

THE *FUNDAMENTALS* OF FERPA, AND MORE

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FERPA

- The Family Educational Rights and Privacy Act of 1974
- A.K.A. the Buckley Amendment

FERPA's Big Three

- *College* students have the right, *in general*, to:
 - Control the disclosure of their "education records" to others
 - Inspect and review their "education records"
 - Seek amendment of their "education records"

So, What's an "Education Record"?

- "[O]fficial records, files, and data directly related to [students], including all material that is incorporated into each student's cumulative record folder, and intended for school use or to be available to parties outside the school or school system, and specifically including, but not necessarily limited to, identifying data, academic work completed, level of achievement (grades, standardized achievement test scores), attendance data, scores on standardized intelligence, aptitude, and psychological tests, interest inventory results, health data, family background information, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns."

So, What's an "Education Record"?

- "'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"

So, What's an "Education Record"?

- "'Educational . . . institution' means any public or private . . . institution" that receives funds "under any program administered by the Secretary [of Education]"

So, What's an "Education Record"?

- "'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"
- N.B.: Does *not* include information that is not "recorded" – that is, personal knowledge

So, What's an "Education Record"?

- "'Student' . . . means any individual who is or has been in attendance at an educational . . . institution"
 - Applicants are not "students" unless they are accepted and "attend"
 - But "students" retain FERPA rights even after leaving the institution
 - FERPA rights in any given record continue to exist until either the record's destruction or the student's death

So, What's an "Education Record"?

- In general, a record is "directly related" to a student if it contains "personally identifiable information" about that student
 - "'Personally identifiable information' includes, but is not limited to"
 - The name of the student or of the student's parent or other family member
 - The address of the student or student's family
 - Personal identifiers such as SSNs, student numbers, or biometric records
 - Other indirect identifiers such as date or place of birth or mother's maiden name

So, What's an "Education Record"?

- "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"

So, What's an "Education Record"?

- "Maintain" is *not defined!*
- *Owasso Independent School District v. Falvo*, 534 U.S. 426 (2002):
 - "FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar."
 - "The ordinary meaning of the word 'maintain' is 'to keep in existence or continuance; preserve; retain.'"
- Requires conscious decision on the part of the institution?

We Don't Need No "Education"

- "Education records" certainly includes transcripts, exams, papers, and the like
- But it also includes:
 - Advising records
 - Financial aid and account records
 - Disability accommodation records
 - Discipline records
 - Athletic records
 - Photographs
 - Email
 - "Unofficial" files
 - *Virtually* everything!

Except for These:

- "Sole possession" records
 - As long as not shared or accessible
- "Law enforcement" records
 - But only the law enforcement office's copy
- "Employment" records
 - Unless student status is a job requirement
- "Alumni" records
 - But not if they "relate back"
- "Treatment" records
 - Only if not shared

The Metaphysics of Medical Records

- FERPA does not *prohibit* the release of treatment records to persons other than "individuals providing the treatment" under any of the exceptions applicable to education records
 - It simply excepts them from the "inspect and review" right, and defers to state law on patient access, as long as they are not shared more broadly
- HIPAA: "Protected health information *excludes* individually identifiable health information in:
 - (i) Education records covered by the Family Educational Rights and Privacy Act, as amended, 20 U.S.C. 1232g; [and]
 - (ii) Records described at 20 U.S.C. 1232g(a)(4)(B)(iv) [that is, treatment records]"
- But state medical confidentiality rules still apply (to medical professionals)

Disclosure

- Before disclosing education records – or information from education records – an institution must obtain a signed and dated written consent from *all* relevant students, specifying:
 - The records that may be disclosed
 - The purpose for which they may be disclosed
 - The persons or classes to whom they may be disclosed

Except for Disclosures:

- Of "directory information"
 - Can include name; address; e-mail address; telephone number; photograph; date and place of birth; major; grade level; enrollment status (undergraduate or graduate, full- or part-time); dates of attendance; participation in officially recognized activities and sports; weight and height of athletes; degrees, honors, and awards received; most recent educational institution attended, and other information "that would not generally be considered harmful or an invasion of privacy if disclosed"

Except for Disclosures:

- Must give students notice of your definition and an opportunity to opt out
- Need not give notice to alumni, but must continue to honor prior opt out
- Cannot disclose or confirm directory information if an SSN or other non-directory information is used to confirm the student's identity

Except for Disclosures:

- To "school officials . . . whom the . . . institution has determined to have legitimate educational interests"
 - Each institution specifies its own standards
 - "School officials" can include students serving on committees and outside contractors
 - "Legitimate educational interests" can include what is needed to do one's job
 - Institution, not individual, makes the determination

Except for Disclosures:

- To "officials of another . . . 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"
 - Unless disclosure is initiated by the student, must either:
 - Make a "reasonable attempt to notify" the student, or
 - Describe your practice of disclosing such information in your annual notice

Except for Disclosures:

- To "parents . . . of a dependent student" for federal tax purposes
 - Parents of college students have no general right to see their children's records, *even if the students are minors*
 - Need to verify dependent status by obtaining either a copy of parents' most recent federal tax return or confirmation from student
 - Warning: Tell them about this *before* there's a problem

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RELEASE OF INFORMATION

ACADEMICS

- Course Descriptions
- Family Educational Rights and Privacy Act – FERPA
- FERPA Definitions
- FERPA FAQs
- Release of Information**
- ShareLink Access
- Final Exam Policy
- Grades & GPA
- Ordering a Transcript

The following policy on the release of information to parents and guardians is provided in accordance with the University's obligations under the Family Educational Rights and Privacy Act (FERPA).

