

When FERPA Doesn't Protect Students

Last month I wrote about FERPA, the Family Educational Rights and Privacy Act, and why we should all be concerned with protecting our students' privacy. I wrote, "We owe it to our students to take care of their privacy. We might never know whose health and well-being our discretion will protect." This month I want to share a story of how one university used FERPA to abuse a student's privacy when it was staring down the barrel of a multimillion-dollar lawsuit, and [how that student's bravery](#), and [the bravery of the mental health care worker at the University of Oregon who blew the whistle on the records grab](#), changed the law.

A case study from the University of Oregon

Back in February 2015, I read about a horrifying campus rape. Jane Doe, a female student at the University of Oregon, was suing her school for mishandling her rape case—and for granting admission to her rapist, a transfer student who had been banned from his former campus for sexual assault. At the end of UO's campus investigation, three players on the varsity basketball team had been kicked out of school for gang-raping Jane Doe. But, UO had dragged its feet during the investigation so that the players could finish out the NCAA basketball season. [UO eventually settled](#) Jane Doe's case in August 2015 for \$800,000, for four years' worth of tuition for Jane Doe, and for a change in policy regarding how they admit transfer students.

Of interest to us here is one specific part of Jane Doe's lawsuit. She accused the school of accessing her medical records—in particular, her mental health records from the student counseling center—before the lawsuit was filed, and thereby violating her privacy. Indeed, the UO administration admitted to taking her medical records in anticipation of her lawsuit, without her permission, and giving them to their general counsel's office to help them prepare a defense. A student mental health care worker at UO [blew the whistle on the records transfer](#). UO claimed their actions were protected by FERPA. And, it turned out, UO was right.

Converting treatment records to education records

[I wrote a column for *The Chronicle of Higher Education* \(CHE\)](#) outlining my concerns—how could it be possible that a school could access a student's medical records so easily under FERPA? Why weren't student medical records protected like all other medical records—by the Health Insurance Portability and Accountability Act (HIPAA)? [It turned out there were "treatment records" under FERPA](#), which were different from "education records." Treatment records received special protection, and couldn't be shared around campus without the student's written permission. But it also turned out that, under FERPA, it was far too easy to "convert" treatment records into education records, which caused them to lose any special protection they may have had.

For example, FERPA allowed for treatment records

to be converted to education records if anyone other than the person providing the treatment looked at the records—including the student herself, or, say, her lawyer. If Jane Doe had asked to see her own treatment records, then her treatment records were no longer treatment records under FERPA. They were education records, and they could be shared around campus without Jane Doe's written permission. Basically, as I wrote for *CHE*, "compared with HIPAA, FERPA is about as protective as cheesecloth."

In the real world, looking at your own medical records doesn't cause them to lose their confidentiality. HIPAA continues to protect them. In college, under FERPA, it does. (See entry 8 on this FERPA guidance sheet from the Department of Education: <http://www2.ed.gov/policy/gen/guid/fpco/doc/ferpa-hipaa-guidance.pdf>.)

Once Jane Doe's treatment records were converted to education records, UO could access them freely, allowing the school to bypass the protections of the litigation discovery process. Imagine allowing opposing attorneys in a lawsuit to just walk into your doctor's office and take whichever of your records they wanted, relevant to your case or not. That's what happened here: UO just took Jane Doe's records, whichever ones they wanted, with no judicial oversight. FERPA, it turned out, wasn't HIPAA, not even close. And that's what I wrote in my *CHE* column.

How could it be possible that a school could access a student's medical records so easily under FERPA?

Dear Colleague letter

I received a lot of angry responses to my *CHE* column. There were those who were angry because they thought I'd misread the law (a "you got it wrong" argument; this one was the most common). There were those in the mental health profession who were angry, for some reason, that I had brought the records-grabbing to light. They were very protective of the sanctity of the mental health profession, and they thought I'd violated that sanctity (a "you made us look bad" argument). High-level administrators (all men, by the way) told me that, even though I got the law right, they certainly wouldn't do what UO did (a "just trust us" argument; this one was my favorite). [One guy said](#) it didn't matter that FERPA allowed for the records grab because all of the records would have come out in discovery anyway. I guess he doesn't have much respect for judicial oversight and the other protections of the discovery process.

I do.

