

Catching Up With FPCO: The 2008 Amendments to FERPA

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I. Changes to Definitions (§ 99.3)

A. "Attendance"

1. Changed the old definition (which focused on physical attendance and correspondence work) to include "videoconference, satellite, Internet, or other electronic information and telecommunications technologies for students who are not physically present in the classroom."
2. Intended to be somewhat open-ended, to allow for new technological formats to be developed.

B. "Directory Information"

1. Old regulations specifically listed certain items as directory information and allowed schools to specifically designate other items, but did not say whether there were any categories of information that could not be designated as directory information.
2. New regulations state that student Social Security numbers or other student identification numbers may not be disclosed as "directory information."
3. However, a student ID number or other unique personal identifier used by the student for purposes of accessing or communicating in electronic systems can be designated as "directory information" but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, such as a personal identification number (PIN), password, or other factor known or possessed only by the authorized user.

4. The new regulations stress that a school must continue to honor any valid request to opt out of the disclosure of directory information made while a student was in attendance unless the student rescinds the opt out request. (34 CFR § 99.37(b)).

5. The new regulations also stress that a student cannot use the opt-out provisions to prevent a school from disclosing or requiring a student to disclose the student's name, identifier, or institutional e-mail address in a class in which the student is enrolled. (34 CFR § 99.37(c)).

C. "Disclosure"

1. The definition of disclosure was refined to exclude the return of a document to "the party identified as the party that provided or created the record."

2. Among other benefits, the new definition will allow the State to allow school districts to have access to student documents that they provide to the State, without the State violating the provisions on redisclosure.

3. The new definition will also allow schools to deal with what appear to be fraudulent documents (such as falsified transcripts or letters of recommendation), but allowing schools to return the documents to their ostensible sender for verification.

D. "Education Records"

1. The old definition of "education records" excluded "records created or received by an educational agency or institution after an individual is no longer a student in attendance," which FPCO generally referred to as "alumni records."

2. The new regulations add "...and that are not directly related to the individual's attendance as a student" to the end of the definition, to stress that documents that come into the possession of a school district after a student leaves but that relate to that person's attendance as a student are still "education records."

3. One example given is a settlement agreement reached after the student is no longer enrolled at the school that relates directly to the student's attendance; this would be considered an educational record.

E. "Peer-Graded Papers"

1. The new regulations exclude "grades on peer-graded papers before they are collected and recorded by a teacher" from the term education records.

2. This change was intended to codify *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426 (2002), with which the Department agreed.

II. State Audits

A. The proposed regulations included changes to the definition of “state auditor” and “audits,” which would have limited disclosure to “audits” that were defined as “testing compliance with applicable laws, regulations, and standards.”

B. The Department received a number of objections to the limited scope of “audits” from parties that wanted audits to include “performance audits” (i.e. evaluations of program efficiency and effectiveness).

C. Because the Department was concerned that broadening the scope of what an “audit” is could potentially allow too great a disclosure of information, so the changes to the definition of “audit” were pulled and are still being studied by the Department.

III. Disclosure to Parents of Students Who Have Turned 18

A. Generally, all rights of a parent under FERPA, including the right to review records, transfers to the student when the student turns 18.

B. In light of the 2007 Virginia Tech shootings, the new regulations were modified slightly (§ 99.5 and § 99.36) to stress that a school may disclose information to a student’s parents, without consent, after the student has turned 18 in at least three major situations:

1. When the student is still a dependent for Federal income tax purposes. (§ 99.31(a)(8));
2. The disclosure is in connection with a health or safety emergency, and if knowledge of the information is necessary to protect the health or safety of the student or other individuals. (§99.31(a)(10); § 99.36);
3. For postsecondary students, if the student has violated any law, school policy or school rule governing the use or possession of alcohol or a controlled substance, if the school determines that the student has committed a

disciplinary violation regarding that use or possession, and if the student is still under 21 at the time of the disclosure. (§ 99.31(a)(15)).

C. While the Department noted that it did not have authority to extend the disclosure of information about “dependent students” to anyone other than parents, it stressed that the health and safety exception applied to “appropriate parties,” and thus could include other family members, including the student’s spouse.

D. The new regulations have dropped the requirement that the health and safety exception be “strictly construed.”

1. Now, an educational 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.

2. If the educational 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.

3. The Department will not substitute its judgment for the educational institution, if a rational basis existed for the decision based on the information available to the educational institution at that time.

IV. Outsourcing (§ 99.31(a)(1)(i)(B))

A. General Disclosure Rules

1. Schools may allow “school officials” access to a student’s educational records if the school determines that the “school official” has a “legitimate educational interest” in the information.

2. A school that uses this exception to disclose information must include in its annual FERPA notice to parents and students the specification of criteria for determining who constitutes a “school official” and what constitutes a “legitimate educational interest.” (§ 99.7)

B. Outsourcing

1. The new regulations expand “school officials” to include “a contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions.”

