

## FERPA: Hot Topics and Updates

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General Counsel  
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### Tell Me What We're Gonna Do Now

- Outsourcing e-mail and other student records
- U-Tube: FERPA in the electronic classroom
- New guidance on addressing emergencies on campus
- The latest on state longitudinal database systems
- Safeguarding requirements for electronic student records
- What's hot in Cleveland (or anywhere else?): Open Q&A

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### Let's Start at the Very Beginning

- 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"

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

- "[O]fficial records, files, and data directly related to [students], including all material that is incorporated into each student's cumulative record folder, and intended for school use or to be available to parties outside the school or school system, and specifically including, but not necessarily limited to, identifying data, academic work completed, level of achievement (grades, standardized achievement test scores), attendance data, scores on standardized intelligence, aptitude, and psychological tests, interest inventory results, health data, family background information, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns."

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### 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"?

- "'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

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

- In general, a record is "directly related" to a student if it contains "personally identifiable information" about that student

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

- "Maintain" is *not defined!*
- *Owasso Independent School District v. Falvo*, 534 U.S. 426 (2002):
  - "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.'"
- Requires conscious decision on the part of the institution?

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### We Don't Need No "Education"

- "Education records" certainly includes transcripts, exams, papers, and the like
- But it also includes:
  - Financial aid and account records
  - Disability accommodation records
  - Discipline records, including complaints
  - SSNs and campus ID numbers
  - Photographs
  - "Unofficial" files
  - Records that are publicly available elsewhere
  - Information that the student has publicly revealed
  - *Virtually everything!*

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## E-mail?

- Record?
  - "Record" means any information recorded in any way, including, but not limited to, . . . computer media"
- Directly related?
  - E-mail address in the "to" or "from" line
  - Student name, address, ID number, or other identifying information (broadly defined) within the body of a message
  - Not every message will be personally identifiable, but do you really want to sort it out?
- Maintained?
  - Messages residing in student mailboxes
  - Messages residing in faculty and staff mailboxes

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## Outsourcing

- "A contractor, consultant, volunteer, or other party to whom an . . . institution has outsourced institutional services or functions may be considered a school official . . . provided that the outside party –
  - Performs an institutional service or function for which the agency or institution would otherwise use employees;
  - Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and
  - Is subject to the requirements . . . governing the use and redisclosure of personally identifiable information from education records."

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## Outsourcing

- Institutions must "ensur[e] that outside parties that provide institutional services or functions as 'school officials' . . . do not maintain, use, or redisclose education records except as directed by the agency or institution that disclosed the information. . . . [O]ne way in which schools can ensure that parties understand their responsibilities under FERPA with respect to education records is to clearly describe those responsibilities in a written agreement or contract."

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A technology platform schools can trust

Our business is built on your trust. We recognize that schools expect us to properly secure their data and respect the privacy of their information.

Google data center security

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• FAQ

• Corporate policies

Google complies with applicable US privacy law, and the Google Apps Terms of Service can specifically detail our obligations and compliance with FERPA (Family Educational Rights and Privacy Act) regulations.

Google Apps is also governed by a detailed Privacy Policy, which ensures we will not inappropriately share or use personal information placed in our systems.

The Google Apps Terms of Service contractually ensures that your institution (or students, faculty, and staff) are the sole owners of their data.

Because customers own the data they put into Google Apps, we believe it should be easy for your users to move their data in and out of our systems.

The controls, processes, and policies that protect user data in our systems have obtained a SAS 70 Type II attestation and will continue to meet similar objectives.

Google complies with applicable US privacy law, and the Google Apps Terms of Service can specifically detail our obligations and compliance with FERPA (Family Educational Rights and Privacy Act) regulations.

Google is registered with the US-EU Safe Harbor program, which helps ensure that our data protection compliance meets European Union standards for educational institutions.

Students are thrilled, and we feel comfortable that security and privacy issues have been met.

