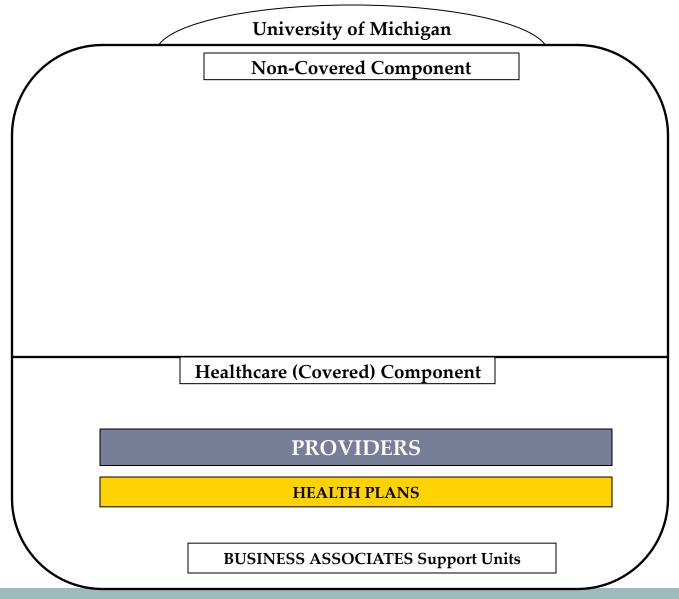
OGeneral Overview

⊙Intersection of HIPAA and FERPA

U-M is a hybrid entity

- Non- covered components
- Covered components
 - -health care provider
 - -health plans
- -business associates (support units)

U-M "Hybrid Entity": High Level Overview



UM "Hybrid Entity": Non-Covered Component

University of Michigan

Non-Covered Component

Non-Covered Components:

-Athletics

-Academic Units

- -School of Kinesiology
- -Counseling and Psychology Services (CAPS)
- -School of Psychology

-FASAP

-Work Connections (Worker's

-Government Relations

- *Comp records)*
- -Institute for Social Research (ISR)
- --HR Personnel Records

- -Intercollegiate Athletics
- -Occupational Safety and

Environmental Health (OSEH)

Healthcare (Covered) Component

PROVIDERS

HEALTH PLANS

BUSINESS ASSOCIATES Support Units

UM "Hybrid Entity": Provider Component

University of Michigan

Non-Covered Component

Healthcare (Covered) Component

PROVIDERS

- -UM Hospitals and Health Centers
- -UM Medical School-Faculty group practices
- -University Health Service
- -School of Dentistry (entire School including Dental Faculty Associates, Community Dental Center)
- -Institute for Human Adjustment (entire Institute, including Autism & Communications Disorders Center, Center for the Development of Language & Literacy, Psychological Clinic)
- -School of Nursing, Nurse Managed Centers
- -Flint Urban Health & Wellness Clinics

HEALTH PLANS

BUSINESS ASSOCIATES Support Units

U-M "Hybrid Entity": Plan Component

University of Michigan

Non-Covered Component

Healthcare (Covered) Component

PROVIDERS

HEALTH PLANS

- Premier Health Plan
- Prescription Drug Plan
- Comprehensive Major Medical Plan -
- Two part major medical plan
- Dental Plan
- Vision Plan
- Healthcare Flexible Spending Account

BUSINESS ASSOCIATES Support Units

U-M "Hybrid Entity": Support Component

University of Michigan

Non-Covered Component

Healthcare (Covered) Component

PROVIDERS

HEALTH PLANS

BUSINESS ASSOCIATES-SUPPORT COMPONENT

- -Office of VP and General Counsel (OGC)
- -Office of VP for Research (OVPR)
- -School of Public Health
- -College of Pharmacy
- -Risk Management
- -Internal Audit
- -IT COM (other IT Support?)
- -Communications
- -Development
- -Printing & Mail Services
- -U Attic & Bently Historical Library



