

THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) FOR THE RELATED SERVICE PROVIDER

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Family Educational Rights and Privacy Act (FERPA)

- Statute: 20 U.S.C. 1232g which is part of the General Education Provisions Act (GEPA)
- Regulations: 34 CFR Part 99
- Enforced by: Family Policy Compliance Office (FPCO) of the U.S. Dept. of Education
- Regulations are Located at:
<http://www2.ed.gov/policy/gen/reg/ferpa/index.html>



PARENT AND STUDENT RIGHT TO ACCESS RECORDS



What Does FERPA Have to Say?

- “Except as limited under § 99.12, a parent or eligible student must be given the opportunity to inspect and review the student's education records...” 34 C.F.R. § 99.10(a).
- The district “shall comply with a request for access to records within a reasonable period of time, but not more than 45 days after it has received the request.” 34 C.F.R. § 99.10(b).
- The district “shall respond to reasonable requests for explanations and interpretations of the records.” 34 C.F.R. § 99.10(c).



How Does FERPA Define “Parent”?

- ❑ “Parent means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian...” 34 C.F.R. § 99.3.



How Does IDEA Define “Parent”?

- ❑ “Parent means—
 1. A biological or adoptive parent of a child;
 2. A foster parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent;
 3. A guardian generally authorized to act as the child’s parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State);
 4. An individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child’s welfare; or
 5. A surrogate parent who has been appointed in accordance with § 300.519 or section 639(a)(5) of the Act.” 34 C.F.R. § 300.30(a).



What Does IDEA Have to Say?

- ❑ “Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to § 300.507 or § § 300.530 through 300.532, or resolution session pursuant to §300.510, and in no case more than 45 days after the request has been made.” 34 C.F.R. § 300.613(a).
- ❑ “The right to inspect and review education records under this section includes...[t]he right to have a representative of the parent inspect and review the records.” 34 C.F.R. § 300.613(b)(3).



More of What IDEA Has to Say...

- ❑ “Each participating agency must provide parents on request a list of the types and locations of education records collected, maintained, or used by the agency.” 34 C.F.R. § 300.616.



Does Access mean Copies?

- ❑ “If circumstances effectively prevent the parent or eligible student from exercising the right to inspect and review the student's education records, the educational agency or institution, or SEA or its component, shall—
 1. Provide the parent or eligible student with a copy of the records requested; or
 2. Make other arrangements for the parent or eligible student to inspect and review the requested records.” 34 C.F.R. § 99.10(d).



Do You Have an Example of When Copies are Required?

- ❑ “A case in point would be a situation in which the parent does not live within commuting distance of the school.” *Letter to Anonymous*, 18 FAB 41 (FPCO 2015).



Can we Share Records with the Minor Student without Parental Consent?

- ❑ One of the FERPA parental consent exceptions is when the disclosure is “to the student.” 34 C.F.R. § 99.31(a)(12).



Do Rights Ever Transfer to the Student?

- ❑ Under FERPA, “eligible student” means “a student who has reached 18 years of age or is attending an institution of postsecondary education.” 34 C.F.R. § 99.3.
- ❑ “When a student becomes an eligible student, the rights accorded to, and consent required of, parents under this part transfer from the parents to the student.” 34 C.F.R. § 99.3.
- ❑ This is similar to IDEA’s transfer of rights.



When Rights Transfer can we no longer Communicate with the Parent?

- You can disclose FERPA protected information to the parent with the consent of the adult (“eligible”) student.
- You can also disclose FERPA protected information to the parent without the consent of the adult student if one of the exceptions apply.
- A common applicable exception is when “the disclosure is to parents, as defined in §99.3, of a dependent student, as defined in section 152 of the Internal Revenue Code of 1986.” 34 C.F.R. § 99.31(a)(8).
- Another common applicable exception is the health and safety exception which we will discuss below. See 34 C.F.R. § 99.31(a)(10).



Navigating Potential Ethical Dilemmas Between Parent and Student

- Many professional codes of ethics require that you inform the student, parent, client or patient of the limits of confidentiality.
- Do not promise the student or parent a level of confidentiality that you cannot deliver.
- One of the best ways to inform students and parents of the limits of confidentiality presented by FERPA is by reviewing with them the annual FERPA notification that must be provided to parents and adult students each year.
- See FERPA’s annual notification requirement located at 34 C.F.R. § 99.7.



