

FERPA and Public Health

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Family Educational Rights and Privacy Act (FERPA)

Statute: 20 U.S.C. § 1232g

Regulations: 34 CFR Part 99

Webinar Outline

- FERPA basics
- Key FERPA definitions
- Exceptions to FERPA's general consent rule
- Interactions between FERPA and other laws
- Response to questions received
- Contact information

What is FERPA?

- FERPA is the Federal law that protects the privacy of students' education records.
- FERPA applies to educational agencies and institutions that receive funds under any program administered by the Secretary of Education. § 99.1.
- Most private and parochial schools at the elementary and secondary levels do not receive such funds and are, therefore, not subject to FERPA.

Primary Rights of Parents under FERPA

- Right to inspect and review education records.
- Right to seek to amend education records.
- Right to consent to the disclosure of information from education records, except as provided by law.

Rights of Eligible Students under FERPA

These rights under FERPA transfer to the student when he or she turns 18 years of age or enters a postsecondary institution at any age (“eligible student”).

“Education records”

- “Education records” are 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.

§ 99.3 “Education records”

“Education records”, cont.

- Records on a student receiving services under Part B of the Individuals with Disabilities Education Act (IDEA) are “education records” subject to FERPA.
- Medical or health related records are “education records” subject to FERPA.

“Education records,” cont.

Exceptions to “education records” include –

- Records created and maintained by a law enforcement unit for a law enforcement purpose.
- Medical and psychological treatment records of *eligible students* if they are made, maintained, and used only in connection with treatment of the student and disclosed only to professionals providing the treatment.

“Personally identifiable information”

- “Personally identifiable information” (PII) includes, but is not limited to:
 - The student’s name;
 - The name of the student’s parent or other family members;
 - A personal identifier, such as the student’s social security number, student number, or biometric record;
 - Other indirect identifiers, such as the student’s date of birth, place of birth, and mother’s maiden name;

“Personally identifiable information,” cont.

- 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; or
- Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education records relates.

§ 99.3

“Directory information”

“Directory information” is –

- Information not generally considered harmful or an invasion of privacy if disclosed.
- Includes, but is not limited to:
 - name, address, telephone listing, electronic mail address
 - date and place of birth, photographs
 - participation in official recognized activities and sports
 - field of study
 - weight and height of athletes
 - enrollment status (full-,part-time, undergraduate, graduate)
 - degrees & awards received
 - dates of attendance
 - most previous school attended
 - grade level

“Directory information,” cont.

- “Directory information” cannot generally include a student’s social security number or student ID number.
- A student’s ID number may be designated as “directory information” when the ID cannot, alone, be used to access education records.

§ 99.3

“Student”

- “Student” means any individual –
 - who is or has been in attendance at a school; and
 - regarding whom the school maintains education records.

§ 99.3

Right to Inspect and Review

§ 99.10 *What rights exist for a parent or eligible student to inspect and review education records?*

- School must comply with request within 45 days.
- Generally required to give copies only if failure to do so would effectively deny access – example would be a student or former student who does not live within commuting distance.
- School may *not* destroy records if request for access is pending.

Disclosure of Personally Identifiable Information from Education Records by an Educational Agency or Institution

- *§ 99.30 Under what conditions is prior consent required to disclose information?*
 - Except for specific exceptions, a parent or eligible student shall provide a signed and dated written consent before a school may disclose education records. The consent must:
 - Specify records that may be disclosed;
 - State the purpose of disclosure; and
 - Identify the party or class of parties to whom disclosure may be made.

Exceptions to Consent Requirement

§ 99.31 *Under what conditions is prior consent not required to disclose information?*

The exceptions which relate to K-12 schools and school districts are:

- To school officials with legitimate educational interests (defined in the school's annual notification).
- To schools in which a student seeks or intends to enroll.
- To Federal, State, and local *educational* authorities conducting an audit, evaluation, or enforcement of education programs.

