

# THE FUNDAMENTALS OF FUNDAMENTAL FERPA

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## FERPA

- The Family Educational Rights and Privacy Act of 1974
- A.K.A. the Buckley Amendment

## FERPA's Big Three

- College students have the right, *in general*, to:
  - Control the disclosure of their "education records" to others
  - Inspect and review their own "education records"
  - Seek amendment of their "education records"

## So, What's an "Education Record"?

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

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## So, What's an "Education Record"?

- "'Educational . . . institution' means any public or private . . . institution" that receives funds "under any program administered by the Secretary [of Education]"

## So, What's an "Education Record"?

- "'Record' means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche"
- N.B.: Does *not* include information that is not "recorded" – that is, personal knowledge

## So, What's an "Education Record"?

- "'Student' . . . means any individual who is or has been in attendance at an educational . . . institution"
- "'Attendance' includes, but is not limited to . . . [a]ttendance in person or by correspondence"

## So, What's an "Education Record"?

- A record is "**directly related**" to a student if it contains "personally identifiable information" about that student
- "**Personally identifiable information**" includes, but is not limited to: "name, address, personal identifiers (such as SSNs or campus ID numbers), "a list of personal characteristics that would make the student's identity easily traceable", and "other information that would make the student's identity easily traceable"

## So, What's an "Education Record"?

- "**Maintain**" is . . .

## So, What's an "Education Record"?

- "Maintain" is *not defined!*
- Supreme Court:
  - "FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar."
  - "The ordinary meaning of the word 'maintain' is 'to keep in existence or continuance; preserve; retain.'"

## We Don't Need No "Education"

- "Education records" certainly includes transcripts, exams, papers, and the like
- But it also includes:
  - SSNs, ID numbers, and driver license numbers
  - Attendance and absence records
  - Discipline records, including complaints
  - Disability accommodation records
  - Records that are publicly available elsewhere
  - Records of information that the student has publicly revealed
  - *Pretty much everything!*

## Except for These:

- "Sole possession" records
  - As long as not shared or accessible
- "Law enforcement" records
  - But only the law enforcement office's copy
- "Employment" records
  - Unless student status is a job requirement
- "Treatment" records
  - Only if not shared

## The Metaphysics of Medical Records

- HIPAA: Protected health information *excludes* individually identifiable health information in:
  - (i) Education records covered by the Family Educational Rights and Privacy Act, as amended, 20 U.S.C. 1232g; [and]
  - (ii) Records described at 20 U.S.C. 1232g(a)(4)(B)(iv) [that is, treatment records]
- But state medical confidentiality rules still apply (to medical professionals)

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- "Treatment" records
  - Only if not shared
- "Alumni" records
  - But not if they "relate back"

## Disclosure

- Before disclosing education records – or information from education records – an institution must obtain a signed and dated written consent from *all* relevant students, specifying:
  - The records that may be disclosed
  - The purpose for which they may be disclosed
  - The persons or classes to whom they may be disclosed

## Except for Disclosures:

- To "school officials . . . whom the . . . institution has determined to have legitimate educational interests"
  - Each institution specifies its own standards
  - "School officials" can include students serving on committees and outside contractors
  - "Legitimate educational interests" can include what is needed to do one's job
  - Institution, not individual, makes the determination

## Recent Guidance

- "FERPA does not require a postsecondary . . . institution to make education records available to anyone other than an eligible student. Therefore, nothing in FERPA would prevent the University from adopting a policy that a faculty member may not have access to these records", regardless of the faculty member's "educational interest".

## Except for Disclosures:

- To "parents . . . of a dependent student" for federal tax purposes
  - Parents of college students have no general right to see their children's records, *even if the students are minors*
  - Need to obtain a copy of parents' most recent tax return to verify dependent status
  - **Warning: Tell them about this *before* there's a problem**

## Except for Disclosures:

- In connection with a "health or safety emergency"
  - Disclosure may be made only to "appropriate parties" and must be limited to "information [that] is necessary to protect the health or safety of the student or other individuals"

## Recent Guidance

- An "emergency" exists when "a specific situation presents imminent danger or threat to students or other members of the community, or requires an immediate need for information in order to avert or diffuse serious threats to the safety or health of a student or other individuals."
- "This Office will not substitute its judgment for what constitutes a true threat or emergency unless the determination appears manifestly unreasonable or irrational."

## Recent Guidance

- Serious communicable diseases that are epidemic in nature – yes
- Serious infectious diseases – case-by-case
- Suicidal ideation – case-by-case
  - "[A] student's suicidal statements, coupled with unsafe conduct and threats against another student, constitute a "health or safety emergency" under FERPA. However, . . . this exception does not support a general or blanket exception in every case in which a student utters a threat."

