



UNITED STATES DEPARTMENT OF EDUCATION

WASHINGTON, D.C. 20202

March 2011

Dear Chief State School Officer:

The Department of Education (Department) is required to notify annually each State educational agency (SEA) and each local educational agency (LEA) of their obligations under the Family Educational Rights and Privacy Act (FERPA) and the Protection of Pupil Rights Amendment (PPRA). This letter serves to provide that notification to the SEA and to provide you general guidance and reference information for each of the laws discussed below. A similar notice has been provided to LEA superintendents in your State.

It is essential that SEA officials who have access to student information understand their roles and responsibilities to protect that information and uphold the student's privacy and confidentiality. Student education records at the SEA contain a large amount of personal and sensitive information, and SEAs should ensure that adequate controls are in place so that the education records of all students are handled in accordance with FERPA's privacy protections.

Family Educational Rights and Privacy Act (FERPA)

Statute: 20 U.S.C. § 1232g. Regulations: 34 CFR Part 99.

Rights of Parents

FERPA applies to an "educational agency or institution" that receives funds under a program administered by the U.S. Department of Education. The Family Policy Compliance Office (FPCO) in the Department has issued guidance documents about FERPA for parents and for eligible students. Those documents are available on FPCO's Web site – <http://www2.ed.gov/policy/gen/guid/fpc/ferpa/parents.html> and <http://www.ed.gov/policy/gen/guid/fpc/ferpa/students.html>.

Educational agencies and institutions subject to FERPA may not have a policy or practice of denying parents the right to:

- Inspect and review education records (34 CFR § 99.10);
- Seek to amend education records (34 CFR §§ 99.20, 99.21, and 99.22); and
- Consent to the disclosure of personally identifiable information from education records except as specified by law (34 CFR §§ 99.30 and 99.31).

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

While an SEA may receive funds from the Department, as a practical matter, FERPA generally would not apply to the records of an SEA. This is 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. 20 U.S.C. § 1232g(a)(4) and (a)(6). Since students generally are not in attendance at an SEA, it follows that FERPA does not generally apply to the SEA. At the SEA level, however, FERPA does provide parents with the right to inspect and review education records maintained by the SEA within a reasonable period of time, but not more than 45 days after it has received a request. 20 U.S.C. § 1232g(a)(1)(B); 34 CFR § 99.10(a)(2). **This includes, for example, State assessments administered by LEAs and maintained by the SEA.** The SEA may make the education records available to the parent either directly, by sending them to the LEA for inspection and review, or making other appropriate arrangements. For more information on this provision, see 20 U.S.C. § 1232g(a)(1)(B); 34 CFR § 99.10.

Permitted Disclosures to SEAs

FERPA permits educational agencies and institutions, such as LEAs and their constituent schools, to disclose education records to SEAs and other State educational authorities without a parent's prior consent under certain conditions. For a review of the exceptions to the general prior consent rule in FERPA, see 34 CFR § 99.31. The most common exception that relates to disclosure to a State educational authority is found in 34 CFR § 99.31(a)(3) and § 99.35. The disclosure must be in connection with:

- An audit or evaluation of Federal or State supported education programs; or
- The enforcement of or compliance with Federal legal requirements relating to such programs.

Information collected under this provision generally must be:

- Protected so that information is not disclosed to anyone other than the authorized representatives of the State educational authority (34 CFR § 99.35(b)(1)); and,
- Destroyed when no longer needed for the purposes listed above (34 CFR § 99.35(b)(2)).

Redisclosure and Recordation

On December 9, 2008, the Department published final regulations amending FERPA requirements. See the link on our website to the *Federal Register* notice: <http://www.ed.gov/legislation/FedRegister/finrule/2008-4/120908a.pdf>.

Please note that several changes were made to the FERPA regulations that impact SEAs. Specifically, the FERPA regulations published in December 2008 modified FERPA's prohibition on redisclosure of education records (as noted above) by State and local educational authorities, including SEAs. Under the new regulations, State and local educational authorities, as well as the Secretary of Education and other Federal officials and agencies that are listed in § 99.31(a)(3), may redisclose personally identifiable information on behalf of educational agencies and institutions in accordance with the longstanding requirements in § 99.33(b) that require recordation of further disclosures that could be made by other parties that received education records.

