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**Issues Arising From Application of New FERPA Regulations**

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These materials are designed to provide a general foundation for the discussion of the accompanying hypothetical case study. They concentrate on a review of pertinent features of the new FERPA regulations. They do not represent a comprehensive examination of FERPA or all the elements and implications associated with the application of the recently adopted regulations. In addressing specific issues arising at their university administrators should consult legal counsel.

**Introduction**

The Federal Educational Rights and Privacy Act (FERPA) 20 U.S.C. § 1232g, 34 C.F.R. Part 99 was adopted in 1974 without public hearings or committee reports as a floor amendment to spending legislation. Initially intended to protect the privacy of student educational records against the dangers of an emerging technology for collecting and storing personal data, its sponsor, Senator Buckley, also noted that its “fundamental reason” was his “firm belief in the basic rights and responsibilities – and the importance- of parents for the welfare and development of their children.”<sup>1</sup> He also suggested that “elitist and paternalistic attitudes reflect the widening efforts of some, both in and out of Government, to diminish the rights and responsibilities of parents for the upbringing of their children, and to transfer such rights and function to the State.”<sup>2</sup>

Supreme Court justices have referred to FERPA’s key language as “broad and nonspecific” and terms such as “educational records” as leaving “schools uncertain as to just when they can, or cannot, reveal various kinds of information.”<sup>3</sup> Justice Scalia has referred to it as “incurably confusing.”<sup>4</sup> Moreover, in the wake of the Virginia Tech tragedy “the panel’s review of information privacy laws governing mental health, law enforcement, and educational records and information revealed widespread lack of understanding, conflicting practice, and laws that were poorly designed to accomplish their goals.”<sup>5</sup>

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<sup>1</sup> 121 CONG. REC. 13,991 (1975).

<sup>2</sup> 120 CONG. REC. 14,580 (1974). See also Stephanie Humphries, *Institutes of Higher Education, Safety Swords, and Privacy Shields: Reconciling FERPA and the Common Law* 35 JOURNAL OF COLLEGE AND UNIV. L. 15 (2008) for a particularly elucidating article on the relationship between FERPA’s privacy shield and IHE’s expanding common law duty to share information in order to foresee and assist at risk students.

<sup>3</sup> *Gonzaga Univ. v. Doe*, 536 U.S. 273, 292 (2002) (Breyer, J. & Souter, J., concurring).

<sup>4</sup> *Owasso Indep. Sch. Dist. V. Falvo*, 534 U.S. 426, 437 (2002) (Scalia, J., concurring).

<sup>5</sup> OFFICE OF THE GOVERNOR OF THE COMMONWEALTH OF VIRGINIA, MASS SHOOTINGS AT VIRGINIA TECH APRIL 16, 2007: REPORT OF THE REVIEW PANEL 63 (2007)

Responding to these criticisms the Department of Education announced new regulations, effective January 8, 2009, in an effort “to clarify permissible disclosures...and conditions that apply to disclosures in health and safety emergencies,” and revise definitions of attendance, disclosure, education records, personally identifiable information, and other key terms.”<sup>6</sup>

In general students have the right to control/consent to disclosure, review, and seek amendment to their educational records. In this regard FERPA defines and explains certain standards related to the right of student control. These standards explain the meaning, scope, and coverage of:

- Educational Records
- Personally Identifiable Information (PII)
- Disclosure Requirements
- Disclosure Exceptions
- Right of Inspection, Review, and Amendment

### **Educational Records**

Educational records are not restricted to academic records or the information in official student files. An educational record consists of any personally identifiable information (PII) created or maintained by a school, its employees, or a person acting for the school. 34 C.F.R. § 99.3 lists information that includes the names and addresses of the student or family members, social security numbers, personal characteristics, student number, indirect identifiers such as a student’s place of birth, date of birth, or mother’s maiden name. It also includes papers, exams, class schedules, disciplinary records, photographs, disability accommodation records, e-mail messages, and records publicly available elsewhere, even that which the student has publically disclosed. The new regulation removed the “easily traceable” standard from personally identifiable information. The old regulation included PII as “other information” which was “easily traceable.” The new regulation clarifies this standard by including “other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty.”<sup>7</sup> Hence, a school may not release penalties imposed on a student for cheating on a test where the local media has published identifiable information about the only student who received the penalty. Moreover, witness statements can be reviewed by student or parents if directly related to the student or if the information cannot be segregated and redacted without destroying its meaning.<sup>8</sup> However, the new regulations allow class papers to be exchanged by students for legitimate pedagogical purposes, such as grades on peer-graded papers, before they are collected and recorded by the instructor, consistent with the Supreme Court’s opinion in *Falvo*.<sup>9</sup>

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<sup>6</sup> 73 Fed. Reg. 74806 (December 9, 2008).

