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The *Fun*damentals of *Fun*damental FERPA

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I. BACKGROUND AND BASICS

Enacted as a seemingly inconsequential floor amendment having little to do with higher education, the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, popularly known as "FERPA" or the "Buckley Amendment," nevertheless quickly became one of the mainstays of college and university law practice. And although it still tends to inhabit only the remotest fringes of our consciousness most of the time, it is fair to say that FERPA is relevant to virtually everything we do on our campuses. Thus, it is appropriate to "refresh" our understanding of its requirements every once in a while, and there is no time like the present.

Congress enacted FERPA in response to a growing public awareness of and concern about the public dissemination by primary and secondary schools of information commonly considered private in nature, the withholding of "secret files" on students, and recordkeeping practices in general. Much like other "records" statutes of that era, it reflected a desire to give a measure of control to the subjects of potentially sensitive records – in this case, "education records." In very general terms, FERPA gives college students the rights to:

1. Control the disclosure of their "education records" to others;
2. Inspect and review their own "education records;" and
3. Seek amendment of their "education records."

Unlike at the primary and secondary level, these rights belong to the student, and not to the student's parents or legal guardians – regardless of the student's age. Moreover, the rights continue to exist after the student's graduation and expire only upon either the destruction of the relevant records or the student's death.

II. KEY DEFINITIONS

All of FERPA revolves around the central term "education records[1]," which is defined in the implementing regulations as follows:

[1] The commonly used variant "education*al* records" is both incorrect – it does not exist in the statute or regulations – and misleading. While records that are "educational" in nature, such as student papers, exams, and transcripts, certainly are covered by FERPA, so are a multitude of records that have nothing whatever to do with "academics." Banish the term from your vocabulary.

"Education records" . . . means those records that are:

(1) Directly related to a student; and

(2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

34 C.F.R. § 99.3 (emphasis added).

To fully understand that definition requires an understanding of the further definitions of each of the underlined terms, and a few more:

"Educational institution": "any public or private . . . institution" that receives funds "under any program administered by the Secretary [of Education]," most notably including the various federal financial aid programs. 34 C.F.R. §§ 99.1and 99.3. In other words, almost every institution of higher education.

"Record": "any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche." 34 C.F.R. § 99.3. Thus, the manner or form in which information is recorded is irrelevant; not only paper records, but also electronic records, photographs, videotapes, and even hand-carved stone tablets (should you have any) are covered. Note, however, that information that is recorded in your brain – that is, personal knowledge – is not considered to be a "record," and thus is not an "education record," and thus is not subject to FERPA. (Be careful when dealing with information that is both within your personal knowledge and recorded in some other format, as it will not always be clear which you are relying on.)

"Student": "any individual who is or has been in attendance at an educational . . . institution." 34 C.F.R. § 99.3. The term does not include applicants, who thus are not protected by FERPA unless and until they are admitted and "attend," thereby becoming "students." If they do, FERPA not only applies to their records going forward, but also "reaches back" and brings their application records within its scope.

"Attendance": "includes, but is not limited to . . . [a]ttendance in person or by paper correspondence, videoconference, satellite, Internet, or other electronic information and telecommunications technologies for students who are not physically present in the classroom." 34 C.F.R. § 99.3. Each institution has discretion to define for itself when, between admission and the first day of classes, its student are first considered to be "in attendance."

"Directly related": The term is not defined in either the statute or the regulations, but, under long-standing interpretation of the Student Privacy Policy Office (*nee* Family Policy Compliance Office, *aka* FPCO), the office within the Department of Education charged with overseeing FERPA, a record generally is considered to be "directly related" to a student if it contains "personally identifiable information" about that student. A record need not be "mostly" or even "significantly" related to

a student to qualify as "directly related" to that student, but a record that is only "tangentially" and "remotely" related to a student *may* at some point not qualify as "directly related" to that student. *See* <https://studentprivacy.ed.gov/faq/faqs-photos-and-videos-under-ferpa>.

"Personally identifiable information": broadly "includes, but is not limited to:

> (a) The student's name;
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> (b) The name of the student's parent or other family members;
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> (c) The address of the student or student's family;
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> (d) A personal identifier, such as the student's social security number, student number, or biometric record;
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> (e) Other indirect identifiers, such as the student's date of birth, place of birth, or mother's maiden name;
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> (f) 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; or
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> (g) Information requested by a person who the educational . . . institution reasonably believes knows the identity of the student to whom the education record relates."

34 C.F.R. § 99.3.

"Maintained": Although this term may be the most critical of all – especially when it comes to determining the status of, say, student e-mail messages that are stored in the student's account on an institutional server – it is not defined in either the statute or the regulations. In *Owasso Independent School District v. Falvo*, 534 U.S. 426, 435 (2002), the Supreme Court noted – tantalizingly – that "FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar," but ultimately declined to define "maintain" that narrowly, or, really, to give much of any guidance on the question at all. Thus, for now, it is unclear whether a record is "maintained" by an educational institution whenever it is in the possession, custody, or control of any employee or agent of the institution, or, rather, only when an employee or agent of the institution has made a conscious decision to "maintain" the record for the institution's own purposes. I personally believe that the answer is, and should be, the latter, and representatives of the Student Privacy Policy Office have hinted that that may be correct, but there is no clear authority to that effect.

In short, given the vast breadth of its various components, the term "education records" includes not only such standard "academic" records as student transcripts, papers, and exams, but also virtually any information about a student in any record that is "maintained" by the institution. The only such records that are specifically excluded from the scope of the term, and that therefore are not subject to the (full panoply of) restrictions of FERPA, are the following:

> **"Sole possession" records**: "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." 34 C.F.R. § 99.3. For example, the private notes a professor may keep about class participation over the course of a semester, for consultation when it comes time to set final grades.
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> **"Law enforcement" records**: those records that are "(i) created by [the institution's] law enforcement unit [including non-commissioned public safety or security offices]; (ii) created [at least in part] for a law enforcement purpose; and (iii) maintained by the law enforcement unit." 34 C.F.R. §§ 99.3 and 99.8 (emphasis added). Records that are generated by others and sent to the law enforcement unit – say disciplinary records from the institution's judicial affairs office – are not "law enforcement" records, because they were not "created" by the law enforcement unit, and they remain covered by FERPA even when in the law enforcement unit's hands. If the law enforcement unit discloses law enforcement records to others – which it is free to do, because they are not subject to FERPA – metaphysical things begin to happen: The law enforcement unit's copies of those records remain free from FERPA restrictions, as do any copies that it discloses to the general public, but any copies that end up in the hands of other institutional employees or agents transform into "education records" subject to the full panoply of FERPA restrictions. *See generally* <https://studentprivacy.ed.gov/sites/default/files/resource_document/file/SRO_FAQs_2-5-19_0.pdf>
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> **"Employment" records**: records related solely to the employment of a "student" by the institution, provided that the student is not "employed as a result of his or her status as a student." 34 C.F.R. § 99.3. In other words, if being a student is part of the job description and requirements – a work-study or GTA/GRA position, for example – any employment records concerning the student who holds the position are "education records" and thus subject to FERPA. This exclusion was intended primarily to keep the employment records of institutional employees who happen to take classes from becoming "education records." Records pertaining to such employees' *student* status *are* "education records," however.
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> **"Treatment" records**: records that are "(i) made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity; (ii) made, maintained, or used only in connection with treatment of the student; and (iii) disclosed only to individuals providing the treatment." 34 C.F.R. § 99.3. Although such records are not subject to FERPA, the final part of this definition nevertheless effectively prohibits an institution from disclosing them

other than in accordance with FERPA – a seeming paradox that is the entire basis for the general exclusion of student medical records from the privacy provisions of HIPAA. (In effect, such records really are exempt only from the "inspect and review" part of FERPA. That issue is deferred to state law on patients' right of access to their medical records. And, while FERPA does not prohibit the sharing of such records under any of its generally applicable restrictions, it also does not preempt applicable state medical confidentiality laws, which generally are considerably more restrictive.)

"Alumni" records: "Records created or received by an educational . . . institution after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student." 34 C.F.R. § 99.3. This exception is intended primarily to cover the sorts of records generated by an institution's alumni office post-graduation. Note, however, that the time a record is created is not determinative; if the information recorded "relates back" to the student's time at the institution, it is still an "education record" even though it was generated after its subject was no longer a "student."

"Peer grades": "Grades on peer-graded papers before they are collected and recorded by a teacher." 34 C.F.R. § 99.3.

III. DISCLOSURE

A. WITH CONSENT

In general, an institution may not disclose "education records" – or information from "education records" – to anyone other than the relevant student unless it first has obtained a signed and dated written consent from the relevant student (or *all* relevant students, if the records are "directly related" to more than one), specifying the records that may be disclosed, the purpose for which they may be disclosed, and the persons or classes of persons to whom they may be disclosed. 34 C.F.R. § 99.30(a) and (b). The requisite consent and signature may be obtained electronically if the method used "identifies and authenticates a particular person as the source of the electronic consent" and "indicates such person's approval of the information contained in the electronic consent." 34 C.F.R. § 99.30(d). An institution that receives a valid consent is not required to disclose the relevant records; the consent gives the institution the discretion to do so, but does not require the institution to do so.

B. WITHOUT CONSENT

In general, an institution may disclose "education records" without such consent only if it first fully "de-identifies" – that is, redacts all "personally identifiable information" from – the records, 34 C.F.R. § 99.31(b), *or* one of the 16 exceptions enumerated in the regulations applies. Those exceptions are as follows:

1. The disclosure is of "**directory information**," meaning "information . . . that would not generally be considered harmful or an invasion of privacy if disclosed," including, but not limited to,

"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." 34 C.F.R. §§ 99.31(a)(11) and 99.3. Social Security Numbers may not be treated as "directory information," but other student ID numbers and user IDs may be treated as "directory information" as long as they cannot be used to gain access to education records without further authentication. 34 C.F.R. § 99.3. To take advantage of this exception, an institution must first give its students notice of the information it has designated as "directory information" – which need not be the full list specifically authorized by the regulations, and which, conversely, may include more – and an opportunity to "opt out." 34 C.F.R. § 99.37.

An institution need not provide annual notice of its definitions to alumni, but it "must continue to honor any valid request to opt out of the disclosure of directory information made while a student was in attendance unless the student rescinds the opt out request." 34 C.F.R. § 99.37(b).

A student may not use the opt-out right "to prevent an . . . institution from disclosing or requiring [the] student to disclose the student's name, identifier, or institutional e-mail address in a class in which the student is enrolled" or from requiring the student "to wear, to display publicly, or to disclose a student ID card or badge that exhibits information" that the institution has properly designated as directory information. 34 C.F.R. § 99.37(c).

An institution may not disclose or confirm directory information about a student if it uses non-directory information (including SSNs) to identify either the student or the records from which the directory information is determined, as such a disclosure would implicitly reveal more than just directory information. 34 C.F.R. § 99.37(d).

2. The disclosure is to "**school officials** . . . whom the . . . institution has determined to have **legitimate educational interests**." 34 C.F.R. § 99.31(a)(1). To take advantage of this exception, the institution must give annual notice of its criteria for determining who is a "school official" and what is a "legitimate educational interest." 34 C.F.R. § 99.7(a)(3)(iii). Both definitions can be quite broad. In its model annual notice, the Student Privacy Policy Office suggests the following language:

> A school official is a person employed by the [School] in an administrative, supervisory, academic, research, or support staff position (including law enforcement unit personnel and health staff); a person serving on the board of trustees; or a student serving on an official committee, such as a disciplinary or grievance committee. A school official also may include a volunteer or contractor outside of the [School] who performs an institutional service of function for which the school would otherwise use its own employees and who is under the direct control of the school with respect to the use and maintenance of PII from education records, such as an attorney, auditor, or collection agent or a student volunteering to assist another school official in performing his or her tasks.
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> 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 responsibilities for the [School].

Note that it is the institution, and not the individuals who may wish access, who make these determinations; an institution is free to deny access to a "school official" who does have a "legitimate educational interest," if the institution determines that there are countervailing policy reasons to do so (or, for that matter, just because it feels like denying access). Note also that the institution "must use reasonable methods [physical, technological, and/or administrative] to ensure that school officials obtain access to only those education records in which they have legitimate educational interests." 34 C.F.R. § 99.31(a)(1)(ii).

As noted in the model annual notice, "school officials" may include a "contractor, consultant, volunteer, or other party to whom an . . . institution has outsourced institutional services or functions," as long as those services or functions are ones "for which the . . . institution would otherwise use employees," the outside party is "under the direct control of the . . . institution with respect to the use and maintenance of education records," and the outside party is subject to the same limitations as the institution on "the use and redisclosure of personally identifiable information from education records." 34 C.F.R. § 99.31(a)(1)(i)(B). A written contract is not required, but is advisable in most circumstances.