WHAT CONSTITUTES AN EDUCATION RECORD?



“Education Records” Defined

- ❑ “The term 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.” 34 C.F.R. § 99.3.



What is not included?

- ❑ “The term [education record] does not include:
 - 1) Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.
 - 2) Records of the law enforcement unit of an educational agency or institution, subject to the provisions of § 99.8. ...
 - 5) Records created or received by an educational agency or institution after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student.
 - 6) Grades on peer-graded papers before they are collected and recorded by a teacher.” 34 C.F.R. § 99.3.



If I do not share my counseling notes with anyone, does that make them “sole possession”?

- ❑ FPCO “generally interprets the definition of sole possession records to be memory-jogger type information.”
- ❑ “For example, if a teacher wrote as a memory jogger, ‘Be sure to bring [] disciplinary file to the January 12 meeting,’ that is generally what [FPCO] considers to be a sole possession record.”
- ❑ “This exception to the definition of education records, however, does not include records that a school official created in conjunction with a student.”
- ❑ “Any records maintained by a counselor which include information from a counseling session with a student would generally be a part of that student's education records to which the student's parent would have the right to inspect and review.”

Letter to Ruscio, 115 LRP 18601 (December 17, 2014).



Is the Parent entitled to My “Personal” Files?

- ❑ In *Letter to Baker* (2005), the parent requested among other things: “Special education records which are kept in the personal files of the teachers. This includes educational records which document speech and language pathology services, specifically what activities did my daughter do each day, how did she respond, what did the clinician document as to my daughter’s response, further areas to work on, what she has mastered and all observations made during her SLP sessions. Additionally, any such records which exist for her reading resource are also requested.”



Is the Parent entitled to My “Personal” Files? (continued)

- ❑ FPCO Ruling: “Notes about students prepared by school officials (such as teachers, speech-language therapists, clinicians, etc.) are not considered ‘personal’ under this provision merely because they are kept in the school official's office or desk drawer, have not been shared with anyone, or are used to prepare ‘official’ or ‘final’ reports.” *Letter to Baker* (2005).



Do You Recommend Not Creating Records?

- Many codes of professional ethics require that you create and maintain detailed records of the services delivered.
- Other laws, such as Medicaid laws, may also require that you create and maintain detailed records of the services delivered.
- In the event of any kind of legal challenge, contemporaneous records can be very valuable.



Are Protocols Education Records?

- "A psychological evaluation or other assessment document that is identifiable to a particular student would generally meet the definition of an education record under FERPA." *Letter re: Moriah Central Sch. Dist., 105 LRP 11194 (FPCO 2004).*



What about the Separate Test Questions?

- ❑ “Any test protocols or test question booklets that do not contain information directly related to the student are not education records under FERPA.”
- ❑ “However, FERPA requires that a school respond to reasonable requests for explanations and interpretations of education records, such as answer sheets not accompanied by the question booklets. Thus, a school district should, upon request, provide an opportunity for a parent to review the education records and provide the parent with any explanations and interpretations necessary. This could include the interpretation of standardized test scores, such as reviewing the test questions with the parent.”

Letter re: Moriah Central Sch. Dist., 105 LRP 11194 (FPCO 2004).



What about Copyright Law?

- ❑ “Test protocols commonly refer to written instructions on how a test must be administered and the questions posed. Generally, these test protocols are original creations of independent authors and/or organizations. Therefore, they may be protected by the U.S. Copyright Act of 1976, the Digital Millennium Copyright Act of 1988, as well as other state, federal, and international acts and conventions. If a given test protocol is copyrighted, it may not be reproduced, transmitted, distributed, publicly displayed, nor may a derivative work be created therefrom, without express permission from the copyright owner, unless such use is allowed under the Fair Use Doctrine.” *Letter to Price, 57 IDELR 50 (OSEP 2010).*



What is the Fair Use Doctrine?

- ❑ “In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
 - 1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
 - 2) the nature of the copyrighted work;
 - 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
 - 4) the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107.



