

Privacy Concerns: The Effects of the Latest FERPA Changes

By Christine Cossler



Privacy, something once taken for granted, has again become top-of-mind for public school districts thanks to technology's increasing reach, as well as new changes to privacy laws governing student information.

Recently, educators have had to face important changes to the Family Educational Rights and Privacy Act (FERPA), originally signed into law in 1974. As school business officials are more than aware, FERPA has a twofold purpose: (1) to ensure that parents have access to their children's education records and (2) to protect the privacy rights of both parents and children by limiting access to those records without parental consent.

The latest round of amendments to this 35-year-old law went into effect

on January 8, strengthening some areas of privacy and clarifying others. Many of these amendments codify positions taken by courts over the years in interpreting FERPA, while other amendments impose new requirements.

All changes affect how school districts must handle such issues as school safety, access to education data for research and accountability, and the safeguarding of education records.

The most significant changes affect the following areas:

- Attendance
- Directory information and personally identifiable information
- Disclosure
- Definition of education records
- School officials exception
- Control of access to education records by school officials

- Records to a student's new school
- Ex parte court orders under USA PATRIOT Act
- Registered sex offenders
- Identification and authentication of identity of parties requesting education records disclosure
- Health and safety emergencies
- Student identification and communication in class for opt-outs
- Enforcement provisions

Obviously, the goal of these new changes is to provide students with a quality education in a safe environment—with the knowledge that their privacy is protected. But what burdens of accountability now rest on your shoulders to ensure that goal? What changes do you need to make? And what do you need to know about the ongoing bolstering of privacy issues in public education?

This article should familiarize you with the most recent FERPA changes and help you stay within the law when you receive a public records request or when other issues arise pertaining to the privacy of your district's education records.

Attendance

The final regulations amend the definition of "attendance" to encompass other situations in which students "attend" class but are not necessarily present physically. They include videoconference, satellite, the Internet, and other electronic information and telecommunications technologies.

The new amendment also clarifies that covered students include those who receive instruction through distance learning and other contemporary modalities.

Directory Information and Personally Identifiable Information

Under past FERPA regulations, schools could disclose directory information about former students without providing notice as otherwise required or an additional opt-out opportunity. The most recent changes now require schools to honor a former student's opt-out request made while in attendance, unless it has been specifically rescinded by the former student.

Not surprisingly, the new amendments also focus heavily on the use of students' Social Security numbers. The amendments clarify that using a student's Social Security number as an identification element when disclosing or confirming directory information is prohibited unless the student has provided written consent for the disclosure.

You may disclose student ID numbers as directory information if they qualify as electronic personal identifiers by essentially functioning as a name. They cannot be used solely to authenticate identity or gain access to education records.

Many directories that support electronic information systems used to deliver certain student services require disclosure of a user name or other personal identifier when students gain access to these systems. They include Web-based class registration, access to academic records, and library resources.

Amended FERPA regulations allow these electronic personal identifiers to be designated as directory information, including student ID numbers, only if the identifier functions essentially as a name.

Disclosure

In light of the new amendments, "disclosure" now excludes returning an education record or information from a record to the party identified as the record's creator or provider.

This change allows school districts to access information originally provided to a state-consolidated record system without violating the statutory prohibition on redisclosure. Districts are not authorized to release or transfer education records to a student's previous institution that is *not* identified as the source of those records.

The amendments now also allow schools to return questionable documents, such as transcripts, letters of recommendation, and other files, to the sender for verification.

Definition of Education Records

The amended regulations clarify that postenrollment records pertaining to an individual's previous attendance are considered "education records," regardless of when they were created or received by an institution.

The final regulations, codifying prior court decisions, create an express exception to the definition of "education records" that excludes peer-on-peer-graded papers before a teacher collects and reads them. This exclusion clarifies that peer grading does not violate FERPA and should be conveyed to your district's teaching staff as such.

School Officials Exception

The school officials exception underwent many changes and clarifications under the new amendments in light of the fact that the term "school officials" has been expanded to include contractors, consultants, volunteers, and other outside service providers that perform institutional services and functions. So what does the expansion of this exception mean?

