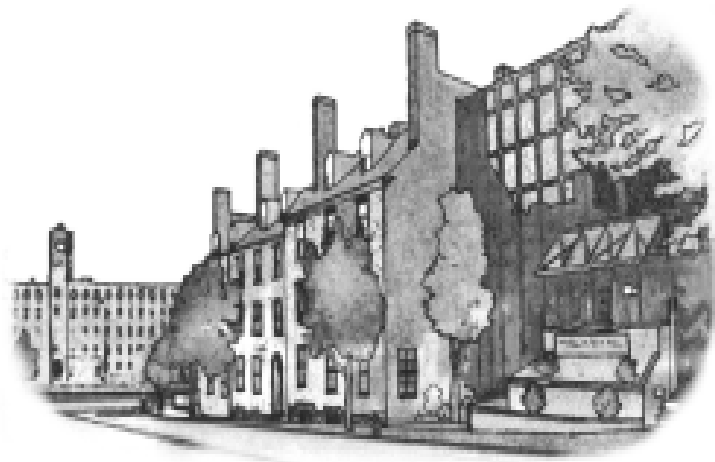


# Understanding FERPA

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### About the Author

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### A Word of Caution

No two cases are exactly alike. This material is designed to provide educators with a broad understanding of the law pertaining to certain aspects of FERPA. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

## I. OVERVIEW

The purpose of this material is to educate the educator with a working knowledge of the Family Education Rights and Privacy Act ["FERPA"]. The goal of this seminar is to equip educators with the tools necessary to ensure that they are able to comply with this federal law. The intent of this material is not to teach to the minimal legal requirements but also to encourage educators as to the best practices in the area of FERPA compliance.

## II. FERPA: What is it?

As implied by the title, FERPA addresses the **privacy** and **access** rights of parents and adult students in their educational records. Under FERPA, schools are required to protect the privacy rights of parents and adult students through the limitation of disclosure and to further the access rights through the opportunity to inspect, review and seek to amend student records. This material discusses the regulatory requirements pertaining to both the concept of protecting family privacy and preserving parental/adult student access.

## III. The Legislative History of FERPA

The Family Educational Rights and Privacy Act of 1974 ("FERPA"), § 513 of P.L. 93-380 (The Education Amendments of 1974), became law on August 21, 1974.<sup>1</sup> FERPA was enacted as a new § 438 of the General Education Provisions Act (GEPA) called "Protection of the Rights and Privacy of Parents and Students," and codified at 20 U.S.C. § 1232g. It was also commonly referred to as the "**Buckley Amendment**" after its principal sponsor, Senator James Buckley of New York. FERPA was offered as an amendment on the Senate floor and was not the subject of Committee consideration. Accordingly, traditional legislative history for FERPA as first enacted is unavailable.

Senators Buckley and Pell sponsored major FERPA amendments that were enacted on December 31, 1974, just four months later, and made retroactive to its effective date of November 19, 1974. These amendments were intended to address a number of ambiguities and concerns identified by the educational community, including parents, students, and institutions. On December 13, 1974, these sponsors introduced the major source of legislative history for the amendment, which is known as the "Joint Statement in Explanation of Buckley/Pell Amendment" ("Joint Statement"). See Volume 120 of the Congressional Record, pages 39862-39866.

Congress has amended FERPA a total of nine times in the nearly 28 years since its enactment, as follows:

P.L. 93-568, Dec. 31, 1974, effective Nov. 19, 1974 (Buckley/Pell Amendment)

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<sup>1</sup> See [www.ed.gov/policy/gen/guid/fpco/ferpa/leg-history.html](http://www.ed.gov/policy/gen/guid/fpco/ferpa/leg-history.html)

P.L. 96-46, Aug. 6, 1979 (Amendments to Education Amendments of 1978)  
P.L. 96-88, Oct. 17, 1979 (Establishment of Department of Education)  
P.L. 101-542, Nov. 8, 1990 (Campus Security Act)  
P.L. 102-325, July 23, 1992 (Higher Education Amendments of 1992)  
P.L. 103-382, Oct. 20, 1994 (Improving America's Schools Act)  
P.L. 105-244, Oct. 7, 1998 (Higher Education Amendments of 1998)  
P.L. 106-386, Oct. 28, 2000 (Campus Sex Crime Prevention Act)  
P.L. 107-56, Oct. 26, 2001 (USA PATRIOT Act of 2001)

The law known as FERPA can be found at 20 U.S.C. 1232g. The regulations adopted by the US DOE can be found at 34 CFR Part 99.

