

THE FUNDAMENTALS OF FUNDAMENTAL FERPA

Steven J. McDonald
General Counsel
Rhode Island School of Design

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"

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"

So, What's an "Education Record"?

- "'Attendance' includes, but is not limited to . . . [a]ttendance in person or by paper correspondence, videoconference, satellite, Internet, or other electronic information and telecommunications technologies for students who are not physically present in the classroom"
- "We do not agree that the definition of *attendance* should be limited to receipt of instruction leading to a diploma or certificate, because this would improperly exclude many instructional formats."

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
- But "[r]ecords that teachers and other school officials maintain on students that use only initials, nicknames, or personal descriptions to identify the student are education records under FERPA because they are directly related to the student"

So, What's an "Education Record"?

- "'Personally identifiable information' includes, but is not limited to"
 - The name of the student or of the student's parent or other family member
 - The address of the student or student's family
 - Personal identifiers such as SSNs, student numbers, or biometric records
 - Other indirect identifiers such as date or place of birth or mother's maiden name

So, What's an "Education Record"?

- "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"
- "Information requested by a person who the educational . . . institution reasonably believes knows the identity of the student to whom the education record relates"

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?

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?
- Directly related?
 - Student 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 accounts
 - Messages residing in faculty and staff accounts

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
- "Alumni" records
 - But not if they "relate back"
- Grades on peer-graded papers
 - until collected and recorded
- "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)

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:

- Of "directory information"
 - Can include name; address; e-mail address; telephone number; photograph; date and place of birth; major; grade level; enrollment status (undergraduate or graduate, full- or part-time); dates of attendance; participation in officially recognized activities and sports; weight and height of athletes; degrees, honors, and awards received; most recent educational institution attended, and other information "that would not generally be considered harmful or an invasion of privacy if disclosed"

Except for Disclosures:

- *Cannot* include SSN
- Can include student ID number, user ID, or other unique personal identifier used by student to access or communicate in electronic systems, *but only if* the identifier cannot be used to gain access to education records without further authentication

Except for Disclosures:

- Must give students notice of your definition and an opportunity to opt out
- Need not give notice to alumni, but must continue to honor prior opt out
- Students cannot use opt out to prevent disclosure of name, institutional e-mail address, or other identifier in classes in which they are enrolled
- Cannot disclose or confirm directory information if an SSN or other non-directory information is used to confirm the student's identity
- "[A]n . . . institution is not required to make . . . directory information available to the general public just because the information is shared within the institution"

Recent Guidance

- "[P]ostsecondary institutions may disclose, without prior written consent, properly designated 'directory information' on those students who have not opted out of 'directory information' disclosures to representatives of the [Census] Bureau. That is, an RA or other school official may provide census takers with the names and campus addresses of students (who have not opted out), assuming that the institution has a 'directory information' policy and has designated names and addresses as 'directory information' items.

Recent Guidance

- "If the student does not complete the census form and the Bureau representatives request that a school official . . . fill out the census form in the student's absence, the school official may only disclose, without prior written consent, properly designated 'directory information' to the census takers."

Recent Guidance

- "The census form also asks for information about the student's sex, ethnicity and race. However, school officials may not disclose this information, without prior written consent, to census takers because these items of information may not be designated as 'directory information.'"

Recent Guidance

- "As this Office has advised previously and as stated in a recent amendment to the FERPA regulations, SSNs may not be designated as 'directory information' and disclosed without consent. . . . Moreover, the institution may not utilize SSNs provided by the requester to locate the 'directory information' on the students."

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

Except for Disclosures:

- "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."

Except for Disclosures:

- "Legitimate educational interests" can include what is needed to do one's job
 - Institution, not individual, makes the determination
 - "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:

- An "institution that makes a disclosure solely on the basis that the individual is a school official violates FERPA if it does not also determine that the school official has a legitimate educational interest."
- "An educational . . . institution must use reasonable methods to ensure that school officials obtain access to only those education records in which they have legitimate educational interests. An educational . . . institution that does not use physical or technological access controls must ensure that its administrative policy for controlling access to education records is effective"

Except for Disclosures:

- To "officials of another . . . institution of postsecondary education where the student seeks or intends to enroll, or where the student is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer"
 - "[T]he regulations are intended to clarify that, after a student has already enrolled in a new school, the student's former school may disclose any records or information, including health records and information about disciplinary proceedings, that it could have disclosed when the student was seeking or intending to enroll in the new school."