O General Overview

⊙Intersection of HIPAA and FERPA

Generally speaking, permits disclosures <u>without</u> an authorization for

- Treatment
- Payment
- Healthcare/business operations

"TPO"

OGeneral Overview

⊙Intersection of HIPAA and FERPA

Disclosures are also permitted <u>without</u> an authorization (but usually must track disclosure for "accounting")

- When "required by law" (e.g. reporting abuse or neglect)
- For Public health and health oversight activities
- For certain law enforcement activities
- For certain legal and administrative proceedings or activities
- For certain research activities
- For certain fundraising activities
- To prevent or lessen a serious threat of harm to the public, the health or safety of another person or for purposes of protecting the patient's own health and safety.



OGeneral Overview

OIntersection of HIPAA and FERPA

HIPAA excludes from the definition of Personal Health Information (PHI):

"Education records" or "treatment records" as defined by the FERPA

45 CFR 160.103 Protected Heath information (2)(i)

FERPA (and the confidentiality provisions in IDEA, where applicable), not HIPAA, protects the privacy of information in <u>education records</u>, including health related information (i.e., immunization records, health appraisals, OSSD records)



• General Overview

OIntersection of HIPAA and FERPA

When is medical documentation an "educational record" or a "treatment record"?

The answer depends on:

Who created the record?

- Why the record was created?
- With whom the record was shared?



• General Overview

OIntersection of HIPAA and FERPA

Campus Units that maintain treatment records for students	Campus units that maintain educational records that contain medical/treatment information
University Health Service (UHS)	Schools and colleges
Counseling and Psychological Services (CAPS)	Services for Students with Disabilities (SSD)
Some academic units that provide treatment/clinical services (e.g., Dentistry, Social Work)	Office of Student Conflict Resolution (OSCR)
Faculty and Staff Assistance Program (FASAP) if also an employee	Athletics
	Housing
	OGC, Risk Management, and other business units



• General Overview

OIntersection of HIPAA and FERPA

COMPARISON CHART

	FERPA	HIPAA
Covered Entity	Educational agencies and institutions that receive funds from the U.S. Department of Education	 Health plans; Health care clearinghouses; Health care providers that transmit health information in electronic form in connection with covered transactions (e.g., billing)
Rights Holder	Parents and eligible students	Patients
Types of records	Education records	Treatment/billing records but NOT education records under FERPA
Main protections	ConfidentialityAccessRequest correction	 Privacy and Security rules Access and copies Request for correction
Enforcement	 No private cause of action loss of DOE funds 	No private cause of actionPenalties imposed by DHHS

The College of Pharmacy requires all entering students to submit immunization records and a certificate of fitness from the student's medical provider, as a part of the admissions process. In addition, every year students are required to be tested for infectious diseases as a condition of continued enrollment. Are these records maintained by the College:

- 1. Education records
- 2. HIPAA covered PHI
- 3. Education records and HIPAA covered PHI

ANSWER

1. Education Records

The School of Nursing has an affiliation agreement with Big Heart Hospital. Candi Striper is a nursing student completing her clinical rotation at BHH. Can BHH share information with School of Nursing about Candi who was admitted to the psychiatric ward, over the past weekend?