2. A school may only disclose information under the outsourcing exception if the outsourced service or function is one that the school would otherwise perform using its own employees.

a) The comments to the final regulations note that this would prevent a school from providing student information to an insurance company that would offer students a discount on insurance that the school would otherwise not provide to the students.

3. The outside service provider must be “under the direct control of the agency or institution with respect to the use and maintenance of education records.”

4. The contractor must ensure that only individuals who have a “legitimate education interest” have access to the documents that it receives from or creates on behalf of the school.

5. The outside service provider is subject to the same requirements governing the use and redisclosure of personally identifiable information from education records.

6. If a school intends to provide educational records to third parties performing outsourced functions, it must note in its FERPA notice to parents and students that it uses contractors, consultants, etc. as “school officials” to provide certain institutional services and functions.

7. The Department made clear that the outsourcing rule was not new, but was simply a codification of how it has interpreted “school officials” for many years.

V. Control of Access to Education Records by School Officials

A. Current regulations do not specify what steps a school must take to enforce the “legitimate educational interest” requirement of the “school officials” exception.

B. The new regulations state that “an educational agency or institution must use reasonable methods to ensure that school officials obtain access to only those education records in which they have legitimate educational interests.” (§ 99.31(a)(1)(ii))

C. If an educational agency or institution does not use physical or technological access controls to educational records, it 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.

VI. A Student's New School

A. Under the old regulations, a school district could disclose educational records, without consent, to another school or postsecondary institution where a student "seeks or intends to enroll." (§ 99.31(a)(2)).

B. There was some confusion over whether this exception allowed a school district to continue sending records to the new school once the student actually enrolled.

C. The new regulations clarify that the old school may continue to send records to the new school, even after the student enrolls, "so long as the disclosure is for purposes related to the student's enrollment or transfer."

1. The comments to the regulations make clear that this is not limited to information that relates specifically to admission or enrollment, but applies to any documents that the school could have disclosed when the student was seeking or intending to enroll in the new school.

2. The Department noted that there are other laws – specifically the IDEA, Section 504, and Title II of the ADA – that might also impact the ability of schools to share records.

3. This clarification was specifically intended to allow schools to update, supplement or correct records sent prior to enrollment.

4. In addition, when combined with the new "return to sender" definition of disclosure, the new regulations should make it easier for schools to identify and investigate fraudulent records provided by the student.

VII. Organizations Conducting Studies (§ 99.31(a)(6))

A. The old regulations allowed the disclosure of education records, without consent, to organizations conducting studies "for, or on behalf of" the disclosing school, for purposes of:

1. Developing, validating, or administering predictive tests

2. Administering student aid programs; or
3. Improving instruction.

B. The phrase “for, or on behalf of” was not defined, leading to the following questions:

1. Could organizations seeking to conduct independent research gain access to student records under this section?
2. Could school districts release information under this exception even if they have no particular interest in the study?

C. Under the new regulations:

1. Any study must be conducted in a manner that does not permit personal identification of parents and students by individuals other than representatives of the organization that have legitimate interests in the information.

2. The information must be destroyed when no longer needed for the purposes for which the study was conducted.

3. The educational institution must enter into a written agreement with the organization that:

a) Specifies the purpose, scope, and duration of the study or studies and the information to be disclosed;

b) Requires the organization to use personally identifiable information from education records only to meet the purpose or purposes of the study as stated in the written agreement;

c) Requires the organization to conduct the study in a manner that does not permit personal identification of parents and students, as defined in this part, by anyone other than representatives of the organization with legitimate interests; and

d) Requires the organization to destroy or return to the educational institution all personally identifiable information when the information is no longer needed for the purposes for which the study was conducted and specifies the time period in which the information must be returned or destroyed.

4. The new regulations specifically state that an educational institution is not required to initiate a study or agree with or endorse the conclusions or results of the study.

a) However, the comments state that the educational institution must agree with the purpose of the study and retain control over the information from the education records that is disclosed.

5. The Department also made it clear in the comments to the new regulations that it strongly recommends that even under this exception, information from education records be provided in a de-identified form, to reduce the risk of unauthorized redisclosure of the information.

VIII. Ex Parte Court Orders under the USA Patriot Act (§ 99.31(a)(9)(ii)(C))

A. The new regulations have been brought into compliance with the statutory provisions of FERPA, which state that an educational institution must provide information from education records, without the consent of or notice to the student or parents, in compliance with an ex parte court order issued under the USA Patriot Act.

IX. Registered Sex Offenders (§ 99.31(a)(16))

A. Education institutions may release information from education records if:

1. the disclosure concerns sex offenders and other individuals required to register under section 170101 of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 14071 (the “Wetterling Act”); and
2. the information was provided to the educational agency or institution under 42 U.S.C. 14071 and applicable Federal guidelines.

