

2022-2023: Privacy, Confidentiality, & Privilege in Disclosures of Sexual and Interpersonal Violence



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This module introduces three major legal and ethical concepts governing how college and university officials, *including student employees*, may disclose student information reported following an incident of sexual and interpersonal violence: privacy, confidentiality, and privilege.

When it comes to privacy and disclosure, every situation demands an individual assessment of what information can and cannot be shared as matter of law, policy, and ethics.

The module defines and compares these concepts, and evaluates how they are applied in the frameworks of FERPA and Title IX. The learning objective is for officials who interact with students to understand the meaning of these terms and how to apply them in practice upon receiving a report of sexual and interpersonal violence and investigating and resolving the matter.

Click the "*Start Course*" button to begin.

☰ **The Three Principles: Privacy, Confidentiality, and Privilege**

☰ **FERPA**

☰ **Title IX**

☐ **Review**

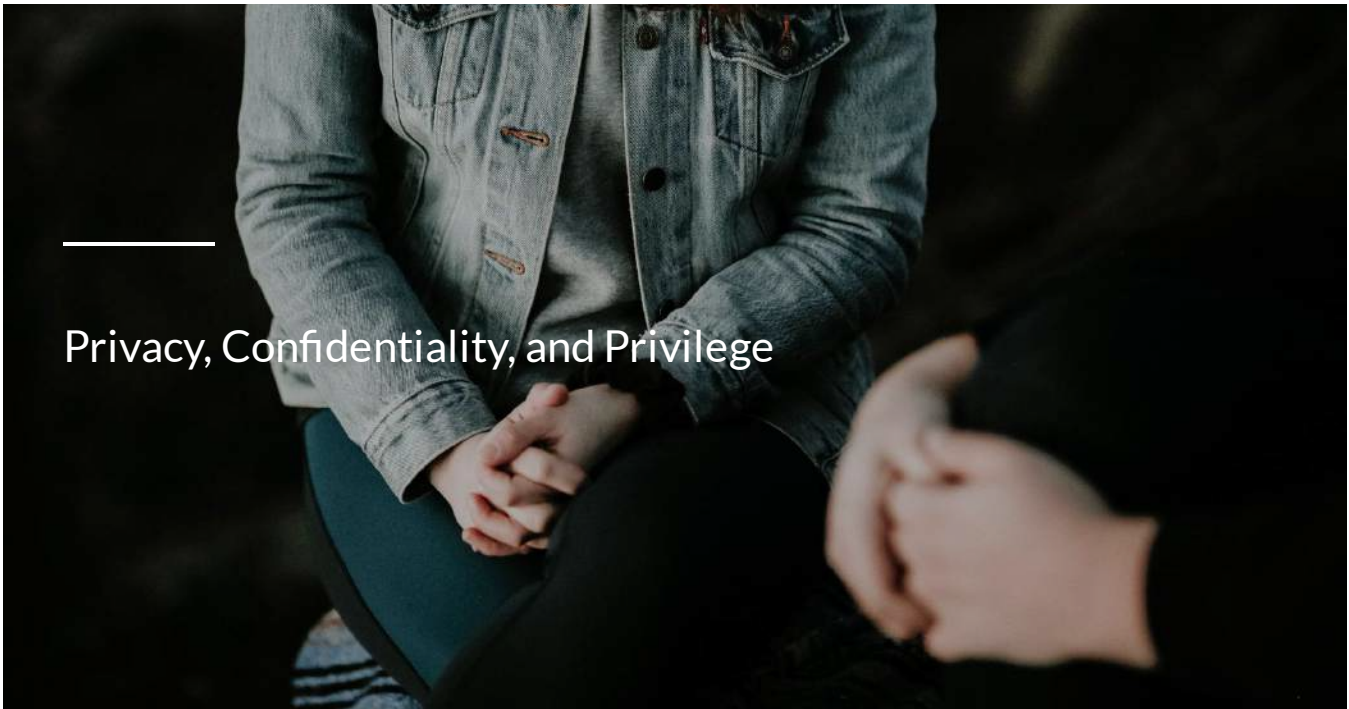
☰ **Conclusion**

The Three Principles: Privacy, Confidentiality, and Privilege



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00:16

This module includes both audio and visual information. You will need to review all material, including listening to the audio content and completing tests, to earn credit for the module.



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What do these concepts mean?

