FERPA and ATHLETICS

Family Educational Rights & Privacy Act
A College Student’s DEFENSE
The Office of Legal Affairs
Presented by: Venus D. Boston, Assistant University Legal Counsel
Ohio State University Football Players

When football players at Ohio State University swapped championship rings, jerseys and other memorabilia for tattoos and their coach tried to cover up the violation, the institution wasn’t required to release documents related to the incident because they were protected by the federal student privacy law (FERPA).

In 2012, the Ohio Supreme Court sided with the university over ESPN, which asked for records looking into the NCAA’s investigation of Ohio's above mentioned actions. In the end, the records were protected by the Family Educational Rights and Privacy Act (FERPA).
What is FERPA?

- FERPA applies to **ALL** public schools, colleges and universities receiving federal funding.
- It’s a *DEFENSE* to the STUDENTS, protecting their **Privacy**, preventing the release of educational records without the **STUDENT’s Consent**.
Rights Under FERPA

Students have the right to:

To **INSPECT** education records;
To **PREVENT DISCLOSURE** of education records;
To **SEEK AMENDMENT** to education records if believed to be **inaccurate** or **misleading**;
To **BE NOTIFIED** of privacy rights under FERPA;
AND **FILE A COMPLAINT** with the U.S. Department of Education concerning an alleged failure by the University to comply with FERPA.
What is Protected Under FERPA?

- Education Records, directly related to a student AND maintained by Winston-Salem State University:
  - These records are maintained in whatever format or medium, or by an agent/party acting for the University; and containing information personally identifiable to the student.
- Examples:
  - Class rosters, grade reports, student schedule, transcripts, most disciplinary records, student’s name, student’s parent(s), family members of student, student’s campus address, student’s home address, student’s social security number (ANYTHING THAT WOULD MAKE THE STUDENT’S IDENTITY EASILY IDENTIFIABLE.)

“To Release OR NOT to RELEASE, that is the question?”
What University Official has a right to FERPA information?

• One with a **LEGITIMATE EDUCATIONAL INTEREST**:
  • If a **University Official needs to review** an education record in order to **fulfill his/her official responsibility**.
  • This includes such purposes as:
    • performing appropriate tasks **specified in her/his job description or by contract agreement**
    • performing a task **related to a student’s education**
    • performing a task **related to the discipline of a student**
    • providing services for the student or the student’s family, such as health care, counseling, job placement, or financial aid.
What is NOT a Legitimate Educational Interest?

ANY INTEREST personal or private in nature!
What is NOT Protected Under FERPA?

• **Records in sole possession** of the maker (e.g. personal memory aid).
  • Records/ Notes made by an individual, as an individual recollection (of the maker) and are notes maintained in the possession of the individual and shared with a temporary substitute.

• **Law enforcement records** created and maintained by the public safety office for law enforcement or public safety purposes. **NOTE:** Once the record is shared with another school official it becomes subject to FERPA.
  • Campus Police Records

• **Employment records** (except where the employment is based on student status – e.g. work-study, wages, graduate teaching assistants).

• **Medical/psychological treatment records** from a health or counseling center. (Doctor-patient privilege records)

• **Alumni records** which are created after the student graduates or leaves the institution.

• **Peer -Graded Papers** before they are collected and recorded by the Faculty.

“To Release OR NOT to RELEASE, that is the question?”
**What can you share? Directory Information**

“Information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.” (FERPA Regulations, Code of Federal Regulations, Title 34, Part 99.3)

**INFOGRAPHIC that is NOT included in the FERPA CONFIDENTIALITY REQUIREMENTS**

- For practice, if a school system discloses this type of information, it is recommended that PUBLIC NOTICE of the FERPA POLICY be given and explain what is included in the information.

- Directory information includes: school email address, school of enrollment and enrollment status, dates and periods of attendance at WSSU, degree(s) awarded and date(s) of conferral, honors, participation in sport activities, weight and height measurements of student athletes, student’s major or minor, and photographs.
When is Prior Consent NOT Required to Disclose Information?

