

FERPA: Student Privacy and Student Affairs Practice

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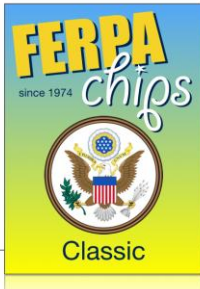
FERPA: Student Privacy and Student Affairs Practice

The Family Educational Rights and Privacy Act of 1974 (FERPA) governs how colleges and universities handle student education records and significantly impacts student affairs practice. With continued revisions to and clarification of the FERPA regulations, student affairs face an additional challenge in remaining current on and complying with the U.S. Department of Education's expectations. This presentation will provide an overview of FERPA's requirements and an update of particularly thorny issues at the intersection of student affairs practice and student privacy.

My Perspective on FERPA

What FERPA
is & isn't....





You can neither
confirm nor
deny that you
ate just one.



Source: <http://paulgordonbrown.com/2015/10/21/ferpa-chips-you-can-neither-confirm-nor-deny-that-you-ate-just-one/>

FERPA Chips

Fine Print: The original FERPA Chip recipe was developed by James Buckley in 1974 – but has been updated according to changing consumer tastes over multiple years. FERPA Chips utilize only Grade [redacted] potatoes (grades cannot be disclosed for FERPA Chips). FERPA Chips may or may not contain salt. FERPA Chips may or may not contain traces of nuts. FERPA Chips may or may not have been found responsible for code violations. Pricing and availability is considered directory information and can be found on the FERPA Chips website. Also try out our new flavor, HIPPA Chips... the hipper chip.

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FERPA

- Originally passed in 1974.
- Amended numerous times over the past 4 decades.
- Significant changes were included in the Higher Education Amendments of 1998 and minor changes in the Higher Education Opportunity Act of 2008.
- Codified at 20 USC 1232(g).
- Regulations appear at 34 CFR 99.
- The most recent Final Rules were published in the *Federal Register* on December 9, 2008 (pp. 74805-74855) and December 2, 2011 (pp. 75604-75660).



Rights Under FERPA

- Right to inspect and review education records.
- Right to seek to amend records.
- Right to have some control over the disclosure of information from education records.

Education Record

Under FERPA, **education record** means those records that are:

1. Directly related to the student; and
2. Maintained by educational institution or by a party acting for the institution.
(§99.3)

Multiple Students Records

Education records are defined in FERPA as 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. Under this definition, a parent (or eligible student) has a right to inspect and review any witness statement that is directly related to the student, even if that statement contains information that is also directly related to another student, if the information cannot be segregated and redacted without destroying its meaning. (2008, pp. 74832-74833)

Disciplinary Action or Proceeding

Disciplinary Action or proceeding means the investigation, adjudication, or imposition of sanction by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students of the agency or institution. (§99.3)

Annual Notification of Rights

Each educational agency or institution shall annually notify parents of students currently in attendance, or eligible students currently in attendance, of their rights under FERPA.

The U.S. Department of Education published a model notification of rights for postsecondary institutions in the December 2, 2011 Final Rule published in the *Federal Register* (pp. 75657-75660).

The annual notification of rights must include:

- Rights under FERPA,
- How to file a complaint with the U.S. Department of Education,
- Procedures to inspect and review education records,
- Procedures to request an amendment to records, and
- Institutional definition of "school official" and "legitimate educational interest."

Law Enforcement Records

Law enforcement unit means any individual, office, department, division, or other component of an educational agency or institution, such as a unit of commissioned police officers or non-commissioned security guards, that is officially authorized or designated by that agency or institution by that agency or institution to -- (§99.8)

(i) Enforce any local, State, or Federal law, or refer to Appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself; or

(ii) Maintain the physical security and safety of the agency or institution. (§99.8)

Law Enforcement Records

Records of a law enforcement unit means only those records, files, documents, and other materials that are—

- Created by a law enforcement unit;
- Created for a law enforcement purpose; and
- Maintained by the law enforcement unit. (§99.8)

Records of a law enforcement unit does not mean:

- Records relating to law enforcement that are maintained by an office institution other than the law enforcement unit; and
- Records relating to a disciplinary action or proceeding conducted by the educational agency or institution. (§99.8)

Personal Notes

FERPA excludes from the definition of *education records*:

Records of instructional, supervisory, and administrative personnel and educational personnel ancillary to those persons that are kept in the sole possession of the maker of the record, and are not accessible or revealed to any other person except a short term substitute for the maker of the record.

