

Public Policy Update



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2009 NASPA Conference

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Higher Education Opportunity Act (Public Law 110-315)



Higher Education Opportunity Act Public Law 110-315

- Reauthorization of the Higher Education Act
- Last Reauthorization in 1998
- Signed into law by President George Bush on August 14, 2008.
- Most provisions are subject to negotiated rulemaking. See <http://www.ed.gov/heoa> for more information

Negotiated Rulemaking

On December 31, 2008, the U.S. Department of Education announced its plans for negotiated rulemaking and established teams including:

- Team I—Loans-Lender/General Loan Issues;
- Team II—Loans-School-based Loan Issues;
- Team III—Accreditation;
- Team IV—Discretionary Grants;
- **Team V—General and Non-Loan Programmatic Issues (including campus safety issues)**

Key Sections with Broad Implications for Student Affairs

- Changes to the Clery Act
 - Peer-to-Peer File Sharing
 - Fire Safety ⚡
 - Missing Student Procedures ⚡
- ⚡ Only applies to institutions with on-campus housing.

Changes to the Clery Act

- A statement of current campus policies regarding immediate emergency response and evacuation procedures, including the use of electronic and cellular communication (if appropriate).

Changes to the Clery Act

These policies must include procedures to–

- (i) **immediately notify** the campus community upon the confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or staff occurring on the campus, unless issuing a notification will compromise efforts to contain the emergency;
- (ii) publicize emergency response and evacuation procedures on an annual basis in a manner designed to reach students and staff; and
- (iii) test emergency response and evacuation procedures on an annual basis.

Changes to the Clery Act

Expands the list of hate crimes* to be reported to include:

- larceny-theft
- simple assault
- intimidation
- destruction, damage, or vandalism of property

* Note: these statistics are not required generally, but only for hate crimes.

Clery Act Whistleblower Protections



(17) Nothing in this subsection [The Clery Act] shall be construed to permit an institution, or an officer, employee, or agent of an institution, participating in any program under this title to retaliate, intimidate, threaten, coerce, or otherwise discriminate against any individual with respect to the implementation of any provision of this subsection.

Victim Notification

The institution will, **upon written request**, disclose to the alleged victim of any crime of violence, or a nonforcible sex offense, the report on the results of any disciplinary proceeding conducted by such institution against a student who is the alleged perpetrator of such crime or offense with respect to such crime or offense. If the alleged victim of such crime or offense is deceased as a result of such crime or offense, the next of kin of such victim shall be treated as the alleged victim.

Peer-to-Peer File Sharing

- (i) an annual disclosure that explicitly informs students that unauthorized distribution of copyrighted material, including unauthorized peer- to-peer file sharing, may subject the students to civil and criminal liabilities;
- (ii) a summary of the penalties for violation of Federal copyright laws; and
- (iii) a description of the institution's policies with respect to unauthorized peer-to-peer file sharing, including disciplinary actions that are taken against students who engage in unauthorized distribution of copyrighted materials using the institution's information technology system.

Peer-to-Peer File Sharing

The institution must certify that it

- (A) has developed plans to effectively combat the unauthorized distribution of copyrighted material, including through the use of a variety of technology- based deterrents; and
- (B) will, to the extent practicable, offer alternatives to illegal downloading or peer-to-peer distribution of intellectual property, as determined by the institution in consultation with the chief technology officer or other designated officer of the institution.

Peer-to-Peer File Sharing

The conference report states:

Effective technology-based deterrents are currently available to institutions of higher education through a number of vendors. These approaches may provide an institution with the ability to choose which one best meets its needs, depending on that institution's own unique characteristics, such as cost and scale. These include bandwidth shaping, traffic monitoring to identify the largest bandwidth users, a vigorous program of accepting and responding to Digital Millennium Copyright Act (DMCA) notices, and a variety of commercial products designed to reduce or block illegal file sharing. (p. 548)

Fire Safety ⚡

- (A) statistics concerning the following in each on-campus student housing facility during the most recent calendar years for which data are available:
- (i) the number of fires and the cause of each fire;
 - (ii) the number of injuries related to a fire that result in treatment at a medical facility;
 - (iii) the number of deaths related to a fire; and
 - (iv) the value of property damage caused by a fire;

⚡ Only applies to institutions with on-campus housing.

Fire Safety

- (B) a description of each on-campus student housing facility fire safety system, including the fire sprinkler system;
- (C) the number of regular mandatory supervised fire drills;
- (D) policies or rules on portable electrical appliances, smoking, and open flames (such as candles), procedures for evacuation, and policies regarding fire safety education and training programs provided to students, faculty, and staff; and
- (E) plans for future improvements in fire safety, if determined necessary by such institution.

Missing Student Procedures ⚡

- (A) establish a missing student notification policy for students who reside in on-campus housing that—
- (i) informs each such student that such student has the option to identify an individual to be contacted by the institution not later than 24 hours after the time that the student is determined missing in accordance
 - (ii) provides each such student a means to register confidential contact information in the event that the student is determined to be missing for a period of more than 24 hours;

⚡ Only applies to institutions with on-campus housing.

