

Family Educational Rights and Privacy Act (FERPA)

NASPA
March 2008

Primary Rights under FERPA

- Right to inspect and review education records
- Right to seek to amend education records
- Right to have some control over the disclosure of information from education records

Waiver of Rights under FERPA

- A parent alleged that her rights under FERPA were violated because, in order for her children to participate in a field trip, she was required to sign a permission slip to allow her children to be photographed, filmed, and interviewed for media.
- The parent did not want to agree to the release of visual images and possibly other information about her children as a condition of their participation in the field trip.
- In general, parents and eligible students may not be required to waive their rights under FERPA as a condition of receiving educational training or services.
- There are limited circumstances in which a parent or eligible student may be required to agree to the release of certain information from the student's education records.

Waiver of Rights, cont.

- For example, FPCO has determined that FERPA does not prevent an outside organization from requiring students to consent to the release of information from their education records as a condition of participating in sports governed by that organization.
- Also, educational agencies and institutions may require parents and students to agree to release certain information as a condition for participating in extracurricular sports and similar activities.
- In this case, we explained that it was the outside organization and not the school that was requiring the release of certain information in order for the student to participate in this extracurricular activity, and consequently no basis for initiating an investigation existed.

Education Records

- "Education records" are records which –
 - (1) contain information which is directly related to a student; and
 - (2) are maintained by an educational agency or institution or by a party acting for the agency or institution.

Education Records, cont.

- Exceptions to "education records" include:

Sole Possession Records
Law Enforcement Records
Employment Records
Treatment Records
Alumni Records

Treatment Records

- "Education records" do not include records on an eligible student that are:
 - (1) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;
 - (2) Made, maintained, or used only in connection with treatment of the student; and
 - (3) Disclosed only to individuals providing the treatment. For the purpose of this definition, "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution.

Treatment Records, cont.

- Once "treatment records" are disclosed outside of the requirements described above, the records become "education records" under FERPA.
- Records maintained by an office of disability services are "education records" because they contain information that is directly related to a student.
- "Treatment" does not include determining appropriate accommodations for a disability.
- There is no exclusion from the definition of "education records" for "health" or "medical" records, except for "treatment" records that meet the requirements described above.

Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule

- Establishes standards and imposes requirements to protect the privacy of individually identifiable health information.
- HIPAA Privacy Rule specifically excludes from its definition of "protected health information" individually identifiable health information contained in an "education record" covered by FERPA, as well as "treatment" records excluded from the definition of "education records." (see page 82483, Federal Register, December 28, 2000)
- Other HIPAA rules may apply.

HIPAA Privacy Rule, cont.

- (2) 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) ["treatment records"].

34 CFR § 99.3 Definitions

- "Student" means any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records.
- An attorney for a postsecondary institution in Virginia asked about the applicability of FERPA to a provision in Virginia's Sex Offender and Crimes Against Minors Registry.

Definitions, cont.

- The law requires both two-year and four-year institutions in Virginia to report to the State Police the following information for all applicants who are accepted for admission:
 1. name;
 2. social security number or other identifying number;
 3. date of birth; and
 4. gender.
- The information is to be reported after acceptance for admission, but prior to the applicant becoming a "student in attendance."

Definitions, cont.

- Institutions are to report this information within seven working days of granting an applicant acceptance or enrolling him or her in the institution.
- State guidelines provide that an institution not able to report the information before applicants become students due to continuous enrollment policies, should revise its "directory information" policy so that it can report the information as "directory information" under FERPA.
- Other than the definition of "student," FERPA does not further clarify as to when a student would be considered "in attendance" for the purposes of FERPA.

Definitions, cont.

- Historically, the Department has left it to each institution to determine when a student is considered to be "in attendance" at that particular institution. However, such a determination should be justified by some reasonable basis of fact and the determination must be applied consistently.
- Applications of individuals who are not attending an educational agency or institution are generally not considered "education records" because the individuals are not yet "students" at the institution.

Definitions, cont.

- However, an institution is required to protect information, such as a transcript, that it receives in an application from a high school or another postsecondary institution and may not disclose the information except in accordance with § 99.33 of the FERPA regulations.
- While the implementation of a "directory information" policy under FERPA is *permitted* but not *required* under the federal law, a State statute can require educational agencies and institutions to implement and disclose "directory information" under certain conditions.
- FERPA would not permit a State to require that information that is considered harmful or an invasion of privacy – such as students' SSN, race, or gender – be designated and disclosed as "directory information."

Definitions, cont.

