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Welcome to Today's
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Webinar

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FERPA Compliance:

Avoid Mistakes & Costly Violations Across Campus

Wednesday, April 11, 2018 · 2:00 – 3:30 pm ET


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The opinions expressed during today's event are not necessarily those of PaperClip Communications.

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Moderator

- Laura Betti
- Webinar Coordinator
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Presenter

Steven J. McDonald
General Counsel
Rhode Island School
of Design



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Agenda

- The *fundamentals* of FERPA
- Current topics
 - Public records, public demands, public interest
 - Disciplinary notations on transcripts
 - Data security requirements
- What lies ahead
- Questions (and possibly answers)

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Our Love's in Jeopardy, Baby!

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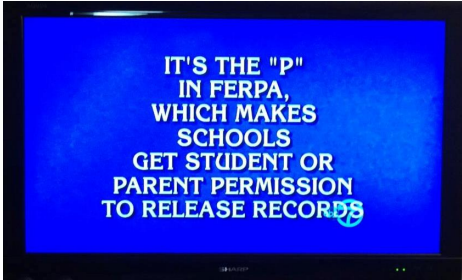
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FERPA

- The Family Educational Rights and Privacy Act of 1974
- A.K.A. the Buckley Amendment

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FERPA's Big Three

- College students have the right, *in general*, to:
 - Control the disclosure of their "education records" to others
 - Inspect and review their own "education records"
 - Seek amendment of their "education records"

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So, What's an "Education Record"?

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So, What's an "Education Record"?

- "[O]fficial records, files, and data directly related to [students], including all material that is incorporated into each student's cumulative record folder, and intended for school use or to be available to parties outside the school or school system, and specifically including, but not necessarily limited to, identifying data, academic work completed, level of achievement (grades, standardized achievement test scores), attendance data, scores on standardized intelligence, aptitude, and psychological tests, interest inventory results, health data, family background information, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns."

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So, What's an "Education Record"?

- "'Education records' . . . means those records that are:
 - (1) Directly related to a student; and
 - (2) Maintained by an educational agency or institution or by a party acting for the agency or institution"

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So, What's an "Education Record"?

- "'Educational . . . institution' means any public or private . . . institution" that receives funds "under any program administered by the Secretary [of Education]"

So, What's an "Education Record"?

- "'Record' means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche"
 - The medium is *not* the message
 - N.B.: Does *not* include information that is not "recorded" – that is, personal knowledge

So, What's an "Education Record"?

- "'Student' . . . means any individual who is or has been in attendance at an educational . . . institution"
 - Applicants are not "students" unless they are accepted and "attend," physically or virtually
 - But "students" retain FERPA rights even after leaving the institution
 - Once attached, FERPA rights in any given record continue to exist until either the record's destruction or the student's death

So, What's an "Education Record"?

- In general, a record is "**directly related**" to a student if it contains "personally identifiable information" about that student

So, What's an "Education Record"?

- "'Personally identifiable information' includes, but is not limited to"
 - The name of the student or of the student's parent or other family member
 - The address of the student or student's family
 - Personal identifiers such as SSNs, student numbers, or biometric records
 - Other indirect identifiers such as date or place of birth or mother's maiden name

So, What's an "Education Record"?

- "Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty"

So, What's an "Education Record"?

- "Maintain" is

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- "Maintain" is *not defined!*

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- *Owasso Independent School District v. Falvo*, 534 U.S. 426 (2002):

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So, What's an "Education Record"?

- "Maintain" is *not defined!*
- *Owasso Independent School District v. Falvo*, 534 U.S. 426 (2002):
 - "FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar."

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 - "The ordinary meaning of the word 'maintain' is 'to keep in existence or continuance; preserve; retain.'"
- Requires conscious decision on the part of the institution?

So, What's an "Education Record"?