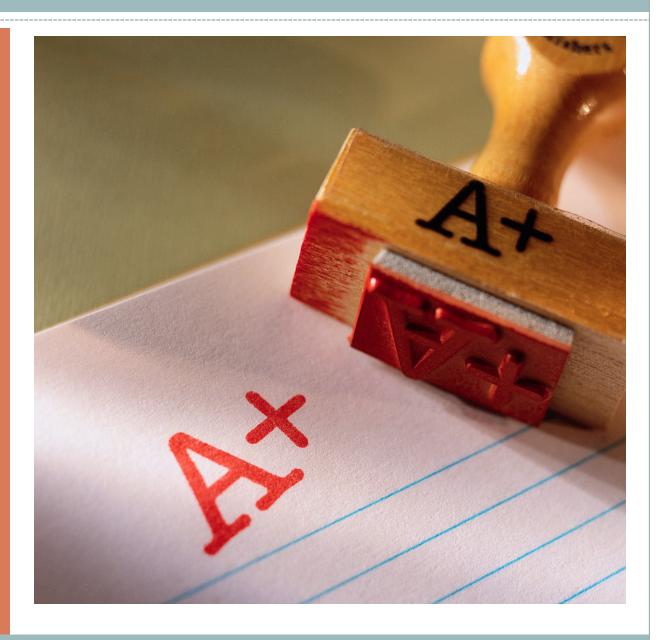
- 1. Yes because the Affiliation Agreement provides that the BHH is considered a school official for the purposes of supervising its students and there is a legitimate educational reason for SON to have a medical update.
- 2. No because Candi's medical records were created because she was a patient and unrelated to her student status.

ANSWER

2. BHH must get Candi's permission to release her medical records.

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CASE SCENARIOS



Professor Smart receives disturbing emails from Sophomore Sally containing lengthy and incoherent essays. Professor Smart discusses her concerns with her GSI. The GSI shares that Sally has missed the last four small group sessions and that Sally seems "weird". Professor Smart shares this information with Sally's advisor. The advisor takes great notes and updates the student's electronic student record with her notes of her conversation with Professor Smart and plans for follow-up with Sally.

Under FERPA, is Sally entitled to a c c e s s to the Advisor's confidential notes regarding her conversation with Professor Smart and action plan?

- 1. YES
- 2. NO

ANSWER:

YES

The notes were placed in the electronic student record for access by others

PRACTICE TIPS

- If you want the records to be confidential, then don't share them with others or make them available to others
- Documenting contacts with and about students is important for reliable institutional memory so create factual records with the expectation of the student or others as potential readers

PRACTICE TIPS

- Create records that are factual rather than opinionated
- Create records that pertain only to one student
- Keep student personal or medical information in a separate "advisory" folder so that it isn't available to school officials who may have a legitimate educational interest in other parts of the educational records
- Follow school/college file retention policy

Martha Mom contacts you and is frantic. She explains that she just received an eviction notice from her son Dash's landlord. When she called the landlord she was informed that her son hasn't paid rent in 3 months and that the apartment has been trashed. Ms. Mom has not been able to reach her son in a week. She is concerned because he has a history of depression. As you are listening to mom, you pull up his record and are reminded that Dash shared with you that after struggling last term things were looking better and that he was excited about moving in with his new boyfriend this term. Ms. Mom wants any information that you can provide.

What information are you permitted to share with Martha Mom?

- 1. Nothing. Inform Mom that FERPA prevents you from saying anything
- 2. Information that you know from your memory that is not documented in the educational record
- 3. Directory information such as enrollment status, current address (if no FERPA flag)
- 4. Both 2 and 3

ANSWER

#4

Information that we know from our personal observations is not an educational record We can share directory information as long as the student has not opted-out.

PRACTICE TIPS

• Just because we are legally permitted to share information doesn't mean that we should

 Encourage parents to communicate directly with their adult student

Encourage students to follow-up with concerned parents

PRACTICE TIPS

What if Ms. Mom claims Dash as a dependent for federal income tax purposes?

While FERPA allows institutions to choose to provide student record information to parents who claim their college student as a dependent for federal income tax purposes, we do not take advantage of that option at U-M.

U-M provides more privacy rights to students.

At the beginning of every winter term, Dr. Davis Department Chair requests the unofficial transcripts and financial aid records of all graduating seniors in order to determine who he will nominate for a prestigious award from his professional association. He also uses the transcripts to write letters of recommendations for employment and graduate school or professional schools for those students who ask for his recommendation. Is this permissible under FERPA?

