What You Need to Know About FERPA and Electronic Records

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FERPA

- Family Educational Rights and Privacy Act.
- Two primary purposes:
 - First: to guarantee parental access to records.
 - Second: to limit disclosure to others.

Parental Access

- General rule: parents have a right of access to virtually all "records" maintained by the school pertaining to their child.
- Records come in many forms—might be audio or video or digital as well as print or handwriting on paper.



What Is Not a Record?

- Kept in the sole possession of the maker
- School district's law enforcement records
- Records of a former student
- Grades on peer-graded papers before they are collected by a teacher

Former Student: Example

- Joba Chamberlain's former high school posts a picture of him in his NY Yankees uniform on its website with a story about their former student's big league career... This is not a record.
- Jane Doe, former student, settles a lawsuit with the district based on failure to provide FAPE while she was a student. The settlement agreement is a record.

Who is the Parent?

- FERPA has a broad definition that includes natural parent, guardian, "or an individual acting as a parent in the absence of a parent or a guardian."
- Sometimes the grandparent meets this definition. Sometimes the stepparent meets this definition.



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Divorced Parents

- The general rule is that both parents retain rights of access to educational records after divorce.
- This may be modified by the divorce decree, but rarely is.
- Usually, one parent cannot block other parent from access to records.

Adult Students

- At age 18, FERPA rights transfer to the student.
- However, the parent may still be provided with access to records if the parent carries the child as a dependent for income tax purposes.

Restrictions on Disclosure

- Parents have access, but as a general rule, disclosure to others requires parent consent.
- Many exceptions to that general rule.



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Exception: Other School Officials

- Information can be disclosed to "school officials" who have a "legitimate educational interest" in the records.
- Districts define these terms in local policy.

Other School Officials

- Administrator, nurse, teacher
- May also include outside agents, contractors and volunteers if "under the direct control" of the school and subject to the regulations about "use and redisclosure" of information

Problem for Districts

- Districts must use "reasonable methods" to make sure that school officials have access to ONLY those records in which they have a "legitimate educational interest."
- This is mostly about the easy access to electronic databases.



Does Your System Work?

"An educational agency or institution 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 [the regulations]." 34 CFR 99.31(a)(1)(B)(3)(ii)

Cautions for Educators

- You do not have a LEGITIMATE EDUCATIONAL INTEREST in the records of every student on your campus.
- Do not confuse LEGITIMATE EDUCATIONAL INTEREST with "interesting story."

Exception: Directory Information

- Directory information can be disclosed UNLESS parents take affirmative action to block it.
- The term is defined in local policy.
- Student's name, address, telephone listing, electronic email address, photograph, birthday, grade level, honors or awards, etc.



Exception: Subpoena, Court Order

- Information can be disclosed without consent in response to a lawfully issued subpoena or court order.
- Caution: a phone call from an attorney or police officer is not a "subpoena" or "court order."
- Must make good faith effort to notify the parent prior to compliance with subpoena.

Exception: Other Schools

- Records can be disclosed without consent to officials of other schools where the student is enrolled AFTER the enrollment.
- Purpose of the disclosure must be "related to the student's enrollment or transfer."

Exception: Health and Safety Emergencies

■ This can be done if "knowledge of the information is necessary to protect the health or safety of the student or other individuals." 34 CFR 99.36(a).



Videotapes of Students

- Security camera footage maintained by "law enforcement unit" is not a record
- Other videos are records if students are personally identifiable
- FPCO position videos ARE records for students who are the "direct focus" of the video. See Letter re: Berkeley County School District, 104 LRP 44490 (2004).

SPED Notice As Electronic Record

- IDEA Regulations specify that a parent may elect to receive prior written notice, procedural safeguards notice and due process hearing notice by email.
- Request to receive notification by email does not have to be in writing.

FERPA Enforcement

- U.S. Supreme Court has held that individuals do not have grounds for a "cause of action" for FERPA violations.
- The law is enforced through withholding of federal funds.



Personal Consequences

- Educators can be held ACCOUNTABLE for violations of FERPA, even if not held LIABLE.
- Administrators should take corrective action if an educator violates confidentiality standards.



ensure that an educational agency or institution does not disclose education records to an outside service provider unless it can control that party's maintenance, use, and redisclosure of education records. This could mean, for example, requiring a contractor to maintain education records in a particular manner and to make them available to parents upon request. We are revising the regulations, however, to provide this clarification.

Neither the statute nor the FERPA regulations specifically requires that educational agencies and institutions verify that outside parties to whom schools outsource services have the necessary resources to safeguard education records provided to them. However, as discussed in the NPRM, educational agencies and institutions are responsible under FERPA for ensuring that they themselves do not have a policy or practice of releasing, permitting the release of, or providing access to personally identifiable information from education records, except in accordance with FERPA. This includes ensuring that outside parties that provide institutional services or functions as "school officials" under § 99.31(a)(1)(i)(B) do not maintain, use, or redisclose education records except as directed by the agency or institution that disclosed the information.

