



May 2021

FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) REVIEW

Recent Developments March 2020 through March 2021

The following is a brief description of the Family Educational Rights and Privacy Act (FERPA) and a summary of the Student Privacy Policy Office (SPPO) decisions/guidance over the past year which interpret and augment the FERPA regulations. The update provides practical insight into how FERPA applies to real-world circumstances.

FERPA¹ is a federal statute and set of regulations that protect the privacy of student educational records and Personally Identifiable Information (PII) contained in such records. Note: California has its own rules designed to protect the privacy of student records.² California regulations provide that they are to be understood so as to be harmonious with FERPA.³ Hence, the SPPO Guidance is pertinent in California.

FERPA also affords parents other rights with regard to their child's education records. These include the right to inspect and review the education records, the right to seek to have the education records amended, the right to have some control over the disclosure of PII from the education records, and the right to file a written complaint with SPPO regarding an alleged violation of FERPA. Note: The pertinent California statutes serve nearly identical purposes.

SPPO investigates timely complaints containing sufficient allegations of fact that would lead to the belief that a violation of FERPA may have occurred. Enforcement of the California's rules, however, is not within the jurisdiction of SPPO. The California Department of Education (CDE) and the state's superior courts have jurisdiction over California rules.

Federal agencies, other than SPPO, may address record-related issues as well. For example, the U.S. Department of Education, Office of Special Education Programs within the Office of Special Education and Rehabilitative Services (OSEP/OSERS), may address record-related issues

¹ 20 U.S.C. section 1232g; 34 C.F.R. sections 99.1, et seq.

² Education Code section 49060, et seq.; 5 C.C.R. sections 434 and 436

³ Education Code section 49060

in the context of the Individuals with Disabilities Education Act (IDEA). The U.S. Department of Education, Office for Civil Rights (OCR), may address record-related issues in the context of racial or disability discrimination/Section 504 related allegations.

A. Providing parent with a copy of their child’s education records is generally not required by FERPA - only access within 45 calendar days of the request is required by FERPA; but, in California, Education Code section 49069 provides that a copy must be made available upon request and the timeline is five business days.

120 LRP 40834 Letter to Anonymous SPPO 10/28/2020

Facts: Parent sought copies of her child’s cumulative file. District declined to provide copies and told her that she could come to her child’s elementary school at any time to view the requested records. SPPO ruled in favor of the school.

SPPO Guidance: Under FERPA, a school must provide parent with an opportunity to inspect and review his or her child’s education records within 45 (calendar) days of receipt of the request. However, a school is not generally required to provide copies of education records by FERPA.

However, if circumstances effectively prevent a parent from exercising his or her federal right to inspect and review education records, the school is then required to either provide parent with a copy of the requested records or make other arrangements that would allow parent to inspect and view the requested records. An example is a situation in which the parent does not live within commuting distance of the school.

Note: In California, the federal 45-day timeline has been reduced to five business days and parents are entitled to copies subject only to reimbursement regulations.⁴ Reimbursement rules are:

- A reasonable amount may be charged, but it cannot exceed the actual cost.
- No charge may be made to search for and retrieve the records.
- No charge may be made for the first two transcript requests.⁵

Any disclosure of education records to third parties, even with parent’s consent, is permitted, but not required by FERPA. Note: California has the same rule.⁶

⁴ Education Code section 49069

⁵ Education Code section 49065

⁶ Education Code section 49075

B. Generally, a district must obtain prior written parental consent before disclosing to a third party PII learned from a student's education record. Information learned from personal knowledge, observation, or a source other than a student's education record is not protected from disclosure by FERPA.

FERPA affords parents the opportunity to seek amendment of his or her child's education record. Districts are required to consider the request, inform the parent of its decision, conduct an evidentiary hearing on the matter if requested, and allow the parent to insert a statement in the record contesting the information. FERPA does not require districts to make substantive changes to the record.

120 LRP 40801 Letter to Anonymous SPPO 10/28/2020

Facts: The husband of a student's teacher confronted the student at a gun shooting range and asserted that the student threatened to kill his wife and other school employees. Parent alleges that a teacher disclosed PII about her child's school-related disciplinary incident to her (the teacher's) husband. The husband, however, had access to the information independent of his wife – a police report.

In addition, parent sought to amend her child's education record because she believed that certain information was inaccurate, misleading, or violated her child's privacy rights. The district declined to change the record as she requested. She appealed to the SPPO. SPPO ruled in favor of the school.