Missing Student Procedures

- (iii) advises each such student who is under 18 years of age, and not an emancipated individual, that the institution is required to notify a custodial parent or guardian not later than 24 hours after the time that the student is determined to be missing in accordance with such procedures;
- (iv) informs each such residing student that the institution will notify the appropriate law enforcement agency not later than 24 hours after the time that the student is determined missing in accordance with such procedures; and

Missing Student Procedures

- (v) requires, if the campus security or law enforcement personnel has been notified and makes a determination that a student who is the subject of a missing person report has been missing for more than 24 hours and has not returned to the campus, the institution to initiate the emergency contact procedures in accordance with the student's designation; and

Missing Student Procedures

The institution must establish official notification procedures for a missing student who resides in on-campus housing that

- (i) includes procedures for official notification of appropriate individuals at the institution that such student has been missing for more than 24 hours;
- (ii) requires any official missing person report relating to such student be referred immediately to the institution's police or campus security department; and

Missing Student Procedures

If the investigation of the official report, such department determines that the missing student has been missing for more than 24 hours, requires—

- (I) such department to contact the individual identified by such student;
- (II) if such student is under 18 years of age, and not an emancipated individual, the institution to immediately contact the custodial parent or legal guardian of such student
- (III) if subclauses (I) or (II) do not apply to a student determined to be a missing person, inform the appropriate law enforcement agency.

Family Educational Rights & Privacy Act of 1974



Final Rule: Family Educational Rights and Privacy

Federal Register
December 9, 2008
pp. 74805-74855

Effective Date: January 8, 2009

Key Changes and Clarification

- Health and Safety Emergencies
- Sharing Information with Parents
- Changes to the Seeks and Intends to Exception
- Outsiders as School Officials

Health and Safety Emergencies

§ 99.36 What conditions apply to disclosure of information in health and safety emergencies?

- (a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals. (p. 74864)

Health and Safety Emergencies

(c) In making a determination under paragraph (a) of this section, an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination. (p. 74864)

§ 99.32 Record Keeping

- (5) An educational agency or institution must record the following information when it discloses personally identifiable information from education records under the health or safety emergency exception in § 99.31(a)(10) and § 99.36:
- (i) The articulable and significant threat to the health or safety of a student or other individuals that formed the basis for the disclosure; and
 - (ii) The parties to whom the agency or institution disclosed the information. (p. 74853)

Sharing Information with Parents

§ 99.5 What are the rights of students?

(2) Nothing in this section prevents an educational agency or institution from disclosing education records, or personally identifiable information from education records, to a parent without the prior written consent of an eligible student if the disclosure meets the conditions in § 99.31(a)(8), § 99.31(a)(10), § 99.31(a)(15), or any other provision in § 99.31(a). (p. 74852)

Sharing Information with Parents

FERPA allows institutions of higher education to share information with parents in a number of circumstances including:

- If the student is a dependent for income tax purposes.
- If a health or safety emergency involves their son or daughter.
- If the student who is under age 21 has violated any law or its policy concerning the use or possession of alcohol or a controlled substance.

Sharing Information with Parents

“Institutions can determine that a parent claims a student as a dependent by asking the parent to submit a copy of the parent’s most recent Federal income tax return.... Institutions may rely instead on a student’s assertion that he or she is not a dependent unless the parent provides contrary evidence” (p. 74813).

The Family Policy Compliance Office has developed two sample forms which colleges and universities can use to collect information regarding dependency status:

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

Outsiders as School Officials

(B) A contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a school official under this paragraph provided that the outside party—

- (1) Performs an institutional service or function for which the agency or institution would otherwise use employees;
- (2) Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and
- (3) Is subject to the requirements of § 99.33(a) governing the use and redisclosure of personally identifiable information from education records. (p. 74852)

Expanding Seeks or Intends to Enroll

§ 99.31 Under what conditions is prior consent not required to disclose information?

(2) The disclosure is, subject to the requirements of § 99.34, to officials of another school, school system, or 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.** (p. 74852)

Joint Guidance on the Application of the *Family Educational Rights and Privacy Act (FERPA)* and the *Health Insurance Portability and Accountability Act of 1996 (HIPAA)* To Student Health Records (Nov. 2008)

<http://www.ed.gov/policy/gen/guid/fpco/doc/ferpa-hippa-guidance.pdf>

HIPAA v. FERPA

“FERPA applies to most public and private postsecondary institutions and, thus, to the records on students at the campus health clinics of such institutions. These records will be either education records or treatment records under FERPA, both of which are excluded from coverage under the HIPAA Privacy Rule, even if the school is a HIPAA covered entity” (p. 6).

HIPAA v. FERPA

“While the health records of students at postsecondary institutions may be subject to FERPA, if the institution is a HIPAA covered entity and provides health care to nonstudents, the individually identifiable health information of the clinic’s nonstudent patients is subject to the HIPAA Privacy Rule. Thus, for example, postsecondary institutions that are subject to both HIPAA and FERPA and that operate clinics open to staff, or the public, or both (including family members of students) are required to comply with FERPA with respect to the health records of their student patients, and with the HIPAA Privacy Rule with respect to the health records of their nonstudent patients” (p. 7).

FERPA

Questions concerning FERPA may be directed to:

Family Policy Compliance Office

U.S. Department of Education
600 Independence Avenue, S.W.
Washington, D.C. 20202-4605
(202) 260-3887

<http://www.ed.gov/offices/OM/fpco/ferpa@ed.gov>

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