FERPA: Hot Topics and Updates

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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

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"
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 psychology tests, interest inventory results, health data, family background information, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns."

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"

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"?

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

So, What's an "Education Record"?

• "Maintain" is not defined!
  – "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?

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!
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

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."

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."
5.4 FERPA: The 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.

Security & Privacy

Google’s privacy policy protects your users:

- It’s your data, 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, ant-virus protection, or malware detection. Our systems scan content to make Apps work better for users, ensuring our own functionally 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 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 Apps for Education Agreement

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

1. Not Subject to your Google Apps Agreement. The Additional Services are not governed by the Google Apps Agreement, but are governed only by the applicable service-specific Google terms of service. The Additional Services with their respective terms of service are located at the following URL: http://www.google.com/support/additionalservices/terms/privacy.html for other ULP that Google Apps provides.

2. Customer is responsible for ensuring that all End Users comply with the applicable Google terms of service for each Additional Service. Where applicable, Customer agrees that it is solely responsible for the accuracy and completeness of information received from any End User, and that it has necessary mechanisms in place to verify the accuracy and completeness of the information.

3. Modifications. Google may modify these Additional Terms from time to time.
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?

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?

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."
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."

• 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."

• 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."
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?

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."
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.
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.”

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

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 misused or redistributed. It is imperative to protect student privacy to avoid discrimination, identify theft or other malicious and damaging criminal acts. All education agencies must act responsibly and be held accountable for safeguarding student personally identifiable information from practices of early learning to their developing systems across the education continuum. FIPPS and from schools to their contractors. The need for unclassified privacy protections and the need for more comprehensive information were both explicitly discussed in the Franklin report. Education records are protected and shared discretionately. As forests develop and refine their information management systems, it's critical that they ensure that student information continues to be protected and for student personally identifiable information is disclosed only for authorized purposes and under the circumstances permitted by law. All stakeholders should be involved in the development of these statewide systems and privacy policies.
• "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."

• "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."

• "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 . . . ."
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.

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."

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

"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."

"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."
State Longitudinal Database Systems, Now

• "Any 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."

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."

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’ of the original disclosing entity even if that entity objects to the redisclosure."
State Longitudinal Database Systems, Now

• "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."

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."

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 . . . ."
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."

• 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 . . .
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."

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."
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."

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

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."
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."

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."