Personally Identifiable Information

The term includes, but is not limited to—

- a) The student's name;
- b) The name of the student's parent or other family members;
- c) The address of the student or student's family;
- d) A personal identifier, such as the student's social security number, student number, or biometric record;
- e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;

Personally Identifiable Information

"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." (2008, p. 74852)

Written Consent

A signed and dated written consent is required before disclosing personally identifiable information from a student's education record except as provided for in the FERPA regulations (§ 99.31). The consent must:

1. Specify the records that may be disclosed;
2. State the purpose of the disclosure; and
3. Identify the party or class of parties to whom the disclosure may be made.

Written Consent

The consent is **required** for disclosures to the media.

I, (student's name), consent to the release, inspection, copying or other disclosure of any and all of my student records (whether academic, disciplinary, financial, scholarship, degree, or otherwise to . . . journalists employed by the (newspaper) . . . in connection with their review and reporting on recent allegations I made against the university.

Exceptions To Prior Consent

99.31(a)(1)—School officials including attorneys with legitimate educational interests
99.31(a)(2)—Seeks or intends to enroll
99.31(a)(8)—Parents of dependent students
99.31(a)(9)—Subpoenas/Court orders
99.31(a)(11)—Directory Information
99.31(a)(13)—Victim Notification
99.31(a)(14)—Release to the public
99.31(a)(15)—Parental Notification
99.31(a)(16)—Sex Offenders

Legitimate Educational Interest

A school official has a **legitimate educational interest** if the official needs to review an education record in order to fulfill his or her professional responsibilities for the [School]. (2011, p. 75658)

[Optional] Upon request, the University discloses education records without consent to officials of another school in which a student seeks or intends to enroll. (2011, p. 75658)

Legitimate Educational Interest

A school official is a person employed by the [School] in an administrative, supervisory, academic, research, or support staff position (including law enforcement unit personnel and health staff); a person serving on the board of trustees; or a student serving on an official committee, such as a disciplinary or grievance committee. A school official also may include a volunteer or contractor outside of the [School] who performs an institutional service or function for which the school would otherwise use its own employees and who is under the direct control of the school with respect to the use and maintenance of PU from education records, such as an attorney, auditor, or collection agent or a student volunteering to assist another school official in performing his or her tasks. (2011, pp. 75657-75658)

Seeks or Intends to Enroll

The institution must make a reasonable effort to notify the student that disclosure will be made to an institution at which the students seeks or intend to enroll unless--

- the student requests the disclosure
- the Notification of Rights includes a statement that such disclosures will be made.

This also applies to other institutions the student attends. (§99.34)

Expanding Seeks or Intends to Enroll

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

(2) The disclosure is, subject to the requirements of § 99.34, to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll, or **where the student is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer.** (2008, p. 74852)

Parents of Dependent Students

(8) The disclosure is to parents of a dependent student, as defined in section 152 of the Internal Revenue Code of 1986. (§99.31)



Subpoenas

Generally, when complying with a judicial order or lawfully issued subpoena, a college or university must make “a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance so that the parent or eligible student may seek protective action” unless--

Subpoenas

1. Complying with a Federal grand jury subpoena and the court has ordered that the existence or the contents of the subpoena and provided information not be disclosed.
2. Complying with any other subpoena for a law enforcement purpose in which it has been ordered that that the existence or the contents of the subpoena and provided information not be disclosed.

Directory Information

“Directory information” means information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to the student’s name, address [school or home], telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended. (§99.3)

Directory Information

- (a) An educational agency or institution may disclose directory information if it has given public notice to students in attendance or institution of:
- What is designated as directory information;
 - The student's right to refuse to let the institution designate information about the student as directory information; and
 - When the student has to notify institution in writing not to information designated as directory information. (§99.37)

FERPA Enforcement

- In a December 20, 2018 document, *Improving the Effectiveness and Efficiency of FERPA Enforcement*, the U.S. Department of Education announced changes to its investigatory practices for FERPA.
- For complaints involving misunderstandings of FERPA's requirements or isolated incidents of accidental disclosures, the department will work to resolved the matter with technical assistance to the institution.
 - The department will continue to conduct full, formal investigations when in its judgement those "highest risk complaints for formal investigation based on 'the severity of risk to student privacy, the number of students affected, [and] other relevant factors.'"
 - The department will also "conduct self-initiated investigations in the absence of a filed complaint, when we identify violations that warrant such investigation."

Release of the Final Results of Disciplinary Proceedings



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Victim Notification

FERPA was also amended in 1990 by the Clery Act to allow colleges & universities to inform the alleged victim of a "crime of violence" of the outcome of the student disciplinary proceeding against the alleged perpetrator. (§99.31) The amendments to the Student Right-to-Know and Campus Security Act in 1992 require colleges and universities to inform the victim of an alleged sexual assault of the final outcome of the disciplinary proceeding against the alleged perpetrator.

