2016 FERPA Update

Back To The Basics (Or Back To The Future?)

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2016 FERPA UPDATE
BACK TO THE BASICS (OR BACK TO THE FUTURE?)

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I. Introduction

Since its passage in 1974, the Family Educational Rights and Privacy Act (“FERPA”)—which is sometimes referred to as the Buckley or Pell Amendment (20 U.S.C. § 1232g)—and its corresponding regulations (99 C.F.R. Part 99) has become one of the most frequently encountered education laws in America. Few, if any, state or federal education laws impact every phase of school operations as FERPA does. Board members, administrators, teachers, students, parents, and school attorneys run into FERPA issues on an almost daily basis.

While FERPA has been revised and amended from time to time during its existence, it has not had a major revision in a number of years. While legislation is currently being discussed which would update and revise FERPA, action on those amendments is still pending at the time of the preparation of this article. Because it is unknown whether revisions will be enacted any time soon, now is a good time to remind ourselves of the basics of FERPA, some of the frequently encountered problems and conundrums with the statute, and some revisions which may result based on the current discussions.

II. Purposes of FERPA

The primary purpose of FERPA is to protect the privacy of parents and their students, and the educational records of those students. 34 C.F.R. § 99.2 However, FERPA is the proverbial two-sided coin – although its primary purpose may be the protection of privacy of parents and student information, the flip side of that coin (and the side perhaps most frequently encountered by school attorneys) is what student information can be released, under what conditions that information can be released, and how such student records can be used both within and outside of the school. Although many of us spend more time reviewing the regulations in 34 C.F.R. Part 99 than the statute itself, a review of the actual text of FERPA makes these purposes clear. Using typical Spending Clause\(^1\) language, the statute states, “[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy of:"

1) “denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children.” 20 U.S.C. § 1232g(a)(1)(A).

2) “denying, or effectively prevents, parents of students the right to inspect and review the education records maintained by the state educational agency on their children…” 20 U.S.C. § 1232g(a)(1)(B).

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\(^1\) United States Constitution, Article I, Section 8
3) “unless the parents of students who are, or have been, in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student’s education records, in order to ensure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein, and to insert into such records a written explanation of the parents respecting the content of such records.” 20 U.S.C. § 1232g(a)(2).

4) “permitting the release of education records (or personally identifiable information contained therein other than directory information) … without the written consent of their parents to any individual agency or organization…. 20 U.S.C. § 1232g(b)(1).

5) “releasing, or providing access to, any personally identifiable information in the education records other than directory information or as is permitted [herein].” 20 U.S.C. § 1232g(b)(2).

If a school receives federal funds, it must follow the mandates of FERPA.

III. Applicability

As noted from the Spending Clause language above, and under 34 C.F.R. § 99.1, FERPA only applies to agencies or institutions which have received federal funding. FERPA will not apply to educational agencies or institutions solely because their students receive non-monetary benefits under a federal program. 34 C.F.R § 99.1(b). However, the Secretary of Education will consider funds to have been made available to an educational agency or institution if funds are provided to the agency or institution by grant, cooperative agreement, contract, subgrant, or subcontract, or if funds are provided to students attending the agency or institution and the funds may be paid to the agency or institution by those students for educational purposes, such as under federal grant or loan programs. 34 C.F.R. § 99.1(c).

Since FERPA is a federal law, it will preempt any conflicting state statute. For example, the Texas Attorney General has repeatedly opined that FERPA prevails over the Texas Public Information Act to prevent the disclosure of education records otherwise responsive to a Public Information Act request. Texas Open Records Decision No. 431 (1985). The Attorney General later held that a school could withhold education records under FERPA without first seeking an Attorney General opinion, as would otherwise have been required under the Public Information Act. Open Records Decision No. 634 (1995). According to the Texas Attorney General’s Public Information Handbook, 2014, (p. 126), the Family Policy Compliance Office (FPCO), the division of the United States Department of Education responsible for administering FERPA (34 C.F.R. § 99.60), told the Attorney General in 1998 that FERPA records could be submitted to the Attorney General for an opinion on whether they must be released in response to a Public Information Act request, but retracted that opinion in 2006 to say such records could not be submitted to the Attorney
General without parental consent. Since that time, the Attorney General has said it is prohibited from reviewing educational records because of FERPA, and left that determination up to the educational institution.

