



# An Overview of the Family Education Rights & Privacy Act

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## LAWFULLY MANAGING STUDENT RECORDS AND PRIVACY

# An Overview of the Family Education Rights & Privacy Act (FERPA)

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### An Overview

The Family Educational Rights and Privacy Act (20 U.S.C. § 1232g) (“FERPA”) was an amendment to the General Education Provisions Act (“GEPA”), offered on the Senate floor by New York Senator, James Buckley and Rhode Island Senator Claiborne Pell<sup>1</sup> to address privacy concerns about student records. It applies to any educational institution or government agency that provides educational services or instruction to students or which is authorized to direct and control public educational institutions, provided funds have been made available for such entities through a program administered by the U.S. Department of Education (“USDOE”).<sup>2</sup>

FERPA has three main objectives: (i) to enable the parents of students under 18, as well as students over the age of 18 and post-secondary school students (“eligible students”), to access a student’s “education records;”<sup>3</sup> (ii) to provide a process for parents and eligible students to challenge the accuracy of education records; and (iii) to

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<sup>1</sup> Hence, a nickname by which it was commonly known for several years: the “Buckley Amendment.”

<sup>2</sup> In this document, the term “educational institution” will refer to educational institutions and agencies that are subject to FERPA (*i.e.*, have had funds made available to them by a program of the USDOE and are an institution providing educational services and/or instruction to students or an agency possessing authority to direct and control public elementary, secondary and postsecondary educational institutions.

<sup>3</sup> The rights provided by FERPA transfer from a student’s parents to the student, upon the student reaching the age of 18. *See, infra*, [FERPA’s Key Definitions](#), Education Records, § I(B)(vi), Eligible Student, § I(B)(vii); *see also* 20 U.S.C. § 1232g (4) (a) and 34 CFR § 99.3.



provide parents and eligible students with some control over who has access to a student's education records.<sup>4</sup>

## **Key Definitions**

Understanding the mandates of FERPA requires an understanding of its essential defined terms, including the following:<sup>5</sup>

- (i) De-identified records: records and information from which a student's personally identifiable information has been removed and which does not contain any information that, alone or used in combination with other information, would allow someone without personal knowledge of relevant circumstances to identify a specific student with reasonable certainty.
- (ii) Directory Information: information contained in a student's education records that would not be considered harmful or an invasion of privacy if disclosed, provided the educational institution has notified parents and eligible students of the types of information it considers to be directory information that it may release without written consent, which may include:
  - Name, address, telephone listing, e-mail address;
  - Date and place of birth;
  - Photograph;
  - Major field of study;
  - Dates of attendance;
  - Grade level;
  - Enrollment status (*e.g.*, graduate, undergraduate, part-time, full-time);
  - Participation in officially recognized activities and sports;
  - Weight and height of athletic team members;
  - Degrees, honors, and awards received; and
  - The most recent educational agency or institution attended.

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<sup>4</sup> 34 CFR § 99.5(a).

<sup>5</sup> 34 C.F.R. §99.3.

- (iii) Disciplinary action or proceeding: a school's investigation, adjudication, or imposition of sanctions concerning an infraction or violation of its student conduct rules.
- (iv) Disclosure: permitting access to or the release, transfer, or other communication of a student's personally identifiable information contained in education records to a third party. Such communication may occur by any means, including oral, written, or electronic means.
- (v) Early Childhood Program: (1) a Head Start program or an Early Head Start program operating under the Head Start Act (42 U.S.C. § 9831, et seq.), serving children from birth through age six and addressing cognitive, social, emotional and physical development of a child, and which is a State pre-kindergarten program, a program operated under the Individuals With Disabilities Education Act, or one operated by a local educational agency.
- (vi) Educational agency or institution: an educational institution or agency receiving federal funds through a program administered by the USDOE.
- (vii) Education records: Records that are –
  - Directly related to a student; and
  - Maintained by a school or its agent or representatives, excluding<sup>6</sup> –
    - Records kept in the sole possession of the maker, which are only used as personal memory aides and are not accessible to anyone else, except as a temporary substitute for the maker of the record (e.g., memory jogger notes);
    - Records of a school's law enforcement unit, as defined by the regulations;
    - Records relating to a school employee that: (a) are made and maintained in the normal course of business; (b) relate exclusively to the individual's capacity as an employee; and (c) are

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<sup>6</sup> The recent spate of copyright enforcement litigation, filed by record companies, has resulted in a number of cases holding that computer-Internet ISP addresses are not personally identifiable information contained within education records and are not protected by FERPA. See, e.g., *LaFace Records, LLC v. Does 1-5*, 2008 US Dist. Lexis 13638, 9-10 (W.D. MI 2008); *Virgin Records America, Inc. v. Does 1-33*, 2007 US Dist. Lexis 79134 (E.D. Tenn. 2007).

not available for any other purpose. [This exception excludes education records concerning a student's employment, if that employment arises from the student's study (*i.e.*, internships, etc.)].

- Records only containing information about an individual after he or she is no longer a student at that agency or institution.
- Records concerning students who are at least 18 years of age or attending post-secondary institution, if the records were:

- (A) made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his/her professional/paraprofessional capacity;

- (B) made, maintained, or used only in connection with treatment of the student; and

- (C) are disclosed only to individuals providing the treatment – excluding remedial education or activities that are part of a student's program of instruction.

- Examples: items such as grades, transcripts, and class lists, student course schedules, health records (at the K-12 level), student financial information (at the post-secondary level), and student discipline files.

- This definition would not include a school official's personal knowledge or observations of the student. Accordingly, such information may be communicated to third parties without written consent.

(viii) Eligible student: a student who is at least 18 years old or attending a postsecondary school or program.

- (ix) Institution of postsecondary education: an institution providing education to students beyond the secondary school level.<sup>7</sup>
- (x) Parent: the parent of a student, including natural parents, guardians, and individuals acting as parents in the absence of a parent or guardian.
- (xi) Personally identifiable information: is defined to include information such as student names; student parent names; the address of a student or a student's family; personal identifiers (e.g., Social Security number, student identification number or biometric marking); other indirect identifiers, such as a student's date of birth, place of birth, and mother's maiden name; other information that, by itself or in combination, can be linked to a specific student that would allow a reasonable person in the school community, without "personal knowledge of the relevant circumstances," to identify a student with reasonable certainty; or information requested by a person in the educational agency or institution believes to know the identity of the student about whom the information concerns.
- (xii) Record: any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.<sup>8</sup>
- (xiii) School Official: includes teachers, school principals, chancellors, board members, registrars, counselors, admissions officers, attorneys, accountants, human resource professionals, information system specialist, and support or clerical personnel. A school official may also be a contractor, consultant, volunteer or other party to whom the school or institution has outsourced institutional services or functions, provided such individuals are performing an institutional service or function for which the institution would have otherwise used employees and the individual is under the direct

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<sup>7</sup> Secondary school level means the educational level (which does not exceed grade 12) at which secondary education is provided as determined under State law.

<sup>8</sup> The United States Dept. of Education has stated in its guidance material that student images obtained from security videotapes maintained by the school's law enforcement unit are not education records and, therefore, they are not subject to FERPA. See 34 C.F.R. §99.8 and *Balancing Student Privacy and School Safety: a Guide to the Family Educational Rights and Privacy Act for Elementary and Secondary Schools*, US Dept. of Education, <http://www.ed.gov/policy/gen/guid/fpco/brochures/elsec.html>.

control of the institution with respect to the use and maintenance of education records.<sup>9</sup>

- (xiv) Student: any individual in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records.

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<sup>9</sup> 34 CFR § 99.31(a)(1)(i)(B).



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