- "The phrase '**acting for**' connotes agents of the school, such as teachers, administrators, and other school employees."
 - Not just the registrar
 - *Including you . . .*

We Don't Need No "Education"

- "Education records" certainly includes transcripts, exams, papers, and the like
- But it also includes:
 - Financial aid and account records
 - Disability accommodation records
 - Disciplinary records
 - Most of what's in your SIS and LMS
 - Photographs
 - Faculty and staff e-mail messages to, from, or about a student
 - Records that the student has made publicly available
 - *Virtually everything!*

Except for These:

- "Sole possession" records
 - As long as they are not shared or accessible
- "Law enforcement" records
 - But only the law enforcement office's copy
- "Employment" records
 - Unless student status is a job requirement
- "Alumni" records
 - But not if they "relate back"
- "Treatment" records
 - Only if they are not shared


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The Metaphysics of Medical Records

- FERPA does not *prohibit* the release of treatment records to persons other than "individuals providing the treatment" under any of the exceptions applicable to education records
 - It simply excepts them from the "inspect and review" right, and defers to state law on patient access, as long as they are not shared more broadly
- HIPAA: "Protected health information *excludes* individually identifiable health information in:
 - (i) Education records covered by the Family Educational Rights and Privacy Act, as amended, 20 U.S.C. 1232g; [and]
 - (ii) Records described at 20 U.S.C. 1232g(a)(4)(B)(iv) [that is, treatment records]"
- ***But state medical confidentiality rules still apply (to medical professionals), and typically are more stringent***

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Q&A Session



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Disclosure

- Before disclosing education records – *or information from education records* – an institution must obtain a signed and dated written consent from *all* relevant students, specifying:
 - The records that may be disclosed
 - The purpose for which they may be disclosed
 - The persons or classes to whom they may be disclosed

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Except for Disclosures:

- Of "directory information"
 - Can include name; address; e-mail address; telephone number; photograph; date and place of birth; major; grade level; enrollment status (undergraduate or graduate, full- or part-time); dates of attendance; participation in officially recognized activities and sports; weight and height of athletes; degrees, honors, and awards received; most recent educational institution attended, and other information "that would not generally be considered harmful or an invasion of privacy if disclosed"

Except for Disclosures:

- Must give students notice of your definition and an opportunity to opt out
- Need not give notice to alumni, but must continue to honor prior opt out
- Students cannot use opt out to prevent disclosure of name, institutional e-mail address, or other identifier in classes (physical or virtual) in which they are enrolled
- Cannot disclose or confirm directory information if an SSN or other non-directory information is used to confirm the student's identity
- "[A]n . . . institution is not required to make . . . directory information available to the general public just because the information is shared within the institution"

Except for Disclosures:

- To "school officials . . . whom the . . . institution has determined to have legitimate educational interests"
 - Each institution specifies its own standards
 - "School officials" can include students serving on committees and outside contractors
 - "Legitimate educational interests" can include what is needed to do one's job
 - Institution, not individual, makes the determination

Except for Disclosures:

- Institutions must "ensur[e] that outside parties that provide institutional services or functions as 'school officials' . . . do not maintain, use, or redisclose education records except as directed by the . . . institution that disclosed the information. . . . [O]ne way in which schools can ensure that parties understand their responsibilities under FERPA with respect to education records is to clearly describe those responsibilities in a written agreement or contract."

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Except for Disclosures:

- To "officials of another . . . institution of postsecondary education where the student seeks or intends to enroll, or where the student is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer"
 - "[T]he regulations are intended to clarify that, after a student has already enrolled in a new school, the student's former school may disclose any records or information, **including health records and information about disciplinary proceedings**, that it could have disclosed when the student was seeking or intending to enroll in the new school."

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Except for Disclosures:

- To "parents . . . of a dependent student" for federal tax purposes
 - Parents of college students have no general right to see their children's education records, *even if the students are minors*
 - Need to obtain a copy of parents' most recent federal tax return or confirmation from student to verify dependent status
 - **Warning: Tell them about this before there's a problem**

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Release To Parent Revised 4/2010

Under the Family Educational Rights and Privacy Act (FERPA), most information about you from RISD records, including grades received, is considered confidential and, with certain exceptions, generally may not be released to third parties, including your parents, without your written consent. See the *Course Announcement 2010-2011* for more information about FERPA.

You may authorize Rhode Island School of Design to release information from your records to your parents by completing the information requested below and returning this form. Or, you may return it to the Registrar's Office during the first week of the semester.

Please note that without this authorization, RISD's ability to disclose information from your records to your parents or to speak with your parents about information from your records will be significantly restricted. You are urged to inform your parents of this fact if you decide not to execute the authorization form.

