

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

by

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Applicable Laws and Regulations

Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232g (now part of the General Education Provisions Act)

FERPA is the federal law that sets forth basic privacy requirements for personally identifiable information contained in educational records created or maintained by schools.

Federal regulations implementing FERPA, at 34 C.F.R. Part 99 (§§99.1-99.67).

The Part 99 regulations, promulgated by the Department of Education (DOE), set forth confidentiality requirements and provisions in much greater detail, in order for FERPA to be implemented by the schools. These regulations contain the specific provisions with which schools must comply under FERPA.

Individuals with Disabilities Education Act (IDEA), at 20 U.S.C. §1412(a)(8), 1418(c).

IDEA orders the Department of Education to take appropriate action to assure the protection of confidentiality of personally identifiable information maintained by school districts and state educational agencies. The Department of Education took such appropriate action by promulgating the IDEA regulations that confirm and reinforce school districts' confidentiality duties with respect to personally identifiable information relating to IDEA-eligible students. In addition, IDEA requires that state plans (required for federal funding eligibility) contain policies and procedures to ensure protection of confidential information located in the schools.

Federal regulations implementing IDEA, at 34 C.F.R. §§300.610-300.300.627.

As part of the set of federal regulations implementing IDEA, the Department of Education has also promulgated 18 regulations that serve to confirm and reinforce that personally identifiable information contained in educational

records relating to IDEA-eligible students is subject to the requirements of FERPA. In some instances, the IDEA regulations add certain protections specific to parents of IDEA-eligible students.

Broad Outline of Basic FERPA Provisions

Coverage	Any educational agency that receives any type of federal funding, or directs and controls an educational institution. <i>See new</i> 34 C.F.R. §99.1(a)(2).
Purposes	To allow parents access to educational records relating to their children. To prohibit disclosure of education records to third parties unless the school obtains prior written parental consent for such disclosure, or an exception to the consent requirement applies.
Notice	School districts must notify parents of students annually regarding their rights under FERPA.
Amendments	Schools must set up procedures to allow parents to request amendments to educational records, as well as a hearing process, in case the parents disagree with a school's decision to not amend a certain record.
Enforcement	Department of Education has set up the Family Policy Compliance Office (FPCO) and the Office of Administrative Law Judges to enforce compliance with FERPA, review and investigate complaints, and, in the case of FPCO, provide technical assistance regarding compliance with FERPA.

Important FERPA Definitions (34 C.F.R. §99.3)

Education Records	Records that are (1) directly related to a student, and (2) maintained by an educational agency or a party acting on behalf of the educational agency. <i>See also</i> 34 C.F.R. §300.611(b).
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Directly Related to a Student—Generally, if an educational record contains “personally identifiable information” regarding a student, it will be “directly related” to the student. Personally identifiable information includes:

1. Name;
2. Name of parents or other family members;
3. Address;
4. Personal identifier (e.g., social security number, student number);
5. Other indirect identifiers (date of birth, place of birth, mother’s maiden name, race, ethnicity);
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 to identify the student with reasonable certainty;
7. Information requested by a person who the school reasonably believes knows the identity of the student to whom the record relates.

Student ID numbers are FERPA-protected—FPCO has held that ID numbers and social security numbers constitute personally identifiable information since they are “easily traceable” to the student. *Letter to Shea*, 36 IDELR 7 (FPCO 2001).

“Maintained” by Educational Agency or Its Agent—Whether a document is an educational record under FERPA depends on who maintains it, not who created it. Documents not created by the school, but maintained by school employees, are also education records, if they contain personally identifiable information. Education records maintained by agents of the school on its behalf, are also covered by FERPA.

To be “maintained” by the school, and thus covered by FERPA, the record must be kept in one place with a single record of access. *Owasso Indep. Sch. Dist. v. Falvo*, 36 IDELR 62 (U.S. 2002). Thus, records maintained briefly by staff, such as a student’s assignments, do not qualify as education records. See, e.g., *Saddleback Valley Unified Sch. Dist.*, 57 IDELR 298 (SEA California 2011)(incident reports of a student’s injuries maintained by school’s risk management department were not educational records); *Gwinnett County Sch. Dist.*, 62 IDELR 156 (SEA Georgia 2013)(10th-grader’s work completed in special education class was not an education record).

The term “education records” does *not* include:

- 1) **Records kept in the sole possession of the maker, used only as a personal memory aid, and not accessible or revealed to any other person except a temporary substitute for the maker of the record.**

For example, **lesson plans or notes kept privately by a teacher** or counselor meant as memory aids, and not shared with anyone except a substitute would not be education records subject to parental access under FERPA. Likewise, any other notes or documents created by a staffperson that are kept privately and not shared with other personnel are the private property of the staffperson and are not subject to parental access under FERPA.

Counselor’s notes, which were used only as a “memory-jogger,” were not education records, as the counselor did not share the notes with other staff. *Letter to Ruscio*, 115 LRP 18601 (FPCO 2014). Psychologists’ notes also fall under this exception if used only as memory aids and not disclosed to anyone except a substitute. *Irvine (CA) Unified School District*, 14 EHLR 353 (OCR 1989).

Test protocols—OSEP and the Family Policy Compliance Office (FPCO) have stated that test protocols, test instruments, or question booklets are not considered FERPA records if they do not contain the student’s name or other personally identifiable information. *Letter to Anonymous*, 111 LRP 18281 (FPCO 2010); *Montgomery County Pub. Schs.*, 111 LRP 55173 (SEA Maryland 2011); *Letter to Shuster*, 108 LRP 2302 (OSEP 2007); *Letter to MacDonald*, 20 IDELR 1159 (OSEP 1993); *FPCO Policy Letter* (FPCO—October 2, 1997).

But, test protocols that contain personally identifiable information, or are comingled with education records, may be considered FERPA-covered records. *Letter to Price*, 57 IDELR 50 (OSEP 2010); *Letter to Westport Cent. Sch.*, 105 LRP 25651 (FPCO 2005); *School Dist. U-46*, 45 IDELR 74 (SEA Illinois 2005).

Schools, however, have to respond to requests by parents to inspect and review completed answer sheets or records related to a test completed by the student, in order to answer their questions about the evaluation. *Fonda-Fultonville (NY) Central School*, 31 IDELR 149 (FPCO 1998); see 34 C.F.R. §99.10(c)(LEA “shall respond to reasonable requests for

explanations and interpretations of the records.”). Although a question booklet with no answers may not contain personally identifiable information, a school may need to review the booklet with the parent in response to a reasonable request for explanation or interpretation of the testing. *FPCO Policy Letter* (FPCO—October 2, 1997). Schools, moreover, should not destroy protocols that contain personally identifiable information of a student (except when complying with retention and destruction procedures). See *Charles Community School District*, 17 IDELR 18 (OCR 1990).