Shirley Blockstein, Director of Technology Support Services, Northwestern University

Take a deeper look

Read a review of Google Apps security measures in our Security Whitepaper

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Google Apps

Google Apps for Education Agreement

Go to the Additional Terms for services made available with the new accounts infrastructure

This Google Apps for Education Agreement (the "Agreement") is entered into by and between Google Inc. ("Google"), with offices at 1600 Amphitheatre Parkway, Mountain View, California 94041 and ENTER CUSTOMER'S FULL LEGAL NAME, with an address at ENTER CUSTOMER ADDRESS ("Customer"). This Agreement governs Customer's access to and use of the Services and will be effective as of the Effective Date.

1. Services

1.1 Facilities and Data Transfer. All facilities used to store and process Customer Data will adhere to reasonable security standards no less protective than the security standards at facilities where Google stores and processes its own information of a similar type. Google has implemented at least industry standard systems and procedures to ensure the security and confidentiality of Customer Data, protect against unauthorized access or disclosure to the security or privacy of Customer Data, and protect against unauthorized access for use of Customer Data.

5.4 FERPAThe parties acknowledge that (a) Customer Data may include personally identifiable information from education records that are subject to FERPA ("FERPA Records"); and (b) to the extent that Customer Data includes FERPA Records, Google will be considered a "School Official" (as that term is used in FERPA and its implementing regulations) and will comply with FERPA.

must so notify Google via the Help Center within thirty days after receiving notice of the change. If Customer notifies Google as required, then Customer will remain governed by the terms in effect immediately prior to the change until the end of the then current Term. If the Services are renewed, they will be renewed under Google's then current US Terms.

1.3 Access. Customer is solely responsible for monitoring, responding to, and otherwise processing emails sent to the "Value" and "System" aliases for Customer Domain Names but Google may monitor emails sent to these aliases for Customer Domain Names to allow Google to identify Services abuse.

1.4 Ads

a. Default. The default setting for the Services is one that does not allow Google to serve Ads. Customer may change this setting in the Admin Console, which constitutes Customer's authorization for Google to serve Ads. If Customer enables the serving of Ads, it may revert to the default setting at any time and Google will cease serving Ads.

b. Selectively Showing Ads. Notwithstanding Section 1.4(a), if Customer separates different classifications of End Users by domain or Google provides the capability for Customer to show Ads only to particular sets of End Users within the same domain, then Customer must enable the serving of Ads to End Users who are alumni.

c. Selectively Showing Ads. If Customer chooses to separate different classifications of End Users by domain, then Customer must enable the serving of Ads to Alumni. If Google provides the capability for Customer to show Ads only to particular sets of End Users, then Customer must enable Google's serving of Ads to End Users who are not Students or Staff.

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Google's privacy policy protects your users:

- It's your content, not ours. Your Apps content belongs to your school, or individual users at your school. Not Google.
- We don't look at your content. Google employees will only access content that you store on Apps when an administrator from your domain grants Google employees explicit permission to do so for troubleshooting.
- We don't share your content. Google does not share personal information with advertisers or other 3rd parties without your consent.
- We sometimes scan content. And for very good reasons, like spam filtering, anti-virus protection, or malware detection. Our systems scan content to make Apps work better for users, enabling unique functionality like powerful search in Gmail and Google Docs. This is completely automated and involves no humans.

Note that there are a few common-sense exceptions to the points above, like valid legal processes and maintaining the safety and security of our systems. For more information, see our detailed Privacy Policy, Privacy Principles, and Terms of Service.

- Google is registered with the US-EU Safe Harbor program, which helps ensure that our data protection compliance meets European Union standards for educational institutions.

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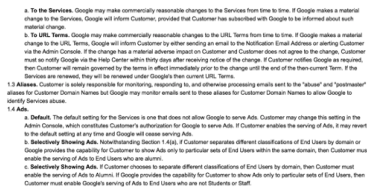
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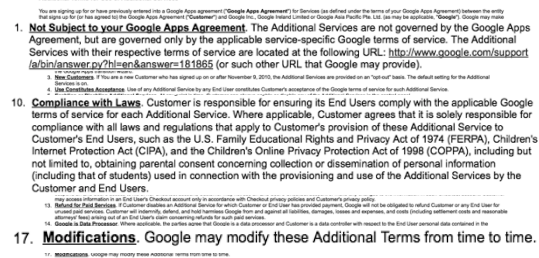
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<http://counsel.cua.edu/res/docs/ferpa/resources/contract.doc>

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## U-Tube?