3. The disclosure is to another educational institution "where the student seeks or intends to enroll, or where the student is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer." 34 C.F.R. § 99.31(a)(2). To take

advantage of this exception, sometimes referred to as the "**transfer exception**," the disclosing institution must first give notice that it intends to respond to requests from other institutions for such information, either by making a "reasonable attempt" to notify the relevant students individually or – preferably – by informing all students generally in its annual notice. 34 C.F.R. § 99.34. Any prior school may disclose to the current or anticipated school under this exception, but the current or anticipated school may not use this exception to report back to prior schools.

4. The disclosure is **to the student** him-, her-, or themself. 34 C.F.R. § 99.31(a)(12).

5. The disclosure is to parents of a student who is considered their "**dependent**" for federal tax purposes. 34 C.F.R. § 99.31(a)(8). To establish the parents' eligibility to receive such a disclosure, the institution must obtain either a copy of the parents' most recent federal tax return (at least the first page, on which dependents are listed, but the financial portions of which the parents may redact) or an acknowledgment from the student that the student is, in fact, their dependent; the institution may not presume dependency, even for traditional-age students. Note that because it is tied to the federal tax system, this exception generally is not available with respect to international students, whose parents generally do not file U.S. tax returns.

6. The disclosure is made "in connection with a **health or safety emergency**," is made only to "appropriate parties," and is limited to information that "is necessary to protect the health or safety of the student or other individuals." 34 C.F.R. §§ 99.31(a)(10) and 99.36. The institution has considerable discretion to determine for itself what situations constitute "emergencies" (a "threat" can be sufficient), what parties are "appropriate," and what information is "necessary": "If, based on the information available at the time of the [institution's] determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the . . . institution." 34 C.F.R. § 99.36(c).

7. The disclosure is made to "comply with a **judicial order or lawfully issued subpoena**." 34 C.F.R. § 99.31(a)(9)(i). Before complying, the institution (or an outside contractor acting on its behalf pursuant to the "school official" exception) must in most cases first make a "reasonable effort to notify the . . . student of the order or subpoena in advance of compliance, so that the . . . student may seek protective action." 34 C.F.R. § 99.31(a)(9)(ii). The institution need not – and generally may not – give such advance notice in the case of grand jury or other law enforcement subpoenas,

if the court or issuing agency has ordered that the existence or contents of the subpoena or information furnished in response not be disclosed, or in the case of *ex parte* court orders pursuant to the USA PATRIOT Act. Id. Note that the institution's obligations are limited to, at most, confirming the facial (including jurisdictional) validity of the subpoena or order and notifying the student; the institution is not required to fight the order or subpoena on the student's behalf (and likely does not have standing to do so), and it may (and generally must) comply regardless of the student's wishes if the student fails to take action.

8. The disclosure is to a court in the context of a **lawsuit** that the student brought against the institution or that the institution brought against the student. 34 C.F.R. § 99.31(a)(9)(iii). The institution need not give the student advance notice of such a disclosure, but is limited to disclosing information that is "relevant" to the action and that does not relate to other students who are not adversary parties in the lawsuit. By interpretation, but not yet by regulation, the Student Privacy Policy Office has occasionally allowed an institution to make similar disclosures when one of its students has made a complaint to, or initiated some other form of adversary "proceeding" before, a government or similar agency having the power to take official action against the institution. *See*, *e.g.*, <https://studentprivacy.ed.gov/resources/ letter-finding-cornell-university>. Apart from these two limited instances, however, a student's public disclosure of his, her, or their own "education records" does not constitute an "implied waiver" of FERPA rights that would justify further disclosures by the institution, nor does the level of public interest in the issue make any difference.

9. The disclosure is to parents of a student who is under the age of 21 *at the time of the disclosure* and relates to a determination by the institution that the student has violated its **drug or alcohol** rules. 34 C.F.R. § 99.31(a)(15).

10. The disclosure is of the "final results" of a disciplinary proceeding against a student whom the institution has determined violated an institutional rule or policy in connection with alleged acts that would, if proven, also constitute a "**crime of violence or non-forcible sex offense**." 34 C.F.R. § 99.31(a)(14). For purposes of this exception, "final results" is limited to the name of the student, the basic nature of the violation the student was found to have committed, and a description and the duration of any sanction the institution has imposed against the student. 34 C.F.R. § 99.39.

11. The disclosure is to "a **victim of an alleged perpetrator of a crime of violence or non-forcible sex offense**" and consists only of the

"final results" (as defined above) of an institutional disciplinary proceeding in connection with that alleged crime or offense. The institution may (and, under the Campus Sexual Assault Victims' Bill of Rights Act when applicable, must upon request) make such a disclosure regardless of the outcome of the proceeding. 34 C.F.R. § 99.31(a)(13).

12. The disclosure is in connection with **financial aid** that the student has applied for or received and is for the purpose of determining the student's eligibility for, the amount of, or the conditions for the aid, or to enforce the terms and conditions of the aid. 34 C.F.R. § 99.31(a)(4).

13. The disclosure is to authorized representatives of the Comptroller General, Attorney General, Secretary of Education, or state or local educational authorities in connection with an **audit of federal- or state-supported education programs** or with the **enforcement of or compliance with federal legal requirements** relating to those programs. In the absence of consent or a specific federal law to the contrary, information collected under this exception must be protected so that individuals are not personally identifiable other than to the "authorized representatives," and the information must be destroyed when no longer needed. 34 C.F.R. §§ 99.31(a)(3) and 99.35. This provision has, controversially, been interpreted to allow considerable sharing of information to and from state longitudinal database systems.

14. The disclosure is to **accrediting organizations** to carry out their accrediting functions. 34 C.F.R. § 99.31(a)(7).

15. The disclosure is to **organizations conducting studies** for educational institutions to develop, validate, or administer predictive tests; administer student aid programs; or improve instruction, provided that the studies are conducted in a manner that prevents personal identification of parents and students by anyone other than representatives of the organizations, the information is destroyed when no longer needed for purposes of the studies, and the institution enters into a written agreement with the organization specifically limiting its use of the information in these ways. The institution need not initiate the study itself or agree with or endorse the study's conclusions. 34 C.F.R. § 99.31(a)(6). Moreover, under the interpretation noted above, state longitudinal database systems may conduct such studies for an institution even if the institution objects.

16. The disclosure concerns **sex offenders** and consists of information provided to the institution pursuant to the Violent Crime Control

and Law Enforcement Act of 1994, commonly known as the "Wetterling Act." 34 C.F.R. § 99.31(a)(16).

Each of these exceptions is independent of the others; if you can find one that applies to your situation, it doesn't matter whether that situation also would qualify under any of the others. Thus, for example, if you have determined that a 19-year-old student's serious, alcohol-related injuries constitute a "health or safety emergency" that is "appropriate" to disclose to the student's parents, you need not also determine whether the student is their dependent for tax purposes or whether the student has violated your alcohol policies before making the disclosure.

Note also that, at least as far as FERPA itself is concerned, it is entirely within the institution's discretion whether to make a disclosure under any of these exceptions. 34 C.F.R. § 99.31(b). Thus, for example, a parent never has a *right*, under FERPA, to see his, her, or their college student's education records, even if the student is the parent's dependent for tax purposes, is involved in a health or safety emergency, and has violated the institution's alcohol policies – and even if the student is not yet 18 years old. A subpoena, a court order, or another law such as the Campus Sexual Assault Victims' Bill of Rights Act may require broader disclosure in certain circumstances, but FERPA does not.

C. REDISCLOSURE

FERPA imposes similar limitations on redisclosure. In general, an institution disclosing personally identifiable information from an education record must inform the recipient that it may not redisclose that information without the consent of the student and that it may use the information only for the purpose for which the disclosure was made. 34 C.F.R. § 99.33(a). Exceptions to this requirement include disclosures of directory information; disclosures to the relevant student, to the parents of a dependent student, or to parents in connection with a drug or alcohol violation; and disclosures made in connection with a court order, lawfully issued subpoena, lawsuit in which the student and the institution are adversaries, or (generally) disciplinary proceeding involving an alleged crime of violence or non-forcible sex offense. 34 C.F.R. § 99.33(c).

D. RECORDKEEPING

The institution generally must maintain a record of each request for access to and each release of personally identifiable information from a student's education records. This separate record must include, at a minimum, the identities of the requesters and recipients and the "legitimate interests" they had in the information; in the case of a "health or safety emergency," it also must include a description of the perceived threat. In addition, it must be maintained with the student's education records for as long as those records are themselves maintained. 34 C.F.R. § 99.32(a). Exceptions to this requirement include disclosures to a school official, a parent or student, a person with written consent, or a person requesting directory information, and disclosures in connection with a grand jury or other law enforcement subpoena prohibiting disclosure of its existence or

contents or an *ex parte* court order pursuant to the USA PATRIOT Act. 34 C.F.R. § 99.32(d).

IV. INSPECTION AND REVIEW

FERPA also gives college and university students the right to inspect and review their own education records. 34 C.F.R. § 99.10(a). The institution must provide access to the records within 45 days of a request and must respond to reasonable requests for explanations and interpretations of the records. 34 C.F.R. § 99.10(b) and (c). FERPA does *not* require the institution to provide copies of records to the student, unless "circumstances effectively prevent" the student from exercising the right to inspect and it is not possible to "make other arrangements" for inspection. 34 C.F.R. § 99.10(d). The institution may not destroy records while a request for their inspection is outstanding, 34 C.F.R. § 99.10(e), but FERPA does not otherwise impose any records retention requirements.

There are several limitations on the right of inspection. First, if the requested records contain information about more than one student, the requesting student may have access only to those portions pertaining to him-, her-, or themself. 34 C.F.R. § 99.12(a). (Note, however, that if information that is "directly related" to multiple students "cannot be segregated and redacted without destroying its meaning," each student may have access to the information even though it is also "directly related" to other students. 73 Fed. Reg. 74806, 74832-33 (Dec. 9, 2008).) In addition, students do not have the right to inspect the following:

1. Financial records of their parents. 34 C.F.R. § 99.12(b)(1).

2. Confidential letters and statements of recommendation, if the student has waived the right to review and inspect those documents and they are related to the student's admission, application for employment, or receipt of an honor or honorary recognition. 34 C.F.R. § 99.12(b)(3). Such a waiver is valid only if it is not a condition of admission to or receipt of a benefit or service from the institution and it is in writing and signed by the student. 34 C.F.R. § 99.12(c)(1). If the student provides such a waiver, the student must be given, upon request, the names of the persons providing the recommendations, and the institution may not use the letters for any purpose other than that for which they were originally intended. 34 C.F.R. § 99.12(c)(2). The student may revoke the waiver in writing; however, revocation affects only those documents received after the date of the revocation. 34 C.F.R. § 99.12(c)(3). In other words, a student may not revoke the waiver in order to see documents already received.

3. "Treatment" records, as defined above in Section II. However, upon request, the student may have any such records reviewed by a physician or other appropriate professional of the student's choice. 34 C.F.R. § 99.10(f).

V. AMENDMENT

If a student believes that his, her, or their education records contain inaccurate or misleading information or information that violates the student's right to privacy, the student may request that the institution amend the records. 34 C.F.R. § 99.20(a). The institution must make a decision on the request within a "reasonable time" after receipt. 34 C.F.R. § 99.20(b). If the institution decides not to make the requested amendment, it must so inform the student and advise the student of the right to a hearing. 34 C.F.R. § 99.20(c).

If the student requests a hearing, the hearing must meet the following minimum requirements:

1. It must be held within a reasonable time after the request;

2. The student must be provided reasonable notice of the date, time, and place of the hearing;

3. The individual conducting the hearing must not have a direct interest in the outcome;

4. The student must have a "full and fair opportunity" to present his, her, or their case and may be assisted or represented by others, including an attorney; and

5. The decision must be in writing, rendered within a reasonable time after the hearing, and based solely on the evidence presented at the hearing, and it must include a summary of the evidence and the reasons for the decision.

34 C.F.R. § 99.22.

If, as a result of the hearing, the institution agrees with the student, it must amend the record and notify the student in writing. 34 C.F.R. § 99.21(b)(1). If the institution does not agree, it must advise the student that he, she, or they may place a written statement in the file commenting on the contested information and/or stating the nature of the disagreement. 34 C.F.R. § 99.21(b)(2). If the student chooses this option, the statement must be maintained with the contested information and disclosed in conjunction with any subsequent release of the contested information. 34 C.F.R. § 99.21(c).