Copyright Issues—FPCO also states that schools can avoid providing copies of protocol-type materials that are copyrighted (or otherwise prohibited for release by the publisher) by allowing parents access to the record by offering to review the document with them. *FPCO Policy Letter* (FPCO—October 2, 1997). Problems can arise, however, when a parent lives in another state and cannot review the records personally. FPCO suggests that the school can contact the new out-of-state school, send the school the child’s protocols, and make arrangements to have the parents review them locally. After the parents review the materials, presumably they would be returned to the original school. But might it be a copyright violation merely to have the old school release the protocols to the new school? FPCO does not address the possibility. One would think that FPCO would ensure that FERPA is interpreted and enforced in a way that does not place schools in the impossible conundrum of having to violate one federal law in order to comply with another.

- 2) **Records maintained by a law enforcement unit of the educational agency, created for the purpose of law enforcement**, if maintained separately from education records, maintained solely for law enforcement purposes, and disclosed only to other members of a school police force. 34 C.F.R. §99.8. FERPA neither requires nor prohibits the disclosure of its law enforcement unit records. 34 C.F.R. §99.8(d).

Disclosure of education records to the law enforcement unit—Since the law enforcement personnel are protecting the safety of the school, they can be considered to have a “legitimate educational

interest” in students’ educational records, and thus can access those records without parental consent under FERPA consent exceptions (*see below*). To ensure this is the case, the school should designate its law enforcement personnel as “school officials” with a “legitimate educational interest” in its local FERPA policies.

Other functions—Schools’ law enforcement units do not lose their status if they also perform other functions, such as investigations that lead to disciplinary actions under a local code of conduct. 34 C.F.R. §99.8(a)(2).

What if the law enforcement unit records are maintained by another component or office of the local educational agency? Then they are not considered records of a law enforcement unit. 34 C.F.R. §99.8(b)(2)(i). Thus, it is advisable that law enforcement unit records be maintained separately from education records.

What about disciplinary records? Records created by a law enforcement unit exclusively for a non-law enforcement purpose, such as disciplinary action or proceeding conducted by the school, are education records covered by FERPA. 34 C.F.R. §99.8(b)(2)(ii). Therefore, as long as a law enforcement unit’s investigation or action is limited to enforcement of a school’s code of conduct or local policy, it is considered a disciplinary record, even if it relates to an offense that is also illegal, such as drug possession.

Question—Difficulties arise when the law enforcement unit’s investigation or action may lead to both school disciplinary action and law enforcement action. For example, in a gun possession incident, the law enforcement unit’s investigation is likely to lead to both school disciplinary action and juvenile justice prosecution. In that situation, one could argue that the investigation is not limited to school disciplinary action, and that those records are not covered by FERPA (meaning, for example, they could be disclosed without parental consent). Moreover, the regulations make clear that nothing in FERPA prohibits schools from contacting their law enforcement units to ask them to investigate or enforce any local, state, or Federal law. 34 C.F.R. §99.8(c)(1).

Security videotapes—Schools increasingly use security cameras to monitor and improve student safety. Videotapes of students taken

with security cameras that are maintained by a school's law enforcement unit are not considered education records under FERPA. See, e.g., *Rome City Sch. Dist. v. Grifasi*, 105 LRP 59984 (N.Y.Sup.Ct. 2005); *Lindeman v. Kilso School District*, 172 P.3d 329 (Wash. 2007); *Balancing Student Privacy and School Safety: A Guide to FERPA for Elementary and Secondary Schools*, Department of Education Pamphlet. Thus, they can be shared with other parents without consent, or, the school can choose not to provide access to them.

But what if the law enforcement unit uses the tapes purely for disciplinary action, and not law enforcement purposes?

One could argue that, in general, the tapes are not "created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose," and thus, they should not be covered by FERPA. Another argument is that the portion of the tape containing the offense will solely be used for disciplinary purposes, and thus, that portion is a FERPA records. A Utah court found that security videotapes are FERPA-protected records, seemingly contrary to FPCO guidance. *Bryner v. Canyons Sch. Dist.*, 2015 UT App. 131 (2015). FPCO, moreover, has taken the position that if a record focuses on a student or a group of students with respect to a particular incident, such as a disciplinary offense, then it is an education record under FERPA with respect to both students. *Letter of Technical Assistance to School Districtre: Disclosure of education records containing information on multiple students*, FPCO Letter Archive (October 31, 2003). FPCO appears to apply this guidance to videotapes. But, when a tape contains an incident involving multiple students, FPCO has ruled the parent can only see the portion with their child, and not the images of another child, unless they are somehow redacted. *Letter re: Berkeley School District*, 104 LRP 44490 (FPCO 2004).

As can be seen, there is some confusion with respect to the status of security videotapes, particularly if they are used solely for disciplinary purposes and involve a multiple-student incident. Schools should consult with their school attorneys regarding the use and maintenance of such tapes.

- 3) **Records relating to an employee of the educational agency** that are maintained in the normal course of business, relate exclusively

to the employee's capacity as an employee, and are not available for any other purpose (but does not include records of students employed by the school under a vocational program, office assistant, or work-study project).

- 4) **Records of a student who is 18 years or older, or is attending college that are maintained by health professionals**, and are maintained or used only in connection with physical or mental health treatment issues.

Remedial educational activities or other services part of the educational institution's programs are not to be considered "treatment" within the meaning of this exception. 34 C.F.R. §99.3, definition of Education Records, subsection (b)(4)(iii).

- 5) **Records that contain information about a student after he or she are no longer a student at that educational agency.**
- 6) **Grades on peer-graded papers before they are collected and recorded by a teacher.**

This exception was added to comport with the Supreme Court's opinion in *Owasso Indep. Sch. Dist. v. Falvo*, 36 IDELR 62 (U.S. 2002). In that case, the Court held that the fact that students graded each other's assignments in a class and called out the grades did not create a violation of FERPA, as the assignments were not "education records," and the grades were not "maintained" until they were recorded in teachers' gradebooks. See 71 Fed. Reg. 74,811 (2008).

HIPAA and FERPA—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 the schools, such as by their nurses, those records are education records governed by FERPA, and not subject to the privacy rules of HIPAA. *Joint Guidance on the Application of the Family Educational Rights and Privacy Act and the Health Insurance Portability and Accountability Act of 1996 to Student Health Records* (Depts. of Health and Education, November 2008), at Questions 1, 2, 3.

School Staff's E-mail Communications—Electronic communications pose challenges when applying traditional FERPA rules and regulations, as they only have started to incorporate provisions addressing electronic

media. Thus, questions arise as to whether and when staff e-mails regarding students constitute “educational records” under FERPA.