Disclosure provisions, cont.

Exceptions, cont.

- To organizations conducting studies for or on behalf of the school.
- To parents of a dependent student.
- To comply with a judicial order or subpoena (reasonable effort to notify).
- In connection with a health or safety emergency.
- Directory information.
- To State and local officials in connection with serving the student under the juvenile justice system (established by State law).

School Officials

- § 99.31(a)(1) The disclosure is to school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.
- Criteria for who is considered a “school official” and what is a “legitimate educational interest” must be included in annual notification of rights to parents and students currently in attendance. § 99.7

School Officials, cont.

- A contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a “school official” under FERPA provided that the outside party –
 - Performs an institutional service or function for which the agency or institution would otherwise use employees;
 - Is under the *direct control* of the agency or institution with respect to the use and maintenance of education records; and
 - Is subject to the requirements of § 99.33(a) governing the use and redisclosure of PII from education records.

Health or Safety Emergencies

§ 99.36 *What conditions apply to disclosure of information in health or safety emergencies?*

- Disclosure must be to appropriate parties in connection with an emergency if knowledge of information is necessary to protect the health or safety of the student or others.
- “Appropriate parties” may include parents of an eligible student.

Health or Safety Emergencies, cont.

- If school determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any party whose knowledge of the information is necessary to protect the health or safety of the student or other individuals.
- If, based on the information available at the time, there is a rational basis for the determination, the Department will not substitute its judgment for that of the school's in evaluating the circumstances and making its determination.

Health or Safety Emergencies, cont.

- An educational agency or institution must record the following information when it discloses PII under the health or safety emergency exception in FERPA:
 - The articulable and significant threat to the health or safety of a student or other individuals that form the basis for the disclosure; and
 - The parties to whom the institution disclosed the information.

§ 99.32(a)(5)

Organizations Conducting Studies

- § 99.31(a)(6) The disclosure is to organizations conducting studies for, or on behalf of, educational agencies or institutions to:
 - Develop, validate, or administer predictive tests;
 - Administer student aid programs; or
 - Improve instruction.

Organizations Conducting Studies, cont.

- The school must have a written agreement with the receiving organization that:
 - Specifies the purpose, scope and duration of the study or studies and the information to be disclosed;
 - Requires the organization to use information only to meet the purpose of the study;
 - Requires the organization to conduct the study in a manner that does not permit PII of parents and students by anyone other than organization representatives with legitimate interests;
 - Requires the organization to destroy or return all PII when no longer needed for purposes of the study; and
 - Specifies the time period in which the information must be returned or destroyed.

Redisclosure

§ 99.33 *What limitations apply to the redisclosure of information?*

- When disclosing information from education records to one of the parties listed under § 99.31, a school should inform the receiving party that the information may not be further disclosed, except when:
 - The receiving party discloses information on behalf of the school under § 99.31.

Redisclosure, cont.

- The disclosure was made pursuant to a court order, subpoena, or in connection with litigation between the school and parent/student.
- The disclosure is to the parent or eligible student.
- The disclosure is to the parents of a dependent student.
- The information disclosed is directory information.

Other Laws With Which FERPA Interacts

- Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule
 - Educational institutions that provide health or medical services to students may qualify as “covered entities” under the HIPAA Privacy Rule.
 - However, the HIPAA Privacy Rule specifically excludes from its coverage those records that are protected by FERPA.
 - See definition of “Protected health information” in 45 CFR 45 CFR § 160.103

Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule

Joint Guidance on the Application of the
Family Educational Rights and Privacy Act (FERPA)
and the *Health Insurance Portability and
Accountability Act of 1996 (HIPAA)*
to Student Health Records

(November 2008)

<http://www2.ed.gov/policy/gen/guid/fpco/doc/ferpa-hipaa-guidance.pdf>

Other Laws With Which FERPA Interacts, cont.

