

FERPA FAQS

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Because of the sensitive nature of personally identifiable information contained in the education records of students with disabilities, myriad questions frequently arise under the Family Educational Rights and Privacy Act (FERPA). This presentation will attempt to cover the “waterfront” of issues that arise under FERPA, including a general review of important provisions and definitions under the law and parent rights regarding disclosure of, access to and amendment of student records.

I. INTRODUCTORY QUESTIONS

A. What is FERPA?

The Family Educational Rights and Privacy Act (FERPA) is a statute that is part of the larger General Education Provisions Act (GEPA) and can be found at 20 U.S.C. §1232g. FERPA’s implementing regulations, curiously set out in a Q&A fashion, are found at 34 C.F.R. Part 99.

B. What Does FERPA Provide?

FERPA essentially provides parents with certain rights regarding the education records of their children (and eligible adult students are entitled to them too). Those rights include 1) inspection and review of education records; 2) prevention of disclosure of personally identifiable information (PII) contained in education records to third parties without consent; and 3) amendment of education records. 20 U.S.C. § 1232g(4)(A) and 34 C.F.R. § 99.3.

FERPA requires annual notification to parents of students currently in attendance or “eligible students” currently in attendance of their FERPA rights. The U.S. DOE provides a Model Notification of Rights under FERPA for Elementary and Secondary Schools on its website, as well as a Model Notice of Directory Information on its website.

C. To What Agencies Does FERPA Apply?

For purposes of this presentation, FERPA applies to all educational agencies or institutions that receive federal educational financial assistance and provide educational services or instruction to students. 34 C.F.R. § 99.1. FERPA does not generally apply to private and parochial schools at the elementary and secondary level because DOE funds are not generally provided to those schools. However, in a situation where a public school agency places a student for receipt of services under the IDEA in a private school, the records of that particular student are subject to FERPA, and the placing public education agency is responsible for compliance with FERPA relative to that student's records. *Letter to Schaffer*, 34 IDELR 151 (OSERS 2000).

II. ENFORCEMENT AND REMEDIES UNDER FERPA

A. How are the Provisions of FERPA Enforced?

Generally, the U.S. Department of Education's "Office of the Chief Privacy Officer" (OCPO) oversees the administration of FERPA, in addition to other government initiatives regarding the acquisition, release and maintenance of information. Within OCPO, the Family Policy Compliance Division, known as the Family Policy Compliance Office (FPCO), is responsible for administering two federal laws that provide parents and students with certain privacy rights: FERPA and the Protection of Pupil Rights Amendment (PPRA).

FPCO is the division that enforces FERPA and issues Letters of Findings and other guidance that will be referenced in these materials. *See* 82 Fed. Reg. 6,252 (2017). FPCO also has the authority to provide technical assistance to ensure that education agencies comply with FERPA and its regulations. 34 C.F.R. § 99.60(b)(2).

Under the FERPA regulations, a parent or eligible student may file a timely written complaint with FPCO regarding an alleged violation under FERPA by an education agency. 34 C.F.R. § 99.63. The regulations provide that a complaint must contain specific allegations of fact giving reasonable cause to believe that a violation of FERPA has occurred, but it is not required that a complaint allege a violation based on a policy or practice of the education agency. 34 C.F.R. § 99.64(a).

In order to be timely, a complaint must be filed with FPCO within 180 days of the alleged violation or within 180 days of the date that the complainant knew or reasonably should have known of the alleged violation. *Letter to Anonymous*, 113 LRP 28738 (FPCO 2013) [because some of the parent's allegations related to record requests were made more than 180 days prior to the date which the parent filed a complaint, there is no basis to pursue these allegations]; and *Letter to Anonymous*, 115 LRP 50728 (FPCO 2015) [investigation declined where complaint filed 298 after the date of the alleged unlawful disclosure]. The regulations also provide that FPCO "may extend the time limit" for "good cause shown." 34 C.F.R. § 99.64(d).

When a timely complaint has been filed, FPCO will notify the complainant (where there is one) and the education agency in writing if it decides to initiate an investigation. 34 C.F.R. § 99.65(a). The notice to the education agency will include the substance of the allegations against the agency and direct the agency to submit a written response and other relevant information within a specified

period of time, including information about its policies and practices related to student education records. FPCO will also notify the complainant if it decides that it will not investigate because the complaint is not appropriate or timely. 34 C.F.R. § 99.65(a) and (b).

In addition to the complaint investigation process and as part of its general enforcement responsibilities, FPCO can also require an education agency at any time to submit reports, information on policies and procedures, annual notifications, training materials, and other information necessary to carry out enforcement responsibilities. 34 C.F.R. § 99.62. In addition, FPCO may also conduct its own investigation, even when no complaint has been filed or a complaint has been withdrawn. 34 C.F.R. § 99.64(b).

B. What Kinds of Remedies May FPCO Order if it finds a Violation of FERPA?

While FPCO is charged with investigating, processing, reviewing and adjudicating violations of FERPA, it does not have the power to assess fines or award damages against an education agency. 34 C.F.R. § 99.60(b). Instead, if an education agency is found to be in noncompliance with FERPA, FPCO will issue a “letter of findings” or directive to the agency that typically details specific steps that the agency must take to comply. FPCO will offer a reasonable period of time, given all of the circumstances of the case, during which the agency may comply voluntarily. 34 C.F.R. § 99.66(c).

If an education agency does not comply with an FPCO directive, the U.S. Secretary of Education is authorized to take any legally available enforcement action, including but not limited to, the following enforcement actions:

1. Withhold further payments under any applicable program;
2. Issue a complaint to compel compliance through a cease-and-desist order.
3. Terminate eligibility to receive funding under any applicable program.

34 CFR 99.67(a),

C. Is there an Appeal Process of an FPCO Decision of Noncompliance with FERPA?

Not really. According to FPCO, each determination it makes regarding individual complaints, including any decision not to initiate an official investigation into allegations made in a particular complaint, represents the final determination of the U.S. DOE and is not subject to appeal. The U.S. Office of Administrative Law Judges, serving as a review board over such a decision, will enter the process only where a determination is made to withhold funds from the education agency or to take other enforcement action against it. *Letter to Sanders*, 107 LRP 64190 (FPCO 2007).

D. Can Parents/Students Sue for Damages under FERPA if an Education Agency Violates its Provisions?

No. FERPA does not confer to parents/students enforceable rights on its own or through another avenue, such as Section 1983. *Gonzaga University v. Doe*, 37 IDELR 32, 536 U.S. 273 (2002). *See also*, *Wong v. State Dept. of Educ.*, 71 IDELR 128 (D. Conn. 2018) [where parents do not

have a private right to sue under FERPA, district's motion to dismiss is granted. The Supreme Court has ruled that FERPA does not provide parents or students with the right to sue for access to education records. Rather, FERPA's remedy is that the Secretary of Education may withhold federal funds from any education agency or institution that violates the statute's provisions].

III. WORKING DEFINITIONS UNDER FERPA

A. What is the Definition of a Parent under FERPA?

Parent is defined as a "parent of a student" and includes a natural parent, a guardian or an individual "acting as a parent in the absence of a parent or a guardian." 34 C.F.R. § 99.3.

B. What if the Rights of a Parent have been Terminated or a Parent is not the Custodial Parent?

The FERPA regulations provide that education agencies are to give full rights under FERPA to either parent, unless the agency has been provided with evidence that there is a court order, State statute or legally binding document relating to matters such as divorce, separation or custody that specifically revokes these rights. 34 C.F.R. § 99.4. *Letter to Anonymous*, 118 LRP 3628 (FPCO 2017). If a parent's rights have been terminated by the state, then the parent is no longer a parent under FERPA.