Navigating Potential Ethical Dilemmas Concerning Protocols

- ❑ “The Analysis of Comments and Changes to the 1999 IDEA Part B regulations states:

[P]ublic agencies are required to comply with the provisions of IDEA and FERPA [Family Educational Rights and Privacy Act of 1974], and must ensure that State law and other contractual obligations do not interfere with compliance with IDEA and FERPA. Federal copyright law protects against the distribution of copies of a copyrighted document, such as a test protocol. Since IDEA and FERPA generally do not require the distribution of copies of an education record, but rather parental access to inspect and review, Federal copyright law generally should not be implicated under these regulations.”

Letter to Price, 57 IDELR 50 (OSEP 2010).



RECORDS ON MORE THAN ONE CHILD



What Does FERPA Have to Say?

- ❑ “If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student.” 34 C.F.R. § 99.12(a).



Case Study

Letter to Prescott, 115 LRP 39435 (FPCO 2015)

Background Facts:

- ❑ Parent sought access to a record of her daughter's involvement in a harassment investigation that had been placed in the file of the alleged perpetrator.
- ❑ District offered access to the joint education record through a school representative who would inform the Parent of the specific information from that record pertaining to her child.
- ❑ The Parent met with the school representative and was provided with a copy of the Student's entire education record except one document containing the personally identifiable information of multiple students.



Case Study (continued)

Letter to Prescott, 115 LRP 39435 (FPCO 2015)

Ruling:

- ❑ “In cases where joint records cannot be easily redacted or the personal identifiable information omitted, the school district may satisfy the parental request for access by informing the parent about the contents of the specific record in question.”
- ❑ “It appears from the information provided by the District that it met its obligation under FERPA with respect to providing the Parent access to her child's education records.”



What About the Rights of the Victim in a Discriminatory Harassment Case?

In 1994, Congress amended the General Education Provisions Act (GEPA), of which FERPA is a part, to state:

- ❑ Nothing in GEPA “shall be construed to affect the applicability of Title VI of the Civil Rights Act of 1964, Title IX of Education Amendments of 1972, Title V of the Rehabilitation Act of 1973, the Age Discrimination Act, or other statutes prohibiting discrimination, to any applicable program.” 20 U.S.C. § 1221(d).



Discrimination Case Study

Letter to Soukup, 115 LRP 18668 (FPCO 2015)

Background Facts:

- ❑ In an OCR investigation of a Title IX discrimination complaint, OCR sought to obtain an agreement that the district would agree to give notice of the outcome including “the consequences imposed on any individual found to have engaged in discrimination that relate directly to the subject of the complaint, such as requiring the individual found to have engaged in discrimination to stay away from the complainant, prohibiting the individual from attending school for a period of time, or transferring the individual to other classes or another school.”
- ❑ The district objected on the basis of FERPA and sought assistance from the FPCO.



Discrimination Case Study (continued)

Letter to Soukup, 115 LRP 18668 (FPCO 2015)

Ruling:

- “[T]he Department has long viewed FERPA as permitting a school to disclose to the parent of a harassed student (or to the harassed student if 18 or older or in attendance at a post-secondary institution) information about the sanction imposed upon a student who was found to have engaged in harassment when that sanction directly relates to the harassed student.”
- “[D]isclosure of other information in the student's education record, including information about sanctions that do not directly relate to the harassed student, may result in a violation of FERPA.”
- “[W]e do not interpret FERPA as prohibiting the District from complying with the notice of outcome provisions in OCR's resolution agreement in this case or in any other case involving discriminatory harassment.”



Videos or Photographs Depicting More than One Student



Directly Related To the Student Standard

- ❑ Under FERPA, “the standard is whether the information is ‘directly related to’ a student, not whether a student is simply ‘personally identifiable.’”
- ❑ “For example, [FPCO] does not consider a videotape of routine activities by students riding a school bus to be ‘directly related to’ any particular student and, therefore, not an ‘education record’ under FERPA, even though those students may be ‘personally identifiable.’”
- ❑ “If, however, a videotape of a school bus ride records a student involved in an assault on another student, for example, then that part of the videotape would be considered ‘directly related to’ and, therefore, the ‘education record’ of those two students.”