<sup>7</sup> 34 C.F.R. 99.3 (f).

<sup>8</sup> 73 Fed. Reg.74833 (December 9, 2008).

<sup>9</sup> *Owasso Independent School Dist. No. I-011 v. Falvo*, 534 U.S. 426 (2002).

## **Directory Information**

Directory information may be disclosed without the consent of the student. Such information is “that [which] would not generally be considered harmful or an invasion of privacy if disclosed” and generally includes student’s name, address, telephone number or e-mail address, dates of attendance, major, degrees and awards, and participation in officially recognized activities or sports. The University should define and identify directory information in its bulletin, student handbook, or other relevant source. Students or parents may choose to “opt out” of directory information disclosure, usually by filing a formal request to block such information. The new regulations clarify a longstanding interpretation that requires institutions to continue to honor such “blocks” until the parent or eligible student rescinds it. Directory information may still be disclosed under a legal exception without the student’s consent (i.e. health and safety or court authorized subpoena). Moreover, an IHE is not required to disclose directory information.

## **Disclosure to Parents**

An eligible student 18 years or older may generally consent to the release of educational records to his parents or other family members.<sup>10</sup> FERPA also provides a statutory exception that permits disclosure if the student is claimed as a dependent for federal income tax purposes. Institutions can determine that a student is a dependent by asking for a redacted federal income tax return. Other statutory exceptions authorizing disclosure include: the health or safety emergency provisions of § 99.31 (a)(10) & 99.36; commission of a use and possession of alcohol or controlled substance offense under § 99.31 (a)(15); directory information authorized by § 99.31 (a)(11); or disclosure in compliance with a court order or lawfully issued subpoena in § 99.31 (a)(9). Moreover, consistent with the Campus Sex Crimes Act (CSCPA) revisions to the regulations allow disclosure, without consent, of any information concerning registered sex offenders which has been provided to an educational agency or institution under the Violent Crime Control and Law Enforcement Act 42 U.S.C. 14071. In fact, “participating institutions are required under section 485 (f)(1) of the Higher Education Act of 1965, as amended, 20 U.S.C. 1092 (f)(1), to advise the campus community where it may obtain law enforcement agency information provided by the State under 42 U.S.C. 14071 (j) concerning registered sex offenders.”<sup>11</sup>

Parents often request witness statements in disciplinary hearings related to their student. Records related to a student and maintained by the institution may be disclosed if the institution has a reasonable belief that the requester knows the identity of the student to whom the record relates. The common practice has been to redact references to personally identifiable information of other students. New section 99.3 (g) defining PPI removes the requirement that the requestor have “direct personal knowledge” of the identity of the student to whom a record relates. The revised standard provides in paragraph (g) that PPI means information requested by a person who the institution “reasonably believes” knows the identity of the student to whom the record relates.<sup>12</sup> Education records are defined in FERPA as records “directly related” to the

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<sup>10</sup> See model forms developed by the Department’s Family Policy Compliance Office: <http://www.ed.gov/policy/gen/guid/fpco/ferpa/safeschools/>.

<sup>11</sup> 73 Fed. Reg. 74820 (December 9, 2008).

<sup>12</sup> *Id.* at 74833.

student. “Under this definition, a parent (or eligible student) has a right to inspect and review any witness statement that is directly related to the student, even if the statement contains information that is directly related to another student, if the information cannot be segregated and redacted without destroying its meaning.”<sup>13</sup> This new standard provides greater flexibility for the institution to evaluate such requests according to its “reasonable belief” about the requester’s knowledge. The discussion of the new standard reveals a practical application of this standard in a pertinent example:

*For example, parents of both John and Michael would have a right to inspect and review the following information in a witness statement maintained by their school district because it is directly related to both students: “John grabbed Michael’s backpack and hit him over the head with it.” Further, in this example, before allowing Michael’s parents to inspect and review the statement, the district must also redact any information about John (or any other student) that is not directly related to Michael, such as: “John also punched Steven in the stomach and took his gloves.” Since Michael’s parents likely know from their son about other students involved in the altercation, under paragraph (g) the district could not release any part of this sentence to Michael’s parents. We note also that the sanction imposed on a student for misconduct is not generally considered directly related to another student, even the student who was injured or victimized by the disciplined student’s conduct, except if a perpetrator has been order to stay away from a victim<sup>14</sup>.*

