



# FERPA: *Parent and Eligible Student Rights and School Obligations*

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# LAWFULLY MANAGING STUDENT RECORDS AND PRIVACY

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

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### A. *FERPA: Parent and Eligible Student Rights and School Obligations*

FERPA gives parents and eligible students the right to access a student's education records; object to information contained in those records that they believe is inaccurate, misleading or a violation of the student's privacy rights; and requires educational institutions to obtain written authorization from a parent or eligible student before disclosing a student's education records, unless one of FERPA's exceptions apply. State agencies that maintain education records containing personally identifiable information must also comply with these obligations.<sup>1</sup>

Educational institutions must give a parent all of the parental rights provided by FERPA, unless it has evidence of a court order, a State statute, or a legally binding document (*e.g.*, a divorce decree, a separation or custody order) that specifically revokes such rights relative to a parent.<sup>2</sup> It is not uncommon for schools to be placed in the middle of custody disputes, for example, with claims that a parent has lost his/her parental rights under FERPA. School officials should respond to such claims by advising the parties concerned that it will continue to afford both parents the rights provided under FERPA unless and until it is provided with an true copy of a court order or other legal document that limits one parent's FERPA rights.

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<sup>1</sup> The Secretary of Education has stated that a state educational agency's records are typically not "education records," as FERPA defines them, because "FERPA defines 'education records' as information directly related to a 'student,' which itself is defined as excluding a person who has not been in attendance at the educational agency or institution. Since students generally are not in attendance at an SEA, it follows that FERPA does not apply to the SEA." (See guidance of the Secretary of Education's Letter to Chief State School Officers, <http://www.ed.gov/policy/gen/guid/fpc/doc/chiefsea.doc>).

<sup>2</sup> 34 CFR § 99.4

FERPA also requires educational institutions to provide parents and eligible students with an annual notice of their rights under FERPA; the types of documents that are considered directory information which can be disclosed without written authorization; and the types of non-school personnel that the institution considers to be school officials.

## **1. Review and Amendment of Education Records**

FERPA requires educational institutions to provide parents and eligible students with access to a student's education records and to consider requests to amend the information in those records.

### **(a) Review of Education Records**

An educational institution must provide a parent of a student under the age of 18 with access to his/her child's education records within a reasonable amount of time, but not later than within 45 days of receipt of the request. It must also provide eligible students with such access to their own education records. However, an institution only needs to provide the parent or eligible student with access to the records; it is not required to send copies of the records, unless the parent or eligible student lives so far from the institution's facilities, or other circumstances exist, that the parent or eligible student cannot access the records at the institution's facilities.<sup>3</sup>

### **(b) Requests to Amend a Student's Education Records**

A parent or eligible student may request the removal or modification of any information contained in the student's education records which they claim to be inaccurate, misleading or to violate the student's privacy rights. An institution must respond to such a request "within a reasonable amount of time" by notifying the parent or eligible student whether the institution will modify the information as requested. If it decides to grant such a request, it must advise the parent or eligible student how it will amend the student's record(s) to comply with the request. If it denies such a request, it must advise the parent or eligible student of its decision and the right to a hearing on the matter.<sup>4</sup> The institution should also state the grounds for its denial of the request.

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<sup>3</sup> 34 CFR § 99.10 (a) – (d).

<sup>4</sup> 34 C.F.R. §99.20. See also *Lee v. Southern Univ. Law Ctr.*, 2008 US Dist. Lexis 37258, pp. 11 – 12 (M.D.L.A. May 7, 2008) (FERPA only provided plaintiff-student with a right to challenge the accuracy of records containing his grade – not the grading process used by his professor or to contest whether a different grade should have been given).

If the institution denies a request to modify a student's education record(s), and the parent or eligible student requests a hearing about that decision, the institution must conduct the hearing within a reasonable time after receiving the request.<sup>5</sup> It must provide the parent or eligible student with reasonable notice of the date, time, and place of the hearing, and arrange for someone to conduct the hearing who does not have a direct, personal interest in its outcome.<sup>6</sup> The institution may have an employee conduct the hearing, provided the employee is not directly interested in the outcome.<sup>7</sup>

The person conducting the hearing must give the parent or eligible student a full and fair opportunity to present relevant information about whether the contested information is inaccurate, misleading, or violates the student's privacy rights. The parent or eligible student have a right to be represented at such a hearing by one *or more* individuals, including an attorney hired at their expense.<sup>8</sup> The institution must notify the parent or eligible student in writing of its decision within a reasonable time after the hearing. The decision must be based on evidence provided during the hearing and the institution's written notice must include a summary of that evidence and specify which evidence it relied on for its decision.<sup>9</sup>

If the institution's decision is to amend the student's education record(s), it must also advise the parent or eligible student with written notice of the amendment. If the institution denies the request to modify a student's education records, however, it must notify the parent or eligible student in writing of that decision and the right to place a written statement in the student's education record that comments on the contested information or states why the parent or eligible student objects to it being included in the student's education records.<sup>10</sup> The institution must append the statement to the contested portion of the record and maintain it there for as long as it maintains the contested portion of the record. Anytime it discloses "the portion of the record to which the statement relates," it must also provide the statement.<sup>11</sup>

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<sup>5</sup> 34 C.F.R. § 99.22(a).

