

Family Educational Rights and Privacy Act (FERPA)

2008 AACRAO Annual Meeting

Primary Rights of Students under FERPA

- **Right to inspect and review education records**
- **Right to seek to amend education records**
- **Right to have some control over the disclosure of information from education records**

§ 99.3 Definitions

Attendance

- Currently defined to include attendance in person or by correspondence.
- Proposed regulation will add other situations in which students are not physically present on a campus, but attend class in another manner, such as:
 - video conference
 - satellite
 - internet
 - other electronic information and telecommunications technologies
- Ensures that the records of individuals receiving instruction through distance learning and other contemporary modalities are understood to be students whose records are protected under FERPA.

Directory Information

- Currently defined as information that would not generally be considered harmful or an invasion of privacy if disclosed.
- Some items are listed specifically, but no items are listed as prohibited from being designated as directory information.
- Proposed regulations will specifically prohibit the designation of a student's SSN or student ID number as directory information.

Directory Information, cont.

- Proposed regulations will permit the designation as directory information of a student's "user ID" or other unique personal identifier used to access or communicate in electronic systems when the identifier functions as a name, and cannot be used without some other authentication factor (such as a secret password or PIN) to gain access to education records.

-Ensures that schools are able to use electronic information systems to deliver certain student services.

Disclosure

- Currently defined as permitting access to or the release, transfer, or other communication of information from education records to any party by any means. Current interpretation prohibits disclosing education records back to the original provider of the records.
- Proposed regulations will change the definition of "disclosure" to permit the return of an education record to the provider or creator of the record.
- Change will allow an institution to access information it originally provided to a State consolidated record system without violating prohibition on redisclosure.
- Change will allow an institution to return a questionable document (such as possibly falsified transcripts or letters of recommendation) to the purported sender for verification of the information in the document.

Education records

Post-enrollment records:

- Current regulations exclude records that contain information about an individual after he or she is no longer a student. Intended to apply to fundraising and other records related to alumni.
- This provision has been misinterpreted to apply to **any** records created or received after a student is no longer enrolled, such as a settlement agreement that concerns matters that arose while the individual was a student in attendance.
- Proposed regulations will clarify that the exclusion covers only those records that concern an individual after that person is no longer a student, such as alumni activities.

Education records (continued)

Peer grading

- Current definition of "education records" does not provide any guidance on the status of student-graded tests and assignments before they have been collected and recorded by an instructor.
- The practice known as "peer grading" was the subject of a U.S. Supreme Court decision in Owasso. The Court held that this practice does not violate FERPA.
- Proposed regulations will implement the U.S. Supreme Court's decision in Owasso by specifically permitting the use of peer grading.

Personally Identifiable Information

- Currently defined to include student's name and other personal identifiers, as well as indirect identifiers, such as the address of the student or personal characteristics or other information that would make the student's identity easily traceable.
- Current regulations do not define "easily traceable."
- Proposed regulations will add "biometric record" to the list of personal identifiers.
- Proposed regulations will list additional indirect identifiers, such as date and place of birth and mother's maiden name.
- Proposed regulations will delete the non-defined term "easily traceable" and modify definition to include other information that "would allow a reasonable person in the school or its community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty."

State auditor

- Current regulations permit a school to disclose education records to State and local educational authorities and officials for audit or evaluation of education programs, or to enforce or comply with Federal legal requirements of education programs.
- Current regulations do not address the disclosure of education records to State auditors not employed by an educational authority.
- Proposed regulations will modify define "state auditor" as a party under any branch of government with authority and responsibility under State law to conduct audits.
- This will clarify that audits conducted by legislative branch officials and other parties that are not educational authorities may access education records for purposes of auditing Federal or State supported *education* programs.

§ 99.5 Disclosures to parents and rights of students

- Current regulations state that all rights of parents under FERPA transfer to the student when the student reaches 18 years old or attends a postsecondary institution.
- Current regulations (§ 99.31) contain permitted disclosures to parents after FERPA rights have transferred to students.
- Some schools have misinterpreted the transfer of rights to prohibit any disclosure of education records without consent to parents.

§ 99.5 Disclosures to parents and rights of students

- Proposed regulations will clarify that schools are permitted to disclose education records without consent to parents in some circumstances:
 - When a student is a dependent student under the IRS tax code;
 - When the student has violated a law or the school's rules or policies governing alcohol or substance abuse, if the student is under 21 years old;
 - When the information is needed to protect the health or safety of the student or other individuals in an emergency.
- Ensure that schools understand that FERPA does not block information sharing with parents if any of the above exceptions apply.

Authorized Disclosures Without Prior Written Consent

§ 99.31(a)(1)(i)(A) "Other school officials"

- Current regulations permit disclosure of education records to school officials within the agency or institution if the official has been determined to have a legitimate educational interest in the records.
- Current regulations do not directly address disclosure of education records to contractors, consultants, volunteers, and other outside parties providing services and functions or otherwise acting for an agency or institution.

Authorized Disclosures Without Prior Written Consent, cont.

