

LEGAL ISSUES in RECORDS and REGISTRATION

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Legal Considerations in the Office of the Registrar

- The Registrar and members of the Registrar's staff must be at a minimum generally aware of all applied policies regulating information and activities in the Registrar's Office and student records.
- Because of this unique position of accountability, legal counsel of the institution must be available to Registrar's staff.

Basic Legal Questions that arise in Records & Registration

- FERPA and Disclosures
- FERPA-HIPAA Interplay
- Catalog & Contract Liability
- Miscellaneous
 - Campus Security Act/Clery Act
 - Solomon Amendment
 - Patriot Act
 - Grading

FERPA & Disclosures

- Inadvertent disclosures
 - Grade Postings & Peer Grading
 - Use of SSNs versus Institution IDs
- Hacking incidents – GLB
- Colleges/Universities Selling Out!
 - Marketing to New or Continuing Students
- Communications identifying specific students
 - Press releases
 - Emergency or tragedy notifications

Privacy Bright Lines

THE THINGS WE ALREADY KNOW...

- Do not publicize a student's grade information or social security number.
- Do not release information from a student's education records without the consent of the student.
- Do share with "school officials" for "legitimate educational interest."

What does Case Law tell us?

- *Gonzaga v. Doe* (2002)
 - Court found no private right of action under FERPA. An individual aggrieved by a disclosure of confidential/personal information may not bring a lawsuit under FERPA. FERPA violations/infractions are the domain of the FPCO.
- *Owasso Independent School District v. Falvo* (2002)
 - Court concluded peer grading does not violate a student's privacy. The grade would not be an education record until recorded by the instructor.

Posting Grades/Use of SSNs

- Cannot post grades by student ID number OR by social security number
 - Either in whole OR in part
- Only acceptable posting system is to assign randomly unique numbers per examination per student

Inadvertent Disclosures

- As *best practice*, notify affected students of hacking incidents or security breaches.
 - FRAUD ALERT: Equifax, Transunion, Experian
 - Consider providing information on identity theft, if the breach relates to SSNs or other consumer data: FTC brochures or other information
- Consider self-reporting incidents to FPCO
 - Explain the incident
 - Outline steps taken to mitigate effects of the incident
 - Detail steps devised to avoid repetition of the incident
 - Talk to concerned students/employees

Graham-Leach-Bliley Act (GLB)

- GLB requires “financial institutions” to protect the privacy of their customer records
- Act defines “financial institutions” as companies that offer financial products or services to individuals, like loans, financial or investment advice, or insurance
- But FTC interprets “financial institutions” to include universities, because many make loans to consumers

GLB Compliance

- To the extent the GLB requirements apply to your university, you must protect the “nonpublic financial information” of customers (students/parents)
 - By establishing administrative, technical, and physical safeguards
 - By implementing an Information Security Program
 - By designating a GLB program coordinator

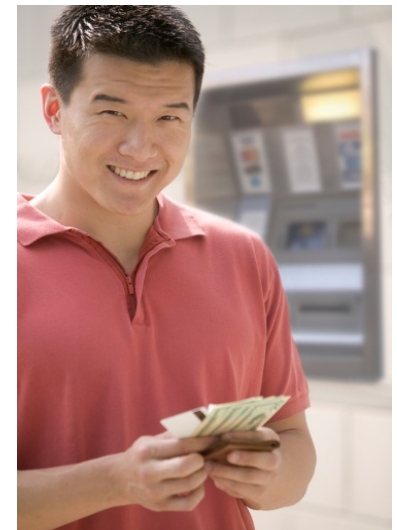
Providing/Selling Lists of Student Information

Various colleges provide lists of student information to corporations or political organizations (such as banks)

These lists may include names, phone numbers, and e-mail addresses of students - these lists may be used to promote goods and services.

Many consumer groups assert that colleges have turned a blind eye to aggressive and deceptive marketing to their students—via direct mail, “cold” calls, and organized visits to campus.

Some universities profit from this activity.



