THE FUNDAMENTALS OF FUNDAMENTAL FERPA

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I. BACKGROUND AND BASICS

Enacted as a seemingly inconsequential floor amendment having little to do with higher education, the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, popularly known as "FERPA" or the "Buckley Amendment", nevertheless quickly became one of the mainstays of college and university law practice. And although it still tends to inhabit only the remotest fringes of our consciousness most of the time, it is fair to say that FERPA is relevant to virtually everything we do on our campuses. Thus, it is appropriate to "refresh" our understanding of its requirements every once in a while, and there is no time like the present.

Congress enacted FERPA in response to a growing public awareness and concern about the public dissemination by primary and secondary schools of information commonly considered private in nature, the withholding of "secret files" on students, and recordkeeping practices in general. Much like other "records" statutes of that era, it reflected a desire to give a measure of control to the subjects of government records – in this case, "education records". In very general terms, then, FERPA gives college students the rights to:

1. Control the disclosure of their "education records" to others;

2. Inspect and review their own "education records"; and

3. Seek amendment of their "education records".

Unlike at the primary and secondary level, these rights belong to the student, and not to the student's parents or legal guardians, regardless of the student's age. Moreover, the

rights continue to exist after the student's graduation and expire only upon the student's death.

II. KEY DEFINITIONS

All of FERPA revolves around the central term "education records"[1], which is defined in the implementing regulations as follows:

> **"Education records"** . . . means those records that are:
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> (1) Directly related to a student; and
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> (2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

34 C.F.R. § 99.3 (emphasis added).

To fully understand that definition requires an understanding of the further definitions of each of the underlined terms, and a few more:

> **"Educational institution"**: "any public or private . . . institution" that receives funds "under any program administered by the Secretary [of Education]". 34 C.F.R. §§ 99.1 and 99.3. In other words, pretty much every institution of higher education.
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> **"Record"**: "any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche". 34 C.F.R. § 99.3. Thus, the manner or form in which information is recorded is irrelevant; not only paper records, but also electronic records, photographs, videotapes, and even stone tablets are covered. Note, however, that information that is not recorded anywhere other than in your brain – that is, personal knowledge – is not a "record", and thus not an "education record", and thus not subject to FERPA. (Be careful when dealing with information that is

[1] As we shall see, the commonly used variant "educational records" is both incorrect and misleading. While records that are "educational" in nature, such as student papers, exams, and transcripts, certainly are covered by FERPA, so are a multitude of records that have nothing whatever to do with "academics". Banish the term from your vocabulary.

both within your personal knowledge and recorded in some other format, however, as it will not always be clear which you are relying on.)

"Student": "any individual who is or has been in attendance at an educational . . . institution". 34 C.F.R. § 99.3. The term does not include applicants, who thus are not protected by FERPA unless and until they are admitted and "attend", thereby becoming "students". If they do, however, FERPA "reaches back" and brings their application records within its scope.

"Attendance": "includes, but is not limited to . . . attendance in person or by correspondence". 34 C.F.R. § 99.3. Each institution has discretion to define when, between admission and the first day of classes, a student is first considered to be "in attendance".

"Directly related": The term is not defined in either the statute or the regulations, but, under long-standing interpretation of the Family Policy Compliance Office, the office within the Department of Education charged with overseeing FERPA, a record is considered to be "directly related" to a student if it contains "personally identifiable information" about that student.

"Personally identifiable information": "includes, but is not limited to:

> (a) The student's name;
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> (b) The name of the student's parent or other family member;
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> (c) The address of the student or student's family;
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> (d) A personal identifier, such as the student's social security number or student number;
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> (e) A list of personal characteristics that would make the student's identity easily traceable; or
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> (f) Other information that would make the student's identity easily traceable."

34 C.F.R. § 99.3. Note that, in determining what "other information" would make a student's identity "easily traceable", an institution must take into account whether the person to whom disclosure is proposed has prior knowledge about the student that, in combination with the information to be disclosed, would allow the student's identity to be deduced.

"Maintained": Although this term may be the most critical of all – especially when it comes to determining the status of, say, student e-mail messages that are stored on an institutional server – it is not defined in either the statute or the regulations. In *Owasso Independent School Dist. v. Falvo*, 534 U.S. 426, 435 (2002), the Supreme Court noted – tantalizingly – that "FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar", but ultimately declined to define "maintain" that narrowly, or, really, to give much of any guidance on the question at all. Thus, for now, it seems safest to assume that a record is "maintained" by an educational institution whenever it is in the possession, custody, or control of any employee or agent of the institution.