#### **IV. The Scope of FERPA**

FERPA is known as a “spending clause” statute enacted under the Constitutional authority of Congress to spend funds to provide for the general welfare. See U.S. Const. Art. I, Sec. 8. Simply put, recipients of federal funds are required to meet certain statutory requirements in order to receive the funds available under the applicable federal program. FERPA is an example of such legislation, imposing requirements on recipients of federal funds administered by the US Department of Education as a precondition to their receipt.

FERPA applies to any:

- State or **local educational agency** [“LEA”];
- Institution of higher education;
- Community college;
- School;
- Agency offering a preschool program; or
- Other educational institution.

School districts are considered “local educational agencies” and thus are subject to FERPA. FERPA does not apply to private and parochial schools that do not receive funding from the US Department of Education.

#### **V. Defining an “education record” under FERPA**

The intent of FERPA is to extend privacy and access rights to “education records.” Therefore, it is vital that the educator understand what is an education record under FERPA. The Department of Education has adopted regulations pertaining to FERPA, and we look to these regulations at 34 CFR Part 99 in order to answer this question.

34 CFR 99.3 contains the operational definitions of various terms under FERPA, including the term, “Education Records.” The term 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.

This definition is certainly broad and standing alone, creates a presumption that all student information is an education record. However, FERPA also defines certain categories of information out of the term. The following records are not considered education records:

Records kept in your sole possession, for your use only, that are used as a personal memory aide;

Your personnel file and school personnel records<sup>2</sup>

Records of an adult student or student enrolled in college pertaining to medical, psychiatric, psychological treatment and not remedial education or part of the educational program

Records containing information pertaining to someone who has already graduated.

Records created by a “law enforcement unit” which could be an individual, office, department, division or other component of a school or a school district, such as a school resource officer.

The 1994 amendments to the Improving America’s Schools Act added a specific clause with regard to student disciplinary records. This section states that nothing in FERPA prohibits an agency or institution from including in a student’s records appropriate information regarding disciplinary actions taken against the student for “conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community. . .” The same amendments provide that districts may disclose “that information to teachers and other school officials who have legitimate educational interests in the student’s behavior.”

## **VI. Rights of Parents and Adult Students**

FERPA enumerates a number of rights that Parents and adult students (students 18 years of age and older) have with regard to student records. This section discusses those rights and how they are actualized.

### **A. The right to inspect, review and access education records**

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<sup>2</sup> Unless you are a student employed by virtue of your status as student.

Simply put, parents have the right to inspect and review the education records of their children. When the data pertains to more than one child the parent has the right “to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material.” The privacy rights of other students are implicated in these circumstances, and the District is required to redact the names and other personally identifiable information about other students that may be included in the child’s education records. As a matter of best practice, student records should be generated in a manner which, as much as feasible, keep the records student specific.

The regulations require that when a parent makes a request to inspect and review his or her child’s education records the District must provide the parent with access within 45 days of the request. The best practice however, is not to delay disclosure. When a parent has made a request, the District should promptly allow access.

The right of access includes the right to request copies of education records. The District has a duty to provide copies to parents, but may charge a reasonable duplication fee for those copies.

**B. The right to challenge the content of education records**

A parent/adult student has the right to challenge the content of their education records

Upon receipt of a challenge, the District has a choice:

To agree to amend the record; or

To offer the student a hearing on the request if it decides not to amend the record in accord with the request.

If after hearing, the District still is of the mind not to permit amendment, the District is required to offer the parent the right to place a statement in their child’s record, which will be kept and disclosed with the record in question. A District that fails to offer a policy allowing parents a hearing when it refuses to amend a record is considered ineligible for federal funds.

There are certain circumstances under which a District need not consider a request under FERPA for amendment to a record:

When the amendment sought is to a grade or a disciplinary decision; or

When the parent seeks to change the opinions or reflections of a school official or other person reflected in an education record.

**C. The Right to Consent to the Disclosure of Education Records**

The parent/adult student retains the right to consent to the release/disclosure of education records. FERPA creates a general presumption that a school district may not release the education records of a student without **the prior written consent** to the disclosure. This general presumption is ameliorated by two concepts: the concept of **directory information** and the concept of certain **exceptions to the prior written consent rule**.

**Directory information** is defined as information that a district may release, after public notice, provided that the parent/adult student has not refused the release of the information. Directory information may include the student's:

- name;
- address;
- telephone listing;
- date and place of birth;
- major field of study;
- participation in officially recognized activities and sports;
- weight and height, if a member of an athletic team;
- dates of attendance;
- degrees and awards received;
- the most recent previous educational institution attended.