- May faculty require:
  - Participation on listservs?
  - Blog posts?
  - Use of online portfolios?
  - Creation and posting of videos?
  - Use of other social media?
- Does it matter whether it's hosted on-campus or off-site?
- Does it matter whether it's open to the public or closed to the class?

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## First Things First

- FERPA applies to educational institutions and their agents, not to students and not to external social media
- At least as far as FERPA is concerned, students are free to post their own work wherever they want whenever they want
- Faculty *probably* may require students to do so, at least on external social media
- But may they require students to do so on internal social media, and/or may they post student work themselves?

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## Steve McDonald's "Implied Pedagogical Exception" Theory™

- FPCO: "Neither the statute, the legislative history, nor the FERPA regulations require institutions to depart from established practices regarding the placement or disclosure of student theses so long as students have been advised in advance that a particular undergraduate or graduate thesis will be made publicly available as part of the curriculum requirements."

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**Steve McDonald's "Implied Pedagogical Exception" Theory™**

- FPCO: "The final regulations . . . ensure that . . . students [may] not use the right to opt out of directory information disclosures to remain anonymous in the classroom, by clarifying that opting out does not prevent disclosure of the student's name, institutional e-mail address, or electronic identifier in the student's physical or electronic classroom."

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**Steve McDonald's "Implied Pedagogical Exception" Theory™**

- FPCO: "[W]hile [students] may opt out of the disclosure of directory information, this opt out does not prevent an educational agency or institution from requiring a student to wear, display, or disclose a student ID card or badge that exhibits directory information."

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**Steve McDonald's "Implied Pedagogical Exception" Theory™**

- Owasso: "We doubt Congress meant to intervene in this drastic fashion with traditional state functions. Under the Court of Appeals' interpretation of FERPA, the federal power would exercise minute control over specific teaching methods and instructional dynamics in classrooms throughout the country. The Congress is not likely to have mandated this result, and we do not interpret the statute to require it."

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## Can vs. May vs. Should

- What is the pedagogical reason for requiring the posting to be public?
- If there is one, is it really important that the posting be attributed?
- What are the implications for the student's privacy?
- What are the implications for the student's intellectual property?
- Who's reading the contracts and terms of service?

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## Addressing Emergencies on Campus June 2011

Tragedies like the incidents in Tucson and at Virginia Tech remind us all of the importance of having policies and standard practices in place on campuses to ensure the physical safety of students in the event of an emergency and to aid in preventing such terrible tragedies from occurring in the future. Tucson has again sparked a national dialogue about campus safety, and in light of these terrible events some school officials may be reevaluating their current policies and practices. We hope this guidance assists the work of those school officials who may be reassessing their campus safety policies by offering a summary of two applicable Federal education laws administered by the Department of Education (Department): the Family Educational Rights and Privacy Act (FERPA) and the Higher Education Act of 1965 (HEA), as amended. This Federal component is only one piece of what is necessary to consider in ensuring the safety of our Nation's students, faculty, and school staff. A comprehensive and effective campus policy must incorporate all Federal and State policies regarding health and safety emergencies, education, student privacy, civil rights, and law enforcement, as well as specific local community needs.

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## The 411 on 911

- "An educational agency or institution may disclose personally identifiable 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."

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### The 411 on 911

- Potential "appropriate parties" include not only people who can provide protection (such as law enforcement), but also threat assessment team members, people who may have information that may assist in providing or evaluating the need for protection (such as peers, mental health professionals, and prior schools attended), potential victims, and parents of the student or of potential victims

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### The 411 on 911

- "Disclosures for health or safety emergency reasons do not include disclosures to address emergencies for which the likelihood of occurrence is unknown, such as would be the case in emergency preparedness activities. Rather, disclosures made under the health or safety emergency provision must be 'in connection with an emergency,' which means it must be related to an actual, impending, or imminent emergency, such as a natural disaster, a terrorist attack, a campus shooting, or the outbreak of an epidemic disease."