While the concepts of privacy, confidentiality, and privilege are often used interchangeably, they mean very different things in the student context.



Privacy

Privacy is a legal concept. From the broadest view, it refers to an individual's right to choose what they want to disclose about themselves, and to decide what they do not wish to share with others.

As we will discuss in this module, students have a right to privacy in their disclosures of sexual and interpersonal violence.

This means they have the right to choose whether to report incidents of sexual and interpersonal violence to campus officials, or keep that information private.

That privacy right does not end just because they have chosen to make a disclosure. Federal law prohibits campus officials from disclosing this information to anyone without the student's consent, unless some exception exists.

And, to the extent campus officials need to share this information to investigate and resolve the case, they must maintain the student's privacy to the greatest extent possible, and may only relay this information as necessary for appropriate officials to investigate the incident and seek a resolution.



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Confidentiality

Confidentiality is an ethical principle. It refers to the duty that a practitioner owes to their patient or client not to disclose information shared during therapy or treatment without authorization. The purpose is to promote effective treatment by building confidence and trust between provider and patient.

We won't cover the details of confidentiality in the medical and mental health settings in this module. The basic rule is that a practitioner cannot share information disclosed in treatment except in narrow circumstances, such as:

- a court order, where the interest of justice outweighs the need for confidentiality
- to attorneys representing clients where the need for involuntary hospitalization arises
- to an endangered person or law enforcement, where a client poses an imminent risk of harm to an identifiable individual. State law may require such disclosure, and practitioners who fail to take reasonable care to protect the foreseeable victim of that danger may also face civil liability under the *Tarasoff* doctrine.



00:41

Privilege

Privilege applies to communication that takes place within a special and specific relationship in which the patient or client is protected by law from having their confidential communication disclosed in a legal proceeding without permission.

Privilege only exists where:

- there is a professional relationship with the patient

- the information is acquired while treating the patient in a professional capacity
- the information is necessary to enable treatment
- the patient did not waive the privilege
- the privilege and communication was intended to be confidential

Privacy vs. Confidentiality

While privacy is a student's legal right to choose what to disclose about themselves, "confidentiality" refers to the ethical duty of the practitioner to protect information revealed during

Legal Privilege

Communications made within a special and specific relationship protected by law (attorney-client; physician-patient) are privileged from disclosure in a legal proceeding without permission.



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Unpacking these concepts



02:29

What laws define and protect student privacy? —

As experienced practitioners know, a variety of federal laws, along with campus policies, protect student privacy from disclosure. These include:

- Family Educational Rights and Privacy Act of 1974 (FERPA): 20 U.S.C. § 1232g; 34 C.F.R. Part 99
- Health Insurance Portability and Accountability Act (HIPAA): 42 U.S.C. § 1320d (and related); 45 C.F.R. Part 164

When can I promise a student confidentiality? —

Within the context of Title IX reporting, confidentiality may only be offered by officials who are not required to report incidents of sexual assault and other crimes under federal and state law.

Effectively, no institutional official can offer true confidentiality unless they have such a legal privilege. Only those officials with a legal privilege may promise to keep information confidential.

For example, a Title IX Coordinator who also is a licensed attorney does not have a legal privilege when it comes to their conversations with reporting individuals or students accused of misconduct. Even though the Title IX Coordinator is a lawyer, there's no attorney-client relationship prohibiting the Coordinator from reporting the conversation as needed to advance the investigation and resolution of the matter.

What are examples of confidential resources? —

State law typically defines what relationships are protected by legal privilege, and when practitioners may breach their duty of confidentiality to prevent an imminent risk of harm to a foreseeable victim of that danger.

Depending on your state, confidential resources available to students may include: medical providers (physician, dentist, podiatrist, chiropractor, nurse), psychologists, clergy, rape crisis counselors, and social workers.

New York's "laws of privilege" are listed within [CPLR Article 45](#).

What happens if student privacy is breached? —

Our primary mission in higher education is to serve the needs of students. Putting students first means taking active steps to avoid any illegal disclosures of students' personal information. Institutions may be investigated and sanctioned by government agencies for compromising student privacy. Students may also sue both the institution and its individual employees for damages in federal and state court for privacy-related harms.

Now let's look at the major laws governing how student privacy works.



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FERPA



Family Educational Rights and Privacy Act of 1974 (FERPA)



00:43

What Is the Family Educational Rights and Privacy Act of 1974 (FERPA)?