### **Crimes of Violence or Non-forcible Sex Offense Exception**

“In a separate (and again independent) exception, FERPA further permits institutions to disclose to anyone the final results of a disciplinary proceeding conducted against a student who is an alleged perpetrator of a crime of violence or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation or the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution’s own rules or policies with respect to such crime or offense. Yet another exception permits institutions to disclose the final results of such a proceeding to the victim *regardless* of whether the alleged perpetrator was found to be in violation of the institution’s rules or policies. For purposes of these two exceptions, “final results” is limited to the name of the student who is an alleged perpetrator of a crime of violence, the violation found to have been committed, and any sanction imposed against the student by the institution.”<sup>15</sup>

### **Internal Disclosure to Campus Officials**

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<sup>13</sup> *Id.* at 74833.

<sup>14</sup> *Id.* Note: the Cleary Act may require disclosure to accuser and accused of the outcome of any campus disciplinary proceeding brought alleging a sexual offense.

<sup>15</sup> Nancy E. Tribbensee & Steven McDonald, *FERPA and Campus Safety*, 5 NACUA NOTES Vol. 5 No. 4 (August 6, 2007).

School officials may share educational records with those who have “legitimate educational interests” in the information. Institutions may broadly define who is a “school official” and the nature of a “legitimate educational interest.” Every faculty or administrator does not have a right to know. FPCO has provided the following model definitions of these terms:

*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 it agent to provide a service in 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.<sup>16</sup>*

A school official may even include volunteers if they have a legitimate educational interest in the information. Many institutions outsource record keeping to perform institutional services. Under new clarified rules a contractor, consultant, volunteer, or other party may be considered a school official provided that the party performs an institutional service for which the institution would otherwise use employees, is under the institution’s direct control, is subject to PII redisclosure requirements, and uses “reasonable measures to ensure that school officials obtain access to only those educational records in which they have educational interests.<sup>17</sup> At the discretion of a school, such “officials” may include bus drivers, school nurses, practicum and fieldwork students, unpaid interns, and volunteers as long as there is compliance with these requirements. Schools need not record disclosures to these “outside parties” as long as it complies with the notification requirements in § 99.7 (a)(3)(iii) by specifying its policy regarding such disclosure to parents and students. FPCO has developed model notifications on its web site.<sup>18</sup> The Department advises that schools “outsourcing information technology services, such as web-based and e-mail services, should make clear in their service agreements or contracts that the outside party may not use or allow access to personally identifiable information from education records,” except in accord with the institution’s policies.<sup>19</sup>

## **Campus Law Enforcement Records**

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<sup>16</sup> Family Policy Compliance Office. Model Notification of Rights under FERPA for Postsecondary Institutions: <http://www.ed.gov/policy/gen/guid/fpco/ferpa/ps-officials.html>

<sup>17</sup> See § 99.31 (a)(i)(B) & (ii).

<sup>18</sup> See <http://www.ed.gov/policy/gen/guid/fpco/ferpa/ps-officials.html> and <http://www.ed.gov/policy/gen/guid/fpco/ferpa/lea-officials.html>

<sup>19</sup> 73 Fed. Reg. 74816 (December 9, 2007).

Campus law enforcement records or investigative reports created by the institution's campus police are excluded from the definition of education records under § 99.3 and not subject to FERPA requirements. As such they may be shared with outside parties, including outside police.<sup>20</sup> However, if as law enforcement official obtains educational records from another campus unit, they must protect their privacy, subject to consent or statutory exceptions. "For [this] reason, it is advisable that officials of a law enforcement unit maintain education records separately from law enforcement records."<sup>21</sup>

### **Personal Knowledge of Campus Employees**

Personal knowledge or observations of student conduct on campus are not prohibited from disclosure to outside parties unless they become part of the educational record or state privacy laws prohibit such disclosures. If an employee describes the observation in a way that it becomes part of a student's educational record, the record may not be disclosed (barring an exception or consent), although the employee may be permitted to disclose the observation independently of the record. For example, an employee who testifies in a campus disciplinary hearing may not disclose the record of her testimony. It is advisable for employees to restrict disclosures to trained professionals than risk broader disclosures that may implicate privacy laws.