<sup>6</sup> *Id.* (b).

<sup>7</sup> *Id.* (c).

<sup>8</sup> *Id.* (d).

<sup>9</sup> *Id.* (e) – (f).

<sup>10</sup> 20 U.S.C. § 1232g(a)(2); 34 C.F.R. § 99.21.

<sup>11</sup> 34 C.F.R. § 99.21(c).

It is important for educational institutions to be mindful of these requirements and to carefully adhere to them. While the U.S. Supreme Court has held that FERPA does not provide parents or students with a private cause of action for money damages, at least two courts have ruled that parents or eligible students may still have a private cause of action to challenge a school's decision when it concerns an assigned grade that is erroneous because of ministerial (*i.e.*, not involving the use of judgment or discretion, but merely performance of a perfunctory tasks).<sup>12</sup> Additionally, state statutes providing similar rights may also provide a private cause of action.

## **2. Confidentiality Protections Under FERPA**

In addition, FERPA prohibits educational institutions subject to its provisions from disclosing a student's personally identifiable information in education records, unless such disclosure has been authorized in writing by a parent or eligible student or one of FERPA's exceptions apply.<sup>13</sup> Personally identifiable information is defined as information that, alone or with in combination with other information, is linked to a specific students or would allow a reasonable person in the school community, without any personal knowledge of the relevant circumstances, to identify a student with reasonable certainty or the person requesting the information is reasonably believed to know the identity of the student about whom information relates.<sup>14</sup>

### **(a) Prior Consent**

Written consent must be provided by a student's parent, guardian, or person in parental relation or an eligible student. Written consent must specify the records that the institution may disclose, state the purpose for the disclosure, and identify the party or class of parties to whom the institution may make such disclosure. In addition, it must be signed by the parent or eligible student and be dated, but the signature requirement can be satisfied electronically, provided the electronic form identifies and authenticates the parent or eligible student as its source and states that person's approval of the requested disclosure.

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<sup>12</sup> *Lee v. Southern Univ. Law Ctr.*, Case No. 07-632 (JVP-SCR), 2008 US Dist. Lexis 37258 at \* 11 - \*12 (stating an exception for challenges to an assigned grade resulting from "ministerial error") (citing *Tarka v. Cunningham*, 917 F.2d 890, 891-892 (5th Cir. 1990)).

<sup>13</sup> 20 U.S.C. § 1232(b)(1); 34 C.F.R. § 99.30.

<sup>14</sup> 34 C.F.R. §§ 99.3, 99.30(a).

Upon receipt of written consent, an educational institution may disclose personally identifiable information from a student's education records and need not maintain a record of a request for such disclosure or of any documents disclosed pursuant to a written consent.<sup>15</sup> However, if a parent or eligible student requests it, the institution must provide the parent or eligible student with a copy of any information disclosed pursuant to the written consent. Moreover, if a parent is consenting to a disclosure regarding a K-12 student under the age of 18, the parent can require the institution to provide copies of any disclosed documents to the student.<sup>16</sup>

### **(b) Disclosure of Directory Information**

FERPA's confidentiality provisions do not apply to information that has been properly classified as "directory information." An institution may classify information that a reasonable person would not consider harmful or a violation of a student's privacy, provided it has notified parents and eligible student of the kinds of information it considers to be directory information, which can be released without authorization.<sup>17</sup> The notice must also advise parents and eligible students of their right to refuse to allow the institution to classify one or more of such types of information as directory information, as well as the deadline by the parents and eligible students must notify the institution of a decision to opt a student out of one or more categories of directory information.<sup>18</sup> Alternatively, an institution's notice can state that the institution will only disclose directory information to specific parties, for specific purposes, or both. Of course, an institution using this alternative notice must comply with such limitations.<sup>19</sup>

An institution must not disclose a category of directory information about a student for whom it has received a timely opt out notice pertaining to that category of information, unless it receives written authorization to do so or an exception to FERPA's confidentiality provisions apply.

Assuming an institution has provided the appropriate annual notice, it can disclose directory information for any student for whom it has not received an opt out notice, without

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<sup>15</sup> 34 C.F.R. § 99.32(d).

<sup>16</sup> 34 C.F.R. § 99.30(b), (c).

<sup>17</sup> 34 C.F.R. §§ 99.3, 99.37(a).

<sup>18</sup> 34 C.F.R. § 99.37(a).

