



Additional Duties and Responsibilities Under FERPA and FERPA Enforcement

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Additional Duties and Responsibilities Under FERPA

FERPA imposes a number of obligations and duties upon schools receiving federal funds. The following discussion analyzes school districts' primary obligations under FERPA.

1. Annual Notice

FERPA mandates that educational institutions receiving federal funds provide their enrolled students' parents or their enrolled eligible students with annual notice of the statute's provisions and protections. This notice should advise parents and eligible students of the following rights:

- (i) To inspect and review the student's education records;
- (ii) To seek the amendment of any of the student's education records that the parent/eligible student believed to be inaccurate;
- (iii) To be notified of and consent to any disclosure of "personally identifiable information" contained in the student's education records, except where such disclosure is permitted without such consent;
- (iv) The types of information the school district or school considers to be "directory information," if that school district or school discloses such information without consent;
- (v) If the school district or school discloses directory information without consent, the right of the parent or eligible student to opt out of disclosure of directory information;
- (vi) To file a complaint with the Family Policy Compliance Office of the U.S. Dept. of Education, concerning any alleged failure by the school district or school to comply with FERPA.

The annual notice must also include the following information:

- (i) The procedure for exercising the right to inspect and review educational records;
- (ii) The procedure for requesting an amendment of such records;
- (iii) Whether the school district or school has a policy of disclosing personally identifiable information contained in education records to other school officials or teachers within the school district or school who have a legitimate educational interest in such information, and, if so, the criteria of the terms "school official" and "legitimate educational interest."

Educational institutions may provide this annual notice by any means reasonably calculated to inform parents or eligible students of their rights under FERPA, including a special letter, inclusion in a PTA bulletin, a provision in a student handbook, a newspaper article, or the school district's web site.¹ The annual notice, however, must effectively provide notice to disabled parents or eligible students and to parents or eligible students who have a primary or home language other than English.²

2. Procedures For Disclosure of Education Records

While it is now well established that FERPA does not provide individuals with a private cause of action,³ it still authorizes a stiff penalty for educational institutions that violates its mandates by policy or practice: the loss of Federal aid. Such a loss would be catastrophic for most educational institutions. Accordingly, adequate procedures and policies are critical to a school district and private school relative to compliance with FERPA.

School districts and private schools are well advised to develop policies, combined with detailed written procedures and guidelines, which their personnel must follow when working with education records. These

¹ Family Compliance Office, *FERPA*, <http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html>.

² 34 CFR § 99.7(b).

³ *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002); *Woodruff v. Hamilton Township Public Schools*, 2008 US Dist. Lexis 29304 (D.N.J. 2008); *Capone v. Patchogue-Medford Union Free School Dist.*, 2006 US Dist. Lexis 96016 (E.D.N.Y.2 2006).

procedures should clearly define the definitions of “educational records,” “directory information,” “school officials,” “legitimate educational interests,” and other pertinent definitions. School policies and procedures should also set forth the circumstances under which parental consent is required for the disclosure of personally identifiable information in a student’s education records.

Other important guidelines that should be part of any school policy/procedure include the following:

- (i) Prohibit employees and other school personnel from disclosing non-directory student information over the telephone. This medium increases the potential for informal and improper disclosure of personally identifying information from education records;
- (ii) Prohibit employees and school personnel from leaving student records or information visible on their desks or their computer screens when they are away from their desks. When viewing such information electronically, password-protected files should be used and computers should be safeguarded with password protection as well;
- (iii) Prohibit leaving students graded papers or examinations in an unattended pile for student retrieval. Returning papers in such an informal way makes it impossible to verify that students have picked up only their own papers;
- (iv) Loading of graded test/exams/papers onto classroom web sites;
- (v) Access to electronic records containing student records with personally identifiable information should be restricted to those school officials who have a legitimate need to know the information – particularly in the case of disabled students. Such access should be controlled by passwords, administrator imposed restrictions, etc.
- (vi) Prohibit employees from copying or forwarding electronic education records containing personally identifiable information, unless the employee has been provided with

a written consent for such disclosure, signed by the parent or eligible student;

- (vii) Prohibit the use of Social Security numbers and other personally identifiable information as a means of identifying students;
- (viii) Prohibit employees from accessing education records concerning students for whom the employees have no presently existing responsibility or obligation; and
- (ix) Prohibit the posting of student photographs unless the employee has first confirmed that the student's parent or eligible student has not opted out of such disclosure.