Some hearing officers and courts have taken the position that e-mails that briefly reference a child, but are used only as a communication tool, and were not maintained as part of the student’s records are not FERPA records. *Brownsburg Cmty. Sch. Corp.*, 59 IDELR 146 (SEA Indiana 2012); *Washoe County Sch. Dist.*, 114 LRP 25728 (SEA Nevada 2014)(since school never printed the e-mails of a child’s rollerskating observation, maintained them as part of the educational records, or kept them in storage or a secure database, they were not FERPA records); *Middleton-Cross Plains Area Sch. Dist.*, 115 LRP 31928 (SEA Wisconsin 2015)(finding school was not required to provide parents with access to e-mails not maintained in the student’s cumulative file). Similarly, in *S.A. v. Tulare County Office of Educ.*, 53 IDELR 111 (E.D.Cal. 2009), the court held that e-mails are only education records if saved on a permanent secure database or printed and stored in the student’s file.

Questions—The above cases suffer from some analytical weaknesses. A written letter containing personally identifiable information about a student may also be intended as a communication tool, but no one would seriously argue it is not a FERPA record. Moreover, can the school avoid FERPA implications of its e-mail documents merely by ensuring that they are not made part of the student’s “official” file? Does an electronic record become a record only when it is printed? This seems to run afoul of the definition of education record as encompassing all forms of records in all kinds of media.

Open records laws, production requests, and subpoenas—School staff must recognize that even if they can successfully argue that e-mails about the student are not FERPA records, parents can access them by other means, including state open records laws, production requests as part of due process hearings, or subpoenas issued by hearing officers or judges. Destruction of e-mail records can potentially have damaging implications in litigation, if there is testimony that the e-mails contained statements relevant to the disputed claims.

Practical Guidance—Ultimately, school staff should be trained to use e-mails for minor day-to-day communications, but avoid their

use for documentation of more substantive matters and concerns. If an e-mail is intended to document a substantive matter or concern, it should be printed and included in the student's file. E-mails are quite commonly produced and introduced as evidence in due process hearings, so they should be written with care, if at all. As staffpersons draft e-mails, they should assume that the student's attorney might read it at some point.

Directory Information

Information which would not generally be considered as harmful or an invasion of privacy if disclosed, including name, address, telephone listing, e-mail address, photograph, date and place of birth, major field of study, participation in sports, dates of attendance, honors, awards, degrees, weight and height of team members, and most recently attended previous educational agency. *See* 34 C.F.R. §99.3, definition of "Directory Information."

Social security numbers are not directory information. Student ID numbers are also not directory information, unless the numbers cannot be used to access education records except when used with other factors to authenticate the user's identity, such as a PIN number or password known only to the authorized user. This also applies to student ID numbers displayed on student badges.

Disclosure

Permitting access to information, or releasing information by any means, including orally, in writing, or electronically.

Thus, there is no difference between providing a copy of a record and orally disseminating information contained in that record.

Parent

Includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or guardian (very similar to the IDEA definition of "parent" under 34 C.F.R. §300.30).

The IDEA definition expressly includes surrogate parents appointed for IDEA purposes, but the FERPA definition does not. Moreover, there can be debate as to whether surrogate parents under IDEA are "acting as a parent in the absence of a parent or guardian"

within the meaning of the FERPA definition. Surrogate parents are certainly acting as the parent for IEP-team purposes, but not anything else (e.g., feeding, clothing, supervising the child as a parent would). The issue has not come up, but we can safely agree that a surrogate parent under IDEA could not effectively fulfill their responsibilities without accessing information from educational records.

Personally Identifiable Information	Name, names of family members, address, social security or student ID number, list of personal characteristics, or any other information that would make identity easily traceable.
Records	Information recorded in any way (e.g., handwriting, print, computer media, video or audiotape, film, microfilm, and microfiche).

Student and Parent Rights

General Rights – 34 C.F.R. §99.4

Both parents are accorded full rights under FERPA, even if divorced, unless the school has been provided with evidence of 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.

Thus, non-custodial parents in a divorce situation are still entitled to access to FERPA records, unless the divorce or custody decree specifically takes those rights away from the non-custodial parent.

Practical Tip for Schools—In divorce situations, schools should request that the parents provide the final divorce decree containing the custody provisions. Typical advice from school attorneys is that unless the decree clearly removes a non-custodial parent’s rights to access records, it must be assumed that the non-custodial parent retains equal access rights. If custodial parents wish to prevent the non-custodial parent from accessing school records, they can seek an amendment to the divorce and custody decree through the courts (and possibly some sort of immediate injunctive relief).

Student Rights – 34 C.F.R. §99.5

When a student reaches the age of majority or enrolls in a postsecondary

institution, the rights afforded to parents under FERPA transfer to the student. 20 U.S.C. §1232g(d), 34 C.F.R. 99.5(a). At that point, the student is called an “**eligible student**” in the regulations.

This means that when an IDEA-eligible student turns 18 FERPA rights to access records and prevent non-consensual disclosure to third parties transfer to the student, unless the student has been determined to be incompetent by a court of law. *See also* 34 C.F.R. §300.625(b). But, under IDEA, parents of adult students must still be provided all required IDEA notices. 34 C.F.R. §300.625(c).

Thus, an adult student who is not held incompetent could prevent his parents from accessing his educational records. But the District must still notify the parent of IEP team meetings.

FERPA does not prohibit the disclosure of information from education records to the adult student’s parents without the student’s consent if certain exceptions to the consent requirement apply per 34 C.F.R. §99.31(a). 34 C.F.R. §99.5(a)(2).

Schools are free to provide access and privacy rights in excess of those required by FERPA. 34 C.F.R. §99.5(b).

If a student has attended a school and applies for admission to another component of the school, the student does not have FERPA rights with respect to records maintained by the new program (e.g., admission documents, application) unless the student is accepted and attends the new program. 34 C.F.R. §99.5(c). *See also FPCO letter* (FPCO – March 10, 1999).

Parent and Eligible Students’ Rights to Inspect and Review Records – 34 C.F.R. §99.10

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

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 the records. 34 C.F.R. §§99.10(c), 300.613(b)(1). Schools must not destroy records if there is an outstanding request for the parent

or eligible student to review the records. 34 C.F.R. §99.10(e).

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). This is not the case generally under FERPA with respect to non-IDEA students, as the school would not be required to allow a non-parent access to records. See, e.g., *Letter to Segura*, 113 LRP 7194 (FPCO 2012).

Parents have the right to request that the District provide **copies** of the records if failure to provide copies would effectively prevent the parents from exercising the right to inspect and review the records. 34 C.F.R. §§99.10(d)(1), 300.613(b)(2).

The District can charge a **fee** for copies if the fee would not effectively prevent the parent from accessing the records. No fee can be charged for searching for or retrieving records. 34 C.F.R. §§99.11, 300.617.

In the case of *Lincoln-Way Area (IL) Special Education Joint Agreement District 843*, 35 IDELR 68 (OCR 2000), a parent challenged the school's policy of charging 30¢ per page for copying student records for parents. The school also had a policy of providing one full copy of student files without charge before beginning to apply the copying charge. OCR found that the District had valid reasons for the charge (staff time, copying time, copy costs, related maintenance costs, etc.). Moreover, OCR found that the charge had not actually resulted in parents not getting access to their children's records. OCR therefore upheld the District policy.