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### The 411 on 911

- "Under this health or safety emergency provision, an educational agency or institution must determine whether to disclose personally identifiable information from education records on a case-by-case basis, taking into account the totality of the circumstances pertaining to a threat to the health or safety of the student or others."

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## The 411 on 911

– "This is a flexible standard under which the Department defers to school administrators so that they may bring appropriate resources to bear on the situation, provided that there is a rational basis for the educational agency's or institution's decisions about the nature of the emergency and the appropriate parties to whom the information should be disclosed."

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## And Don't Forget

- Personal knowledge
- Law enforcement unit records
- Disciplinary records
- Parental disclosures
- Judicial orders and subpoenas
- Threat assessment teams as school officials with legitimate educational interests

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U.S. Department of Education  
Safeguarding Student Privacy

### The use of data is vital to ensuring the best education for our children.

Parents should expect that their personal information is safe, properly collected and maintained and that it is used only for appropriate purposes and not improperly redisclosed. It is imperative to protect students' privacy to avoid discrimination, identity theft or other malicious and damaging criminal acts. All education data holders must act responsibly and be held accountable for safeguarding students' personally identifiable information – from practitioners of early learning to those developing systems across the education continuum (P-20) and from schools to their contractors. The need for articulated privacy protections and data security continues to grow as Statewide Longitudinal Data Systems (SLDS) are built and more education records are digitized and shared electronically. As States develop and refine their information management systems, it is critical that they ensure that student information continues to be protected and that students' personally identifiable information is disclosed only for authorized purposes and under the circumstances permitted by law. All P-20 stakeholders should be involved in the development of these statewide systems and protection policies.

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### State Longitudinal Database Systems, Then

- "Authorized representatives of [state and local educational authorities] may have access to education records in connection with an audit or evaluation of Federal or State supported education programs . . . ."
- Schools may disclose education records to "organizations conducting studies for, or on behalf of, educational agencies or institutions to:
  - (A) Develop, validate, or administer predictive tests;
  - (B) Administer student aid programs; or
  - (C) Improve instruction."

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### State Longitudinal Database Systems, Now

- "We generally have interpreted the term 'State and local educational authority' to refer to an SEA, a State postsecondary commission, BIE, or any other entity that is responsible for and authorized under local, State, or Federal law to supervise, plan, coordinate, advise, audit, or evaluate elementary, secondary, or postsecondary Federal- or State-supported education programs and services in the State."
- "State agencies other than an SEA [such as a State social services agency] could, depending on the individual circumstances, be considered to be an 'educational agency or institution' or a State educational authority under FERPA."

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### State Longitudinal Database Systems, Now

- "*Authorized representative* means any entity or individual designated by a State or local educational authority . . . to conduct – with respect to Federal- or State-supported education programs – any audit or evaluation . . . ."

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State Longitudinal Database Systems,  
Now

- "[I]t is entirely appropriate that we permit State educational authorities . . . to have the flexibility and discretion to determine who would best be able to represent them in connection with audits [and] evaluations . . . . Restricting their discretion to select only their own officers and employees or those under their 'direct control' is not required by the term's plain, dictionary meaning.

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State Longitudinal Database Systems,  
Now

- "The Department agrees . . . that the definition of the term 'authorized representative' in the final regulations will increase the ability of FERPA-permitted entities to conduct audits or evaluations of Federal- and State-funded education programs, including those that link PII from education records across the education and workforce sectors."

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State Longitudinal Database Systems,  
Now

- "[T]he Department is not legally authorized to create a national, student-level database, and the Department has no desire or intention to create a student record data system at the national level. . . . On the other hand, we do not agree with the suggestion that Congress intended to prohibit States from developing their own SLDS or linking SLDS across State lines. The right to develop SLDS or link SLDS across State lines is reserved to the States."