3. Maintaining a Record of Parties Accessing Records

FERPA requires educational institutions to keep a record of every request for access to and disclosure of personally identifiable information from a student's educational records, except for directory information. The request must specifically indicate the legitimate interest that each person, agency, or organization has in the information. Educational institutions may make that record of access available only to parents or eligible students, the school official, and his/her assistants responsible for maintaining custody of such records, and the persons or organizations authorized in auditing the operation of the system. Naturally, educational institutions should have a copy of the executed consent for every consented disclosure or a record of the circumstances that justified a non-consensual disclosure of the records.

4. Application of FERPA to Special Education Records

Records concerning disabled students may not be designated as "directory information" without constituting an undue invasion of student privacy. In fact, the Individuals with Disabilities Education Act ("IDEA") specifically incorporates FERPA's privacy protections. Courts have held that the identity of the parents of disabled students cannot constitute directory information under FERPA's terms and those of its enacting regulations.⁴

⁴ See, e.g., Disability Law Center of Alaska, Inc. v. Anchorage School Dist., 2007 US Dist. Lexis 72300, 23 (D. of Alaska 2007), citing Washington Prot. v. Evergreen School Dist., 71 Fed app. 654 (9th Cir. 2003).

In view of FERPA's requirement that schools limit access to a student's education records to school officials having a legitimate educational need for such access, school districts are well advised to limit education records containing personally identifiable information about disabled students to those school officials requiring access to such information. This may include transportation personnel, service providers, teachers, aids, etc. Such access, however, should not necessarily include every school employee with whom the student comes into contact, and school districts are well advised to limit such information to those who have a legitimate need for it.

While IDEA, itself, does not restrict the disclosure of a disabled child's education records, its incorporation of FERPA's restrictions does not create a privilege from disclosure of such records in litigation. In other words, there is no "special education privilege" for a disabled student's education records.⁵

FERPA Enforcement

As noted above, FERPA does not provide individuals with a private cause of action that can be enforced in civil courts. Rather, FERPA is enforced by the FCO, a branch of the United States Dept. of Education.⁶ Pursuant to the statute, the US Dept. of Education may terminate a school district's or other funded school's federal assistance, assuming the school or school district has habitually or chronically engaged in policies or procedures that result in a violation of FERPA.⁷ Any educational institution concluding it cannot comply with FERPA because of a conflicting state or local law must notify the FCO within 45 days of that determination, giving the text and citation of the conflict in law.

A parent or eligible student may file a written complaint with the FCO, concerning an alleged violation of FERPA. The allegation must

⁵ See, e.g., *CT v. Liberal School Dist.*, 2008 US Dist. Lexis 10348 (D. Kansas 2008) *Catrone v. Miles*, 215 Ariz. 446, 452-456, 160 P.3d 1204, 1210-1212 (Arizona Ct. App. 2007) (rejecting the notion of a "special education privilege" and applying a balancing test concerning the discovering party's need for the information sought and the student's right to privacy).

⁶ Some courts have held, however, that parents or eligible students can pursue federal civil rights claims regarding erroneous information in student records, which are the result of ministerial errors and an arbitrary refusal to amend such information, as well as a school district's failure to provide a process by which a parent or eligible student can be heard regarding the request that information contained in the student's education records be amended. See, e.g., *Lee v. Southern Univ. Law Ctr.*, *supra*, 2008 US Dist. Lexis 37258 at 11-12.

⁷ 20 U.S.C. §§ 1 232g (f) and (g).

contain specific factual allegations that provide reasonable cause to believe a violation occurred. The FCO will investigate each timely complaint⁸ to determine whether the educational institution has failed to comply with FERPA.⁹

Upon receipt of a complaint, the FCO shall notify the educational institution in writing of the complaint and that it has initiated an investigation under 34 C.F.R. §99.64(b). This notice shall include the substance of the alleged violation and ask the educational institution to submit a written response to the complaint. The FCO will then review the complaint and response and it may permit the parties to submit further written or oral arguments or information. After its investigation, the FCO will provide the complainant and educational institution written notice of its findings and their basis. If the FCO concludes that the educational institution has not complied with FERPA, its notice shall state the specific steps the institution must take to become compliant and provide it a reasonable period to do so, depending on the circumstances.¹⁰ If the educational institution does not comply within that period, the Dept. of Education may:

- (i) Withhold further payments under any applicable program;
- (ii) Issue a complaint to compel compliance through a cease-and-desist order; or
- (iii) Terminate eligibility to receive funding under any applicable program.

⁸ A timely complaint is one filed within 180 days of the date of the alleged violation or the date that the complainant first knew or reasonably should have known of the alleged violation. (34 CFR § 99.64 (c). **The FCO has discretion to extend this time limit for good cause shown. (*Id.* § 99.64(d). Of**

⁹ 34 C.F.R. §§99.61-99.65.

¹⁰ 34 CFR § 99 .66.

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