



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE CHIEF FINANCIAL OFFICER

07/19/2016

ACQUISITION ALERT 2016-06

TO: Contracting Officer, Contract Specialists, and Contracting Officer's Representatives
FROM: Director, Enterprise Procurement Initiatives
SUBJECT: Class Deviation to Implement the Family Educational Rights and Privacy Act (FERPA)

1. **Purpose:** The purpose of this Alert is to issue a class deviation in order to incorporate FERPA provisions and clauses into contracts. ED is Congressionally-mandated to comply with FERPA requirements to safeguard the privacy of student education records.
2. **Deviated language:** FAR Part 24--Protection of Privacy and Freedom of Information. FAR Part 12 deviation not required (*see* FAR 12.301(f)).
3. **Applicability:** This deviation applies to all solicitations and contracts, including those for commercial items, when a contractor will collect or receive access to personally identifiable information (PII) from student education records, in connection with the conduct of an audit, evaluation, study, compliance review, or other Federal law enforcement activity.
4. **Effective Date:** 07/19/2016
5. **Expiration Date:** Effective until incorporated in the EDAR or otherwise rescinded.
6. **Guidance:**
 - a. *New Policy:* ED's policy is to designate as authorized representatives any contractors that will collect or receive access to PII from student education records, in connection with the conduct of an audit, evaluation, study, compliance review, or other Federal law enforcement activity. Additionally, ED must set forth, in all applicable contracts, contractor responsibilities for the use, management and retention of such PII.
 - b. *New Procedures:* This Deviation requires Principal Offices (Requiring Activities), in consultation with ED's Chief Privacy Officer and the Director of the Family Policy Compliance Office, to determine whether an acquisition will require ED to share PII from student education records with a contractor or authorize a contractor to collect or receive access to PII from student education records, in connection with the conduct of an audit, evaluation, study, compliance review, or other Federal law enforcement activity. Contracting Officers, upon notification from a requiring activity, shall insert the clause at 52.224-70 (Deviation) in all applicable solicitations and resultant contracts.

400 MARYLAND AVE. S.W, WASHINGTON, DC 20202
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7. Attachments:

- A. Class Deviation signed by the Chief Acquisition Officer, dated July 15, 2016.
- B. Deviated language Implementing the Family Educational Rights and Privacy Act.

8. Additional Information:

Questions or comments about this class deviation may be directed to Todd Anthony at 202-245-6387 or todd.anthony@ed.gov; or David Munford at 202-245-8185 or david.munford@ed.gov.

Attachment B: Deviated Language Implementing the Family Education Rights and Privacy Act (FERPA)

New definition within FAR 2.1—Definitions.

Subpart 2.101—Definitions (DEVIATION)

2.101 Definitions.

Insert the following definition of *Requiring Activity* immediately after the definition of *Renewable energy technology*:

Requiring Activity means the principal office charged with meeting or supporting a mission and delivering requirements. The requiring activity is responsible for obtaining funding or developing the program objectives. The requiring activity may also be the organizational unit that submits a written requirement or statement of need for services required by a contract.

New sub-paragraph within FAR Part 12—Acquisition of Commercial Items

Insert the following sub-paragraph immediately following 12.301(f):

(1) The clause at 52.224-70 (Deviation) has been authorized for inclusion in acquisitions of commercial items. Refer to 24.70 (Deviation) for provisions related to the use of this clause.

New subpart within FAR Part 24—Protection of Privacy and Freedom of Information.

Insert the following subpart immediately after Subpart 24.2—Freedom of Information Act

Subpart 24.70—The Family Educational Rights and Privacy Act (DEVIATION)

24.701 Authority.

This subpart implements the Family Educational Rights and Privacy Act (FERPA or the Act), 20 U.S.C. § 1232g. Additional FERPA-implementing regulations are found at 34 CFR part 99.