In short, given the vast breadth of its various components, the term "education records" includes not only such standard "academic" records as student transcripts, papers, and exams, but also virtually any information about a student in any record that is in the hands of any institutional employee or agent. The only such records that are specifically excluded from the scope of the term, and that therefore are not subject to the restrictions of FERPA, are the following:

"Sole possession" records: "Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record." 34 C.F.R. § 99.3. For example, the private notes a professor may keep during the course of a semester for consultation when it comes time to set final grades.

"Law enforcement" records: those records that are "(i) created by [the institution's] law enforcement unit [including non-commissioned public safety or security offices]; (ii) created for a law enforcement purpose; and (iii) maintained

by the law enforcement unit." 34 C.F.R. §§ 99.3 and 99.8 (emphasis added). Records that are generated by others and sent to the law enforcement unit – say disciplinary records from the institution's judicial affairs office – are not "law enforcement" records and remain covered by FERPA even when in the law enforcement unit's hands. If the law enforcement unit discloses law enforcement records to others – which it is free to do, because they are not subject to FERPA – metaphysical things begin to happen: The law enforcement unit's copy of those records remain free from FERPA restrictions, as do any copies that it discloses to the general public, but any copies that end up in the hands of other institutional employees or agents become transformed into "education records" subject to the full panoply of FERPA restrictions.

"Employment" records: records related solely to the employment of a "student" by the institution, provided that the student is not "employed as a result of his or her status as a student". 34 C.F.R. § 99.3. In other words, if being a student is part of the job description and requirements – a work-study or GTA/GRA position, for example – any employment records concerning the student who holds the position <u>are</u> "education records" and thus subject to FERPA. This exclusion was intended primarily to keep the employment records of institutional employees who happen to take classes from becoming "education records". Records pertaining to such employees' student status *are* "education records", however.

"Treatment" records: records that are "(i) made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity; (ii) made, maintained, or used only in connection with treatment of the student; and (iii) disclosed only to individuals providing the treatment." 34 C.F.R. § 99.3. Although such records are not subject to FERPA, the final part of this definition nevertheless effectively prevents an institution from disclosing them other than in accordance with FERPA – a seeming paradox that is the entire basis for the general exclusion of student medical records from the privacy provisions of HIPAA.

“Alumni” records: “Records that only contain information [obtained] about an individual after he or she is no longer a student at that agency or institution”. 34 C.F.R. § 99.3. This exception is intended primarily to cover the sorts of records generated by an institution’s alumni office post-graduation. Note, however, that if the information recorded “relates back” to the student’s time at the institution, it is still an “education record” even though it was generated after its subject was no longer a “student”.

III. DISCLOSURE

A. WITH CONSENT

In general, an institution cannot disclose “education records” – or information from “education records” – to anyone other than the relevant student unless it first has obtained a signed and dated written consent from the relevant student (or *all* relevant students, if the records are “directly related” to more than one), specifying the records that may be disclosed, the purpose for which they may be disclosed, and the persons or classes of persons to whom they may be disclosed. 34 C.F.R. § 99.30(a) and (b). The requisite consent and signature may be obtained electronically if the method used “identifies and authenticates a particular person as the source of the electronic consent” and “indicates such person’s approval of the information contained in the electronic consent”. 34 C.F.R. § 99.30(d).

B. WITHOUT CONSENT

An institution may disclose “education records” without such consent only if it first redacts all “personally identifiable information” from the records *or* one of the 15 exceptions enumerated in the regulations applies. Those exceptions are as follows:

1. The disclosure is of “**directory information**”, meaning “information . . . that 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, 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 and sports, weight and height of members of athletic teams, degrees, honors and awards received, and the most recent educational agency or institution attended." 34 C.F.R. § 99.31(a)(11). To take advantage of this exception, an institution must first give its students notice of the information it has designated as "directory information" – which need not be the full list authorized by the regulations – and an opportunity to "opt out". 34 C.F.R. § 99.37.

2. The disclosure is to "**school officials** . . . whom the . . . institution has determined to have **legitimate educational interests**". 34 C.F.R. § 99.31(a)(1). To take advantage of this exception, the institution must give annual notice of its criteria for determining who is a "school official" and what is a "legitimate educational interest". 34 C.F.R. § 99.7(a)(3)(iii). Both definitions can be quite broad. In its model notice, the Family Policy Compliance Office suggests the following language:

> A school official is a person employed by the University in an administrative, supervisory, academic or research, or support staff position (including law enforcement unit personnel and health staff); a person or company with whom the University has contracted as its agent to provide a service instead of using University employees or officials (such as an attorney, auditor, or collection agent); a person serving on the Board of Trustees; or a student serving on an official committee, such as a disciplinary or grievance committee, or assisting another school official in performing his or her tasks.
>
> 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 University.

