

Presentation

Elementary/Secondary School Officials

Slide 1

- Good afternoon. My name is Dale King. I am the Director of the Family Policy Compliance Office (or FPCO). FPCO is responsible for administering the Family Educational Rights and Privacy Act (FERPA).
- I want to thank you for taking the time to participate in today's webinar. The purpose of this webinar is to provide local school officials with an overview of their responsibilities and obligations under FERPA.
- You need be aware of State laws and local policies that might address some of the issues we will be talking about today. I am only addressing how FERPA applies to various situations.
- We are conducting this webinar as a part of the Department of Education (Department) requirement to notify annually school officials their obligations under the Family Educational Rights and Privacy Act (FERPA) and the Protection of Pupil Rights Amendment (PPRA). While we only have time today to cover the basic of FERPA, we do provide helpful information on PPRA in our annual notification that is posted on FPCO's website and which is emailed to all SEAs and to the larger LEAs in the country. Because we do not have an email address for all the LEAs, we have asked that SEAs ensure that this information is forwarded to the local superintendents in their State. We also distribute this information via our office listserv. If your LEA is not signed-up for FPCO's listserv, I will provide you with how to do so at the end of this presentation.
- Today's presentation will cover the basic requirements under FERPA and cover some of the changes included in the December 2, 2011 regulations. At the end of the basic overview of FERPA, time permitting, I will present various scenarios that are of interest to LEAs. This webinar is scheduled for one hour.

- Before I begin, I want to point out that this presentation will be a listen session only. There will not be a question and answer period or opportunity for you to submit questions or comments during the webinar. However, if you have questions that arise during the webinar, you may submit them afterwards to our email address at FERPA@ed.gov.
- Also, if you have any technical difficulties during the webinar please email Bernie Cieplak or Regina Miles. Their email addresses are included in the email you received regarding this webinar.

Slide 2:

- Congress passed the Family Educational Rights and Privacy Act (FERPA) in 1974 around the same time that other privacy statutes were passed. Congress has amended FERPA approximately 10 times since its original enactment. Typically, when Congress amends the statute, the Department issues new regulations reflecting those changes, as well as changes based on administrative experience. What we are going to discuss today are the regulations by which FPCO administers this important law.

Slide 3:

- FERPA is a federal law that affords parents the right to have access to their children's education records, the right to seek to have the records amended, and the right to consent to the disclosure of personally identifiable information from education records, except as provided by law.
- When a student turns 18 years old, or enters a postsecondary institution at any age, the rights under FERPA transfer from the parents to the student, and he or she is known as an "eligible student" under FERPA.
- We will talk specifically about these rights as we get into this presentation.
- FERPA not an opens record law or a data sharing law. Rather, it is a privacy law.

Slide 4:

- FERPA applies to “educational agencies and institutions” that receive funds under any program administered by the Department of Education.
- Generally, most private and parochial schools at the elementary and secondary levels do not receive such funds and are, therefore, not subject to FERPA.
- However, that if a student is placed in a private school under IDEA, the placing public agency (typically the LEA) remains responsible under FERPA for that specific student’s records and compliance with FERPA.
- Note that by “educational agency or institution,” we mean schools, school districts, colleges and universities where a student attends.

Slide 5:

- Now let’s look at some of the basic provisions in FERPA. Understanding the definitions in FERPA will help you understand how to apply FERPA to your particular situations.

Slide 6:

- The most basic definition is the term “education records.” Education records are broadly defined to mean those records that are directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution.

Slide 7:

- There some exceptions to the definition of education records. They include :
 - Sole possessions (notes used as a personal memory aid by a teacher or other officials);
 - Law enforcement unit records (that is, law enforcement records created and maintained by the school’s law enforcement unit, such as a campus police department or security office);

- Alumni records (that is, information about a student after he or she is no longer a student, such as the former student now serves in the military or is president of his own company); and
- Peer-graded papers before they are collected and recorded by the teacher.

