FERPA/CLERY ACT FOCUS GROUP

I. FERPA AMENDMENTS RELATED TO PUBLIC SAFETY

- Institutions may disclose to an alleged victim of a crime of violence the results of disciplinary proceedings conducted by the institution against the alleged perpetrator of the crime, regardless of the outcome (Campus Security Act of 1990).

- Institutions may include in a student’s records relevant information concerning disciplinary action taken against the student for conduct that “posed a significant risk to the safety or well-being of that student, other students, or other members of the school community” (Improving America’s School Act of 1994)

- Institutions may disclose disciplinary actions taken against students to teachers and school officials, including those in other schools, who have a legitimate educational interest in the behavior of the student. (Higher Education Amendment of 1998)

- Institutions may disclose the final results of any disciplinary proceeding involving a crime of violence or nonforcible sex offense to anyone, including the public, if the institution determines the student committed a violation of its rules or policies with respect to the crime. (Higher Education Amendments of 1998)

- Institutions may disclose to a parent or legal guardian information concerning violations of a law or institutional policy concerning the use or possession of alcohol or drugs for students under 21 who have been found to have violated an institutional policy or rule (Higher Education Amendments of 1998)
• Campus law enforcement records excluded from the protection of FERPA as an educational record (FERPA Amendment, 1992)

II. LAWS THAT DIMINISH FERPA’S GUARANTEES OF PRIVACY.

• the Campus Sexual Assault Victim Bill of Rights Act (20 U.S.C. Sec. 1092(f)(7)) (passed in 1992, this law requires that victims of sexual assaults be informed of the outcome of disciplinary proceedings);

• the Solomon Amendment, passed in 1996, provides for military access to student recruitment information;

• INS regulations require colleges and universities to collect and report certain information with respect to international students (name, address, academic status, full time attendance, disciplinary action taken as a result of conviction of a crime).

• Campus Sex Crimes Prevention Act (P.L. 106-386, Section 1601) - This law, which went into effect in October 2002, requires registered sex offenders to report to the appropriate state authority each institution of higher education at which they are either employed or attending as a student. State authorities must disclose this information to local law enforcement agencies within the jurisdiction of the higher education institution. Higher education institutions are required to notify the campus community where they can find information concerning registered sex offenders and must document compliance with this requirement in their annual campus security report due October 1, 2003. The law amends FERPA to allow for the release of information related to the conviction of sex offenders who are students.

• USA PATRIOT ACT. Provisions of particular relevance to our student population include:
  ▶ the full implementation and expanded monitoring of foreign students and the inclusion of air flight schools, language training schools, and vocational schools within the coverage of monitoring requirements (Section 416)
enhanced surveillance procedures, including expanded authority to intercept wire, oral and electronic communications related to terrorism or computer fraud and abuse; expanded authority to share criminal investigative information; expanded reach of subpoenas and court orders in obtaining technology related information; expanded internet surveillance (Sections 201 - 212)

- federal law enforcement may access student information from the National Center for Education Statistics (Section 508)

- FERPA has been amended to allow an assistant attorney general or higher ranking federal officer or employee to obtain a court order upon certification to the court that there are “specific and articulable” facts giving rise to the belief that the education records likely contain information relevant to an authorized investigation or prosecution of domestic or international terrorism. An institution is immune from liability for the good faith release of these records in response to an ex-parte order of the court (thus, no liability if the student is not notified prior to release of the educational record). FERPA record keeping requirements do not apply. (Section 507)

- The Family Policy Compliance Office’s April 12, 2002 guidance entitled “Recent Amendments to FERPA Relating to Anti-Terrorism Activities” is attached.

III. COURT DECISIONS

While unrelated to issues of campus security, it is worthy of note that the U.S. Supreme Court has, during the past two years, issued two decisions concerning FERPA. These decisions are the Supreme Court’s first ever consideration of FERPA.

Owasso Independent School District v. Falvo, 122 S. Ct. 934 (2002). In Falvo, the Supreme Court considered whether the practice of elementary students grading one another’s papers and calling out the grades to the teacher, violates FERPA. While the particular case arose in the elementary school setting, its implications could have significantly impacted academic
practices at the post-secondary level.