- Any State requirement concerning "directory information" would have to honor "opt-outs" by students at postsecondary institutions.
- For those students already in attendance – i.e., continuous, rolling, or instantaneous admissions – FERPA would permit institutions to disclose only properly designated "directory information," and only on those students who have not opted-out.
- See FPOC's 08/16/07 letter:
<http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/vasehoffenderlw081607.html>

Procedures for Amending Education Records – §§ 99.20, 99.21, & 99.22

- A student filed a complaint against a university for refusing to provide her with a hearing on its decision not to amend her education records as requested.
- Some school officials had filed student conduct complaints against the student, which were later dismissed and an apology issued. The student requested that her file be purged of information about the complaints that were dismissed and, if that request was denied, that the university conduct a formal hearing in accordance with her FERPA rights.
- Her request to purge her file of the information was denied. The student stated that, at a meeting with a university official, she was told that she had a right to amend, review or write notes in her file.
- The student claimed that when she read the FERPA hearing provision to the official, his response was "OK, I'm hearing you now."

Amending Records, cont.

- The university contended that the records the student wished to amend were not amendable under FERPA and, therefore, she was not entitled to a FERPA amendment hearing.
- The university claimed that the student was not seeking to correct "inaccurate or misleading" material in her records. The university also argued that even if they had given her a hearing in which she prevailed, her only remedy would have been to put a statement in her file, and this remedy was already provided to her.
- The student argued that her education records are amendable because all allegations were proven to be false, there was no hearing on the complaints, and she was not disputing a grade.

Amending Records, cont.

- FPCO found that the university violated FERPA when it denied the student an opportunity for a hearing to challenge the content of her education records on the grounds that information related to student conduct complaints is inaccurate or misleading.
- § 99.20(a) provides that an eligible student may seek to amend education records that the student believes are inaccurate, misleading, or in violation of privacy rights of the student.
- If the institution decides not to amend the records as requested, it must inform the student of its decision and of the student's right to a hearing under § 99.21.
- Under § 99.21, an institution must provide a student with an opportunity for a hearing to challenge the content of the student's education records on the grounds that they are inaccurate, misleading, or in violation of the privacy rights of the student.

Amending Records, cont.

- If the institution decides as a result of the hearing not to amend the record as requested, it must notify the student of his or her right to place a statement in the record commenting on the contested information or records.
- The university's description of the limitations of the FERPA amendment provisions is generally correct. An eligible student's right under § 99.21 is not unlimited.
- An institution is not required to afford students an opportunity to seek to change substantive decisions made by school officials, such as grades and other student evaluations, including decisions regarding disciplinary matters.
- In this case, the student was seeking to challenge information in her file on the grounds that it does not reflect accurately the nature and circumstances of the complaints against her that were dismissed and, therefore, was misleading.

Amending Records, cont.

- FPCO received a complaint from a student alleging that his college violated § 99.22(c) of FERPA when members of a committee that conducted a hearing had a direct interest in the outcome by virtue of their professional title, office affiliation, and inherent job responsibilities.
- § 99.22(c) states –
“The hearing may be conducted by any individual, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing.”
- The legislative history of this provision indicates that schools should have some flexibility in conducting record amendment hearings consistent with a rule of reason.

Amending Records, cont.

- § 99.22(c) does not require automatic disqualification of any employee or official of the school that makes an initial decision not to amend education records. However, a rule of reason approach suggests that the deciding official in a hearing on amendment of education records must be someone who does not have a personal or professional interest that would conflict with his or her objectivity in the hearing.
- In this particular complaint, FPCO could not conclude that the professional position of the school official who served as a member of the hearing committee disqualified her in this matter under the standards in § 99.22(c). In fact, we noted that the official's current expertise may even be considered a valuable contribution to the objectivity and reasonableness of the committee's decision.

Disclosure of Education Records

§ 99.30 Consent

- **Except for specific exceptions, a student shall provide a signed and dated written consent before a school may disclose education records.**
 - The consent must:
 - Specify records that may be disclosed;
 - State purpose of disclosure; and
 - Identify party or class of parties to whom disclosure may be made.

Disclosure, cont.

- A student alleged that the college violated § 99.30 of FERPA when it disclosed his education records to his father without his written consent.
- The student alleged that his father hacked into the college's web page using his SSN, created a password, and represented himself as the student. The father obtained information from the student's education records, which he used in court proceedings against the student's mother.
- The college notified students by mail about the web page, which could be used to view semester schedules, check grades, view schedules, and run program evaluations to ascertain graduate requirements remaining.
- The college advised students that their login was the student's first name, underscore, and last name. The student's password was the last 6 digits of their SSN, which students were prompted to change the first time they logged on.

Disclosure, cont.

- FPCO found the college in violation of FERPA because an institution may not have a policy or practice that allows students (or other individuals) to authenticate their identity and gain access to education records by using information known to other individuals, such as SSNs, thus permitting access to those records by unauthorized individuals.
- Requiring the student to create a new password upon login does not negate the fact that the college allowed the student's education records to be accessed by anyone in possession of the student's name and SSN until the password was actually changed into a password of the student's choice.
- An institution must authenticate identity using information known or possessed only by the authorized user.