Letter Re: Magnolia Independent School District, 107 LRP 685 (FPCO 2006)



FAQs on Photos and Videos under FERPA, LRP 16524 (FPCO 2018)

- ❑ Directly Related to the Student Factors
- ❑ “The educational agency or institution uses the photo or video for disciplinary action (or other official purposes) involving the student (including the victim of any such disciplinary incident);”



FAQs on Photos and Videos under FERPA, LRP 16524 (FPCO 2018)

Directly Related to the Student Factors (continued)

- “The photo or video contains a depiction of an activity:
 - that resulted in an educational agency or institution's use of the photo or video for disciplinary action (or other official purposes) involving a student (or, if disciplinary action is pending or has not yet been taken, that would reasonably result in use of the photo or video for disciplinary action involving a student);
 - that shows a student in violation of local, state, or federal law;
 - that shows a student getting injured, attacked, victimized, ill, or having a health emergency;”



FAQs on Photos and Videos under FERPA, LRP 16524 (FPCO 2018)

Directly Related to the Student Factors (continued)

- “The person or entity taking the photo or video intends to make a specific student the focus of the photo or video (e.g., ID photos, or a recording of a student presentation); or
- “The audio or visual content of the photo or video otherwise contains personally identifiable information contained in a student's education record.”



FAQs on Photos and Videos under FERPA, LRP 16524 (FPCO 2018)

When the video directly relates to more than one student

- ❑ “If the educational agency or institution can reasonably redact or segregate out the portions of the video directly related to other students, without destroying the meaning of the record, then the educational agency or institution would be required to do so prior to providing the parent or eligible student with access.”
- ❑ “On the other hand, if redaction or segregation of the video cannot reasonably be accomplished, or if doing so would destroy the meaning of the record, then the parents of each student to whom the video directly relates (or the students themselves if they are eligible students) would have a right under FERPA to access the entire record even though it also directly relates to other students.”



CONSENT



What Does FERPA Have to Say?

- ❑ “The parent or eligible student shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records, except as provided in § 99.31.” 34 C.F.R. § 99.30(a).



What Does “Disclosure” Mean?

- ❑ Disclosure means “to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records to any party, by any means, including oral, written, or electronic means.” 34 C.F.R. § 99.3.



“Personally Identifiable” Information

- ❑ “Personally Identifiable Information” – “The term includes but is not limited to –
 - a) The student’s name;
 - b) The name of the student’s parent or other family members;
 - c) The address of the student or student’s family;
 - d) A personal identifier, such as the student’s social security number, student number, or biometric record;
 - e) Other indirect identifiers, such as the student’s date of birth, place of birth, and mother’s maiden name; ...”



“Personally Identifiable” Information (Continued)

- ❑ “Personally Identifiable Information” – “The term includes but is not limited to –
 - ...
 - f) 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; or
 - g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.”



Can You “De-Identify” a Record?

- ❑ “De-identified records and information. [A district], or a party that has received education records or information from education records under this part, may release the records or information without the consent required by § 99.30 after the removal of all personally identifiable information provided that the [district] or other party has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.” 34 C.F.R. § 99.31(b)(1).



IPRA and FERPA

- ❑ FERPA protected information is exempt from public disclosure under the New Mexico Inspection of Public Records Act (IPRA).
- ❑ Be aware that sometimes FERPA protected information is imbedded within a record that otherwise must be disclosed under IPRA.
- ❑ Before disclosing under IPRA, make sure that the personally identifiable information is de-identified.
- ❑ If it cannot be de-identified, then it is not a public record and should not be disclosed under the “other laws” exception.
- ❑ If you withhold a FERPA protected record requested under IPRA, you must comply with IPRA’s timelines and procedures for withholding.



HIPAA and FERPA

- ❑ HIPAA: “Protected health information excludes individually identifiable health information ... In education records covered by the Family Educational Rights and Privacy Act, as amended, 20 U.S.C. 1232g.” 45 C.F.R. § 160.103.
- ❑ “If a person or entity acting on behalf of a school subject to FERPA, such as a school nurse that provides services to students under contract with or otherwise under the direct control of the school, maintains student health records, these records are education records under FERPA, just as they would be if the school maintained the records directly. This is the case regardless of whether the health care is provided to students on school grounds or off-site. As education records, the information is protected under FERPA and not HIPAA.” DOH and USDE Joint Guidance Document (November 2008).