Slide 8:

- Another important definition to keep in mind is the definition of “personally identifiable information.” This works together with “education records” in determining what information must be protected from disclosure.

Slide 9:

- PII includes not only direct identifiers, obvious items such as name, address, SSN, but also indirect identifiers that would have the effect of identifying a student. The standard is, can a “reasonable person in the school community” – someone without personal knowledge of the circumstances – identify the student.
- Also, PII includes information requested by a person whom the school believes knows the identity of the student.

Slide 10:

- Directory Information is defined as PII that is not generally considered harmful or an invasion of privacy if disclosed. These are items that you might find in a school yearbook, a sports program, or a student directory.
- Directory information cannot include a student’s social security number and generally cannot include a student ID number.
- In the regulations released on December 2nd, we amended the definition of “directory information” to include a student ID number or other unique personal identifier that is displayed on a student ID badge, but only if the identifier cannot be used to gain access to education records, except when used in conjunction with one or more factors that authenticate the user’s

identity. (This is used mostly at postsecondary level when students use their ID numbers to get into various systems, inside and outside the college.)

Slide 11:

- Now we are going to talk about the rights of parents and eligible students under FERPA.
- One important thing to note is that FERPA affords full rights to either parent, custodial or noncustodial, unless there is a legally binding document or State law that specifically provides otherwise.

Slide 12:

- As stated earlier, when a student turns 18 or enters college at any age, the rights under FERPA transfer from the parents to the student. However, nothing in FERPA prevents a school from disclosing education records to parents under one of the exceptions that might apply. (This applies at the high school level, as well as at the college level.)

Slide 13:

- Schools must comply with a request for access within 45 days of receiving the request. (That's "comply," not just "respond.") In some states, there may be a law that addresses access to education records. Some states may require schools to provide access in fewer than 45 days and other states may require that school provide access in more than 45 days. If your state law requires access be provided in, say, 60 days, the school must comply with FERPA and provide access in no more than 45 days after receiving a request.
- Also note that FERPA doesn't generally require that you maintain education records and a school can destroy records – unless there is an outstanding request for access.
- LEAs and SEAs may charge for copies of education records within reason – unless doing so prevents a parent or student from exercising their right to inspect and review education records.

- And, schools need to be careful when a record contains information on more than one student – the parent or student may see or be informed of only the specific information that relates to the student.

Slide 14:

- Another right under FERPA is the right to seek to amend information in education records.
- The right to seek amendment is not unlimited; a school is not required by FERPA to afford a parent the right to seek to change substantive decisions (or opinions) made by school officials, such as grades or other evaluations of a student. So, while FERPA affords parents the right to seek to amend education records which contain inaccurate information, this right cannot be used to challenge a grade, disciplinary rulings, disability placements, or other such determinations.

Slide 15:

- Another right that parents and eligible students have under FERPA is the right to provide consent before PII from education records is disclosed. Consents must be signed and dated and must specify the records that may be disclosed, state the purpose of the disclosure, and identify the party or class of parties to whom the disclosure may be made.

Slide 16:

- Parents or eligible students may file a written complaint with FPCO regarding an alleged violation of FERPA. Complaints must be submitted to FPCO within 180 days of the alleged violation.

Slide 17:

- Schools are required to annually notify parents and eligible students of their rights under FERPA. We have a model notification on FPCO's website that schools can download and adapt to their situations. Some schools include their directory information notification within the annual notification.

- Note here that the annual notification must include the criteria for who your school considers to be a school official and what you consider to be a legitimate educational interest. We have sample language for that in the model notice as well.

Slide 18:

- So, when is prior consent NOT required before disclosing PII in education records?

Slide 19, 20:

- There are a number of exceptions to FERPA's general consent rule. Here are some that generally relate to LEAs.