- Proposed regulations will expand the school official exception to include contractors, consultants, volunteers, and other parties to whom a school has outsourced services or functions under certain circumstances:
 - The party is under the direct control of the school;
 - The party is subject to the same conditions governing the use and redisclosure of education records applicable to other school officials;
 - The school has specified these parties as school officials in their annual FERPA notice as required in § 99.7.
 - Clarifies the specific conditions under which schools may disclose education records to outside parties performing services or functions for the school.

99.31(a)(1)(ii)

99.31.(a)(1)(ii) Controlling access to education records by school officials

- Current regulations do not specify the steps a school must take to ensure that a school official only gains access to education records for which the official has a legitimate educational interest.
- Some institutions permit school officials unrestricted access to education records, particularly those contained in electronic records systems.
- Proposed regulations will require schools to use "reasonable methods" to ensure an official is given access to only those education records in which the official has a legitimate educational interest.

99.31(a)(1)(ii)

- Schools may choose to use methods such as:
 - Physical controls (locked filing cabinets)
 - Technological controls (role-based access controls for electronic records)
 - Administrative policies (must be effective in ensuring compliance)

-Clarifies that a school is responsible for ensuring that it is taking measures to permit only those officials with a legitimate educational interest to access education records.

99.31(a)(2)

99.31(a)(2) Disclosure to a school where student seeks or intends to enroll

- Current regulations permit a school to disclose education records to another school where the student seeks or intends to enroll.
- Current regulations do not address whether a school is permitted to disclose education records after a student has actually enrolled in another school.
- Proposed regulations will clarify that the authority to disclose or transfer education records to a student's new school continues after actual enrollment so long as the disclosure is in connection with the student's enrollment.
 - Ensures that a school may supplement, update, or correct records sent during the student's application or transfer period.

§ 99.31(a)(6)

§ 99.31(a)(6) Organizations conducting studies

- Current regulations state that a school may disclose education records to organizations conducting studies "for, or on behalf of" the disclosing school but does not explain what that means.
- Proposed regulations will clarify that a school does not have to initiate the research request or agree with or endorse the conclusions or results of the study. The school must agree with the purposes of the study and retain control over the information from the education records it discloses.

§ 99.31(a)(6)

- The school must have a written agreement with the receiving organization that specifies:
 - the purposes of the study;
 - the information may only be used to meet the purposes of the study stated in the agreement;
 - the restriction on redisclosure of the information;
 - the requirement for destruction of the information when no longer needed.
- Clarify requirements that information disclosed under this exception is used only to meet the purposes of the study, and that all redisclosure and destruction requirements are met.

§ 99.31(a)(9)(ii)

§ 99.31(a)(9)(ii) Ex parte court orders under USA Patriot Act

- Current regulations do not address amendments to FERPA under the USA Patriot Act.
- Proposed regulations will implement the authority for the U.S. Attorney General to apply for an ex parte court order that permits the Attorney General to collect education records from a school that are relevant to an investigation or prosecution of an act of domestic or international terrorism.
- Proposed regulations will permit the disclosures without consent or notice to the student.
 - Implements a new exception to FERPA's consent requirement contained in the USA Patriot Act.

§ 99.31(a)(16)

§ 99.31(a)(16) Registered sex offenders.

- Current regulations do not address changes made to FERPA by the Campus Sex Crimes Prevention Act .
- Proposed regulations will implement a new exception to FERPA that permits schools to disclose information received under a community notification program concerning a student who is required to register as a sex offender in the State.
 - Implements a new exception to FERPA's consent requirement contained in the Campus Sex Crimes Prevention Act.

§ 99.31(b)

§ 99.31(b) De-identification of information

- Current regulations permit release of information without consent from education records if all personally identifiable information has been removed.
- Proposed regulations will provide objective standards to inform schools when information releases may be considered to be de-identified.
- Proposed regulations will apply to individual, redacted records and statistical information from education records in both student level and aggregate form.
- Proposed regulations will clarify the permitted use of de-identified data releases for research purposes.
 - Implement objective standards schools can use to determine when information from education records can be released as de-identified data.

§ 99.31(c)

§ 99.31(c) Identification and authentication of identity.

- Current regulations do not address how a school must ensure that it has identified a party to whom it discloses education records.
- Proposed regulations will require a school to use reasonable methods to identify and authenticate the identity of parents, students, school officials, and other parties before disclosing education records.
- Identification means determining who is the intended or authorized recipient of the information.
- Authentication means ensuring that the recipient is who he or she claims to be.
- Proposed regulations will permit use of PINs, passwords, personal security questions; smart cards and tokens; biometric indicators; or other factors known or possessed only by the authorized recipient.
 - Will clarify identification and authentication requirements, particularly in complex electronic record storage and transmission environments.

§ 99.33(b)(2)

§ 99.33(b)(2) Redisclosure of education records under court order or subpoena

- Current regulations state that a party may redisclose education records in compliance with a judicial order or lawfully issued subpoena.
- Proposed regulations will clarify that the redisclosing party is responsible to notify the eligible student(s) in compliance with FERPA's requirements before making the disclosure.
 - Clarifies the responsibility of the original disclosing party and the redisclosing party to comply with FERPA's notice requirements in response to a judicial order or subpoena for education records.