In order for a District to be free to release directory information without prior written consent, the District must provide public notice of the areas of information that it has designated as "directory information," and allow a reasonable time for parents to refuse to allow release of directory information without prior written consent.

The NCLB addresses the disclosure of directory information, such as student's names, addresses, and telephone numbers to military recruiters, requiring, with some exceptions, such as parental refusal, that districts disclose this information to military recruiters.

There are Ten (10) exceptions to the "prior written consent" rule. They are as follows:

**1. Other school officials**

Prior written consent is not required for disclosure of education records to teachers and other school officials who have a "legitimate educational interest" in reviewing the records. It is the school which makes the determination as to which educators have a "legitimate educational interest" in obtaining the records.

The NCLB requires that the district have a procedure in place to ensure that disciplinary records pertaining to a student's suspension or expulsion are transferred to any elementary or secondary school where the student is enrolled or intends to enroll.

**2. Officials of other schools or schools systems in which the student intends to enroll.**

A district may release education records to other schools or school systems in which the student intends to enroll upon the following conditions:

- The parent/adult student must be notified of the transfer;
- Receive a copy of the records, if desired; and
- Have an opportunity for a hearing to challenge the content of the record.

**3. Authorized representatives of the State Department of Education**

State and local education officials have access to student or other records which may be necessary in connection with the audit of their programs. For example, state auditors may request student records in order to audit a state supported program.

**4. Financial Aid Officials**

This exception permits appropriate officials in connection with a student's application for, or receipt of, financial aid to obtain education records, including a student's social security number.

**5. Persons subject to a Subpoena or Court Order**

FERPA allows education records to be released pursuant to a subpoena upon condition that parents and students are notified in advance of compliance with the subpoena. There is no such notification requirement for a federal grand jury subpoena, and when subpoenas are issued for a law enforcement purpose, notice to the parent is at the discretion of court or other issuing agency.

**6. Disclosure to State and local officials in connection with the state's juvenile justice system under specified conditions**

FERPA allows educators to share information verbally with organizations such as Child Protective Services agencies. For example, FERPA does not prohibit an educator from making a verbal report to the Division for Children, Youth and Family.

In addition, schools may receive and use information from law enforcement courts and other justice system components in order to provide services to students and to maintain a safe and effective learning environment. However, once the information is received and maintained by the school, it becomes subject to FERPA and the FERPA exceptions.

Educators are also permitted to make disclosure to state and local officials or authorities in compliance with a state statute that concerns the juvenile justice system and the system's ability to effectively serve, prior to adjudication the student whose records are being released. For example, when a district has been joined by the court in a juvenile system it may share information with the court as part of the joinder and evaluation process.

It is also important to remember that information garnered by a school resource officer is not considered an “education record,” under FERPA. If, for example, a school resource officer creates a file and places a report in it pertaining to a school based investigation, a school resource officer is entitled to share that information with a law enforcement unit or for that matter any other law enforcement unit.

#### **7. Organizations conducting studies for educational agencies**

Organizations conducting studies for, or on behalf of educational agencies for purpose of developing, validating or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and that such information will be destroyed once no longer needed.

#### **8. Accrediting organizations**

Organizations which carry out accrediting functions are exempt from the prior written disclosure requirement.

#### **9. Parents**

Parents of dependent students as defined in the IRS Code are exempt from the prior written consent requirement by virtue of their status as the child’s parent.

#### **10. Emergency Personnel, in an emergency**

Appropriate persons in connection with an emergency are entitled to obtain education records if the knowledge of the information is necessary to protect the health or safety of the student or other persons.

#### **11. The Patriot Act of 2001**

The USA Patriot Act of 2001 added a new subsection that allows the US Attorney General to apply for an ex parte order requiring an educational agency to allow the Attorney General to collect and use education records relevant to investigations and prosecutions of specified crimes or acts of terrorism, whether domestic or international.

### **VII. Record keeping requirements under FERPA**

There is a mandated record keeping requirement with regard to FERPA. The school district is required to keep a log with the education records of each student which indicates:

- all individuals, agencies or organizations that have requested or obtained access to a student’s education records;

- specifically the legitimate interest that each of the above has in obtaining the information.

School officials with legitimate educational interests need not “sign off” on the access log. The record of access is available only to parents and school officials responsible for custody of the records.

