

FERPA 2018: Data Transparency and Student Privacy in the Digital Age

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To: Congresswoman Susan Davis

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RE: FERPA 2018: Data Transparency and Student Privacy in the Digital Age

Policy Problem

The United States is no longer the most highly educated nation in the world.¹ Lawmakers and stakeholders have put in place new standards that educational institutions must achieve. Undergraduate student profiles are shifting in the United States and are diverse in terms of age, race and ethnicity, socioeconomic status and work histories.² This policy brief focuses only on postsecondary education as it refers to FERPA as a procedural policy. For any higher educational institution that receives federal funding, they must follow the Family Educational Rights and Privacy Act (FERPA). Once a student reaches 18 years of age or attends a postsecondary institution, he or she becomes an "eligible student," and all rights formerly given to parents under FERPA transfer to the student.³ These lines become blurred because students in high school are also eligible to take college credit courses.

FERPA was enacted in 1974 to protect student educational privacy and records in which Congress has amended nine times⁴ (See Appendix 1). The last amendment was in 2001 with the Patriot Act following 9-11. A bi-partisan bill to overhaul FERPA was put forth in 2015 but didn't result in any action.⁵ It is unacceptable that there are currently sixteen loopholes in which disclosure from educational institutions may be made without student consent.⁶ For example, institutions can disclose disciplinary

proceedings to officials at other institutions to which a student has applied for graduate school.⁷ Another example is that tuition paying parents are not allowed to see their child's grades or disciplinary file unless the student is "dependent" within the IRS code.⁸ FERPA hasn't kept up with the digital global information economy we live in.

Educational records in 1974 were defined as "any records, files, documents and other materials."⁹ Higher education now works with meta data- not hardcopy records. The definition isn't clear in the current language of the Act and poses potential and ongoing problems. At the time it was not necessary to define educational institution or agency.¹⁰ However, it is critical today to define several terms in FERPA because the law currently places no limitations on how that institution can make use of data collected.¹¹

FERPA only applies to educational institutions- not 3rd party vendors who make up IT departments and manage most student data including online courses, degrees and certificates.¹² Outside contractors such as Canvas, Zoom, and Box can now be considered "school officials."¹³ The statutes terminology has become obsolete. Inaction by Congress poses a threat to the statutes because they are in need of a serious overhaul to keep up to date with current internet accessibility and cloud based data.

American public universities and colleges continue facing decreased federal and state funding budgets while public higher education institutions are being scrutinized and tasked with being more transparent, affordable and accessible by federal and state governments.¹⁴ Universities are using predictive analytics through data mining to provide necessary data to retain federal and state funding, meet access and completion rates and other issues targeted within The Higher Education Act (HEA).¹⁵

The HEA created in 1965, has gone through eight iterations. The current HEA passed in the house committee in December 2017. Among the issues that are included in the final bill are affordability and college costs, access, and completion; student loan programs; accreditation and innovation.¹⁶ However, institutional data mining wasn't an issue included within the Act that impacts each of these topics. With growing government pressure to meet mandated retention levels, thirty-two states have either a formula or policy that allocates a portion of funding based on course completion, time to degree, transfer rates and other performance indicators, according to the 2015 National Council of State Legislatures Research.¹⁷

Predictive analytics in higher education is used for early-alert systems (to identify students most in need of advising); recommender systems (students are able to map their degree plan); adaptive technologies (to personalize learning by developing adaptive learning courseware); and enrollment management (to target recruitment efforts and financial aid).¹⁸ Georgia State has done this well and is now the "only public university of its size that has closed the achievement gap-graduating first-generation, Pell-eligible, ethnic and minority students at or above the rates for the student body overall."¹⁹

Learning analytics presents important personal moral and policy values surrounding student privacy. In the face of the recent Cambridge Analytica and Facebook data crisis, digital privacy should be a current topic of immediate discussion for overhauling FERPA. Stone addresses the policy paradox of security. There are two competing ideas- institutions need information for enrollment management, innovation, research and HEA compliances and students need their identifying information to be

kept private and have access to their records. According to the rationality model to increase security, policy makers must prevent or reduce the likelihood of bad events.²⁰ For example, sensitive student data that is privately identifiable information is currently being hacked or sold to 3rd party vendors.

