



Confidentiality of Student Records: Key Issues in FERPA, IDEA, and HIPAA

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Brief Intro

- Materials are extensive and intended as a resource—Presentation will cover key issues
- Watch for periodic changes to the FERPA regulations (amended fairly frequently)
- **Fundamental Protections:**
 - Parental **access** to education records
 - Privacy** protections (confidentiality)

Broad Outline

- Coverage/Scope
- Purposes (Access and Privacy)
- Notice to parents
- Amendment to records
- Disclosure Rule and Exceptions
- Enforcement

Key Definitions

- **“Education Records”**—Records (1) *directly related to a student*, and (2) *maintained by an educational agency or party acting on behalf of the educational agency*

Mostly, if a record contains personally identifiable information (including ID numbers and SSNs), it is a FERPA education record

Key Definitions

- **“Maintained”**—Records kept in one place with a single record of access.

Includes records not created by the school, if the school maintains the records

Records maintained briefly by staff, such as a student’s assignments, do not qualify as education records (see *Owasso ISD v. Falvo* (S.Ct. 2002))

E-mails addressed later...

- **NOT Education Records:**

Records (1) kept in sole possession of the maker, (2) used only as personal memory aid, and (3) not accessible or revealed to other persons except temporary substitutes for the maker of the record

E.g., staff notes, notes taken during IEP meetings, counselor notes, possibly lesson plans

(But, can be subject to subpoena or production orders...)

- **NOT Education Records:**

Test Protocols?

Not considered FERPA records if they have no names or other personally identifiable info

But, if they have such info, or are commingled with education records, they may be FERPA records

So, just keep personally identifiable info off the protocols, right?...

- **NOT Education Records:**

Test Protocols?

Problem is that parents have a right to make reasonable inquiries about records, including evals

This may require reviewing protocols with parents

Also, the protocols may be necessary in case of litigation involving the evaluation

- **NOT Education Records:**

Test Protocols?

Thus, most advisable to maintain protocols as long as the evaluation is maintained

Make sure contract evaluators don't discard protocols either

Copyright issues? Offer to review protocols with parent, instead of providing copies



- **NOT Education Records:**

Records maintained by law enforcement units of LEAs, for purpose of law enforcement (if maintained separately from education records, solely for law enforcement purposes, and disclosed only to other members of a school police force)

Would not include disciplinary records not maintained for law enforcement purposes

- **NOT Education Records:**

Question—What if the school police have records on an offense that will involve a disciplinary action *and* a potential law enforcement action (e.g., drugs, weapons)?

One could argue the investigation is not limited to a disciplinary action, and the police records are not covered by FERPA (meaning, they could be disclosed without parental consent).

- **NOT Education Records:**

Security Videotapes

An evolving area, not fully clear...

Clear—Videotapes of students that are maintained by a school's law enforcement unit are **not** considered FERPA records

But what if the tapes are used only for a disciplinary action?...

- **NOT Education Records:**

Security Videotapes

A Utah court held security tapes are FERPA records, (seemingly contrary to FPCO guidance). *Bryner v. Canyons Sch. Dist.*, 2015 UT App. 131 (2015)

And, FPCO says that if a record focuses on a student or group of students in a particular incident, such as a discipline offense, then it is an FERPA record with respect to both students

- **NOT Education Records:**

Security Videotapes

But, then parents may be able to access only the portions with their child's image on them (unless they are properly redacted)

Guidance—Get a firm legal opinion from your local school attorney as to the status of your schools' security videotapes, where they should be kept, what they should be used for...

- **NOT Education Records:**

Grades on peer-graded papers before they are collected and recorded by a teacher

Owasso ISD v. Falvo (S.Ct. 2002)—
Although students graded each other's assignments in class and called out grades, no violation of FERPA, as assignments are not “education records,” and grades were not “maintained” until recorded in teachers' gradebooks

- **NOT Education Records:**

Grades on peer-graded papers before they are collected and recorded by a teacher

After the test is graded and entered into the teacher's gradebook, is it then a FERPA record?

Unlikely, since the teacher probably returns the test to the student.

