

The Right Balance: Discussion of Student Privacy and Campus Safety

Minnesota State Colleges and Universities

Office of General Counsel

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Gordon Davies' presentation about last spring's shootings at Virginia Tech, recently rebroadcast to system colleges and universities, provides an advantageous opportunity to review some important principles of data privacy as they relate to dealing with students in distress. That tragedy and the ensuing discussions in higher education and other venues has highlighted the importance of effective communication among administrators, faculty, staff, as well as between campus representatives and students, families, and surrounding communities. As you may be aware, the U. S. Department of Education also has recently published proposed changes to FERPA regulations, inspired at least in part by a perceived need to clarify FERPA requirements following the Virginia Tech tragedy. This office will follow up with our colleges and universities once those regulations are adopted.

Striking the appropriate balance between respecting student privacy and disclosing information for safety concerns is critical. Accurate knowledge of the circumstances under which data privacy laws permit disclosure of certain student information can empower administrators to take timely and appropriate action in exigent circumstances. Thinking in advance about the policy choices that FERPA allows will result in better and faster decision making when issues arise. We hope the following discussion will demonstrate that data privacy laws are not a significant obstacle to appropriate communications intended to protect student, campus and public safety.

Of course, the Office of General Counsel and Attorney General's Office are available at any time to assist administrators with particular situations, provide campus training or to discuss these matters in more detail.

SOME PRELIMINARIES:

- The primary data privacy laws that regulate student or "education records" are the federal Family Educational Rights and Privacy Act (FERPA), and the Minnesota Government Data Practices Act (MGDPA; Minnesota Statutes Chapter 13).
- Data privacy laws apply to all "education records," which is a very broad term that is not limited to "academic" records. "Education records" include virtually all information maintained by an educational institution, in any format, that is personally identifiable to one or more of its past or present students. Thus, "education records" include not only transcripts, but coursework, most counseling records, disciplinary records, electronic data, Post-it notes – and much more!
- Information about students that is not contained in a record, such as observed behavior or conversations, is not governed by education data privacy laws BUT the disclosure of such information to third parties such as law enforcement should be carefully considered as it could be legally problematic in other respects.

- Most education records are classified as “private,” which means that they are available to the subject student but not to the public unless permitted by the student in writing or some other legal authority.
- Some information is designated by the college or university as “directory” data, which means it is generally public. Each college and university publishes its definition of directory data in its FERPA policy. Students have the right to “suppress” their directory data, however, so when releasing directory data, it is important to have accurate information about suppression requests.

QUESTIONS AND ANSWERS

Privacy of student records has been promoted for so long that I am not sure whether or what information I can share with others on campus – what are the general guidelines?

You are correct that the “default rule” about student records is that they are “private” and generally require the student’s written consent to disclose. One of the important exceptions to that rule is that “school officials” may exchange information from education records to the extent that they have a “legitimate educational interest” in the information. All colleges and universities should have a written FERPA policy that defines these terms. Generally, “school officials” include employees (including student workers), and others appointed or with whom the school has contracted as an agent to provide a service that the school would ordinarily perform itself. “Legitimate educational interest” may be broadly defined as a need to review an education record in order to fulfill an employee’s assigned responsibilities for the college or university.

Thus, consistent with campus policies, employees concerned about a student may share information, even if it is part of an “education record,” with other “school officials” whose job it is to deal with such issues; this would include campus security personnel, counselors, deans or the judicial affairs office.

May information from a student’s education records be disclosed to protect health or safety?

Data privacy laws specifically permit the disclosure of information from education records “to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.” This exception allows the disclosure of appropriate information to law enforcement, health care professionals, parents or others who may be at risk of harm or who could appropriately assist in protecting the health or safety of the student or others.

This exception does not authorize “knee-jerk” or (in most cases) “broadcast” disclosures, but a limited disclosure to a limited number of people, made on the basis of a good-faith determination in light of the facts available at the time. This exception to the general consent rule is also limited to the period of the emergency. In general, and when reasonably possible, the initial disclosure should be made to professionals trained to

evaluate and handle health or safety emergencies, such as campus mental health or law enforcement personnel, who can then determine whether further and broader disclosures are appropriate. It should be noted that information from another source, such as law enforcement, may be public and provide an alternative means of giving notice about a possible threat from someone who is also a student at the college or university.

When may a college or university disclose information from a private education record to a student's parent or legal guardian?

All students in attendance at a college or university control the privacy of their records regardless of age; parents do not have an automatic right to access their child's records as they did in high school. Thus, parents must have their child's written consent for school officials to disclose private education records to them unless the disclosure fits an exception in the law. One of the exceptions is the "health or safety emergency" situation discussed above. Another exception permits a college or university to adopt a policy of disclosing education record information to parents if the student is a dependent for federal tax purposes. Implementing such a policy would, of course, require a procedure to verify the student's tax status and maintain updated records, as well as notice to students of the policy. Any system school considering adopting such a policy is encouraged to contact the Office of General Counsel for assistance.