Note also that it is the institution that makes these determinations, not the individuals who may wish access.

3. The disclosure is to another educational institution where the student seeks or intends to enroll. 34 C.F.R. § 99.31(a)(2). To take advantage of this exception, sometimes referred to as the

"**transfer exception**", the "home" institution must first give notice that it intends to respond to requests from other institutions for such information, either by making a "reasonable attempt" to notify the relevant students individually or by informing all students generally in its annual notice. 34 C.F.R. § 99.34.

4. The disclosure is **to the student** him- or herself. 34 C.F.R. § 99.31(a)(12).

5. The disclosure is to parents of a student who is considered their "**dependent**" for federal tax purposes. 34 C.F.R. § 99.31(a)(8). To establish the parents' eligibility to receive such a disclosure, the institution must obtain either a copy of the parents' most recent tax return (at least the first page, on which dependents are listed) or an acknowledgment from the student that the student is, in fact, their dependent; the institution may not presume dependency.

6. The disclosure is made "in connection with a **health or safety emergency**", is made only to "appropriate parties", and is limited to information that "is necessary to protect the health or safety of the student or other individuals". 34 C.F.R. §§ 99.31(a)(10) and 99.36. The institution has some discretion to determine for itself, within reason, what situations constitute "emergencies", what parties are "appropriate", and what information is "necessary".

7. The disclosure is made to "comply with a **judicial order or lawfully issued subpoena**". 34 C.F.R. § 99.31(a)(9)(i). Before complying, the institution must in most cases first make a "reasonable effort to notify the . . . student of the order or subpoena in advance of compliance, so that the . . . student may seek protective action". 34 C.F.R. § 99.31(a)(9)(ii). The institution need – and may – not give such advance notice in the case of grand jury or other law enforcement subpoenas, if the court or issuing agency has ordered that the existence or contents of the subpoena or information furnished in response not be disclosed. *Id*. Note that the

institution's obligations are limited to, at most, notifying the student; it is not required to fight the order or subpoena on the student's behalf, and it may comply regardless of the student's wishes if the student fails to take action.

8. The disclosure is to a court in the context of a **lawsuit** that the student brought against the institution or that the institution brought against the student. 34 C.F.R. § 99.31(a)(9)(iii). The institution need not give the student advance notice of such a disclosure, but is limited to disclosing information that is "relevant" to the action and that does not relate to other students who are not adversary parties in the lawsuit. By interpretation, but not yet by regulation, the Family Policy Compliance Office has occasionally allowed an institution to make similar disclosures when one of its students has made a complaint to, or initiated some other form of adversary "proceeding" before, a government or similar agency having the power to take official action against the institution.

9. The disclosure is to parents of a student who is under the age of 21 at the time of the disclosure and relates to a determination by the institution that the student has violated its **drug or alcohol** rules. 34 C.F.R. § 99.31(a)(15).

10. The disclosure is of the "final results" of a disciplinary proceeding against a student whom the institution has determined violated an institutional rule or policy in connection with alleged acts that would, if proven, also constitute a "**crime of violence or non-forcible sex offense**". 34 C.F.R. § 99.31(a)(14). For purposes of this exception, "final results" is limited to the name of the student, the basic nature of the violation the student was found to have committed, and a description and the duration of any sanction the institution has imposed against the student. 34 C.F.R. § 99.39.

11. The disclosure is to "a **victim of an alleged perpetrator of a crime of violence or non-forcible sex offense**" and consists only of the

"final results" (as defined above) of an institutional disciplinary proceeding in connection with that alleged crime or offense. The institution may (and, under the Campus Sexual Assault Victims' Bill of Rights Act, must) make such a disclosure regardless of the outcome of the proceeding. 34 C.F.R. § 99.31(a)(13).

12. The disclosure is in connection with **financial aid** that the student has applied for or received and is for the purpose of determining the student's eligibility for, the amount of, or the conditions for the aid, or to enforce the terms and conditions of the aid. 34 C.F.R. § 99.31(a)(4).

13. The disclosure is to authorized representatives of the Comptroller General, Attorney General, Secretary of Education, or state or local educational authorities in connection with an **audit of federal- or state-supported education programs** or with the enforcement of or compliance with federal legal requirements relating to those programs. In the absence of consent or a specific federal law to the contrary, information collected under this exception must be protected so that individuals are not personally identifiable other than to the "authorized representatives", and the information must be destroyed when no longer needed. 34 C.F.R. §§ 99.31(a)(3) and 99.35.

