



FERPA: Managing Compliance Challenges Under the Old Law and New Amendments

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Introduction

- ▶ FERPA is an old law from 1974
- ▶ It has been amended, interpreted, and the subject of legal challenges
- ▶ No private right of action, so little legal risk
- ▶ Practitioners still struggle with compliance
- ▶ Why?



Introduction Cont.

- ▶ Universities have a lot of important information about students and that information is diffuse
- ▶ Regulations not always clear
- ▶ Record custodians feel an ethical responsibility for the care of that information
- ▶ No one wants to violate the law
- ▶ Some fear of the "ultimate penalty": withdrawal of federal funding
- ▶ We want to do the right thing



Introduction Cont.

- ▶ How do we do the right thing?
 - Familiarize ourselves with the goals of FERPA
 - Become conversant with the regulations
 - Be aware of new changes
 - Learn to recognize FERPA red flags
 - Offer periodic training and review any policies or practices

The Goals:

- ▶ Four main goals or purposes:
 - Students' right to inspect, review, and amend
 - Students' right to nondisclosure (except in limited circumstances)
 - Students' right to notice about FERPA
 - Students' right to file complaint with DOE

Key Elements of the Regulations: The What and Who

- ▶ FERPA applies to "education records" of "eligible students"
 - Definition of **education record** is broad (emails, paper documents, computer records, video)
 - Directly related to student
 - Personally-identifiable information includes information which alone or in combination can identify the student
 - Maintained by institution
 - **What it is not:** sole possession records, certain employment records, law enforcement records, medical records
 - The HIPAA privacy rule expressly excludes student health records maintained by institutions; be careful of state law requirements on medical and mental health records

Key Elements cont.: What and Who

- Eligible student:
 - An individual who is or has been **in attendance** at the institution
 - Institution defines "in attendance"
 - In attendance includes correspondence or on-line
 - The age of the student is irrelevant for rights under FERPA

Key Elements cont: The What

- ▶ Notice Requirements—Annual
 - Advise students of:
 - Right to inspect and review their own records
 - Right to seek amendment
 - Right to consent to disclosure
 - Right to file a complaint with DOE
 - Right to opt out of directory information (provide definition)
 - Definition of school officials and legitimate educational interest
 - Records transfer policy

Key elements: The How cont.

- ▶ How can education records be disclosed?
 - *Disclosure is always **permissive** under FERPA*
 - Student consent:
 - Written
 - Signed
 - States the purpose
 - States to whom
 - Identifies records

Key elements: The How

- If directory information
- Without consent, under some circumstances
 - To parents of a dependent student
 - To parents regarding a violation of law or policy concerning alcohol or controlled substances, under certain circumstances
 - To victims of certain violent offenses, certain information
 - To an institution at which a student seeks to transfer/enroll or is already enrolled but only about transfer and enrollment

Key elements: The How cont.

- To others:
 - School officials with legitimate educational interest, including contractors
 - Directory information
 - To comply with subpoena or judicial order
 - In connection with a health and safety emergency
 - Certain disciplinary records
 - For research, under certain circumstances
 - For audit and evaluation by certain state and local officials
 - Information about sex offenders at the institution
 - Final results of a disciplinary proceeding involving a crime of violence or non-forcible sex offense, under certain circumstances

Key Elements: The How cont.

Directory Information

- | | |
|--|---|
| <ul style="list-style-type: none">• Name• Address• Telephone number• Email address• Date and place of birth• Major field of study• Dates of attendance• Grade level• Enrollment status | <ul style="list-style-type: none">• Participation in activities and sports• Weight and height of athletes• Degrees, honors, awards• Most recent educational institution attended• Photograph• Other information generally not considered harmful or an invasion of privacy |
|--|---|



Key Elements: The How cont.

- ▶ The health and safety exception
 - Look at totality of circumstances
 - If justifiable, DOE will not second guess
 - Institution must keep a record of threat that formed the basis for the decision to disclose records, and to whom those records were disclosed

Key elements: The How cont.