- **HIPAA and FERPA (p. 7)**

In the vast majority of situations in public schools, student medical records and medically-related education records are **not subject to HIPAA**

When schools receive medical records from parents or other sources, and those records are maintained by schools, such as by their nurses, those records are education records governed by FERPA, and not subject to the privacy rules of HIPAA (see Joint HHS/DOE Memo)

- **E-mail Communications (p. 8)**

Some hearing officers and courts take the position that e-mails that briefly reference a child, but are used only as a communication tool, and not maintained as part of the student's records, are not FERPA records (see cases on p. 8)

But, even if not FERPA records, e-mails could be accessed in other ways (open records laws, subpoenas, motions for production in DP hearings)



- **E-mail Communications**

Destruction of e-mails that are relevant to issues in litigation can have negative implications in court (i.e., spoliation doctrines)

Example? E-mails from AP to Principal about informal removals to home of a student with ED (otherwise undocumented) and they disappear prior to DP hearing...



- **E-mail Communications**

Practical Guidance—School staff should be trained to use e-mails for minor day-to-day communications, but avoid their use for more substantive matters and concerns.

If an e-mail is intended to document a substantive matter or concern, it should be printed and put in the student's file.

Watch what you write! It doesn't just float away...



- **Directory Information (p. 9)**

Information not generally considered harmful or an invasion of privacy if disclosed (i.e., name, address, telephone, e-mail address, photograph, date and place of birth, participation in sports, dates of attendance, honors, awards, weight and height of team members, and most recently attended previous school)

Parents must be notified of what the district considers directory information in annual notice

Student and Parent Rights

- Both parents have full rights under FERPA, ***even if divorced***, unless school has been provided with a court order, statute, or legally binding document relating to divorce, separation, or custody that specifically revokes those rights. 34 C.F.R. §99.4.
- In divorce situations, ask for copy of divorce decree and review it (or send to attorney)

Student and Parent Rights

- **Right to Inspect and Review Records**

Districts must comply with requests to access records within a reasonable period of time, without unnecessary delay, (under IDEA regulations, before an IEP team meeting or hearing), and in no case later than 45 days after the request is made. 34 C.F.R. §§99.10(b), 300.613(a).



- **Right to Inspect and Review Records**

Aside from the right to inspect and review records, parents have the right to a school response to *reasonable requests for explanations* and interpretations of records. 34 C.F.R. §§99.10(c), 300.613(b)(1).

Under IDEA, parents also have the right to have their *representatives* inspect and review the records (if they have parental consent). 34 C.F.R. §300.613(b)(3).



- **Right to Inspect and Review Records**

Copies—One method for accessing documents, but school can charge a reasonable fee for copies (unless the fee would make prevent parents from accessing records).

Also under the IDEA regulations, parents must be provided with a **list of the types and locations of education records** kept by the District. 34 C.F.R. §300.616.



- **Amendment of Records (p. 12)**

Parents can request that a District make amendments to education records they believe are inaccurate, misleading, or in violation of their privacy rights. 34 C.F.R. §§99.20, 300.618(a).

Districts must respond to requests. If the decision is to not amend the record, the parent is entitled to a local hearing (can be before another employee without a stake in the issue).



- **Amendment of Records**

The district must notify parents of the hearing decision.

If the decision is to not amend the record, the parent is entitled to place a statement along with the record in question.

Limits—Parents cannot use FERPA records amendment procedures to challenge the decisions contained in student records, such as grades, tardies, or the substantive content of records (see cases on p. 13).

- **Amendment of Records (p. 13)**

Transgender students—The May 13, 2016 DOJ/OCR letter states that schools “must consider” requests from students to amend records to comport with their gender identity

Hearing must be provided if school refuses

Letter states that “updating” records “will help protect privacy and ensure personnel consistently use appropriate names and pronouns.”

- **Amendment of Records**

Transgender Students—The letter also states that “school officials may not designate students’ sex, including transgender status, as directory information, because doing so could be harmful of an invasion of privacy.”

This will require changes in district policy and FERPA annual notice.

FPCO complaints are likely for districts that do not comply

School District Duties

- **Annual Notice of FERPA Rights**

- 1) Statement of right to inspect and review records.
- 2) Statement of right to seek amendment of records.
- 3) Statement of right to consent to disclosure of info, except where regs allow disclosure w/o consent.
- 4) Statement of right to file a complaint with the Family Policy Compliance Office (FPCO).
- 5) Procedure for inspecting and reviewing records.
- 6) Procedure for requesting amendment of records.
- 7) Criteria used to determine who is a “school official” with “legitimate educational interest.”