C. What is the Definition of a Student under FERPA?

A student eligible for FERPA protection and to assert rights (referred to as an "eligible student") is a "student who has reached 18 years of age or is attending an institution of postsecondary education." 34 C.F.R. § 99.3. Thus, FERPA rights transfer to the student on the student's 18th birthday or when the student begins attending a postsecondary institution.

D. What is an "Education Record?"

Whether a particular "record" about a student is covered by FERPA depends on whether it meets FERPA's definition of an "education record."

Under the FERPA regulations, education records are those that are (1) directly related to a student; and are (2) maintained by an education agency or institution or by a party acting for the agency or institution. 34 CFR § 99.3. The IDEA, which also contains records provisions, incorporates FERPA's definition of education record by reference. 34 C.F.R. § 300.611(b).

E. Are Education Records Documents only?

No. Education records may be recorded in any manner, including but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm or microfiche. 34 C.F.R. § 99.3.

F. What Does “Directly Related to a Student” Mean?

Unfortunately, there is no statutory definition of the term “directly related to a student.” However, the definition of “personally identifiable information”—that which is protected in education records—may give some guidance as to what “directly related to a student” means based upon interpretive letters issued by the FPCO.

G. So, What is “Personally Identifiable Information”?

Under the FERPA regulations, “personally identifiable information” (PII) includes, but is not limited to the following:

1. The student's name;
2. The name of the student's parents or other family member;
3. The address of the student or student's family;
4. A personal identifier, such as the student's social security number, student number, or biometric record;
5. Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;
6. Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or
7. Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

34 C.F.R. § 99.3.

H. What is a Biometric Record?

The FERPA regulations define a “biometric record” as “a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual. Examples include fingerprints; retina and iris patterns; voiceprints; DNA sequence; facial characteristics; and handwriting.” 34 C.F.R. § 99.3.

I. Are There Any Exceptions to the Definition of Education Record?

FERPA specifically excludes several types of records from the definition of education records, even though they may contain information directly related to a student and might be maintained by the education agency. 34 C.F.R. § 99.3. These exceptions are:

1. Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.
2. Records of the law enforcement unit of an education agency that were created by that unit for the purpose of law enforcement.

3. Records relating to an individual who is an employee of the education agency that are made and maintained in the normal course of business; relate exclusively to the individual in that individual's capacity as an employee; and are not available for use for any other purpose. However, records relating to an individual in attendance at the education agency who is employed as a result of his/her status as a student *are* education records.
 4. Records of a student who is 18 years old or older or is attending an institution of postsecondary education that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in such capacity; or made, maintained, or used only in connection with the provision of treatment to the student; and are not available to anyone other than people providing such treatment. For the purpose of this definition, "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the education agency.
 5. Records created or received by an education agency after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student.
 6. Grades on peer-graded papers before they are collected and recorded by a teacher. *See Owasso Indep. Sch. Dist. No. 1-011 v. Falvo*, 36 IDELR 62 (2002) [FERPA is not violated when one student grades a classmate's paper and then calls out the grade to the teacher. This is because the grades are not "maintained" by the agency at least until the teacher has recorded the grades].
- J. What Are Some Specific Examples of Things that Are or Are Not Education Records not Specifically Addressed by FERPA?**

Are Education Records

- Juvenile court records, because they were maintained by the school district's attorney (as its agent) and contained information directly related to the student. *Belanger v. Nashua Sch. Dist.*, 21 IDELR 429 (D. N.H. 1994).
- Any records made as a result of a disciplinary action or proceeding, because they are directly related to students and are not specifically excluded from the definition of education records. *Letter to Anonymous*, 113 LRP 35726 (FPCO 2013).
- IEP meeting minutes are education records subject to parental review. *Letter to Dempsey*, 110 LRP 37103 (FPCO 2009).
- Medical records that have been released by the medical record custodian to, and the records come under the control of, the education agency. *In re: Student with a Disability*, 40 IDELR 119 (SEA NM 2003).
- Certain records created through an education agency's use of third-party online educational services (such as student identification information given to an online educational services provider in order to create an online account for the student). *Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices* (U.S. DOE 2014). *See also, Protecting Student Privacy While Using Online Educational Services: Model Terms of Service* (U.S. DOE 2015) ["A good contract (with a third-party online educational service provider) will acknowledge the need to share student information with

the school upon request in order to satisfy FERPA's parental access requirements. As a best practice, parental access to their children's data should be seamless”].

Are Not Education Records

- Anecdotal notes and work samples collected by an SLP to monitor student performance used by the SLP to develop a final IEP progress report and were not disclosed to other employees. *Deer Park Comm. City Schs.*, 116 LRP 1361 (SEA OH 2015).
- Lost white notebook/ binder used by the student’s teacher to jog her memory as she completed his progress reports and not disclosed to others. *Ann Arbor Pub. Schs.*, 115 LRP 6219 (SEA MI 2015).
- Mental health and emotional counseling notes regarding student created by the school counselor as a personal memory aid and never shared with any other staff member. *Letter to Ruscio*, 115 LRP 18601 (FPCO 2014).
- Tally sheets used by teachers and therapists to keep track of each student’s daily activities and achievements, since they were not maintained by the education agency and were kept in the sole possession of the maker and used as a memory aid. *Board of Educ. of the Toledo City Sch. Dist. v. Horen*, 55 IDELR 102 (N.D. Ohio 2010), *aff’d*, 113 LRP 45713 (6th Cir. 2011) (unpublished).
- Every individual piece of student work, such as student writing samples, written assignments and worksheets (700 pages). *K.C. v. Fulton Co. Sch. Dist.*, 2006 WL 1868348, 46 IDELR 39 (N.D. Ga. 2006). *See also, Gwinnett County Sch. Dist.*, 62 IDELR 156 (SEA GA 2013) [because work a 10th-grader completed in her special education class did not qualify as an education record, district did not violate the IDEA by failing to preserve those work samples for the parent's review].
- A “hit list” that a student wrote on the cover of his geography book, since it was not maintained by the district. *Risica v. Dumas*, 106 LRP 68490, 466 F.Supp.2d 434 (D. Conn. 2006).
- Incident reports relating to a student’s injuries maintained in a district’s risk management department. *Saddleback Valley Unif. Sch. Dist.*, 57 IDELR 298 (SEA CA 2011).
- Medical records—until a medical record custodian releases the records to, and the records come under the control of, the district. *In re: Student with a Disability*, 40 IDELR 119 (SEA NM 2003).
- Videotapes recorded to maintain the physical security and safety of the school building. *Rome City Sch. Dist. v. Grifasi*, 105 LRP 59984 (N.Y. Sup. Ct. 2005)(unpublished).

K. What About Emails?

It depends.

Several courts have found it important to determine whether the emails at issue are actually maintained by the education agency. In a recent decision, the 9th Circuit Court of Appeals found that there was no evidence that the district interfered with the parents’ right to review and inspect records when it turned over all emails about their 4th grader with ADHD that it maintained in the student’s file. *Burnett v. San Mateo-Foster City Sch. Dist.*, 118 LRP 27117 (9th Cir. 2018) (unpublished). The Court ruled that the district had no obligation to turn over unprinted emails,

since IDEA and FERPA define “education records” to include those that contain personally identifiable information that are maintained by an education agency. “Maintained” suggests something more than an ordinary exchange of emails and refers instead to records that are kept in a filing cabinet or a permanent secure database.

See also, S.A. v. Tulare Co. Office of Educ., 53 IDELR 143 (E.D. Cal. 2009) and *Middleton-Cross Plains Area Sch. Dist.*, 115 LRP 31928 (SEA WI 2015) [district did not violate state or federal law by not providing the parents of 18 year-old student access to emails not maintained in the student’s cumulative file]; and *Brownsburg Comm. Sch. Corp.*, 59 IDELR 146 (SEA IN 2012) [email correspondence that briefly referenced the child was merely used as a communication tool and there is no evidence that district maintained such correspondences as part of the students' education records]. *See also, Cobb Co. (GA) Sch. Dist.*, 114 LRP 42730 (OCR 2014) [district may charge \$1,147 in retrieval fees to parents because they requested to review all emails regarding their child, most of which were not printed and maintained as education records in the student's file].