### **Health or Safety Emergency**

Educational agencies or institutions are permitted to disclose personally identifiable information from student's educational records without consent, under § 99.31 (a)(10) in connection with a health or safety emergency. A new standard reflected in the FERPA recordkeeping requirements of § 99.32 (a)(5) requires the institution to record "the articulable and significant threat to the health or safety of a student or other individuals that formed the basis for the disclosure; and the parties to whom the agency or institution disclosed the information." Moreover, section 99.36 (c) eliminates the previous requirement that paragraphs (a) and (b) be "strictly construed." It provides instead that an institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals if there is an "articulable and significant threat" to the student or others. The Department notes in its commentary that it "will not substitute its judgment for that of the agency or institution if, based on the information available at the time of the determination there is a rational basis for the agency's or institution's determination that a health or safety emergency exists and that the disclosure was made to appropriate parties."<sup>22</sup> The substitution of a "rational basis" standard (based upon an assessment of the "totality of the circumstances" available at the time) for the former "strict construction" standard provides more flexibility for school officials to act quickly and decisively in emergency situations without being second-guessed at a later point. Still, officials must be able to identify the nature of the threat and scope of the disclosure under § 99.36 when it makes and records the disclosure. The Department employs standard dictionary references for the terms "articulable" and "significant." The phrase simply means that if an official can explain, based on available information, why she believes that the student poses a

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<sup>20</sup> See *Balancing Student Privacy and School Safety: A Guide to the Family rights and Privacy Act for Elementary and Secondary Schools*.

<sup>21</sup> 73 Fed. Reg. 74815 (December 6, 2007).

<sup>22</sup> 73 Fed. Reg. 74837 (December 9, 2008).

noticeably or measurably large threat to any person, such as substantial bodily harm, then she can disclose educational records to any person whose knowledge from those records will assist in protecting people from the threat. It is worthy of note that the Department acknowledged that educational institutions may need assistance in determining when an emergency exists for purposes of complying with FERPA. It “encourage[d] schools to implement a threat assessment team that utilizes the expertise of representatives from law enforcement agencies in the community. Schools can respond to student behavior that raises concerns about the mental health and safety of students and others that is chronic or escalating by using a threat assessment team, and then make other disclosures as appropriate, when an “articuable and significant” threat exists.”<sup>23</sup>

### **Educational Research - Studies Exception**

FERPA § 99.31 (a)(6)(ii)(A) has been amended to provide that research studies must be conducted in a manner that does not permit personal identification of parents or students by anyone other than representatives of the organization that have legitimate interest in the information. Section 99.31 (a)(6)(ii)(C) has been amended to require “that the written agreement with the research entity specify the purpose, scope, and duration of the study and the organization to be disclosed; require the organization to use PPI from educational records only to meet the purpose or purposes of the study as stated in the written agreement; limit any disclosures of information to individuals in the organization conducting the study who have a legitimate interest in the information; and require the organization to destroy or return to the educational agency all PPI when the information is no longer needed for the study, and specify the time period during which the organization must either destroy or return the information to the educational agency or institution.”<sup>24</sup>

### **Inspection, Review, and Amendment**

With the exception of parental financial records, recommendation letters (waived), and certain treatment records, the college student possesses a right to inspect and review their own educational records within 45 days.<sup>25</sup> The IHE must also provide reasonable explanations and interpretations of records, if requested.<sup>26</sup> Moreover, students are entitled to amendments that correct any inaccurate or misleading information in their records.<sup>27</sup> If the IHE denies a request for amendment, it must notify the student and advise the student of his/her right to a hearing. The hearing must provide the student with a “full and fair opportunity” to present his/her case within a reasonable period of time after the request and the person conducting the hearing must not have a direct interest in the outcome.<sup>28</sup> Courts have interpreted this provision as intended to address “scrivener’s errors.” It is not intended as a forum for review of substantive claims challenging institutional decisions, such as grades or disciplinary actions.<sup>29</sup>

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<sup>23</sup> See Department’s Web site: <http://www.ed.gov/admins/lead/safety/edpicks.jhtml?src=1n>.

<sup>24</sup> 73 Fed. Reg. 237 74828 (December 9, 2008).

<sup>25</sup> 34 C.F.R. sec. 99.10(a).

<sup>26</sup> 34 C.F.R. sec. 99.10(b) & (c).

<sup>27</sup> 34 C.F.R. sec. 99.20(a).

<sup>28</sup> 34 C.F.R. sec.99.22.