<sup>19</sup> 34 C.F.R. § 99.37(d).

making or maintaining a record of the request or the information disclosed. However, an institution cannot disclose or even confirm the existence of directory information concerning a student if it used the student's Social Security number or other non-directory information to help it identify the student or the student's records. This prohibition applies regardless of whether the institution used such information by itself or with "other data elements."<sup>20</sup>

Educational institutions need not comply with the annual notice requirements and opt-out procedures relative to former students. However, they must honor any valid request to opt a student out of the disclosure of a directory information category that the student (or the parent of a non-eligible student) made while the student was still enrolled in the institution, unless the student rescinds it.<sup>21</sup>

The right to opt out of one or more types of directory information cannot be used by a parent or eligible student to prevent an educational institution from disclosing or requiring a student to disclose the student's name, identifier, or institutional e-mail address in a class in which the student is enrolled. Nor can it be used to prevent an educational institution from requiring a student to wear, publicly display, or disclose a student ID card or badge exhibiting properly designated directory information.<sup>22</sup>

As noted above, directory information cannot be information that a reasonable person would consider harmful or an invasion of a student's privacy rights if disclosed. The USDOE regulations provide a non-exhaustive list of the types of information that *can* properly be considered directory information, which is set forth above.<sup>23</sup> However, it says very little about the types of information that *may not* be considered directory information, except to list student social security numbers and student identification numbers as the type of information that may not be considered directory information, with one exception. A student identification number, user identification, or other unique personal identifier that's a student uses to access or communicates in electronic systems may be classified as directory information, provided that information, by itself, cannot be used to gain access to educational records. Rather, such information can only be

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<sup>20</sup> 34 C.F.R. § 99.37(e).

<sup>21</sup> 34 C.F.R. § 99.37(b).

<sup>22</sup> 34 C.F.R. § 99.37(c).

<sup>23</sup> See also U.S. Dep't of Educ., *Frequently Asked Questions*, <http://www.ed.gov/policy/gen/guid/fpco/faq.html>.



directory information if it has to be used in conjunction with additional information known only to the student, such as a personal identification number, password, or other such thing.<sup>24</sup>

Boiled down to its essentials, FERPA requires educational institutions to use common sense when classifying information as directory information. A basic rule of thumb is that if a reasonable person would probably consider the release of particular information to be an invasion of privacy or harmful, it should not be considered directory information and should only be released if the institution has received written consent for the release or an exceptions applies.

### **(c) Disclosure to Military Recruiters**

Upon receipt of a request for such information, local educational institutions must provide military recruiters with the names, addresses, and telephone numbers of secondary school students. However, in their annual FERPA notice, educational institutions must notify parents and eligible student of their right to opt out of such disclosure to military recruiters. If a parent or eligible student opts out of such disclosure, the institution may not release such information about a student to a military recruiter. Educational institutions must also provide military recruiters with the same access to secondary school students that they provide to postsecondary institutions and prospective employers. Therefore, an institution that has a policy or practice of allowing postsecondary institutions or employers to come on school property and provide information to students must give that same opportunity to military recruiters.<sup>25</sup>

### **(d) Additional Exceptions to FERPA's Confidentiality Provisions**

FERPA sets forth a number of exceptions to its requirement that educational institutions maintain personally identifiable information in education records as confidential information, which may be released only with the consent of a parent or eligible student. The most common exceptions are discussed in some detail below.

#### **(i) Disclosure to Parents**

Of course, disclosure of personally identifiable information regarding a K-12 student under the age of 18 to that student's parent does not require an exception to FERPA. Such a parent possesses all of the rights afforded by FERPA, including access rights. However, these

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<sup>24</sup> 34 C.F.R. § 99.3 – *Directory Information*.

<sup>25</sup> U. S. Dep't of Educ., *Military Recruiters, Frequently Asked Questions*, available at [http://familypolicy.ed.gov/sites/fpc.ed.gov/files/FPCO\\_Military%20Recruers%20FAQ.pdf](http://familypolicy.ed.gov/sites/fpc.ed.gov/files/FPCO_Military%20Recruers%20FAQ.pdf) (last accessed, February 4, 2017).

rights transfer to the student on the student's 18<sup>th</sup> birthday. Therefore, an educational institution may not disclose personally identifiable information to a parent without the student's written authorization, unless an exception applies. However, FERPA provides a number of exceptions to this restriction.