The "direct control" requirement is intended to apply only to the outside party's provision of specific institutional services or functions that have been outsourced and the education records provided to that outside party to perform the services or function. It is not intended to affect an outside service provider's status as an independent contractor or render that party an employee under State or Federal law.

We believe that the use of the "direct control" standard strikes an appropriate balance in identifying the necessary and proper relationship between the school and its outside parties that are serving as "school officials." The recommendation that we adopt a standard more closely aligned with the GLB standard does not appear workable, especially with regard to requiring that schools enter into formal contracts with each outside party performing services, including parent-volunteers. However, one way in which schools can ensure that parties understand their responsibilities under FERPA with respect to education records is to clearly describe those responsibilities in a written agreement or contract.

Exercising direct control could prove more challenging in some situations than in others. Schools outsourcing information technology services, such as web-based and e-mail services, should make clear in their service agreements or contracts that the outside party may not use or allow access to personally identifiable information from education records, except in accordance with the requirements established by the educational agency or institution that discloses the information.

Changes: We have revised § 99.31(a)(1)(B)(2) to clarify that the outside party must be under the direct control of the agency or institution with respect to the use and maintenance of information from education records.

(c) Protection of Records by Outside Parties Serving as School Officials

Comment: We received several comments on proposed $\S 99.31(a)(1)(i)(B)(3)$, which provides that an outside party serving as a "school official" is subject to the requirement in § 99.33(a), regarding the use and redisclosure of personally identifiable information from education records. One commenter stated that, while he supported and welcomed this clarification, the proposed regulations did not go far enough to clarify that these outside third parties could not use education records of multiple institutions for which they serve as a contractor to engage in activities not associated with the service or function they were providing.

Some commenters suggested that the regulations should require all school officials who handle education records, including parties to whom institutional services and functions are outsourced, to participate in annual training and to undergo fingerprint and background investigations.

Another commenter stated that any disclosures associated with the outsourcing of institutional services and functions should include a record that will serve as an audit trail. The commenter noted that both the Health Insurance Portability and Accountability Act (HIPAA) and the Privacy Act of 1974 require the maintenance of audit trails or an accounting of disclosures of records.

Discussion: An agency or institution must ensure that an outside party providing institutional services or functions does not use or allow access to education records except in strict accordance with the requirements established by the educational agency of institution that discloses the information. Section 99.33(a)(2) of the FERPA regulations applies to employees and outside service providers alike and prohibits the recipient from using education records for any purpose other than the purposes for which the

disclosure was made. This includes ensuring that outside parties do not use education records in their possession for purposes other than those specified by the institution that disclosed the records.

FERPA does not specifically require that educational agencies and institutions provide annual training to school officials that handle education records, and we decline to establish such a requirement in these regulations. Educational agencies and institutions should have flexibility in determining the best way to ensure that school officials are made aware of the requirements of FERPA. However, for entities subject to the Individuals with Disabilities Education Act (IDEA), 34 CFR 300.623(c) provides that all persons collecting or using personally identifiable information must receive training or instruction regarding their State's policies and procedures under 34 CFR 300.123 (Confidentiality of personally identifiable information) and 34 CFR Part 99, the FERPA regulations. We note that while schools are certainly free to implement a policy requiring school officials and parties to whom services have been outsourced to undergo fingerprint and background investigations, there is no statutory authority in FERPA to include such a requirement in the regulations.

We note also that the Department routinely provides compliance training on FERPA for school officials.

Typically, presentations are made throughout the year to national, regional, or State educational association conference workshops with numerous institutions in attendance.

Training sessions are also scheduled for State departments of education and local school districts in the vicinity of any conference.

For a discussion of the comment that recommended that the regulations require that schools maintain an audit trail or an accounting of disclosures to school officials, including outside providers, see the discussion under the following section entitled *Control of Access to Education Records by School Officials*.

Changes: None.

Control of Access to Education Records by School Officials (§ 99.31(a)(1)(ii))

Comment: Many commenters supported proposed § 99.31(a)(1)(ii), which requires an educational agency or institution to use reasonable methods to ensure that school officials have access to only those education records in which the official has a legitimate educational interest. In this section, we also proposed that an educational

agency or institution 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.