Slide 21:

- The audit or evaluation exception to FERPA's general consent rule is the exception under which LEAs typically disclose PII on students to their SEA.
- Note that authorized representatives of SEAs (or the other specific entities or officials listed in the regulations that can receive information under this exception) may have access to PII from education records only in connection with an audit or evaluation of Federal or State supported education programs or for the enforcement of or compliance with Federal legal requirements which relate to those programs.
- The SEA must protect information in a manner that does not permit the redisclosure of that PII to anyone else and destroyed when no longer needed for the purposes listed above – except as described in § 99.35 of the regulations.

Slide 22:

- The December 2011 regulations included a new definition of “authorized representative.”

Slide 23:

- The 2011 regulations also included a definition of education program.

Slide 24:

- There is no research exception per se under FERPA. However, there is an exception for the conducting of studies. LEAs may enter into agreements with organizations for studies conducted for or on their behalf for specific purposes. Also, the December regulations amended FERPA to clarify that the entities listed in § 99.31(a)(3) of the regulations – such as an SEA -- are not prevented from redisclosing PII from education records as part of agreements with researchers to conduct studies for, or on behalf of, educational agencies.
- Studies must be for the purpose of developing, validating, or administering predictive tests; or administering student aid programs; or improving instruction.
- Further, the 2011 regulations clarified that “for, or on behalf of” does not require the assent of or express approval by the original disclosing educational agency. For example, it is not necessary for an SEA to secure the approval of an LEA prior to making redisclosures for, or on behalf of the LEA, so long as the SEA is acting with express or implied legal authority and for the benefit of the LEA.

Slide 25:

- Both the studies exception and the audit evaluation exception specifically require that the parties execute a written agreement when disclosing PII from education records without consent. The mandatory elements of that agreement vary slightly between the two exceptions. You should review the regulations at § 99.31(a)(6) and § 99.35 for a description of the requirements under the two exceptions.

Slide 26:

- When disclosing PII from education records under the audit or evaluation exception to authorized representatives, LEAs and SEAs are required to use

“reasonable methods” to ensure to the greatest extent practicable that your authorized representative is FERPA-compliant. This specifically means ensuring that your authorized representative [read points from slide].

Slide 27:

- In the last few years, we have gotten a lot of questions about disclosures that relate to health or safety emergencies. In 2008, we clarified that if a school determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose PII to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals.
- There are several guidance documents on our website that explain this provision.
- Based on the information available at the time and if there is a rational basis for the disclosure, the Department will not substitute its judgment for that of the school. However, school officials need to remember that this exception relates to emergencies. This provision cannot be used for disclosures on a routine, non-emergency basis, such as the routine sharing of non-directory information on students with the local police department (which is not allowed). We’ve written extensively about this in the final regulations issued in 2008 and in several guidance documents, which appear on our website and which are listed at the end of this webinar.

Slide 28:

- Section 99.37 provides the conditions for disclosing directory information. Schools may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance concerning directory information.
- Also, the FERPA regulations were amended in 2011 to state that a parent or eligible student may not use the right to opt out of directory information in order to prevent a school from requiring the student to wear or otherwise

display a student ID badge or card that exhibits information that has been properly designated by the school as directory information.

- The regulations were also amended to clarify that schools may adopt a limited directory information policy that allows for the disclosure of directory information to specific parties, for specific purposes, or both. The school must specify its limited directory information policy in the public notice to parents and students.
- For instance, a district could make a policy that they will disclose directory information to entities or purposes that don't include marketers, but rather will provide directory information only for purposes such as yearbook information or a school directory. However, if they do so, the school has to adhere to its stated policy in the directory information notice. If a school's directory information notice to parents and students (for a limited policy) does not include disclosures to marketers (or specifically states that it will not make such disclosures) for instance, then it can't turn around and disclose directory information to those entities not permitted by the policy. (This would be considered an improper disclosure under FERPA.) The school could only do this by revising and reissuing its directory information notice and providing parents and eligible students another opportunity to opt out.