Recall that to be considered an educational record under FERPA, the record must have two characteristics. First, it must be “directly related to a student” and secondly, it must be “maintained by an educational agency or institution or by a party acting for the agency or institution.” 34 CFR Part 99 (§99.3 of the Regulations). The Court in Falvo concluded that while papers exchanged among students for purposes of grading are “directly related to a student”, students do not maintain educational records nor are they acting for the school by virtue of their correcting a fellow student’s paper. Given the Court’s conclusion that educational records were not at issue, the Court unanimously ruled that peer grading does not violate FERPA.

Doe v. Gonzaga, 122 S. Ct. 2268 (2002), Doe v. Gonzaga is significant in its consideration of the long unsettled question of whether FERPA creates an individual right that is privately enforceable under 42 U.S.C. §1983. The potential impact of this decision was significant as many within higher education contemplated increased FERPA litigation were the Supreme Court to rule that individual causes of action could be maintained.

In concluding that individuals are not entitled to maintain private causes of action for violation of FERPA, the Supreme Court looked to the express language of FERPA to evaluate whether Congress intended to create an individual right of action. The Court noted the administrative remedies available under FERPA and concluded “if Congress wishes to create new rights enforceable under §1983, it must do so in clear and unambiguous terms – no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action.” 122 S. Ct. at 2279. Given this decision, the law is now well settled that no private right of action can be maintained under FERPA.
Dear Colleague:

The purpose of this guidance is to provide you with an overview of recent changes made by Congress to the Family Educational Rights and Privacy Act (FERPA) in response to the September 11th terrorist attacks on the United States. In so doing, we also will provide an overview of the relevant provisions of current law. The changes to FERPA became effective on October 26, 2001, when the President signed into law the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001.” (Public Law 107-56; 115 Stat. 272.) Section 507 of the USA PATRIOT ACT amends FERPA, and is attached for your convenience at the end of this letter.

Overview of FERPA

FERPA is a federal law that applies to educational agencies and institutions that receive federal funds under any program administered by the Secretary of Education. 20 U.S.C. § 1232g; 34 C.F.R. Part 99. Generally, FERPA prohibits the funding of an educational agency or institution that has a policy or practice of disclosing a student’s “education record” (or personally identifiable information contained therein) without the consent of the parent. When a student turns 18 years old or attends a postsecondary institution at any age, the rights under FERPA transfer from the parent to the student ("eligible student").

FERPA defines “education records” as “those records, files, documents and other materials which –

(i) contain information directly related to a student; and
(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.”

20 U.S.C. § 1232g(a)(4)(A)(i) and (ii).

FERPA generally requires prior written consent from the parent or eligible student before an educational agency or institution may disclose personally identifiable information from education records to a third party. However, the law contains 16 exceptions to this general rule. Pertinent exceptions that allow release of personally identifiable information without prior written consent are discussed below.

-5-
Ex Parte Orders

Significantly, the recent amendment to FERPA permits educational agencies and institutions to disclose – without the consent or knowledge of the student or parent – personally identifiable information from the student’s education records to the Attorney General of the United States or to his designee in response to an *ex parte* order in connection with the investigation or prosecution of terrorism crimes specified in sections 2332b(g)(5)(B) and 2331 of title 18, U.S. Code. An *ex parte* order is an order issued by a court of competent jurisdiction without notice to an adverse party.

In addition to allowing disclosure without prior written consent or prior notification, this provision amends FERPA’s record keeping requirements (20 U.S.C. § 1232g(b)(4); 34 C.F.R. § 99.32). As a result, FERPA, as amended, does not require a school official to record a disclosure of information from a student’s education record when the school makes that disclosure pursuant to an *ex parte* order. Further, an educational agency or institution that, in good faith, produces information from education records in compliance with an *ex parte* order issued under the amendment “shall not be liable to any person for that production.”

A copy of the new statutory language follows this guidance. The Department will be working with the Department of Justice in the implementation of this new provision. In addition to this guidance, we will be amending and updating the FERPA regulations to include this new exception to the written consent requirement. You should address any questions you have on the new amendment to FERPA@ED.Gov.

Lawfully Issued Subpoenas and Court Orders

FERPA permits educational agencies and institutions to disclose, without consent, information from a student’s education records in order to comply with a “lawfully issued subpoena or court order” in three contexts. 20 U.S.C. § 1232g(b)(1)(J)(i) and (ii), (b)(2)(B); 34 C.F.R. § 99.31(a)(9). These three contexts are:

1. **Grand Jury Subpoenas** – Educational agencies and institutions may disclose education records to the entity or persons designated in a Federal grand jury subpoena. In addition, the court may order the institution not to disclose to anyone the existence or contents of the subpoena or the institution’s response. If the court so orders, then neither the prior notification requirements of § 99.31(a)(9) nor the recordation requirements at 34 C.F.R. § 99.32 would apply.