L. How about Photos and Videos? Are they Education Records?

On April 19, 2018, FPCO issued a long-awaited FAQ document regarding photos and videos under FERPA. *FAQs on Photos and Videos under FERPA*, 118 LRP 16524 (U.S. DOE 2018). With respect to the “education records” question, FPCO essentially states that a photo or video is an education record” when the photo or video is: (1) directly related to a student; and (2) maintained by an education agency or by a party acting for the agency.

“Directly related”

FPCO notes that FERPA does not define what is meant by “directly related” to a student but notes that “[i]n the context of photos and videos, determining if a visual representation of a student is *directly* related to a student (rather than just incidentally related to him or her) is often context-specific” and education agencies “should examine certain types of photos and videos on a case-by-case basis to determine if they directly relate to any of the students depicted therein.”

FPCO has provided some factors that “may help” determine if a photo or video should be considered “directly related” to a student:

- The education agency uses the photo or video for disciplinary action (or other official purposes) involving the student (including the victim of such disciplinary incident);
- The photo or video contains a depiction of an activity:
 - That resulted in an education agency’s use of the photo or video for disciplinary action (or other official purposes) involving a student (or, if disciplinary action is pending or has not yet been taken, that would reasonably result in use of the photo or video for disciplinary action involving a student);
 - That shows a student in violation of local, state or federal law;
 - That shows a student getting injured, attacked, victimized, ill, or having a health emergency
- The person or entity taking the photo or video intends to make a specific student the focus of the photo or video (e.g., ID photos or a recording of a student presentation); or

- The audio or visual content of the photo or video otherwise contains personally identifiable information contained in the student’s education record.

FPCO notes that in the absence of these factors, a photo or video should not be considered directly related to a student. In addition, if the student’s image is incidental or captured only as part of the background, or if a student is shown participating in school activities that are open to the public and without specific focus on any individual, those should not be considered “directly related” to the student.

FPCO goes on to provide specific examples of situations that “may cause” a video to be an education record:

- A school surveillance video showing two students fighting in a hallway, used as part of a disciplinary action, is directly related to the students fighting.
- A classroom video that shows a student having a seizure is directly related to that student because the depicted health emergency becomes the focus of the video.
- If a school maintains a close-up photo of 2 or 3 students playing basketball with a general view of student spectators in the background, the photo is directly related to the basketball players because they are the focus of the photo, but is not directly related to the students pictured in the background. Schools often designate photos or videos of students participating in public events (e.g., sporting events, concerts, theater performances, etc.) as directory information and/or obtain consent from the parents/students to publicly disclose photos or videos from these events.
- A video recording of a faculty meeting during which a specific student’s grades are being discussed is directly related to that student because the discussion contains PII from the student’s education record.

“Maintained by an education agency”

To be an education record, the education agency or party acting on behalf of the agency must maintain it. Thus, a photo taken by a parent at a school football game is not an education record, even if directly related to the student. If, however, the photo shows two students fighting at the game and the parent provides a copy of it to the school that then maintains it in the students’ disciplinary records, the copy of the photo maintained by the school is an education record.

Exclusion for law enforcement unit records

FERPA excludes from the definition of education records those that are created and maintained by a law enforcement unit of an education agency for a law enforcement purpose. Thus, if a law enforcement unit of an education agency creates and maintains the school’s surveillance videos for a law enforcement purpose, then any such videos would not be considered to be education records. If the law enforcement unit provides a copy of the video to another component within the education agency (for example, to maintain the record in connection with a disciplinary action), then the copy of the video may become an education record of the student(s) involved if the video is not subject to any other exclusion from the definition of “education record” and the video is “directly related” and “maintained by the education agency.”

The FAQ is lengthy and also addresses the following issues:

- whether the same recorded image can be the education record of more than one student under FERPA when multiple students are on it;
- whether a parent of one of the students may view a video that is the education record of multiple students;
- whether that same parent could obtain a copy of that video;
- whether education agencies can charge for redacting/segregating education records of multiple students;
- whether FERPA permits legal representatives of parents/students to inspect and review videos with their clients; and
- whether education agencies must turn over videos to the police.

Education agencies should refer to the entire document and apply it to individual situations (with guidance from legal counsel) to answer these questions in case-by-case situations.

M. What about Records Created by School Threat Assessment Teams?

It depends on who maintains those records. If law enforcement maintains them, then they would not be “education records,” unless they are provided to a school official who then decides to maintain them. In establishing school threat assessment teams, school districts must consult with legal counsel regarding FERPA’s requirements and how information will be shared, disclosed, maintained, etc.

There is a very comprehensive guide that was issued jointly by the U.S. DOE and Secret Service: “*Threat Assessment in Schools: A Guide to Managing Threatening Situations and Creating Safe School Climates*” (2004) that can be found online that may be helpful in looking at FERPA and other questions that may arise in the threat assessment team process.

N. What about Test Protocols?

Generally, test instruments, test protocols and interpretative materials that do not contain personally identifiable information are not education records. However, test protocols that include PII are education records within the meaning of the IDEA and FERPA. *Letter to Price*, 57 IDELR 50 (OSEP 2010); *Letter to Anonymous*, 111 LRP 18281 (FPCO 2010); *Letter re: Westport Central Sch.*, 105 LRP 25651, (FPCO 2005); *Letter to Shuster*, 108 LRP 2302 (OSEP 2007) and *Letter re: Moriah Cent. Sch. Dist.*, 105 LRP 11194 (FPCO 2004) [a psychological evaluation or other assessment document that is identifiable to a particular student will generally meet the definition of an education record].

IV. PARENT/STUDENT RIGHT TO INSPECT AND REVIEW RECORDS

Both FERPA and the IDEA grant parents the right to inspect and review all education records relating to their children that are collected, maintained or used by all state and local educational agencies. 34 C.F.R. § 99.10(a) and 34 C.F.R. § 300.613(a). *See also Letter to Chief State Sch. Officers*, 108 LRP 47461 (FPCO 2008) and *Letter to Erquiaga*, 114 LRP 50728 (FPCO 2014).

Under the IDEA, an agency may presume that the parent has authority to inspect and review records unless the agency has been advised that the parent does not have the authority under State law governing such matters as guardianship, separation and divorce. 34 C.F.R. § 300.613(c).

Under FERPA, education agencies are required to comply with a request to inspect education records within 45 days of the request. 34 C.F.R. § 99.10(b). Under the IDEA, an education agency must comply with a request “without unnecessary delay” and before any meeting regarding an IEP or disciplinary change of placement or any due process hearing or resolution meeting. In no case may the agency respond “more than 45 days after the request has been made.” 34 C.F.R. § 300.613(a).

It is important to note that state laws may also provide specific requirements related to parental inspection and review of education records.

A. Can Parents Inspect and Review the Records of Other Students?

Parents may only review their own child’s education records. If the education records of a student contain information about other students, the parents may inspect and review only the specific information about their child. 34 C.F.R. § 99.12(a) and 34 C.F.R. § 300.615. An education agency cannot provide one parent with access to education records that directly relate to two or more students, unless the parents of the other children give written consent. *Letter re: Regional Multicultural Magnet Sch. Dist.*, 108 LRP 29577 (FPCO 2008); *A.B. v. Clarke Co. Sch. Dist.*, 54 IDELR 146 (11th Cir. 2010 (unpublished)); and *Letter to Anonymous*, 113 LRP 14615 (FPCO 2013).