14. The disclosure is to **accrediting organizations** to carry out their accrediting functions. 34 C.F.R. § 99.31(a)(7).

15. The disclosure is to **organizations conducting studies** for educational institutions to develop, validate, or administer predictive tests; administer student aid programs; or improve instruction, provided that the studies are conducted in a manner that prevents personal identification of parents and students by anyone other than representatives of the organizations and the information is destroyed when no longer needed for purposes of the studies. 34 C.F.R. § 99.31(a)(6).

Each of these exceptions is independent of the others. If you can find one that applies to your situation, it doesn't matter whether that situation also would qualify under any of the others. Thus, for example, if you have determined that a 19-year-old student's serious, alcohol-related injuries constitute a "health or safety emergency" that is "appropriate" to disclose to the student's parents, you need not also determine whether the student is their dependent for tax purposes or whether the student has violated your alcohol policies.

Note also that, at least as far as FERPA itself is concerned, it is entirely within the institution's discretion whether to make a disclosure under any of these exceptions. 34 C.F.R. § 99.31(b). Thus, for example, a parent never has a *right*, under FERPA, to see his or her college student's education records, even if the student is the parent's dependent for tax purposes, is involved in a health or safety emergency, and has violated the institution's alcohol policies – and even if the student is not yet 18 years old. A subpoena, a court order, or another law such as the Campus Sexual Assault Victims' Bill of Rights Act may require disclosure in certain circumstances, but FERPA does not.

C. REDISCLOSURE

FERPA imposes similar limitations on redisclosure. In general, an institution disclosing personally identifiable information from an education record must inform the recipient that it cannot redisclose that information without the consent of the student and that it may use the information only for the purpose for which the disclosure was made. 34 C.F.R. § 99.33(a). Exceptions to this requirement include disclosures of directory information; disclosures to the relevant student, to the parents of a dependent student, or to parents in connection with a drug or alcohol violation; and disclosures made in connection with a court order, lawfully issued subpoena, lawsuit in which the student and the institution are adversaries, or disciplinary proceeding involving an alleged crime of violence or non-forcible sex offense. 34 C.F.R. § 99.33(c).

D. RECORDKEEPING

The institution generally must maintain a record of each request for access to and each release of personally identifiable information from a student's

education records. This separate record must include, at a minimum, the identities of the requesters and recipients and the "legitimate interests" they had in the information. It also must be maintained with the student's education records for as long as those records are themselves maintained. 34 C.F.R. § 99.32(a). Exceptions to this requirement include disclosures to a school official, a parent or student, a person with written consent, or a person requesting directory information, and disclosures in connection with a grand jury or other law enforcement subpoena prohibiting disclosure of its existence or contents. 34 C.F.R. § 99.33(d).

IV. INSPECTION AND REVIEW

FERPA also gives college and university students the right to inspect and review their own education records. 34 C.F.R. § 99.10(a). The institution must provide access to the records within 45 days of a request and must respond to reasonable requests for explanations and interpretations of the records. 34 C.F.R. § 99.10(b) and (c). FERPA does *not* require the institution to provide copies of records to the student, unless "circumstances effectively prevent" the student from exercising the right to inspect and it is not possible to "make other arrangements" for inspection. 34 C.F.R. § 99.10(d). The institution may not destroy records while a request for inspection is outstanding. 34 C.F.R. § 99.10(e).

There are several limitations on the right of inspection. First, if the requested records contain information about more than one student, the requesting student may have access only to those portions pertaining to him- or herself. 34 C.F.R. § 99.12(a). In addition, students do not have the right to inspect the following:

1. Financial records of their parents. 34 C.F.R. § 99.12(b)(1).

2. Confidential letters and statements of recommendation, if the student has waived the right to review and inspect those documents and they are related to the student's admission, application for employment, or receipt of an honor or honorary recognition. 34 C.F.R. § 99.12(b)(3). Such a waiver is valid only if it is not a condition of admission to or receipt of a benefit or service from the institution and it is in writing and signed by the student. 34 C.F.R. § 99.12(c)(1). If the student provides such a waiver,

the student must be given, upon request, the names of the persons providing the recommendations, and the institution may not use the letters for any purpose other than that for which they were originally intended. 34 C.F.R. § 99.12(c)(2). The student may revoke the waiver in writing; however, revocation affects only those documents received after the date of the revocation. 34 C.F.R. § 99.12(c)(3). In other words, a student may not revoke the waiver in order to see documents already received.