- ▶ Disclosures to parents of dependents
 - Must be able to show that student is a dependent for tax purposes
 - DOE has developed a model form—can also serve as a consent form

Key Elements: The How cont.

- ▶ Institutions must use “reasonable methods” to identify and authenticate the identity of those who access records
 - Possible methods might include a combination of some of the following: requiring photo ID; all or part of a student ID number or SSN; date of birth; PINs; personal security questions; passwords

Key Elements: The How cont.

- ▶ Note: It is not a disclosure of an education record or information contained in an education record for a school official to share personally-identifiable information about a student that is based on the official's personal knowledge
 - However, if the official has also created a record about it, the disclosure of the record may be a violation of FERPA

Red Flags

- ▶ A parent requests information from the bursar's office to pay his son's bill.
 - Is the information protected by FERPA?
 - Is the student a dependent?
 - Do you have consent?
 - Do you wish to include the parents?

Red Flags cont.

- ▶ A parent claims that there is an obligation to consult with them about their daughter's disability accommodation.
 - Is the information protected by FERPA?
 - Is the student a dependent?
 - Do you have consent?
 - Do you wish to include the parents?
 - No requirement of parental involvement under ADA.

Red Flags cont.

- ▶ A student wishes to see the letters of reference from his admissions file.
 - Are the records protected by FERPA?
 - Are they confidential references to which the student has waived his right of inspection?

Red Flags cont.

- ▶ Directory information at the institution is defined as name, email address, home address, and phone number. The campus chief of police believes that "name" means "identity" and has shared a picture of a student taken from a class list maintained on Blackboard to the local D.A. without a subpoena.
 - Does identifying "name" in the list of directory information mean a student photo?
 - Can the information be shared by campus law enforcement without a subpoena?

Red Flags cont.

- ▶ Campus conduct officer receives a subpoena to testify at a trial of a student who was also the subject of a disciplinary hearing on campus.
 - Is the subpoena valid?
 - Does it involve producing records?
 - Does FERPA apply to either the testimony or the records?

Red Flags cont.

- ▶ Student has expressed suicidal tendencies but does not wish the campus to contact his parents.
 - Could an administrator share with the parents his or her personal knowledge or observation?
 - If information is in a record, can it be shared?
 - Can the student prevent the sharing of student records or student record information that is made under a FERPA exception to consent?

Red Flags cont.

- ▶ A request is made for a list of directory information regarding alumni.
 - How does the opt out apply to alumni?
 - If the list of directory information has changed since an alumnus was last at the institution, what information may you provide?

Red Flags cont.

- ▶ The institution has students working in the registrar's office. They can access student transcripts and other personally identifiable student information.
 - Does this violate FERPA?
 - Should the students be trained about confidentiality and FERPA?

Red Flags cont

- ▶ A former student who now lives out of state has requested her transcript. The individual still has an outstanding balance on her account.
 - Does FERPA require the institution to provide the transcript?
 - Does it have to be the official transcript?

Red Flags cont.

- ▶ A student has accused a professor of discrimination. The professor believes he can see the name of the student-accuser because he is a school official with a legitimate educational interest.
 - May the professor see the name under that rationale?
 - May the professor see the name under another rationale?

Red Flags cont.

- ▶ The institution has a committee that discusses students of concern. Members take notes at the committee and a spread sheet is created to manage the various students, their incidents, and any interventions.
 - Are those documents education records?
 - Could a student inspect and review those documents?

Red Flags cont.

- ▶ Student complains that school has an all-or-nothing approach to opting in or out of directory information and would prefer to pick and choose which elements of directory information he would like disclosed and vice-versa.
 - Does a school have to have an "a la carte" approach to opting out of directory information?

Red Flags cont.

- ▶ A professor, who will be teaching a student in an upcoming semester, wishes to see the student's previous grades. The student happens to be the daughter of his neighbor.
 - Does FERPA permit it?
 - Could the institution refuse him access?

Red Flags cont.

