



May 25, 2016

## FERPA UPDATE - May 2016 (Also Covering 2014 and 2015)

### A. PRIVACY IN GENERAL - GOVERNING LAW

California Constitution, art. 1, § 1; Penumbras emanating from the guarantees of the U.S. Constitution; statutory schemes passed by Congress and the State legislature; and related case law.

### B. BROAD CATEGORIES OF PRIVACY RIGHTS

1. Disclosures regarding personal/intimate decisions/conduct in the areas of family, marriage, sexual relations, medical treatment and association including child rearing, private sexual conduct with consenting adults, use of contraceptives, abortion, marriage, procreation, right to die and private group affiliations.
2. Physical invasions of privacy interests including drug testing, eavesdropping, unreasonable searches/seizures of persons and property.
3. Appropriation of a person's name, voice, signature, photograph or likeness.
4. Collection of, access to and disclosure of personal information in the areas of medical records, educational records, financial records and business records.

### C. PRIVACY PROTECTED PUPIL RECORDS AND THE INFORMATION IN THOSE RECORDS - GOVERNING LAW

1. FERPA - FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT; 20 U.S.C. § 1232g

FERPA is Federal law that gives parents the right to have access to their child's education records, the right to seek to have the records amended, and the right to have some control over the disclosure of information from the records. The term "education records" means those records directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution.

Courts have routinely held that FERPA does not create a private right of action against an educational institution. Complaints, however, may be filed with the Department of Education, which will investigate all issues. An educational institution that fails to comply with FERPA may forfeit its federal funding.

State statutes and common law may allow for monetary damages for the disclosure of private information in some circumstances.

2. REGULATIONS DULY DEVELOPED BY THE OFFICE OF THE SECRETARY, DEPARTMENT OF EDUCATION IN 34 C.F.R. Part 99

Duly enacted regulations are law. 34 C.F.R. Part 99 is an extensive set of rules governing educational agency's obligations under 20 U.S.C. § 1232g. The regulations contain directives which address particular nuances associated with the implementation of FERPA. The regulations also provide guidance of a more general nature.

3. CASE LAW FROM THE FEDERAL COURTS

*Owasso Ind. School Dist. v. Falvo*, 534 U.S. 426 (2002). Peer Grading, whereby a teacher asks students to score each other's tests, papers, and assignments as the teacher explains the correct answers to the entire class does not violate FERPA as the assignments are not educational records, at least until the teacher has collected them and recorded them in his or her grade book.

*S.A. v. Tulare County Office of Education*, 53 IDELR 111 (E.D. Calif 2009). Emails are maintained as education records only when they are kept in a filing cabinet in a records room at the school, saved on a permanent secure database or printed and placed in a student's file. Emails that are never saved or printed for any purpose are not an education record and a school district does not have to provide it in response to a parent's inspection request.

4. FPCO - FAMILY POLICY COMPLIANCE OFFICE WITHIN THE U.S. DEPARTMENT OF EDUCATION

FPCO issues guidance which is treated as a persuasive authority or authoritative guidance.

FPCO administers FERPA. In doing so addresses particular issues pertaining to education records by issuing letters in response to inquires or complaints. Such letters are a form of regulatory guidance and serve to fill the gap left by the statues and regulations.

5. PTAC - PRIVACY TECHNICAL ASSISTANCE CENTER WITHIN THE U.S. DEPARTMENT OF EDUCATION

Set up as a resource to learn about data privacy, confidentiality and security practices related to student level longitudinal data systems and other uses of student data.

6. CALIFORNIA EDUCATION CODE §§ 49060-49079.9

California has its own version of FERPA. Largely, it is “in step” with the federal version except that many of the various requirements with which school districts must comply are more stringent. The California Department of Education administers Education Code §§ 49060-49079.9.

7. CASE LAW FROM THE STATE COURTS

None in California.