2. **Law Enforcement Subpoenas** – Educational agencies and institutions may disclose education records to the entity or persons designated in any other subpoena issued for a law enforcement purpose. As with Federal grand jury subpoenas, the issuing court or

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1 These statutes define Federal crimes of terrorism as offenses calculated to influence the conduct of government such as destruction of aircraft, assassination, arson, hostage taking, destruction of communications lines or national defense premises, and use of weapons of mass destruction.
agency may, for good cause shown, order the institution not to disclose to anyone the existence or contents of the subpoena or the institution’s response. In the case of an agency subpoena, the educational institution has the option of requesting a copy of the good cause determination. Also, if a court or an agency issues such an order, then the notification requirements of § 99.31(a)(9) do not apply, nor would the recordation requirements at 34 C.F.R. § 99.32 apply to the disclosure of education records issued pursuant to the law enforcement subpoena.

3. **All other Subpoenas** – In contrast to the exception to the notification and record keeping requirements described above, educational agencies or institutions may disclose information pursuant to any other court order or lawfully issued subpoena only if the school makes 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. Additionally, schools must comply with FERPA’s record keeping requirements under 34 C.F.R. § 99.32 when disclosing information pursuant to a standard court order or subpoena.

**Health or Safety Emergency**

FERPA permits non-consensual disclosure of education records, or personally identifiable, non-directory information from education records, in connection with a health or safety emergency under § 99.31(a)(10) and § 99.36 of the FERPA regulations. In particular, § 99.36(a) and (c) provide that educational agencies and institutions may disclose information from an education record “to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals” and that the exception will be “strictly construed.” Congress’ intent that the applicability of this exception be limited is reflected in the Joint Statement in Explanation of Buckley/Pell Amendment, 120 Cong. Rec. S21489 (Dec. 13, 1974).

Accordingly, the Department consistently has limited the health and safety exception to a specific situation that presents imminent danger to a student, other students, or other members of the school community – or to a situation that requires the immediate need for information from education records in order to avert or diffuse serious threats to the safety or health of a student or other individuals. For example, the health or safety exception would apply to nonconsensual disclosures to appropriate persons in the case of a smallpox, anthrax or other bioterrorism attack. This exception also would apply to nonconsensual disclosures to appropriate persons in the case of another terrorist attack such as the September 11 attack. However, any release must be narrowly tailored considering the immediacy, magnitude, and specificity of information concerning the emergency. As the legislative history indicates, this exception is temporally limited to the period of the emergency and generally will not allow for a blanket release of personally identifiable information from a student’s education records.

Under the health and safety exception school officials may share relevant information with “appropriate parties,” that is, those parties whose knowledge of the information is necessary to provide immediate protection of the health and safety of the student or other individuals.
U.S.C. § 1232g(b)(1)(I); 34 C.F.R. § 99.36(a). Typically, law enforcement officials, public health officials, and trained medical personnel are the types of parties to whom information may be disclosed under this FERPA exception. FERPA’s record keeping requirements (§ 99.32) apply to disclosures made pursuant to the health or safety exception.

The educational agency or institution has the responsibility to make the initial determination of whether a disclosure is necessary to protect the health or safety of the student or other individuals. However, the Department is available to work with institutions to assist them in making such decisions in order to ensure that the disclosure comes within the exception to FERPA’s requirement of prior written consent.

In short, the health or safety exception will permit the disclosure of personally identifiable information from a student’s education record without the written consent of the student in the case of an immediate threat to the health or safety of students or other individuals. Of course, a school official, based on his or her own observations, may notify law enforcement officials of suspicious activity or behavior. Nothing in FERPA prohibits a school official from disclosing to federal, State, or local law enforcement authorities information that is based on that official’s personal knowledge or observation and not from an education record.

Law Enforcement Unit Records

Under FERPA, schools may disclose information from “law enforcement unit records” to anyone – including federal, State, or local law enforcement authorities – without the consent of the parent or eligible student. FERPA specifically exempts from the definition of “education records” – and thereby from the privacy restrictions of FERPA – records that a law enforcement unit of a school district or postsecondary institution creates and maintains for a law enforcement purpose. A “law enforcement unit” is an individual, office, department, division, or other component of a school district or postsecondary institution – such as a unit of commissioned officers or noncommissioned security guards – that is officially authorized or designated by the school district or institution to: (1) enforce any federal, State, or local law; or (2) maintain the physical security and safety of the school. See 34 C.F.R. § 99.8.