Both the Student Privacy Policy Office and the courts have ruled that this portion of FERPA is intended primarily to deal with "scrivener's errors" in a record, not to provide a means by which a student may challenge the underlying substantive decisions that are recorded, such as grades, or obtain information on how a particular grade was assigned. *See*, *e.g.*, <https://studentprivacy.ed.gov/resources/letter-parent-re-amendment-special-education-records>; *Adatsi v. Mathur*, 934 F.2d 910 (7th Cir. 1991) ("FERPA addresses the situation where a student seeks to have misleading or inaccurate information in his records corrected. There is nothing inaccurate about Adatsi's grade. He just feels he deserves something else. This fails to state a claim under FERPA."); *Tarka v.Cunningham*,

741 F. Supp. 1281, 1282 (W.D. Tex.), *aff'd*, 917 F.2d 890 (5th Cir. 1990) ("At most, a student is only entitled to know whether or not the assigned grade was recorded accurately in the student's record.").

VI. ANNUAL NOTIFICATION OF RIGHTS

FERPA requires each institution to notify its students annually of their rights under the act. 34 C.F.R. § 99.7. The best place to start (and perhaps end) is the Student Privacy Policy Office's model notice of rights, which is available at <https://studentprivacy.ed.gov/node/495>. The notice may be provided by "any means that are reasonably likely to inform . . . students of their rights." 34 C.F.R. § 99.2(b). Each institution must also give "public notice" of its list of directory information and its procedure for "opting out." 34 C.F.R. § 99.37(a). The easiest way to do so is by including this information in the annual notice.

VII. ENFORCEMENT

The responsibility for enforcing FERPA rests with the Student Privacy Policy Office of the Department of Education, which is authorized to investigate and review potential violations and to provide technical assistance regarding compliance issues. 34 C.F.R. § 99.60. If it determines *both* that a complaint is meritorious *and* that the violation "was based on a policy or practice" rather than an isolated incident, the Office will recommend steps necessary to ensure compliance with the act and provide a reasonable time for the institution to come into compliance. 34 C.F.R. § 99.66(c). If – *and only if* – the institution does not come into compliance, the Department is then authorized to terminate all or any portion of the institution's federal funds or to take "any [other] legally available enforcement action." 34 C.F.R. § 99.67; s*ee also* <https://studentprivacy.ed.gov/sites/default/files/resource_document/file/FERPA_Enforcement_Notice_2018.pdf> ("Only in those instances where an educational agency or institution is unwilling or unable to come into voluntary compliance with the law and it is otherwise appropriate will the Department withhold federal funds."). In *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the Supreme Court held that FERPA does not create personal rights that an individual may enforce through 42 U.S.C. § 1983.

VIII. RESOURCES

Student Privacy Policy Office/Privacy Technical Assistance Center:
https://studentprivacy.ed.gov

NACUA's FERPA Resource Page:
https://www.nacua.org/resource-library/resources-by-topic/privacy-transparency/ferpa

Higher Education Compliance Alliance Privacy/Student Records Resource Page:
https://www.higheredcompliance.org/resources-by-topic/?topic=privacy-student-records

Boston University's Policy Regarding Release of Information to Parents and Guardians:
http://www.bu.edu/reg/academics/ferpa/release

The Family Educational Rights and Privacy Act: 7 Myths — and the Truth

By STEVEN J. MCDONALD

An extraordinary amount of the national discussion since the shootings at Virginia Tech a year ago has focused on the role that the Family Educational Rights and Privacy Act, or Ferpa, the federal statute governing the privacy of student records, played in that tragedy. What that discussion has revealed most notably is that, although colleges have been subject to Ferpa for more than 30 years, and although few if any statutes have such wide-reaching, everyday application on our campuses, most of us still don't know much about it. In a way, Ferpa is the Rodney Dangerfield of statutes: While there is a great deal to it, it just doesn't get much respect.

In an effort to bring about greater clarity, the Family Policy Compliance Office, the office within the Education Department that oversees and enforces Ferpa, recently proposed the first major amendments to the regulations since 2000. For the most part, those amendments would simply codify and reinforce existing guidance. In a few circumstances, they would actually expand our already considerable discretion to disclose student records and information. But even those amendments will do no good unless we begin to pay attention to Ferpa and dispel a number of all-too-common myths about it that continue to get in the way of our doing the right thing for our students. Those myths include:

1. Ferpa applies to all information about our students. In fact, Ferpa governs the disclosure only of "records" and information from "records," not information generally. Personal knowledge is not subject to Ferpa, and its disclosure is therefore not prohibited by Ferpa — even if it also happens to be recorded.

Thus, for example, a professor who observes a student behaving oddly in a classroom, a resident assistant who notices a disturbing change in a student's temperament, or an adviser who sees a student become increasingly withdrawn and uncommunicative is free, as far as Ferpa is concerned, to raise the concern with others — and should do so. We do neither the student nor ourselves a favor if we don't try to reach out and deal with such situations when we still have the opportunity.

Ordinarily, if circumstances allow, it is preferable to raise such concerns first with those trained to evaluate and deal with them, such as campus mental-health professionals, campus police, or appropriate student-affairs officials. When the situation appears to be urgent, however, it is both appropriate and permissible to disclose the concern as broadly as seems necessary.

2. Ferpa makes it virtually impossible to disclose anything to anyone. The statute does apply broadly to almost all recorded student information in our possession, but, even so, it still offers us considerable leeway.

First, it exempts entirely from its coverage several categories of records, including, most significantly, "law-enforcement records." Records that are created by a campus's law-enforcement unit — be it commissioned police or noncommissioned security — at least in part for law-enforcement purposes and that are maintained by that unit may, under Ferpa, be freely shared with anyone for any reason. It makes no difference whether the creation of those records was also motivated by internal disciplinary or other reasons or whether they are shared with others on the campus for their own use. The copies of any such records that are shared with other offices do become subject to Ferpa, but the originals in the law-enforcement unit's possession remain entirely free of Ferpa's restrictions.

In addition, Ferpa offers no fewer than 15 exceptions to its general prohibition on the disclosure of student records and the information they contain (see list on following page), and a 16th exception has been proposed.

Finally, Ferpa also allows us to disclose records that have been thoroughly "anonymized," or scrubbed of personally identifiable information, and we are always free to disclose any student record with the student's consent.

At the same time, Ferpa also never compels us to use any of that leeway. Rather, it gives us discretion to do so under the specified circumstances if we deem it appropriate — and therefore requires us to make a decision, a situation that can lead to paralysis. But if we choose not to disclose student information when we would be permitted to do so, whether for legitimate policy reasons or by default, we should not use Ferpa as an excuse and thereby perpetuate this unfortunate and potentially harmful myth.

3. Ferpa prohibits us from sharing any student information with parents unless students specifically consent. As useful as such a "rule" might be in this age of attack-helicopter parents, and while we are free to adopt it as a policy matter if we so wish, we are not compelled to do so by the statute. Primary control over a student's records does shift from the parents to the student when the student enrolls in college, even if the student is still a minor, but primary control is not the same as total control. Institutions can disclose student information to parents under any number of circumstances.

Among the circumstances:

- If either parent claims the student as a federal tax dependent, the institution may, with confirmation of that status, disclose any and all information it has about the student to both parents, regardless of the student's age or whether there is an emergency.
- If the student is under 21, the institution may inform the student's parents of any violations of its alcohol or drug policies, regardless of whether the student is a tax dependent or whether there is an emergency.
- If the institution reasonably believes that there is a health or safety emergency involving the student, the institution may alert the student's parents and seek their

assistance, regardless of the student's age or whether the student is a tax dependent.

Moreover, we can make such disclosures even if the student has asked us not to. Ferpa doesn't give students a veto over any of the permitted disclosures except the one for "directory information."

4. We can't rely on the "health or safety emergency" exception if there's any uncertainty at all about whether we're facing imminent catastrophe. The many reviews and reports after Virginia Tech found the greatest confusion about, and resulting fear of, the Ferpa exception for disclosures to "appropriate persons" in connection with an "emergency" involving the "health or safety of the student or other persons." Much of that confusion and fear, it seems, can be traced to the regulation's statement that each of those terms must be "strictly construed." Additional guidance, intended to head off backlash against foreign students after September 11, 2001, indicates that the "danger" used to justify invocation of the exception must be both "serious" and "imminent."

To be sure, Ferpa is a privacy statute, and we certainly must acknowledge our students' legitimate interest in maintaining their privacy, but Ferpa does not make that interest an absolute, unassailable priority. Nor does Ferpa require that the situation at hand be a "red level" crisis, that only the intended disclosure will avert it, and that we be absolutely sure of both those conditions before proceeding.

Rather, Ferpa recognizes that decisions about when emergency disclosure is needed and what disclosure is appropriate must often be made in the heat of the moment, before all of the facts are, or could possibly be, known. In other guidance, the Family Policy Compliance Office has expressly stated that it will not fault good-faith decisions in that regard even if they turn out, in hindsight, to have been wrong: "This office will not substitute its judgment for what constitutes a true threat or emergency unless the determination appears manifestly unreasonable or irrational."

The reality, then, is that there is little to worry about when relying on the health-or-safety-emergency exception. But to make that point even clearer, the compliance office has just proposed to amend the regulation by eliminating the "strictly construed" provision and replacing it with a codification of its previous guidance. Those changes, the compliance office states, are intended to underscore that colleges have far "greater flexibility and deference" than we may have realized to "bring appropriate resources to bear on a circumstance that threatens the health or safety of individuals." We should not hesitate to take advantage of that flexibility and deference when it reasonably appears to be in the best interest of our students and institution that we do so.

5. Both Ferpa and Hipaa, the Health Insurance Portability and Accountability Act, prohibit the disclosure of student medical records to anyone. Ferpa's handling of student medical records and its "Alphonse and Gaston" interplay with Hipaa are, without question, counterintuitive and difficult to understand at first look. To begin, Hipaa expressly excludes from the coverage of its privacy provisions any records that are

subject to Ferpa. Ferpa in turn provides that "treatment records" — records created by medical professionals in the course of treating a student — are not subject to Ferpa. Back to Hipaa, which nevertheless excludes "treatment records" as well.

But there's a hitch: Such records are exempt from Ferpa's restrictions only as long as they are not shared with anyone other than those involved in providing the treatment. To the extent they are shared with anyone else, they are subject to the same disclosure restrictions under Ferpa as any other student records. (Other medically related student records that do not involve "treatment," such as disability-accommodation records or immunization verifications, are always subject to Ferpa and its general restrictions, and not to Hipaa.)

The reason for that convoluted, backhanded definition is not that Congress wanted student medical records to go wholly unprotected, but, rather, that it didn't want them to be subject to students' near-absolute right under Ferpa to "inspect and review" their own records. As long as such records remain in this Ferpa-Hipaa limbo, they are subject instead only to the typically more-limited state rules concerning when patients may access their own medical records.

The net result is that medically related student records — whether "treatment" records or not — are never subject to Hipaa's privacy provisions, are always (really) subject to Ferpa, and are, for all practical purposes, treated no differently under Ferpa than any other student records.

Campus medical professionals continue to be bound as well by whatever limits are imposed upon them by applicable state medical-confidentiality laws, but even those laws generally allow consultation with other medical professionals involved in treating the student, whether on or off the campus, and appropriate disclosures when deemed necessary to avert a serious threat to the health or safety of the student or others. Moreover, others on the campus who may have access to medically related student records generally are not subject to such state laws. They remain free to disclose those records to other college officials with a job-related need to know, in response to a health or safety emergency, to parents of a dependent student, in compliance with a subpoena, or in any of the other ways that Ferpa allows student records to be disclosed.

6. The consequences of violating Ferpa are devastating, so the safest course is to disclose nothing. It is true that withholding student information is, almost always, "safe," at least as far as Ferpa is concerned. At the college level, the only person who ever has a legally enforceable right under Ferpa to know what is in a student's records is the student. All of the exceptions that permit broader disclosure are entirely discretionary, so there is no legal consequence under Ferpa in choosing not to disclose.

Disclosing student-record information is, however, almost equally safe as far as Ferpa is concerned. In the 2002 case *Gonzaga University v. Doe,* the U.S. Supreme Court held that there is no private right of action under Ferpa. As a result, we cannot be sued by

aggrieved students or others even if we stray over the line of permissible disclosure. Their only recourse is to file a complaint with the Family Policy Compliance Office.

Moreover, while the enforcement tools in that office's arsenal are theoretically severe — potentially including the termination of federal support — Ferpa imposes no penalty whatever for making a single, honest mistake. Rather, it reserves its consequences only for institutions that have a "policy or practice" of violating its provisions. Even then sanctions may be imposed "only if … compliance cannot be secured by voluntary means" — in other words, only if an institution engages in repeated, intentional violations. In the 34 years since Ferpa's enactment, the compliance office has reviewed hundreds of complaints, and has found numerous violations, but has never once terminated even a single penny of federal money.