One commenter who supported the proposed regulations expressed concern that not all districts and institutions have the financial or technological resources to create or purchase an electronic system that provides fully automated access control and that an institution using only administrative controls would be required to demonstrate that each school official who accessed education records possessed a legitimate educational interest in the education records to which the official gained access According to the commenter, the regulations seem to omit the "reasonable methods" concept for those schools that utilize administrative controls rather than physical or technological controls. The commenter was concerned that smaller schools that lack resources to create or purchase a system that fully monitors record access would be disadvantaged by having to meet a higher standard of ensuring a legitimate educational interest on the part of the school officials that access the records.

One commenter expressed concern that the standard in § 99.31(a)(1)(ii) is too restrictive and asked whether the Department would use flexibility and deference in taking into consideration an institution's efforts in compliance with the requirement.

Another commenter requested that we include in the regulations a requirement that contractors hosting data at offsite locations must institute effective access control measures. The commenter stated that many schools and contractors are uncertain as to whether the school or the contractor is responsible for ensuring that access controls are applied to data hosted by contractors.

One commenter stated that the regulations created an unnecessary burden, as school districts already do their best to comply with FERPA and an occasional mistake should be excused. The commenter, however, was pleased that the regulations do not require the use of technological controls. The commenter was concerned that schools are unable to pre-assign risk levels to categories of records in order to determine appropriate methods to mitigate improper access. The commenter supported the use of effective administrative controls as determined by a district to ensure that

information is available only to those with a legitimate educational interest. One commenter expressed concern that the requirement to use reasonable methods to ensure appropriate access was not sufficiently restrictive, because under the regulations, all volunteers would be designated as school officials. The commenter believed that the regulations would enable volunteers to gain access more easily to confidential and sensitive information in education records.

A commenter who is a parent of a special education student also expressed concern that the language in the regulations was not adequate. The commenter described a software package used by her district that permits all school officials unrestricted access to the IEPs of all special education students.

Discussion: Section 99.30 requires that a parent or eligible student provide written consent for a disclosure of personally identifiable information from education records unless the circumstances meet one of the exceptions to consent, such as the release of information to a school official with a legitimate educational interest. Thus, a district or institution that makes a disclosure solely on the basis that the individual is a school official violates FERPA if it does not also determine that the school official has a legitimate educational interest. The regulations in § 99.31(a)(1)(ii) are designed to clarify the responsibility of the educational agency or institution to ensure that access to education records by school officials is limited to circumstances in which the school official possesses a legitimate educational interest.

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. In order to establish a system driven by physical or technological access controls, a school would generally first determine when a school official has a legitimate educational interest in education records and then determine which physical or technological access controls are necessary to ensure that the official can access only those records. The regulations require a school that uses only administrative controls to ensure that its administrative policy for controlling access to education records is effective and that the school is in compliance with the legitimate

educational interest requirement in § 99.31(a)(1)(i)(A). However, the "reasonable methods" standard applies whether the control is physical, technological, or administrative.

The regulations permit the use of a variety of methods to protect education records, in whatever format, from improper access. The Department expects that educational agencies and institutions will generally make appropriate choices in designing records access controls, but the Department reserves the right to evaluate the effectiveness of those efforts in meeting statutory and regulatory requirements.

The additional language that one commenter requested concerning outsourcing is already included in the regulations in § 99.31(a)(1). That section specifically provides that contractors are subject to the same conditions governing the access and use of records that apply to other school officials. As long as those conditions are met, the physical location in which the contractor provides the service is not relevant.

Because the regulations permit the use of a variety of methods to effectively reduce the risk of unauthorized access to education records, we do not believe the requirement to establish "reasonable methods" for controlling access is unduly burdensome. Schools have the flexibility to decide the method or methods best suited to their own circumstances. For the many schools, districts, and institutions that already meet the standard, no operational changes should be necessary.

The regulations do not designate all volunteers as school officials. Rather, the regulations clarify that schools may designate volunteers as school officials who may be provided access to education records only when the volunteer has a legitimate educational interest. Schools can and should carefully assess and limit access by any school official, including volunteers. This issue is discussed in more detail previously in this preamble under the section entitled *Outsourcing*.

With regard to the parent who expressed concern that the language in the regulations was not adequate to address the problem of software that permits all school officials to access the IEPs of all special education students, we believe that the language in § 99.31(a)(1)(ii) is sufficient. As previously noted, FERPA prohibits school officials from having access to education records unless they have a legitimate educational interest. The commenter's point illustrates the need for educational agencies and institutions to ensure that adequate controls are in

place to restrict access to education records only to a school official with a legitimate educational interest.

Changes: None.