School District Duties

- **Annual Notice of FERPA Rights**

Should also include which info is considered “directory information”

Standard of *effective* notification to parents of students with disabilities (e.g., braille version for blind parents) and parents who do not speak English. 34 C.F.R. §99.7(b).



- **Disclosure of Education Records or Information**

General Rule—Written parental consent required prior to each disclosure (signed and dated).

For consent requirement to apply, the disclosure must be of info *from education records*, as opposed to info from other parents, personal knowledge, or observations (see *Letter to Jones* at p. 15)



- **Disclosure of Education Records or Information**

Elements of Consent Form—Written consent must (1) specify the records to be disclosed, (2) the purpose of the disclosure, (3) the party or class of parties to whom the record will be disclosed. 34 C.F.R. §99.30(b).

(Parents can always ask for copies of records they consent to be disclosed)



- **Exceptions to the Consent Requirement**

More than a dozen separate exceptions, of which the most important are reviewed

PATRIOT Act exception for terrorism investigations—see p. 15



- **Exceptions to Consent Requirement**

Disclosures to school officials or employees with a legitimate educational interest in the information. 34 C.F.R. §99.31(a)(1).

In annual notice, District must inform parents of criteria under which it determines who is a “school official” with “legitimate educational interests.”



- **Disclosures to school officials or employees with a legitimate educational interest**

School must use “reasonable methods” to ensure staff do not access records without a legitimate educational interest

(e.g., physical or technological access restrictions, effective school policies)

Contract staffpersons—Like school officials, if they perform functions school would have to perform

- **Disclosures to school officials or employees with a legitimate educational interest**

Same for consultants, attorneys, accountants, collectors, etc (they should handle records with care)

Clerical Staff/Volunteers—Can be used for records maintenance if annual notice so indicates (*Letter to Heiligenthal*, at 16-17), advisable to provide some training on FERPA requirements

- **Disclosures to school officials or employees with a legitimate educational interest**

Watch where you keep records, as it can lead to bad disclosures (e.g., *Pueblo SD*)

See p. 17 for some examples of clear violations of the consent requirement

Clearly OK? Students' teachers, classroom aides, principal, asst. principal, child's speech therapist, contract OT, and so on

- **Disclosures to other districts or postsecondary institutions where student seeks or intends to enroll.**

34 C.F.R. §99.31(a)(2).

Disclosing district must attempt to notify parent or eligible student at last known address (unless parent or student initiated the disclosure, or District has indicated in its annual notice that it routinely forwards records to other districts where the student seeks or intends to enroll).

- **Disclosures to other institutions where student seeks or intends to enroll**

Districts are not *required* to disclose records to another district in which the child seeks or intends to enroll without parental consent (it is a matter of inter-agency courtesy, but not legal obligation).

Requests for records over the telephone? Get something in writing verifying to whom the records are disclosed.

- **Disclosures required by judicial order or lawfully issued subpoena. 34 C.F.R. §99.31(a)(9)—p. 20**

Failure to comply with court orders can lead to contempt sanctions (not good)

Districts must make reasonable efforts to notify parent of the order or subpoena in advance of disclosure, so that they may seek protective action, if they wish (unless court has ordered parents not be notified).

- **Disclosures required by judicial order or lawfully issued subpoena. 34 C.F.R. §99.31(a)(9).**

No specific timeline to inform parent, but it should be quick enough to allow parents to take legal action to quash.

State law determines if a subpoena is **“lawfully issued.”** *Letter to Simlick.*

When would it not be? Watch for subpoenas sent by attorneys or litigation assistance firms, not courts

- **Disclosures required by judicial order or lawfully issued subpoena. 34 C.F.R. §99.31(a)(9).**

What about arrest warrants or law enforcement requests? Need subpoena asking school to disclose records.

What if parent is suing school or vice-versa? Disclosure to attorneys, courts, or hearing officers OK even without consent.

What about attorney-client privilege between school and its attorneys?...