If a contractor or other outside service provider is given access to education records, that access must be under the direct control of the disclosing institution, that is, your school district. This use is subject to the same conditions on use and redisclosure of these records that govern other school officials under FERPA regulations.

Contractors must also ensure that only individuals with legitimate educational interests have access to students' personally identifiable information in the education records created or maintained on behalf of the district. They also may not redisclose this information without consent unless the district has authorized the redisclosure under a FERPA exception and records the subsequent disclosure.

Your district also may not disclose education records to any outside service provider under this exception unless you have specified in your annual FERPA notification that you use contractors, consultants, and volunteers as "school officials" to provide certain services and functions key to the operation of your institution.

This exception permits disclosure only if you outsource a service that your district would otherwise provide using its own employees. Note that recording a disclosure to an outside service provider does not

waive your requirement to comply with the annual notification mandate.

Control of Access to Education Records by School Officials

The latest amendments require school districts to use “reasonable methods” to ensure that teachers and other school officials, including outside service providers, obtain access to only those paper or electronic records in which they have legitimate educational interests.

High-risk records, such as Social Security numbers and other information that could be used for identity theft, should generally receive greater and immediate protection than medium- or low-risk records.

Records to a Student’s New School

Prior FERPA regulations allowed school districts to disclose education records, without consent, to officials of another school system or postsecondary institution where a student “seeks or intends to enroll.”

The amended regulations clarify the “seeks or intends to enroll” language to show that the authority to disclose or transfer education records—including health and disciplinary records—to a student’s new school does not cease automatically the moment a student has enrolled and continues to be in effect for any disclosures related to a student’s enrollment or transfer.

This clarification now allows a student’s previous school to supplement, update, or correct any records it sent during a student’s application or transfer period—something previously unclear under FERPA.

Ex Parte Court Orders under the USA PATRIOT Act

The new changes allow school districts, per ex parte court orders under the USA PATRIOT Act, to disclose records to the attorney general without the typically required consent or notice to the parent or student if the school district ensures the order’s validity.

Registered Sex Offenders

The amended regulations add a new exception that allows school districts to disclose, without consent, information received from a state under the Wetterling Act about a student who is required to register as a sex offender in the state.

Identification and Authentication of Identity of Parties Requesting Education Records Disclosure

Under the latest FERPA amendments, school districts must use reasonable methods to identify and authenticate the identity of parents, students, school officials,

and any other parties to whom they disclose education records. Prior regulations did not address this issue.

Districts may use personal identification numbers, passwords, personal security questions, “smart cards” and tokens, biometric indicators, or other factors known or possessed only by the user as appropriate in the context of electronic disclosure.

Health and Safety Emergencies

If the district determines that there is an explainable and significant threat to the health or safety of a student or other individuals, the school may disclose information from education records to appropriate parties whose knowledge of the information is necessary to protect the health and safety of the student or other individuals.

The final regulations remove the “strict construction” of such health and safety emergency provisions. Instead, they now give education agencies the ability to consider that totality of circumstances in respect to how a threat pertains to the safety and health of students and other individuals.

Student Identification and Communication in Class for Opt-Outs

The most recent changes clear up debate on the fact that if a student opts out of directory information disclosures, it does not prevent schools from identifying that student by name or from disclosing a student’s electronic identifier or institutional e-mail address in class.

Enforcement Provisions

The latest amendments allow the U.S. Department of Education’s Family Policy Compliance Office to investigate allegations made by either school officials or other nonparent or nonstudent parties on the grounds that FERPA has been violated.

Subject to investigation is information brought to the attention of the Family Policy Compliance Office by media reports.

Understanding the Regulations

The vast number of changes in the latest revisions to FERPA can be overwhelming, to say the least. The final regulations include different nuances and interpretations of education records privacy than in the past.

Experienced legal counsel can help you wade through this sea of updates and review your school district’s current privacy policies to ensure that you are compliant with the new changes. No one wants a visit from an enforcement officer regarding FERPA violations.

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