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State Longitudinal Database Systems,  
Now

- "FERPA makes no distinctions based on State or international lines. . . . The disclosure of PII from education records is not restricted by geographic boundaries."

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State Longitudinal Database Systems,  
Now

- "The terms ['audit' and 'evaluation'] are not defined in FERPA, and the Department did not propose to define them . . . because we did not wish to define them in ways that would unnecessarily restrict the educational community."
- "[T]he authority for a FERPA-permitted entity to conduct an audit [or] evaluation . . . may be express or implied."

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State Longitudinal Database Systems,  
Now

- "*Education program* means any program that is principally engaged in the provision of education, including, but not limited to, early childhood education, elementary and secondary education, postsecondary education, special education, job training, career and technical education, and adult education, and any program that is administered by an educational agency or institution."

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State Longitudinal Database Systems,  
Now

- "[A]ny program administered by an educational agency or institution is considered to be an education program. We have made this change to ensure that, in addition to programs dedicated to improving academic outcomes, this definition includes programs, such as bullying prevention, cyber-security education, and substance abuse and violence prevention, when administered by an educational agency or institution."

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State Longitudinal Database Systems,  
Now

- "It is the Department's intent that the following types of programs, regardless of where or by whom they are administered, fall under the new definition of 'education program': The educational programs conducted by correctional and juvenile justice facilities or alternative long-term facilities such as hospitals, dropout prevention and recovery programs, afterschool programs dedicated to enhancing the academic achievement of its enrollees, schools for the hearing and visually impaired, college test tutoring services, and high school equivalency programs."

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State Longitudinal Database Systems,  
Now

- "[A] FERPA-permitted entity would be permitted to redisclose PII from education records under the studies exception . . . if: (1) The FERPA-permitted entity has the express or implied legal authority to have the study in question conducted, and (2) the educational agency or institution either agrees to the redisclosure, in which case the redisclosure would be 'for' the educational agency or institution, or the study is designed to improve instruction, in which case the redisclosure would be 'on behalf of' the educational agency or institution. Accordingly, a redisclosure may be 'for' or 'on behalf of' the original disclosing entity even if that entity objects to the redisclosure."

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State Longitudinal Database Systems,  
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- "To disclose PII from education records without consent to an authorized representative (other than an employee), the exception requires written agreements and the use of reasonable methods to ensure to the greatest extent practicable FERPA compliance by an authorized representative."

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State Longitudinal Database Systems,  
Now

- "While the Department agrees that it is vital that written agreements clearly set forth all parties' obligations with respect to PII from education records, the Department believes that it would be inappropriate to be more prescriptive than the specific safeguards and provisions we are including in these regulations. The Department believes that it is more appropriate to provide the parties to the agreements with the flexibility to draft written agreements that meet the specific needs of the circumstances surrounding the data disclosure."

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State Longitudinal Database Systems,  
Now

- "The Department believes that FERPA-permitted entities should be accorded substantial flexibility to determine the most appropriate reasonable methods for their particular circumstances. In other words, what constitutes a reasonable method for ensuring compliance is not a one-size-fits-all solution . . . . Nonetheless, while the Department is granting more flexibility to determine appropriate reasonable methods given the specific circumstances of the data disclosure, the Department will consider a FERPA-permitted entity disclosing PII from education records to its authorized representative without taking any reasonable methods to be in violation of FERPA . . . ."

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## State Longitudinal Database Systems, Now

- "The Department does not believe it is appropriate to regulate specific data security requirements under FERPA. The Department believes it is more appropriate to allow for flexibility based on individual circumstances."

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### The Family Educational Rights and Privacy Act Guidance for Reasonable Methods and Written Agreements

#### *What is the Family Educational Rights and Privacy Act?*

The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232g, is a Federal agency law administered by the Family Policy Compliance Office (FPCO) in Office of the U.S. Department of Education (Department or DE). FERPA and its implementing regulations in 34 CFR part 99 protect the privacy of students' education records and afford parents and eligible students (i.e., students who are 18 years of age or older or attend an institution of postsecondary education) certain rights to inspect and review education records, to seek to amend these records, and to consent to the disclosure of personally identifiable information from education records (PII from education records).