24.702 Policy.

It is ED's policy to designate as its authorized representative, for purposes of compliance with FERPA, any contractor that will collect or receive access to PII from student education records in connection with the conduct of an audit, evaluation, study, compliance review, or other Federal law enforcement activity. ED will notify such contractors, or prospective contractors, prior to award or during contract performance of their obligations to protect student privacy in compliance with FERPA. Further, ED will incorporate into all relevant solicitations and contracts the provisions and clauses needed to implement FERPA requirements. The aforementioned policies do not apply to Federal Student Aid (FSA) contracts for the origination, servicing, or collection of student financial aid provided such contracts do not include tasks

relating to the conduct of an audit, evaluation, study, compliance review, or other enforcement activity.

24.703 Procedures.

During acquisition planning, the requiring activity, in consultation with ED’s Chief Privacy Officer (CPO) and the Director of the Family Policy Compliance Office (FPCO Director), shall review requirements to determine whether the contract will require ED to share PII from students’ education records with its contractor or authorize its contractor to collect such PII from students’ education records for the purposes of conducting a study, evaluation, or audit of a Federally-supported education program, or the enforcement of Federal legal requirements that relate to such education programs. The requiring activity shall notify the Contracting Officer of the determination.

24.704 Contract clause.

The Contracting Officer shall insert the clause at 52.224-70 in all solicitations and contracts, including those for the acquisition of commercial items, when a requiring activity has provided notification that a contractor will collect or receive access to PII from student education records in connection with carrying out an audit, evaluation, study, compliance review, or other Federal law enforcement activity on behalf of ED. The Contracting Officer shall fill out paragraph (b) with the type(s) of PII to be collected or accessed by contractor.

New clauses within Part 52—Solicitation Provisions and Contract Clauses.

Insert the following clause after 52.224-2 Privacy Act.

52.224-70 Protection of student privacy in compliance with FERPA (DEVIATION).

As prescribed in 24.704, insert the following clause in solicitations and contracts:

PROTECTION OF STUDENT PRIVACY IN COMPLIANCE WITH FERPA

(a) Pursuant to the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g, and its implementing regulations, 34 C.F.R. part 99, ED designates the contractor to serve as an authorized representative of the Secretary of Education, solely for the purpose of carrying out an audit or evaluation of Federally-supported education programs, the enforcement or compliance with Federal legal requirements that relate to Federally-supported education programs, or conducting a study for, or on behalf of ED, to develop, validate, or administer predictive tests, administer student aid programs, or improve instruction, as specified in the statement of work, the schedule, and other similar documents to the contract.

(b) The contractor shall collect or receive access to the following personally identifiable information from student education records that is protected by FERPA: [*specify the PII from student education records to be collected or accessed by the contractor, as identified by the requiring activity*] (collectively, the “PII”).

(c) The contractor shall only use the PII to meet the purpose set forth in paragraph (a) of this clause and for the activity, scope, and duration specified in the statement of work, the schedule, and other similar documents to the contract. Prior to collecting or receiving access to the PII, the contractor shall establish policies and procedures, consistent with FERPA and other Federal

confidentiality and privacy provisions, to protect the PII from further disclosure (except back to ED) and unauthorized use, including limiting use of the PII to only authorized representatives with legitimate interests in the purpose set forth in paragraph (a) of this clause.

(d) To the extent required to ensure the contractor's compliance with the provisions of FERPA and other Federal laws, the contractor shall afford ED and its authorized agents access to all of the facilities, installations, technical capabilities, operations, documentation, records, databases, policies, procedures, and systems of the contractor and any subcontractor.

(e) The contractor shall limit access to the PII to the contractor's personnel who require the PII to satisfy the contractor's obligations under the contract.

(f) If the contractor collects or receives access to the PII to conduct a study for, or on behalf of, an educational agency or institution, then the contractor shall conduct such study in a manner that does not permit personal identification of parents and students by anyone other than representatives of the contractor, or subcontractors, with legitimate interests in the study.

(g) Once the purpose for which the PII was collected or accessed is fully satisfied, the contractor shall notify ED immediately and seek ED's instruction and authorization regarding destruction of the PII in accordance with law.

(h) If the contractor subcontracts any of the contract work requiring collection or access to the PII, then the contractor shall include this clause (including this paragraph (h)) in any such subcontract and, further, the contractor shall ensure that subcontractors at any tier comply with all terms, conditions and obligations imposed on the contractor herein and under FERPA.

(End of clause)