FERPA narrowly defines a law enforcement record as a record that is: (i) created by the law enforcement unit; (ii) created for a law enforcement purpose; and (iii) maintained by the law enforcement unit. 34 C.F.R. § 99.8(b). While other components of an educational institution generally can disclose, without student consent, student education records to school law enforcement units (under FERPA’s exception for school officials with legitimate educational interests), these records are not thereby converted into law enforcement unit records because the records were not created by the law enforcement unit. Thus, a law enforcement unit cannot disclose, without student consent, information obtained from education records maintained by other components of an educational institution.
Directory Information

FERPA’s regulations define “directory information” as information contained in an education record of a student “that would not generally be considered harmful or an invasion of privacy.” 34 C.F.R. § 99.3. Specifically, “directory information” includes, but is not limited to the student’s name, address, telephone listing, electronic mail address, photograph, date and place of birth, major field of study, dates of attendance, grade level, enrollment status (e.g., undergraduate or graduate, full-time or part-time), participation in officially recognized activities or sports, weight and height of members of athletic teams, degrees, honors and awards received, and the most recent educational agency or institution attended. Id. A school may disclose “directory information” from the education records without prior consent only after giving notice to the student of its directory information policy, and providing parents and eligible students with an opportunity to opt out of having their “directory information” disclosed. See 34 C.F.R. § 99.37.

Under FERPA, a school may not comply with a request for “directory information” that is linked to other non-directory information. For instance, a school cannot disclose “directory information” on students of a certain race, gender, or national origin. However, the school could disclose “directory information” on all students (who have not opted out) to law enforcement authorities who may be requesting “directory information.”

Disclosures to the Immigration and Naturalization Service (INS)

The Immigration and Naturalization Service (INS) requires foreign students attending an educational institution under an F-1 visa to sign the Form I-20. The Form I-20 contains a consent provision allowing for the disclosure of information to INS. The consent provision states that, “I authorize the named school to release any information from my records which is needed by the INS pursuant to 8 C.F.R. 214.3(g) to determine my nonimmigrant status.” This consent is sufficiently broad to permit an educational institution to release personally identifiable information of a student who has signed a Form I-20 to the INS for the purpose of allowing the INS to determine the student’s nonimmigrant status. Students that have an M-1 or J-1 visa have signed similar consents and education records on these students may also be disclosed to the INS.

Finally, we anticipate there may be a need for additional guidance in the future on other INS disclosure issues.
Technical Assistance on FERPA

For additional guidance on these or other provisions of FERPA contact the Family Policy Compliance Office at the following address and telephone number:

Family Policy Compliance Office  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, D.C. 20202-4605  
(202) 260-3887 – Telephone  
(202) 260-9001 – Fax

Additionally, schools officials may contact the Family Policy Compliance Office by e-mail for quick, informal responses to routine questions about FERPA. That address is: FERPA@ED.Gov. The Web site address is: www.ed.gov/offices/OM/fpco.

Sincerely,

/s/

LeRoy S. Rooker  
Director  
Family Policy Compliance Office

Enclosure
SEC. 507. DISCLOSURE OF EDUCATIONAL RECORDS. [115 Stat. 367-68]

Section 444 of the General Education Provisions Act (20 U.S.C. 1232g), is amended by adding after subsection (i) a new subsection (j) to read as follows:

``(j) Investigation and Prosecution of Terrorism.—
``(1) In general.--Notwithstanding subsections (a) through (i) or any provision of State law, the Attorney General (or any Federal officer or employee, in a position not lower than an Assistant Attorney General, designated by the Attorney General) may submit a written application to a court of competent jurisdiction for an ex parte order requiring an educational agency or institution to permit the Attorney General (or his designee) to--
``(A) collect education records in the possession of the educational agency or institution that are relevant to an authorized investigation or prosecution of an offense listed in section 2332b(g)(5)(B) of title 18 United States Code, or an act of domestic or international terrorism as defined in section 2331 of that title; and
``(B) for official purposes related to the investigation or prosecution of an offense described in paragraph (1)(A), retain, disseminate, and use (including as evidence at trial or in other administrative or judicial proceedings) such records, consistent with such guidelines as the Attorney General, after consultation with the Secretary, shall issue to protect confidentiality.
``(2) Application and approval.--
``(A) In general.--An application under paragraph (1) shall certify that there are specific and articulable facts giving reason to believe that the education records are likely to contain information described in paragraph (1)(A).
``(B) The court shall issue an order described in paragraph (1) if the court finds that the application for the order includes the certification described in subparagraph (A).
``(3) Protection of educational agency or institution.—An educational agency or institution that, in good faith, produces education records in accordance with an order issued under this subsection shall not be liable to any person for that production.
``(4) Record-keeping.—Subsection (b)(4) does not apply to education records subject to a court order under this subsection.".
Disclosure to Victims of Alleged Crimes of Violence: FERPA Online Library: Family Policy Compliance Office