B. Are there Provisions about Time and Place for Access to Records?

No. There is no requirement that an education agency maintain a student's educational records at the same location at which the student is educated. *Letter to Woodson*, 213 IDELR 224 (OSEP 1989). State and local education agencies can develop specific policies and procedures that apply to parents seeking to review the educational records of their children, as long as such policies do not effectively prevent parents from reviewing their child's education records. *Letter to LEA Superintendents*, 108 LRP 47595 (FPCO 2008).

C. What about Access to a Parent’s “Representative?”

Under FERPA, the right to review and inspect education records is personal to the parent, and an education agency is not required to allow a parent to assign or delegate the right to review to a representative, whether that individual is an attorney, parent advocate, friend or relative. *Letter to Longest*, 213 IDELR 173 (OSEP 1988) and *Letter to Segura*, 113 LRP 7194 (FPCO 2012). However, under the IDEA and for students with disabilities, the law provides parents the right to have a “representative of the parent” inspect and review records. 34 C.F.R. § 300.613(b)(3). It is common practice for education agencies to require a release from the parents indicating that the person who is requesting access to the records is an appropriate “representative” to whom records may be released. *See, e.g., In re: Student with a Disability*, 54 IDELR 272 (SEA MT 2010) [district

did not violate the IDEA by requiring a signed release before turning over the student's records to the parent's representative].

D. Does the Right to Inspect and Review also include the Right to Copies of the Records?

Where circumstances may effectively prevent parents from actually exercising the right to inspect and review education records, FERPA requires an education agency to provide copies of requested records or "make other arrangements for the parent or eligible student to inspect and review the requested records." 34 C.F.R. § 99.10(d)(1). While the regulations do not describe any specific circumstances that may be considered those that would "effectively prevent" inspection, the U.S. DOE has indicated that, customarily, parents who live too far away from a school district (out of commuting distance) to view the records in person are considered to be effectively prevented from exercising the right to inspection and review. *Letter to Kincaid*, 213 IDELR 271 (OSEP 1989); *Letter to Longest*, 213 IDELR 173 (OSEP 1988); and *Letter to Anonymous*, 114 LRP 50813 (FPCO 2014). *See also, Bevis v. Jefferson Co. Bd. of Educ.*, 48 IDELR 100 (N.D. Ala. 2007) [because the parent could get physical access to her son's education records, she is not entitled to copies of the 999-page file].

E. What about Copies of Records to the Parents' "Representative?"

Although a parent's right to review and inspect education records includes the right to have his/her representative inspect and review the records, OSEP has opined that education agencies are not required to provide copies of records to a parent representative. This is so, even if the failure to do so would prevent a distantly-located representative from reviewing them altogether. *Letter to Longest*, 213 IDELR 173 (OSEP 1988).

While it may not be required, at least one court has found a harmful procedural violation when the school district did not ensure that copies of test protocols were provided to a distant expert. *Woods v. Northport Pub. Schs.*, 59 IDELR 64 (6th Cir. 2012) [failure to ensure that parent's expert, who was not within commuting distance, received delivery of test protocols to review is a procedural violation of the IDEA that infringed upon the parents' ability to participate in the IEP process, resulting in substantive harm and constitutes a denial of FAPE. Without access to the protocols, the expert was unable to consider the protocols in making his IEP recommendations, lessening the parents' ability to advocate for their son during the IEP process].

F. Isn't it a Violation of Copyright Law to Distribute Copies of Test Protocols?

The answer is not clear. FPCO has indicated that test protocols may be protected by federal copyright laws providing that where a given test protocol is copyrighted, it may not be reproduced, transmitted, distributed, publicly displayed, nor may a derivative work be created therefrom, without express permission from the copyright owner, unless such use is allowed under the "Fair Use Doctrine." *Letter to Prince*, 57 IDELR 50 (OSEP 2010).

In contrast, at least one court has ruled that school districts can distribute copies of test protocols to parents without violating federal copyright law. *Newport-Mesa Unif. Sch. Dist. v. State of*

California, 371 F.Supp.2d 1170, 43 IDELR 161 (C.D. Cal. 2005). The court noted that such distribution of copyrighted test protocols is a fair use under copyright law because it is noncommercial and broadens parents' understanding of their child's educational needs. When the copyright holder for the test protocol intervened in the suit to assert its interest in protecting its copyright claiming that widespread public access to the test protocols would diminish the test's market value, the court found no evidence that the limited release of test protocols to parents of special education students, which had been the California DOE's policy since 1983, resulted in any adverse market effect.

G. Since we are Talking about Protocols, Would it be Alright for an Evaluator to Destroy the Protocols if They are no Longer Needed?

While we will discuss destruction of records later, FPCO has opined that destroying protocols is not a violation of FERPA, unless protocols are part of a student's education records and a parental request for inspection and review is pending at the time of destruction. *Letter to Anonymous*, 111 LRLP 18281 (FPCO 2010). However, there has been some case law to support that the failure to keep student responses and scores in test booklets is a denial of FAPE where it interfered with the parents' ability to meaningfully participate in educational decision-making or program development. *McKinney Indep. Sch. Dist.*, 54 IDELR 303 (SEA TX 2010) [contracted evaluator's destruction of protocols interfered with parent participation in IEP development].

H. Are there other Arrangements that might Work instead of Providing Copies of Records to Parents who are not in Commuting Distance?

There certainly could be. In at least one situation, FPCO found no violation of FERPA where the district's procedure for providing access to student records to those parents who live outside of commuting distance from the school contemplates providing those parents with access to records over the Internet rather than providing copies. FPCO noted that as long as the parent is provided with the requested access within 45 days, the procedures for complying with the request are generally left to the school or district. Here, it did not appear that the parent alleged a failure of timely compliance. Rather, the expressed concern related to the district's procedure of requiring the parent to view the records over the Internet and the fact that the parent did not have instant access every time she attempted to log on to the district's Web site. Accordingly, there was no evidence that the district's procedures were out of compliance with FERPA. *Letter re: Broward Co. Pub. Schs.*, 108 LRP 12928 (FPCO 2007).

I. Can any Fees be Charged Related to Parent Inspection and Review of Records?

Under FERPA, an education agency may charge a fee for copies of education records, even when it is obligated to provide copies to the parents. However, the agency is required to waive the fees when the imposition of a charge would effectively prevent the parent from exercising the right to review and inspect the records. 34 C.F.R. § 99.11(a).

With respect to charging for an employee to search or retrieve education records, FERPA and the IDEA do not permit it. 34 C.F.R. § 99.11(b) and 34 C.F.R. § 300.617(b).

V. PARENT/STUDENT RIGHT TO PREVENT DISCLOSURE OF RECORDS

Under FERPA, an education agency must obtain prior written parental (or eligible student) consent before it discloses personally identifiable information derived from a student's education records to third parties, subject to certain exceptions. 34 C.F.R. § 99.30. It is important to note that this requirement applies exclusively to education records and does not protect the privacy of student information in general.

The term "disclosure" under FERPA means to permit access to or the release, transfer, or other communication of PII contained in education records by any means, including oral, written or electronic means to any party except the party identified as the party that provided or created the record. 34 C.F.R. FR 99.3. While recognizing that FERPA does not set forth specific requirements for safeguarding education records, particularly those that are maintained electronically, FPCO has recently noted that all education agencies must ensure that the education records maintained in its electronic data systems are sufficiently protected from "unauthorized access and disclosure." FPCO has urged education agencies to consult resources regarding appropriate data security controls, including the guidelines published by the U.S. DOE in the *Department Recommendations for Safeguarding Education Records*, 73 Fed. Reg. 15,598 (2008). See *Letter to Tobias*, 115 LRP 33135 (FPCO 2015).

A. Are there Specific Requirements for a Consent or Records Release Form?

FERPA contains requirements for the signed and dated written consent required for disclosure of education records. The written consent must:

1. Specify the records that may be disclosed;
2. State the purpose of the disclosure; and
3. Identify the party or class of parties to whom the disclosure may be made.