8. CALIFORNIA ATTORNEY GENERAL OPINIONS

64 Ops. Cal. Atty. Gen. 292 (1981). Pupil records, protected by Education Code § 49076, of pupils who are not parties to a hearing regarding another child’s placement or continued enrollment in a special education class may be produced by a school district in response to a subpoena duces tecum issued by the Superintendent of Public Instruction only when a court has ordered the school district to comply with the subpoena, in the manner provided by law or when the parents of the affected pupils consent in writing to the release of the pupil records of their children.

84 Ops. Cal. Atty. Gen. 146 (2001). A school district may, without issuance of a subpoena or court order or parental consent, allow the district attorney to view a videotape of an assault upon a student by another student that was recorded on the security camera of a school bus, depending upon the particular circumstances.

78 Ops. Cal. Atty. Gen. 18 (1995). School district may purposefully exclude military service representatives from access to pupil directory information.

9. OTHER RELATED PRIVACY LEGISLATION ENACTED BY THE FEDERAL GOVERNMENT

COPPA - Children’s Online Privacy Protection Act - 15 U.S.C. §§ 6501-6505; 16 C.F.R. Part 312. Imposes requirements on operators of websites or online services directed to children under 13 years old.

PPRA - Protection of Pupil Rights Amendment - 20 U.S.C. § 1232h. It governs the administration to students of a survey, analysis, or evaluation that concerns protected areas such as personal or family; political affiliations or beliefs; mental or psychological problems; sex behavior or attitudes; religious practices, affiliations or income.

UNINTERRUPTED SCHOLARS ACT - 20 U.S.C. § 1232g(b)(1)(L). Amends FERPA to allow schools to disclose personally identifiable information from

educational records of students in foster care, without parental consent, to an agency caseworker of a local child welfare agency or tribal organization that is responsible for the care and protection of the student.

HIPAA - Health Insurance Portability and Accountability Act - 29 and 42 U.S.C.; 45 C.F.R. Parts 160, 162 and 164

Title II of HIPAA sets out policies, procedures and guidelines for maintaining the privacy and security of individually identifiable health information. The rules apply to “covered entities” as defined by HIPAA and the Department of Health and Human Services (HHS). Covered entities include health plans, health care clearinghouses, such as billing services and community health information systems, and health care providers that transmit health care data. Educational entities providing health care services to students may be governed by HIPAA in some circumstances. The HHS regulations provide for civil money penalties for violating HIPAA rules and establishes procedures for investigations and hearings for HIPAA violations.

The HIPAA regulations exclude individually identifiable health information that an educational agency maintains and are governed by FERPA.

#### 10. OTHER RELATED PRIVACY LEGISLATION ENACTED BY CALIFORNIA

Student Online Personal Information Protection Act - SB 1177 - Section 22584 of the California Business and Professions Code.

### D. INCIDENT REPORTS INVOLVING MORE THAN ONE STUDENT

*Letter to Prescott, 115 LRP 39435(FPCO 4/20/15)*

A joint education record or joint pupil record which contains protected information (PI) regarding multiple students. Incident reports and related student statements are an example. The rule is that the school district must only provide a requesting parent access with the part of the records that pertains to his/her child. (34 C.F.R. § 99.12(a).) A school district should redact the names of, or personally identifiable information, regarding other student mentioned in the report. In cases where a joint record cannot be easily redacted and the personally identifiable information omitted, the school district may satisfy the parent request for access by informing the parent about the contents of the report in question.

### E. STANDING ACCESS REQUESTS

*Letter to Anonymous, 115 LRP 40693 (FPCO 03/13/15)*

FERPA gives parents the right to have access to their children’s education records. Custodial and non-custodial parents have the same rights under FERPA unless there is a court order that specifically provides to the contrary. However, a school is not required to comply with a standing request by a parent for access to education records. Rather, the school is required to comply with each individual request for access to education records.