Slide 29:

- Just as a reminder, under FERPA, all of the disclosures a school can make without consent are permitted disclosures, not required disclosures – except, of course, for disclosures to the parent or the eligible student, which are required.

Slide 30:

- School officials need to be familiar with FERPA's recordkeeping requirements, which you can read about in § 99.32 of the FERPA regulations. Generally, you must record to whom you disclose PII from education records and that party's legitimate interest in obtaining that

information. There are exceptions to this requirement to record disclosures, such as disclosures made with consent and disclosures to school officials.

Slide 31:

- There are limitations on the RE-disclosure of PII from education records, which are discussed in § 99.33. When you disclose PII to one of the parties listed in the exceptions to consent (§ 99.31), a school should inform the receiving party that it may not make further disclosures of the PII. However, this restriction does not apply if the third party makes disclosures on behalf of the school under one of the permitted disclosures in § 99.31.

Slide 32:

- FPCO is the office in the Department that administers FERPA. We are the office that investigates complaints filed by parents and eligible students and provide technical assistance on FERPA.
- In the 2011 regulations, we amended the enforcement provisions in FERPA so that if an State educational authority or another entity that receives funds under a program administered by the Department has access to PII from student education records and violates FERPA (regardless if they have students in attendance), FPCO may bring an enforcement action against that entity.
- We clarified that enforcement options against entities that receive funds under a program administered by the Department include: withholding payment, cease and desist orders, and compliance agreements. The regulations also clarified that the Department's option include the 5-year rule, which may be applied against any entity outside of the educational agency or institution whether or not such an entity receives funds under a program administered by the Department if the entity violates FERPA's re-disclosure provisions or the requirement under the studies exception to destroy the PII from education records when no longer needed for the purposes for which the study was conducted. This means, for example, if an

LEA provided PII from students' education records to an organization to conduct a study and that organization used the information for other purposes or did not destroy (or return) the PII to the LEA, we could impose a ban on the LEA providing education records to that organization for at least 5 years.

- Before we get to the point of recommending to the Secretary the enforcement options I just mentioned, such as withholding payments to an LEA or SEA, FPCO works with educational agencies and institutions to bring them into compliance with FERPA. Should we find that a school violated FERPA through our investigation, FPCO would require that the school take certain measures to come into compliance with FERPA and provide us with assurance that it has done so.

Slide 33-36: Where to go for help

[Describes information about FPCO's ListServ, guidance documents, and FPCPO contact information.]

Slide 37:

This completes the overview of the basic requirements in FERPA. As you may know, FERPA can be confusing. So, let's see how well you can apply FERPA. I will present a practical scenario for you to think about. I will give you a moment to read and study each scenario (just a few seconds) and then I will provide the answer and rationale.

Now remember, just like in the previous slides, we are *only* talking about how *FERPA* would apply. You may have State laws or even local policies that provide additional rights to parents and eligible students. If you have any questions in that regard, you need to consult with your legal counsel.

Slide 38:

No. You cannot link "directory information" with an item that cannot be designated as a "directory information" item, such as race or ethnicity. The school could notify the parents or eligible students and ask them to sign a consent form giving permission to disclose the students' names to the media.

Slide 39:

No. You cannot link “directory information” with an item that cannot be designated as a “directory information” item, such as disability status. The school could send home a note to the parents of these students and ask them to sign a consent form giving permission to disclose the students’ names to the organization.

Slide 40:

Technically, no. While the definition of “directory information” includes “dates of attendance,” we included a definition of that term in § 99.3 a few years ago because of all the questions we received about this matter. “Dates of attendance” means the period of time during which a student attends or attended an educational agency or institution, such as an academic year, a spring semester, or a first quarter. The term does not include the specific daily records of a student’s attendance at a school.

So, while you could not disclose that specific information to the policeman absent a subpoena, the school could call the student to the office to talk to the officer.