34 C.F.R. § 99.30(b). The FERPA regulations also note that "signed and dated written consent" may include a record and signature in electronic format that:

1. Identifies and authenticates a particular person as the source of the electronic signature; and
2. Indicates such person's approval of the information contained in the electronic format.

34 C.F.R. § 99.30(d).

B. Are the Parents/Student Entitled to a Copy of the Records that are Disclosed?

If they request it. Under FERPA, if the parent or eligible student requests it, the education agency must provide a copy of the records it has disclosed to a third party to the parent/eligible student. 34 C.F.R. § 99.30(c)(1). In addition, if the parent of a student who is not an "eligible student" requests it, copies of the disclosed records must also be provided to the student. 34 C.F.R. §99.30(c)(2). The regulations do not address whether the agency can charge a fee for the copies made to comply with these requirements.

C. What are FERPA's Exceptions to the Prior Consent Rule?

Under the FERPA regulations, there are a number of specific exceptions under which an education agency may disclose PII from an education record without prior written consent. 34 C.F.R. § 99.31(a). Most relevant to school districts and other education agencies would include the following disclosures:

- To teachers or other district officials who have a legitimate educational interest.
- To officials of another school system or school where the student seeks to enroll or has enrolled.
- To authorized representatives of the U.S. comptroller general, the federal education secretary or state and local educational authorities.
- In connection with the application for or receipt of financial aid by the student.
- To state and local juvenile justice systems or their officials.
- To organizations conducting educational studies.
- To accrediting organizations.
- To parents of an eligible student considered a dependent student under the Internal Revenue Code.
- In compliance with a judicial order or lawfully issued subpoena.
- In connection with a health or safety emergency.
- If designated as directory information.
- To parents (of a non-eligible student) or to an eligible student.
- To an agency caseworker or other representative of a state or local child welfare agency or tribal organization, who has the right to access a student's case plan, when such agency or organization is legally responsible for the care and protection of the student. (added by 20 USC 1232g(b)(1)(L) but not yet in the FERPA regulations).

D. Are Education Agencies Required to Keep Records of Access?

Yes. FERPA requires agencies to keep and maintain a log of each request for access to and each disclosure of PII from education records of each student, as well as the names of state and local educational authorities and federal officials and agencies listed above that may make further disclosures of PII from the student's education records without consent. 34 C.F.R. § 99.32(a)(1).

The record of access or disclosure must include the following:

1. The parties who have requested or received the information.
2. The parties' legitimate interests in requesting or obtaining the information.

34 C.F.R. § 99.32(a)(3).

E. What about Re-disclosure of this Information by the Requesting or Receiving Party?

When an education agency discloses information from a student's education record, it may do so only on the condition that the party to whom the information is disclosed will not "re-disclose" it

to any other party without first obtaining parental consent. 34 C.F.R. § 99.33(a)(1). In addition, any officers, employees or agents who receive the disclosed information from the education agency may only use it “for the purposes for which the disclosure was made.” 34 C.F.R. § 99.33(a)(2).

FERPA permits re-disclosure without parental consent if:

1. The disclosing educational agency could share the information with the same third party without parental consent under the exceptions contained in 34 CFR 99.31; and
2. The educational agency, state, local educational authority, federal official, or agency has complied with the recordkeeping requirements of 34 CFR 99.32(b), which include keeping a log of the names of the additional parties to which it discloses information and their legitimate interests.

34 C.F.R. § 99.33(b)(1).

The U.S. DOE has indicated that “[e]ducational agencies and institutions retain primary responsibility for disclosing and authorizing re-disclosure of their education records without consent.” 73 Fed. Reg. 74,821 (2008).

F. Can we ever Disclose Information to Parents of an “Eligible Student?”

As set forth previously, rights under FERPA transfer from parents to the student at the earlier of one of two dates: 1) the student turns 18 years of age or 2) the student enrolls in an institution of postsecondary education. However, the transfer of rights does not prevent an education agency from disclosing education records, or personally identifiable information from education records, to a parent without the prior written consent of an eligible student if:

1. The student is claimed as a dependent for federal income tax purposes by either parent;
2. The disclosure is in connection with a health or safety emergency described in the FERPA regulations;
3. The disclosure is in regard to the student's violation of a law or policy; or
4. The disclosure meets any other provision of 34 CFR 99.31(a).

34 C.F.R. § 99.5(a)(2). *See also, Letter to Anonymous*, 53 IDELR 235 (US DOE 2008).

G. How does the “Directory Information” Exception Work?

As indicated previously, FERPA permits education agencies to release information designated as “directory information” without parental consent, provided they meet certain conditions. 34 C.F.R. § 99.31(a)(11). FERPA defines “directory information” as that contained in an education record of a student that is not harmful or is not an invasion of privacy if disclosed. It includes, but is not limited to, the student's name; address; telephone listing; email address; photograph; date and place of birth; major field of study; grade level; enrollment status (e.g., undergraduate or graduate, full-time or part-time); dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors, and awards

received; and the most recent educational agency or institution attended. 34 C.F.R. § 99.3. See *Letter to Carpenter*, 104 LRP 16353 (FPCO 2003) and *Letter to Richardson*, 110 LRP 51098 (FPCO 2010).

It is important to note that an education agency may release information under this exception where the agency has formally designated it as “directory information.” Where an agency chooses to disclose directory information without written parental consent under this exception, it must give public notice to parents and currently attending eligible students of the following:

1. The types of PII designated as directory information;
2. The parent’s/student’s right to refuse to “opt out” of allowing the education agency to designate any or all of those types of information about the student as directory information; and
3. The period of time within which the parent/student has to notify the school in writing that he/she does not want any or all of those types of information about the student designated as directory information.

34 CFR 99.37(a). With respect to former students, an education agency may disclose directory information about them without complying with the notice and opt-out conditions of 34 C.F.R. § 99.37(b). *Letter to Anonymous*, 115 LRP 39409 (FPCO 2015). However, the agency must continue to honor any valid request to opt out of the disclosure of directory information made while a student was in attendance unless the student rescinds the opt out request. 34 C.F.R. § 99.37(b).

In its public notice of directory information required by 34 CFR 99.37(a), a district may specify that disclosure of directory information will be limited to specific parties, for specific purposes, or both. If it does so, the district must limit its directory information disclosures to those specified in its public notice. 34 CFR 99.37(d). See *Model Notice for Directory Information* on U.S. DOE’s website.

H. What about Disclosures for Health and Safety Emergencies?

As indicated earlier, FERPA permits education agencies to disclose “personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health and safety of the student or other individuals.” 34 C.F.R. § 99.36(a).

In *Letter to Anonymous*, the U.S. DOE noted that “[a]n emergency exists if there is a significant and articulable threat to an individual’s health or safety when considering the totality of the circumstances.” 53 IDELR 235 (U.S. DOE 2008). Thus, when determining whether to release PII, an education agency can take into account “the totality of the circumstances” pertaining to a threat to the health or safety of a student or other individuals. If the education agency determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. 34 C.F.R. § 99.36(c).

The U.S. Department of Education has commented that “[t]he requirement that there must be an ‘articulable and significant threat’ does not mean that the threat must be verbal. It simply means that the institution must be able to articulate what the threat is under Sec. 99.36 when it makes and records the disclosure.” 73 Fed. Reg. 74,838 (2008). School officials must merely have reasonable grounds for reaching the conclusion that a health or safety emergency exists. *Letter to Anonymous*, 53 IDELR 235 (US DOE 2008). In the ordinary course, once a student is reported to and in the hands of the authorities, there will no longer be such an emergency.