**F. STUDENT DATA COLLECTED BY CLOUD COMPUTING SERVICES AND ONLINE APPLICATIONS**

1. STUDENT ONLINE PERSONAL INFORMATION ACT - SB 1177; SECTION 22584 OF THE CALIFORNIA BUSINESS AND PROFESSIONS CODE EFFECTIVE 1/1/2016

This measure is designed to prohibit data mining by third-party service providers operating an internet website, online service, online application, or mobile application from engaging in targeted advertising to students or their parents, using personally identifiable information, selling a student's information, or disclosing that information.

2. PROTECTING STUDENT PRIVACY ACT, S. 1322

Student data-privacy legislation pending in the U.S. Senate that would amend FERPA to cover student-data marketing by third-party service providers. If enacted, S. 1322 would amend FERPA to:

- Require data security safeguards to protect sensitive student data held by private companies.
- Prohibit the use of students' personally identifiable information to advertise or market a product or service.
- Give parents the right to access their children's personal information held by companies and amend it if incorrect.
- Make transparent the name of all outside parties that have access to student information.
- Minimize the amount of personally identifiable information that is transferred from schools to private companies.
- Ensure that private companies cannot maintain detailed inventories on students in perpetuity by requiring deletion of personally identifiable information when the information is no longer used for its specified purpose.

3. STUDENT DIGITAL PRIVACY AND PARENTAL RIGHTS ACT, H.R. 2092

Similarly purposed legislation pending in the House of Representatives.

4. PTAC GUIDANCE - MODEL TERMS OF SERVICE (TOS) AGREEMENT AND PRIVACY PLEDGE; BEST PRACTICE RECOMMENDATION FROM THE PRIVACY TECHNICAL ASSISTANCE CENTER

For use when contracting with providers of online educational services and mobile applications.

5. CALIFORNIA EDUCATION CODE § 49073.1/AB 1584

Contracts between local educational agency and third party to provide services for the digital storage, management, and retrieval of pupil records; contract contents.

**G. DATA BREACH; THEFT OF FILES OR HARDWARE; INADVERTENT RELEASE OF DATA**

*Letter to Tobias, 115 LRP 33135 (FPCO 5/8/2015)*

FERPA requires that each school district double check that educational records maintained in its electronic data systems are protected from unauthorized access and disclosure. School districts must implement multiple security and safety procedures that will protect data systems containing students' education records.

No system for maintaining and transmitting education records, whether in paper or electronic form, can be guaranteed safe from every hacker and thief, technological failure, violation of administrative rules, and other causes of unauthorized access and disclosure.

The FERPA Safeguarding Recommendations specify that an educational agency or institution that has experienced a theft of files or computer equipment, hacking or other intrusion, software or hardware malfunction, inadvertent release of data to internet sites, or other unauthorized release or disclosure of education records, should consider one or more of the following steps:

- Report the incident to law enforcement authorities.
- Determine the specific information that was compromised.
- Take steps to immediately retrieve the data and prevent further disclosures.
- Identify affected records and students.
- Determine how the incident occurred, including which school officials had control of and responsibility for the information that was compromised.
- Determine whether any institutional policies were breached.
- Determine whether the breach occurred because of a lack of monitoring and oversight.
- Conduct a risk assessment and identify measures to prevent future breaches.
- Notify students of a website they can access if they suspect identity theft.

**H. THREAT ASSESSMENTS**

*Letter to Anonymous, 115 LRP 33141 (FPCO 05/08/15)*

Under the Health and Safety exception to the FERPA non-disclosure rule, a school district may non-consensually disclose information from education records in order to protect the health or safety of the student or other individuals. In this matter, the school district

conducted a threat assessment of a student and concluded that he/she presented a “high level of risk.”

Based on the threat assessment, FPCO determined that the school district had a rational bases for concluding that an articulable and significant threat to the health or safety of other students or other individuals existed. Under such circumstances, disclosure may be made to anyone whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. Without parental consent, the school district disclosed the information to law enforcement and school officials in the surrounding area.

#### **I. SCHOOL COUNSELOR’S NOTES**

*Letter to Ruscio, 115 LRP 18601 (FPCO 12/17/14)*

Parents have the right to inspect all of their children’s education records. There are, however, some documents that don’t meet the definition of an education record even if they contain personally identifiable information.