HIPAA and FERPA (Continued)

- ❑ The School may be a “covered entity” under HIPAA if it conducts any covered transactions electronically in connection with that health care.
- ❑ If a school is a covered entity, it must comply with the HIPAA Administrative Simplification Rules for Transactions and Code Sets and Identifiers with respect to its transactions.
- ❑ However, the school is not required to comply with the HIPAA Privacy Rule if the only health records maintained by the school are “education records” of students under FERPA since “education records” are excluded from coverage under the HIPAA Privacy Rule.
- ❑ See DOH and USDE Joint Guidance Document (November 2008).



Exceptions to Consent Requirement



There are Exceptions?

- ❑ FERPA Regulation, 34 C.F.R. § 99.31 is titled, “Under what conditions is prior consent not required to disclose information?”
- ❑ 34 C.F.R. § 99.31 contains sixteen exceptions to the parental consent requirement.
- ❑ In addition, there are other federal laws which have amended FERPA and created additional exceptions.



Navigating Potential Ethical Dilemmas Related to Telling

- Many professional codes of ethics require that you inform the student, parent, client or patient of the limits of confidentiality.
- Do not promise the student or parent a level of confidentiality that you cannot deliver.
- Consider reviewing with the parent and student the annual FERPA notification that must be provided to parents and adult students each year. See FERPA's annual notification requirement located at 34 C.F.R. § 99.7.
- When delivering services and creating a record of those services, remember to stay in your professional lane.



What is My Professional Lane?

- If you were hired to deliver related services, your professional lane is that of a related service provider in an educational setting.
- IDEA defines “related services” as “transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education...” 34 C.F.R. § 300.34(a).
- Those services are further defined by an IEP Team in an IEP.
- If you find yourself having trouble staying in your lane, get help.



School Personnel with a Legitimate Educational Interest



Consent Not Required

- ❑ “[A district] may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions ... The disclosure is to other school officials, including teachers, within the [district] whom the [district] has determined to have legitimate educational interests.” 34 C.F.R. § 99.31(a)(1)(i)(A).



Types of School Officials

- ❑ “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.” 34 C.F.R. § 99.31(a)(1)(i)(B).



Included in Your Annual Notice

- ❑ “The [annual FERPA] notice must include all of the following...If the [district] has a policy of disclosing education records under § 99.31(a)(1)[to school officials], a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.” 34 C.F.R. § 99.7(a)(3)(iii).



Legitimate Educational Need

- ❑ “[A district] must use reasonable methods to ensure that school officials obtain access to only those education records in which they have legitimate educational interests. [A district] that does not use physical or technological access controls must ensure that its administrative policy for controlling access to education records is effective and that it remains in compliance with the legitimate educational interest requirement in paragraph (a)(1)(i)(A) of this section.” 34 C.F.R. § 99.31(a)(ii).



Safeguarding Education Records

73 Fed. Reg. 74805-74855 (2008)

- ❑ “We believe that the standard of ‘reasonable methods’ is sufficiently flexible to permit each educational agency or institution to select the proper balance of physical, technological, and administrative controls to effectively prevent unauthorized access to education records, based on their resources and needs.”
- ❑ “The regulations ... require an educational agency or institution to use reasonable methods to ensure that teachers and other school officials obtain access to only those education records in which they have legitimate educational interests.”
- ❑ “This requirement [applies] to records in any format, including computerized or electronic records and paper, film, and other hard copy records.”



Safeguarding Education Records

73 Fed. Reg. 74805-74855 (2008)

- ❑ “An educational agency or institution that chooses not to restrict access to education records with physical or technological controls, such as locked cabinets and role-based software security, must ensure that its administrative policy for controlling access is effective and that it remains in compliance with the legitimate educational interest requirement.”
- ❑ “Administrative experience has shown that schools that allow teachers and other school officials to have unrestricted access to education records tend to have more problems with unauthorized disclosures, such as school officials obtaining access to education records for personal rather than professional reasons.”



IDEA’s Requirement to Provide Access

- ❑ “Each public agency must ensure that—
 - 1) The child’s IEP is accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation; and
 - 2) Each teacher and provider described in paragraph (d)(1) of this section is informed of—
 - i. His or her specific responsibilities related to implementing the child’s IEP; and
 - ii. The specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.” 34 C.F.R. § 300.323(d).