Some specific circumstances that have been found to constitute a “health or safety emergency” include:

- District could transmit a student's threat assessment to local law enforcement under the “health or emergency” exception because the assessment indicated that the student was a “high level of risk” to others. *Letter to Anonymous*, 115 LRP 33141 (FPCO 2015).
- District could disclose two students’ essay tests to the police to determine whether one of the students wrote a threatening note that the school received earlier in the day. *Letter to Anonymous*, 111 LRP 64574 (FPCO 2011).
- FERPA would not have prevented the district from disclosing information about a student’s contagious disease to an OT who worked with the student if knowledge of the information is necessary to protect the health or safety of the student or other individuals. *Letter to Martinez*, 107 LRP 691 (FPCO 2006).
- Disclosure of a diabetic student’s PII without prior parental consent to medical personnel during an apparent diabetic emergency did not violate FERPA. *Letter re: Pioneer Sch.*, 108 LRP 12926 (FPCO 2007).

When an education agency discloses PII from education records pursuant to the health and safety emergency exception, it is required to record the following:

- (1) The articulable and significant threat to the health or safety of a student or other individuals that formed the basis of the disclosure; and
- (2) The parties to whom the agency disclosed the information.

34 C.F.R. § 99.32(a)(5).

I. Who are “Other School Officials with a Legitimate Educational Interest?”

FERPA regulations allow the education agency to determine which other individuals (in addition to teachers) possess such an interest. 34 C.F.R. § 99.31(a)(1). Outside parties can qualify as “school officials” to whom an education agency may disclose PII from an education record without consent.

In order to qualify as a school official, a “contractor, consultant, volunteer or other party to whom an agency or institution has outsourced institutional services or functions” may be considered a school official if the outside party:

1. Performs an institutional service or function for which the agency or institution would otherwise use employees;
2. Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and
3. Is subject to the requirements of FERPA governing the use and re-disclosure of personally identifiable information from education records.

34 C.F.R. § 99.31(a)(1)(i)(B).

Outside parties who may qualify as school officials may include:

- School transportation officials (including bus drivers and aides)
- School nurses
- Practicum and fieldwork students
- Unpaid interns
- Consultants
- Contractors
- Student or parent volunteers
- Third-party online educational service providers
- Others who are designated in the annual notice

Letter to Anonymous, 117 LRP 41927 (FPCO 2017) and *Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices* (US DOE 2014).

A couple of specific rulings to consider:

- Disclosures made to the College Board, such as during college applications or requests for accommodations, do not fall under the “school officials” exception to the parent consent rule. *Letter to Wall*, 115 LRP 4922 (FPCO 2014) [College Board does not qualify as an official within the district or an individual providing services on behalf of the district for FERPA purposes].
- States that enlist parents and volunteers to assist with their compliance and monitoring duties under Part B of the IDEA can allow those individuals to view PII from student records provided that they exercise direct control over their helpers. *Letter to Copenhagen*, 51 IDELR 108 (OSEP 2008) and *Letter to Heiligenthal*, 112 LRP 58499 (FPCO 2012).

J. What about Disclosures to Receiving Schools?

FERPA also permits disclosure without prior written consent “to officials of another school, school system or institution of postsecondary education where the student seeks or intends to enroll, or where the student is already enrolled so long as the disclosure is for purposes related to the student’s enrollment or transfer.” 34 C.F.R. § 99.31(a)(2). This applies “to any school that a student previously attended, not just the school that the student attended most recently.” 73 Fed. Reg. 74,818 (2008).

In using this exception, a school agency must make a reasonable attempt to notify the parent, unless the disclosure was initiated by the parent or eligible student or the education agency's annual FERPA notification includes a provision that education records will be forwarded upon request to other institutions where the student seeks admission or intends to enroll or is already enrolled. 34 C.F.R. § 99.34(a)(1)(ii). The parent/student is entitled to a copy of the record that was disclosed and has the right to a records hearing (seeking to amend the record). 34 C.F.R. § 99.34(a)(2) and (3).

K. What if the Education Agency is looking for Potential Placements for a Student? Can PII be sent without consent?

Because FERPA's exception talks about sending information to a school "where the student seeks admission or intends to enroll," probably not. An important case to consider on this issue:

W.A. v. Hendrick Hudson Cent. Sch. Dist., 67 IDELR 178 (S.D. N.Y. 2016). Parents' Section 1983 suit will not be dismissed where the district disregarded privacy concerns when referring a student to several potential placements, even though the parents refused consent to disclosure of education records. The Second Circuit has repeatedly recognized a protected right to privacy in medical records under the Due Process Clause of the 14th Amendment. Here, the district forwarded student special education records, including a neuropsychological evaluation and psychiatric update. While the district disclosed the records in its effort to comply with its obligations under the IDEA, the disclosure was made against the express statements of the student's parents and were "excruciatingly private and intimate in nature." Although the district argued that neither FERPA nor HIPAA creates a private cause of action for a breach of confidentiality, the parents' claims are based on a constitutional violation. Unauthorized disclosure of certain medical information might be a constitutional violation, and the district's motion to dismiss the parents' constitutional claims is denied.

L. What about the "Welfare and Tribal Agencies" Exception?

In 2013, the Uninterrupted Scholars Act (USA) was enacted to address the rights of students in foster care placement. USA amended FERPA in two ways:

1. It amends FERPA to permit educational agencies and institutions to disclose a student's education records, without parent consent, to a caseworker or other representative of a state or local child welfare agency or tribal organization authorized to access a student's case plan "when such agency or organization is legally responsible, in accordance with State or tribal law, for the care and protection of the student." 20 USC Sec. 1232g(b)(1)(L).
2. The USA also allows educational agencies and institutions to disclose a student's education records pursuant to a judicial order without requiring additional notice to the parent by the educational agency or institution in specified types of judicial proceedings in which a parent is involved (e.g., the parents are a party to a court proceeding involving abuse, neglect or dependency matters and the order/subpoena stems from that proceeding).

20 USC Sec. 1232g(b)(2)(B). These changes to FERPA (and, consequently, to the confidentiality provisions applicable to Parts B and C of the IDEA) were designed to assist in improving educational and developmental outcomes for children in foster care by providing those agencies that are legally responsible for such children access to specific information that is maintained by those agencies that provide early intervention or educational services to such children. *Guidance on the Amendments to the Family Educational Rights and Privacy Act by the Uninterrupted Scholars Act* (FPCO/OSERS 2014).

Under the USA, education agencies are not required to have written agreements with the child welfare agency or tribal organization prior to disclosing PII from education records to the welfare agency or tribal organization. However, the U.S. DOE has suggested that they may want to consider the development of a memorandum of understanding with the agency or organization to ensure that the agency or organization is aware of its responsibility to protect education records from unauthorized disclosure. *Guidance on the Amendments to the Family Educational Rights and Privacy Act by the Uninterrupted Scholars Act* (FPCO/OSERS 2014).

M. How do we Respond to Court Orders or Subpoenas?

Contact your school attorney!

As indicated previously, FERPA allows the disclosure of PII pursuant to a judicial order or lawfully issued subpoena. However, an education agency must make a reasonable effort to notify the parent/ eligible student of the order or subpoena in advance of compliance, so that the parent/student has the opportunity to seek protective action. 34 C.F.R. § 99.31(a)(9)(ii).

The advance notice requirement does not apply if the disclosure is in compliance with a federal grand jury subpoena or subpoena issued for law enforcement purposes and if the court has ordered that the existence or contents of the subpoena (or the information furnished in response) are not to be disclosed. 34 C.F.R. § 99.31(a)(9)(ii)(A) and 34 C.F.R. § 99.31(a)(9)(ii)(B). In addition, the advance notice requirement does not apply to an ex parte court order obtained by the U.S. attorney general (or designee not lower than an assistant attorney general) concerning investigations or prosecutions of an offense listed under the USA Patriot Act or an act of domestic or international terrorism. 34 C.F.R. § 99.31(a)(9)(ii)(C).