Nevertheless, Ferpa's "nuclear option" is frequently cited to limit or deny disclosure of student information, usually out of unwarranted fear of liability — and occasionally in an effort to cut off an opponent's policy argument in favor of disclosure. Instead of fretting about that extraordinarily remote threat, we should focus our discussions and decisions about disclosure on what is best for our students, secure in the knowledge that Ferpa gives us considerable room to do so.

7. Ferpa is seriously broken and needs to be fixed. That is perhaps the biggest myth of all. There is no question that Ferpa can be frustrating and even paralyzing. Its numerous provisions can be confusing, simply by virtue of their sheer quantity. They occasionally seem to point to conflicting conclusions. All too often they appear to be nothing more than micromanaging.

And yet Ferpa is actually quite flexible and forgiving. Only rarely does it restrict us from communicating about our students when we need to do so, and hardly ever does it compel communication about our students. It gives us considerable discretion to do what we, in our best judgment, think should be done. The consequences Ferpa imposes for good-faith mistakes are, in reality, little more than a gentle admonishment to learn from those mistakes and do better next time.

The real problem with Ferpa is that its flexibility is not well or widely understood. But if that is the problem, making Ferpa even more complex, by grafting ever-more-detailed exceptions — and exceptions to exceptions — onto it, is unlikely to help. While no doubt well intentioned, the many calls and proposals for major substantive revisions to Ferpa in the aftermath of Virginia Tech would, if adopted, probably yield only more confusion — and more paralysis — rather than clarity and better decision making.

Instead of trying to "fix" Ferpa, we should give it the respect it is due by learning what it actually provides, rather than relying on the myths we've heard about it. There is nothing to fear in Ferpa itself.

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KEY EXCEPTIONS TO FERPA

- Under the Family Educational Rights and Privacy Act, which governs the disclosure of student records, colleges may disclose any and all student records and information to faculty and staff members, to lawyers, accountants, and other outside contractors retained to provide services to the institution or to perform functions on its behalf, and even to other students who are acting on the institution's behalf — such as student representatives on a disciplinary committee — as long as they reasonably need access to the records and information to do their jobs. To use that exception, colleges must notify their students at least annually of how broadly they intend to employ it.
- Colleges may disclose any and all such records and information to officials at other colleges at which a student seeks or intends to enroll or is simultaneously enrolled. (Again, colleges must notify their students at least annually of their practice of doing so.)
- Unless a student has affirmatively opted out, colleges may disclose to anyone a fairly long list of "directory information," including name; physical and e-mail addresses; telephone numbers; major; degrees, honors, and awards received; participation in officially recognized activities and sports; photographs; and more. They cannot, however, disclose such information in a way that implicitly discloses nondirectory information as well. For example, colleges cannot disclose a list of "just names and addresses" in response to an inquiry about students who achieved a specified grade-point average, who took a particular course, or who were brought before a disciplinary committee in a given year. Doing so would reveal more about those students than "just" their names and addresses.
- If a college determines through its disciplinary system that a student committed certain serious offenses involving actual or threatened violence, it may disclose to anyone the student's name, the violation that occurred, and the sanction that was imposed.
- Colleges may disclose any such records or information in response to a subpoena from a court or agency having jurisdiction over them, although they generally must notify the student first.
- Colleges may disclose student records and information to students' parents in certain circumstances.
- Colleges may disclose such records and information to "appropriate parties" in connection with a "health or safety emergency."

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includes in its notice under paragraph (b) of this section:

(1) A statement of the specific steps that the Secretary recommends the recipient or contractor take to comply; and

(2) Provides a reasonable period of time, given all of the circumstances of the case, during which the recipient or contractor may comply voluntarily.

(Authority: 20 U.S.C. 1221e–3(a)(1), 1232h)

§ 98.10 Enforcement of the findings.

(a) If the recipient or contractor does not comply during the period of time set under § 98.9(c), the Secretary may either:

(1) For a recipient, take an action authorized under 34 CFR part 78, including:

(i) Issuing a notice of intent to terminate funds under 34 CFR 78.21;

(ii) Issuing a notice to withhold funds under 34 CFR 78.21, 200.94(b), or 298.45(b), depending upon the applicable program under which the notice is issued; or

(iii) Issuing a notice to cease and desist under 34 CFR 78.31, 200.94(c) or 298.45(c), depending upon the program under which the notice is issued; or

(2) For a contractor, direct the contracting officer to take an appropriate action authorized under the Federal Acquisition Regulations, including either:

(i) Issuing a notice to suspend operations under 48 CFR 12.5; or

(ii) Issuing a notice to terminate for default, either in whole or in part under 48 CFR 49.102.

(b) If, after an investigation under § 98.9, the Secretary finds that a recipient or contractor has complied voluntarily with section 439 of the Act, the Secretary provides the complainant and the recipient or contractor written notice of the decision and the basis for the decision.

(Authority: 20 U.S.C. 1221e–3(a)(1), 1232h)

PART 99—FAMILY EDUCATIONAL RIGHTS AND PRIVACY

Subpart A—General

Sec.

Subpart B—What Are the Rights of Inspection and Review of Education Records?

Subpart C—What Are the Procedures for Amending Education Records?

Subpart D—May an Educational Agency or Institution Disclose Personally Identifiable Information From Education Records?

AUTHORITY: 20 U.S.C. 1232g, unless otherwise noted.

SOURCE: 53 FR 11943, Apr. 11, 1988, unless otherwise noted.

Subpart A—General

§ 99.1 To which educational agencies or institutions do these regulations apply?

(a) Except as otherwise noted in § 99.10, this part applies to an educational agency or institution to which funds have been made available under any program administered by the Secretary, if—

(1) The educational institution provides educational services or instruction, or both, to students; or

(2) The educational agency is authorized to direct and control public elementary or secondary, or postsecondary educational institutions.

(b) This part does not apply to an educational agency or institution solely because students attending that agency or institution receive non-monetary benefits under a program referenced in paragraph (a) of this section, if no funds under that program are made available to the agency or institution.

(c) The Secretary considers funds to be made available to an educational agency or institution of funds under one or more of the programs referenced in paragraph (a) of this section—

(1) Are provided to the agency or institution by grant, cooperative agreement, contract, subgrant, or subcontract; or

(2) Are provided to students attending the agency or institution and the funds may be paid to the agency or institution by those students for educational purposes, such as under the Pell Grant Program and the Guaranteed Student Loan Program (titles IV-A-1 and IV-B, respectively, of the Higher Education Act of 1965, as amended).

(d) If an educational agency or institution receives funds under one or more of the programs covered by this section, the regulations in this part apply to the recipient as a whole, including each of its components (such as a department within a university).

(Authority: 20 U.S.C. 1232g)

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59295, Nov. 21, 1996; 65 FR 41852, July 6, 2000]

§ 99.2 What is the purpose of these regulations?

The purpose of this part is to set out requirements for the protection of privacy of parents and students under section 444 of the General Education Provisions Act, as amended.

(Authority: 20 U.S.C. 1232g)

NOTE TO § 99.2: 34 CFR 300.610 through 300.626 contain requirements regarding the confidentiality of information relating to children with disabilities who receive evaluations, services or other benefits under Part B of the Individuals with Disabilities Education Act (IDEA). 34 CFR 303.402 and 303.460 identify the confidentiality of information requirements regarding children and infants and toddlers with disabilities and their families who receive evaluations, services, or other benefits under Part C of IDEA. 34 CFR 300.610 through 300.627 contain the confidentiality of information requirements that apply to personally identifiable data,

information, and records collected or maintained pursuant to Part B of the IDEA.

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59295, Nov. 21, 1996; 73 FR 74851, Dec. 9, 2008]

§ 99.3 What definitions apply to these regulations?

The following definitions apply to this part:

Act means the Family Educational Rights and Privacy Act of 1974, as amended, enacted as section 444 of the General Education Provisions Act.

(Authority: 20 U.S.C. 1232g)

Attendance includes, but is not limited to—

(a) Attendance in person or by paper correspondence, videoconference, satellite, Internet, or other electronic information and telecommunications technologies for students who are not physically present in the classroom; and

(b) The period during which a person is working under a work-study program.

(Authority: 20 U.S.C. 1232g)

Authorized representative means any entity or individual designated by a State or local educational authority or an agency headed by an official listed in §99.31(a)(3) to conduct—with respect to Federal- or State-supported education programs—any audit or evaluation, or any compliance or enforcement activity in connection with Federal legal requirements that relate to these programs.

(Authority: 20 U.S.C. 1232g(b)(1)(C), (b)(3), and (b)(5))

Biometric record, as used in the definition of *personally identifiable information,* means a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual. Examples include fingerprints; retina and iris patterns; voiceprints; DNA sequence; facial characteristics; and handwriting.

(Authority: 20 U.S.C. 1232g)

Dates of attendance. (a) The term means the period of time during which a student attends or attended an educational agency or institution. Examples of dates of attendance include an academic year, a spring semester, or a first quarter.

(b) The term does not include specific daily records of a student's attendance at an educational agency or institution.

(Authority: 20 U.S.C. 1232g(a)(5)(A))

Directory information means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.

(a) Directory information includes, but is not limited to, 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.

(b) Directory information does not include a student's—

(1) Social security number; or

(2) Student identification (ID) number, except as provided in paragraph (c) of this definition.

(c) In accordance with paragraphs (a) and (b) of this definition, directory information includes—

(1) A student ID number, user ID, or other unique personal identifier used by a student for purposes of accessing or communicating in electronic systems, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, such as a personal identification number (PIN), password or other factor known or possessed only by the authorized user; and

(2) A student ID number or other unique personal identifier that is displayed on a student ID badge, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the

user's identity, such as a PIN, password, or other factor known or possessed only by the authorized user.

(Authority: 20 U.S.C. 1232g(a)(5)(A))

Disciplinary action or proceeding means the investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students of the agency or institution.

Disclosure means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record.

(Authority: 20 U.S.C. 1232g(b)(1) and (b)(2))

Early childhood education program means—

(a) A Head Start program or an Early Head Start program carried out under the Head Start Act (42 U.S.C. 9831 *et seq.*), including a migrant or seasonal Head Start program, an Indian Head Start program, or a Head Start program or an Early Head Start program that also receives State funding;

(b) A State licensed or regulated child care program; or

(c) A program that—

(1) Serves children from birth through age six that addresses the children's cognitive (including language, early literacy, and early mathematics), social, emotional, and physical development; and

(2) Is—

(i) A State prekindergarten program;

(ii) A program authorized under section 619 or part C of the Individuals with Disabilities Education Act; or

(iii) A program operated by a local educational agency.

Educational agency or institution means any public or private agency or institution to which this part applies under §99.1(a).

(Authority: 20 U.S.C. 1232g(a)(3))

Education program means any program that is principally engaged in the provision of education, including, but not limited to, early childhood education, elementary and secondary education, postsecondary education, special education, job training, career and technical education, and adult education, and any program that is administered by an educational agency or institution.

(Authority: 20 U.S.C. 1232g(b)(3), (b)(5))

Education records. (a) The term means those records that are:

(1) Directly related to a student; and

(2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include:

(1) 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.

(2) Records of the law enforcement unit of an educational agency or institution, subject to the provisions of §99.8.

(3)(i) Records relating to an individual who is employed by an educational agency or institution, that:

(A) Are made and maintained in the normal course of business;

(B) Relate exclusively to the individual in that individual's capacity as an employee; and

(C) Are not available for use for any other purpose.

(ii) Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph (b)(3)(i) of this definition.

(4) Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are:

(i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;

(ii) Made, maintained, or used only in connection with treatment of the student; and

(iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, ''treatment''

does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution; and

(5) Records created or received by an educational agency or institution after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student.

(6) Grades on peer-graded papers before they are collected and recorded by a teacher.

(Authority: 20 U.S.C. 1232g(a)(4))

Eligible student means a student who has reached 18 years of age or is attending an institution of postsecondary education.

(Authority: 20 U.S.C. 1232g(d))

Institution of postsecondary education means an institution that provides education to students beyond the secondary school level; ''secondary school level'' means the educational level (not beyond grade 12) at which secondary education is provided as determined under State law.

(Authority: 20 U.S.C. 1232g(d))

Parent means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.

(Authority: 20 U.S.C. 1232g)

Party means an individual, agency, institution, or organization.

(Authority: 20 U.S.C. 1232g(b)(4)(A))

Personally Identifiable Information

The term includes, but is not limited to—

(a) The student's name;

(b) The name of the student's parent or other family members;

(c) The address of the student or student's family;

(d) A personal identifier, such as the student's social security number, student number, or biometric record;

(e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;

(f) 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

(g) 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.

(Authority: 20 U.S.C. 1232g)

Record means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.

(Authority: 20 U.S.C. 1232g)

Secretary means the Secretary of the U.S. Department of Education or an official or employee of the Department of Education acting for the Secretary under a delegation of authority.

(Authority: 20 U.S.C. 1232g)

Student, except as otherwise specifically provided in this part, means any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records.