FERPA is the federal law that governs access to student "education records" and their disclosure.

FERPA ensures that students can access their own records, and controls when their college or university and its staff may disclose information within those education records to third-parties, including the students' parents, other college staff members, the general public, and other outside requestors.

As a general rule, unless an exception applies, information in a student's education record may not be disclosed without the student's written consent.



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00:42

What is an "education record" under FERPA?

"Education records" are records that are directly related to a student and that are maintained by an educational agency or institution or a party acting for or on behalf of the agency or institution.

In the postsecondary setting, these records include (but are not limited to) grades, transcripts, class lists, student course schedules, student financial information, and student discipline files.

The information may be recorded in any way, including through handwriting, print, computer media, videotape, audiotape, film, microfilm, microfiche, and e-mail.



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01:23

What is not an "education record"?

The law states that some documents are not part of the "education record," and therefore are not subject to FERPA disclosure protections. They may, however, be subject to other laws prohibiting them from disclosure without consent, such as HIPAA and state privacy laws.

Treatment records

FERPA excludes records "made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his [or her] professional or paraprofessional capacity.

Law enforcement records

FERPA education records do not include records maintained by a law enforcement unit of the institution that were created by that unit for the purpose of law enforcement.

2 of 3

Sole possession records

FERPA education records do not include records “of instructional, supervisory and administrative personnel ...which are in the sole possession of the maker thereof and are not accessible or revealed to

3 of 3



Complete the content above before moving on.

If it is an "education record," ask yourself: *Do any exceptions apply?* If not, then it is FERPA protected.



What are the exceptions to FERPA?



00:22

The law describes several exceptional situations where the college or university may disclose student education records without the student's written consent.

Each exception is independent of the others. You only need to identify one exception to support the disclosure.

Exception 1

Dependent Students



00:32



FERPA permits, but does not require, campuses to share with parents of a dependent student information contained in education records.

Campuses may provide the student information to either parent, including to a divorced or non-custodial parent. A student may fall into the “dependent student” category until they are 24.

Remember, this exception is not mandatory. The institution may decline to make these disclosures to protect student privacy.

Exception 2

Drug and Alcohol Violation



00:35



A campus may disclose to a student's parents, regardless of the student's dependency status, in the limited case of violations of law or campus policy by a student under the age of 21 at the time of the report, concerning the use or possession of alcohol or controlled substance.

But, where drug or alcohol violations are not at issue, *and* the student is not a dependent, student consent is necessary unless another exception, such as health or safety, applies.

Exception 3

Health or Safety Emergency



00:56



In emergency situations, FERPA allows for a case-by-case review permitting the disclosure of education records.

Only those who can act to protect health or safety, such as parents or professionals trained to handle emergencies should receive emergency disclosures. Keep in mind, of course, that in some situations, parental involvement may exacerbate the underlying crisis.

The emergency must be serious and imminent as determined by the campus using a rational basis standard; once the campus rationally believes that a threat has dissipated, the exception no longer applies.

Federal regulators have found emergency releases appropriate

- In cases of smallpox, anthrax and bioterrorism attack
- In cases of a student's suicidal statements coupled with unsafe conduct and threats against another student
- In cases of reporting incidents of identified communicable diseases to a State Health Department.

Exception 4

School Officials with Legitimate Educational Interests



00:43



FERPA allows **school officials**, including professors, administrators, and legal counsel, to disclose education records among themselves without student consent, provided the institution has determined that those officials have a legitimate educational interest in the records.

FERPA allows each campus to define for itself in an annual notice to students who qualifies as a “school official” and what is a “legitimate educational interest.”

Campuses should define these terms broadly and may include non-employees, such as agents and contractors who provide a service the campus would otherwise do itself.

Summary



00:20

Assuming that student information is contained in an "education record," FERPA does not permit colleges to disclose that information without the student's written consent. FERPA does outline four major exceptions to this rule, all of which are important to understand when it comes to addressing cases of sexual and interpersonal violence.



Complete the content above before moving on.

Is there an exception?

Please drag-and-drop the card in the appropriate stack.