First, an educational institution may disclose an eligible student's personally identifiable information to the student's parent if the student is a dependent of the parent for income tax purposes.<sup>26</sup> Second, an educational institution can disclose a student's personally identifiable information to the student's if it determines that there is a health or safety emergency (*i.e.*, an articulable and significant threat to the health or safety of a student or other person) and such disclosure is necessary to protect the health or safety of the student or others.<sup>27</sup>

Third, a *postsecondary* institution may disclose personally identifiable information to the parent of an eligible student who is under the age of 21 if it concerns a violation of a Federal, State or local law, or a rule or policy of the institution, that governs the use or possession of alcohol or a controlled substance and the institution has determined that the student committed a disciplinary violation through such use or possession.<sup>28</sup>

In some of its guidance materials, the USDOE Family Compliance Office ("FCO") suggests there is also an exception under FERPA that allows school officials to disclose to an eligible student's parents the official's personal knowledge about, or observation of, the student. Of course, such information is not an education record in the first instance and, therefore, no exception is required to disclose the information.<sup>29</sup> In any event, such information can be disclosed to a student's parent without violating for.

## **(ii) Other School Officials with Legitimate Educational Interest**

Perhaps the most common of these exceptions concerns a disclosure made to another school official in the same institution, such as another teacher or an administrator.<sup>30</sup> Such

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<sup>26</sup> 34 C.F.R. § 99.31(a)(8).

<sup>27</sup> 34 CFR § 99.36. (*See also*, [The Health and Safety Emergency Exception](#), § (I)(C)(h), *infra*.)

<sup>28</sup> 34 C.F.R. § 99.31(a)(15). This subsection states that it does not supersede the provisions of any State law that prohibited a postsecondary institution from disclosing such information.

<sup>29</sup> *See* [FERPA's Key Definitions](#), § I(B)(vi), *supra*.

<sup>30</sup> School officials include teachers, school principals, presidents, chance was, Board members, trustees, registrars, counselors, admissions officers, attorneys, accountants, human resource professionals, information system specialist's, and school or clerical personnel. U. S. Dep't of Educ., *FERPA Frequently Asked Questions – FERPA*

disclosures may be made without prior consent from a parent or eligible student, provided the school official has a legitimate educational interest in the information.<sup>31</sup> Basically, this means that the individual needs such information to perform his or her job duties.

### **(iii) Outside Contractors, Consultants and Volunteers**

Likewise, educational institutions may disclose personally identifiable information taken from educational records to contractors, consultants, volunteers, or other parties to which the institution has outsourced certain services or functions, provided that it would have otherwise used its employees to perform such services or functions; the entity to which the information is disclosed is under the institution's direct control relative to the use and maintenance of education records; and the entity is subject to the requirements of FERPA's requirements regarding the use and/or re-disclosure of personally identifiable information from educational records.<sup>32</sup> The USDOE recommends that educational institutions use contracts as a means of gaining direct control over an outside person or entity's use and handling of education records.

The agreement should obligate the outside entity or person to use personally identifiable information from education records only for the services or functions for which the records were provided. In addition, it should require the outside person or entity to use reasonable means to ensure the education records it receives can only be accessed by personnel who have a legitimate educational interest in doing so. Accordingly, if an entity does not utilize physical or technological access controls for education records, it must ensure that its administrative policy for controlling access to educational records is effective and complies with the legitimate educational interest requirement stated above.<sup>33</sup>

Disclosure to a community-based organization ("CBO") may also satisfy this exception, provided the CBO meets the above-stated criteria. Keep in mind that the CBO must meet the criteria stated in the school's annual notification concerning those outside entities or persons who may be considered school officials with a legitimate educational interest in education records. Also, it must be subject to the requirements and restrictions of sec. 99.33(a), and a written

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for *School Officials* (hereafter, ("FERPA FAQ")), available at <http://familypolicy.ed.gov/faq-page/13#69n420> (last accessed, February 6, 2017).

<sup>31</sup> *Id.*; 34 CFR § 99.31(a)(1)(i)(A).

<sup>32</sup> 34 C.F.R. § 99.31(a)(1)(i)(B).

<sup>33</sup> 34 C.F.R. § 99.31(a)(1)(i) (ii).

agreement requiring the CBO to observe these provisions is an effective means of satisfying this criterion.

If the FCO determines that a third-party outside the educational institution to which information is disclosed under this exception violates the requirement that the information be destroyed when no longer needed, the educational institution must bar that party from any access to any other education records containing personally identifiable information for at least five years.

#### **(iv) Disclosure to Outside Entity for a Study**

Schools and other educational institutions can also disclose personally identifiable information from educational records to an outside entity that is conducting a study on the school's behalf, without obtaining prior consent. However, the educational institution may only do so if the study is for one of the following purposes: (1) developing, validating, or administering predictive tests; (2) administering student aid programs; or (3) improving instruction.<sup>34</sup> Even if that criteria is satisfied, the disclosure is permissible only if the school has an agreement with the outside entity that includes the following provisions:

- (i) specification of the purpose, scope and duration of the study and the information to be disclosed;
- (ii) requirement that the entity conducting the study use personally identifiable information only to conduct the study;
- (iii) requirement that entity conducting the study do so in a manner that only allows its personnel with a legitimate educational interest to access the personally identifiable information of parents and students;<sup>35</sup>
- (iv) requirement that the entity destroy all personally identifiable information when it is no longer needed for the study, including specification of the time period in which the information must be destroyed.<sup>36</sup>

In addition, the institution must ensure that results of the study are published in a way that protects the privacy of the individuals involved. For example, the use of data tables may require

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<sup>34</sup> 34 C.F.R. § 99.31(a)(6)(i).