X. De-identified records and information (§ 99.31(b))

A. The new regulations state:

An educational agency or institution, 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

educational agency or institution 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.

B. Personally Identifiable Information - is defined to include (but is not limited to):

1. The student's name;
2. The name of the student's parent or other family members;
3. The address of the student or student's family;
4. A personal identifier, such as the student's social security number, student number, or biometric record;

a) "biometric record" is new, and is defined as "a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual. Examples include fingerprints; retina and iris patterns; voiceprints; DNA sequence; facial characteristics; and handwriting.

5. Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;

6. 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;

a) The use of the "reasonable person" standard was intended to create an objective standard "by referring to identification not in the mind of the disclosing party or requestor but by a reasonable person and with reasonable certainty." (Comments to § 99.31(b)).

b) Educational institutions should take into account whether public directories, previously released information, local publicity, or even de-identified information can be linked to an otherwise de-identified student education record to render information personally identifiable.

(1) Example from the Comments: a school may not release statistics on penalties imposed on students for cheating on a test where the local media have published identifiable information about the only student (or students) who received that penalty; that statistical information or redacted record is now personally identifiable to the student or students because of the local publicity.

c) *The use of the phrase “school community” is intended to focus on the school, and not necessarily in the broader community in which the school is located.*

(1) Example from the Comments: it might be well known among students, teachers, administrators, parents, coaches, volunteers, or others at the local high school that a student was caught bringing a gun to school but generally unknown in the town in which the school is located. A school district would not be able to release information about this situation, even though a reasonable person in the town would not be able to identify the student, because a reasonable person at the school would be able to identify the student.

7. 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.

a) *This test does not require the educational institution to guess why a requestor wants information or what the requestor intends to do with the requested information. No investigation is required.*

b) *Instead, it is intended to address the situation where a request is made for information that would generally qualify as a properly redacted record, but the facts indicate that redaction would be a useless formality because the subject’s identity is already known.*

C. “Reference Codes” (§ 99.31(b)(2))

1. An educational institution, or a party that has received education records or information from education records under this part, may release de-identified student level data from education records for the purpose of education research by attaching a code to each record that may allow the recipient to match information received from the same source, provided that:

a) *information about how the educational institution generates and assigns a record code, or that would otherwise allow a recipient to identify a student based on a record code, is not disclosed;*

b) *The record code is used for no purpose other than identifying a de-identified record for purposes of education research and cannot be used to ascertain personally identifiable information about a student; and*

c) *The record code is not based on a student's social security number or other personal information.*

XI. Identification and Authentication of Identity (§ 99.31(c)).

A. The new regulations require an educational institution to “use reasonable methods to identify and authenticate the identity of parents, students, school officials, and any other parties to whom the agency or institution discloses personally identifiable information from education records.”

B. An educational institution is not required to eliminate all risk of unauthorized disclosure, but to reduce that risk “to a level commensurate with the likely threat and potential harm.”

C. The regulations recognize that measures that might be “reasonable” for high risk student information, such as social security numbers, might be excessive for lower risk information, such as directory information.

XII. Recordkeeping Requirements

A. Under § 99.32, an educational institution must maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student, as well as the names of State and local educational authorities and Federal officials and agencies listed in §99.31(a)(3) that may make further disclosures of personally identifiable information from the student's education records without consent under §99.33(b).

B. The new regulations require a State or Federal official that rediscloses education records on behalf of an agency or institution to comply with these recordation requirements if the agency or institution does not do so, and to make the record available to an educational agency or institution upon request within a reasonable period of time not exceeding 30 days.

C. An educational agency or institution is required to obtain a copy of the State or Federal official’s record of further disclosures and make it available in response to a parent’s or eligible student’s request to review the student’s record of disclosures.

XIII. Student Statements and Videos – Discipline Situations

A. Parents often request witness statements in student discipline situations, where the statements may have been made by other students or contain information about multiple students.

B. The new regulations note that an educational record is one that is “directly related” to a student and offers the following example:

Under this definition, a parent (or eligible student) has a right to inspect and review any witness statement that is directly related to the student, even if that statement contains information that is also directly related to another student, if the information cannot be segregated and redacted without destroying its meaning.

For example, parents of both John and Michael would have a right to inspect and review the following information in a witness statement maintained by their school district because it is directly related to both students: "John grabbed Michael's backpack and hit him over the head with it."

Further, in this example, before allowing Michael's parents to inspect and review the statement, the district must also redact any information about John (or any other student) that is not directly related to Michael, such as: "John also punched Steven in the stomach and took his gloves." Since Michael's parents likely know from their son about other students involved in the altercation, under paragraph (g) the district could not release any part of this sentence to Michael's parents.

We note also that the sanction imposed on a student for misconduct is not generally considered directly related to another student, even the student who was injured or victimized by the disciplined student's conduct, except if a perpetrator has been ordered to stay away from a victim.