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.

Limitations on Access to Records

Parents can only obtain information about their children. 34 C.F.R. §99.12(a). If a record contains information about more than one student, it must be redacted accordingly before the parents can obtain access, parental consent must be obtained from all other parents, or the parent can be allowed to access the portion of the record relating to their child. *Letter re: Regional Multicultural Magnet Sch. Dist.*, 108 LRP 29577 (FPCO 2008); *Letter to Anonymous*, 113 LRP 14615 (FPCO 2013).

Limited right to access original documents—Schools can make other arrangements for the parents to inspect and review the records as well. If the school has provided an exact electronic version of the requested record to the parent, for example, it does not have to provide access to the original document. *Letter to Flores*, 115 LRP 39433 (FPCO 2015).

Amendment of Education Records – 34 C.F.R. §§99.20-99.22

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

If the District decides not to amend a record as requested, it must inform the parents of its refusal and their **right to seek a hearing**. The District must decide whether to amend the record as requested within a reasonable time (probably safe to stay under 45 days). 34 C.F.R. §99.20 (b), (c).

Parents can request a hearing to challenge the content of education records if they believe the records are inaccurate misleading, or in violation of their privacy rights, and the school refuses to amend the record. 34 C.F.R. §§99.20(c), 99.21(a). The **hearing** must be held within a reasonable time after it receives a request for a hearing. 34 C.F.R. §99.22(a). The parents must be provided notice of the date, time, and place of the hearing reasonably in advance of the hearing. 34 C.F.R. §99.22(b). The hearing can be conducted by any individual, including an employee of the District, as long as such person has no direct interest in the outcome of the hearing. 34 C.F.R. §99.22(c). Parents must have a full and fair opportunity to present evidence and be represented by any person, including an attorney. 34 C.F.R. §99.22(d). The District must render a decision in writing within a reasonable time after the hearing, and such decision must be based on the evidence alone. 34 C.F.R. §99.22(e), (f).

If, as a result of the hearing, the District decides that the parents are correct in their allegations regarding the records, it must amend the record accordingly and inform the parent of such action in writing. 34 C.F.R. §99.21(b)(1). If not, the District must inform the parents that they have a right to place a statement in the record commenting on the contested information and the results of the hearing. §99.21(b)(2). Such a statement must be thereafter treated as an integral part of the record, and must be disclosed whenever the portion of the record to which the statement relates is disclosed. §99.21(c).

Limitations—Parents cannot use the FERPA records amendment procedures to challenge the substantive decisions contained in student records, such as grades, tardies, or the substantive content of records. See, e.g., *Letter to Anonymous*, 107 LRP 52770 (FPCO 2007). The records amendment process, for example, could not be used to change comments made by a teacher on a report card, but rather only to challenge inaccurate recording in a document. *Letter to Anonymous*, 107 LRP 20021 (FPCO 2007). It also could not be used to change statements made accurately by a physician based on his analysis, with which the parent disagreed. *Letter to Anonymous*, 115 LRP 18661 (FPCO 2015). Likewise, it could not serve to change a school’s attendance records based on the parent’s disagreement with the school’s attendance policies. *Letter to Moody*, 113 LRP 9505 (FPCO 2013).

Transgender Students—In its letter of May 2016, the Department of Justice and the Office for Civil Rights (OCR) advised that if a school receives a request to amend educational records to comport with the student’s gender identity, the school must consider the request. If it refuses, the student has a right to a FERPA hearing. The letter stated, however, that “updating a transgender student’s education records to reflect the student’s gender identity and new name will help protect privacy and ensure personnel consistently use appropriate names and pronouns.” *Dear Colleague Letter*, 116 LRP 19809 (DOJ/OCR 2016).

Other FERPA issues regarding transgender students—The 2016 *Dear Colleague Letter* also states that a failure to protect the privacy of students related to their transgender status, including their birth name of sex assigned at birth might violate Title IX. Thus, the letter 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.”

School District Duties and Responsibilities

Annual Notice of FERPA Rights – 34 C.F.R. §99.7

The FERPA regulations do not require that Districts maintain policies explaining FERPA requirements, but instead require annual notification of FERPA rights to parents and eligible students.

Contents of the required notification (34 C.F.R. §99.7(a)(2), (a)(3)):

- 1) Statement of right to inspect and review education records.
- 2) Statement of right to seek amendment of records.
- 3) Statement of right to consent to disclosures of personally identifiable information to third parties, except where the regulations allow disclosure without consent.
- 4) Statement of right to file a complaint with the FPCO.
- 5) The District procedure for inspecting and reviewing records.
- 6) The District procedure for requesting amendment of records.
- 7) A specification of the criteria used by the District for determining who constitutes a “school official” and what constitutes a “legitimate educational interest” (since schools can disclose information without parent consent to other District employees with a legitimate educational interest in the information—see below).

With respect to **parents or eligible students with disabilities**, the notice must “*effectively*” notify such persons. 34 C.F.R. §99.7(b)(1). This is a higher standard of notice than for non-disabled parents and students, who are only entitled to notice “by any means that are reasonably likely to inform the parents or eligible students of their rights.” 34 C.F.R. §99.7(b). For disabled parents, this section is likely to require notice in an appropriate communication medium, depending on the parent’s disability (i.e. Braille or large-print for visually impaired parents). The higher “effective” notification also applies to parents who have a primary or home language other than English. 34 C.F.R. §99.7(b)(2).

Disclosure of Education Records or Information – 34 C.F.R. §§99.30-99.39

General Rule of Prior Written Parental Consent

Unless an exception applies, a District may not disclose personally identifiable information in a student’s education records unless the parent or adult student provides a signed and dated written consent to such disclosure. 34 C.F.R. §§99.30(a), 300.622(a).

“Signed and dated” may include a **signature in electronic form** that identifies the particular person as the source of the electronic

consent and indicates such person's approval of the information contained in the electronic consent. 34 C.F.R. §99.30(d).

For the consent requirement to apply, the disclosure must be of information specifically from educational records. Thus, in *Letter to Jones*, 112 LRP 58502 (FPCO 2012), FPCO could not find a violation when a staffperson shared information about the student with another parent, as the information may not have come from records, but rather the staffpersons' personal knowledge, observations, or other sources.

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

The parent can request a copy of any record that is disclosed, or can request that a copy be provided to the student. 34 C.F.R. §99.30(c).

Exceptions to the Consent Requirement (34 C.F.R. §99.31)

USA PATRIOT Act of 2001 amendment to FERPA

On October 24, 2001, President Bush signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act of 2001). Section 507 of the Act adds a new subsection to FERPA.

The 2001 FERPA amendment authorizes the U.S. Attorney General to seek ex parte (without the other party getting notice) court orders requiring a school or college to submit educational records relating to anti-terrorism investigations and prosecutions. 20 U.S.C. §1232g(j)(1)(A). The AG must allege "specific and articulable facts giving reason to believe" that the education records are likely to contain information relevant to anti-terrorism investigations. 20 U.S.C. §1232g(j)(2)(A).