Policy Options

Alternative 1: Deontological Decision

Reintroduce the Student Digital Privacy Act with Additional Language

In 2015, the Student Digital Privacy Act was introduced, which would work in juxtaposition with FERPA to regulate collection of students' data. The Act targeted K-12 and was modeled closely after California's Student Online Privacy Protection Information Act (SOPIPA) which limits 3rd party vendors in sharing student data for marketing and advertising purposes.²¹ Reintroducing the Student Digital Privacy Act and including higher education would address some privacy concerns and modernize FERPA. However, this alternative unless rewritten doesn't address FERPA definitions or violations that are major disrupters in current legislation.

As a part of reintroducing this Act, legislation should be added to allow students to request deletion of educational records after a period of time and minimize certain types of data collected. This issue doesn't exist in many of the laws including California's (SOPIPA).²² Educational technology vendors can virtually collect and retain large amounts of profoundly sensitive data about students. Data can be collected both actively and passively.²³ This can include social security numbers, test scores, any type of assessment, health information, survey responses and others. Passive data is collected by the vendor by tracking and using algorithms. Examples include, how many

times a student visits a certain webpage, scrolling patterns on webpages, how long it takes to answer questions on tests, which questions they got incorrect.²⁴ The list is endless.

FERPA does allow students to access and correct certain information in an educational record but universities and colleges are under no obligation to destroy the data or to even keep it. The data is basically theirs to do with what they want through 3rd party vendors. Currently, students don't have the right to request their educational records to be deleted after graduating from the institution or at a later date.²⁵

Case Study 1:

The President of Mount St. Mary's University in Maryland used a student survey to weed out students who would hurt the colleges retention rate in order for the school to rank higher. He did this by requiring new students to take a survey and use their answers to predict who were most likely to drop out.²⁶ In an email Newman sent to staff, he wrote, "...wanted 20-25 people to leave by September to boost retention by 4 to 5%."²⁷

This is clearly aimed at inequality and not the intention of predictive analytics as most models help universities keep their students by monitoring where they are failing and then assigning advising and tutoring help.

Alternative 2: Utilitarian Decision

Overhaul The Family Educational Rights and Privacy Act (FERPA)

A key FERPA concept is 'legitimate educational interest'—the operating principle for determining if educators can share student data. Mezzanette said, "The language is vague and, especially nowadays, ripe for loopholes big enough to fit a data

warehouse.”²⁸ Obsolete definitions should be updated to include 21st century education environments and to protect students from 3rd party vendors with their educational records. These definition updates include:

- Student Records
- Educational Institution
- School Official

FERPA only regulates educational institutions, and therefore vendors are technically not required to comply with the law’s guidelines.²⁹ They can investigate a vendor but the educational institution is penalized, not the vendor. The Department of Education can’t enforce the law because it is too rigid and basically removes all federal funding from an institution if in violation and it hasn’t been used.³⁰ Changing regulations so scaffolding penalties can be applied against educational institutions violating the law would be more enforceable and secure more FERPA-compliant contracts with 3rd party vendors.

Case Study 2:

As the current FERPA statute reads Yale Law School was able to destroy all of its student admissions evaluation data along with counseling memos to avoid being forced to hand over a thick file of records to its students.³¹ Another similar instance happened at Stanford when a student run email newsletter gave instructions on how students could access their admissions records. The school was so overwhelmed with requests that it deleted its admissions files and no longer maintains them.³²

Preferred Alternative

The preferred alternative at this time is alternative 2 because it is an incremental decision that provides a short term solution that will work. With Congress being more divisive than ever and the current administration abolishing anything that the Obama administration previously approved it would be very unlikely that congress would come to a compromise by reintroducing a bill by the previous administration. Infact, it would probably die quickly. Alternative 1 is also a mixed scanning decision making process that would take more time. Although alternative 2 doesn't address everything that FERPA needs it would secure much needed protections not covered in its current form. It would also close several loopholes leading to a much stronger and vigorous bill that protects student privacy while allowing universities to collect the information they need. It would make the most impact of the two alternatives for students and educational institutions.