Consent to Disclosure
The University does not routinely send grade reports, course schedules, transcripts, or preliminary disciplinary communications to parents. Parents are encouraged to speak directly with their son or daughter for information on academic performance or general well-being, or to ask the student to grant them access to the online transcript, proof of enrollment, and student account information via ShareLink.

Conversations between a student and advisors, mentors, and disciplinary hearing officers are treated as confidential and are generally not shared with others, including parents, without the student's specific permission. This is consistent with the University's view that students should be treated as responsible adults, and with the University's goal of promoting students' growth and independence.

Disclosure with Student Consent
If a student has provided consent via Consent-to-Disclosure on the StudentLink, the University may communicate with parents in the following situations:

<http://www.bu.edu/reg/academics/ferpa/release>

Except for Disclosures:

- In connection with an "articulable and significant threat to the health or safety of a student or other individuals"
 - Disclosure may be made to "appropriate parties" and may include "information [that] is necessary to protect the health or safety of the student or other individuals"

Except for Disclosures:

- "[T]he Department will not substitute its judgment for that of the . . . institution if, based on the information available at the time . . . there is a rational basis for the . . . institution's determination that a health or safety emergency exists and that the disclosure was made to appropriate parties."
- "FERPA is not intended to be an obstacle in addressing emergencies and protecting the safety of students."

Except for Disclosures:

- And several more
- N.B.: As far as *FERPA* is concerned, all of these are discretionary
 - May be other disclosure obligations
 - For example, under FERPA, the accuser *may* be informed of the final results of a disciplinary proceeding involving an alleged sex offense, but under the Campus Sexual Assault Victims' Bill of Rights Act, the accuser *must* be informed upon request
- Also N.B.: These exceptions are independent of each other, not cumulative



Privacy Technical
Assistance Center

For more information, please visit the Privacy Technical
Assistance Center: <http://ptac.ed.gov>

Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices

Overview

The U.S. Department of Education established the Privacy Technical Assistance Center (PTAC) as a "one-stop" resource for education stakeholders to learn about data privacy, confidentiality, and security practices related to student-level longitudinal data systems and other uses of student data. PTAC provides timely information and updated guidance on privacy, confidentiality, and security practices through a variety of resources, including training materials and opportunities to receive direct assistance with privacy, security, and confidentiality of student data systems. More PTAC information is available on <http://ptac.ed.gov>.

PTAC welcomes input on this document and suggestions for future technical assistance resources relating to student privacy. Comments and suggestions can be sent to PrivacyTA@ed.gov.

<http://ptac.ed.gov/document/protecting-student-privacy-while-using-online-educational-services>

Is Student Information Used in Online Educational Services Protected by FERPA?

- "It depends."
- Yes: "For example, a district may decide to use an online system to allow students . . . to log in and access class materials."
- No: "For example, a teacher may have students watch video tutorials or complete interactive exercises offered by a provider that does not require individual students to log in. In these cases, no PII from the students' education records would be disclosed to (or maintained by) the provider."
- What about providers that *do* require individual log-ins but that don't have a relationship with the school?

What Does FERPA Require if PII from Students' Education Records is Disclosed to a Provider?

- "It depends."
- Directory Information: Only that, and no opt-outs
- School Official: "[T]he framework under which the school or district uses the service must satisfy the 'direct control' requirement by restricting the provider from using the PII for unauthorized purposes. . . . If the school or district has shared information under FERPA's school official exception, . . . the provider cannot use the FERPA-protected information for any other purpose than the purpose for which it was disclosed. . . . [T]he provider may not share (or sell) FERPA-protected information, or re-use it for any other purpose, excepted as directed by the school or district and as permitted by FERPA."

What Does FERPA Require if PII from Students' Education Records is Disclosed to a Provider?

- "A provider that has been granted access to PII from education records under the school official exception may use any metadata that are not linked to FERPA-protected information for other purposes, unless otherwise prohibited by the terms of their agreement with the school or district."
 - Is there anything that isn't *really* linked?

What Does FERPA Require if PII from Students' Education Records is Disclosed to a Provider?

- "Schools and districts are encouraged to remember that FERPA represents a minimum set of requirements to follow. Thus, even when sharing PII from education records under an exception to FERPA's consent requirement, it is considered a best practice to adopt a comprehensive approach to protecting student privacy when using online educational services."

Inspect and Review

- Must allow students to "inspect and review" their own education records within 45 days of request
- Need not provide copies unless "circumstances effectively prevent the . . . student from exercising the right to inspect and review"
- Does not include financial aid records of parents or confidential letters of recommendation to which the student has waived access

Seek Amendment

- Students may request amendment of records containing "information that is inaccurate, misleading, or in violation of the student's rights of privacy"
 - *Not* a grade grievance mechanism
- If deny request, must give student an opportunity for a hearing
- If still deny request, student may include a statement with the record

Saving the Best for Last: Enforcement

- No private right of action
- FPCO may terminate an institution's education-related federal funding, or take "any [other] legally available enforcement action," if, *but only if*:
 - The institution violates FERPA, *and*
 - The violation represents a "policy or practice," *and*
 - "[C]ompliance cannot be secured by voluntary means" within a reasonable period of time