Schools need not make a record of access for disclosures under this provision. 20 U.S.C. §1232g(j)(4).

Schools are also immunized from liability associated with a good faith disclosure of educational records pursuant to this provision. 20 U.S.C. §1232g(j)(3).

Other Key Exceptions to the Consent Requirement (34 C.F.R. §§99.31(a)(1)-(13))

1) **Disclosures to other school officials or employees that the District has determined have a legitimate educational interest in the information. 34 C.F.R. §99.31(a)(1).**

In its annual notice, the District must inform the parents of the criteria under which it determines who is a “school official” with “legitimate educational interests.” 34 C.F.R §99.7(a)(3)(iii) (*see above*).

Schools must use “reasonable methods” to ensure that staff obtain access to only those records in which they have legitimate educational interest. This can be achieved either with physical or technological access controls, or with administrative policies for controlling access to records that are effective and in compliance with the legitimate educational interest requirement. 34 C.F.R. §99.31(a)(1)(ii).

Contract staffpersons, consultants, volunteers, or other parties who assist the school in providing services or functions are considered school officials, as long as they perform a function for which the school would otherwise use employees, are under the direct control of the school with respect to records, and are subject to the restrictions on redisclosure of information from records (under 34 C.F.R. §99.33(a)). 34 C.F.R. §99.31(a)(1)(i)(B); *Letter to Anonymous*, 116 LRP 17297 (FPCO 2015)(disclosure to contract company that maintained enrollment information was appropriate unless it violated confidentiality); *Marshfield School (Union 102)*, 22 IDELR 198 (SEA Maine 1995).

Other Contractors and Consultants—Thus, schools also do not have to obtain parental consent to release education records to their attorneys, accountants, collectors, or other consultants or contractors (e.g., MDs, psychologists) since they perform professional services as part of the operation of the institution that the school would otherwise have to do itself. *Washoe County Sch. Dist.*, 113 LRP 24807 (SEA Nevada 2013)(contracted attorney and psychiatrist were controlled by the school and performed services that otherwise would have had to be done by employees); *Letter to Garvin*, 30 IDELR 543 (FPCO 1998); *Letter to Diehl*, 22 IDELR 734 (OSEP 1995); *In re Jeremiah*, 25 IDELR 475 (SEA NH 1997). Thus, these contractors are considered school employees with a legitimate educational interest, and entitled to access educational records without parental consent. But, in *Letter to Wall*, 115 LRP 4922 (FPCO 2014), FPCO ruled that a school’s disclosure of records to the College Board relative to a request for SAT accommodations required prior parental consent, as the College Board was not an official of the school or a contractor providing

services on its behalf.

Clerical staff and volunteers—Schools may use staff and volunteers for clerical functions that require accessing educational records if they include a statement in their annual notice indicating that this practice may take place, specifying the criteria for determining the volunteers that can view the records, and explaining the legitimate educational interest (i.e., proper maintenance and organization of student educational records to allow appropriate access). *Letter to Heiligenthal*, 112 LRP 58499 (FPCO 2012).

Practical Tip—It is advisable to provide clerical staff and volunteers with training on the confidentiality requirements of FERPA.

Location of Records—The location of educational records can lead to unauthorized disclosures if the records are readily accessible and in plain sight of staff without a legitimate educational interest in the records. Thus, a Colorado hearing officer found that a school’s practice of storing educational records in an office where nine psychologists worked violated its obligation to protect the confidentiality of the records. *Pueblo Sch. Dist. 60*, 57 IDELR 237 (SEA Colorado 2011). The psychologists had the opportunity to access records related to students they were not involved with, thus creating the potential for unauthorized disclosures.

Clear violation cases—Posting the names of all students who have been expelled on the school’s website, without prior parental consent, is a clear violation of FERPA. *Letter to Anonymous*, 110 LRP 51091 (FPCO 2010). A school principal’s verbal disclosure of a child indicating his disability status in a crowded volleyball game, where he was overheard by others, was a violation of FERPA. *Letter to Wolf*, 111 LRP 77092 (FPCO 2011). Disclosing students’ telephone numbers, where the school’s FERPA notice did not indicate that telephone numbers were among the items it designated as directory information, was a violation of FERPA. *Letter to Mosier*, 111 LRP 72126 (FPCO 2011).

Medicaid reimbursement issues—Prior parental consent is required for disclosures of information from student records to Medicaid agencies for purposes of reimbursement to the school. This includes providing lists of students with disabilities who receive IDEA services to Medicaid. *Letter to Wisconsin*, 28 IDELR 497 (FPCO 1997). But, schools can provide such information to Medicaid billing and reimbursement agencies they contract with to recover Medicaid funding. These agencies may not disclose educational record information to Medicaid or other agencies without

parental consent, but they can compare school enrollment lists to lists of Medicaid-eligible persons they obtain from Medicaid agencies. Moreover, the parents' application for Medicaid assistance may suffice to meet the consent requirements if the proper elements are included.

Note to contractors and school attorneys: FERPA protections attach to the educational records contained in legal files in law offices and other contractors' places of employment since the contractors are "acting for" the educational institution. Make sure clerical and file management staff understand the privacy protections to which those records are entitled.

2) Disclosures to other Districts or postsecondary institutions where the student seeks or intends to enroll. 34 C.F.R. §99.31(a)(2).

In such situations, the disclosing District must attempt to notify the parent or eligible student at their last known address, unless the parent or eligible student initiated the disclosure or the District has included in its annual notice a statement indicating that it routinely forwards education records to other Districts where the student seeks or intends to enroll. 34 C.F.R. §99.34(a)(1); *Letter to Anonymous*, 112 LRP 47381 (FPCO 2012).

Practical Note: If the District's annual FERPA notice indicates that the District routinely complies with such requests from other schools, it does not need to attempt to contact the parents when disclosing. 34 C.F.R. §99.34(a)(1)(ii).

In addition, the District must also provide copies of the disclosed records upon request of the parent. 34 C.F.R. §99.34(a)(2).

The District must also provide the parents an opportunity for a FERPA hearing, upon request, to seek an amendment to an education record (if the school refuses to amend it). 34 C.F.R. §99.34(a)(3).

Students already in attendance at new school—Schools can also disclose educational records of a student already in attendance at another educational agency if the student is enrolled there and the school makes reasonable efforts to notify the parent (or maintains a policy of forwarding records in these situations). 34 C.F.R. §99.34(b).

Districts are not *required*, however, to disclose records to another District in which the child seeks or intends to enroll without parental consent. 34 C.F.R. §99.31(b). It is a matter of inter-District courtesy, but not legal

obligation. But see also *Smith v. Wheaton*, 29 IDELR 200 (D.Conn. 1998) (failure to provide records to new institution may lead to violations of IDEA and §504); *Alexander S. v. Boyd*, 22 IDELR 139 (D.S.C. 1995).