In this case, the school refused to provide a father mental health and emotional counseling notes regarding his son that were created by the school counselor. Because the counselor only used the notes as a personal memory aid and never shared them with any other staff member, they constituted “sole possession records” and were exempt from the FERPA parental access requirement.

#### **J. INFORMATION ABOUT A STUDENT OBTAINED THROUGH PERSONAL KNOWLEDGE OR OBSERVATION**

*Letter to Charles, 114 LRP 38005 (FPCO 05/30/14)*

When students asked why he was wearing a coat and tie, the teacher responded that he was going to court to be sued by an angry parent. All the students immediately knew whose father was that angry parent. That student was embarrassed by the teacher’s statement.

FERPA does not protect the confidentiality of information in general and, therefore, does not apply to disclosure of information derived from a source other than education records, even if education records exist which contain that information. Rather, FERPA protects information derived from education records from improper disclosure. As a general rule, information obtained through personal knowledge or observation, and not from an education record, is not protected from disclosure under FERPA.

#### **K. VIDEO TAPE FROM SURVEILLANCE CAMERA AS A STUDENT RECORD**

*Bryner v. Canyons Sch. Dist., 2015 UT App. 131 (Utah App.Ct. 5/29/2015)*

Surveillance camera outside the classroom recorded a fight between several students. A parent of one of the students sued under the Utah version of the Public Records Act for an un-redacted copy of the video tape. The Utah Appellate Court ruled that the video tape was an



educational record within the meaning of FERPA. The school district was directed to provide a redacted copy of the video tape upon payment of the cost of redaction - \$120.

**L. VIDEO TAPE FROM A SURVEILLANCE CAMERA ON A SCHOOL BUS AS A STUDENT RECORD**

*Lindeman v. Kelso School District No. 458*, 107 LRP 66455, 172 P.3d 329 (Wash. 2007)

The case involved a surveillance tape of an altercation on a school bus. The parents of a student involved in the altercation requested a copy. The Washington Supreme Court rejected the school district's position that the surveillance tape qualified as a pupil record under Washington state law. The Court ruled that state law contemplated privacy protected pupil information including information such as grades, assessments, standardized test results, class schedules, and contact information whereas the surveillance camera was intended to maintain safety and security on school buses.

**M. EMAIL REGARDING A STUDENT AS A PUPIL RECORD**

*Washoe County Sch. Dist.*, 114 LRP 25728 (SEA NV 05/23/14)

This case is a decision by the Nevada Department of Education. The context is a due process complaint. Parent requested to inspect and review the students education records, including email, regarding observations of her child roller skating. Those emails, however, were never printed nor maintained in a records room or secured data base.

Relying on *S.A. v. Tulare County Office of Education*, 53 IDELR 111 (E.D. Calif. 2009), the Department of Education advised that emails are maintained as education records only when they are kept in a filing cabinet in a records room at the school, saved on a permanent secure database, or printed and placed in a student's file. Because the emails at issue were never saved or printed for any purpose, the Department of Education concluded that the school district had no obligation to comply with the parent's inspection request in regard to the emails.

*Middleton-Cross Plains Area Sch. Dist.*, 115 LRP 31928 (SEA WI 06/15/15)

This case is a decision by the Wisconsin Department of Education. The context is a due process complaint. The parents made a request to inspect and review the student's education records. They asserted that the school district's response to their request was deficient because they were not permitted to inspect all emails or personal notes pertaining to the student. The email was maintained in multiple in-boxes of many individuals within the school and the school district.

"Education record" does not include 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.



Relying on *S.A. v. Tulare County Office of Education*, 53 IDELR 143 (E.D. Cal. 2009), the Department of Education determined that only those documents placed in a student's permanent file are considered "maintained" by the school district. Emails that may appear in multiple in-boxes of many individuals within the school and the school district are not maintained by the school district because they are not kept in a central location with a single record of access.