Likely within a FERPA
exception

On-campus report of anthrax exposure

Release of transcript to parent of dependent student

Release of information about drug violation to parent of dependent student

Emails among campus violence prevention response team about a student's behavior

Not within a FERPA exception

Names of students who witnessed sexual assault at an off-campus party

Student financial information

Class lists

Remember, just because FERPA allows disclosure in those circumstances does not mean the college *must* disclose the education record. The college's goal should always be to serve the needs of students first.

Now that you know how FERPA works, we will discuss its interplay with Title IX investigations and adjudications.



Complete the content above before moving on.

Title IX



Confidentiality in reporting



00:40

Now let's consider the intersection of Title IX with these confidentiality laws and principles.

Old rule: "Responsible Employees"

For several decades, the U.S. Department of Education's Office for Civil Rights (OCR) has advised colleges and universities that a broad range of employees (including student employees) may be "responsible employees" capable of putting the institution officially on notice of a report of sexual harassment or sexual violence.

Under that agency's [2001 Revised Sexual Harassment Guidance](#), a responsible employee includes both individuals with the express authority to take action along with "an individual who a student could reasonably believe has this authority or responsibility." 2001 Revised Sexual Harassment Guidance, p. 13.



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01:33

New Rule: Narrow group of employees responsible for taking reports

Under the Title IX Final Rules, issued on May 19, 2020, the Department continues to allow institutions to designate its employees as "responsible employees" for purposes of Title IX reporting. In other words, if a school wishes to make all faculty and staff responsible employees, it may do so. For example, if your campus currently designates all full-time faculty as responsible employees, it may continue to do so if it wishes.

However, such requirements are no longer mandated; an institution of higher education will no longer be deemed to have "actual knowledge" of an incident of Title IX sexual harassment unless that incident is reported to either the Title IX Coordinator or an official with authority to take corrective measures in response to the report. The Final Rules indicate that the institution

will identify both the Title IX Coordinator and the specific officials who have this authority to take corrective measures.

Again, nothing in the Final Rule requires an institution of higher education to read its reporting obligations so closely. If the institution wants to make a broad range of employees mandatory reporters, it may do so. The Rule simply indicates that the institution will not be in violation of Title IX if decides not to.


Note that if you work at the K-12 level, the Department's rules on confidential reporting are markedly different; rather than narrow the class of employees responsible for reporting, the Title IX Final Rule widely expands K-12 reporting obligations to what appears to be all of a K-12 school's employees.



Balancing confidentiality with safety

Under Title IX, reporting individuals may request that their disclosures be made confidentiality, and that the institution not pursue further remedial measures or investigations.

Moreover, an institution may move forward with an investigation, even where the reporting individual seeks to remain anonymous or elects not to pursue a formal complaint.

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State laws on confidential disclosure

Some states have defined a list of risk factors for campus officials to weigh when determining whether to move forward on an investigation without the reporting individual's permission.

New York law, for example, requires that the institution "seek consent" from reporting individuals before investigating, and requires that institutions honor a decision not to go forward "unless the institution determines in good faith that failure to investigate does not adequately mitigate a potential risk of harm to the reporting individual or other members of the community." N.Y. Ed. Law § 6446 (g) (4).

Those risk factors include:

- Whether the accused has a history of violent behavior or is a repeat offender
- Whether the incident represents an escalation in unlawful conduct on behalf of the accused from previously noted behavior
- Whether there is a risk the accused will commit more acts of violence
- Whether the accused used a weapon or force
- Whether the reporting individual is a minor
- Whether the institution has other means of gathering information such as security footage, and
- Whether available information shows a pattern of misconduct at a given location or by a particular group. N.Y. Ed. Law § 6446 (g) (4).



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Privacy



01:21

Privacy in campus investigations

Reporting individuals are owed privacy at all stages of a campus investigation and adjudication.

Ideally, this privacy right should include the right to make as few disclosures as necessary to allow the process to move forward. For example, New York law provides reporting individuals with the right to:

"Describe the incident to as few institution representatives as practicable and not be required to

unnecessarily repeat a description of the incident"

New York Education Law Article 129-B, Section 6443

Of course, under the FERPA exception described previously, a campus may request that reporting individual share their account for legitimate reasons, such as repeating the narrative to a Title IX investigator or conduct board.

Rather, under New York law, the reporting individual need not relay their account to hall directors, professors, or academic affairs offices from which they need an interim accommodation; the Title IX Coordinator should work directly with those individuals and offices to make the accommodations on the reporting individual's behalf, thereby avoiding repeated disclosures by the reporting individual themselves.