Disclosure, cont.

- When releasing education records to students in person, an institution could require a driver's license or other photo ID to confirm the student's identity
- When making education records available to students electronically, the institution could *mail* a secret PIN or password to the student that would be used in combination with a user ID to access the records.

Disclosure, cont.

- Student filed a complaint alleging that his university violated § 99.30 of FERPA when a school official placed the student's graded papers in an open mailbox, from which information about the student was easily accessible to other students in the area.
- Complaint closed based on the university's assurance that all school officials were advised to use sealed envelopes if they use open mailboxes to transmit personally identifiable information from education records.
- The use of sealed envelopes in these circumstances would appear to be a reasonable method to protect the confidentiality of education records.
- It is incumbent upon the university to make appropriate adjustments if it appears that this method is not in fact adequate to prevent unauthorized access to education records placed in open mailboxes.

Disclosure, cont.

- In another complaint, FPCO found a college in violation of § 99.30 when an individual was able to remove students' education records from unlocked filing cabinets in the registrar's office. The individual disclosed the education records to a number of people. One school official who received the records faxed the material to an unattended fax machine not controlled by the intended recipient and the material was intercepted by an unidentified individual and further disclosed to unintended recipients.
- We closed the complaint after the college instituted a policy that education records must be maintained in locked filing cabinets at all times when not in use. The policy also included procedures for transmitting education records via fax to ensure that information is not disclosed to unauthorized parties.
- The college also took appropriate steps to locate and retrieve all copies of the education records that were taken from the registrar's office and faxed to college and state officials.

School Officials § 99.31(a)(1)

- FPCO found a school district in violation of § 99.30 when it disclosed personally identifiable information from a student's education records to a school resource officer (SRO) who, in turn, redisclosed the information to the county prosecuting attorney.
- The school district contracts with the county sheriff's office for SRO services. The SRO serves in a variety of roles, including law enforcement officer and as a liaison with the sheriff's office in reporting offenses and filing charges.
- The school district took the position that the SRO was the district's "law enforcement unit" under § 99.8(a)(1) of FERPA and that the incident report he released was a "law enforcement unit record," which is excluded from the definition of "education records."

School Officials, cont.

- The school district also took the position that the SRO was a "school official" of the school district with a "legitimate educational interest."
- Nothing in FERPA prohibits an educational agency or institution from contacting its law enforcement unit to ask the unit to investigate a possible violation of law or to refer a possible violation of law to another authority for enforcement.
- Nothing in FERPA prevents an educational agency or institution from designating its law enforcement unit officials as "school officials" with legitimate educational interest in education records under § 99.31(a)(1) of FERPA.

School Officials, cont.

- However, if the law enforcement unit is comprised of local police officers who work under contract and not as employees of the educational agency or institution, then in order to qualify as a "school official" for purposes of receiving education records without consent, the agency or institution must meet the direct control and other requirements for designating outside parties as "school officials."
- These requirements are found in our letter to Clark County (NV) School District, found on our web site: <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/clarkcty062806.html>

School Officials, cont.

- In order to be considered a "school official," an agency or institution must be able to show that a non-employee or other outside party is providing an institutional service or function that the agency or institution would otherwise use employees to perform.
- The school must also show that the outside party would have "legitimate educational interests" in the information disclosed if the service were performed by employees.
- And, an agency or institution must be able to show that the outside party, in providing these services, is doing so under the *direct control* of the agency or institution with respect to the use and maintenance of information from education records, including compliance with the requirement in § 99.33(a) prohibiting redisclosure of the information to any other party without prior written consent, except as authorized under § 99.33(b).

School Officials, cont.

- In this case, the particular information about the reporting relationship between school district officials and the SRO demonstrated that the district did not have direct control over the SRO's use and maintenance of information from education records.
- Even if the SRO had qualified as a "school official" under § 99.31(a)(1), the school district violated FERPA when the SRO used information from students' education records to prepare an incident report and sent that report to the local prosecutor's office.
- The SRO's incident report would constitute a "record of a law enforcement unit," and not an "education record" under FERPA, had it not contained information about the students that the SRO obtained from education records.

Authorized Representative § 99.31(a)(3) & § 99.35

- South Carolina Commission on Higher Education (CHE) asked whether FERPA would permit it to disclose unit-record student data to a research organization so that the organization could create a longitudinal, statewide enrollment model to be updated annually on an ongoing basis.
- Educational agencies and institutions may disclose personally identifiable information from education records, without consent, to "authorized representatives" of State and local educational authorities for purposes of an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements that relate to those programs.

Authorized Representative, cont.