- **When it goes to:**
  - Student who gave consent
  - To school officials with an legitimate educational interests
  - To schools in which a student has the intent to enroll or seeks to enroll
  - To federal, state, and local authorities conducting an audit, evaluation, or enforcement of education programs
  - A party, such as the Department of Veteran’s Affairs or an employer, providing financial aid to the student
  - To organizations conducting studies on behalf of educational institutions
  - To accrediting organizations
  - To comply with a judicial order or subpoena

- **In a health or safety emergency**
- **For directory information (unless the student has requested a privacy hold)**
- **A court if the student has initiated a legal action against the student or the institution has initiated a student has commenced a legal action against the court**
- **Results of a disciplinary hearing to an alleged victim of a crime of violence**
- **Results of a disciplinary hearing concerning a student who is an alleged perpetrator of a crime of violence and who is found to have committed a violation of the institution’s rules or policies**
- **To a parent of a student under the age of 21 if the institution determines the student has committed a violation of its drug or alcohol rules or policies**
How does FERPA merge with Athletics?

• **From the Story ABOVE:** Ohio isn’t the only university to withhold information about college athletic scandals.

• At the University of Oregon, Vanderbilt University and the University of Montana, *FERPA was cited to withhold records and information*. FERPA was even cited at Florida State University to withhold records about Heisman-winning quarterback who was accused of sexual assault in December 2012.
FERPA and Athletics

• Universities often cite FERPA when an athlete has been removed from the team “for some kind of disciplinary or legal reason,” or when the behavior of a coach or athletic employee comes into question.

• However, all college athletes must sign a waiver agreeing to disclose their education records to the NCAA in any case the non-profit association needs to publish or distribute the information.

• Unlike universities that receive federal money: NCAA is not bound by FERPA.
FERPA and Athletics

• The NCAA requires each university to secure signed forms from all student-athletes “prior to the student’s participation in intercollegiate competition each academic year.”

• Failure to sign the form each year “shall result in the student-athlete’s ineligibility to participate in intercollegiate activities.”

• The form advises the student-athlete that FERPA protects the privacy of educational records. Also, such records may not be released without the student-athlete’s consent.
FERPA and the NCAA: Rights to Disclosure

• The form contains a provision authorizing disclosure of the educational records of the student-athlete.
• However, the authorization is not a blanket release, but is limited to two categories of information.
Category 1

- Allows release of certain information ONLY to the institution, its athletic conference, and the NCAA. The items allowed to be released to these entities are:
  - (1) the FERPA Release Form
  - (2) results of any NCAA drug tests
  - (3) results of positive drug tests performed by other national or international athletics organizations
  - (4) all transcripts from high school or any other higher education institution
  - (5) pre-college test scores and related information,
  - (6) financial aid records
  - (7) all other information relating to NCAA eligibility.
Category 1 cont.

• The form restricts release of this information for the limited purposes of:
  • (1) determining the student-athlete’s eligibility for NCAA participation or athletically related financial aid
  • (2) inclusion in summary information reported to the NCAA by each institution
  • (3) information relevant for NCAA research studies AND
  • (4) NCAA compliance review.
Category 2

- Authorizes ONLY the NCAA to release *personally identifiable information* from educational records to a 3rd party, including the media, “as necessary to correct *inaccurate statements* reported by the media or related to a student-athlete reinstatement case, infraction case or waiver request.
  - The NCAA wants to protect itself if there winds up being a controversy.

- Although the form allows the NCAA to release information it does not authorize the release of grade information, whether good or bad, of individual student-athletes.
What Happens if Protected Information Under FERPA is Released?

• FAILURE TO COMPLY:
  • The institution will be given the opportunity to make corrections, which will bring the institution into compliance.
  • The Dept. of Education’s Family Policy Compliance Office, which reviews and investigates FERPA violations and complaints will establish a reasonable period of time for the institution to comply.
  • If, after this reasonable period an institution has not complied and compliance cannot be met, the Secretary of Education may prohibit federal funding made available to Winston-Salem State University under his administrative control (financial aid, education grants, etc.).

