

Changes to Federal Student Records Privacy Law

Concerns about protecting the privacy of students' education records led to the passage in 1974 of the Family Educational Rights and Privacy Act (FERPA) by the U.S. Congress. In the ensuing 35 years, FERPA and its provisions have become a familiar part of the landscape of education at all levels (elementary, secondary, and post-secondary), and its key concepts - an "education record," "directory information," a student's "opt-out" rights, etc. have become well known. Not unexpectedly, as educational institutions have operated under FERPA and as the federal Family Policy Compliance Office (FPCO) in the Department of Education (the agency responsible for its enforcement) has overseen its implementation, new issues and questions have arisen. This has resulted in a number of advisory FPCO letters attempting to interpret and/or clarify the intent of FERPA provisions and even amendments to the governing regulations. The latter generally require educational institutions to adjust or revise their student records policies.

The University has incorporated regulation changes that became effective in early 2009 into its Student Records Policy. Many of these changes represent codifications of previous court rulings or FPCO positions, while some impose new requirements. One prominent area relates to disclosures of information in a health or safety emergency. Other changes involve additional situations in which an "unconsented" disclosure may be made, certain classroom issues, education record disclosures to other institutions and to outside service providers, the disclosure of "de-identified data," and some definitional changes.

Previously, a university was permitted to provide personally identifiable information from a student's education record in connection with an emergency affecting the health or safety of the student or other individuals. The regulations now make clear that this exception to the requirement of prior student consent will not be strictly construed if challenged. An institution may take into account the "totality of circumstances" in determining whether such an emergency exists. If the assessment shows an "articulable and significant threat," disclosure may be made to any party who may be able to help protect the student or others, and the FPCO will not second-guess the institution's judgment on this matter. Documentation about the basis for the "threat" determination and the party or parties to whom disclosure is made should be maintained. It is clear that a parent may, in an appropriate situation, be provided education record information about a son or daughter whose conduct poses a threat to himself/herself under this broadened exception.

Several important definitions have been modified. A "student" now includes any person in attendance at the University who is receiving instruction by correspondence, video conference, satellite, the Internet or other telecommunications or electronic information technology, as well as in person. This means that individuals enrolled only in courses offered online are considered students and are entitled to FERPA protection. An individual in the University's Cooperative Education program is also considered a student during both the "work" and "study" portions of the program. Protected "personally identifiable information" has been expanded to include biometric information and "indirect identifiers," which would allow a reasonable person in the campus community to identify the student. Examples of an indirect identifier might include the student's date and place of birth, his/her mother's maiden name, etc.

“Directory information” is the term used to describe general categories of information about a student that an institution may identify in its policy as subject to disclosure without a student’s consent. The new regulations reiterate the long-held FPCO position that a student’s social security number may not be classified by the institution as directory information. The regulations do, however, state that a student’s identification (ID) number, “user ID,” or other personal identifier used to access records or communicate electronically may be designated as directory information if certain conditions exist. These conditions are that the identifier function as a name and that it cannot be used, without another authentication factor (such as a secret password or PIN), to gain access to education records. An officially assigned student e-mail address is considered to be a personal identifier in this context, and it has been designated as a type of directory information at this campus.

In this connection, the revised regulations deal with several “classroom” issues. FERPA provides that a student may choose not to allow an institution to disclose his/her directory information by exercising “opt out” rights. However, such a student may not prevent a university from identifying him by name or disclosing an institutional e-mail address in the classroom. The revised regulations make it clear that students who have opted out are not guaranteed anonymity in class and may not by that choice impede normal classroom interactions. Moreover, the practice of allowing “peer grading” of examinations and assignments and group grading of team project experiences is validated by the regulations, which provide that such exams/assignments are not part of the education record prior to the time a faculty member records the grade. Finally, although not included in the revised regulations, a provision has been added to the University’s policy reflecting previous FPCO advice that information about a student based solely on an official’s personal knowledge or observation is not considered part of the student’s education record. Such information (such as, for example, an instructor’s observation that a student, in a class in which attendance is not recorded, has been frequently absent) may therefore be disclosed without violating FERPA.

Other regulation provisions and policy changes address a variety of issues:

- * University officials who have a “legitimate educational interest” in a student’s records have been permitted access without specific student consent. This exception has now been broadened to encompass, under certain circumstances, contractors, volunteers, and other parties who are performing institutional services or functions by virtue of an “outsourcing” arrangement.

- * The University may now disclose, without the student’s consent, a former student’s education record to an institution to which the student has applied or in which the student is enrolled. This includes, specifically, health and disciplinary records. The disclosure must, however, be made only for a purpose connected with the enrollment or transfer. It is possible that disclosure of a former student’s disciplinary record might be made under both this exception and the “health and safety” exception discussed above, if the disciplinary action concerned conduct by the student posing a significant risk to himself/herself or others and the officials at the other institution have a legitimate educational interest in the information.

* Under specified conditions, a university may make an unconsented disclosure of education record information to an organization that is conducting, on behalf of the university, studies relating to predictive tests, student aid programs, or instruction.

* The University may disclose to appropriate parties information received about a student who is a registered sex offender.

* The regulations clarify the fact that the return of a record to the original provider or creator is not considered a disclosure. This means that a questionable transcript or other document received by the University may be sent back to the purported originator, without the student's consent, to verify its accuracy or authenticity.

* In any instance in which disclosure of personally identifiable information is made, a university must now take reasonable steps to verify and authenticate the identity of the recipient, whether a parent, official of another institution, or another third party. In a related provision, a university allowing access to a student's education record by institutional officials must use "reasonable methods" to ensure that disclosure does not go beyond those records as to which a legitimate educational interest exists. Physical or technological controls or an "effective administrative policy" may be used for this purpose.

* Disclosure of so-called "de-identified" records, that is, records that have been redacted by the removal of all personally identifiable information, may be made without the necessity of obtaining student(s)' consent.

By way of reminder, under the University's policy the consent of a student, where required for disclosure of a record, must be written.

As is evident by a review of the foregoing regulatory revisions, FERPA is continuing to evolve, and compliance is becoming even more challenging for an educational institution. In fact, the Department of Education just last month issued a new set of regulations making another round of changes in the way educational institutions are to implement FERPA. The Office of Counsel will be reviewing these regulations and proposing appropriate changes to the University's Student Records policy. In the meanwhile, any University official with questions is invited to contact either the Office of Counsel or the University Registrar.