**N. THE COLLEGE BOARD (SAT EXAM) IS NOT A SCHOOL OFFICIAL FOR DISCLOSURE PURPOSES**

*Letter to Wall*, 115 LRP 4922 (FPCO 11/18/14)

Based on a parent's verbal request, school released 39 pages of a student's education record to the College Board so that the student could receive accommodations on the SAT. School district staff asked the parent to sign a consent form before releasing the records. The parent, however, persistently avoided doing so. The parent filed a complaint when the records were nevertheless sent.

FERPA includes an exception to its prior written consent requirement for school officials who have a legitimate educational interest in the information. (34 C.F.R. § 99.31(a)(1).) The "school official" exception is for officials within the educational agency itself or for those individuals providing instructional functions or services on behalf of the school district. The school official exception does not apply to an outside agency.

**O. DISCLOSURE OF BULLIES' DISCIPLINE TO PARENTS IF SANCTIONS IMPACT VICTIM**

*Letter to Soukup*, 115 LRP 18668 (FPCO 02/09/15)

FERPA generally prohibits a school district from disclosing students' personally identifiable information to third parties without parental consent. There's an exception to this rule in cases involving unlawful discriminatory harassment. To reconcile the conflict between FERPA's and Title IX's notice requirements, the FPCO determined that the parents of a harassed student may have the right to know the discipline imposed on their child's bullies when that sanction directly relates to the harassed student.

FPCO does not interpret FERPA as prohibiting a school district from complying with the notice of outcome provisions in any case involving discriminatory harassment. Moreover, FPCO determined that if there was a direct conflict between the requirements of FERPA and the requirements of any civil rights laws, such as Title IX and Title VI, the requirements of the civil rights laws override any conflicting FERPA provisions.

A school district may inform the parents of a harassment victim of the disciplinary sanction imposed on the perpetrators of the harassment when that sanction directly relates to the victim. An example of this would be an order that the harasser stay away from the harassed student.

However, school districts may violate FERPA if sanctions are disclosed and they do not relate to the harassment victim.

**P. DISCLOSURE OF INFORMATION OBTAINED THROUGH PERSONAL KNOWLEDGE, OBSERVATION, OR SOURCES OTHER THAN PUPIL RECORDS**

*Letter to Anonymous*, 115 LRP 18650 (FPCO 02/23/15)

A mother complained that a school principal improperly told another student's parent, during a telephone conversation, about the details of a bullying incident in which the mother's son was a victim. The school principal had called the parents of the other students involved in the alleged bullying incident and explained what had taken place. The school principal may have also spoken to a parent of a student who was not involved in the bullying incident and revealed the victim's identity when asked to do so during the conversation.

FERPA applies to tangible education records. FERPA does not protect the confidentiality of information in general and, therefore, does not apply to disclosure of information derived from a source other than education records, even if education records exist which contain that information. Rather, FERPA protects information derived from education records from improper disclosure. As a general rule, information obtained through personal knowledge or observation, and not from an education record, is not protected from disclosure under FERPA.

**Q. COURT-ORDERED DISCLOSURE OF PERSONALLY IDENTIFIABLE INFORMATION**

*Morgan Hill Concerned Parents Ass'n. v. California Dept. of Educ.*, 67 IDELR 83 (E.D. Cal. 2016)

The underlying lawsuit arose when two parent advocacy groups alleged that CDE violated its monitoring and enforcement responsibilities under the IDEA. During the discovery phase of the suit, the court ordered CDE to disclose personally identifiable information about millions of students on the CDE data base. However, the court did not require CDE to send individual notice to each affected student or parent. Instead, the court ordered CDE to post a notice on its website that would inform parents of affected students how to object to the court-ordered disclosure.

There was a significant public outcry about the pending disclosure. Given the number and scope of the objections filed by parents, the judge revised the order and precluded the plaintiff parent groups from having a copy of the student records on the CDE database.

If you have any questions concerning this or related issues, do not hesitate to contact our office.

— Alan B. Harris

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