- The student-level records in question were disclosed to CHE by educational agencies or institutions under this exception to the consent requirement in FERPA.
- The information that CHE provided indicated that the research organization would not conduct its proposed research as an employee, contractor or other party under the "direct control" of the CHE.
- Rather, the research organization proposed to establish its own database with education records maintained by CHE in order to conduct independent research as directed by the organization.
- CHE's opportunity to collaborate with the organization in various ways did not provide the "direct control" needed to consider the organization an "authorized representative" of the CHE in accordance with FERPA requirements.

Authorized Representative, cont.

- FPCO provided to CHE guidance explaining how educational agencies and institutions may release information from education records to independent researchers without meeting the written consent requirements of FERPA.
- As explained in our November 11, 2004, letter to the Tennessee Department of Education, an educational agency or institution may release information from education records to researchers by removing "all personally identifiable information" and identifying students in the "anonymous data file" only by a non-personal identifier. See http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/nashville_tn2004.html

Parents of Dependent Students § 99.31(a)(8)

- The issue of disclosing information to parents of college students generated much discussion following the VA Tech tragedy. The Department is concerned that some institutions may believe that FERPA prevents them from providing parents with any information about a college student.
- Under FERPA, a postsecondary institution may disclose education records to parents of dependent students without consent.
- Neither the age of the student nor the parent's status as custodial parent is relevant to determining whether disclosure of information from the education records of eligible students to a parent without written consent is permissible under FERPA. If a student is claimed as a dependent by either parent for tax purposes, then either parent may be given access under this provision.

Parents of Dependent Students, cont.

- To make such a dependency determination, a school may --
 - Ask the parent to provide a copy of the most recent Federal income tax form (parent may redact financial information and just show dependency); or
 - Ask students at registration to indicate if they are claimed as a dependent for income tax purposes by either parent.

<http://www.ed.gov/policy/gen/guid/fpco/ferpa/safeschools/modelform.html> &

<http://www.ed.gov/policy/gen/guid/fpco/ferpa/safeschools/modelform2.html>

Directory Information § 99.3

- "Directory information" is --
 - Information not generally considered harmful or an invasion of privacy if disclosed.
 - Includes, but is not limited to:
 - name, address, telephone listing, electronic mail address
 - date and place of birth, photographs
 - participation in officially recognized activities and sports
 - field of study
 - weight and height of athletes
 - enrollment status (full, part-time, undergraduate, graduate)
 - degrees & awards received
 - dates of attendance
 - most recent previous school attended
 - grade level

Directory Information § 99.31(a)(11) & § 99.37

- On September 7, 2007, the Department's Assistant Secretary for the Office of Postsecondary Education issued a Dear Colleague Letter (DCL) on the subject of releasing student information to outside entities, including student lending organizations, under open records laws.
- The DCL reminded institutions that FERPA applies to all postsecondary institutions that receive funds under any program administered by the Department.

Directory Information, cont.

- The DCL also explained that, while one of the exceptions to the prior written consent requirements in FERPA permits an institution to disclose appropriately designated "directory information," institutions may not disclose "directory information" that is linked to non-directory information, such as information on a student's financial aid status.
- Accordingly, if an institution receives a request for information for "directory information" on students who have received student financial aid, the institution is prohibited by FERPA from disclosing that information without the student's prior written consent. See <http://fap.ed.gov/dclletters/GEN0705.html>.

Technical Assistance

For technical assistance and advice to school officials:

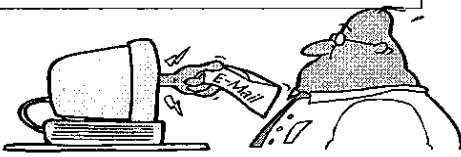


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U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-8520

(202) 260-3887 Telephone
(202) 260-9001 Fax




Informal Technical Assistance



For informal requests for technical assistance, email us at:


FERPA@ed.gov

FPCO ListServ



- Postsecondary officials:
- <http://www.ed.gov/policy/gen/guid/fpcosites/psd/fpcospsignup.html> to <http://www.ed.gov/policy/gen/guid/fpcosites/psd/fpcospsignup.html> to <http://www.ed.gov/policy/gen/guid/fpcosites/psd/fpcospsignup.html>
- Type the word "privacy" in both the password and user ID text boxes.
- Announcement only ListServ

Guides to the Family Educational Rights and Privacy Act (FERPA)
For Parents, and K-12 School and Postsecondary Officials




Learn about:

- Parents' rights regarding children's education records; and
- How to balance student privacy and school safety.

Nothing is more important to Americans than the safety of their children. Our schools should provide the best of care and resources to ensure that all children need to learn and grow. These children are entitled to an education, regardless of their background. America's schools have a responsibility to ensure that every child's education is safe and secure.

—U.S. Secretary of Education
Margaret Spellings

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