I, _____, authorize
Print name
 Rhode Island School of Design to disclose any and all information from my records to my parents(s). This consent will remain in effect while I am enrolled at RISD unless withdrawn by me in writing at the Registrar's Office.

Student (signature) _____
 Date _____

RISD ID # (if known) or your street address _____

If your parents have changed address since admission or if grades must go to each parent at a separate address, please provide names and address on the back of this form. If you have previously submitted this release, you need not do it again! OVR

Release of Grades To Parents(s)

Name(s) and address(es) of parent(s) to receive grades

Name: _____

Street Address: _____

City, State, Zip: _____

Name: _____

Street Address: _____

City, State, Zip: _____

Additional Information about Grade Reports

The parent copy of the grade report is always mailed to the parental home address(es) specified above. Students access their grades on the RISD intranet site using WebAdvisor (<http://www.bu.edu/webadvisor>). Accessing this confidential part of the system requires the student's log-in name and password. Paper copies are sent to students only upon written request.

As a supplemental evaluation, instructors in studio classes may complete narrative evaluations of student work. These evaluations are sent only to the student.

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Office of the University Registrar

[Home](#) [Academics](#) [Registration](#) [Graduation](#) [Students](#) [Faculty & Staff](#) [Contact Us](#)

RELEASE OF INFORMATION

ACADEMICS

- Course Descriptions
- Family Educational Rights and Privacy Act - FERPA
- FERPA Deletions
- FERPA FAQs
- Release of Information
- Shared Access
- Final Exam Policy
- Grades & GPA
- Ordering a Transcript

The following policy on the release of information to parents and guardians is provided in accordance with the University's obligations under the Family Educational Rights and Privacy Act (FERPA).

Consent to Disclosure
 The University does not routinely send grade reports, course schedules, transcripts, or preliminary disciplinary communications to parents. Parents are encouraged to speak directly with their son or daughter for information on academic performance or general well-being, or to ask the student to grant them access to the online transcript, proof of enrollment, and student account information via ShareLink.

Conversations between a student and advisors, mentors, and disciplinary hearing officers are treated as confidential and are generally not shared with others, including parents, without the student's specific permission. This is consistent with the University's view that students should be treated as responsible adults and with the University's goal of promoting students' growth and independence.

Disclosure with Student Consent
 If a student has provided consent via [Consent to Disclosures](#) on the [StudentLink](#), the University may communicate with parents in the following situations:

<http://www.bu.edu/reg/academics/ferpa/release>

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Except for Disclosures:

- In connection with an "articulable and significant threat to the health or safety of a student or other individuals"
 - Disclosure may be made to "appropriate parties" and may include "information [that] is necessary to protect the health or safety of the student or other individuals"

Except for Disclosures:

- "[T]he Department will not substitute its judgment for that of the . . . institution if, based on the information available at the time . . . there is a rational basis for the . . . institution's determination that a health or safety emergency exists and that the disclosure was made to appropriate parties."
- "FERPA is not intended to be an obstacle in addressing emergencies and protecting the safety of students."

Except for Disclosures:

- Of the "final results" of a disciplinary proceeding against an alleged perpetrator of a crime of violence or non-forcible sex offense, *if* the institution determines that the accused student violated an institutional rule or policy
 - "Final results" = name of the accused student, violation committed, and sanction imposed
 - If the institution determines that the accused student is *not* in violation, may disclose the "final results" only to the complainant

Except for Disclosures:

- And several more
- N.B.: As far as *FERPA* is concerned, all of these are discretionary
 - May be public record or other disclosure requirements
- Also N.B.: These exceptions are independent of each other, not cumulative

Inspect and Review

- Must allow students to "inspect and review" their own education records within 45 days of request
- Need not provide copies unless "circumstances effectively prevent the . . . student from exercising the right to inspect and review"
- The *only* exceptions are financial aid records of parents and confidential letters of recommendation to which the student has waived access
- If record relates to more than one student, must redact portions relating to other students

Seek Amendment

- Student may request amendment of records containing "information that is inaccurate, misleading, or in violation of the student's rights of privacy"
 - *Not* a grade grievance mechanism
- If deny request, must give student an opportunity for a hearing
- If still deny request, student may include a statement with the record



Q&A Session



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"30 Second Stretch"

We think your health is important. Please feel free to take a 30 second break to stretch and/or reflect before we continue.