It turns out I had read the law right. Folks from Congress gave me a ring and asked me for advice on how to make FERPA better. I said the answer was simple. Make FERPA like HIPAA. HIPAA, the medical privacy law that protects your medical records unless you're a college student, should be how FERPA works in practice. Within six months, because of a brave UO student and mental health worker and because of strong leadership in Washington DC, the Department of Education issued new guidance on FERPA in the form of a [Dear Colleague letter](#), published in

August 2015.

The Dear Colleague letter on “protecting student medical records” advised that “without a court order or written consent, institutions that are involved in litigation with a student should not share student medical records with the institution’s attorneys or courts unless the litigation in question relates directly to the medical treatment itself or the payment for that treatment, and even then disclose only those records that are relevant and necessary to the litigation”—not all of them.

If a school wants medical records for any other kind of litigation—such as the kind in Jane Doe’s case—then “the school should not access the student’s treatment records without first obtaining a court order or consent.” This new guidance brings FERPA more in line with HIPAA, protecting all students from administrative overreach.

The bravery of Jane Doe and of the UO mental health care worker who blew the whistle on the records grab, and the strong leadership and quick action in Congress, has led to stronger protection of student medical records on campus. Their important work has ensured that students who are at their most vulnerable can feel safe asking for help. 

—KRGF

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One of those ideas is the FAST Fund, which was started by Dr. Goldrick-Rab and of which you are a board member. Can you talk about what that fund was designed to do, and how people can contribute if they’re interested?

One of the things that Sara has come across is faculty who quite literally are reaching into their pockets and giving students money, or buying them sandwiches, or driving them places, doing things for them that are very personal, caring for their students through an “I don’t know what else to do in this situation” [response].

Seeing that this is happening and recognizing (a) it’s not sustainable for the faculty but (b) it’s incredibly powerful for the student, how do we harness the power of a faculty member doing something that personal for a student without making it a burden? We thought what if we just gave money to the faculty members that we know are already doing this [to] have them be able to impact students and feel empowered to impact students.

It’s a very small initiative right now, three selected schools. We have faculty at Bunker Hill Community College, Milwaukee Area Technical College, and one in the Madison area school district that we have given funding to serve students as they see fit. The faculty member does the needs assessment or an intake; they just make a decision on what they want to do for that student. There’s no bounds to it: the faculty could buy them a pair of shoes, or give them a \$20 bill or take them to the grocery store. Whatever the faculty member wants to do that is necessary for the student, they can do. FAST stands for Faculty and Students Together; we definitely know that

relationships create such an important impact on student retention and student persistence. We just gave the first deposits to the faculty [who] are doing it, so we’ll see what happens!

We have a systemic illness that we need to be dealing with on a systemic level. But hunger, a student not being able to pay an internet bill, not necessarily being able to get a textbook—those are the symptoms. We need to be able to alleviate those in the meantime.

If you had to identify other good first steps in addressing some of these symptoms (hunger, homelessness, etc.), what would you advise readers to think about, look at, or think of doing? Where should they start?

There is one thing I will consider to be the most impactful: give money. Very few of these programs aren’t struggling for money. At a campus pantry, money can go further than things like food or time. If they have a partnership with an area food bank, they can get food at a tremendously discounted cost. Policy change is driven by money. If people want to think about what the most impactful thing they can do, short of starting a program yourself, it’s giving money.

Getting a grasp on what the issue is really the first step. From there, it’s just a matter of “do I want to focus on individual situations or focus systemically?” I wrote an article for *About Campus* that touches on exactly this kind of progression. The CUFBA website has resources on how to start a food pantry on campus if that’s the solution deemed most appropriate.

Beyond that, it’s about how to support policy initiatives. The Wisconsin HOPE Lab put out a report recommending we expand the national school lunch program into higher education. Who do we have to write letters to about that? Who are we pushing? How can we engage in that kind of policy change? There’s a broad range because this is so new; it doesn’t really matter where you put your energy as long as you put it in. Every single entry point is going to be impactful. Every single one. What do you care about, how do you care about it and what are you best at? And then go there. You’re going to make a difference. 

—AM

BCRW Hosts Postelection Intergenerational Discussion,
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“Encourage and sponsor both alumni and current students in creating oral history collections,” says Price. “Use reunions to mix and match different classes for intergenerational conversation.”

Acey’s two years as a BCRW senior activist fellow were very enlightening and dispelled myths about older and young activists not wanting to interact. She says the activists of her generation are still open to learning and taking in new ideas as well as giving support and sharing histories that help inform what people are doing today. 

—LE