What kinds of attempts at providing notice will constitute a “reasonable effort” will turn on the particular circumstances of the case. In *Doe v. State of Ohio*, 61 IDELR 67 (S.D. Ohio 2013), the court held that the Ohio DOE was not required to provide direct notice to 1.7 million students whose education records would be disclosed during court proceedings. However, the court directed the district to seek alternative methods of appropriate notice.

N. What if the Education Agency and the Parents are in a Lawsuit?

If an education agency initiates legal action against a parent or student, the education agency may disclose to the court without a court order or subpoena the education records of the student relevant for the agency to proceed with its action as a plaintiff. If the parent or student initiates action against the education agency, the school is permitted to disclose to the court without order or

subpoena the student's education records relevant for the education agency to defend itself. 34 CFR 99.31(a)(9)(iii)(A) and (B).

O. What about Transmitting Records to Criminal or Juvenile Authorities?

Both FERPA and the IDEA contain provisions related to how education agencies can disclose student records to juvenile and criminal authorities. For students with disabilities, the IDEA sets out specific guidelines with respect to the transmittal of special education and disciplinary records when an education agency reports a student with a disability to the police. Specifically, “[a]n agency reporting a crime committed by a child with a disability must ensure that copies of the special education records and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime.” 34 C.F.R. § 300.535(b)(1). The education agency, however, may release the records only to the extent that FERPA permits the transmission. 34 C.F.R. § 300.535(b)(2).

While the IDEA regulations direct education agencies to transmit special education and disciplinary records to appropriate authorities when they report a crime committed by a student with a disability, the regulations do not identify by title or qualifications which entities or individuals may constitute appropriate authorities. *See* 34 CFR 300.535(b). According to the U.S. DOE, the circumstances that determine whether records may be transmitted will generally determine whether a specific request from a law enforcement official would need to be made, to whom the records would be transmitted, and the extent of the information provided. 64 Fed. Reg. 12,362 (1999). *See, e.g., Northside Indep. Sch. Dist.*, 28 IDELR 1118 (SEA TX 1998) [“appropriate authorities” are those who can either make, or order the making of, a determination of the student's special education needs]; *Baltimore Co. Pub. Schs.*, 51 IDELR 201 (SEA MD 2008) [district did not violate the IDEA when it failed to provide the records of a student with a hearing impairment and ADHD to a school resource officer. The IDEA requirement to transmit student records when reporting a crime by a student with a disability did not relieve the district of its FERPA obligation to obtain written parental consent before disclosing the records. FERPA states that parental consent is not required for the disclosure of records to school officials with legitimate educational interests in student education records. However, the officer who received the incident report from the district was not designated in a district policy identifying officials with a legitimate interest in student records].

The IDEA does not specify a timeline within which an education agency must transmit special education and disciplinary records of a student with a disability to law enforcement or juvenile authorities. In the absence of a specific timeline under the IDEA, at least one State DOE has applied a “reasonable time.” *See, e.g., Northside Indep. Sch. Dist.*, 28 IDELR 1118 (SEA TX 1998) [it will ordinarily be reasonable to expect districts to transmit records no later than the 10th consecutive school day of the transmitting district's calendar following the child's detention by law enforcement authorities].

P. What if an Individual School Employee (rather than the Education Agency) Individually Files Charges? Is Transmission of Records still Required?

In *Brookwood Academy*, 114 LRP 53987 (SEA OH 2014) the Ohio DOE Education concluded that a charter school did not violate the IDEA when it neglected to transmit the special education and disciplinary records of a student with a disability to a juvenile court after she allegedly assaulted a paraprofessional. Because it was the paraprofessional who reported the crime and she alone opted to file criminal charges against the student, the school was not obligated to provide the student's records to the court.

Q. What about OCR's Requirement for Informing the Parents of a Student Harassment Victim of the Outcome and Consequences Imposed on the Bully? Would that be a Violation of FERPA with Respect to the Bully's Information?

No. In *Letter to Soukup*, 115 LRP 18668 (FPCO 2015), FPCO emphasized its long-standing view that FERPA permits a school to disclose to the parent of the harassed student/eligible student information about any sanction imposed upon a student who was found to have engaged in harassment, as long as that sanction directly relates to the harassed student. However, disclosure of other information in the harasser's record, including information about sanctions that do not directly relate to the harassed student, may result in a violation of FERPA. FPCO provides examples of disciplinary sanctions that directly relate to a harassed student that include, but are not limited to "an order that the harasser stay away from the harassed student" and "an order that the harasser is prohibited from attending school for a period of time, or transferred to other classes."

R. What if Parents ask about other Student involved in an Incident with their Child?

Train staff to be very careful in responding to parent questions about incidents between multiple students. While investigation/disciplinary outcomes may be shared in harassment cases with the parents of victims, other information cannot be:

Letter to Anonymous, 116 LRP 41832 (FPCO 2016). When the school principal answered another parent's question as to who was involved in an incident of alleged bullying by her son, his identification of the student who was bullied was an inappropriate release of the victim's PII without consent. Generally, a school may not disclose PII from a student's education records, including a student's name.

Letter to Anonymous, 117 LRP 46542 (FPCO 2017). Where a third-grade teacher unlawfully disclosed personally identifiable information about a student without parental consent, the district took appropriate action. Here, the parent complained that her child's teacher told two classmates' parents that the child was the perpetrator who started a fight during P.E. and that she did not authorize this disclosure. The district argued that it was not required to seek parent consent to disclose the student's role in the altercation because the school record about the incident contained PII of multiple students. However, even in situations where a student's education record contains information about other children, the district may relay to a parent only the information in the record that pertains to their child, not others. For example, where a school disciplines a perpetrator

of a fight, the parents of the student victim are not entitled to know the details of the perpetrator's discipline, unless it directly relates to both students, such as when the perpetrator is ordered to stay away from the victim. Because the teacher in this case had no reason to inform the classmates' parents about the student's involvement in the altercation and the teacher did not obtain prior consent, the district violated student privacy rights. This complaint is closed, however, since the district provided documentation showing that it ordered the teacher to avoid confidentiality violations and to maintain professionalism in the future.

S. What about Data security and Avoiding Data Breaches?

According to the U.S. DOE, each local and state educational agency should develop and implement a comprehensive data security program, which is critical to protecting the individual privacy and confidentiality of education records. Specifically, the U.S.DOE has noted that education agencies should, among other things:

- Develop a data governance plan outlining organizational policies and standards regarding data security and individual privacy protection;
- Create policies and guidelines concerning personal and work-related use of internet, intranet, and extranet systems;
- Make computing resources physically unavailable to unauthorized users;
- Maintain an inventory of assets, including a list of both authorized and unauthorized devices used in the network, and utilize network mapping tools;
- Employ two-factor authentication technologies;
- Use numerous security tools to create a layered defense for the network, including firewalls and intrusion detection systems;
- Ensure the secure configuration of devices, hardware, and software;
- Establish access control through strong passwords and multiple levels of user authentication;
- Incorporate proactive, automated vulnerability scanning and patch management;
- Shut down unnecessary services;
- Encrypt data on mobile devices;
- Refrain from emailing confidential data or personally identifiable information;
- Develop policies and procedures to prevent and address security breaches; and
- Perform periodic audits and compliance monitoring.

On its website, the U.S.DOE has provided checklists for data security, data breach response and data governance.

VI. PARENT/STUDENT RIGHT TO SEEK AMENDMENT OF RECORDS

Both FERPA and the IDEA provide the right for parents to request amendment to their child's education records if they believe that information in the records collected, maintained or used is inaccurate or misleading or violates the child's privacy rights. 34 C.F.R. § 99.20(a) and 34 C.F.R. § 300.618.