- ▶ An institution has learned of the inadvertent disclosure of personally identifiable student record information.
 - Is it a FERPA violation?
 - Does FERPA require that those students be notified?
 - Should the students be notified?
 - What should they be told?

Red Flags cont.

- ▶ Local law enforcement is seeking a student's schedule so they can locate her and arrest her in class to minimize the possibility that she will abscond.
 - Can you provide them with her class schedule?
 - Is it protected under FERPA?
 - Do the police need a subpoena?

Red Flags cont.

- ▶ The chair of the department has a practice of destroying his student files two years after the students have left the department. A student, who graduated three years ago, makes a request of the registrar's office to inspect and review all his education records.
 - Has the institution violated FERPA by destroying the records?

Red Flags cont.

- ▶ When students request information from education records over the telephone, the institution requires them to identify themselves by their student ID number.
 - Is this sufficient under FERPA?
 - What other information could an institution ask for to help authenticate the identity of the student?

Red Flags cont.

- ▶ A student affairs officer sees a concerning photo posted on a student's Facebook page. He would like to contact the student's parents.
 - Is this a FERPA issue?
 - Could further inquiries from the parent's implicate FERPA?

Red Flags cont.

- ▶ Several years ago, a crime was committed in a campus residence hall. The student-victim is now suing the institution and requests all the names and addresses of the students who lived in the residence hall at that time. He also requests copies of documents from the campus police files.
 - What elements were defined as directory information at the time?
 - If addresses were not defined as directory information but names were, can you still release the names?
 - Can you give him the documents from the campus police files?

Red Flags cont.

- ▶ Campus public safety wants to post the photographs of campus trespassers.
 - Is this a FERPA issue?
 - Is the public safety office a law enforcement office?
 - Are the trespassers students?
 - Are photographs listed as directory information?

Red Flags cont.

- ▶ An institution has received a request from the Direct Loan Program for student records to investigate an allegation of student financial aid fraud.
 - Can you give the Program records in accordance with FERPA?

Red Flags cont.

- ▶ An institution has received a public records request for information relating to travel expenses for recruiting student athletes.
 - Are those records covered by FERPA?
 - What about students who did not attend?
 - How does FERPA interact with the state public records law?

Red Flags cont.

- ▶ The parents of a student who is enrolled both in the institution's on-line program and at high school request the grades of their son.
 - Can the institution give that information directly to the parents?
 - Could it share that information with the high school?

Red Flags cont.

- ▶ An attorney issues a subpoena through a state district court seeking education records of several students involved in an on-campus incident five years ago. One of the student involved has since died, and the others have since left the institution.
 - Can you disclose the records under FERPA?
 - What about the records of the deceased student?
 - Do you have to notify the living students prior to the release of their records?

Conclusion

- ▶ Managing legal risk under FERPA is best done through periodic training of university staff and a general consciousness-raising about treating student records and student-record information sensitively

Resources

- ▶ Family Compliance Office
 - <http://www.ed.gov/policy/gen/guid/fpc/ferpa/safeschools/modelform2.html>
 - <http://www.ed.gov/policy/gen/guid/fpc/ferpa/safeschools/modelform.html>
 - <http://www.ed.gov/policy/gen/guid/fpc/index.html>

Resources

- ▶ [http://www.ed.gov/policy/gen/guid/fpco/br
ochures/postsec.html](http://www.ed.gov/policy/gen/guid/fpco/br
ochures/postsec.html)
- ▶ [http://www.ed.gov/policy/gen/guid/fpco/ho
ttopics/ht-parents-postsecstudents.html](http://www.ed.gov/policy/gen/guid/fpco/ho
ttopics/ht-parents-postsecstudents.html)
- ▶ Final Regulations
- ▶ [http://frwebgate.access.gpo.gov/cgi=
bin/getdoc.cgi?dbname=browse_usc&docid=
Cite:+20USC1232g](http://frwebgate.access.gpo.gov/cgi=
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Cite:+20USC1232g)