Transfer of Education Records to Student's New School (§§ 99.31(a)(2) and 99.34(a))

Comment: All of the comments we received on proposed §§ 99.31(a)(2) and 99.34(a) supported the clarification that an educational agency or institution may disclose a student's education records to officials of another school, school system, or institution of postsecondary education not just when the student seeks or intends to enroll, but after the student is already enrolled, so long as the disclosure is for purposes related to the student's enrollment or transfer. Some commenters noted that this clarification reduces legal uncertainty about how long a school may continue to send records or information to a student's new school; other commenters noted that this clarification will be helpful in serving students who are homeless or in foster care because these students are often already enrolled in a new school system while waiting for records from a previous enrollment.

A few commenters asked us to clarify the requirement that the disclosure must be for purposes related to the student's enrollment or transfer. The commenters asked whether this meant that only records specifically related to the new school's decision to admit the student or records related to the transfer of course credit could be disclosed, or whether the agency or institution could also disclose information about previously undisclosed disciplinary actions related to the student's ongoing attendance at the new institution. One commenter suggested that we remove the requirement that the disclosure must be for purposes of the student's enrollment or transfer because it was confusing and unnecessary. Some commenters asked the Department to provide guidance about the types of records that may be sent under the regulations to a student's new school, noting that the preamble to the NPRM stated that the regulations allow school officials to disclose any and all education records, including health and disciplinary records, to the new school (73 FR 15581).

One commenter asked us to clarify that any school, not just the school the student attended most recently, may disclose information from education records to the institution that the student currently attends. Another commenter asked whether the amended regulations would permit the disclosure of education records to an institution in

which a student seeks information or services but not enrollment, such as when a charter school student requests an evaluation under the IDEA from the student's home school district.

Two commenters asked whether mental health and other treatment records of postsecondary students, which are excluded from the definition of education records under FERPA, could be disclosed to the new school. Other commenters asked whether FERPA places any limits on the transfer of information about student disciplinary actions to colleges and universities and what information a postsecondary institution may ask for and receive regarding a student's disciplinary actions. A few commenters asked us to address the relationship between these regulations and guidance issued by the Department's Office for Civil Rights (OCR) prohibiting the preadmission release of information about a student's disability under section 504 of the Rehabilitation Act of 1973, as amended, and Title II of the Americans with Disabilities Act of 1990, as amended

Discussion: The regulations are intended to eliminate uncertainty about whether, under § 99.31(a)(2), an educational agency or institution may send education records to a student's new school even after the student is already enrolled and attending the new school. The requirement that the disclosure must be for purposes related to the student's enrollment or transfer is not intended to limit the kind of records that may be disclosed under this exception. Instead, the regulations are intended to clarify that, after a student has already enrolled in a new school, the student's former school may disclose any records or information, including health records and information about disciplinary proceedings, that it could have disclosed when the student was seeking or intending to enroll in the new school.

These regulations apply to any school that a student previously attended, not just the school that the student attended most recently. For example, under § 99.31(a)(2), a student's high school may send education records directly to a graduate school in which the student seeks admission, or is already enrolled. Section 99.34(b), which explains the conditions that apply to the disclosure of information to officials of another school, school system, or postsecondary institution, allows a public charter school or other agency or institution to disclose the education records of one of its students in attendance to the student's home school district if the student receives or seeks to receive

services from the home school district, including an evaluation under the IDEA. We note, however, that the confidentiality of information regulations under Part B of the IDEA contain additional consent requirements that may also apply in these circumstances.

Under section 444(a)(4)(B)(iv) of FERPA, 20 U.S.C. 1232g(a)(4)(B)(iv), medical and psychological treatment records of eligible students are excluded from the definition of education records if they are made, maintained, and used only in connection with treatment of the student and disclosed only to individuals providing the treatment, including treatment providers at the student's new school. (While the comment concerned records of postsecondary students, we note that the treatment records exception to the definition of education records applies also to any student who is 18 years of age or older, including 18 year old high school students.) An educational agency or institution may disclose an eligible student's treatment records to the student's new school for purposes other than treatment provided that the records are disclosed under one of the exceptions to written consent under § 99.31(a), including § 99.31(a)(2), or with the student's written consent under § 99.30. If an educational agency or institution discloses an eligible student's treatment records for purposes other than treatment, the treatment records are no longer excluded from the definition of education records and are subject to all other FERPA requirements, including the right of the eligible student to inspect and review the records and to seek to have them amended under certain conditions. In practical terms, this means that an agency or institution may disclose an eligible student's treatment records to the student's new school either with the student's written consent, or under one of the exceptions in § 99.31(a), including § 99.31(a)(2), which permits disclosure to a school where a 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.

FERPA does not contain any particular restrictions on the disclosure of a student's disciplinary records. Further, Congress has enacted legislation to ensure that schools transfer disciplinary records to a student's new school in certain circumstances. In particular, section 444(h) of the statute, 20 U.S.C. 1232g(h), and the implementing regulations in § 99.36(b) provide that nothing in FERPA prevents an educational agency