- **Disclosures in connection with health or safety emergencies. 34 C.F.R. §99.31(a)(10).**

The disclosure must be *necessary to protect health or safety* of the student or others, and only to *appropriate parties* in connection with the emergency.

Schools can include in students' records information concerning **disciplinary actions** against the student for conduct that posed risk to safety or well-being (and can be shared with staff with LEI).

- **Disclosures in connection with health or safety emergencies. 34 C.F.R. §99.31(a)(10).**

How to determine health or safety emergency? There must be “articulable and significant” threat, based on “totality of circumstances.”

If there is a “rational basis” for the district’s determination, FPCO will not second-guess it (see *Letters to Anonymous* for examples—p. 22)

- **Disclosures of directory information.**
34 C.F.R. §99.31(a)(11)—p. 22

Districts must notify parents about:

- (1) types of information considered directory information,
- (2) right to refuse to allow District to designate any or all of their child's info as directory information, and
- (3) period of time within which a parent must refuse designation of information as directory information.

- **Disclosures of directory information.**
34 C.F.R. §99.31(a)(11).

Parents cannot opt out of directory disclosure of the student's name, identifier, or school email address.

Also can't be used to opt out of wearing ID badges at school

Watch students with disabilities and yearbook photos that disclose disability status...

- **Disclosure to victims of crimes of violence or non-forcible sex offenses about results of disciplinary actions by a school against the alleged perpetrator. 34 C.F.R. §99.31(a)(13).**

For the exception to apply, the disclosure must consist only of the *final results of the disciplinary proceeding* conducted by the school (the results may be disclosed without consent even if the proceeding concluded no violation was committed).



- **Bullying Sanction Records (p. 24)**

Letter to Soukup (FPCO 2015)—Parents of harassed students have a right to know the discipline imposed on their child’s bullies if the sanction “directly relates to the harassed student” (e.g., stay-away orders, transfers of bully to another class)

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- **See materials for restrictions on redisclosure of disclosed info by third parties**

See p. 24-25 of materials for restrictions and exceptions to the redisclosure prohibition

Retention and Destruction of IDEA Records

IDEA regulations require districts to inform parents of IDEA students when their children's records are no longer needed. 34 C.F.R. §300.624(a).

Parents can elect to get the records, or have the district destroy them

Schools can forever keep a student's name, address, phone number, grades, attendance records, classes taken, grade level completed, and year completed. 34 C.F.R. §300.624(b).

Retention and Destruction of IDEA Records

If a District cannot locate parents at their last known address, they can publish notice of their intent to destroy old records in local or regional newspapers, or on their websites

The District is probably safe in destroying old records a reasonable time after publication.

Retention and Destruction of IDEA Records

IDEA regulations require a “custodian of records,” and that person must ensure that in destroying records, there is no inappropriate disclosure.

Methods—Recycling, incineration, shredding

Electronic record retention issues?...

Contracts with IEP software providers?...See p. 28 for a resource



- **Custodian of Sp. Ed. Records**

Under IDEA, one official in each LEA must take responsibility for ensuring confidentiality of records at collection, storage, disclosure, and destruction stages. 34 C.F.R. §300.623(b).

Training on FERPA required for staff that will use or collect records

Custodian and staff may inspect and review all records

Enforcement of FERPA

- **Complaints to FPCO**

Complaint must state specific allegations of fact giving reasonable cause that a violation has occurred. 34 C.F.R. §99.64(a).

A complaint is untimely unless it is submitted within 180 days after the date the complainant knew or should have known of the violation. 34 C.F.R. §99.64(c)—FPCO may extend the timeline for good cause shown.

Enforcement of FERPA

- **Complaints to FPCO**

No right to hearing for school, decision is final, failure to comply with corrective order can lead to loss of federal funds.

Only parents or expressly authorized representatives may file complaints.

- **Other Legal Actions (i.e., §1983)**

Gonzaga University v. Doe, 37 IDELR 32
(U.S. 2002)

Supreme Court held FERPA does not provide for an express or implied private cause of action

Only redress possible is FPCO complaint

But, IDEA hearing officers often hear FERPA-related claims based on the IDEA records regulations...

- **Other Legal Actions (i.e., §1983)**

How can hearing officers hear a FERPA issue?
It's not really an issue involving identification, evaluation, placement, or provision of a FAPE.