Practical tip—It is probably wise to refuse to provide information over the telephone to another educational agency staffperson until some evidence is received to the effect that the information is truly being requested from a school employee (e.g., a fax or mail request on school letterhead) working for the District that is requesting the records.

- 3) **Disclosures to authorized representatives of certain government agencies, including the Comptroller General of the U.S., the Department of Education, the U.S. Attorney General or state and local educational authorities. 34 C.F.R. §99.31(a)(3).**

These agencies may have access to records in connection with an audit or evaluation of education programs, or enforcement of federal legal requirements relating to those programs. 34 C.F.R. §99.35(a).

- 4) **Disclosures in connection with student financial aid for which the student has applied or which the student has received. 34 C.F.R. §99.31(a)(4).**

The information must be necessary for determining eligibility for aid, amount of aid, conditions for aid, or to enforce the terms and conditions of the aid. The provision also applies to student loans and scholarships. *Letter to Wisconsin*, 28 IDELR 497 (FPCO 1997).

- 5) **Disclosures to state and local officials or authorities to whom the information is specifically allowed to be disclosed pursuant to a state statute. 34 C.F.R. §99.31(a)(5).**

If the statute was adopted before November 19, 1974, the disclosure must concern the juvenile justice system and its ability to effectively serve the student whose records are disclosed. 34 C.F.R. §99.31(a)(5)(i)(A).

If the statute was adopted after November 19, 1974, the disclosure must concern the juvenile justice system and its ability to effectively serve the student whose records are disclosed, prior to adjudication. The authorities to whom the records are disclosed must certify in writing to the District that the information will not be disclosed to other parties except as provided by state law, unless they have the written consent of the parents.

34 C.F.R. §99.38.

6) Disclosures to organizations conducting studies on behalf of educational agencies or institutions. 34 C.F.R. §99.31(a)(6).

The disclosure must be for the purpose of developing, validating, or administering predictive testing, improving instruction, or to administer student aid programs. 34 C.F.R. §99.34(a)(6)(i).

The study must be conducted in a manner that does not permit personal identification of parents and students by persons other than representatives of the organization with legitimate interests in the information, and the information disclosed must be destroyed when no longer needed, among other requirements. 34 C.F.R. §99.34(a)(6)(iii).

Note that the **Protection of Pupil Rights Amendment (PPRA)** amplifies parent and student rights with respect to surveys, analyses, or evaluations funded by USDOE. 20. U.S.C. §1232h; 34 C.F.R. Part 98.

The PPRA (1) allows parents to review materials that will be used in a USDOE-funded survey, and (2) requires parental consent prior to student participation in a USDOE-funded survey that requests information concerning any of the following: political affiliation, psychological problems, sex behavior and attitudes, illegal or anti-social behavior, critique of fellow students who are close family members, privileged relationships (e.g., attorney, doctor, minister), income (unless an assistance program based on need).

7) Disclosures to accrediting organizations as necessary to carry out their accrediting functions. 34 C.F.R. §99.31(a)(7).

8) Disclosures to parents of a dependent student, as defined in the Internal Revenue Code (§152 of the Internal Revenue Code of 1986). 34 C.F.R. §99.31(a)(8).

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

Districts must make reasonable efforts to notify the parent or eligible student of the order or subpoena in advance of disclosure, so that they may seek protective action. 34 C.F.R. §99.31(a)(9)(ii). This requirement does not apply if the disclosure is in compliance with a **federal grand jury**

subpoena or a law enforcement subpoena, where the court has ordered that the contents of the subpoena or the information furnished in response not be disclosed, or the matter involves a terrorism investigation or prosecution. 34 C.F.R. §99.31(a)(9)(ii)(A-C)

Timeline for reasonable effort to notify—The FPCO has held that FERPA does not define a proper timeframe for notifying parents of subpoena-related disclosures so they have the option of seeking to quash the subpoena or take other action. *Letter to Cochran* (FPCO—February 16, 1999). Factors used in determining whether the timeframe was appropriate include the time period for compliance, whether that timeframe was reasonable, good faith efforts, and the nature of the attempts to notify. The FPCO wrote that “we encourage educational agencies and institutions to strive to provide a sound and sensible time period to allow a parent or eligible student to take action to quash a subpoena, particularly where a subpoena duces tecum has been issued by a court from a state other than the one in which the parent or eligible student resides.” *Id.*

State law must be consulted to determine whether a subpoena is “**lawfully issued.**” *Letter to Simlick* (FPCO—June 22, 1998). Usually, a state’s rules of civil procedure will answer the question.

A **general arrest or contempt of court warrant** against a student is not sufficient to meet the subpoena exception. Before the school complies with a request for records without parental consent the requesting agency must obtain a subpoena or other court order issued with respect to *the school*, not just the student or parents. *Letter to Layton* (FPCO 1997).

Lawsuits between schools and parents—If a school sues a parent or eligible student, the school may disclose education records as part of the litigation without obtaining parental consent, and without the need for a subpoena. 34 C.F.R. §99.31(a)(9)(iii)(A). Similarly, if the parent sues the school, the school can disclose records in its defense. §99.31(a)(9)(iii)(B). This new provision eliminates the need to articulate an implied waiver of FERPA privacy rights in cases of pending litigation. See *Letter to Smith* (FPCO—June 22, 1998).

Attorney-Client Privilege—FPCO has held that FERPA or its regulations are silent on the issue of whether the privilege can be invoked to deny a parent access to an education record. It notes that a school’s ability to assert the privilege “may be inferred by the institution’s need to obtain confidential legal advice in certain circumstances.” *Letter to Smith*

(FPCO—June 22, 1998). The FPCO has set forth the following conditions for asserting the privilege:

1. the school is or sought to be a client,
2. the communication is between the school and its attorney or their subordinate when acting as a lawyer,
3. communication relates to facts disclosed by the school for the purpose of securing a legal opinion or legal services (not to commit an illegal act or tort),
4. the communication is in fact confidential (not made to anyone outside the particular attorney-client relationship), and
5. the privilege has been claimed and not waived.

Note to school attorneys—Make sure that in creating documents containing personally identifiable information regarding students (e.g., opinion letter on a specific situation), the attorney-client privilege is clearly invoked in writing on the documents. The following statement is commonly placed at the top of many attorney-client documents: “*Privileged and confidential attorney-client communication.*” Note that if the document is shared with persons not with the school, the privilege may be waived. Also ensure that the document refers to facts disclosed by the school that are relevant to the legal opinion being rendered.

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

The disclosure must be *necessary to protect the health or safety* of the student or other individuals, and only to *appropriate parties* in connection with the emergency. 34 C.F.R. §99.36(a).

Schools are free to include in a student’s education records information concerning **disciplinary actions** taken against the student for conduct that posed a significant risk to the safety or well-being of the student, other students, or other members of the school community. §99.36(b)(1).