Victim Notification & Redisclosure

§ 99.33 What limitations apply to the redisclosure of information?

The limitations on redisclosure of information do not apply to disclosures that are required to disclose under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, to the accuser and accused regarding the outcome of any campus disciplinary proceeding brought alleging a sexual offense. (pp. 74853-74854)

DOE Georgetown Letter

- Georgetown had a policy of not releasing the final results of disciplinary hearings to the victims of sexual assault, unless the victim signed a nonredisclosure agreement.
- The DOE ruled that a university "cannot require an alleged sexual assault victim to execute a non-disclosure agreement as a pre-condition to accessing judicial proceedings outcomes and sanction information under the Clery Act."
- "The Clery act does require access to outcomes and sections information without condition."

Requirements for Public Notice (§99.31)

- (14)(i) The disclosure, subject to the requirements in Sec. 99.39, is in connection with a disciplinary proceeding at an institution of postsecondary education. The institution must not disclose the final results of the disciplinary proceeding unless it determines that--
- (A) The student is an alleged perpetrator of a crime of violence or non-forcible sex offense; and
- (B) With respect to the allegation made against him or her, the student has committed a violation of the institution's rules or policies.

Requirements for Public Notice (§99.31)

- (ii) The institution may not disclose the name of any other student, including a victim or witness, without the prior written consent of the other student.
- (iii) This section applies only to disciplinary proceedings in which the final results were reached on or after October 7, 1998.

Final Results

Final results means a decision or determination, made by an honor court or council, committee, commission, or other entity authorized to resolve disciplinary matters within the institution. The disclosure of final results must include only the name of the student, the violation committed, and any sanction imposed by the institution against the student. (§99.39)

Crime of Violence

Rather than relying on the definition of a “crime of violence” at 18 U.S.C. 16, the Department of Education has provided an all inclusive list of “crimes of violence”:

- Arson
- Assault offenses
- Burglary
- Robbery
- Kidnapping/abduction
- Forcible and nonforcible sex offenses
- Stalking (no definition)
- Criminal homicide—manslaughter by negligence
- Criminal homicide—murder and nonnegligent manslaughter
- Destruction, damage, and vandalism of property (§99.39)

Victims and Sanctions

“We note also that the sanction imposed on a student for misconduct is not generally considered directly related to another student, even the student who was injured or victimized by the disciplined student’s conduct, except if a perpetrator has been ordered to stay away from a victim” (p. 74833).

Alcohol or Drug Possession Disclosure (§99.31)

(15)(i) The disclosure is to a parent of a student at an institution of postsecondary education regarding the student’s violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance if—

- (A) The institution **determines** that the student has committed a disciplinary violation with respect to that use or possession; and
 - (B) The student is under the age of 21 at the time of the disclosure to the parent.
- (ii) Paragraph (a)(15) of this section does not supersede any provision of State law that prohibits an institution of postsecondary education from disclosing information.

ASCA Recommendation

"ASCA recommends transcript notation when a student is not permitted to enroll in courses due to misconduct. While a 'one-size-fits-all' mandate is discouraged, there are some guiding practices that can help institutions across the country communicate in a mutually understood fashion in order to identify and mitigate some potential risks of violence. Transcript notations alone will not be effective at reducing the risk of violence to a campus, but the comprehensive approach to admissions, review of information, and appropriate action based on that review may be helpful to institutions as they seek to manage risks on their campuses to the best of their abilities."



"Transcripts can include notation of disciplinary actions"

"This will likely continue to be a highly-debated topic and AACRAO advises institutions to consult their local state laws regarding requirements to record such disciplinary actions on the transcript. It is also advised that attention be paid to possible federal action in this area."



Registered Sex Offenders

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

(16) The disclosure concerns sex offenders and other individuals required to register under section 170101 of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 14071, and the information was provided to the educational agency or institution under 42 U.S.C. 14071 and applicable Federal guidelines.

Sharing Information with Parents

§ 99.5 What are the rights of students?

(2) Nothing in this section prevents an educational agency or institution from disclosing education records, or personally identifiable information from education records, to a parent without the prior written consent of an eligible student if the disclosure meets the conditions in § 99.31(a)(8), § 99.31(a)(10), § 99.31(a)(15), or any other provision in § 99.31(a). (p. 74852)

Parents

"The proposed regulations clarify that even after a student has become an eligible student, an educational agency or institution may disclose education records to the student's parents, without the consent of the eligible student,

- if the student is a dependent for Federal income tax purposes (§ 99.31(a)(8)); in connection with a health or safety emergency (§ 99.31(a)(10));
- if the student is under the age of 21 and has violated an institutional rule or policy governing the use or possession of alcohol or a controlled substance (§ 99.31(a)(15)); and
- if the disclosure falls within any other exception to the consent requirement in § 99.31(a) of the regulations, such as the disclosure of directory information or in compliance with a court order or lawfully issued subpoena. (p. 15578).