Justification

Alternative 2 uses a rational-analytic model that clearly states goals and defines each alternative clearly to make decisions on a course of action.³³ University student data is highly targeted by hackers because there is so much personal information available such as social security numbers, credit card accounts, and other personal records. In 2017, over 20.4 million undergraduate students attended American colleges and universities with over \$1.4 trillion in unpaid educational debt.³⁴ A new report from Gemalto “found that the number of lost, stolen or compromised data records went up 164% in the first six months of 2017 compared to the last half of 2016.”³⁵ During the first half of 2017 there were 118 successful occurrences at higher education institutions. The

ability to leak individual personal identifying information can be detrimental to a student's future professional endeavors.³⁶ Putting protective data policies in place will help guard against this continuing trend and increase public opinion support. It wouldn't take an immense amount of persuasion in building a bi-partisan plan.

Conclusion

FERPA currently is outdated and needs to be overhauled for several reasons. First, important terms that need redefining include- educational records, personal identifiable information and school official. Second, the majority of educational technology providers meet the "school official" exception because they are often under contract with a school to perform an institutional service or function. Third, is that FERPA only regulates schools, and therefore companies are technically not required to comply with the law's guidelines. Currently, educational institutions collect highly sensitive student data but many lack the data protection that should accompany such data bases. Data breeches continue to be on the rise. Students' future financial, professional, and personal well-being is at risk.

Furthermore, there have been instances of "Big Data" fostering negative profiling and discrimination of students not likely to succeed by targeting and profiling students like Mount St. Mary's University. FERPA should protect student privacy while supporting data transparency used by higher education to maintain federal funding requirements. FERPA should strive to balance privacy while managing personal data with institutional freedom to collect what is needed to support funding and innovation.

Appendix 1: FERPA Provisions

P.L. 93-568, Dec. 31, 1974, effective Nov. 19, 1974 (Buckley/Pell Amendment)

P.L. 96-46, Aug. 6, 1979 (Amendments to Education Amendments of 1978)

P.L. 96-88, Oct. 17, 1979 (Establishment of Department of Education)

P.L. 101-542, Nov. 8, 1990 (Campus Security Act)

P.L. 102-325, July 23, 1992 (Higher Education Amendments of 1992)

P.L. 103-382, Oct. 20, 1994 (Improving America's Schools Act)

P.L. 105-244, Oct. 7, 1998 (Higher Education Amendments of 1998)

P.L. 106-386, Oct. 28, 2000 (Campus Sex Crime Prevention Act)

P.L. 107-56, Oct. 26, 2001 (USA PATRIOT Act of 2001)

Appendix 2: U.S. Representative Susan Davis, Democrat- California

Representative Susan Davis is a senior member and minority leader of the [House Committee on Education and Workforce](#). Rep. Davis believes every American deserves a quality education and as a country we should be investing in education. Rep. Davis has led efforts in the house Subcommittee to increase access to higher education, equal opportunity in education and the workplace, student safety, and career and technical training.

Congresswoman Susan Davis put forward a number of proposals to strengthen access to higher education opportunities and protect students in 2017 to renew the Higher Education Act. Although FERPA has gone through several minor changes, the attempt at a bipartisan overhaul in 2015 could pave the way for her to work across the aisle to make much needed changes that ultimately affect the issues she is most passionate about. This policy brief is intended to give her the information she needs to put forth new policies for overhauling FERPA.

References

- Electronic Privacy Information Center*. (2018). Retrieved from Family Educational Rights and Privacy Act: <https://epic.org/privacy/student/ferpa/>
- AACTE*. (2018). Retrieved from Higher Education Act 2017: <https://aacte.org/policy-and-advocacy/federal-policy-and-legislation/434-higher-education-act>
- Bolkan, J. (2017, September 20). *Campus Technology*. Retrieved from <https://campustechnology.com/articles/2017/09/20/education-data-breaches-double-in-first-half-of-2017.aspx>
- Bradshaw, A. (2015). *Center for Democracy and Technology* . Retrieved from Privacy and the Digital Student: Center for Democracy and Technology: https://cdt.org/files/2015/06/Student-Privacy-White-Paper-v.-9_1.pdf
- Dougherty, C. (2008). Getting FERPA Right: Encouraging Data Use While Protecting Student Privacy. *A Bye of the Apple*, 38-68.
- Education, D. o. (n.d.). *Laws and Guidance*. Retrieved from Department of Education: FERPA Provisions: <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/leg-history.html>
- EPIC-Electronic Privacy Information Center*. (2018). Retrieved from SOPIPA-Student Online Personal Information Protection Act: <https://epic.org/state-policy/student-privacy/>