SPPO Guidance: FERPA does not require school employees to obtain parental consent before they disclose information derived from a source other than education records, such as personal knowledge or observation.

FERPA affords parents the right to seek to amend their child's education record which contains information that is inaccurate, misleading, or in violation of their child's privacy rights. This right, however, cannot be used to challenge a grade or an individual's opinion, unless the grade or the opinion has been inaccurately recorded. The right is only intended to require that schools conform to fair recordkeeping practices. It is not intended to override the accepted standards and procedures for making academic assessments, disciplinary rulings, or placement determinations.

C. Before a district discloses PII to a third party, it must obtain parental consent; however, under the "school officials" exception to this rule, a district may disclose a student's PII to school officials without parental consent, including outside contractors, who have a legitimate educational interest in the information.

120 LRP 40804 Letter to Anonymous SPPO 10/28/2020

Facts: District hired an outside drug testing facility to conduct all student drug tests in district. The testing facility needs a copy of a related form that contains student PII in order to conduct and process drug tests for district. SPPO ruled in favor of the school.

SPPO Guidance: FERPA regulations specify the conditions under which PII can be disclosed from student education records without the written consent of parent. One of the exceptions to the prior written parent consent requirement allows “school officials, including teachers, within the agency or institution” to obtain access to education records provided the school has determined that they have “legitimate educational interests” in the information.

Although the term “school official” is not defined in the statute or regulations, SPPO/FPCO has interpreted the term broadly to include a teacher, school principal, president, chancellor, board member, trustee, registrar, counselor, admissions officer, attorney, accountant, human resources professional, information systems specialist, and support or clerical personnel.

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.

FERPA regulations require a school to include in its annual notification of rights a statement indicating whether it has a policy of disclosing PII under this exception and, if so, to specify the criteria for determining which parties are school officials and what the school considers to be a legitimate educational interest.

Additionally, under FERPA, a school may disclose PII without parental consent to contractors, consultants, volunteers, or other third parties to whom the school has outsource institutional services or functions that involve the disclosure of education records. To be a school official, an outside party must:

1. Perform an institutional service or function for which the school would otherwise use employees;
2. Be under the direct control of the school with respect to the use and maintenance of education records;
3. Be subject to FERPA requirements which provide that the PII from education records may be used only for the purpose of which the disclosure was made, and which govern re-disclosure of PII from education records; and
4. Meet the criteria specified in the institution’s annual notification of rights for being a school official with a legitimate educational interest in the education records.

D. Parent consent requirement permits the non-consensual disclosure of information derived from a source other than education records, even if education records exist which contain that information unless, however, school staff making the disclosure also had an official role in making a determination that generated a protected education record.

Parent consent requirement permits the non-consensual disclosure of information derived from an education record that has been appropriately designated as “directory information” by the school; FERPA defines directory information as information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed; for example, a photograph. Note: In California, photographs cannot be listed as directory information.

120 LRP 34397 Letter to Anonymous SPPO 10/6/2020

Facts: A girls’ high school varsity soccer head coach uploaded a student’s photo on his personal and private business social media websites. SPPO ruled in favor of the school.

SPPO Guidance: As a general rule, information that is obtained through personal knowledge or observation, and not from an education record, is not protected from disclosure under FERPA.

However, this rule does not necessarily apply where the individual who discloses information about a student, based on personal knowledge or observation, also had an official role in making a determination that generated a protected education record. For example, a teacher may not disclose a grade that the teacher issued to a student merely because the teacher has personal knowledge of the grade. Similarly, a principal who took official action to suspend a student may not disclose that information absent consent or some other exception to consent permitting disclosure.

FERPA provides that a school may disclose “directory information” if it has given public notice of (i) the types of information which it has designated as “directory information”; (ii) the parent’s right to restrict the disclosure of such information; and (iii) the period of time within which a parent has to notify the school in writing that he or she does not want any or all of those types of information designated as “directory information” disclosed by the school without first obtaining parental consent.

Directory information could include information such as the student’s name, address, telephone listing, electronic mail 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. Note: In California, photographs are not a category of information that may be listed as directory information.⁷

E. Both custodial and non-custodial parents are entitled to access their child’s PII unless a court order or state law has expressly terminated his/her FERPA rights.

120 LRP 30656 Letter to Anonymous SPPO 8/31/2020

Facts: A divorced father asserted that his child’s non-custodial mother was not entitled to access the child’s education record. SPPO ruled in favor of the school.

SPPO Guidance: Custodial and non-custodial parents alike have the right to inspect and review their children’s education records unless the school has evidence that there is a court order or state law which expressly provides to the contrary.