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Public-Private Partnership?

- "FERPA is not an open records statute or part of an open records system. The only parties who have a right to obtain access to education records under FERPA are [the relevant] students. Journalists, researchers, and other members of the public have no right under FERPA to gain access to education records for school accountability or other matters of public interest."
- When federal and state requirements conflict, the federal requirements prevail.
- "However, some educational agencies and institutions have advised, and administrative experience has shown, that State open records laws have required disclosure of student directory information because, in most cases, FERPA does not specifically prohibit the disclosure of this information."

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Public-Private Partnership?

- "[I]n 2006, the Virginia General Assembly amended a number of provisions related to the State's Sex Offender and Crimes Against Minors Registry. . . . One provision of the law . . . requires both two-year and four-year institutions in Virginia to report to the Virginia State Police the following information for all applicants that are accepted for admission: (1) name; (2) social security number [SSN] or other identifying number; (3) date of birth; and (4) gender."

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Public-Private Partnership?

- "[A]pplications of individuals who are not attending an educational . . . institution are generally not 'education records' because the individuals are not 'students' at the educational . . . institution."
- "For those students already in attendance, FERPA would permit postsecondary institutions to disclose only properly designated 'directory information,' and only on those students who have not opted-out."
- "[T]his Office excludes from the definition of 'directory information' . . . gender and SSNs."

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Implied Waiver of FERPA Rights

- "The Department will support an educational . . . institution that has inferred an implied waiver of the student's right to consent to disclosure when:
 - the student has taken an adversarial position against the educational . . . institution;
 - the student has initiated the involvement of (a) third party by contacting that party in writing, and, in so doing:
 - a) set forth specific allegations against the educational . . . institution; and
 - b) requested that action be taken against the educational . . . institution or that the third party assist the student in circumventing decisions made about the student by the educational . . . institution;
 - the third party's special relationship with the educational . . . institution:
 - a) gives the third party authority to take specific action against the educational . . . institution; or
 - b) reasonably could be significantly adversely affected if the educational . . . institution cannot refute the allegations; and
 - the disclosure is as limited as is necessary for the educational . . . institution adequately to defend itself from the student's charges or complaint."

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Implied Waiver of FERPA Rights

- "Examples [of third parties with 'special relationships'] include: an educational agency or institution's grantor/grantee relationships; an educational agency or institution's relationship with a state or federal legislator; or an educational agency or institution's relationship with a state or federal commission charged with looking into allegations made by a student."

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Implied Waiver of FERPA Rights

- "[W]e have not found and do not believe that parents and students generally waive their privacy rights under FERPA by sharing information with the media or other members of the general public. The fact that information is a matter of general public interest does not give an educational agency or institution permission to release the same or related information from education records without consent."
- "A record does not lose its status as an education record because the information contained therein appears in a public record. . . . [T]here is no exception in FERPA that exempts information in public records from the definition of education records."

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On the Record

- Mandatory transcript notations:
 - Enacted in Virginia and New York
 - Failed in California and Maryland
 - Proposed or pending in (at least) Colorado, Maine, Pennsylvania, and Texas
 - Federal 'Safe Transfer Act' (Congresswoman Speiers, California)
 - Died in 2016 session; Future: TBD

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On the Record

- Virginia: Most public and private schools "shall include a prominent notation on the academic transcript of each student who has been suspended for, has been permanently dismissed for, or withdraws from the institution while under investigation for **an offense involving sexual violence** under the institution's code, rules, or set of standards governing student conduct. . . . Such notation shall be substantially in the following form: '[Suspended, Dismissed, or Withdrew while under investigation] for a violation of [insert name of institution's code, rules, or set of standards].'"

On the Record

- New York: "For **crimes of violence** [as defined in the Clery Act] . . . , institutions shall make a notation on the transcript of students found responsible after a conduct process that they were 'suspended after a finding of responsibility for a code of conduct violation' or 'expelled after a finding of responsibility for a code of conduct violation.' For the respondent who withdraws from the institution while such conduct charges are pending, and declines to complete the disciplinary process, institutions shall make a notation on the transcript of such students that they 'withdrew with conduct charges pending.'"