<sup>35</sup> This provision require an entity conducting such a study to take steps to limit personally identifiable information from education records to those personnel involved in the study and who require such information to perform their job duties. Further, the entity should also take steps to maintain the confidentiality of personally identifiable information throughout the study. See *FERPA FAQ*, available at <http://familypolicy.ed.gov/faq-page/13#69n420>.

<sup>36</sup> 34 C.F.R. § 99.31(a)(6)(iii)(C).



the use of cell suppression or other methods of disclosure avoidance to that students cannot be identified through numbers or other data displayed in a table.

**(v) Disclosure for Audit, Evaluation and Compliance  
and Enforcement Purposes**

FERPA permits schools to disclose personally identifiable information from educational records without consent to authorized representatives of State and local educational authorities, the Secretary of Education, the Comptroller General of the United States, and the Attorney General of the United States for specified purposes. These include the audit or evaluation of Federal or State supported education programs and the enforcement of Federal legal requirements that relate to such programs.<sup>37</sup> An education program is defined as a program 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, as well as any program administered by an educational agency or institution.<sup>38</sup> With the exception of the above-referenced officers, this exception requires that the educational institution enter into an agreement with the entity to which it is disclosing personally identifiable information from educational records. The written agreement must designate the agency's authorized representatives, other than an employee and further specify the following:

- (i) the personally identifiable information from educational records to be disclosed;
- (ii) that the purpose for such disclosure is to carry out an audit or evaluation of Federal or State supported education programs, or to enforce or comply with Federal legal requirements relating to such programs; and
- (iii) a sufficient specification of the activity to make it clear that the work falls within the exception of 34 CFR § 99.31(a)(3), including a description of how the personally identifiable information from educational records will be used.

The agreement must require that the authorized representative(s) to destroy all provided personally identifiable information from educational records when the information is no longer needed for the audit or evaluation and specify the time period in which such destruction must

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<sup>37</sup> 34 C.F.R. § 99.35.

<sup>38</sup> 34 C.F.R. 99.3.

occur. It must also set forth policies and procedures that are consistent with FERPA and other Federal and State confidentiality and privacy provisions, to protect personally identifiable information from educational records from further disclosure (except back to the disclosing entity) and from unauthorized use, including limiting use of personally identifiable information from educational records to only authorized representatives of legitimate interests in the audit or evaluation of the Federal or State-supported education program or compliance with Federal legal requirements related to such programs.<sup>39</sup>

**(vi) Law Enforcement Unit Records/ Disclosure of  
Personally Identifiable Information to Law  
Enforcement Units**

Excluded from the definition of “educational records” are records of a law enforcement unit of an educational institution, provided the records are: (1) created by a law enforcement unit; (2) created for a law enforcement purposes; and (3) maintained by the law enforcement unit.<sup>40</sup> However, records created by a law enforcement unit for a law enforcement purpose will not be considered excluded from the definition of “education records” if they are maintained by a component of the educational institution other than the law enforcement unit (*e.g.*, a principal, dean, superintendent, etc.).<sup>41</sup> Law enforcement records may be disclosed to others without written consent of a parent or eligible student and without meeting any of the exceptions provided in FERPA to its confidentiality requirements.

Of course, records created and maintained by a law enforcement unit that are used for non-law enforcement purpose, such a student disciplinary actions or proceedings conducted by the educational institution, do not fall within this exception. Such records are, rather, education records that are subject to FERPA and should only be released with prior written consent or if another exception to FERPA’s confidentiality provisions are satisfied.

FERPA defines a law enforcement unit as any individual(s), office, department, division, or other component of an educational institution that the institution has officially authorized or designated to enforce local, State, and/or Federal laws or to refer certain matters to appropriate officials for the enforcement of a local, State, or Federal law. The unit may be composed of

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<sup>39</sup> 34 C.F.R. § 99.35 (a).

<sup>40</sup> 34 CFR § 99.8(b)(1).

<sup>41</sup> 34 CFR § 99.8(b)(2).

commissioned police officers or non-commissioned security guards, so long as the institution has officially authorized or designated them or their department or office for that purpose.<sup>42</sup>

Smaller educational institutions may not have law enforcement personnel available to perform such functions and may assign such responsibilities to a school official or office. In that case, the designated official or office may be considered a law enforcement unit. Other schools, school districts, colleges, and other institutions may employ off-duty police officers to carry out such responsibilities, and in this case any records these officers create and maintain for a law enforcement purpose are outside the ambit of FERPA. Such records will not be considered education records, provided they are not maintained by other school officials or used for a non-law enforcement purpose.