A. What Procedures Apply to a Parental Request to Amend a Record?

With respect to requests to amend records of students with disabilities, IDEA regulations found at 34 C.F.R. §§ 300.618 -621 prescribe a specific procedure for parents to challenge alleged inaccuracies in their child's educational records. Upon the request of a parent, the education agency must decide whether to amend the information as requested "within a reasonable period of time" of receipt of the request. If the agency decides to refuse the request, it must inform the parent of the refusal and advise the parent of the right to a hearing to challenge the information in the education records "to ensure that it is not inaccurate, misleading or otherwise in violation of the privacy or other rights of the child." 34 C.F.R. §§ 300.618-619.

If, as a result of the hearing, the agency decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of the student, it must amend the information accordingly and inform the parent of its decision in writing. However, if the agency decides that the information is not inaccurate, misleading or otherwise in violation of privacy rights, it must inform the parent of the right to place in the records that the agency maintains a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency. 34 C.F.R. § 300.620.

Any statement/explanation submitted by the parent must be maintained by the agency as part of the child's records as long as the record or contested portion is maintained by the agency and if the child's record or the contested portion is disclosed by the agency to any party, the explanation/statement must also be disclosed to the party. 34 C.F.R. §300.620(c).

B. What Does a "Records Hearing" Look Like?

The actual "records hearing" regarding a student with a disability is to be conducted according to the procedures set forth in the FERPA regulations set out in 34 C.F.R. § 99.22 and include the following:

- The agency must hold the hearing within a reasonable time after it receives the request for a hearing from a parent or eligible student.
- The agency must give the parent or eligible student notice of the date, time and place reasonably in advance of the hearing.
- The hearing is to be conducted by any individual, including an official of the agency, who does not have a direct interest in the outcome of the hearing.
- The agency must provide the parents or eligible student a full and fair opportunity to present evidence relevant to the issues raised.
- The parents or eligible student may, at their own expense, be assisted or represented by one or more individuals of their own choice, including an attorney.
- The agency must issue a written decision within a reasonable period of time after the hearing.
- The decision must be based solely on the evidence presented at the hearing and must include a summary of the evidence and the reasons for the decision.

In terms of what “rules of evidence” or procedure may apply to a records hearing, IDEA and FERPA are silent. The adoption of any pertinent rules governing admission of evidence is a matter of state or local discretion.

C. Can Parents Ask that a Child’s Grades or Test Scores be Changed?

There are several reported decisions regarding a parental request to use FERPA’s record amendment provision to ask the education agency to change a child’s grades or test scores. Generally, it has been allowed if the parent demonstrates that the grade was inaccurately recorded; that a mathematical error was made in its computation; or that there was a scoring error on a test that affected the grade. Absent proof of any inaccuracy, FPCO has found that FERPA cannot be used to dispute the validity of report cards, tests or other assessments. *Letter to Anonymous*, 107 LRP 52770 (FPCO 2007). *See also*, *Letter to Anonymous*, 107 LRP 20021 (FPCO 2007) [parent’s attempt to require district to change comments made by a teacher on a second-grade report card is not within the scope of FERPA’s records amendment procedure, as FERPA only allows parents to challenge facts that were inaccurately recorded -- not a grade, evaluation or opinion about the student] and *Letter to Anonymous*, 116 LRP 17292 (FPCO 2015) [district did not violate FERPA when it declined to amend state standardized test scores when student chose not to participate in a state assessment and district gave the student a “0” grade. Parent’s contention that this score fails to reflect student’s non-participation” is rejected where it is a “district level decision” to assign a “0” to every student who does not participate in the state assessment. FERPA’s amendment provisions do not apply to substantive or administrative decisions made by school officials].

D. Can Parents Seek to Remove a Record or Information in a Record because they Disagree with it?

While FERPA provides parents the opportunity to seek amendment of education records that they believe contain information that is inaccurate or misleading, it does not provide them with the opportunity to change substantive decisions made by an education agency just because they do not agree with it. In *Letter to Anonymous*, 115 LRP 18661 (FPCO 2015), FPCO stated that a mother who disagreed with a physician’s report in her child’s school file did not have a right under FERPA to amend the report. FPCO noted that the physician developed the report based upon his conversations with other medical professionals and because the report contained “an accurate reflection of the doctor’s analysis,” it constituted a substantive decision.

Other relevant guidance on this issue from FPCO:

Letter to Anonymous, 116 LRP 48415 (FPCO 2016). Although the parent is unhappy about what a teacher wrote concerning her son in a progress report, she cannot use FERPA’s amendment procedure to modify the report. Because the parent’s challenge is to the substantive decision made by school personnel rather than aimed at correcting factual inaccuracies in the education records, an investigation will not be opened.

Letter to Anonymous, 116 LRP 39321 (FPCO 2016). Where a parent asked her son’s district to revise his disciplinary records regarding two incidents of misconduct during the 2012-13 and 2013-

14 school years, the district is not obligated to comply or provide her with a records hearing because the records accurately reflect the school's substantive disciplinary determinations.

Letter to Anonymous, 116 LRP 6103 (FPCO 2015). Parent may not use FERPA's amendment provisions to modify an incident report regarding a medical emergency which occurred at school or expunge a video surveillance tape of the incident from her child's education records. Although the parent alleges that the report and tape are "misleading," this request falls outside the scope of FERPA.

Letter to Moody, 113 LRP 9505 (FPCO 2013). Because the parent's amendment request appears to challenge the district's attendance procedures rather than to seek to amend inaccuracies in the student's education records, the district has no obligation to consider the request.

E. As Part of an Amendment Request, may a Parent ask for a Record to be Destroyed? Can Districts Destroy Records even when a Parent does not Ask for that?

Not necessarily under FERPA, but the answer is different under the IDEA.

Generally, both IDEA and FERPA provide that an education agency may not destroy any education records if there is an outstanding request pending to inspect and review them. 34 C.F.R. 99.10(e). But neither law requires that the records be kept forever.

With respect to whether an education agency *must* destroy records when requested by a parent, FERPA does not require that a district destroy education records upon parental request. However, it might be appropriate in some circumstances as the best way to amend a record that is inaccurate, misleading or in violation of a student's privacy rights.

With respect to destruction of education records of students with disabilities, the IDEA contains additional requirements. 34 C.F.R. § 300.624. Under the IDEA, education agencies are required to inform parents when PII collected, maintained or used under Part B is no longer needed to provide educational services to the child, and the information must be destroyed at the request of the parents. However, a permanent record of a student's name, address and phone number, his/her grades, attendance record, classes attended, grade level completed and year completed may be maintained with no time limitation.

While FERPA contemplates that education agencies may destroy education records at any time without notice to parents (unless there is an outstanding request from the parent to inspect and review records—*See Letter re: Keystone Cent. Sch. Dist.*, 105 LRP 25813 (FPCO 2005)), it is important that education agencies are careful when destroying special education records. For example, in *Washoe Co. Sch. Dist.*, 115 LRP 26190 (SEA NV 2015), the district had developed what were called "IEP checklists" for a student with an undisclosed disability in order to comply with a prior administrative order from the State Department. Once the district electronically transmitted the checklists to the State, it shredded the originals and deleted the emails to the State and their attachments. When the student's parents learned that the district destroyed the checklists, they filed a State complaint alleging that the destruction of the checklists amounted to an IDEA violation. The State found that the district should have informed the parents before destroying the

checklists and ordered the district to conduct appropriate training of its staff and retrieve the checklists so that they could be produced for the parents.

F. Are there any Guidelines on Methods for Destruction of Education Records?

In May 2014, the U.S. Department of Education's Privacy Technical Assistance Center released guidance—*Best Practices for Data Destruction* (last updated in 2016)—to serve as a best practices guide on properly destroying sensitive student data after it is no longer needed. It details the life cycle of data and discusses various legal requirements relating to the destruction of data under FERPA and examines a variety of methods for properly destroying data. The guide also discusses best practices for data destruction and provides some real-world examples of how to implement it within an education agency. The document can be downloaded from the U.S DOE's website.