3. "Treatment" records, as defined above in Section II. However, upon request, the student may have any such records reviewed by a physician or other appropriate professional of the student's choice. 34 C.F.R. § 99.10(f).

V. AMENDMENT

If a student believes that his or her education records contain inaccurate or misleading information or information that violates the student's right to privacy, the student may request that the institution amend the records. 34 C.F.R. § 99.20(a). The institution must make a decision on the request within a "reasonable time" after receipt. 34 C.F.R. § 99.20(b). If the institution decides not to make the requested amendment, it must so inform the student and advise the student of the right to a hearing. 34 C.F.R. § 99.20(c).

If the student requests a hearing, it must meet the following minimum requirements:

1. It must be held within a reasonable time after the request;

2. The student must be provided reasonable notice of the date, time, and place;

3. The individual conducting the hearing must not have a direct interest in the outcome;

4. The student must have a "full and fair opportunity" to present his or her case and may be assisted or represented by others, including an attorney; and

5. The decision must be in writing, rendered within a reasonable time after the hearing, and based solely on the evidence presented at the hearing, and it must include a summary of the evidence and the reasons for the decision.

34 C.F.R. § 99.22.

If, as a result of the hearing, the institution agrees with the student, it must amend the record and notify the student in writing. 34 C.F.R. § 99.21(b)(1). If the institution does not agree, it must advise the student that he or she may place a written statement in the file commenting on the contested information and/or stating the nature of the disagreement. 34 C.F.R. § 99.21(b)(2). If the student chooses this option, the statement must be maintained with the contested information and disclosed in conjunction with any subsequent release of the contested information. 34 C.F.R. § 99.21(c).

The courts have ruled that this portion of FERPA is intended to deal with "scrivener's errors", not to provide a means by which a student may challenge substantive decisions, such as grades, or obtain information on how a particular grade was assigned. *See*, *e.g.*, *Adatsi v. Mathur*, 934 F.2d 910 (7th Cir. 1991) ("FERPA addresses the situation where a student seeks to have misleading or inaccurate information in his records corrected. There is nothing inaccurate about Adatsi's grade. He just feels he deserves something else. This fails to state a claim under FERPA."); *Tarka v. Cunningham*, 741 F. Supp. 1281, 1282 (W.D. Tex.), *aff'd*, 917 F.2d 890 (5th Cir. 1990) ("At most, a student is only entitled to know whether or not the assigned grade was recorded accurately in the student's record.").

VI. ANNUAL NOTIFICATION OF RIGHTS

FERPA requires each institution to notify its students annually of their rights under the act. 34 C.F.R. § 99.7. The best place to start (and perhaps end) is the Family Policy Compliance Office's model notice of rights, which is available at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/ps-officials.html>. The notice may be provided by "any means that are reasonably likely to inform . . . students of their rights". 34 C.F.R. § 99.2(b). Each institution must also give "public notice" of its list of directory

information and its procedure for "opting out". 34 C.F.R. § 99.37(a). The easiest way to do so is by including this information in the annual notice.

VII. ENFORCEMENT

The responsibility for enforcing FERPA rests with the Family Policy Compliance Office of the Department of Education, which is authorized to investigate and review potential violations and to provide technical assistance regarding compliance issues. 34 C.F.R. § 99.60. If it determines that a complaint is meritorious, the Office will recommend steps necessary to ensure compliance with the act and provide a reasonable time for the institution to come into compliance. 34 C.F.R. § 99.66(c). If the institution does not come into compliance, the Department is authorized to terminate all or any portion of the institution's federal funds. 34 C.F.R. § 99.67. In *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the Supreme Court held that FERPA does not create personal rights that an individual may enforce through 42 U.S.C. § 1983.

VIII. RESOURCES

The Family Educational Rights and Privacy Act: A Legal Compendium (NACUA, 2d ed.)

William Kaplin and Barbara Lee, *The Law of Higher Education* (Jossey Bass, 4th ed.)

Family Policy Compliance Office: http://www.ed.gov/policy/gen/guid/fpco/index.html

Catholic University's FERPA Reference Chart: http://counsel.cua.edu/ferpa/resources/recchart.cfm

University of Maryland's FERPA Tutorial: http://info.sis.usmd.edu/ferpaweb

AACRAO's FERPA Final Exam: http://www.aacrao.org/compliance/ferpa/FERPA_Final_Exam.pdf