Also, FERPA permits educational institutions to use local law enforcement personnel for such purposes. These individuals may also comprise a law enforcement unit if they satisfy the criteria of a “school official” under § 99.31(a)(1)(i)(B). Specifically, such outside personnel must be: (1) performing an institutional service or function for which the institution would otherwise use employees; (2) subject to the direct control of the institution relative to their use and maintenance of education records; and (3) subject to the use and re-disclosure restrictions stated in 34 CFR § 99.33(a), concerning personally identifiable information in educational records. If outside law enforcement or other parties do not meet these requirements, they may not be considered school officials under FERPA and they may not have access to personally identifiable information in student records, unless it is necessary to protect the health and safety of others relative to a health or safety emergency. (*See Health and Safety Emergencies*, § (vii), *infra*.) However, if they meet this criteria, they will be considered a law enforcement unit and any records they create and maintain *solely for a law enforcement purpose* will not comprise education records and parents and eligible students are not entitled to access them. What is more, such records can be disclosed to third parties without prior written consent.

It is important to bear in mind that even when outside law enforcement personnel satisfy the criteria of a “school official,” such individuals are only allowed to access personally identifiable information in education records if they have a legitimate educational interest in such information (*i.e.*, cannot perform their job duties without the information). Further, the institution must identify them as the type of parties the institution considers “school officials” in

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<sup>42</sup> 34 CFR § 99.8(a)(1).

its annual FERPA notice. Such individuals must agree not to re-disclose personally identifiable information obtained from education records to third parties, including other officers in their department or agency who do not qualify as school officials of the institution, unless they obtain written consent for the re-disclosure or an exception applies (*e.g.*, a health or safety emergency).

#### **(vii) Disclosure to Child Welfare Agencies**

Education institutions may, but are not required to, release personally identifiable information from educational records to State or local child welfare agencies without obtaining prior consent from a parent or eligible student. FERPA was amended to provide an exception permitting release of personally identifiable information to for child welfare agency caseworkers or other representatives of a State or local child welfare agency or tribal organization who are authorized to access a student's case plan when that agency is legally responsible for the care and protection of the student.<sup>43</sup> Pursuant to Federal law providing for Federal payments for foster care and adoption assistance, a "case plan" is defined by federal law as a written document that includes a number of specific items that, among other things, must address the proper care of children in foster care placement.<sup>44</sup> A case plan addresses the services to be provided to a child in foster care, the child's parents, and the child's foster parents, including those oriented to ensuring the foster child's educational stability.

This exception for child welfare agencies, however, only applies to information concerning children for whom a child welfare agency is legally responsible under State law and who are in a foster care placement. The exception does not allow institutions to disclose personally identifiable information from educational records concerning children who are not in a foster care placement, even if they are receiving other services from a child welfare agency (*e.g.*, vocational and skill assessments, training, tutoring, educational services, family services, and community enrichment activities).<sup>45</sup>

As noted above, an educational institution may *choose* to disclose all or part of the education records it maintains in a student who is in foster care to a child welfare agency responsible for the child's care and protection, but it is not required to provide any records to such an agency. The Family Compliance Office encourages School District's and schools to

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<sup>43</sup> 20 U.S.C. § 1232g(b)(1)(L).

<sup>44</sup> 42 U.S.C. § 675(1).

<sup>45</sup> FERPA FAQ, available at <http://familypolicy.ed.gov/faq-page/13#85n432>.



disclose the information from education records that a child's welfare caseworker needs to effectively implement the child's case plan and ensure the child's educational needs are met.<sup>46</sup> as indicated in more detail below, educational institutions must maintain records of a request by a child welfare agency or personally identifiable information from educational records concerning a student as well as any education records disclosed to that agency in response.

#### **(viii) The Health and Safety Emergency Exception**

FERPA permits school administrators to disclose personally identifiable information from educational records when they deem it necessary to do so to address a health or safety emergency.<sup>47</sup> However, this exception only applies when such disclosure is necessary to protect the health or safety of the student or other individuals during an "actual, impending or imminent emergency, such as a natural disaster, a terrorist attack, a campus shooting, or the operation of an epidemic disease."<sup>48</sup> When such circumstances exist, an educational institution may release specific personally identifiable information from a student's education records that is necessary to protect the student or others. However, this exception will not justify a blanket release of a student's personally identifiable information from his/her education records, and it may only be relied upon for so long as the actual, impending, or imminent emergency exists.