Information disclosed by the reporting individual to a Title IX investigator, in turn, may be shared by the investigator with conduct officials under the FERPA exception for legitimate educational interests.



Complete the content above before moving on.



02:01

Privacy following sanction and appeal

As discussed earlier, FERPA prohibits colleges and universities from disclosing a student's "education records" without that student's written consent. Student disciplinary records are considered "education records" shielded from non-consensual disclosure.

The courts have insisted on rigid adherence to FERPA even where the disciplinary matter itself is notorious or involves students in the public eye.

So, where a journalist sought disclosure of disciplinary records, the fact that a respondent was a prominent student-athlete, or that the public already knew a substantial amount of information about the case through national media coverage, did not outweigh the respondent's "enhanced privacy interest" in their education records; therefore, these records remained shielded under FERPA and state privacy law, regardless of how well the student was known or the public's knowledge of the case. *Krakauer v. State by & through Comm'r of Higher Educ.*, 396 Mont. 247, 258, reh'g denied (Aug. 7, 2019).

FERPA protects the privacy of any student involved in the process, from the parties to witnesses to bystanders identified in investigatory reports, from public disclosure.

But if the institution finds that a violation of its rules occurred, then the final results of that disciplinary proceeding could be released without the students' consent. Final determinations arising from disciplinary proceedings concerning sexual and interpersonal violence are presumptively public under FERPA. *DTH Media Corp. v. Folt*, 374 N.C. 292, 298, 841 S.E.2d 251, 256 (2020), cert. denied sub nom. *Guskiewicz v. DTH Media Corp.*, 141 S. Ct. 1126, 208 L. Ed. 2d 563 (2021).

And this disclosure may only include the name of the responsible student, the violation, and the sanction imposed; it cannot include the name of any other student without that student's written consent. 20 U.S.C. § 1232g(b)(6)(C)(i)-(ii).

A disclosure of disciplinary records may also be possible under a state or federal court order or subpoena. Typically, such disclosures are strictly monitored by the court, and all personally-identifiable information concerning students will be redacted unless necessary for the case at hand.

While reporting individuals and respondents are not themselves barred from FERPA from sharing the results of the disciplinary process, they may not do so in an unreasonable manner with the intention to harm or embarrass another, or in a manner that would recklessly do so regardless of intention.

Students should be advised that such disclosure is a form of retaliation that may be sanctioned through a separate charge under the code of conduct.



Now that we have covered the intersection of FERPA and Title IX, let's apply that knowledge.



Complete the content above before moving on.

Lesson 4 of 5

Review

Question

01/05

What rights do students have under FERPA? Select **ALL** the correct responses.

- The right to control the disclosure of their education records subject to certain exceptions.
- The right to report incidents of sexual and interpersonal violence without fear of retaliation.
- The right to control the disclosure of their education records under all circumstances
- The right to restrict their parents from accessing their education records subject to certain exceptions.

Question

02/05

Which of the following is not an exception to FERPA?

- Dependent Student
- Drug and Alcohol Violation
- Health or Safety Emergency
- Public Right to Know

Question

03/05

Who may be able to offer confidentiality to a reporting individual?

- Pastor at an on-campus ministry
- Title IX Coordinator who is also an attorney
- Rape crisis counselor not employed by the university

Question

04/05

What reasonable steps may a Title IX Coordinator take to protect student privacy after a report of sexual or interpersonal violence?

- Take affirmative steps to limit the number of times a reporting individual has to re-describe the facts of the alleged assault.

- Advise the parties that unreasonably sharing the details of the proceedings may amount to retaliation, which violates the code of conduct.

- Decline media requests for interviews about the details of the alleged assault.

- Impose a "gag order" on the parties of any discussion of the pending discipline with anyone other than the Title IX Coordinator or their advisor.

Question

05/05

A journalist asks for the record of a disciplinary proceeding where a student has been found responsible for sexual assault. What information may the university disclose without the students' permission?

- The name of the respondent
- The name of the reporting individual
- The names of witnesses to the proceeding
- The sanction imposed
- The violation found

Conclusion

Thank you for taking this training!

More relevant information can be found on our Student Conduct Institute Casebook, which you can find on the homepage of our web platform. Please make sure to select the "Complete Module" button at the bottom of this page. This will register that you have completed the module, and your progress will be uploaded into your learner dashboard.



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