Although FERPA also permits the disclosure to parents of alcohol or controlled substance violations by students under age 21, state law currently does not clearly allow such disclosure absent a student's authorization. However, we believe that a clarifying amendment to the MGDPA is needed for system schools to utilize this exception. This issue has been under discussion at the Legislature and is once again being considered during the current session.

What about disclosing information from the student discipline process, either to others on campus or to other institutions?

Discipline information is a private "education record" subject to the general rules discussed above concerning use and disclosure. Thus, "school officials" who have a "legitimate educational interest" in such information may have access without the student's consent.

Additionally, FERPA (as well as the MGDPA) specifically clarifies that institutions may include in a student's education records appropriate information concerning disciplinary action taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the community, AND that such information may be disclosed to faculty and school officials in other schools who have been determined to have legitimate educational interests in the behavior of the student.

Colleges and universities should establish appropriate implementation procedures for such a practice.

Are there other circumstances in which a college or university may disclose information from education records to another institution without the student's consent?

In addition to the exceptions discussed above, FERPA expressly permits the disclosure of information from a student's education records to officials of other institutions at which the student seeks or intends to enroll, or, for students in attendance, to other institutions where the student is enrolled or receives services. In order to make these disclosures, a school must make a reasonable attempt to notify the student that it has done so unless the disclosure is initiated by the student or the practice is included in the school's annual FERPA notice of rights. In either case, if requested, the student must be given a copy of the records that were disclosed, and an opportunity to challenge the accuracy of the content of the disclosed records.

Are there campus law enforcement unit records that are not subject to FERPA?

A college or university may designate a "law enforcement unit" consisting of individuals or a department authorized to refer law enforcement matters to the appropriate authorities and maintain the physical security or safety of the institution (a commissioned police force is not required, but organizations that contract with a college or university to provide security services must follow different rules). Records that are created and maintained by the law enforcement unit apart from education records, solely for a law enforcement purpose, and by policy are not disclosed to anyone other than law enforcement personnel, are exempt from the definition of "education record." These segregated records may be disclosed by law enforcement unit personnel to others, in addition to local law enforcement personnel, pursuant to reasonable procedures that are not limited to the FERPA regulations.

It is important to recognize that this exception is narrowly limited to the records that are maintained by this unit solely for a law enforcement purpose. Employees in a law enforcement unit are also "school officials" who may have access to education records when they have a "legitimate educational interest." To the extent education records are retained by the law enforcement unit, they remain education records subject to FERPA, so careful separation of records within the law enforcement unit is important.

If law enforcement unit records are provided to other school officials, those school officials must handle them as education records subject to FERPA and they could not, for example, disclose them to law enforcement without legal authority such as a search warrant or authorized circumstances such as a health or safety emergency.

What if a college or university receives a court order or subpoena requesting education records?

Campus personnel should be directed to immediately provide any such document to a designated administrator who can seek legal advice from the Office of General Counsel or the Attorney General's Office. In general, a college or university may disclose records

in response to a judicial order or lawfully issued subpoena, but court rules must be consulted to determine validity. Further, in most instances, colleges and universities are required to give students prior notice of their intent to comply with a subpoena. It is important to note that search warrants are subject to immediate compliance but system legal counsel should be notified as soon as possible.

May an employee disclose personal knowledge and impressions about a student based on the employee's personal interactions with the student?

As discussed above, education data privacy laws do not govern the disclosure of information that is not recorded in or derived from a student's education records. For example, a faculty or staff member who personally observes a student engaging in erratic and threatening behavior is not prohibited from data privacy laws from disclosing that information to a third party. However, if that information is recorded in a personally identifiable form, it would be an education record subject to FERPA and the MGDPA. An employee could still disclose his or her personal observations but would not be permitted to disclose the record unless one of the exceptions to FERPA applied or the student consented. Again, however, employees generally should limit disclosure of such information to professionals trained to evaluate and manage it, as other laws could conceivably apply, depending on the circumstances.

What should a college or university employee do if he or she is concerned about a student?

If the concern is that a student may engage in violent behavior toward self or others and the threat appears imminent, the employee should contact campus security or call local law enforcement through 9-1-1.

When circumstances reasonably permit, the employee should consult with professionals on campus or associated with the institution who may be able to assist in deciding on an appropriate course of action. In consultation with appropriate campus resources, a collective decision may then be made to contact a family member, an appropriate off-campus resource or others. FERPA or the MGDPA would not present an obstacle to any of these disclosures.

Conclusion

While navigating data privacy laws often appears to be complex, it is generally possible to share student information amongst campus officials or with appropriate third parties when there is a legitimate concern relating to campus safety. Colleges and universities may wish to review their current FERPA policies (such as how directory data is defined, as well as identifying "school officials" and "legitimate educational interest") in order to gain maximum flexibility and discretion for information sharing.

Just as important as updating those policies is the need to inform all employees about the true limits and applications of FERPA and the MGDPA. The Office of General Counsel

and the Attorney General's Office are available to assist in those efforts or make other educational resources available.