Section 99.33(b) also requires the educational agency or institution to comply with § 99.32(b) and record the names of the additional parties to which the receiving party may make further disclosures and their legitimate interests under § 99.31. The new regulations require a State educational official that rediscloses education records on behalf of an educational agency or institution to comply with this recordation requirement, if the educational agency or institution where the education records originated does not make the recordation of the redisclosure by the SEA. 34 CFR § 99.32(b)(2)(i)(A). An educational agency or institution is required to obtain a copy of the SEA's record of further disclosures and make it available in response to a parent's or eligible student's request to review the student's record of disclosures. 34 CFR § 99.32(a)(4). The SEA must make its record showing its redisclosures available to an educational agency or institution upon request within a reasonable period of time not exceeding 30 days. 34 CFR § 99.32(b)(2)(iii). The regulations permit the SEA to maintain the record by the student's class, school, district, or other grouping rather than by the name of the student. 34 CFR § 99.32(b)(2)(ii).

Release of De-Identified Information

The 2008 FERPA regulations also provide standards for the removal of all personally identifiable information ("de-identified information") from education records for education research that will allow release of that version of the information identified by a record code. For purposes of education research, student level information from education records that has been de-identified may be disclosed by using a separate record code that a recipient can use to match information received from the same source. The regulations further require that:

- (1) No information is disclosed about how the creator generates and assigns a record code or that would allow a recipient to identify a student based on a record code;
- (2) The record code is used for no purpose other than identifying a de-identified record for education research and cannot be used to ascertain personally identifiable information about a student; and
- (3) The record code is not based on a student's social security number or other personal information.

See § 99.31(b)(1) and (2) *De-identified records and information*, and the discussion in the preamble about this subject, on pages 74833-74836 of the *Federal Register* notice.

Safeguarding Recommendations

The 2008 regulations also contain helpful recommendations for handling and protecting education records. See pages 74843-74844 of the *Federal Register* notice, *Department Recommendations for Safeguarding Education Records*.

Regulatory Changes

The Department is considering proposing additional changes to the FERPA regulations in 2011. If changes are proposed, you will be advised of the publication of a Notice of Proposed Rulemaking (NPRM) in the *Federal Register*, and of your opportunity to submit comments on the proposed amendments.

ESEA Provision Affecting FERPA

Section 4155(b) of the Elementary and Secondary Education Act of 1965 (ESEA), as amended, 20 U.S.C. § 7165(b), requires a State that receives funds under the ESEA to assure the Secretary that it “has a procedure in place to facilitate the transfer of disciplinary records, with respect to a suspension or expulsion, by local educational agencies to any private or public elementary school or secondary school for any student who is enrolled or seeks, intends, or is instructed to enroll, on a full- or part-time basis, in the school.”

Section 99.31(a)(2) of the FERPA regulations provides specifically that an educational agency or institution may disclose education records, without parental consent, to a school in which the student seeks or intends to enroll, subject to conditions set forth in 34 CFR § 99.34. FERPA also allows disclosure of appropriate information regarding specified disciplinary actions to teachers and school officials, including those in other schools, who have legitimate educational interests in the behavior of the student. See 34 CFR § 99.36(b).

Protection of Pupil Rights Amendment (PPRA)

Statute: 20 U.S.C. § 1232h. Regulations: 34 CFR Part 98.

PPRA applies to the programs and activities of an SEA, LEA, or other recipient of funds under any program funded by the U.S. Department of Education. It governs the administration to students of a survey, analysis, or evaluation that concerns one or more of the following eight protected areas:

1. political affiliations or beliefs of the student or the student’s parent;
2. mental or psychological problems of the student or the student’s family;
3. sex behavior or attitudes;
4. illegal, anti-social, self-incriminating, or demeaning behavior;
5. critical appraisals of other individuals with whom respondents have close family relationships;
6. legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers;
7. religious practices, affiliations, or beliefs of the student or student’s parent; or,
8. income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program).

PPRA also concerns marketing surveys and other areas of student privacy, parental access to information, and the administration of certain physical examinations to minors. The rights under PPRA transfer from the parents to a student who is 18 years old or an emancipated minor under State law.

LEAs must provide parents and eligible students effective notice of their rights under PPRA. The notice must explain that an LEA is required to obtain prior written consent from parents before students are required to submit to a survey that concerns one or more of the eight protected areas listed above, if the survey is funded in whole or in part by

Department funds. For surveys that contain questions from one or more of the eight protected areas that are not funded in whole or in part with Department funds, LEAs must notify a parent at least annually, at the beginning of the school year, of the specific or approximate date(s) of the survey and provide the parent with an opportunity to opt his or her child out of participating. LEAs must also notify parents that they have the right to review, upon request, any instructional materials used in connection with any survey that concerns one or more of the eight protected areas and those used as part of the educational curriculum.