- 1. YES
- 2. NO
- 3. MAYBE

ANSWER

NO

Dr. Davis does not have a legitimate educational interest in this information. The student's prior, written consent is required.

PRACTICE TIPS

- We can share information internally, without the student's consent or knowledge, to other school officials ONLY when that school official has a legitimate educational interest in the information being shared
- There needs to be a nexus between the school official's job duties and responsibilities and need for the data in the education record
- Generally, we defer to the academic unit to define legitimate educational interest

- Best practice is to ask the student for the information or get permission to share
- Just because a school official has legitimate educational interest in some student educational records does not mean that he/she has legitimate educational interest in all student educational records. For example:
 - A career counselor may need access to transcripts but not financial aid records
 - A faculty advisor may need access to information about students assigned to him/her but not student-athlete data in general

When should a faculty member or staff person have access to student records?

YES	NO
Disciplinary information to impacted faculty/staff	Employment/Hiring unrelated to student status
Remediation plans to necessary faculty/ staff	Reference or Recommendation Letters
	Just curious

As you listen to your favorite local radio news station on your way to work on Monday morning, you learn that the AAPD is actively searching for Troubled Tim, one of your students. Tim is a person of interest in an armed robbery and carjacking of Taxi cab driver that occurred about 4:00 a.m. on Sunday morning. When you arrive at work, police officers from AAPD and DPS are waiting to see you. They want Tim's transcript, course schedule and all advising notes. Your phone is also ringing and it's the Dean's office wanting the student's entire file. As you open your email, you have 3 urgent messages from Tim's parents wanting access to Tim's email account.

What do you do next?

- 1. Turn around and go home
- 2. Provide the Police and the Dean's Office with the information that they are requesting and tell the parents to call ITS
- 3. Call OGC

ANSWER:

#3

CALL OGC and we will work with you to sort out each request

Health and Safety Emergency

We are permitted to share student record information when there is an "articulable and significant" threat to the health and safety of the student or the community to anyone who is able to minimize/eliminate the risk

- Look at the totality of the circumstances
- We need to document our analysis

LAW ENFORCEMENT'S REQUEST:

Deny and insist on subpoena or search warrant

DEAN'S OFFICE REQUEST:

 Grant based on legitimate educational interest in dealing with the student if he decides to show up for class

PARENTS' REQUEST:

Deny based on confidential nature of email accounts

PRACTICAL TIPS

University's major concerns are for the health and safety of the individual student <u>and</u> the community.

We can and will share educational record information with others when it makes sense to do so.

Consult with others. Available resources include:

- Student Affairs Professionals
- Counseling Services
- Office of the Vice President and General Counsel





UNINTENTIONAL DISCLOSURES

- •No duty to notify students under FERPA but notice may be required by other laws. Consult with Office of the General Counsel
- •There is a requirement to keep a record of all disclosures of student record data including inadvertent or unauthorized disclosures
 - Prepare Disclosure Report
 - Maintain Disclosure Report in student file

THIRD PARTY REQUESTS

- Very different from FOIA (pro-disclosure law). FERPA does not create a right of access to student records to anyone other than the student.
- You can give anything to anyone <u>with</u> the student's prior written consent.
- Must give student notice of most disclosures and maintain record of all disclosures
- Forward all "non-legal" requests to Freedom of Information Act Office
- Forward all "legal" requests to Office of the Vice President and General Counsel

BACKGROUND CHECKS

- Get copy of student's written authorization for you to provide the information
- Get name, title, badge or identification number, and business contact information of person making the request
- Confirm with student before making the disclosure
- Maintain this information in the student's file along with a copy of the information provided
- Contact OGC if you have any questions or concerns

COURSE WORK, EXAMS, COMMUNICATIONS

- Do not leave student course work or exams that contain personally identifiable information out for pick up
- Students are entitled to access to their written exams (including prelims) and the results of those exams, including notes of graders that are shared with others

DISUSSION





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