Such information can be disclosed to employees with legitimate educational interests in the student’s behavior, or to teachers and school officials of other schools who have been determined to also have legitimate educational interests in the student’s behavior. §99.36(b)(2), (3).

In making its determination on a health or safety emergency, a school may take into account the “totality of the circumstances”

pertaining to a threat. If the school determines that there is an “articulable and significant” threat to health or safety, it may disclose information from records to any person whose knowledge of the information is necessary to protect health and safety. If there is a “rational basis” for such a determination, based on the information available at the time, the FPCO will not substitute its judgment for that of the school in evaluating the circumstances and making its determination. 34 C.F.R. §99.36(c); see also *Letter to Anonymous*, 53 IDELR 235 (FPCO 2008).

The requirement for an “articulable and significant” threat does not mean that the threat must be verbal. Rather, it means that the school must be able to articulate what the threat is when it makes the disclosure. 73 Fed. Reg. 74,838 (2008).

The above provision represents a shift from previous versions of the regulations that would have FPCO apply strict scrutiny to schools’ disclosures in this area. Thus, in modern cases, FPCO has tended to defer to schools’ determinations of health and safety emergencies. In *Letter to Anonymous*, 111 LRP 64574 (FPCO 2011), a school disclosed a student’s essays to police at a time when a written threat of harm was found on the school campus. When the parent complained, FPCO found that the school may have disclosed the essay to police in an effort to determine if he wrote the threatening note, and thus, was a valid non-consensual disclosure under the health and safety emergency exception.

Similarly, in *Letter to Anonymous*, 115 LRP 33141 (FPCO 2015), FPCO upheld a school’s decision to disclose a student’s threat assessment to police and area schools, as it concluded that he presented a high level of risk and thus was rationally related to goal of ensuring safety.

11) Disclosures of directory information (see above for definition of directory information). 34 C.F.R. §99.31(a)(11).

Districts must notify parents regarding (1) the types of information it considers directory information, (2) parents’ right to refuse to allow the District to designate any or all of their child’s information as directory information, and (3) the period of time within which a parent must elect to exercise their right to refuse designation of information as directory information. 34 C.F.R. §99.37(a).

Directory information regarding former students may be disclosed without complying with the above conditions. §99.37(b).

The opt-out right cannot be invoked to prevent a school from:

1. Disclosing or requiring a student to disclose the student's name, identifier, or institutional email address of the school in which the student is enrolled;
2. Requiring a student to wear an ID badge or display an ID card with directory information that has been properly designated as directory information under these regulations. 34 C.F.R. §99.37(c).

Schools' public notices may indicate that directory information will be disclosed to limited parties for specific purposes. If a school's notice to parents so indicates, then the school must abide by those limitations. 34 C.F.R. §99.37(d).

12) Disclosures to the parent of a student (who is not an adult or attending college) or to the student. 34 C.F.R. §99.31(a)(12).

Adult students can access their own educational records without the school obtaining parental consent. This section is also made necessary by the rule on non-custodial parents' retention of FERPA rights after divorce.

13) Disclosure is to an alleged victim of any crime of violence or a non-forcible sex offense about the results of any disciplinary proceeding conducted by a school against the alleged perpetrator with respect to that crime. 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 or postsecondary institution. The final results, however, may be disclosed without consent even if the proceeding concluded no violation was committed.

Another regulation provides definitions for crimes of violence, non-forcible sex offenses, and other terms relevant to this provision. See 34 C.F.R. §99.39.

(Exceptions 14 and 15 involve postsecondary institutions and are omitted).

16) Disclosure involves sex offenders and other individuals required to

register under the Violent Crime Control and Law Enforcement Act of 1994 (43 U.S.C. §14071) and the information was provided to the school under that law and its guidelines.

Redaction of personally identifiable information—Schools may disclose education records with parental consent after the removal of all personally identifiable information, if it has made a reasonable determination that the disclosed records will not otherwise identify the student. 34 C.F.R. §99.31(b)(1).

Authenticating identity of parties receiving disclosed information—When a school discloses information subject to the above exceptions, it must use “reasonable methods” to identify and authenticate the parties to whom it is disclosing the information.

Practical Tip—Reasonable methods could include verifying of fax numbers or email addresses of recipients, or requiring identification of recipients prior to disclosure. The idea is ensuring that the records are being received by the right persons for whom the particular exception applies.

Exceptions do not mandate disclosure without consent—Schools should remember that these exceptions to the consent requirement do not require the school to disclose records, except when the parent, eligible student, or their representative seeks access. 34 C.F.R. §99.31(b); 34 C.F.R. §300.613(b)(3). The exceptions merely allow the schools to disclose without parental consent if they wish to do so, and in accordance with any conditions set forth under the applicable exception.

Disclosures related to bullying sanctions—In light of the nationwide concern over bullying and harassment at schools, FPCO has taken the position that 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.” *Letter to Soukup*, 115 LRP 18668 (FPCO 2015). This would include an order that the bully stay away from the harassed student, or an order prohibiting the bully from attending school for a period of time, or an order transferring the bully to another class.

Redisclosure of Records

The general rule is that a District may disclose confidential information from education records, subject to the provisions of FERPA, only on the condition that the party to whom the information is disclosed will not disclose it to any other party without parental or eligible student’s consent. 34 C.F.R. §99.33(a)(1).

Schools are not strictly prohibited, however, from disclosing records to a party with the understanding that that party might make further disclosures on the school's behalf, if the original disclosure is appropriate under FERPA, and the record of access shows to whom there might be redisclosure (see below).

Exceptions to Redisclosure Rules—The general rule above does not apply to disclosures to parents of dependent students, pursuant to subpoenas, of directory information, to a parent or eligible student, disclosures of results of disciplinary proceedings, to parents of dependent students, or involving sex offenders. 34 C.F.R. §99.33(c).

Districts must inform parties who access information regarding the requirement to not redisclose the information without parental consent, unless one of the above exceptions applies. 34 C.F.R. §99.33(d).

Retention and Destruction of IDEA-related Records

Since IDEA records can be extensive, Districts may wish to destroy certain sets of old files to make better use of facility space and to maintain proper organization of records. IDEA allows for destruction of records under certain conditions, and subject to applicable state retention schedules or rules.

The IDEA regulations require that the District inform parents of IDEA students when their children's records are no longer needed. 34 C.F.R. §300.624(a). The school has discretion in determining when records are no longer needed. *Powell v. Defore*, 553 IDELR 293 (M.D.Ga. 1982). Schools, however, may want to inform parents that they might need the records for other purposes, such as Social Security benefits or litigation. Parents may elect to obtain the original records instead, or may request that the District destroy the records. Schools, however, may permanently maintain 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). Parents cannot demand destruction of information that may be maintained permanently.

If a District cannot locate parents at their last known address, and have published 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 after a reasonable time.