The general rule under FERPA is that PII from education records cannot be disclosed without written consent. However, FERPA includes several exceptions that permit the disclosure of PII from education records without consent. Two of these exceptions are discussed in this document – the studies exception and the audit or evaluation exception. The two exceptions contain specific, and slightly different, requirements, described more fully in the implementing regulations (34 CFR Part 99).

#### *What is the purpose of this document?*

The audience for this document includes schools, school districts (also referred to as local educational agencies (LEAs)), postsecondary institutions, and State educational authorities (such as State educational agencies (SEAs)) that may disclose PII from education records. Our intent is to provide these entities with information about requirements and best practices for data disclosures under the studies exception and the audit or evaluation exception.

#### *What is the Studies Exception? (see 20 U.S.C. §1232g(b)(2)(D) and 34 CFR 99.101(b))*

The studies exception allows for the disclosure of PII from education records without consent to organizations conducting studies for or on behalf of schools, school districts, or postsecondary institutions. Studies can be for the purpose of developing, validating, or administering predictive tests, assessing student and program, or improving instruction.

**Example:** An SEA may disclose PII from education records without consent to an organization for the purpose of conducting a study that compares program outcomes across school districts to further assess what programs provide the best instruction and then duplicate those results in other districts.

#### *What is the Audit or Evaluation Exception? (see 20 U.S.C. 1232g(b)(2)(C), (b)(3), and (b)(5) and 34 CFR 99.101(c) and 99.103)*

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## State Longitudinal Database Systems, Now

- Under either of these exceptions, "[a]n educational agency or institution may disclose personally identifiable information from an education record of a student without . . . consent"
- But States may require institutions to disclose information that FERPA permits them to disclose
- Stay tuned . . . .

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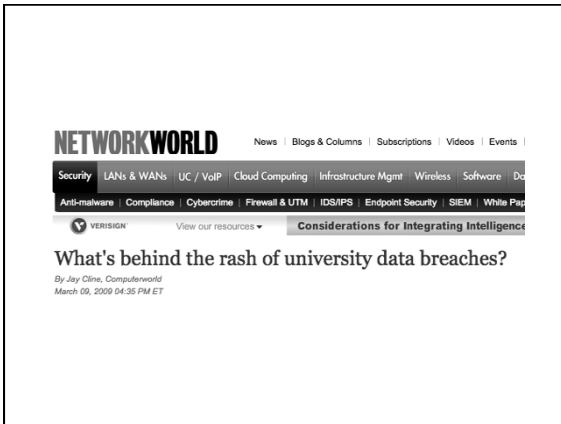
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## What is a Disclosure?

- "Disclosure means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record"

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## Safeguarding Requirements

- 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."

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### Hey, Let's Be Careful Out There

- "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."

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### It's Up To You

- "[A]n . . . institution may use any method, combination of methods, or technologies it determines to be reasonable, taking into consideration the size, complexity, and resources available to the institution; the context of the information; the type of information to be protected (such as social security numbers or directory information); and methods used by other institutions in similar circumstances."
- But it must use *some* method or methods

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### Nobody's Perfect

- "Due to the differences in size, complexity, and access to technology, we believe that . . . institutions should have the flexibility to decide the methods for identification and authentication of identity best suited to their own circumstances. . . . 'Effectiveness' is certainly one measure, but not necessarily a dispositive measure, of whether the methods used by an . . . institution are 'reasonable'. . . . [A]n . . . institution is not required to eliminate all risk of unauthorized disclosure of education records but to reduce that risk to a level commensurate with the likely threat and potential harm."

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## No Madness to the Method

- "[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."

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## Oops!

- "FERPA does not require an educational agency or institution to notify students that information from their education records was stolen or otherwise subject to an unauthorized release . . . . In any case, direct student notification may be advisable if the compromised data includes student SSNs and other identifying information that could lead to identity theft."

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