Slide 41:

No. The student disciplinary record, although now maintained by the school’s law enforcement unit, does not become exempt from the definition of “education records” merely because it is maintained by the security unit. As such, the disciplinary record is the student’s “education records” and could not be disclosed by the law enforcement unit to the media.

Slide 42:

Yes. This is because FERPA prohibits the improper disclosure of information derived from education records. Therefore, information that is based on observation or hearsay and not specifically contained in education records would not be protected from disclosure under FERPA.

Slide 43:

No. Generally, information about overdue material or payments owed by a student meets the definition of “education records” and there is no exception to the general consent rule that permits it to be publicly disclosed without consent.

And you certainly don’t want to send an email to all parents whose children owe money to the school where the recipients know who all received the email.

Slide 44:

FERPA does not require that a school disclose education records to a new school to which the student is transferring – it permits the disclosure. (FERPA only requires disclosure to parents and eligible students.) However, there is a provision in the Elementary and Secondary Education Act (ESEA) that requires that each State that receives funds under the ESEA have “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.”

LEAs should include a notice in their annual notification of rights under FERPA that they forward education records to other schools that have requested the records and in which the student seeks or intends to enroll. (See our model notification of rights.)

Slide 45:

It’s complicated.

At the high school, the rights under FERPA have NOT transferred to the student because the student is under 18. However, at the local college, the student is considered an “eligible student” and the rights belong to her for those records at the college. The high school and college may share records on students who are attending both schools. If the college sends the records to the high school, then the parents have the right to see them there. Otherwise, the college “may” but is not required to share the records with the parents if the parents claim the student as a dependent for federal income tax purposes.

Slide 46:

Yes. In the 2011 amendments to the FERPA regulations, we clarified that a parent or eligible student may not opt out of directory information in order to prevent a school from requiring the student to wear a student ID badge that exhibits information that has been properly designated by the school as “directory information.”

Slide 47:

Yes. More than likely, the student is still living at home and is probably claimed as a dependent by the parents for IRS tax purposes. If so, then the school can share any information from the student’s education records with the parents, even if the student hasn’t provided consent (or objects).

Slide 48:

FERPA. At the elementary/secondary level, any records that a school nurse or health center maintains that are directly related to a student are considered “education records” subject to FERPA – not the HIPAA Privacy Rule. A school nurse may share information on students with other school officials if these school officials have a legitimate educational interest in the records. Typically, if there is a health condition about which other teachers and school administrators need to be aware in order to provide a safe and healthy environment for the student, then the school could include such a criteria for what it considers to be a “legitimate educational interest.” See <http://www2.ed.gov/policy/gen/guid/fpco/doc/ferpa-hipaa-guidance.pdf>.

Slide 49:

Generally, we view after school programs as requiring parental consent before PII from students’ education records may be disclosed to the organizations running the programs. As you know, FERPA requires written consent from parents (and eligible students) before PII from students’ education records are disclosed. There are a number of exceptions to the general consent rule, but none appear to apply in this situation.

However, FERPA would permit the school district to disclose properly designated directory information on those students whose parents have not opted out of directory information, in conjunction with the school’s or school district’s directory

information policy. The YMCA could use directory information to contact parents about their program.

Slide 50:

Generally, parents or students, if they are eligible students, would need to provide consent (that meets the requirements of § 99.30) for the school to provide the advisor with non-directory PII from education records.

The high school may provide directory information on students whose parents (or they) have not opted out of directory information.

Slide 51:

FERPA requires that the parents of these students – or the students themselves once they turn 18 years old – provide consent so that the high schools may disclose the students' education records to them. This consent – which must follow § 99.30 – may be worked in as part of the initial information provided to parents and students. Grantees of the Department are required to comply with FERPA in carrying out their programs. There is no exception to FERPA's general consent rule that permits a grantee to have access to non-directory information without consent.

High schools may certainly provide programs with properly designated “directory information,” as long as the high school followed FERPA in designating and disclosing the information and parents or eligible students have not opted out.

This completes the webinar. I would like to thank you for your participation.