In deciding whether an actual, impending, or imminent emergency exists, an educational institution should take into account the totality of circumstances in a situation and determine if there is "an articulable and significant threat to the health or safety of a student or other individuals." If it has a rational basis to conclude that such an emergency exists at the time it makes that determination, the USDOE will not second-guess the institution after the fact. So long it can demonstrate that it had "a rational basis for [its] determination" at the time it made the determination, "the Department will not substitute its judgment for that of the educational agency or institution[.]"<sup>49</sup> In such case, the institution may release personally identifiable information under this exception without undue concern for being second-guessed her being unnecessarily

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<sup>46</sup> *Id.*

<sup>47</sup> 34 CFR § 99.31(a)(10) and 99.36.

<sup>48</sup> *Id.*

<sup>49</sup> 34 C.F.R. § 99.36(c).

hamstrung by concern about whether the USDOE might come to a different conclusion, considering the matter in hindsight.<sup>50</sup>

However, there must be a basis for concluding there is an actual, impending or imminent emergency. An educational institution may not rely on the health and safety emergency exception for the release of personally identifiable information as part of a preparedness exercise or some other circumstance that does not involve an existing or impending emergency.

In assessing whether an emergency exists, some educational institutions use threat assessment team's composed of individuals with particular expertise or experience that is useful in assessing whether a situation constitutes an actual emergency. These individuals may also have resources or expertise that is needed for an appropriate response to such an emergency. Threat assessment team members often include individuals such as school administrators, counselors, school law enforcement personnel, outside medical and mental health professionals, and outside law enforcement personnel. An institution may disclose a student's personally identifiable information to such individuals without written consent provided the team satisfies the above-stated criteria by which contractors, consultants, and volunteers may be considered "school officials." If an institution uses a threat assessment team, it is well advised to have an agreement with each team member in which the member agrees not to read disclose a student's personally identifiable information and to use such information only for the purpose of assessing and, if necessary, responding to an emergency.

When it is necessary to provide an appropriate response to an existing or impending emergency, school officials, including threat assessment team members, can disclose or re-disclose a student's personally identifiable information from to individuals or agencies needed to protect students or others. These individuals or agencies are typically a student's parents, law enforcement officials, public health officials, trained medical personnel, or any other person whose knowledge of such information is necessary to protect the health or safety of a student or other persons.

Personally identifiable information that may be disclosed or re-disclosed may include information about disciplinary action taken against a student for conduct that posed a significant risk to the safety or well-being of that student or others. Such information may be disclosed to teachers and school officials within the institution if the institution finds that such individuals

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<sup>50</sup> FERPA FAQ, available at <http://familypolicy.ed.gov/faq-page/13#t67n436>).

have a legitimate educational interest in the behavior of the student. It may also include officials and instructors at other institutions that are determined to have a legitimate educational interest in the student's behavior.

When an educational institution discloses personally identifiable information pursuant to this exception, the institution must record in the student's education record the articulable and significant threat that formed the basis for the disclosure, the records that were disclosed, and the parties to whom the information was disclosed.<sup>51</sup>

#### (ix) **Postsecondary School Disclosure Of the Results of a Disciplinary Hearing**

Although FERPA protects student disciplinary records as education records, in some circumstances *postsecondary* institutions may disclose disciplinary records without the student's consent. First, FERPA permits postsecondary institutions to disclose to an alleged victim of a crime of violence or non-forcible sex offense the final results of a disciplinary proceeding conducted by the institution against the alleged perpetrator of such crime, regardless of whether the institution determines the individual committed the alleged violation.<sup>52</sup> A postsecondary institution may disclose to anyone – not just the victim – the final results of a disciplinary proceeding when a student is alleged to have committed a crime of violence or non-forcible sex offense with respect to the allegations made against that student, provided the institution determines that the student committed a violation of its rules or policies.<sup>53</sup> The *final results* of a disciplinary proceeding to a victim of an alleged perpetrator of a crime of violence or non-forcible sex offense. It may make such disclosure regardless of whether it has concluded that a violation occurred.<sup>54</sup> The institution must not, however, disclose the name of any other student involved in the matter, including any victim or witness, unless it obtains prior written consent from such person to so.

In this regard, the term “final result” 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. Offenses that fall within the category of violent crimes or non-

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<sup>51</sup> 34 C.F.R. § 99.36(d)(2)

<sup>52</sup> 34 CFR § 99.31(a)(13).

<sup>53</sup> 34 CFR § 99.31(a)(14).

<sup>54</sup> 34 C.F.R. §99.39; FERPA FAQ, available at <http://familypolicy.ed.gov/faq-page/13#73n80>.

forcible sex offenses include arson, assault offenses, burglary, criminal homicide (manslaughter by negligence), criminal homicide (murder and non-negligent manslaughter), destruction/damage/vandalism of property, kidnapping/abduction, robbery, forcible sex offenses, statutory rape and incest.