YOU CAN LOSE FEDERAL FUNDING!!

WINSTON-SALEM STATE UNIVERSITY
Scenarios/Questions
Scenario One: Prior Consent

Actions by student-athletes have been brought against the NCAA in administrative or court proceedings on both state and federal levels. In the federal regulations effective December 23, 1996, prior consent is not required when the disclosure is to comply with a judicial order or lawfully issued subpoena or when the educational agency or institution initiates legal action against a parent or student:

Is prior consent of the student required when the NCAA discloses the student’s education records for purposes of defending itself against a lawsuit or in an administrative proceeding brought by the student-athlete?
Answer

No, if the disclosure is necessary for the NCAA to defend itself.

It is inferred that the student has an implied waiver of the right to consent to the disclosure of information from the student’s education records if the student has sued the institution.
Scenario Two: NCAA

May the NCAA assume implied consent of a student-athlete that sues the NCAA?
Answer

Yes, the NCAA may reveal the student’s education records in court in order to defend itself.
Scenario Three: NCAA

If a student refers to other students in such cases and argues that he/she is being treated differently from the other students, is it permissible for the NCAA to defend itself against such accusations by referring to personally identifiable information pertaining to other students.
Answer

No. There is no exception in FERPA that allows the NCAA to reveal education records of other students who have been named in a lawsuit without the other students’ prior written consent. **However, redaction of all personally identifiable information from an education record may be acceptable, as long as the students’ identities would not be easily traceable.** In addition, FERPA would not prevent the NCAA from disclosing education records of another student if it received a subpoena for such records.
Scenario Four: Coach transferring Grades

A coach from Winston-Salem State University copied, in his own handwriting, the grades, courses and GPAs from a student’s unofficial transcript that had been used for advising purposes. Without consulting anyone, that coach then sent the hand-copied information to another coach at North Carolina Central University that the student-athlete had expressed interest in transferring to—but hadn’t yet applied to. Did the WSSU’s coach violate FERPA?
Answer

Yes. The WSSU coach didn’t think he did anything wrong because he copied the information in his own handwriting. He reasoned that by doing so he was providing unofficial information that wasn’t part of an official college record.

Handwriting or Not: It’s still a part of the student’s educational record and a violation of FERPA.
Scenario Five: Newspaper Story

A front-page newspaper article exposed that a college student-athlete’s grades were changed to make him eligible to play basketball. The reporter included the before and after grades for the student-athlete. The reporter’s source was a college administrator who knew about and objected to the grades being changed. The administrator was a whistle-blower. Did the administrator violate FERPA?
Yes. The administrator disclosed non-directory information to the newspaper without obtaining the student-athlete’s written consent first.
FERPA at WSSU

The Office of the Registrar is responsible for reporting information to third parties from the official student academic record.

Feel Free to Contact: Sharon Stoddard, University Registrar with additional questions

Email: stoddardst@wssu.edu
Telephone: (336) 750-3339
Address: Thompson Center 202

This presentation can be found on the Legal Affairs website under:
Legal Training Resources
WSSU’s FERPA Policy can be found on the Legal Affairs website under:
Chapter 300 – Section 301
Authoritative Sources

• 34 C.F.R. Part 99
• Family Policy Compliance Office (FPCO) | FERPA
• Family Policy Compliance Office (FPCO) | About FPCO
• FERPA Presentation for Elementary/Secondary School Officials (FPCO)
• WSSU Policy on the Release of Student Information & Educational Records
• Auburn University at Montgomery: FERPA Scenarios for Faculty and Staff
• Jackie Wernz, "Are Emails, Texts, Tweets, and Other Digital Communications Student Records Under FERPA and State Law?" Education Law Insights, JDSupra Business Advisor, February 20, 2013.
• Is Your Use of Social Media FERPA Compliant?
• NCAA, 2003-2004 Division I Manual

WINSTON-SALEM STATE UNIVERSITY