March 10, 2003

Mr. S. Daniel Carter
7505 Granda Drive
Knoxville, Tennessee 37909-1730

Dear Mr. Carter:

This is to respond to your October 10, 2002, letter and December 11, 2002, e-mail objecting to restrictions on the redisclosure of the final results of student disciplinary proceedings. This Office administers the Family Educational Rights and Privacy Act (FERPA), which addresses issues that relate to students’ education records.

Specifically, you stated that the U.S. Department of Education should change its regulations so as to permit the victim of an alleged perpetrator of a crime of violence to redisclose the final results of a disciplinary proceeding conducted by a postsecondary educational institution with respect to that alleged crime. You also assert that the victim should be permitted to redisclose the name of the assailant, what the person was accused of, and any disciplinary action taken by the school.

FERPA is a Federal law that gives postsecondary students the right to have access to their education records, the right to seek to have the records amended, and the right to have some control over the disclosure of information from the records. The term “education records” is defined as those records that contain information directly related to a student and which are maintained by an educational agency or institution or by a party acting for the agency or institution. 34 CFR § 99.3 “Education records.”

Under FERPA, a school may not generally disclose personally identifiable information from a postsecondary student’s education records to a third party unless the student has provided written consent. 34 CFR § 99.30(a). However, there are several exceptions to FERPA’s prohibition on nonconsensual disclosure of education records. In particular, FERPA provides specific exceptions for disclosure of disciplinary records in certain circumstances. One of the exceptions permits disclosure to an alleged victim of any crime of violence or non-forcible sex offense of the final results of any disciplinary proceeding conducted by an institution of postsecondary education against the alleged perpetrator of that crime with respect to that crime. In this circumstance, the institution may disclose the final results of the disciplinary proceeding to the individual, regardless of whether the institution concluded a violation was committed. 20 U.S.C. § 1232g(b)(6); 34 CFR § 99.31(a)(13).
Those individuals who receive information under one or more of the 15 disclosure exceptions set forth in § 99.31 may not generally redisclose that information to any other party without appropriate written consent of the student. 34 CFR § 99.33. As such, the § 99.33 redisclosure limitations apply not only to the § 99.31(a)(13) disclosure exception, but to many other of the §99.31 exceptions as well. If an individual makes a disclosure that § 99.33 does not permit, then the educational institution may not allow that person to access personally identifiable information from education records for at least five years. 20 U.S.C. § 1232g(b)(4)(B), 34 CFR § 99.33.

A second, related disclosure exception is set forth in § 99.31(a)(14). Under this exception, an institution of postsecondary education may disclose the final results of a disciplinary proceeding, if it determines that:

1. the student is an alleged perpetrator of a crime of violence or non-forcible sex offense; and
2. with respect to the allegation made against him or her, the student has committed a violation of the institution’s rules or policies.

When an institution determines that an accused student is an alleged perpetrator and has violated the institution rules, then there are no restrictions on disclosure or redisclosure of the final results of a disciplinary proceeding. In circumstances where an institution makes a determination that the accused student committed a violation, this clearly provides for much greater disclosure than is permitted by § 99.31(a)(13). In addition, the redisclosure restrictions of § 99.33 do not apply. On the other hand, § 99.31(a)(13) assures that an alleged victim can learn what the final results of a disciplinary proceeding were, even when the institution determines that the accused student did not violate its rules. When an institution discloses the final results, it must also inform the student that FERPA does not permit any redisclosure of this information.

Although we believe that the Department presently remains legally constrained to conclude that an alleged victim may not redisclose such information, we are in the process of considering what statutory or regulatory latitude there may be to permit limited redisclosures in the circumstances you described. We will be in touch with you with regard to any further developments.

Thank you for the comments you have provided on this matter.

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office