## Except for Disclosures:

- Of the "final results" of a disciplinary proceeding against an alleged perpetrator of a crime of violence or non-forcible sex offense, *if* the institution determines that the accused student violated an institutional rule or policy
  - "Final results" = name of the accused student, violation committed, and sanction imposed

## Except for Disclosures:

- To the victim of an alleged perpetrator of a crime of violence or non-forcible sex offense
  - Disclosure is still limited to the "final results" of the disciplinary proceeding
  - However, disclosure is permissible *regardless* of the finding against the accused

## Except for Disclosures:

- To parents of a student under 21 *if* the institution has determined that the student violated its alcohol or drug rules
  - Student must be under 21 at time of disclosure, not just at time of violation

## Except for Disclosures:

- To "comply with a judicial order or lawfully issued subpoena"
  - Must make a "reasonable effort to notify" the student beforehand
    - Unless it's a grand jury or law enforcement subpoena and you've been ordered not to disclose
  - No obligation to fight the subpoena on the student's behalf

## Except for Disclosures:

- And several more
- N.B.: As far as *FERPA* is concerned, all of these are discretionary
  - May be other disclosure obligations
    - For example, under the Campus Sexual Assault Victims' Bill of Rights Act, both the accused and the accuser *must* be informed of the final results of a disciplinary proceeding involving an alleged sex offense
- Also N.B.: These exceptions are independent of each other, not cumulative

## What is a "Disclosure"?

- FERPA "clearly does not allow an educational . . . institution to leave education records unprotected or subject to access by unauthorized individuals, whether in paper, film, electronic, or any other format. We interpret this prohibition to mean that an educational . . . institution must use physical, technological, administrative and other methods, including training, to protect education records in ways that are reasonable and appropriate to the circumstances in which the information or records are maintained."

## What is a "Disclosure"?

- Placing all report cards in a box on a desk
- Sending notice of probation on a postcard rather than in a sealed envelope
  - <http://www.ed.gov/policy/gen/guid/fpc/ferpa/library/gibsoncmpl.html>
- "[A] record management system that allows unauthorized individuals to have access to education records"

## What is a "Disclosure"?

- "[G]iven that it is virtually impossible to use physical or technological safeguards to prevent authorized users from using their access to education records for unauthorized purposes, it is important that an educational agency or institution establish and enforce policies and procedures, including appropriate training, to help ensure that school officials do not in fact misuse education records for their own purposes."

## What is a "Disclosure"?

- "[W]hen an institution is authorized to disclose information from education records . . . , FERPA does not specify or restrict the method of disclosure. . . . FERPA does not mandate any specific method, such as encryption technology, for achieving these standards with electronic disclosure of information from education records. However, reasonable and appropriate steps consistent with current technological developments should be used to control access to and safeguard the integrity of education records in electronic data storage and transmission, including the use of e-mail, Web sites, and other Internet protocols."

## Implicit Disclosures

- "Just the directory information" for a specified student or subset of students
  - e.g., the names and addresses of all students who have made sexual harassment complaints
- "Broken lock" requests
  - e.g., degree verifications in response to student SSNs
- "Anonymized" data and information
  - e.g., redacted disciplinary reports for all residents of a given dormitory this year

## Recent Guidance

- Schools need not honor student consents
- Schools cannot require a waiver as a condition of participation in a course or program

## But Wait, There's More!

- *In general*, must make a record of each request and each disclosure and maintain it with the relevant education record
- *In general*, may disclose only on condition that the information not be redisclosed without student consent
- *In general*, recipients may use disclosed information only for specified purpose

## Inspect and Review

- Must allow students to "inspect and review" their own education records within 45 days of request
- Need not provide copies unless "circumstances effectively prevent the . . . student from exercising the right to inspect and review"
- Does not include financial aid records of parents or confidential letters of recommendation to which the student has waived access
- If record relates to more than one student, must redact

## Recent Guidance

- FERPA does not require the creation or retention of records, regulate the format of records (except for inaccuracies), govern the organization of records, or prohibit the destruction of records (except for pending requests), nor does it require notification of the creation or destruction of records or attestation of the authenticity of records
- FERPA is not a discovery tool; requests must be reasonably specific, and schools need not honor "standing" requests

## Seek Amendment

- Student may request amendment of records containing "information that is inaccurate, misleading, or in violation of the student's rights of privacy"
  - *Not* a grade grievance mechanism
- If deny request, must give student an opportunity for a hearing
- If still deny request, student may include a statement with the record

## Annual Notice

- *Must* include statement of students' rights to:
  - Inspect and review their own education records (and procedures for doing so)
  - Seek amendment of "inaccurate" or "misleading" records (and procedures for doing so)
  - Consent to most disclosures
  - File a complaint with DOE

## Annual Notice

- *May* (and probably should) include:
  - Your definition of "directory information" and procedure and deadline to opt out
  - Your definition of "school officials" and "legitimate educational interest"
  - If applicable, a statement of your practice of forwarding records to schools to which students seek to transfer

Questions?