(Authority: 20 U.S.C. 1232g(a)(6))

[53 FR 11943, Apr. 11, 1988, as amended at 60 FR 3468, Jan. 17, 1995; 61 FR 59295, Nov. 21, 1996; 65 FR 41852, July 6, 2000; 73 FR 74851, Dec. 9, 2008; 76 FR 75641, Dec. 2, 2011]

§ 99.4 What are the rights of parents?

An educational agency or institution shall give full rights under the Act to either parent, unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights.

(Authority: 20 U.S.C. 1232g)

§ 99.5 What are the rights of students?

(a)(1) When a student becomes an eligible student, the rights accorded to,

and consent required of, parents under this part transfer from the parents to the student.

(2) Nothing in this section prevents an educational agency or institution from disclosing education records, or personally identifiable information from education records, to a parent without the prior written consent of an eligible student if the disclosure meets the conditions in § 99.31(a)(8), § 99.31(a)(10), § 99.31(a)(15), or any other provision in § 99.31(a).

(b) The Act and this part do not prevent educational agencies or institutions from giving students rights in addition to those given to parents.

(c) An individual who is or has been a student at an educational institution and who applies for admission at another component of that institution does not have rights under this part with respect to records maintained by that other component, including records maintained in connection with the student's application for admission, unless the student is accepted and attends that other component of the institution.

(Authority: 20 U.S.C. 1232g(d))

[53 FR 11943, Apr. 11, 1988, as amended at 58 FR 3188, Jan. 7, 1993; 65 FR 41853, July 6, 2000; 73 FR 74852, Dec. 9, 2008]

§ 99.6 [Reserved]

§ 99.7 What must an educational agency or institution include in its annual notification?

(a)(1) Each educational agency or institution shall annually notify parents of students currently in attendance, or eligible students currently in attendance, of their rights under the Act and this part.

(2) The notice must inform parents or eligible students that they have the right to—

(i) Inspect and review the student's education records;

(ii) Seek amendment of the student's education records that the parent or eligible student believes to be inaccurate, misleading, or otherwise in violation of the student's privacy rights;

(iii) Consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that the Act and § 99.31 authorize disclosure without consent; and

(iv) File with the Department a complaint under §§ 99.63 and 99.64 concerning alleged failures by the educational agency or institution to comply with the requirements of the Act and this part.

(3) The notice must include all of the following:

(i) The procedure for exercising the right to inspect and review education records.

(ii) The procedure for requesting amendment of records under § 99.20.

(iii) If the educational agency or institution has a policy of disclosing education records under § 99.31(a)(1), a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.

(b) An educational agency or institution may provide this notice by any means that are reasonably likely to inform the parents or eligible students of their rights.

(1) An educational agency or institution shall effectively notify parents or eligible students who are disabled.

(2) An agency or institution of elementary or secondary education shall effectively notify parents who have a primary or home language other than English.

(Approved by the Office of Management and Budget under control number 1880–0508)

(Authority: 20 U.S.C. 1232g (e) and (f))

[61 FR 59295, Nov. 21, 1996]

§ 99.8 What provisions apply to records of a law enforcement unit?

(a)(1) *Law enforcement unit* means any individual, office, department, division, or other component of an educational agency or institution, such as a unit of commissioned police officers or noncommissioned security guards, that is officially authorized or designated by that agency or institution to—

(i) Enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself; or

(ii) Maintain the physical security and safety of the agency or institution.

(2) A component of an educational agency or institution does not lose its status as a *law enforcement unit* if it also performs other, non-law enforcement functions for the agency or institution, including investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceedings against the student.

(b)(1) Records of a law enforcement unit means those records, files, documents, and other materials that are—

(i) Created by a law enforcement unit;

(ii) Created for a law enforcement purpose; and

(iii) Maintained by the law enforcement unit.

(2) Records of a law enforcement unit does not mean—

(i) Records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the educational agency or institution other than the law enforcement unit; or

(ii) Records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution.

(c)(1) Nothing in the Act prohibits an educational agency or institution from contacting its law enforcement unit, orally or in writing, for the purpose of asking that unit to investigate a possible violation of, or to enforce, any local, State, or Federal law.

(2) Education records, and personally identifiable information contained in education records, do not lose their status as education records and remain subject to the Act, including the disclosure provisions of § 99.30, while in the possession of the law enforcement unit.

(d) The Act neither requires nor prohibits the disclosure by an educational agency or institution of its law enforcement unit records.

(Authority: 20 U.S.C. 1232g(a)(4)(B)(ii))

[60 FR 3469, Jan. 17, 1995]

Subpart B—What Are the Rights of Inspection and Review of Education Records?

§ 99.10 What rights exist for a parent or eligible student to inspect and review education records?

(a) Except as limited under § 99.12, a parent or eligible student must be given the opportunity to inspect and review the student's education records. This provision applies to—

(1) Any educational agency or institution; and

(2) Any State educational agency (SEA) and its components.

(i) For the purposes of subpart B of this part, an SEA and its components constitute an educational agency or institution.

(ii) An SEA and its components are subject to subpart B of this part if the SEA maintains education records on students who are or have been in attendance at any school of an educational agency or institution subject to the Act and this part.

(b) The educational agency or institution, or SEA or its component, shall comply with a request for access to records within a reasonable period of time, but not more than 45 days after it has received the request.

(c) The educational agency or institution, or SEA or its component shall respond to reasonable requests for explanations and interpretations of the records.

(d) If circumstances effectively prevent the parent or eligible student from exercising the right to inspect and review the student's education records, the educational agency or institution, or SEA or its component, shall—

(1) Provide the parent or eligible student with a copy of the records requested; or

(2) Make other arrangements for the parent or eligible student to inspect and review the requested records.

(e) The educational agency or institution, or SEA or its component shall not destroy any education records if there is an outstanding request to inspect and review the records under this section.

(f) While an education agency or institution is not required to give an eligible student access to treatment records under paragraph (b)(4) of the definition of *Education records* in § 99.3, the student may have those records reviewed by a physician or other appropriate professional of the student's choice.

(Authority: 20 U.S.C. 1232g(a)(1) (A) and (B))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59296, Nov. 21, 1996]

§ 99.11 May an educational agency or institution charge a fee for copies of education records?

(a) Unless the imposition of a fee effectively prevents a parent or eligible student from exercising the right to inspect and review the student's education records, an educational agency or institution may charge a fee for a copy of an education record which is made for the parent or eligible student.

(b) An educational agency or institution may not charge a fee to search for or to retrieve the education records of a student.

(Authority: 20 U.S.C. 1232g(a)(1))

§ 99.12 What limitations exist on the right to inspect and review records?

(a) If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student.

(b) A postsecondary institution does not have to permit a student to inspect and review education records that are:

(1) Financial records, including any information those records contain, of his or her parents;

(2) Confidential letters and confidential statements of recommendation placed in the education records of the student before January 1, 1975, as long as the statements are used only for the purposes for which they were specifically intended; and

(3) Confidential letters and confidential statements of recommendation placed in the student's education records after January 1, 1975, if:

(i) The student has waived his or her right to inspect and review those letters and statements; and

(ii) Those letters and statements are related to the student's:

(A) Admission to an educational institution;

(B) Application for employment; or

(C) Receipt of an honor or honorary recognition.

(c)(1) A waiver under paragraph (b)(3)(i) of this section is valid only if:

(i) The educational agency or institution does not require the waiver as a condition for admission to or receipt of a service or benefit from the agency or institution; and

(ii) The waiver is made in writing and signed by the student, regardless of age.

(2) If a student has waived his or her rights under paragraph (b)(3)(i) of this section, the educational institution shall:

(i) Give the student, on request, the names of the individuals who provided the letters and statements of recommendation; and

(ii) Use the letters and statements of recommendation only for the purpose for which they were intended.

(3)(i) A waiver under paragraph (b)(3)(i) of this section may be revoked with respect to any actions occurring after the revocation.

(ii) A revocation under paragraph (c)(3)(i) of this section must be in writing.

(Authority: 20 U.S.C. 1232g(a)(1) (A), (B), (C), and (D))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59296, Nov. 21, 1996]

Subpart C—What Are the Procedures for Amending Education Records?

§ 99.20 How can a parent or eligible student request amendment of the student's education records?

(a) If a parent or eligible student believes the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy, he or she may ask the educational agency or institution to amend the record.

(b) The educational agency or institution shall decide whether to amend the record as requested within a reasonable time after the agency or institution receives the request.

(c) If the educational agency or institution decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and of his or her right to a hearing under § 99.21.

(Authority: 20 U.S.C. 1232g(a)(2))

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988, as amended at 61 FR 59296, Nov. 21, 1996]

§ 99.21 Under what conditions does a parent or eligible student have the right to a hearing?

(a) An educational agency or institution shall give a parent or eligible student, on request, an opportunity for a hearing to challenge the content of the student's education records on the grounds that the information contained in the education records is inaccurate, misleading, or in violation of the privacy rights of the student.

(b)(1) If, as a result of the hearing, the educational agency or institution decides that the information is inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall:

(i) Amend the record accordingly; and

(ii) Inform the parent or eligible student of the amendment in writing.

(2) If, as a result of the hearing, the educational agency or institution decides that the information in the education record is not inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall inform the parent or eligible student of the right to place a statement in the record commenting on the contested information in the record or stating why he or she disagrees with the decision of the agency or institution, or both.

(c) If an educational agency or institution places a statement in the education records of a student under paragraph (b)(2) of this section, the agency or institution shall:

(1) Maintain the statement with the contested part of the record for as long as the record is maintained; and

(2) Disclose the statement whenever it discloses the portion of the record to which the statement relates.

(Authority: 20 U.S.C. 1232g(a)(2))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59296, Nov. 21, 1996]

§ 99.22 What minimum requirements exist for the conduct of a hearing?

The hearing required by § 99.21 must meet, at a minimum, the following requirements:

(a) The educational agency or institution shall hold the hearing within a reasonable time after it has received the request for the hearing from the parent or eligible student.

(b) The educational agency or institution shall give the parent or eligible student notice of the date, time, and place, reasonably in advance of the hearing.

(c) The hearing may be conducted by any individual, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing.

(d) The educational agency or institution shall give the parent or eligible student a full and fair opportunity to present evidence relevant to the issues raised under § 99.21. The parent or eligible student may, at their own expense, be assisted or represented by one or more individuals of his or her own choice, including an attorney.

(e) The educational agency or institution shall make its decision in writing within a reasonable period of time after the hearing.

(f) The decision must be based solely on the evidence presented at the hearing, and must include a summary of the evidence and the reasons for the decision.

(Authority: 20 U.S.C. 1232g(a)(2))

Subpart D—May an Educational Agency or Institution Disclose Personally Identifiable Information From Education Records?

§ 99.30 Under what conditions is prior consent required to disclose information?

(a) The parent or eligible student shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records, except as provided in § 99.31.

(b) The written consent must:

(1) Specify the records that may be disclosed;

(2) State the purpose of the disclosure; and

(3) Identify the party or class of parties to whom the disclosure may be made.

(c) When a disclosure is made under paragraph (a) of this section:

(1) If a parent or eligible student so requests, the educational agency or institution shall provide him or her with a copy of the records disclosed; and

(2) If the parent of a student who is not an eligible student so requests, the agency or institution shall provide the student with a copy of the records disclosed.

(d) ''Signed and dated written consent'' under this part may include a record and signature in electronic form that—

(1) Identifies and authenticates a particular person as the source of the electronic consent; and

(2) Indicates such person's approval of the information contained in the electronic consent.

(Authority: 20 U.S.C. 1232g (b)(1) and (b)(2)(A))

[53 FR 11943, Apr. 11, 1988, as amended at 58 FR 3189, Jan. 7, 1993; 69 FR 21671, Apr. 21, 2004]

§ 99.31 Under what conditions is prior consent not required to disclose information?

(a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:

(1)(i)(A) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.

(B) A contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a school official under this paragraph provided that the outside party—

(*1*) Performs an institutional service or function for which the agency or institution would otherwise use employees;

(*2*) Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and

(*3*) Is subject to the requirements of § 99.33(a) governing the use and redisclosure of personally identifiable information from education records.

(ii) An educational agency or institution must use reasonable methods to ensure that school officials obtain access to only those education records in which they have legitimate educational interests. An educational agency or institution that does not use physical or technological access controls must ensure that its administrative policy for controlling access to education records is effective and that it remains in compliance with the legitimate educational interest requirement in paragraph (a)(1)(i)(A) of this section.

(2) The disclosure is, subject to the requirements of § 99.34, to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll, or where the student is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer.

