



March 16, 2018

FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) RECENT DEVELOPMENTS - MARCH 2018

A. FERPA - Refresh and Review

The Family Educational Rights and Privacy Act (FERPA) gives parents the right to inspect, review, and amend their child's education records and protects those records (and information from those records) from non-consensual disclosure to third parties. (20 USC § 1232g(a)(4)(A); and 34 CFR 99.3.) There are many exceptions to the FERPA non-consensual disclosure rule.

Whether a particular item of information about a student is protected by FERPA depends on if it meets the statute's definition of an "education record." Education records under FERPA are those records that are: (1) directly related to a student; and (2) maintained by an education agency or institution or by a party acting for the agency or institution. (34 CFR 99.3.) Information directly related to a student should be considered synonymous with personally identifiable information.

Personally identifiable information includes, but is not limited to:

1. The student's name;
2. The name of the student's parent(s) or other family member(s);
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.

B. What's New

1. **Student Privacy Leadership:** The U.S. Department of Education has created the “Office of the Chief Privacy Officer” (OCPO). The Family Policy Compliance Office (FPCO) is now an office under the Chief Privacy Officer.

Also, under the OCPO, the U.S. Department of Education has created the “Student Privacy Protection and Assistance Division” which includes the Privacy Technical Assistance Center. This Division has a website titled, “Protecting Student Privacy.” The new division is to provide best practices and technical assistance with FERPA, other student privacy related matters, and data security.

The FPCO continues to enforce FERPA by issuing Letters of Findings and guidance.

2. **Rising Threat of Ransomware Attacks:** Hackers (such as WannaCry) use a “worm” type software to encrypt documents in computers and require victims to pay money (bitcoin) in order to regain access. A school in South Carolina paid \$8,500 to get their data back in a district-wide ransomware attack.

3. **Newly Revised (Proposed) Regulations Are Currently in the Works:** FERPA regulations were last revised in 2011. A task force commissioned by the U.S. Department of Education is now working to revise FERPA regulations as part of a department-wide regulatory review to identify rules to keep, modify, or rescind under President Trump’s Executive Order 13777 - Enforcing the Regulatory Reform Agenda. A total of 1,772 items of policy-related guidance is being reviewed. A number of groups submitted suggestions for regulatory review. Examples:

- a. The Healthy, Hunger-Free Kids Act (2010) permits educational agencies to disclose education records without parental consent to the U.S. Agriculture secretary or authorized representatives from the federal Food and Nutrition Service as part of that federal agency’s oversight of programs authorized under the National School Lunch Program.

- b. The Uninterrupted Scholars Act (2013) permits educational agencies to disclose education records without parental consent to a caseworker of a state, local, or tribal child welfare agency when the child welfare agency is “legally responsible” for the care and protection of the student, such as the case when the child is in foster care. Note that California has already made this revision. (See Educ. Code § 49076(a)(1)(N) & (O).)

- c. Usually, educational agencies are required to provide notice to parents before complying with a court order or subpoena for education records. The Uninterrupted Scholars Act clarifies that when the court order or subpoena is issued in connection with a proceeding involving

child abuse, neglect or dependency matters, and the parents are a party to the proceeding, such notice is not required.

d. Surveillance Recordings: More specific guidance to school districts on when pictures of students caught on video recordings may be released. Video recordings have become common in public school districts, including from security cameras installed in buildings and on buses, as well as video recordings of school events, such as graduation and athletics. Also, classroom lessons and images used on district websites and in social media for professional development and evaluation purposes.

C. New FPCO Decisions and Court Case

Letter to Anonymous, 117 LRP 46537, 21 FAB 7 (FPCO 2017) - Common sense safety concerns trump FERPA disclosure requirements.

Facts: Mother with two children obtains a domestic violence restraining order against the children's father. The father requested and received access to the children's pupil records, but all references to their address and telephone were deleted by the school.

Rule: Even if a non-custodial parent's educational rights are not otherwise compromised by a judicial order, and the parent is entitled to his child's educational records, if the school perceives a potential threat, the school can unilaterally redact information from those educational records to address the potential threat.

Letter to Anonymous, 117 LRP 49565, 21 FAB 8 (FPCO 2017) - Take immediate remedial steps if FERPA inadvertently violated.

Facts: District inadvertently mailed a student's psycho-educational assessment results, which included information about the child's birth family, adoptive family, health condition, and diagnosis to the incorrect address. District appropriately rectified the FERPA violation by immediately consulting with legal counsel and taking corrective action.

Guidance: Always take immediate corrective action following a FERPA violation. Components of the corrective can include contacting the parents to inform them of the mistake, and sending a letter to the receiving family to facilitate the recovery of the student's records. Additionally, implement remedies to prevent the likelihood of future errors. For example, in this case, the district increased the levels of staff training at the school and introduced a new system for reviewing the accuracy of mailing addresses prior to the posting of sensitive materials.