Sharing Information with Parents

"Institutions can determine that a parent claims a student as a dependent by asking the parent to submit a copy of the parent's most recent Federal income tax return.... Institutions may rely instead on a student's assertion that he or she is not a dependent unless the parent provides contrary evidence" (p. 74813).

The Family Policy Compliance Office has developed two sample forms which colleges and universities can use to collect information regarding dependency status:

- <http://www.ed.gov/policy/gen/guid/fpco/ferpa/safeschools/modelform2.htm>
- <http://www.ed.gov/policy/gen/guid/fpco/ferpa/safeschools/modelform.html>

Health & Safety Emergencies



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Health and Safety Emergencies

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

(a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals. (p. 74864)

Health and Safety Emergencies

(c) In making a determination under paragraph (a) of this section, an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the educational agency or institution 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 person 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 of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination. (p. 74864)

Threat Assessment

The Department encourages schools to implement a threat assessment program, including the establishment of a threat assessment team that utilizes the expertise of representatives from law enforcement agencies in the community. Schools can respond to student behavior that raises concerns about a student's mental health and the safety of the student and others that is chronic or escalating by using a threat assessment team, and then make other disclosures under the health or safety emergency exception, as appropriate, when an "articulable and significant threat" exists. (p. 74839)

Rational Basis

The Department will not substitute its judgment for that of the agency or institution if, based on **the information available at the time of the determination** there is a rational basis for the agency's or institution's determination that a health or safety emergency exists and that the disclosure was made to appropriate parties. (p. 74837)

§ 99.32 Record Keeping

- (5) An educational agency or institution must record the following information when it discloses personally identifiable information from education records under the health or safety emergency exception in § 99.31(a)(10) and § 99.36:
- (i) The articulable and significant threat to the health or safety of a student or other individuals that formed the basis for the disclosure; and
 - (ii) The parties to whom the agency or institution disclosed the information. (p. 74853)

FERPA and HIPAA, and Student Health Records



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HIPAA v. FERPA

"FERPA applies to most public and private postsecondary institutions and, thus, to the records on students at the campus health clinics of such institutions. These records will be either education records or treatment records under FERPA, both of which are excluded from coverage under the HIPAA Privacy Rule, even if the school is a HIPAA covered entity" (p. 6).

HIPAA v. FERPA

"While the health records of students at postsecondary institutions may be subject to FERPA, if the institution is a HIPAA covered entity and provides health care to nonstudents, the individually identifiable health information of the clinic's nonstudent patients is subject to the HIPAA Privacy Rule. Thus, for example, postsecondary institutions that are subject to both HIPAA and FERPA and that operate clinics open to staff, or the public, or both (including family members of students) are required to comply with FERPA with respect to the health records of their student patients, and with the HIPAA Privacy Rule with respect to the health records of their nonstudent patients" (p. 7).

FERPA and the Courts



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Gonzaga University v. Doe

The Supreme Court ruled that FERPA does not create a private right of action and violations of FERPA **do not** create a federal right enforceable under 42 U.S.C. §1983.

Gonzaga University v. Doe, 536 U.S. 273 (2002).

Are Disciplinary Records Education Records?

Two state supreme courts have concluded that student disciplinary records are not education records and ordered their release under state open records laws:

- *Red & Black Pub. v. Board of Regents*, 427 S.E.2d 257 (Ga. 1993).
Note: This decision was recently effectively overturned by a change in Georgia's open records law by the legislature (2012).
- *State ex rel. The Miami Student v. Miami Univ.*, 680 N.E.2d 956 (Ohio, 1997), cert. denied 522 U.S. 1022 (1997).

United States v. Miami University

- July 1997—Ohio Supreme Court rules that disciplinary records are not education records under FERPA.
- January 1998—Federal government sues Miami and Ohio State claiming they violated FERPA in releasing disciplinary records to the Chronicle in compliance Ohio Supreme Court ruling.
- February 1998—Court issues preliminary injunction preventing further release of records.
- March 2000—Judge Smith permanently enjoins Miami and Ohio State from releasing disciplinary records.
- June 2002—6th Circuit Court of Appeals upholds Judge Smith's decision.

FERPA

Questions concerning FERPA may be directed to:
Student Privacy Policy Office (SPPO)
U.S. Department of Education
600 Independence Avenue. S.W.
Washington, DC 20202-4605
1-855-249-3072
<https://studentprivacy.ed.gov/about>

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