NOTE: Section 4155(b) of the No Child Left Behind Act of 2001, 20 U.S.C. 7165(b), requires each State to assure the Secretary of Education that it has a procedure in place to facilitate the transfer of disciplinary records with respect to a suspension or expulsion of a student by a local educational agency to

any private or public elementary or secondary school in which the student is subsequently enrolled or seeks, intends, or is instructed to enroll.

(3) The disclosure is, subject to the requirements of § 99.35, to authorized representatives of—

(i) The Comptroller General of the United States;

(ii) The Attorney General of the United States;

(iii) The Secretary; or

(iv) State and local educational authorities.

(4)(i) The disclosure is in connection with financial aid for which the student has applied or which the student has received, if the information is necessary for such purposes as to:

(A) Determine eligibility for the aid;

(B) Determine the amount of the aid;

(C) Determine the conditions for the aid; or

(D) Enforce the terms and conditions of the aid.

(ii) As used in paragraph (a)(4)(i) of this section, *financial aid* means a payment of funds provided to an individual (or a payment in kind of tangible or intangible property to the individual) that is conditioned on the individual's attendance at an educational agency or institution.

(Authority: 20 U.S.C. 1232g(b)(1)(D))

(5)(i) The disclosure is to State and local officials or authorities to whom this information is specifically—

(A) Allowed to be reported or disclosed pursuant to State statute adopted before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and the system's ability to effectively serve the student whose records are released; or

(B) Allowed to be reported or disclosed pursuant to State statute adopted after November 19, 1974, subject to the requirements of § 99.38.

(ii) Paragraph (a)(5)(i) of this section does not prevent a State from further limiting the number or type of State or local officials to whom disclosures may be made under that paragraph.

(6)(i) The disclosure is to organizations conducting studies for, or on behalf of, educational agencies or institutions to:

(A) Develop, validate, or administer predictive tests;

(B) Administer student aid programs; or

(C) Improve instruction.

(ii) Nothing in the Act or this part prevents a State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section from entering into agreements with organizations conducting studies under paragraph (a)(6)(i) of this section and redisclosing personally identifiable information from education records on behalf of educational agencies and institutions that disclosed the information to the State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section in accordance with the requirements of § 99.33(b).

(iii) An educational agency or institution may disclose personally identifiable information under paragraph (a)(6)(i) of this section, and a State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section may redisclose personally identifiable information under paragraph (a)(6)(i) and (a)(6)(ii) of this section, only if—

(A) The study is conducted in a manner that does not permit personal identification of parents and students by individuals other than representatives of the organization that have legitimate interests in the information;

(B) The information is destroyed when no longer needed for the purposes for which the study was conducted; and

(C) The educational agency or institution or the State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section enters into a written agreement with the organization that—

(*1*) Specifies the purpose, scope, and duration of the study or studies and the information to be disclosed;

(*2*) Requires the organization to use personally identifiable information from education records only to meet the purpose or purposes of the study as stated in the written agreement;

(*3*) Requires the organization to conduct the study in a manner that does not permit personal identification of parents and students, as defined in this

part, by anyone other than representatives of the organization with legitimate interests;

and

(*4*) Requires the organization to destroy all personally identifiable information when the information is no longer needed for the purposes for which the study was conducted and specifies the time period in which the information must be destroyed.

(iv) An educational agency or institution or State or local educational authority or Federal agency headed by an official listed in paragraph (a)(3) of this section is not required to initiate a study or agree with or endorse the conclusions or results of the study.

(v) For the purposes of paragraph (a)(6) of this section, the term *organization* includes, but is not limited to, Federal, State, and local agencies, and independent organizations.

(7) The disclosure is to accrediting organizations to carry out their accrediting functions.

(8) The disclosure is to parents, as defined in § 99.3, of a dependent student, as defined in section 152 of the Internal Revenue Code of 1986.

(9)(i) The disclosure is to comply with a judicial order or lawfully issued subpoena.

(ii) The educational agency or institution may disclose information under paragraph (a)(9)(i) of this section only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action, unless the disclosure is in compliance with—

(A) A Federal grand jury subpoena and the court has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed;

(B) Any other subpoena issued for a law enforcement purpose and the court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed; or

(C) An *ex parte* court order obtained by the United States Attorney General (or designee not lower than an Assistant Attorney General) concerning investigations or prosecutions of an offense listed in 18 U.S.C. 2332b(g)(5)(B) or an act of domestic or international terrorism as defined in 18 U.S.C. 2331.

(iii)(A) If an educational agency or institution initiates legal action against a parent or student, the educational agency or institution may disclose to the court, without a court order or subpoena, the education records of the student that are relevant for the educational agency or institution to proceed with the legal action as plaintiff.

(B) If a parent or eligible student initiates legal action against an educational agency or institution, the educational agency or institution may disclose to the court, without a court order or subpoena, the student's education records that are relevant for the educational agency or institution to defend itself.

(10) The disclosure is in connection with a health or safety emergency, under the conditions described in § 99.36.

(11) The disclosure is information the educational agency or institution has designated as ''directory information'', under the conditions described in § 99.37.

(12) The disclosure is to the parent of a student who is not an eligible student or to the student.

(13) The disclosure, subject to the requirements in § 99.39, is to a victim of an alleged perpetrator of a crime of violence or a non-forcible sex offense. The disclosure may only include the final results of the disciplinary proceeding conducted by the institution of postsecondary education with respect to that alleged crime or offense. The institution may disclose the final results of the disciplinary proceeding, regardless of whether the institution concluded a violation was committed.

(14)(i) The disclosure, subject to the requirements in § 99.39, is in connection with a disciplinary proceeding at an institution of postsecondary education. The institution must not disclose the final results of the disciplinary proceeding unless it determines that—

(A) The student is an alleged perpetrator of a crime of violence or nonforcible sex offense; and

(B) With respect to the allegation made against him or her, the student has committed a violation of the institution's rules or policies.

(ii) The institution may not disclose the name of any other student, including a victim or witness, without the prior written consent of the other student.

(iii) This section applies only to disciplinary proceedings in which the final results were reached on or after October 7, 1998.

(15)(i) The disclosure is to a parent of a student at an institution of postsecondary education regarding the student's violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance if—

(A) The institution determines that the student has committed a disciplinary violation with respect to that use or possession; and

(B) The student is under the age of 21 at the time of the disclosure to the parent.

(ii) Paragraph (a)(15) of this section does not supersede any provision of State law that prohibits an institution of postsecondary education from disclosing information.

(16) The disclosure concerns sex offenders and other individuals required to register under section 170101 of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 14071, and the information was provided to the educational agency or institution under 42 U.S.C. 14071 and applicable Federal guidelines.

(b)(1) *De-identified records and information.* An educational agency or institution, or a party that has received education records or information from education records under this part, may release the records or information without the consent required by § 99.30 after the removal of all personally identifiable information provided that the educational agency or institution or other party has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.

(2) An educational agency or institution, or a party that has received education records or information from education records under this part, may release de-identified student level data from education records for the purpose of education research by attaching a code to each record that may allow the recipient to match information received from the same source, provided that—

(i) An educational agency or institution or other party that releases de-identified data under paragraph (b)(2) of this section does not disclose any information about how it generates and assigns a record code, or that would allow a recipient to identify a student based on a record code;

(ii) The record code is used for no purpose other than identifying a de-identified record for purposes of education research and cannot be used to ascertain personally identifiable information about a student; and

(iii) The record code is not based on a student's social security number or other personal information.

(c) An educational agency or institution must use reasonable methods to identify and authenticate the identity of parents, students, school officials, and any other parties to whom the agency or institution discloses personally identifiable information from education records.

(d) Paragraphs (a) and (b) of this section do not require an educational agency or institution or any other party to disclose education records or information from education records to any party except for parties under paragraph (a)(12) of this section.

(Authority: 20 U.S.C. 1232g(a)(5)(A), (b), (h), (i), and (j)).

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988, as amended at 58 FR 3189, Jan. 7, 1993; 61 FR 59296, Nov. 21, 1996; 65 FR 41853, July 6, 2000; 73 FR 74852, Dec. 9, 2008; 74 FR 401, Jan. 6, 2009; 76 FR 75641, Dec. 2, 2011]

§ 99.32 What recordkeeping requirements exist concerning requests and disclosures?

(a)(1) An educational agency or institution must maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each

student, as well as the names of State and local educational authorities and Federal officials and agencies listed in § 99.31(a)(3) that may make further disclosures of personally identifiable information from the student's education records without consent under § 99.33(b).

(2) The agency or institution shall maintain the record with the education records of the student as long as the records are maintained.

(3) For each request or disclosure the record must include:

(i) The parties who have requested or received personally identifiable information from the education records; and

(ii) The legitimate interests the parties had in requesting or obtaining the information.

(4) An educational agency or institution must obtain a copy of the record of further disclosures maintained under paragraph (b)(2) of this section and make it available in response to a parent's or eligible student's request to review the record required under paragraph (a)(1) of this section.

(5) An educational agency or institution must record the following information when it discloses personally identifiable information from education records under the health or safety emergency exception in § 99.31(a)(10) and § 99.36:

(i) The articulable and significant threat to the health or safety of a student or other individuals that formed the basis for the disclosure; and

(ii) The parties to whom the agency or institution disclosed the information.

(b)(1) Except as provided in paragraph (b)(2) of this section, if an educational agency or institution discloses personally identifiable information from education records with the understanding authorized under § 99.33(b), the record of the disclosure required under this section must include:

(i) The names of the additional parties to which the receiving party may disclose the information on behalf of the educational agency or institution; and

(ii) The legitimate interests under § 99.31 which each of the additional parties has in requesting or obtaining the information.

(2)(i) A State or local educational authority or Federal official or agency listed in § 99.31(a)(3) that makes further disclosures of information from education records under § 99.33(b) must record the names of the additional parties to which it discloses information on behalf of an educational agency or institution and their legitimate interests in the information under § 99.31 if the information was received from:

(A) An educational agency or institution that has not recorded the further disclosures under paragraph (b)(1) of this section; or

(B) Another State or local educational authority or Federal official or agency listed in § 99.31(a)(3).

(ii) A State or local educational authority or Federal official or agency that records further disclosures of information under paragraph (b)(2)(i) of this section may maintain the record by the student's class, school, district, or other appropriate grouping rather than by the name of the student.

(iii) Upon request of an educational agency or institution, a State or local educational authority or Federal official or agency listed in § 99.31(a)(3) that maintains a record of further disclosures under paragraph (b)(2)(i) of this section must provide a copy of the record of further disclosures to the educational agency or institution within a reasonable period of time not to exceed 30 days.

(c) The following parties may inspect the record relating to each student:

(1) The parent or eligible student.

(2) The school official or his or her assistants who are responsible for the custody of the records.

(3) Those parties authorized in § 99.31(a) (1) and (3) for the purposes of auditing the recordkeeping procedures of the educational agency or institution.

(d) Paragraph (a) of this section does not apply if the request was from, or the disclosure was to:

(1) The parent or eligible student;

(2) A school official under § 99.31(a)(1);

(3) A party with written consent from the parent or eligible student;

(4) A party seeking directory information; or

(5) A party seeking or receiving records in accordance with § 99.31(a)(9)(ii)(A) through (C).

(Approved by the Office of Management and Budget under control number 1880–0508)

(Authority: 20 U.S.C. 1232g(b)(1) and (b)(4)(A))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59297, Nov. 21, 1996; 73 FR 74853, Dec. 9, 2008]

§ 99.33 What limitations apply to the redisclosure of information?

(a)(1) An educational agency or institution may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student.

(2) The officers, employees, and agents of a party that receives information under paragraph (a)(1) of this section may use the information, but only for the purposes for which the disclosure was made.

(b)(1) Paragraph (a) of this section does not prevent an educational agency or institution from disclosing personally identifiable information with the understanding that the party receiving the information may make further disclosures of the information on behalf of the educational agency or institution if—

(i) The disclosures meet the requirements of § 99.31; and

(ii)(A) The educational agency or institution has complied with the requirements of § 99.32(b); or

(B) A State or local educational authority or Federal official or agency listed in § 99.31(a)(3) has complied with the requirements of § 99.32(b)(2).

(2) A party that receives a court order or lawfully issued subpoena and rediscloses personally identifiable information from education records on behalf of an educational agency or institution in response to that order or subpoena under § 99.31(a)(9) must provide the notification required under § 99.31(a)(9)(ii).

(c) Paragraph (a) of this section does not apply to disclosures under §§ 99.31(a)(8), (9), (11), (12), (14), (15), and (16), and to information that postsecondary institutions are required to disclose under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. 1092(f) (Clery Act), to the accuser and accused regarding the outcome of any campus disciplinary proceeding brought alleging a sexual offense.

(d) An educational agency or institution must inform a party to whom disclosure is made of the requirements of paragraph (a) of this section except for disclosures made under §§ 99.31(a)(8), (9), (11), (12), (14), (15), and (16), and to information that postsecondary institutions are required to disclose under the Clery Act to the accuser and accused regarding the outcome of any campus disciplinary proceeding brought alleging a sexual offense.