Directory Information



Consent Not Required

- ❑ “[A district] may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions ... The disclosure is information the [district] has designated as ‘directory information,’ under the conditions described in §99.37.” 34 C.F.R. § 99.31(a)(11).



Directory Information Defined

- ❑ “Directory information means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.” 34 C.F.R. § 99.3.

- ❑ “Directory information does not include a student's—
 - 1) Social security number; or
 - 2) Student identification (ID) number, except as provided in paragraph (c) of this definition.” 34 C.F.R. § 99.3(b).



Examples of Directory Information

- “Directory information includes, but is not limited to,
- ❑ the student's name; address; telephone listing;
 - ❑ electronic mail address;
 - ❑ photograph;
 - ❑ date and place of birth;
 - ❑ major field of study;
 - ❑ grade level;
 - ❑ enrollment status (e.g. undergraduate or graduate, full-time or part-time);
 - ❑ dates of attendance;
 - ❑ participation in officially recognized activities and sports;
 - ❑ weight and height of members of athletic teams;
 - ❑ degrees, honors, and awards received; and
 - ❑ the most recent [district] attended.”
- 34 C.F.R. § 99.3(a).



What Conditions Apply to Disclosing “Directory Information”?

- ❑ “Notice to Parents as part of annual FERPA notice including right to refuse and deadline for refusing in writing. See 34 C.F.R. § 99.37(a).



Students in Foster Care



Consent Not Required

“Uninterrupted Scholars Act of 2013: In January 2013, Congress passed the ‘Uninterrupted Scholars Act (USA)’ which amended FERPA to permit educational agencies and institutions to disclose personally identifiable information from education records of a student in foster care placement to an agency caseworker or other representative of a State or local child welfare agency or tribal organization who is authorized to access a student’s case plan when such agency or organization is legally responsible, in accordance with State or tribal law, for the care and protection of the student. See 20 U.S.C. § 1232g(b)(1)(L).” *Notice to Chief State School Officers*, 115 LRP 8631 (FPCO 2014).



Health or Safety Emergency



Consent Not Required

“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.”
34 C.F.R. § 99.36(a).



It's About the Circumstances at the Time

- ❑ “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.” 34 C.F.R. § 99.36(c).



It's About Safety First

- ❑ “Nothing in this Act or this part shall prevent an educational agency or institution from—
 - 1) Including in the education records of a student appropriate information concerning disciplinary action taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community;
 - 2) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials within the agency or institution who the agency or institution has determined have legitimate educational interests in the behavior of the student; or
 - 3) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials in other schools who have been determined to have legitimate educational interests in the behavior of the student.” 34 C.F.R. § 99.36(b).



Case Example

Letter to Anonymous, 115 LRP 33141 (FPCO 2015)

Background Facts:

- ❑ Parent filed a complaint with the FPCO, alleging that a school principal disclosed to the Police Department and other area schools a student threat assessment relating to the Student, who was described in that document as a “high level of risk.”

Outcome:

- ❑ FPCO ruled Health or Safety Emergency exception applied.



Subpoena or Court Order



Consent Not Required

- ❑ “[A district] may disclose personally identifiable information from an education record of a student without the consent required by §99.30 if the disclosure meets one or more of the following conditions ... The disclosure is to comply with a judicial order or lawfully issued subpoena.”
34 C.F.R. § 99.31(a)(9)(i).
- ❑ “The [district] may disclose information under paragraph (a)(9)(i) of this section only if the [district] makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action, unless the disclosure is in compliance with [a notice exception].”
34 C.F.R. § 99.3(a)(9)(ii).



Suspected Victims of Child Abuse



Federal Child Abuse Prevention and Treatment Act (CAPTA)

- ❑ The Federal Child Abuse Prevention and Treatment Act (CAPTA) mandates that as a condition of receiving federal funding, a state must enact laws and regulations that specify when, with whom, and under what circumstances a child welfare agency may release and access records in connection with a child abuse or neglect case.



