FERPA Basics

• Family Educational Rights and Privacy Act
• Primary rights of students
  — Inspect, review and seek to amend “education records”
  — Provide some control over the disclosure of education records
Education Records

• “Education records”
  – contain information “directly related” to a student (viz., personally identifiable information about a student);
  – are “maintained” by an educational agency or institution or by a party acting for the agency or institution, which includes hard files, electronically stored information, etc.
Education Records

• What is NOT an “education record”?  
  – “Sole possession” records;  
  – Records created and maintained by a law enforcement unit for law enforcement purposes;  
  – Medical records made and maintained in the course of treatment and disclosed only to those individuals providing treatment;  
  – Records that only contain information about a student after he or she is no longer a student at that institution.
Always Check Local Policy

• In any FERPA issue, the analysis is not only the federal law, but also UC policy and UCSC’s local notice of FERPA implementation

• NOTE – Our Registrar has an amazing resource on FERPA and is the campus’s FERPA steward. The answer is almost always contoured by local policy, so always check there.
Disclosure

• Subject to important exceptions, education records and personally identifiable information from those records may not be disclosed without the student’s written consent.

• “Directory information” may be disclosed without student consent, except where such information has been restricted.
Directory Information

• An institution may disclose directory information if it has given notice to students in attendance of:
  • What items the institution has designated as directory information.
    – At UCSC, this is generally tiered – at different points in the student’s trajectory, different amounts of directory information are disclosed.
    – For example, for new students before classes begin, we don’t release very much at all. But after classes begin, we can release college and student names. After the deadline for opt-out passes, we release more, such as department, major, class year, etc.
Exceptions to Consent

• Directory information.
• To school officials with legitimate educational interests ("need-to-know").
• In a health or safety emergency.
• To schools in which a student seeks or intends to enroll.
• To federal, state, and local authorities conducting an audit, evaluation, or enforcement related to education programs.
• In connection with financial aid.
• To organizations conducting studies on behalf of educational institutions.
• To comply with a judicial order or subpoena (reasonable effort to notify).
Legitimate Educational Interest

• University official needs access to the educational records to perform his or her job.

• Department of Ed has provided some discretion to universities here to define “official” and “legitimate educational interests” broadly enough to let people do their jobs.
Mom Calling

You are an academic advisor. You receive a call from a new transfer student’s mother, and she requests a meeting with you before the start of the quarter. Her daughter, the student, is enrolled but classes haven’t begun yet. She wants to alert you to some struggles her daughter has been experiencing, including her daughter’s disability, allergies, and social life. She also wants to talk about the courses her daughter “should” take the upcoming semester. She’s pretty certain that her daughter is falling behind wants to strategize with you about how to help get her back on track.
Mom Calling

• Is this a “student”?  
• Do we have “student records” if the student hasn’t actually started classes?  
• Is this “directory information”?  
• Does Mom have access to course schedule, in any event?
To: Faculty Member
From: Frustrated Professor
Mon, May 15, 2014 13:45:03
re: Kenny Student

Tim: This kid is failing and has no motivation. Not sure what to do. Any ideas? I think he’s an F student and is headed nowhere unless he gets into gear.

FP
Faculty Emails

You are the Assistant Dean. Kenny Student comes to your office to complain about Frustrated Professor and asks for a meeting with the Dean. He also hands you a piece of paper that requests “all emails written by Frustrated Professor about me during this current quarter or last quarter.” He wants the emails right now because he’s certain that Frustrated Professor is discriminating against him. What do you do?
Faculty Emails

• First, call Registrar or Counsel.
• Are these emails, if any, “student records”?  
  – “directly related” to Kenny Student  
  – “maintained”?  
• Is this a “sole possession” record?
Faculty Emails

• **S.A. v. Tulare County Office of Education, 2009 Westlaw 3126322 (E.D.Cal.)**

• “Emails, like assignments passed through the hands of students, have a fleeting nature. An email may be sent, received, read, and deleted within moments. As such, Student's assertion -- that all emails that identify Student, whether in individual inboxes or the retrievable electronic database, are maintained 'in the same way the registrar maintains a student's folder in a permanent file' -- is fanciful.”
FERPA as a weapon

You are a College Provost. A student complains to you that his professor submitted her paper to a plagiarism website (viz., Turn-it-in) and this violated the student’s FERPA rights. The professor thinks that the student cheated and is trying to get away with it.
FERPA as a weapon

• Probably not a violation.
• Best practice would be to remove the student’s name from the paper before submitting it to a third party software provider. Thus, not an “educational record” that is being disclosed.
• Otherwise, Department of Ed has recognized that using third parties to help assist with university work isn’t prohibited by FERPA.
• They offer a few guidelines for permitted disclosures to third party service providers:
  – the outside party is providing a service for the campus that it would otherwise provide for itself using employees;
  – the outside party would have "legitimate educational interests" in the information disclosed if the service were performed by campus; and
  – the outside party is under the direct control of the campus with respect to the use and maintenance of information from education records
  – the outside party cannot redisclose the educational records by agreement.
We are offering a MOOC, and registration is open to “students” who aren’t otherwise admitted to UCSC. Are all of the “students” in the MOOC considered students for FERPA purposes?
MOOC’N

• It depends on how the records are “maintained.” Remember that FERPA covers “education records” that are “maintained” by our campus. Here, the MOOC platform itself may handle the records and may “maintain” them, not our campus. This is likely governed by agreement, so make sure to check with Counsel.
You are a CRE. You have a small notebook that you keep in your pocket, and you occasionally write notes there for your own use. Some of these notes may be about interactions with students or requests that you need to handle later. You don’t share these notes with anyone. Sometimes you make these notes on your iPhone.

One of the students in housing is angry at you and files a complaint. The student says your notes on your phone will prove his or her point. Under FERPA, the student requests copies of these notes.
Sole possession

• Are these “education records”?  
  - directly related to a student
• Are these “sole possession” records?  
  – Not shared with anyone  
  – For the sole purpose of assisting the author with recall
• Does the student get “copies”?  
  – FERPA is “inspection and review”
A student approaches you and asks for help. She says that she’s hearing voices and that she’s afraid of what they’re telling her to do. You ask if she’d like to go to CAPS. She refuses, changes her mind and says she’s fine – the voices are being nice right now. She walks away.
911

• Is there an “education record” here?
• Can you tell your boss/CAPS/someone?
• Can you call her parents/guardians?
• Is this an “emergency”? 
• FERPA isn’t a suicide pact.
• Safety first.
• In an emergency, FERPA permits school officials to disclose without student consent education records, including personally identifiable information from those records, to protect the health or safety of students or other individuals.
911

- In an “emergency,” records and information may be released to appropriate parties such as law enforcement officials, public health officials, and trained medical personnel.
- Exception is limited to the period of the emergency and generally does not allow for a blanket release of personally identifiable information from a student's education records.
911

• What’s an “emergency”?
• Look at the “the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals.”
• “An articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals.”
• “If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.”
911

• Do you call police?
• Do you call parents?
• Are “voices” enough?
  – Articulable threat to student or others
  – Lack of insight
  – Fear