- Individuals with Disabilities Education Act (IDEA) – IDEA has additional or separate confidentiality requirements in addition to FERPA:
 - Part B – 34 CFR § 300.610 - § 300.627.
 - Part C – 34 CFR § 303.402 and § 303.460.

Other Laws With Which FERPA Interacts, cont.

- Federal Child Abuse Prevention and Treatment Act (CAPTA).
 - Provides that a State must have a State law that provides for the reporting of known or suspected instances of child abuse and neglect in order to receive a grant for child abuse prevention and treatment programs.

Other Laws With Which FERPA Interacts, cont.

- State laws –
 - May provide additional rights for parents and students.
 - May not remove any rights afforded by FERPA.

Other Laws With Which FERPA Interacts, cont.

- Protection of Pupil Rights Amendment (PPRA)
 - PPRA governs the administration to students of a survey, analysis, or evaluation that concerns one or more of the following eight protected areas:
 - Political affiliations or beliefs of the student or the student's parent;
 - Mental or psychological problems of the student or the student's family;
 - Sex behavior or attitudes;
 - Illegal, anti-social, self-incriminating, or demeaning behavior;
 - Critical appraisals of other individuals with whom respondents have close family relationships;
 - Legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers;
 - Religious practices, affiliations, or beliefs of the student or student's parents; or
 - Income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program).

Other Laws With Which FERPA Interacts, cont.

- PPRA requires that schools offer parents an opportunity to opt their children out of participating in the following activities:
 - The administration of any survey containing one or more of the 8 areas of information listed previously. (Must contain prior written consent before a minor is required to take a survey containing one or more of the 8 areas of information that is funded in whole or in part with Department funds.)
 - Certain non-emergency, invasive physical examination or screenings.
 - Activities involving the collection, disclosure, or use of personal information collected from students for the purpose of marketing or for selling.

20 U.S.C. § 1232h; 34 CFR Part 98

Responses to Questions Received

Q. 1. Which law – FERPA or the HIPAA Privacy Rule – governs records on health care delivered through a school-based health center when the center is organized and implemented by the school district?

A. 1. Any records that a school nurse or health center maintains that are directly related to a student are considered “education records” subject to FERPA. This issue was explained in our joint guidance on FERPA and HIPAA, and reiterated in the guidance on FERPA and H1N1. If a person or entity is acting on behalf of a school subject to FERPA, such as a school nurse who is under contract with, is an employee of, or is otherwise under the direct control of the school, their student health records are “education records” subject to FERPA. This is the case regardless of whether the health care is provided to students on school grounds or off-site.

Q&A's, cont.

Q.2. What latitude do school nurses or school administrators have in divulging information about teen pregnancy to parents/guardians? Does the pregnant student have the right to refuse schools to notify their parents?

A.2. Schools are not prohibited by FERPA from disclosing information about teen pregnancy to parents, even if the teen requests that the parents not be notified. In fact, if a parent requests to inspect and review records maintained by the school nurse on their minor child, FERPA would *require* the school official to provide the parents with an opportunity to review the records. Personal knowledge and observation are not governed by FERPA.

Q&A's, cont.

Q.3. What latitude do school nurses or school administrators have in divulging information to parents/guardians concerning other matters, such as sexually transmitted diseases/infections and substance abuse?

A.3. The same principles apply. FERPA requires that school officials – including school nurses – provide parents with an opportunity to inspect and review education records on their children. “Education records” include health records. If a student is 18 years old or older, the rights under FERPA belong to him or her. However, more than likely the student is a dependent for IRS purposes and while a school would not be required to disclose information from education records with parents, they may if the parent claims the student as a dependent.

Q&A's, cont.

Q.4. Why must active parental consent be obtained for the school nurse to enter immunization data into the Immunization Registry when the Registry may already contain immunization information for the student in it? And why is consent needed to enter new data to the existing record or enter the primary data for the student that includes demographic and immunization information?