The Intersection of CAPTA and FERPA

- ❑ “While FERPA does not specifically permit schools to disclose information from a student's education record to a child welfare agency if a student is a suspected victim of child abuse, we have advised schools that they may do so under the Federal Child Abuse Prevention and Treatment Act (CAPTA). Our review of CAPTA indicates that it is a later enacted, more specific Federal statute that conflicts with FERPA regarding the disclosure of information, and that Congress intended to override the privacy protections of FERPA when it enacted CAPTA. As a later enacted and more specific statute, we believe that CAPTA reflected congressional intent that information specified in the statute be reported to child welfare agencies, notwithstanding FERPA's privacy provisions.” *Letter to Schaffer*, 34 IDELR 151 (OSERS 2000).



Consent Not Required

- ❑ In New Mexico, the State law implementing CAPTA is the New Mexico's Abuse and Neglect Act, specifically NMSA 1978, Section 32A-4-3(E).
- ❑ The law states: “A law enforcement agency or the department shall have access to any of the records pertaining to a child abuse or neglect case maintained by any of the persons enumerated in Subsection A of this section, except as otherwise provided in the Abuse and Neglect Act.”
- ❑ Subsection A includes “a registered nurse; a visiting nurse; a schoolteacher; a school official; a social worker acting in an official capacity.”



Transfer Students



Consent Not Required

- ❑ Consent is not required to disclose education records when the disclosure is 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.” 34 C.F.R. § 99.31(a)(2).
- ❑ But see limitations and conditions as set forth in 34 C.F.R. § 99.34(a).



Limitations and Conditions

- ❑ “One of the exceptions to the prior written consent provision permits a school to disclose education records to officials of another school where the student seeks or intends to enroll. A school that discloses education records under this provision must make a reasonable attempt to notify the parent or eligible student of the disclosure, unless the disclosure is initiated by the parent or eligible student, or the school's annual notification of rights under FERPA includes a notice that it forwards education records to other agencies or institutions that have requested the records and in which the student seeks or intends to enroll.” *Letter to Anonymous*, 112 LRP 47381 (FPCO 2012).



What Does State Law Have to Say?

- ❑ “Transcripts and copies of pertinent records of students transferring from one school to another, including disciplinary records with respect to suspension and expulsion, shall be forwarded promptly upon written request by the receiving school.” 6.29.1.9(E)(3) NMAC (10/31/11).



What Does IDEA Have to Say?

- ❑ “To facilitate the transition for a child described in paragraphs (e) and (f) of this section—
 - 1) The new public agency in which the child enrolls must take reasonable steps to promptly obtain the child’s records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous public agency in which the child was enrolled, pursuant to 34 C.F.R. § 99.31(a)(2); and
 - 2) The previous public agency in which the child was enrolled must take reasonable steps to promptly respond to the request from the new public agency.” 34 C.F.R. § 300.323(g).



Can a Parent Prevent a School District from Making Such a Disclosure?

- ❑ “[A] school may release a portion or all of a student's education records, under the “seeks or intends” to enroll exception in FERPA, at its discretion. However, the parent does not, under FERPA, have the right to prevent a school which a student previously attended from transferring the student's education records or from communicating information about a student to the student's new school.” Letter to Anonymous, 112 LRP 47381 (FPCO 2012).



Must the Student Have Already Enrolled in the New District?

Letter to Anonymous, 107 LRP 20019 (FPCO 2007)

- A district “is permitted to seek information from the Student's previous schools as part of its admission process.”
- Moreover, “the previous schools are permitted to provide education records to the District since [the parent] sought to enroll the Student in the District.”



FERPA HEARING



Parent Request to Amend Records

- ❑ “If a parent or eligible student believes the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy, he or she may ask the [district] to amend the record.” 34 C.F.R. § 99.20(a).
- ❑ “The [district] shall decide whether to amend the record as requested within a reasonable time after the [district] receives the request.” 34 C.F.R. § 99.20(b).
- ❑ “If the [district] decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and of his or her right to a hearing under § 99.21.” 34 C.F.R. § 99.20(c).



If School Says “No,” Parent Right to Request Hearing

- ❑ The purpose of the hearing is provide an opportunity “to challenge the content of the student's education records on the grounds that the information contained in the education records is inaccurate, misleading, or in violation of the privacy rights of the student.” 34 C.F.R. § 99.21(a).



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