Except for Disclosures:

- "These regulations apply to any school that a student previously attended, not just the school that the student attended most recently."
- "There is no specific authority in FERPA for an educational . . . institution . . . to disclose or redisclose personally identifiable information from education records to a student's former school without consent."
- Unless disclosure is initiated by the student, must either:
 - Make a "reasonable attempt to notify" the student, or
 - Describe your practice of disclosing such information in your annual notice

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
 - Does not apply to international students

Except for Disclosures:

- "Where a student is enrolled in both a high school and a postsecondary institution, the two schools may share education records without the consent of either the parents or the student If the student is under 18, the parents still retain the right under FERPA to inspect and review any education records maintained by the high school, including records that the college or university disclosed to the high school, even though the student is also attending the postsecondary institution."

Except for Disclosures:

- In connection with an "articulable and significant threat to the health or safety of a student or other individuals"
 - 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"

Except for Disclosures:

- 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

Except for Disclosures:

- "[T]he Department will not substitute its judgment for that of the . . . institution if, based on the information available at the time . . . there is a rational basis for the . . . institution's determination that a health or safety emergency exists and that the disclosure was made to appropriate parties."

Recent Guidance

- Serious communicable diseases that are epidemic in nature – yes
 - "The Department considers the declaration made by the HHS Secretary on October 1, 2009, that there is a public health emergency involving the H1N1 flu outbreak as serving as a rational basis for a school to determine that an emergency exists, so long as there is a *current outbreak of H1N1* in the particular school or school district. . . . However, before personally identifiable information regarding students may be disclosed without written consent, the school or school district would still need to determine that the recipient of such information needs the information to protect the health or safety of the student or other individuals."

Recent Guidance

- Serious infectious diseases – case-by-case
- Routine disclosure of immunization data to public health authorities – no
- 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:

- State longitudinal database systems?
 - "[T]here is no provision in FERPA that allows disclosure or redisclosure of education records, without consent, for the specific purpose of establishing and operating consolidated databases and data sharing systems"
 - "State educational authorities that operate State longitudinal data systems . . . are not 'school officials' under FERPA."

Except for Disclosures:

- To "[a]uthorized representatives of [State or local educational authorities] . . . in connection with an audit or evaluation of Federal or State supported education programs"
 - FERPA "does not . . . provide the underlying authority . . . to conduct the various activities" specified

Except for Disclosures:

- Recipients may "redisclose information received . . . under any of the exceptions . . . , including transferring education records to a student's new school . . . , sharing information among other State and local educational authorities and Federal officials for audit or evaluation purposes . . . , and using researchers to conduct evaluations and studies"
- Must be acting "on behalf of" the institutions from which information was received
- *More to come?*

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

Except for Disclosures:

- Also also N.B.: "An educational . . . institution must use reasonable methods to identify and authenticate the identity of parents, students, school officials, and any other parties to whom the . . . institution discloses personally identifiable information from education records"

Except for Disclosures:

- "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."

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"

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/gibsoncmplt.html>
- "[A] record management system that allows unauthorized individuals to have access to education records"

What is a "Disclosure"?

- "[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."

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."

What is a "Disclosure"?

- "[A]n . . . institution may print an ID number on a student's ID card whether or not the number is treated as directory information because under FERPA simply printing the ID number on a card, without more, is not a disclosure and, therefore, is not prohibited."
- "If the student ID number is not designated as directory information, then the . . . institution may not disclose the card, or require the student to disclose the card, except in accordance with one of the exceptions to the consent requirement, such as to school officials with legitimate educational interests."

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 locket" requests
 - e.g., degree verifications in response to student SSNs
- "Anonymized" data and information
 - e.g., redacted disciplinary reports for a specified or known student

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

Inspect and Review

- If record relates to more than one student, must redact portions relating to other students
- However, a student "has a right to inspect and review any [education record] that is directly related to the student, even if that statement contains information that is also directly related to another student, if the information cannot be segregated and redacted without destroying its meaning"

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

Enforcement

- FPCO may terminate an institution's education-related federal funding, or take "any [other] legally available enforcement action," if, *and only if*:
 - The institution violates FERPA, *and*
 - The violation represents a "policy or practice," *and*
 - "[C]ompliance cannot be secured by voluntary means" within a reasonable period of time