§ 99.33(c)

§ 99.33(c) Redislosure of education records under Clery Act

- Current regulations under the Clery Act require a school to inform the accuser and the accused of the outcome of a school's disciplinary proceeding of an alleged sex offense.
- Current FERPA regulations permit this disclosure, but may prohibit the recipient from redisclosing the information to another party without prior consent of the student.
- Some schools have required an accuser to execute a non-disclosure agreement before making the disclosure required under the Clery Act.
- Proposed regulations will clarify that schools may not require the accuser to execute a non-disclosure agreement or otherwise interfere with the redisclosure or other use of information required to be disclosed under the Clery Act.
 - Clarifies the responsibility of the school to disclose information as required under the Clery Act.

§ 99.35(b)(1)

§ 99.35(b)(1) Redislosure of education records by Federal and State officials (listed in § 99.31(a)(3)).

- Current regulations do not permit Federal and State officials to redisclose education records.
- Proposed regulations will permit these officials to redisclose education records under the same conditions as other recipients of education records.
- A State educational agency that received records for audit, evaluation, or compliance and enforcement purposes would be permitted to redisclose records for other qualifying purposes, such as:
 - forwarding records to a student's new school district
 - to another listed official, including the Secretary, or a postsecondary authority
 - to an accrediting agency
 - in connection with a health or safety emergency.
- Enable SEAs and other Federal and State officials to utilize the redisclosure provisions available to other parties receiving education records.

§ 99.36

§ 99.36 Health and safety emergency

- Current regulations permit disclosures if knowledge of the information is necessary to protect the health or safety of the student or other individuals.
- Current regulations require this provision to be "strictly construed."
- Proposed regulations will remove the strict construction.
- Proposed regulations will permit a disclosure when a school, taking into account the totality of circumstances, determines there is an articulable and significant threat to the health or safety of the student or other individuals.
- Provides better balance of safety and privacy interests.

Directory Information

§ 99.37(b) Former students

- Current regulations permit disclosure of directory information on former students without providing notice or additional opt-out opportunities.
- Proposed regulations will clarify that a former student's opt-out provided while a student must continue to be honored unless specifically rescinded by the former student.
- Provide better understanding of ability to disclose directory information of former students.

§ 99.37(c)

§ 99.37(c) Student identification and communication in class

- Current regulations do not address whether an opt-out from directory information also applies within the classroom in the identification of the student by name or disclosure of an electronic identifier.
- Proposed regulations will provide specific notice that an opt-out from directory information does not prevent a school from identifying a student by name or from disclosing an electronic identifier or institutional email address in the classroom.
- Clarifies that a student's opt-out from directory information does not include a right to be anonymous in the classroom, or to impede routine classroom communication and interactions.

§ 99.37(d)

§ 99.37(d) Prohibition on use of SSNs to identify students when disclosing or confirming directory information

- Proposed regulations will clarify that SSNs may not be used to identify a student when disclosing or confirming directory information.
- Clarify that use of SSN to identify a student to disclose or confirm directory information creates an improper disclosure of the student's SSN.

**§§ 99.62, 99.64, 99.65, 99.66, and 99.67
Enforcement**

- Current regulations contain provisions that address the Department's authority, through FPCO, to investigate a school when a student files a complaint.
- Proposed regulations will enhance and clarify the Department's responsibilities as described in Gonzaga University v. Doe, 536 U.S. 273 (2002).
- There is no intention or plan to initiate FERPA institutional compliance reviews or expand investigations beyond the current practices of the Office.

**§§ 99.62, 99.64, 99.65, 99.66, and 99.67
Enforcement**

- Proposed regulations will clarify the information FPCO may require to investigate and resolve complaints, and that a complaint does not need to allege that a school has a policy or practice in violation of FERPA.
- Proposed regulations will clarify that FPCO may find a FERPA violation without further determining that the violation was based on a policy or practice of the school.
- Proposed regulations will clarify that the Secretary may take action to terminate assistance only when a school has been found to have a policy or practice in violation of FERPA, **and** the school fails to voluntarily come into compliance.

Safeguarding

- Recommendations to assist in safeguarding education records.
- Schools are encouraged to review NIST 800-100 and NIST 800-53 for guidance.
- Suggested responses are included to data breaches and other unauthorized disclosures:
 - Report the incident to law enforcement authorities
 - Take steps to retrieve data and prevent further disclosures
 - Identify all affected records and students
 - Determine how the incident occurred
 - Determine whether institutional policies and procedures were breached
 - Conduct a risk assessment

Technical Assistance

For technical assistance and advice to school officials:

Family Policy Compliance Office
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-8520

(202) 260-3887 Telephone
(202) 260-9001 Fax



Informal Technical Assistance



For informal requests for technical assistance, email us at:

FERPA@ed.gov

Visit our web site:

<http://www.ed.gov/policy/gen/guid/fpco/index.html>