On the Record

- AACRAO: "Recognizing that the most egregious acts of misconduct may result in the involuntary separation of the student from an institution, and may indicate a pattern of behavior that might be repeated at a subsequent institution, **some form of notice** should be provided to a receiving institution when a student has committed serious behavioral misconduct (e.g., including, but not limited to, that defined by the Clery Act). . . . **The academic transcript is an appropriate means to support communication about serious student misconduct, but may not be the only means of notification.**"

All, or Nothing at All

- No obligation to allow student to choose to disclose only part of a record
- "Under FERPA, an educational agency or institution may permit a representative of a [student], or any other person, with written consent from the [student] to inspect and review the [student's] education records, but such a disclosure is not required. Under FERPA, the only individual a school is required to provide an opportunity to inspect and review information is a [student]. Therefore, a school may, under FERPA, refuse to allow a third party, even with consent, access to a student's education records."

Safeguarding Requirements

- "Disclosure means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record"

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Safeguarding Requirements

- FERPA "clearly does not allow an educational . . . institution to leave education records unprotected or subject to access by unauthorized individuals, whether in paper, film, electronic, or any other format. We interpret this prohibition to mean that an educational . . . institution must use physical, technological, administrative and other methods, including training, to protect education records in ways that are reasonable and appropriate to the circumstances in which the information or records are maintained."

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Safeguarding Requirements

- "'Effectiveness' is certainly one measure, but not necessarily a dispositive measure, of whether the methods used by an . . . institution are 'reasonable'. . . . [A]n . . . institution is not required to eliminate all risk of unauthorized disclosure of education records but to reduce that risk to a level commensurate with the likely threat and potential harm."

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Safeguarding Requirements

- "FERPA does not require an educational . . . institution to notify students that information from their education records was stolen or otherwise subject to an unauthorized release"
- However, "if an educational agency or institution has experienced a theft of files or computer equipment, hacking or other intrusion, software or hardware malfunction, inadvertent release of data to Internet sites, or other unauthorized release or disclosure of education records, the Department **suggests consideration** of" ways to remediate the issue, including notification

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Ch-Ch-Ch-Ch-Changes?

- S.877 - Protecting Student Privacy Act of 2017
- H.R.2434 - College Transparency Act
- S.856 - Campus Accountability and Safety Act
- H.R.3774 - Reverse Transfer Efficiency Act of 2017
- ED Regulatory Reform Task Force

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Practical Tips

- Posting grades
 - Only by anonymous number in non-alphabetical order
 - Better yet, by authenticated web portal
- Returning exams and papers
 - No self-serve pick-up
- Writing letters of recommendation
 - Get a signed consent

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Practical Tips

- Talking to parents
 - Check student status first
 - Confirm they really are the parents
 - And remember that you don't have to at all

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Practical Tips

- Be careful what you write down about your students
 - Or at least be careful about sharing it
 - "Three may keep a secret, if two of them are dead."
- Be careful how you dispose of it
- Be particularly careful with e-mail, other electronic communications, and digital storage

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Resources and References


- See the handouts for a number of more detailed resources and references

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Upcoming Webinar Conferences:

<p style="text-align: center;">Title IX & the Impact of Procedural Protections</p> <p style="text-align: center;">Ensure Your Policies Are Current & Compliant</p> <p style="text-align: center;">Tuesday, May 15, 2018 2:00-3:30 pm ET</p> <p style="font-size: x-small;">A PaperClip Communications Webinar</p>	<p style="text-align: center;">Audit Your Student Handbook</p> <p style="text-align: center;">Ensure Compliance & Safeguard Your Institution</p> <p style="text-align: center;">Wednesday, May 23, 2018 2:00-3:30 pm ET</p> <p style="font-size: x-small;">A PaperClip Communications Webinar</p>	<p style="text-align: center;">Housing & Residence Life Legal & Compliance Challenges</p> <p style="text-align: center;">Understand Your Obligations & Mitigate Risk</p> <p style="text-align: center;">Wednesday, June 27, 2018 2:00-3:30 pm ET</p> <p style="font-size: x-small;">A PaperClip Communications Webinar</p>
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