IDEA regulations add a provision requiring schools, through the actions of its custodian of records to protect the confidentiality of

the personally identifiable information contained in the records in the process of destroying them. 34 C.F.R. §300.623(a). Destruction could take the form of incineration, recycling, or some other means that ensures the confidentiality of the materials through the destruction process.

Electronic Retention of Records

Some Districts are moving to electronic retention of records, for improved efficiency in storing older records that must be retained under the schedules, but are not currently active. Consult with your appropriate state archive agency—it may have guidelines or procedures regarding e-retention of records.

District Record of Persons Accessing Records

Districts must maintain a record of parties obtaining access to education records each time records are accessed or disclosed. The record must include the party's name, the date of access, and the purpose for which the party is allowed to access the records (i.e., the legitimate interest of the person in the record). 34 C.F.R. §99.32(a)(1), 34 C.F.R. §300.614.

If the party to whom the records are disclosed might redisclose records or information contained therein on behalf of the District, the record of access must also include the names of the persons to whom the information may be redisclosed, and a statement of the legitimate interests of such persons. 34 C.F.R. §99.32(b). See above for additional discussion of redisclosure issues.

Practical Note: Districts can keep an access log sheet on the front of student eligibility folders. The form used should contain spaces for the party's name, date of access, and purpose.

Exceptions to the Record-of-Access Requirement

Access does *not* have to be documented for the following parties when they access education records (34 C.F.R. §99.32(d)):

- 1) Parents or eligible students accessing their children or their own records, respectively.
- 2) School officials or employees with legitimate educational interest in the records or information.

- 3) Parties with written consent from the parent or eligible student.
- 4) Parties seeking directory information.
- 5) Parties accessing records as directed by a federal grand jury, other law enforcement subpoena (if the grand jury or subpoena orders that the contents or existence of the subpoena, as well as information furnished in response, not be disclosed), or terrorism prosecution.

District Custodian of Records

Under IDEA, one official at each local educational agency must assume responsibility for ensuring confidentiality of records at the collection, storage, disclosure, and destruction stages. 34 C.F.R. §300.623(b). In addition, persons that will collect or use records with personally identifiable information must receive training regarding State policies on records, as well as FERPA requirements. 34 C.F.R. §300.623(c). Lastly, local educational agencies must maintain a list of the names and positions of employees that may have access to personally identifiable information. 34 C.F.R. §300.623(d).

The custodian of records (or whatever the person's title may be) and his or her assistants are expressly allowed to inspect and review records (even if they are not technically considered to have a "legitimate educational interest"). 34 C.F.R. §99.32(c)(2).

Enforcement of FERPA

Complaints with the Family Policy Compliance Office (FPCO)

The Department of Education (DOE) was ordered by Congress to take appropriate action to enforce FERPA and deal with violations. 20 U.S.C. §1232g(f). The ultimate enforcement action against a District is termination of all federal financial assistance, where the Department of Education is unable to secure compliance by voluntary means. The statute specifically ordered DOE to establish and designate an office and review board to investigate, process, review, and rule on violations and complaints. 20 U.S.C. §1232g(g).

The office designated by the Department of Education for enforcement of FERPA is the Family Policy Compliance Office (FPCO). 34 C.F.R. §99.60. In addition, the Department designated the Office of Administrative Law Judges to act as the

review board required under the Act.

Parents or eligible students can file written complaints regarding alleged violations of FERPA and its regulations at:

Family Policy Compliance Office
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, DC 20202-4605

The 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 of the violation or the date on which the complainant knew or should have known of the violation. 34 C.F.R. §99.64(c); *Letter to Anonymous*, 113 LRP 28738 (FPCO 2013). The FPCO may extend the timeline for good cause shown. 34 C.F.R. §99.64(d); *Letter to Wagoner* (FPCO—March 10, 1999).

Districts must be notified in writing of the complaint, and are also asked to submit a written response. 34 C.F.R. §99.65. The FPCO will also notify a District if it received a complaint against it that did not meet the requirements for a valid complaint.

The FPCO will issue written findings after allowing the parties to submit additional information and argument. 34 C.F.R. §99.66. There is no right to hearing for the school, and the FPCO's decision is final. *Letter to Sanders*, 107 LRP 64190 (FPCO 2007). If the District is found in violation, the FPCO will include a specific statement of the steps required for compliance and provide a reasonable timeline during which the District may comply voluntarily.

If the District refuses to comply, the Department of Education can withhold further payments of federal assistance due the District, issue a cease-and-desist order, or terminate eligibility to receive any federal funding. 34 C.F.R. §99.67. In cases of non-compliance with FERPA regulation by third parties outside the local educational agency, FPCO can order that the local educational agency not allow those third parties access to records for at least five years. 34 C.F.R. §99.67(c), (d), (e).

Parent advocates and Standing—Persons other than the eligible student or parent, such as a parent advocate do not have standing to file a FERPA complaint. This is because FERPA vests rights only in eligible students and parents—only they can file complaints for harmful violations. To file

a complaint on behalf of the student, an advocate must submit written parental authorization to FPCO for such a complaint. *Letter to Drumheiser*, 35 IDELR 219 (FPCO 2001).

§1983 Civil Rights Actions Based on FERPA Violations

The federal courts are in agreement with the initial point that the language of FERPA does not confer a private cause of action, which means that the statute does not expressly provide for a suit to enforce its provisions or provide compensatory damages to redress violations. *Klein Independent School District v. Mattox*, 830 F.2d 576 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 1473 (1988); *Girardier v. Webster College*, 563 F.2d 1267 (8th Cir. 1977).

In some situations, however, a statute that does not confer a private cause of action can still form the basis for a civil rights action under the Civil Rights Act of 1871, codified at 42 U.S.C. §1983. Section 1983 provides a cause of action in the federal courts for actions by state government officers or employees depriving a person of rights clearly established rights under the Constitution or a federal law, where such law does not provide an exclusive remedy at law.

In the case of *Gonzaga University v. Doe*, 37 IDELR 32 (U.S. 2002), the Supreme Court ruled conclusively that FERPA does not confer enforceable rights either through its provisions or under Section 1983. It found that FERPA provided neither an express, nor implied private cause of action. Thus, the Court held that the only redress for a violation of FERPA lay in a complaint to the FPCO, and in its enforcement mechanisms.

Useful Resources

- *Model Notification of Rights Under FERPA for Elementary and Secondary Schools*, U.S. Department of Education (ferpa-mod-not-rights.doc)(attached).
- *Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices*, Privacy Technical Assistance Center (<http://ptac.ed.gov>).
- *Protecting Student Privacy While Using Online Educational Services: Model Terms of Service*, Privacy Technical Assistance Center (<http://ptac.ed.gov>).
- *Frequently Asked Questions – Cloud Computing*, Privacy Technical Assistance Center (<http://ptac.ed.gov>)

- *Best Practices for Data Destruction*, Privacy Technical Assistance Center (<http://ptac.ed.gov>).