(Authority: 20 U.S.C. 1232g(b)(4)(B))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59297, Nov. 21, 1996; 65 FR 41853, July 6, 2000; 73 FR 74853, Dec. 9, 2008; 76 FR 75642, Dec. 2, 2011]

§ 99.34 What conditions apply to disclosure of information to other educational agencies or institutions?

(a) An educational agency or institution that discloses an education record under § 99.31(a)(2) shall:

(1) Make a reasonable attempt to notify the parent or eligible student at the last known address of the parent or eligible student, unless:

(i) The disclosure is initiated by the parent or eligible student; or

(ii) The annual notification of the agency or institution under § 99.7 includes a notice that the agency or institution forwards education records to other agencies or institutions that have requested the records and in which the student seeks or intends to enroll or is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer;

(2) Give the parent or eligible student, upon request, a copy of the record that was disclosed; and

(3) Give the parent or eligible student, upon request, an opportunity for a hearing under subpart C.

(b) An educational agency or institution may disclose an education record of a student in attendance to another educational agency or institution if:

(1) The student is enrolled in or receives services from the other agency or institution; and

(2) The disclosure meets the requirements of paragraph (a) of this section.

(Authority: 20 U.S.C. 1232g(b)(1)(B))

[53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59297, Nov. 21, 1996; 73 FR 74854, Dec. 9, 2008]

§ 99.35 What conditions apply to disclosure of information for Federal or State program purposes?

(a)(1) Authorized representatives of the officials or agencies headed by officials listed in § 99.31(a)(3) may have access to education records in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements that relate to those programs.

(2) The State or local educational authority or agency headed by an official listed in § 99.31(a)(3) is responsible for using reasonable methods to ensure to the greatest extent practicable that any entity or individual designated as its authorized representative—

(i) Uses personally identifiable information only to carry out an audit or evaluation of Federal- or State-supported education programs, or for the enforcement of or compliance with Federal legal requirements related to these programs;

(ii) Protects the personally identifiable information from further disclosures or other uses, except as authorized in paragraph (b)(1) of this section; and

(iii) Destroys the personally identifiable information in accordance with the requirements of paragraphs (b) and (c) of this section.

(3) The State or local educational authority or agency headed by an official listed in § 99.31(a)(3) must use a written agreement to designate any authorized representative, other than an employee. The written agreement must—

(i) Designate the individual or entity as an authorized representative;

(ii) Specify—

(A) The personally identifiable information from education records to be disclosed;

(B) That the purpose for which the personally identifiable information from education records is disclosed to the authorized representative is to carry out an audit or evaluation of Federal- or State-supported education programs, or to enforce or to comply with Federal legal requirements that relate to those programs; and

(C) A description of the activity with sufficient specificity to make clear that the work falls within the exception of § 99.31(a)(3), including a description of how the personally identifiable information from education records will be used;

(iii) Require the authorized representative to destroy personally identifiable information from education records when the information is no longer needed for the purpose specified;

(iv) Specify the time period in which the information must be destroyed; and

(v) Establish policies and procedures, consistent with the Act and other Federal and State confidentiality and privacy provisions, to protect personally identifiable information from education records from further disclosure (except back to the disclosing entity) and unauthorized use, including limiting use of personally identifiable information from education records to only authorized representatives with legitimate interests in the audit or evaluation of a Federal- or State-supported education program or for compliance or enforcement of Federal legal requirements related to these programs.

(b) Information that is collected under paragraph (a) of this section must—

(1) Be protected in a manner that does not permit personal identification of individuals by anyone other than the State or local educational authority or agency headed by an official listed in § 99.31(a)(3) and their authorized representatives, except that the State or local educational authority or agency headed by an official listed in § 99.31(a)(3) may make further disclosures of personally identifiable information from education records on behalf of the educational agency or institution in accordance with the requirements of § 99.33(b); and

(2) Be destroyed when no longer needed for the purposes listed in paragraph (a) of this section.

(c) Paragraph (b) of this section does not apply if:

(1) The parent or eligible student has given written consent for the disclosure under § 99.30; or

(2) The collection of personally identifiable information is specifically authorized by Federal law.

(Authority: 20 U.S.C. 1232g(b)(1)(C), (b)(3), and (b)(5))

[53 FR 11943, Apr. 11, 1988, as amended at 73 FR 74854, Dec. 9, 2008; 76 FR 75642, Dec. 2, 2011]

§ 99.36 What conditions apply to disclosure of information in health and safety emergencies?

(a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

(b) Nothing in this Act or this part shall prevent an educational agency or institution from—

(1) Including in the education records of a student appropriate information concerning disciplinary action taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community;

(2) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials within the agency or institution who the agency or institution has determined have legitimate educational interests in the behavior of the student; or

(3) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials in other schools who have been determined to have legitimate educational interests in the behavior of the student.

(c) In making a determination under paragraph (a) of this section, an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a 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.

(Authority: 20 U.S.C. 1232g (b)(1)(I) and (h))

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988, as amended at 61 FR 59297, Nov. 21, 1996; 73 FR 74854, Dec. 9, 2008]

§ 99.37 What conditions apply to disclosing directory information?

(a) An educational agency or institution may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance at the agency or institution of:

(1) The types of personally identifiable information that the agency or institution has designated as directory information;

(2) A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information; and

(3) The period of time within which a parent or eligible student has to notify the agency or institution in writing that he or she does not want any or all of those types of information about the student designated as directory information.

(b) An educational agency or institution may disclose directory information about former students without complying with the notice and opt out conditions in paragraph (a) of this section. However, the agency or institution must continue to honor any valid request to opt out of the disclosure of directory information made while a student was in attendance unless the student rescinds the opt out request.

(c) A parent or eligible student may not use the right under paragraph (a)(2)

of this section to opt out of directory information disclosures to—

(1) Prevent an educational agency or institution from disclosing or requiring a student to disclose the student's name, identifier, or institutional email address in a class in which the student is enrolled; or

(2) Prevent an educational agency or institution from requiring a student to wear, to display publicly, or to disclose a student ID card or badge that exhibits information that may be designated as directory information under § 99.3 and that has been properly designated by the educational agency or institution as directory information in the public notice provided under paragraph (a)(1) of this section.

(d) In its public notice to parents and eligible students in attendance at the agency or institution that is described in paragraph (a) of this section, an educational agency or institution may specify that disclosure of directory information will be limited to specific parties, for specific purposes, or both. When an educational agency or institution specifies that disclosure of directory information will be limited to specific parties, for specific purposes, or both, the educational agency or institution must limit its directory information disclosures to those specified in its public notice that is described in paragraph (a) of this section.

(e) An educational agency or institution may not disclose or confirm directory information without meeting the written consent requirements in § 99.30 if a student's social security number or other non-directory information is used alone or combined with other data elements to identify or help identify the student or the student's records.

(Authority: 20 U.S.C. 1232g(a)(5) (A) and (B))

[53 FR 11943, Apr. 11, 1988, as amended at 73 FR 74854, Dec. 9, 2008; 76 FR 75642, Dec. 2, 2011]

§ 99.38 What conditions apply to disclosure of information as permitted by State statute adopted after November 19, 1974, concerning the juvenile justice system?

(a) If reporting or disclosure allowed by State statute concerns the juvenile justice system and the system's ability to effectively serve, prior to adjudication, the student whose records are released, an educational agency or institution may disclose education records under § 99.31(a)(5)(i)(B).

(b) The officials and authorities to whom the records are disclosed shall certify in writing to the educational agency or institution that the information will not be disclosed to any other party, except as provided under State law, without the prior written consent of the parent of the student.

(Authority: 20 U.S.C. 1232g(b)(1)(J))

[61 FR 59297, Nov. 21, 1996]

§ 99.39 What definitions apply to the nonconsensual disclosure of records by postsecondary educational institutions in connection with disciplinary proceedings concerning crimes of violence or nonforcible sex offenses?

As used in this part:

Alleged perpetrator of a crime of violence is a student who is alleged to have committed acts that would, if proven, constitute any of the following offenses or attempts to commit the following offenses that are defined in appendix A to this part:

Arson
Assault offenses
Burglary
Criminal homicide—manslaughter by negligence
Criminal homicide—murder and nonnegligent manslaughter
Destruction/damage/vandalism of property
Kidnapping/abduction
Robbery
Forcible sex offenses.

Alleged perpetrator of a nonforcible sex offense means a student who is alleged to have committed acts that, if proven, would constitute statutory rape or incest. These offenses are defined in appendix A to this part.

Final results means a decision or determination, made by an honor court or council, committee, commission, or other entity authorized to resolve disciplinary matters within the institution. The disclosure of final results must include only the name of the student, the violation committed, and any sanction imposed by the institution against the student.

Sanction imposed means a description of the disciplinary action taken by the

institution, the date of its imposition, and its duration.

Violation committed means the institutional rules or code sections that were violated and any essential findings supporting the institution's conclusion that the violation was committed.

(Authority: 20 U.S.C. 1232g(b)(6))

[65 FR 41853, July 6, 2000]

Subpart E—What Are the Enforcement Procedures?

§ 99.60 What functions has the Secretary delegated to the Office and to the Office of Administrative Law Judges?

(a) For the purposes of this subpart, *Office* means the Office of the Chief Privacy Officer, U.S. Department of Education.

(b) The Secretary designates the Office to:

(1) Investigate, process, and review complaints and violations under the Act and this part; and

(2) Provide technical assistance to ensure compliance with the Act and this part.

(c) The Secretary designates the Office of Administrative Law Judges to act as the Review Board required under the Act to enforce the Act with respect to all applicable programs. The term *applicable program* is defined in section 400 of the General Education Provisions Act.

(Authority: 20 U.S.C. 1232g (f) and (g), 1234)

[53 FR 11943, Apr. 11, 1988, as amended at 58 FR 3189, Jan. 7, 1993; 82 FR 6253, Jan. 19, 2017]

§ 99.61 What responsibility does an educational agency or institution, a recipient of Department funds, or a third party outside of an educational agency or institution have concerning conflict with State or local laws?

If an educational agency or institution determines that it cannot comply with the Act or this part due to a conflict with State or local law, it must notify the Office within 45 days, giving the text and citation of the conflicting law. If another recipient of Department funds under any program administered by the Secretary or a third party to which personally identifiable information from education records has been non-consensually disclosed determines that it cannot comply with the Act or this part due to a conflict with State or local law, it also must notify the Office within 45 days, giving the text and citation of the conflicting law.

(Authority: 20 U.S.C. 1232g(f))

[76 FR 75642, Dec. 2, 2011]

§ 99.62 What information must an educational agency or institution or other recipient of Department funds submit to the Office?

The Office may require an educational agency or institution, other recipient of Department funds under any program administered by the Secretary to which personally identifiable information from education records is non-consensually disclosed, or any third party outside of an educational agency or institution to which personally identifiable information from education records is non-consensually disclosed to submit reports, information on policies and procedures, annual notifications, training materials, or other information necessary to carry out the Office's enforcement responsibilities under the Act or this part.

(Authority: 20 U.S.C. 1232g(b)(4)(B), (f), and (g))

[76 FR 75643, Dec. 2, 2011]

§ 99.63 Where are complaints filed?

A parent or eligible student may file a written complaint with the Office regarding an alleged violation under the Act and this part. The Office's address is: Family Policy Compliance Office, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202.

(Authority: 20 U.S.C. 1232g(g))

[65 FR 41854, July 6, 2000, as amended at 73 FR 74854, Dec. 9, 2008]

§ 99.64 What is the investigation procedure?

(a) A complaint must contain specific allegations of fact giving reasonable cause to believe that a violation of the Act or this part has occurred. A complaint does not have to allege that a

violation is based on a policy or practice of the educational agency or institution, other recipient of Department funds under any program administered by the Secretary, or any third party outside of an educational agency or institution.

(b) The Office investigates a timely complaint filed by a parent or eligible student, or conducts its own investigation when no complaint has been filed or a complaint has been withdrawn, to determine whether an educational agency or institution or other recipient of Department funds under any program administered by the Secretary has failed to comply with a provision of the Act or this part. If the Office determines that an educational agency or institution or other recipient of Department funds under any program administered by the Secretary has failed to comply with a provision of the Act or this part, it may also determine whether the failure to comply is based on a policy or practice of the agency or institution or other recipient. The Office also investigates a timely complaint filed by a parent or eligible student, or conducts its own investigation when no complaint has been filed or a complaint has been withdrawn, to determine whether a third party outside of the educational agency or institution has failed to comply with the provisions of § 99.31(a)(6)(iii)(B) or has improperly redisclosed personally identifiable information from education records in violation of § 99.33.