<sup>29</sup> See *Adatsi v. Mathur*, 934 F.2d 910 (7<sup>th</sup> Cir. 1991); *Tarka v. Cunningham*, 741 F. Supp. 1281 (W.D. Tex), aff’d, 917 F.2d 890 (5<sup>th</sup> Cir. 1990).

## **Medical Treatment Records**

The Virginia Tech Panel recommended that Congress amend FERPA to explain how federal privacy laws apply to student medical records. One commenter on the recent FERPA amendments noted that they did not clarify the issue of sharing of student treatment records between on-campus and off-campus health care providers. The Department chose not to amend the regulations to clarify the relationship between medical privacy under HIPAA and FERPA. Instead, it referred to guidance issued by the Department of Education and Health and Human Resources in a joint report regarding the application of HIPAA and FERPA to student medical records.<sup>30</sup> Although “treatment records” are excluded from the definition of “education records” under FERPA, they may be subject to FERPA disclosure requirements if they are used for any purpose other than the student’s treatment. It appears that the liberalized disclosure features of the revised “health and safety emergency” exception are perceived by the Department as providing sufficient latitude to respond to school emergencies. Educators should consult the joint report for more specific guidance on situations giving rise to disclosure to parties inside and outside the institution. Although treatment records are not subject to FERPA, the definition of such records in sec. 99.3 “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.”<sup>31</sup> A university student health service usually must comply with FERPA before disclosing such records.

## **Recordkeeping Re-disclosure Requirements**

Educational institutions are required under FERPA § 99.31(a)(2) to record its disclosures of PPI from educational records even when it discloses information to another educational agency or institution. An exception exists in the case of a parent or eligible student who would generally know about the disclosure under § 99.32 (d). Although the Department did not expand the redisclosure authority of a local, state, or federal agencies or the obligation of IHE’s to record each request for access to or disclosure of PPI, it did revise or create new recordkeeping requirements. This effort of § 99.32 (b)(2)(ii) eases the recordation burden on educational reports and studies by allowing the record to be maintained by a student’s class, school, or other appropriate grouping rather than by the student’s name. New § 99.32(b)(2) provides that educational agencies maintain a record of disclosure and provide a copy of the record of further disclosures to a requesting educational institution within a reasonable period of time not to exceed 30 days. Revised § 99.32 (a)(1) requires educational institutions to list in each student’s record of disclosures the names of the local, state, or federal officials or agencies that may make further disclosures. New § 99.32(a)(4) also requires an educational institution to obtain a copy of the record of further disclosures by local, state, or federal officials or agencies and make it available in response to a parent’s or student’s request to review such disclosures. These

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<sup>30</sup> See U.S. Department of Health and Human Resources & U.S. Department of Education, Joint Guidance on the Application of the *Family Educational Rights and Privacy Act (FERPA)* and the *Health Insurance Portability and Accountability Act of 1996 (HIPAA)* to Student Health Records (November 2008): <http://www.ed.gov/policy/gen/guid/fpco/index.html>.

<sup>31</sup> Steven J. McDonald, *The Fundamentals of Fundamental FERPA*. <http://www.nacua.org/meetings/VirtualSeminars/January2009/resources.html>.



revisions are intended to balance the need of parents and students to know and access further disclosures without imposing additional recordkeeping burdens on governmental agencies.

### **Enforcement**

In *Gonzaga Univ. v. Doe*, 536 U.S. 273, 292 (2002) the Supreme Court ruled that FERPA conferred no private right of action against a university under 42 U.S.C. § 1983. FERPA lacks a remedial provision and the student's options are limited. It is designed to address policies and practices of unauthorized disclosure rather than single events. FPCO has never withdrawn federal funds based upon FERPA violations. Before taking enforcement action FPCO must determine that the institution is failing to substantially comply with a FERPA requirement and provide it with a reasonable time to comply voluntarily.<sup>32</sup> The Secretary must find that an educational agency or institution has a policy or practice in violation of FERPA requirements before taking actions to terminate, withhold, or recover federal funds for violations. Short of funding termination, however, the Secretary may take enforcement actions such as withholding program funds, issuing a complaint to compel compliance through a cease-and-desist order, terminating eligibility to receive funding under any applicable program, entering into a compliance agreement, or seeking an injunction. FERPA should not constitute an obstacle to sharing of information when campus officials believe that a significant threat exists to campus safety.

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<sup>32</sup> 34 C.F.R. sec. 99.66(c)