Letter to Anonymous, 117 LRP 42285, 21 FAB 4 (FPCO 2017) - FERPA does not prevent a district from requiring parents and eligible students to agree to release certain information as a condition for participating in extracurricular sports and similar activities.

Facts: District required parents and eligible students to agree to release certain health information as a condition for participating in extracurricular sports and similar activities. The

district contracted with the third-party website to maintain students' health information when they sought to participate in school athletic programs.

Guidance: District may disclose “personally identifiable information” from education records to a third party under the “school officials” exception to FERPA's parental consent rule.

Under FERPA’s “school officials” exception, schools may outsource institutional services or functions that involve disclosure of education records to contractors, consultants, volunteers, or other third parties, as long as several conditions are met. The third party: (1) must perform a service or function for which the school would otherwise use employees; (2) be under the school's direct control regarding the use and maintenance of education records; (3) must only use the Personally Identifiable Information (PII) from the records for the purposes for which disclosure was made; and (4) must meet the criteria the school specifies for being considered a school official with a legitimate educational interest in the records

Letter to Anonymous, 117 LRP 42275, 20 FAB 50 (FPCO 2017) - A parent cannot use the FERPA procedures for correcting or amending education records for the purpose of changing the terms of the child’s IEP.

Facts: The parent of a child with a disability sought to amend the child’s IEP to reflect her understanding of the special education services the child would receive under an IEP. Specifically, she sought to have the IEP reflect that her child should have 45 minutes per day with his special education teacher, instead of the 15 minutes written in the IEP.

Guidance: FERPA is intended to require only that educational agencies and institutions conform to fair record-keeping practices. FERPA is not intended to override the accepted standards and procedures for making academic assessments, disciplinary rulings, or placement determinations.

FERPA’s amendment procedures can only be used to correct education records which contain information that is misleading, inaccurate, or in violation of the student’s privacy rights. The amendment procedures may not be used to override the process for making assessments, disciplinary rulings, placement determinations, or other substantive educational decisions made by the district.

Brown v. Metropolitan Gov't of Nashville, 117 LRP 26131 (M.D. Tenn. 06/09/17) - First Amendment (Freedom of Expression) rights may trump FERPA confidentiality rules.

Facts: In 2014, three counselors at a Tennessee school district reported to an investigative reporter that the district improperly removed certain students from “end of course” classes to prevent their test scores from affecting overall school testing statistics. When the district sent the counselors written reprimands, they sued on the grounds that the district's disciplinary actions violated the First Amendment.

Guidance: A Tennessee school district could not prevent three counselors from exercising their free speech rights by denouncing the district's alleged practice of manipulating school testing

statistics during interviews with a local news channel. The district may not use FERPA as the bases for issuing written reprimands that appeared to be retaliation for reporting the district's unethical and illegal testing practices.

Letter to Anonymous, 117 LRP 41929, 21 FAB 2 (FPCO 2017) - Only PII acquired from a pupil's record is privacy protected by FERPA.

Facts: A language arts teacher/former cheerleading coach told students during a game that they could blame their friend and her father for the teacher's decision to leave her position as the cheerleading coach. She also allegedly told the classmates that the student "lies to her parents," and that the student's father "had been threatening her job for months."

Guidance: To establish a FERPA violation, there must be evidence that PII from a student's education records was disclosed to a third party without parental consent.

FERPA does not protect the confidentiality of information in general or information shared or disclosed through other means, such as information based on opinion or hearsay and not specifically contained in education records.

Letter to Anonymous, 117 LRP 42289 (FPCO 2017) - Sharing PII learned from a source other than a pupil record is not prohibited by FERPA.

Facts: Information regarding the details of a student's four day suspension was being shared among students through social media and word of mouth. The dialog was apparently initiated by the student's brother. Nevertheless, the parent alleged that a teacher accessed the student's education record to learn the details of his four day suspension and then shared this information with her son, who then disclosed it to teammates on the school's hockey team.

Guidance: FERPA generally prohibits the disclosure of PII from a student's education record without parental consent. However, when students make such information available by sharing it through social media or word of mouth, there is no FERPA violation, even when the same information is also contained in education records.

Letter to Anonymous, 117 LRP 42287, 21 FAB 5 (FPCO 2017) - Board members may share PII as may be necessary for them to carry out their duties.

Facts: District's board president disclosed an email containing PII about a child to another board director.

Guidance: Generally, school districts must obtain written parental consent before disclosing PII from education records. However, under an exception to this general rule, nonconsensual disclosure may be made if it is to a school official with a legitimate educational interest in the information.

FPCO interprets the term "school official" broadly to include a range of school district employees, including teachers, school principal, president, chancellor, board member, trustee, registrar, counselor, admissions officer, attorney, accountant, human resources professional,

information systems specialist, and support or clerical personnel. Typically, a school official has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility.

The sharing of an email containing a student's PII between school board members is permitted where the board members were school officials with a legitimate educational interest in the information.

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

— Alan B. Harris

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