A.4. Entering a student's immunization or other data into the Registry is considered a "disclosure" of PII from a student's education records. FERPA requires prior written parental consent for disclosures of PII, unless an exception applies. There is not an exception in FERPA that permits the disclosure of PII to a Registry.

Q&A's, cont.

Q.5. How should conflicts among Federal and State laws, organizational policies, and professional ethical codes addressing confidentiality be resolved?

A.5. FPCO routinely reviews potential conflicts with FERPA. In fact, school officials are required to report potential conflicts to FPCO within 45 days of making a determination there is such a conflict. Often times, what school officials believe are conflicts are not and we can provide advice on how to address the matter. Ultimately, however, if there is a conflict and a school wishes to continue to receive U.S. Department of Education funds, it must comply with FERPA.

Q&A's, cont.

Q.6. If a school wants to contact a child's doctor about an inaccuracy on an excuse note, do we need any special permission or may we contact the doctor directly?

A.6. Under FERPA, the 2008 regulations changed the definition of "disclosure" to permit a school to contact the stated source of a record (such as a doctor's note) for verification purposes. This is not considered a disclosure and, therefore, does not violate FERPA. In other words, FERPA permits a targeted release of records back to the stated source for verification purposes in order to provide schools with flexibility needed for this process while preserving a more general prohibition on the release of information from education records. I understand that, under the HIPAA Privacy Rule, it would depend on how the doctor's note is addressed in order for the doctor to respond to the inquiry. If it is addressed to the school or a school official, then HIPAA would permit it to be verified as well. However, if it is a generic note, the school could demand that consent be given for the doctor to disclose the information before agreeing to the student being legitimately absent that day. In a situation in which there is no doctor's excuse note where a school official wishes to call a student's doctor and discuss the student's medication, restrictions, etc., the parent must provide written consent before the school official calls the doctor and discloses information from the student's education records.

Q&A's, cont.

Q.7. Bus drivers in our district are trained in emergency care for certain life-threatening disorders. Is it legal for us to provide to the drivers the names of students with these types of disorders who may require assistance? We have been told that we can only give a generic overview to the drivers, not identifying information unless we have written parental consent.

A.7. A school district may determine that bus drivers should be considered “school officials” with “legitimate educational interests” so that such information on students can be disclosed to them. The FPCO website has a model notification that include sample criteria for who is considered a “school official” and what is considered a “legitimate educational interest.” See:

<http://www2.ed.gov/policy/gen/guid/fpc/ferpa/lea-officials.html>.

Q&A's, cont.

Q.8. May health records or other education records maintained by a school be disclosed, without consent, to the public health department?

A.8. Yes, if the disclosure meets the conditions for FERPA's health or safety emergency exception to the general consent rule. If school officials, taking into account the totality of the circumstances, determine that an articulable and significant threat exists to the health or safety of a student or other individuals, they may disclose PII from education records to appropriate officials, without consent, who need the information to protect the health or safety of the student or other individuals. Typically public health officials and trained medical personnel are among the types of appropriate parties to whom information may be disclosed under FERPA's health or safety emergency provision.

Resources on FERPA

- FERPA regulations: <http://www2.ed.gov/policy/gen/reg/ferpa/index.html>
- FERPA & H1N1: <http://www2.ed.gov/policy/gen/guid/fpco/pdf/ferpa-h1n1.pdf>
- FERPA & Emergencies & Other Disasters:
<http://www2.ed.gov/policy/gen/guid/fpco/pdf/ferpa-disaster-guidance.pdf>
- Amendments to FERPA regulations (2008):
<http://www2.ed.gov/legislation/FedRegister/finrule/2008-4/120908a.pdf>

How to Contact Us

The Family Policy Compliance Office (FPCO)

<http://www2.ed.gov/policy/gen/guid/fpc/index.html>

School officials: FERPA@ED.Gov

Other officials, parents & students: FERPA.Customer@ED.Gov

How to Contact Us, cont.

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