Mezzanotte, J. (2016, May 3). *Motivis Learning*. Retrieved from FERPA in 2016: Guarding Student Privacy in the New Digital Age:

<https://motivislearning.com/insights/ferpa-outdated-in-new-digital-age/>

National Center for Education Statistics. (n.d.). Retrieved from Undergraduate Enrollment: <https://nces.ed.gov/fastfacts/>

NCSL. (2015). Retrieved from National Conference of State Legislators: Higher Education Performance Funding:

<http://www.ncsl.org/research/education/performance-funding.aspx>

Palmer, M. E. (2016, October). *New America Education Policy Higher Education*.

Retrieved from The Promise and Peril of Predictive Analytics in Higher Education: A Landscape Analysis: newamerica.org/education-policy

Palmer, M. E. (2017, March). *New America Education Policy Higher Education*.

Retrieved from Predictive Analytics in Higher Education: Five Guiding Practices for Ethical Use: newaerica.org/education-policy

Pomianowski, J. (2015, March 15). *The New Rrepublic Digital Magazine*. Retrieved from

Yale Law School is Deleting its Admissions Records, and There's Nothing Students Can Do About It: <https://newrepublic.com/article/121297/yale-law-deletes-admissions-records-congress-must-fix-ferpa>

Stone, D. (2012). *Policy Paradox*. New York: W.W. Norton and Company.

- Turk, J. G. (2017). *The Data-Enabled Executive: Using Analytics for Student Success and Sustainability*. Retrieved from American Council on Education:
<http://www.acenet.edu/news-room/Documents/The-Data-Enabled-Executive.pdf>
- Underwood, J. (2017). Phi Delta Kappan. *Under The Law: You say 'records,' and I say 'data'*, 98(8), 74-75. Retrieved from You say 'records,' and I say 'data'.
- White, L. (2013, January 7). *Don't Like FERPA? Change the Law*. Retrieved from The Chronicle of Higher Education: <https://www.chronicle.com/article/Dont-Like-Ferpa-Change-the/136461>

End Notes

- 1 (Turk, 2017)
- 2 (Turk, 2017)
- 3 (Education, n.d.)
- 4 (Education, n.d.)
- 5 (Underwood, 2017)
- 6 (White, 2013)
- 7 (White, 2013)
- 8 (White, 2013)
- 9 (Electronic Privacy Information Center, 2018)
- 10 (Dougherty, 2008)
- 11 (Bradshaw, 2015)
- 12 (Underwood, 2017)
- 13 (Underwood, 2017)
- 14 (Palmer, 2017)
- 15 (Palmer, New America Education Policy Higher Education, 2016)
- 16 (AACTE, 2018)
- 17 (NCSL, 2015)
- 18 (Palmer, New America Education Policy Higher Education, 2016)
- 19 (Palmer, New America Education Policy Higher Education, 2016)
- 20 (Stone, 2012)
- 21 (EPIC-Electronic Privacy Information Center, 2018)
- 22 (EPIC-Electronic Privacy Information Center, 2018)
- 23 (Bradshaw, 2015)
- 24 (Bradshaw, 2015)
- 25 (Bradshaw, 2015)
- 26 (Palmer, New America Education Policy Higher Education, 2016)
- 27 (Palmer, New America Education Policy Higher Education, 2016)
- 28 (Mezzanotte, 2016)
- 29 (Education, n.d.)
- 30 (Education, n.d.)
- 31 (Pomianowski, 2015)
- 32 (Pomianowski, 2015)
- 33 (Stone, 2012)
- 34 (National Center for Education Statistics)
- 35 (Bolkan, 2017)
- 36 (Bolkan, 2017)