(Authority: 20 U.S.C. 1232g(b)(4)(B), (f) and (g))

(c) A timely complaint is defined as an allegation of a violation of the Act that is submitted to the Office within 180 days of the date of the alleged violation or of the date that the complainant knew or reasonably should have known of the alleged violation.

(d) The Office may extend the time limit in this section for good cause shown.

(Authority: 20 U.S.C. 1232g(b)(4)(B), (f) and (g))

[53 FR 11943, Apr. 11, 1988, as amended at 58 FR 3189, Jan. 7, 1993; 65 FR 41854, July 6, 2000; 73 FR 74854, Dec. 9, 2008; 76 FR 75643, Dec. 2, 2011]

§ 99.65 What is the content of the notice of investigation issued by the Office?

(a) The Office notifies in writing the complainant, if any, and the educational agency or institution, the recipient of Department funds under any program administered by the Secretary, or the third party outside of an educational agency or institution if it initiates an investigation under § 99.64(b). The written notice—

(1) Includes the substance of the allegations against the educational agency or institution, other recipient, or third party; and

(2) Directs the agency or institution, other recipient, or third party to submit a written response and other relevant information, as set forth in § 99.62, within a specified period of time, including information about its policies and practices regarding education records.

(b) The Office notifies the complainant if it does not initiate an investigation because the complaint fails to meet the requirements of § 99.64.

(Authority: 20 U.S.C. 1232g(g))

[73 FR 74855, Dec. 9, 2008, as amended at 76 FR 75643, Dec. 2, 2011]

§ 99.66 What are the responsibilities of the Office in the enforcement process?

(a) The Office reviews a complaint, if any, information submitted by the educational agency or institution, other recipient of Department funds under any program administered by the Secretary, or third party outside of an educational agency or institution, and any other relevant information. The Office may permit the parties to submit further written or oral arguments or information.

(b) Following its investigation, the Office provides to the complainant, if any, and the educational agency or institution, other recipient, or third party a written notice of its findings and the basis for its findings.

(c) If the Office finds that an educational agency or institution or other recipient has not complied with a provision of the Act or this part, it may also find that the failure to comply was based on a policy or practice of the

agency or institution or other recipient. A notice of findings issued under paragraph (b) of this section to an educational agency or institution, or other recipient that has not complied with a provision of the Act or this part—

(1) Includes a statement of the specific steps that the agency or institution or other recipient must take to comply; and

(2) Provides a reasonable period of time, given all of the circumstances of the case, during which the educational agency or institution or other recipient may comply voluntarily.

(d) If the Office finds that a third party outside of an educational agency or institution has not complied with the provisions of §99.31(a)(6)(iii)(B) or has improperly redisclosed personally identifiable information from education records in violation of §99.33, the Office's notice of findings issued under paragraph (b) of this section—

(1) Includes a statement of the specific steps that the third party outside of the educational agency or institution must take to comply; and

(2) Provides a reasonable period of time, given all of the circumstances of the case, during which the third party may comply voluntarily.

(Authority: 20 U.S.C. 1232g(b)(4)(B), (f), and (g))

[76 FR 75643, Dec. 2, 2011]

§99.67 How does the Secretary enforce decisions?

(a) If an educational agency or institution or other recipient of Department funds under any program administered by the Secretary does not comply during the period of time set under §99.66(c), the Secretary may take any legally available enforcement action in accordance with the Act, including, but not limited to, the following enforcement actions available in accordance with part D of the General Education Provisions Act—

(1) Withhold further payments under any applicable program;

(2) Issue a complaint to compel compliance through a cease and desist order; or

(3) Terminate eligibility to receive funding under any applicable program.

(b) If, after an investigation under §99.66, the Secretary finds that an educational agency or institution, other recipient, or third party has complied voluntarily with the Act or this part, the Secretary provides the complainant and the agency or institution, other recipient, or third party with written notice of the decision and the basis for the decision.

(c) If the Office finds that a third party, outside the educational agency or institution, violates §99.31(a)(6)(iii)(B), then the educational agency or institution from which the personally identifiable information originated may not allow the third party found to be responsible for the violation of §99.31(a)(6)(iii)(B) access to personally identifiable information from education records for at least five years.

(d) If the Office finds that a State or local educational authority, a Federal agency headed by an official listed in §99.31(a)(3), or an authorized representative of a State or local educational authority or a Federal agency headed by an official listed in §99.31(a)(3), improperly rediscloses personally identifiable information from education records, then the educational agency or institution from which the personally identifiable information originated may not allow the third party found to be responsible for the improper redisclosure access to personally identifiable information from education records for at least five years.

(e) If the Office finds that a third party, outside the educational agency or institution, improperly rediscloses personally identifiable information from education records in violation of §99.33 or fails to provide the notification required under §99.33(b)(2), then the educational agency or institution from which the personally identifiable information originated may not allow the third party found to be responsible for the violation access to personally identifiable information from education records for at least five years.

(Authority: 20 U.S.C. 1232g(b)(4)(B) and (f); 20 U.S.C. 1234c)

[76 FR 75643, Dec. 2, 2011]

APPENDIX A TO PART 99—CRIMES OF VIOLENCE DEFINITIONS

ARSON

Any willful or malicious burning or attempt to burn, with or without intent to defraud, a dwelling house, public building, motor vehicle or aircraft, personal property of another, etc.

ASSAULT OFFENSES

An unlawful attack by one person upon another.

NOTE: By definition there can be no ''attempted'' assaults, only ''completed'' assaults.

(a) *Aggravated Assault.* An unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury. This type of assault usually is accompanied by the use of a weapon or by means likely to produce death or great bodily harm. (It is not necessary that injury result from an aggravated assault when a gun, knife, or other weapon is used which could and probably would result in serious injury if the crime were successfully completed.)

(b) *Simple Assault.* An unlawful physical attack by one person upon another where neither the offender displays a weapon, nor the victim suffers obvious severe or aggravated bodily injury involving apparent broken bones, loss of teeth, possible internal injury, severe laceration, or loss of consciousness.

(c) *Intimidation.* To unlawfully place another person in reasonable fear of bodily harm through the use of threatening words or other conduct, or both, but without displaying a weapon or subjecting the victim to actual physical attack.

NOTE: This offense includes stalking.

BURGLARY

The unlawful entry into a building or other structure with the intent to commit a felony or a theft.

CRIMINAL HOMICIDE—MANSLAUGHTER BY NEGLIGENCE

The killing of another person through gross negligence.

CRIMINAL HOMICIDE—MURDER AND NONNEGLIGENT MANSLAUGHTER

The willful (nonnegligent) killing of one human being by another.

DESTRUCTION/DAMAGE/VANDALISM OF PROPERTY

To willfully or maliciously destroy, damage, deface, or otherwise injure real or personal property without the consent of the owner or the person having custody or control of it.

KIDNAPPING/ABDUCTION

The unlawful seizure, transportation, or detention of a person, or any combination of these actions, against his or her will, or of a minor without the consent of his or her custodial parent(s) or legal guardian.

NOTE: Kidnapping/Abduction includes hostage taking.

ROBBERY

The taking of, or attempting to take, anything of value under confrontational circumstances from the control, custody, or care of a person or persons by force or threat of force or violence or by putting the victim in fear.

NOTE: Carjackings are robbery offenses where a motor vehicle is taken through force or threat of force.

SEX OFFENSES, FORCIBLE

Any sexual act directed against another person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent.

(a) *Forcible Rape* (Except ''Statutory Rape''). The carnal knowledge of a person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her temporary or permanent mental or physical incapacity (or because of his or her youth).

(b) *Forcible Sodomy.* Oral or anal sexual intercourse with another person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her youth or because of his or her temporary or permanent mental or physical incapacity.

(c) *Sexual Assault With An Object.* To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her youth or because of his or her temporary or permanent mental or physical incapacity.

NOTE: An ''object'' or ''instrument'' is anything used by the offender other than the offender's genitalia. Examples are a finger, bottle, handgun, stick, etc.

(d) *Forcible Fondling.* The touching of the private body parts of another person for the purpose of sexual gratification, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her youth or because of his or her temporary or permanent mental or physical incapacity.

NOTE: Forcible Fondling includes ''Indecent Liberties'' and ''Child Molesting.''

NONFORCIBLE SEX OFFENSES (EXCEPT ''PROSTITUTION OFFENSES'')

Unlawful, nonforcible sexual intercourse.

(a) *Incest.* Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

(b) *Statutory Rape.* Nonforcible sexual intercourse with a person who is under the statutory age of consent.

(Authority: 20 U.S.C. 1232g(b)(6) and 18 U.S.C. 16)

[65 FR 41854, July 6, 2000]

FERPA:
what faculty and staff should know

August 2009

In light of recent incidents on other college campuses, and in preparation for the new school year, it's a good time to remind ourselves of our obligations – and rights – under FERPA, the federal statute that governs the privacy of student records and information.

In general terms, FERPA prohibits us from disclosing student records (or information from student records) to anyone other than the student to whom the records pertain, unless we have the student's consent. The records that are covered are ***not*** limited only to "academic" records. FERPA certainly does protect transcripts, exams, grades, and the like, but it also protects virtually ***all other*** records, in ***any*** format, that contain personally identifiable information about a student, including the student information database, class schedules, financial account and financial aid records, disciplinary records, "unofficial" records, and even photographs and e-mails. Moreover, "personally identifiable information" includes not only express identifiers such as names, addresses, and ID numbers, but also other information from which the student's identity could be ascertained, either by itself or in combination with other available information. For example, a record containing such demographic information about a student as gender, age, major, class year, and residence might well make the student personally identifiable even if it does not list the student's name.

Given the breadth of FERPA, it's best to assume that ***all*** records concerning students are covered unless you're sure that they're not. Fortunately, however, there are a number of exceptions to the nondisclosure requirement that enable us to conduct our academic business and make appropriate disclosures even without the relevant student's consent. The most important such exceptions are the following:

1. We may disclose any student records to other College officials (including other students serving on official College committees) who need the information in order to perform their College duties and functions. Thus, for example, a faculty member may (and, of course, should) turn student grades in to the Registrar's Office; an RA who observes a potential disciplinary violation may (and should) inform the College's Disciplinary Committee; and any employee with concerns about a student's mental health may (and should) raise them with the Office of Student Development and, if it involves immediate safety issues, Public Safety.

2. We generally may disclose "directory information" about a student to anyone (though we should use appropriate discretion in doing so). "Directory information" includes a student's name; local, home, and e-mail addresses; local and home telephone number; major field of study; dates of attendance; anticipated degree and degree date; degrees, honors, and awards received; and photograph.

Note, however, that students have the right to "opt out" of having their directory information disclosed, and each year some students do so. Accordingly, we must confirm whether a student has done so before releasing directory information about that student. You can obtain such confirmation from the Colleague system or the Registrar's Office.

Note also that we cannot disclose directory information in ways that would disclose other, non-directory information. For example, we cannot provide a list containing only names and addresses in response to a request for the names and addresses of all students who have disciplinary records or who have a specified

GPA or higher, because in doing so we would implicitly be revealing that those particular students have disciplinary records or the specified GPA, which is protected information.

3. We may disclose any records or information about a student to the student's parents, *but only if* we first have confirmed that the student is their dependent for tax purposes, either by checking with the student or by obtaining a copy of the parents' most recent tax return. For purposes of this exception, it makes no difference whether the student is a minor.

4. When we have a good-faith belief that there is a health or safety emergency, we may disclose student records and information relevant to that emergency to anyone we reasonably believe can help deal with that emergency. In general, and when reasonably possible, the initial disclosure should be made to professionals trained to evaluate and handle such emergencies, such as Public Safety or the Office of Student Development, who can then determine whether further and broader disclosures are appropriate.

In addition, there are a number of other, more limited exceptions for specific situations.

Keep in mind that all of these exceptions are discretionary, that FERPA does not require us to disclose student records to anyone other than the relevant student, and that there may be other legal or policy reasons not to disclose information even when FERPA would allow us to do so. If you have any doubts about whether you can or should disclose information, please contact either of the following before doing so:

Steve McDonald
General Counsel
x4955

Steve Berenback
Registrar
x6156

Here are some things that we should *not* do:

Post a list of student grades by SSN or ID number.

Leave graded tests or papers out in a stack for students to sort through and pick up.

Send student information on a post card instead of in a sealed envelope.

Discuss a student's situation with others not directly involved in the situation or where they might overhear.

Release student information by phone or e-mail without first verifying the identity of the recipient.

Leave student records where they could be seen or accessed by others.

Dispose of old student records in the normal trash.

Access the student information database or other student records for reasons unrelated to our individual College duties and functions.

For additional, more detailed information about FERPA, please see the following:

FERPA: 7 Myths, and the Truth FERPA Allows More Than You May Realize RISD's FERPA Policy