PPRA requires LEAs to work with parents to develop and adopt policies on the following items, unless the LEA or SEA had established comparable policies on or before January 8, 2002:

- The right of parents to inspect, upon request, a survey created by a third party before the survey is administered or distributed by a school to students and the procedure for granting a request by a parent for such access;
- Arrangements to protect student privacy that are provided by the LEA in the event of the administration of a survey to students containing one or more of the eight protected items of information noted above (including the right of parents to inspect, upon request, a survey that concerns one or more of the eight protected items of information);
- The right of parents to inspect, upon request, any instructional material used as part of the educational curriculum for students, and the procedure for granting a request by a parent for such access;
- Administration of physical exams or screenings of students;
- The collection, disclosure, or use of personal information (including items such as a student's or parent's first and last name, address, telephone number or social security number) collected from students for marketing purposes, or to sell or otherwise provide the information to others for marketing purposes, including the LEA's arrangements for protecting student privacy in the event of collection, disclosure, or use of information for these purposes; and
- The right of parents to inspect, upon request, any instrument used in the collection of personal information for marketing or sales purposes before the instrument is administered or distributed to a student and the LEA's procedure for granting a parent's request for such access.

LEAs must notify parents of their rights under PPRA and of these policies at least annually at the beginning of the school year. LEAs must also notify parents within a reasonable period of time if any substantive change is made to the policies.

In addition, an LEA must "directly" notify, such as through U.S. Mail or email, parents of students who are scheduled to participate in the specific activities or surveys listed below and provide an opportunity for parents to opt their child out of participation in the specific survey or activity. The notification must be provided at least annually at the beginning of the school year and must provide the specific or approximate dates during the school year when activities described below are scheduled, or expected to be scheduled. If the LEA is unable to identify the specific or approximate dates of the activities or surveys requiring specific notification at the beginning of the school year, it must provide this notification to parents once the activity or survey is scheduled. Parents should be provided reasonable

notification of the planned activities and surveys and be provided an opportunity to opt their child out, as well as be provided with an opportunity to review any pertinent surveys. A model specific notification for use by LEAs is attached and may also be obtained on the Web site noted at the end of this guidance. LEAs must offer an opportunity for parents to opt their child out of participating in the following activities:

- The administration of any survey concerning one or more of the eight protected areas listed above if it is not funded in whole or in part with Department funds. (LEAs must obtain active consent, and may not use an opt-out procedure, if the survey is funded in whole or in part with Department funds.)
- Activities involving the collection, disclosure, or use of personal information collected from students for marketing purposes, or to sell or otherwise provide the information to others for marketing purposes.
- Any non-emergency, invasive physical examination or screening that is 1) required as a condition of attendance; 2) administered by the school and scheduled by the school in advance; and 3) not necessary to protect the immediate health and safety of the student, or of other students. This law does not apply to any physical examination or screening that is permitted or required by State law, including physical examinations or screenings permitted without parental notification.

PPRA does not preempt applicable provisions of State law that require parental notification. Also, requirements concerning activities involving the collection and disclosure of personal information from students for marketing purposes do not apply to the collection, disclosure, or use of personal information collected from students for the exclusive purpose of developing, evaluating, or providing educational products or services for or to students or educational institutions, such as the following:

- 1) College or other postsecondary education recruitment, or military recruitment.
- 2) Book clubs, magazines, and programs providing access to low-cost literary products.
- 3) Curriculum and instructional materials used by elementary schools and secondary schools.
- 4) Tests and assessments used by elementary schools and secondary schools to provide cognitive, evaluative, diagnostic, clinical, aptitude, or achievement information about students (or to generate other statistically useful data for the purpose of securing such tests and assessments) and the subsequent analysis and public release of the aggregate data from such tests and assessments.
- 5) The sale by students of products or services to raise funds for school-related or education-related activities.
- 6) Student recognition programs.

The address and telephone number for FPCO are:

Family Policy Compliance Office
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202
1-800-USA-LEARN (1-800-872-5327)

Informal inquiries may be sent to FPCO via the following email addresses:
FERPA@ED.Gov and PPRA@ED.Gov. The FPCO Web site address is:
www.ed.gov/policy/gen/guid/fpc.

Sincerely,

/s/

Ellen Campbell
Acting Director
Family Policy Compliance Office