### **VIII. Penalties for Redisclosure by Third Parties**

Personally identifiable information from covered records can only be transferred to a third party on condition that they will not permit any other person access to the records without the parent’s written consent. The 1994 amendments provide that if the third party permits access to education records without parent consent, (except in response to a subpoena) then the district must ban the third party from access to education records for not less than five (5) years.

### **IX. Notification of Rights**

The District is required to “effectively inform” parents and adult students of their FERPA rights. This traditionally has been achieved through the use of annual notice. The best practice is to incorporate the FERPA Notice as part of the Student Handbook and secure the parent/adult student’s signature indicating receipt of the notice.

### **X. FERPA and HIPAA**

The Health Insurance Affordability and Accountability Act of 1996 protects protected health information (PHI) from disclosure. When HIPAA was first adopted questions arose as to whether or not HIPAA applied to school districts. The Family Policy Compliance Office has determined that health records are “education records” subject to FERPA, and not HIPAA. For more information on the subject of HIPAA see “HIPAA Compliance for Special Educators,” at [www.wadleighlaw.com/articles/Articles/articles\\_and\\_other\\_publications.htm](http://www.wadleighlaw.com/articles/Articles/articles_and_other_publications.htm).

### **XI. Electronic Consent**

The Secretary of the Department of Education has amended 34 CFR Part 99.30 to add a new paragraph (d) which reads as follows:

“Signed and dated written consent’ under this part may include a record and signature in electronic form that - (i) identifies and authenticates a particular person as the source of the electronic consent; and (ii) indicates such person’s approval of the information contained in the electronic consent.”

## **XII. The Protection of Pupil Rights Amendment**

The Protection of Pupil Rights Amendment, found at 20 USC §1232(h) and regulated at 34 CFR Part 98 governs the administration to students of a survey, analysis or evaluation that concerns one or more of the following eight (8) protected areas:

1. Political affiliations or beliefs of the student or the student's parents;
2. Mental or psychological problems of the student or the student's family;
3. Sex behavior or attitude;
4. Illegal, anti-social, self-incriminating, or demeaning behavior;
5. Critical appraisals of other individuals with whom respondents have close family relationships;
6. Legally recognized, privileged or analogous relationships, such as those of lawyers, physicians and ministers;
7. Religious practices, affiliations, or beliefs of the student or student's parents; or
8. Income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program).

The rights under PPRA transfer from the parents to a student who is 18 years old or an emancipated minor under state law.

School districts must provide parents and students effective notice of their rights under PPRA. In addition, the No Child Left Behind Amendments to the PPRA require that districts provide for reasonable notice of the adoption or continued use of policies pertaining to surveys. The district must provide this notice at least annually at the beginning of the school year and after any substantive changes to its student survey policy. The general notification must indicate that PPRA applies to surveys that contain questions about one or more of the eight (8) protected areas listed above. The notification must explain that for surveys that contain questions about one or more of the eight (8) protected areas and that are funded in whole or in part by US Department of Education funds, the district must obtain prior written consent from parents before students are required to submit to the survey. Notification must also indicate that, as for surveys that contain questions from one or more of the eight (8) protected areas, but are not funded by US DOE funds, that the district will notify the parent at least annually at the beginning of the school year of the specific or approximate dates during the school year when it will administer the survey(s) and provide an opportunity for the parent to opt his/her child out of participating.

School districts are required to develop and adopt policies in consultation with parents regarding the following:

1. The right of parents to inspect, upon request, a survey created by a third party before the survey is administered or distributed by a school to parents.
2. Arrangements to protect student privacy that are provided by the district in the event of the administration of a survey to students containing one or more of the eight (8) protected items of information noted above (including the right of parents to inspect, upon request, a survey that contains one or more of the eight (8) protected information items).
3. The right of parents to inspect, upon request, any instructional material used as part of the educational curriculum for students, and the procedure for granting a request by a parent for such access.
4. The administration of physical examinations or screenings that the school may administer to students.
5. The collection, disclosure, or use of personal information (including items such as a student's or parent's first and last name, address, telephone number or social security number) collected from students for the purpose of marketing or selling, or otherwise providing the information to others for that purpose, including the district's arrangements for protecting student privacy in the event of collection, disclosure use.
6. The right of parents to inspect, upon request, any instrument used in the collection of personal information as described above in paragraph 5 before the instrument is administered or distributed to a student and the district's procedure for granting the parental request.