**(x) Miscellaneous Additional Exceptions**

In addition to the above-stated exceptions, FERPA also provides the following additional exceptions:

- (A) The disclosure is to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll;
- (B) 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 to:
  - (i) Determine eligibility for the aid;
  - (ii) Determine the amount of aid;
  - (iii) Determine the conditions for the aid; or
  - (iv) Enforce the terms and conditions of the aid.
- (C) The disclosure is to state and local officials or authorities to whom this information is specifically:
  - (i) Allowed to be reported or disclosed pursuant to a 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;
  - (ii) Allowed to be reported or disclosed pursuant to a state statute adopted after November 19, 1974, subject to certain requirements.
- (D) The disclosure is to an accrediting organization, necessary for that organization to carry out its accrediting functions;
- (E) The disclosure is to parents of a dependent student as defined in Section 152 of the Internal Revenue Code of 1986.
- (F) The disclosure is required by a judicial order or lawfully issued subpoena –
  - (i) Provided the educational institution first makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so as to permit the parent or eligible student to seek protective action, unless the disclosure is in compliance with –
    - 1. A federal grand jury subpoena and the court has ordered the educational institution not to disclose the subpoena's



content, existence, or the information furnished in response;

2. Any other subpoena issued for law enforcement purpose and the court or other issuing agency has ordered the institution not to disclose the subpoena's existence, content, or the information furnished in response.<sup>55</sup>

- (G) If an educational institution initiates legal action against the parent or eligible student, it may disclose to the court, without a court order or subpoena, the student's educational records, which are relevant to the institution's claims or position;
- (H) If the parent or eligible student initiates legal action against an educational institution, that institution may disclose to the court, without court order or subpoena, the student's education records, which are relevant to the institution's defense;
- (I) The disclosure is in connection with a health or safety emergency, or knowledge of the information is necessary for appropriate personnel to protect the health or safety of the student or other individuals;
- (J) The institution has previously designated the disclosed information as "directory information," and the institution has given public notice to parents of students in attendance and eligible students in attendance of:
  - (i) The types of personally identifiable information that the agency or institution has designated as directory information;
  - (ii) The right of a parent or eligible student to opt out of any such disclosure;
  - (iii) The period of time within which a parent or eligible student must notify the institution of its decision to opt out of some or all types of directory information disclosure;
- (K) The disclosure is to the parent of a student who is not an eligible student or to the student himself/herself;
- (L) The disclosure, subject to certain requirements, 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;<sup>56</sup>

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<sup>55</sup> See Footnote 21, *supra*.

<sup>56</sup> "The term 'alleged perpetrator of a non-forcible sex offense' means a student who is alleged to have committed acts that, if proven, would constitute statutory rape or incest." (34 CFR § 99 .39.)

(M) The disclosure is to the 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 –

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

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

## **B. *Limits to Parent/Eligible Student FERPA Rights***

Parents and eligible students are only permitted to review those portions of education records that concern the student. Accordingly, if an education record contains information about more than one student, the parent or eligible student may inspect and review or be informed of only the specific information concerning that student. Additionally, postsecondary institutions are not required to permit a student to inspect and review education records that concern the financial information of their parents or which constitute confidential letters/statements, provided the student has waived his/her right to review such documents and the documents meet certain criteria.<sup>57</sup>

While FERPA protects personally identifiable information contained in student education records by requiring parental or eligible student consent to disclosure of such information, courts have repeatedly held that it does not provide a “privilege” from disclosure of such information in court cases – in the sense of the attorney-client privilege or physician-patient privilege. Rather, it specifically provides a process by which schools can provide such information in response to subpoenas and/or Court orders. For example, FERPA permits disclosure of such information in response to a lawfully issued subpoena or court order, provided the school district first makes a reasonable effort to notify the parent or eligible student that it has received a subpoena requiring production of such information, thereby affording the parent or eligible student and opportunity to seek a protective order from the Court or to quash the subpoena.<sup>58</sup>

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<sup>57</sup> 34 CFR § 99.12.

<sup>58</sup> 20 U.S.C. §1232G(a)(5)(A), (b) – (d); 34 CFR § 99.31(a)(9) (ii)(B); see also, *C. T. v. Liberal School Dist.*, 2008 US Dist. Lexis 10348, 15-16 (D. Kan. 2008); see also *T.M. v. Elwyn, Inc.*, 950 A.2d 1050 (Superior Court of PA, June 4, 2008); *Catrone v. Miles*, 215 Ariz. 446, 452-453 (Ariz. Ct. App. 2007); *Frazier v. Fairhaven School Comm.*, 276 F.3d 52, 67 (1st Cir. 2002).

The Patriot Act, however, added a new subsection to FERPA (20 U.S.C. § 1232g(j)), which requires educational institutions to disclose education records without notice to parents/eligible students in response to an *ex parte*

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subpoena or court order obtained by the U.S. Attorney General concerning investigations or prosecutions of an offense listed at 18 U.S.C. § 2332b(g)(5)(B) and/or an act of domestic or international terrorism.

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