Communications Identifying Students

- There are occasions when a communication may need to identify a student to be effective
 - Ex., meningitis case – want those persons who have been in contact with the meningitis student to get checked
- Ask student for permission to include name and other information in the announcement.
 - This was done recently at UCF
- Without permission, identify classes by name & section; identify dormitory; etc.
 - If disclose identity, understand the risks

FERPA-HIPAA Interplay - Immunizations

- Vaccines are licensed by the FDA; CDC recommends the vaccine schedule
- State legislatures adopt the schedules
- Require proof of immunity for attendance in public and private schools
 - Medical exemptions – applicable as long as contraindication or adverse reaction exists
 - Religious exemptions – bona fide religious beliefs contrary to immunization requirement
 - Philosophical exemptions or conscientious objection – refusal without resort to religious or medical justification

Medical Withdrawals

- FERPA, not HIPAA
- Just because student provides medical records to the university, that does not implicate HIPAA
- HIPAA applies **only** to “covered entities”
 - To be a covered entity must be engaged in covered transactions
 - FERPA provides treatment record exception to education record
 - If treatment record is disclosed, it becomes education record
 - FERPA trumps HIPAA

Disciplinary Action Records

- On-campus vs Off-campus conduct
- Should disciplinary action be recorded on the official transcript?
 - Columbia University – Minutemen – 2007
 - Students were disciplined relating to an altercation arising out of a Minutemen Project speech at Columbia
 - Disciplinary warning was noted on transcript until end of 2008
- AACRAO recommends that disciplinary actions ***not*** be recorded on transcript

Administrative Withdrawals, Suspensions, Dismissals

- What grade should be recorded?
- Following 2006 Duke lacrosse team case, a team member filed lawsuit against Duke and a professor alleging that failing grades for team members were due to retaliation over the scandal
 - Settled with grades changed to “P”

The Implied Contract Between University and Student

The Handbook as
Contract

Contractual Relationship

- Courts imply a contract between university and student based on
 - Student's enrollment, academic performance, and following of university rules/procedures
AND
 - University's statement of its rules/procedures, including those procedures relating to academic progression

“This catalog is your contract.”



Is it?

- Maybe
 - Students will be held to the requirements, policies, and procedures described in the catalog.
- Maybe Not
 - The catalog is not a contract – it expresses the requirements in effect at the time of publication but may be changed at any time

Catalog as Contractual Element

- Courts have treated catalog as a document outlining the university-student contract, within reason
 - Terms of the university-student “contract” are supplied by the schools bulletins, circulars, and regulations made available to the student
 - Typically, the catalog and handbook
- University-Student Relationship has the Components of a Contract
 - Offer, Acceptance, Consideration

Does a Disclaimer Change the Analysis?

- Sample disclaimer:
 - Every effort is made to ensure accuracy at the time of publication; however, the **catalog** is **not** an irrevocable **contract** between the student and the community college.
- What does the fine print mean?

Disclaimer or No Disclaimer

- Notice that terms may be changed without notice - whether in booklet, CD-R, or Web Content - may not be enough
 - Especially where there is a longstanding practice or other actions to induce reliance
 - Change in terms & conditions
 - Okay as living document
- But, what is the remedy for breach
 - Specific performance (i.e., do what the catalog says you will do)?

Miscellaneous Laws/Issues

- Campus Security Act/Clery Act
- Solomon Amendment
- Patriot Act
- Grading/Changes in Grades

Campus Security Act/Clery Act

- Requires all institutions participating in federal financial aid programs to disclose campus crime statistics and security policies; to timely notify campus communities of crimes; and to report crime data to DOE
- Daily crime log that lists all crimes reported to the campus police or security – must make available upon request, without exception – not to include identity of accuser or accused

Clery Act & FERPA

- Timely notice of a threat – FERPA would permit release of information in an emergency situation – further, FERPA does not protect law enforcement records
- Clery requires that both the accuser and the accused must be informed of the outcome of any institutional disciplinary proceeding brought alleging a sex offense

Solomon Amendment

- Schools not required to affirmatively assist military recruiters – equal access
 - *Fair et al. v. Rumsfeld* – S.Ct. 2006 – upheld Solomon
- Universities must permit access to directory information or risk losing federal funding eligibility
- Chief Justice Roberts writes, the Solomon Amendment requirement “does not affect the [law] schools’ speech.” They can still object to military ban on homosexuals but must provide level playing field for military recruiters

Patriot Act

- Authorizes the search of records; colleges/universities must release disclose the requested records; challenged as unconstitutional.
 - *Muslim Community Association, et al. v. Ashcroft and Mueller*

Grading Issues

- Administrative change of grade
- Assist faculty by developing clear policies and appeal processes
- Courts will review procedures – ensure that the process is not arbitrary and is consistently applied

QUESTIONS?

Please Ask.