In addition to the general notification, a district must directly notify parents through U.S. mail or e-mail of students who are scheduled to participate in the activities or surveys listed below and furthermore must offer an opportunity for parents to opt their child out of participating in the following activities:

1. Activities involving the collection, disclosure, or use of personal information collected from students for the purpose of marketing or for selling that information, or otherwise providing that information to others for that purpose.
2. Any non-emergency, invasive physical examination or screening that is:
  - a. required as a condition of attendance;
  - b. administered by the school and scheduled by the school in advance;and

- c. not necessary to protect the immediate health and safety of the student, or of other students.
3. The administration of any survey containing one or more of the eight (8) protected areas of information that is not funded in whole or in part by US Department of Education funds. In addition, the district must obtain active consent and may not use an opt out procedure if the survey is funded by US DOE funds.

A school district is not required to develop and adopt new policies if as of January 8, 2002 (the date of enactment of NCLB) it had policies covering the requirements set forth in this law. However, the district must provide annual notice of these policies to parents. Nothing in this law preempts the applicable provisions of state law that require parental notification. In addition, the law does not apply to any physical examination or screening that is permitted or required by state law including physical examinations or screenings permitted without parental notification.

The PPRA is administered by the Family Policy Compliance Office of the US Department of Education.

### **XIII. Pertinent Decisions and Rulings Pertaining to FERPA**

The Family Policy Compliance Office is the office primarily responsible for issuing opinions with regard to FERPA. These opinions provide guidance to the educator as to the interpretation of FERPA.

#### **A. A Parent's Due Process Rights Do Not Entitle Them to Access Records Regarding Other Children**

In Letter to Attorney for School District, 40 IDELR 99 (FPCO October 31, 2003), an attorney asked for an official opinion as to whether FERPA permits a school district to release information in education records related to one student to the parents of another student. An impartial due process hearing officer had ordered that the parents be provided with a "complete and accurate copy" of their son's disciplinary records which would include the names and other personally identifiable information of other students. The FPCO ruled that the IDEA did not trump FERPA and that the IDEA regulations did not give the parents a greater right of access to the education records belonging to other students simply because they were involved in a due process hearing.

#### **B. FERPA Compliance in Proposed Survey of Children with Disabilities**

In Lloyd-Jones, Letter to, 41 IDELR 67 (FPCO 2004), the Compliance Office found that there was no FERPA exception that would allow the State Department of Education to disclose students' personally identifiable information to the State's Health Services Department. The Office further noted that nothing in FERPA prohibited the State Department or districts and schools from disclosing information in the aggregate or in another non-personally identifiable form. However, before making the disclosure, the agency would need to remove the students' names, ID numbers and any personal characteristics that would make the child's identity "easily traceable."

### **C. The IDEA Also Protects Student Privacy**

In Douglas County School District, 41 IDELR 258 (SEA CO 2004) the hearing officer ruled that a Colorado school district violated the IDEA when a principal made comments about a student's cognitive and social/emotional level to parents of another student. The investigating officer refused to consider whether the disclosure denied the child FAPE since such an allegation should be resolved at due process.

It is important to note that the IDEA also contains non-disclosure provisions which are based on the similar provisions of FERPA. 34 CFR 300.571(a)(1) (the IDEA regulation) generally requires parental consent before personally identifiable information contained in their child's educational records may be disclosed to anyone other than school officials.

### **D. Untimely Disclosure of Records Could Expose a District to a Claim of Denial of FAPE**

In Council Rock School District, 41 IDELR 204 (SEA PA 2004), the hearing officer rejected a claim by the parents that the district's failure to provide a timely and complete set of educational records pertaining to their student amounted to a denial of FAPE. The Appeals Panel hearing the case concluded that, "Case laws overwhelming the procedural violations that are not prejudicial failed to establish denial of FAPE." The Panel acknowledged however that it was conceivable that a breach of FAPE could occur based solely on a records violation. The educator is best advised to diligently and timely disclose records to parents who request access.

### **E. OCR Does Not Have Jurisdiction Over Personal Privacy Claims**

In Jonesboro Consolidated Community School District No. 43, 41 IDELR 99 (OCR, Chicago (IL) 2003), OCR issued a ruling explaining that it had no authority to address an allegation that a special education teacher discussed a child's disability and testing information with the child's neighbor. OCR noted that the privacy claim is best addressed by FERPA and directed the parent to contact the Family Policy Compliance Office.

### **F. Peer Grading Does Not Constitute a FERPA Violation**

On February 19, 2002, the U.S. Supreme Court ruled in Owasso Independent School District v. Falvo, that peer grading does not violate FERPA. This practical decision by the U.S. Supreme Court acknowledged that FERPA should not be interpreted in a manner to frustrate legitimate teaching tools such as peer grading.