F. Photographs or videos of children at school are generally not PII, unless a particular child is specifically targeted for an educational reason.

120 LRP 23364 Letter to Anonymous SPPO 6/30/2020

Facts: Two teachers used their personal cell phones to record students in their classroom. They had prior parental consent for some students, but not all. SPPO ruled in favor of the school.

SPPO Guidance: Whether the information on a personal device is a student’s “education record” would depend on whether the information was “directly related” to the student and if the information was being “maintained” by the teacher on behalf of the school.

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 and is not the specific focus of the picture or video, then the photograph or video would not generally be considered directly related to a student, and thus not that student’s education record.

G. When a district encounters a potential FERPA violation by school staff, the proper course is to implement corrective action, such as retraining staff.

20 LRP 23316 Letter to Woods SPPO 4/30/2020

Facts: The complaining parent observed her child’s sixth grade teacher pointing out her child to a classmate’s parent during an intramural event. The complaining parent mistakenly believed that they were discussing her child’s disability diagnosis and Section 504 services. Pursuant to an internal investigation by district, the weight of the evidence suggested that the teacher and other parent were instead discussing the other parent’s child. Incidental to or after

⁷ Education Code section 49061(c)

the discussion, the teacher merely pointed to the complaining parent's child when the other parent asked which child belonged to the complaining parent. SPPO ruled in favor of the school.

SPPO Guidance: Even if the teacher had made an improper disclosure, the district took preemptive steps to remedy the potential FERPA violation by having retrained staff on FERPA requirements and pledging to include additional FERPA training at the next staff training session.

H. If a letter of recommendation written by a teacher regarding a student contains PII, it will likely qualify as an education record and generally cannot be given to a third party without prior parental consent.

120 LRP 23308 Letter to Randle SPPO 4/30/2020

Facts: A parent asked her child's teacher to fill out an application form to assist at a science camp in determining whether the student would be a "good candidate" for the program. Pursuant to the directions in the form, the teacher provided a candid assessment of the student's academic and behavioral performance, including his scores on a cognitive abilities test, and wrote a letter of recommendation.

The teacher sealed the recommendation (which contained PII from the student's education record) in an envelope and had student deliver it to parent. The letter of recommendation was not directly delivered by the teacher to the science camp. Instead, parent opened the sealed envelope, read the letter of recommendation, and choose not to share it with the science camp. SPPO ruled in favor of the school.

SPPO Guidance: Because the letter of recommendation containing PII was given by teacher to parent and not directly to the science camp, the parent consent requirement was not violated.

Note that a letter of recommendation sent to a third party that is based merely on a teacher's personal observation of a student and does not contain information that is memorialized in the student's education record is generally not a disclosure of PII from the student's education record.

I. 120 LRP 9700 Questions and Answers on the Applicability of FERPA to Disclosures Related to COVID-19 SPPO 3-12-2020.

SPPO Guidance: Districts must obtain prior written parental consent before disclosing education records to third parties. However, the "health or safety emergency" exception to the parent consent rule permits districts to share PII related to COVID-19 when such disclosure is necessary to protect the health and safety of students and staff.

If there is an articulable and significant threat to the health or safety of the school community, a district may non-consensually disclose PII, such as health records, to appropriate

parties. However, the “health or safety emergency” exception to the parent consent rule does not allow for a blanket release of sensitive information. A district may, for example, disclose a student’s COVID-19 status to public health officials, medical professionals, and other individuals who need the information to stop the spread of the virus. The district would need to obtain parental consent before releasing the same PII to public or local media outlets.

J. Life threatening tree nut allergies may come within the “health and safety” exception to the parent consent rule.

21 LRP 4894 Letter to Cook SPPO 3/3/2020

Facts: A fifth-grade student has a life threatening allergy to products with tree nuts. All the other students and parents were informed that products with nuts were not allowed in the classroom. The student with the allergy was not identified in the notice, but his identity was known by the entire class because he frequently talked about it.

One day a classmate accidentally brought food to school containing nuts and opened it up in front of the classroom. The teacher admonished him and the rest of the class. In doing so, the teacher did not use the student’s name nor did she point out the student in class. SPPO ruled in favor of the school.

SPPO Guidance: Life threatening allergies allows for an educational agency or institution to disclose PII from an education record to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals. If the educational agency or institution 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. If, based on the information available at the time of the determination, there is a rational basis for the determination, the department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.

Please contact our office if you have questions or need further information on this topic.

- Alan B. Harris

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