Federal statutes such as FERPA may be amended or superseded by subsequent legislation. For example, the Uninterrupted Scholars Act amended portions of FERPA to permit educational agencies and institutions to disclose education records of students in foster care to state and county social service agencies or child welfare agencies. Guidance on the Amendments to the Family Educational Rights and Privacy Act by the Uninterrupted Scholars Act, May 27, 2014 (available on the U.S. Dept. of Education’s Laws and Guidance Index on the Dept. of Education website). Also, if FERPA conflicts with other federal statutes, courts or federal agencies will interpret those statutes to determine which prevails. For example, the Child Abuse Prevention and Treatment Act (CAPTA) was also enacted in 1974. It was amended in 1988 by the Federal Child Abuse Prevention, Adoption, and Family Services Act of 1988. That revision would require, under certain circumstances, the reporting of personally identifiable information from education records in order to protect or treat victims of child abuse. FPCO has issued a number of letter opinions which hold that CAPTA prevails to the extent that it requires reporting of such known or suspected abuse by school authorities, even if reporting requires a disclosure of education records. Letter to Ms. Barbara Jondahl, Minnesota Department of Children, Families, and Learning, November 21, 2006; Letter to University Of New Mexico Re Applicability of FERPA to Health and Other State Reporting Requirements, November 29, 2004; Letter to Ms. Stacy Ferguson, October 10, 1997; Letter to Mr. Steven J. Sibner, March 14, 1994.²

Possible conflicts between FERPA and Title IX have been noted. Office for Civil Rights (OCR) guidance noted that there might be conflicts between Title IX and FERPA, but stated that the requirements of Title IX would override any conflicting FERPA provisions. Office of Civil Rights April 4, 2011 Guidance Letter re Title IX Investigations and Hearings, page 13, fn32. However, FPCO issued guidance in its February 9, 2015 letter to Ms. Lauren W. Soukop 3 which held that FERPA was not in conflict with Title IX, and that FERPA does permit the disclosure of outcomes from discriminatory harassment complaints required by the OCR 2011 Guidance Letter. Accordingly, although FERPA may preempt applicable state laws, beware that other federal statutes may trump FERPA in some circumstances.

² FPCO has posted a number of its letters on its website. However, the FPCO website is in the process of an ongoing revision. Some of these prior opinion letters are available on the website, others seem to have rolled off the website at this time. In addition, the website is somewhat difficult to navigate because opinion letters may be indexed under different titles. For example, the FPCO website publishes some of its letters in its “FPCO Letter Archive”. It also provides copies of some opinion letters under the index entitled, “Key Policy Letters”. Other guidance is included under its, “Featured Resources” index. Some of the letter opinions cited above were accessible on the website in 2014, but cannot be found on the website now. Some of these documents may be located on the U.S. Department of Education’s website separately from the FPCO website. Therefore, research in this area is challenging at best.

³ Letter to the School and College Legal Services of California providing technical assistance regarding concerns with the language from OCR’s April 4, 2011 Dear Colleague Letter (DCL) on sexual violence regarding what information may be disclosed in the notice of the outcome of a discriminatory harassment complaint and whether the language in the DCL is consistent with the requirements of FERPA (2/9/15) (Available on FPCO’s “Online Library”).
IV. Definitions

Both FERPA and its accompanying regulations contain a number of significant definitions. An understanding of these definitions will be essential in correctly applying FERPA’s requirements. Although the definitions contained in 34 C.F.R. § 99.3 are far more extensive than what will be discussed here, special attention should be paid to these essential definitions.

A. Attendance – 34 C.F.R. § 99.3

FERPA applies to students who are or have been in “attendance” at a school or institution. Although the concept of attendance seems fairly basic, it should be noted that it includes more than in-person attendance. Students attending virtual schools by video conference, satellite, Internet, or computer are still considered to be in attendance even though they are not physically present in the classroom. Attendance also includes the period in which a person is working under a “work study” program.


“Education records” are defined as records, files, documents, and other materials which (i) contain information directly related to a student and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution. 34 C.F.R. § 99.3 defines “record” to mean any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche. This definition was written prior to the advent of text messaging, e-mail, cloud computing, and any number of technological advances yet to come, but would likely include all of those media. This definition is so expansive that it could potentially bring almost any document in any type of medium within the protections of FERPA.

These “records” must contain information “directly related to a student”. Little guidance is given as to what “directly related” might mean. Does that mean anytime a student is named in a record that it is a covered education record? Does that include records which are unrelated to the student’s education? Generally, because of the expansive nature of FERPA, schools are advised to consider any record which contains a student’s name as a covered record, unless the record falls within the limited statutory and regulatory exceptions to that definition, as discussed below.

The issue of maintenance of the record by an educational agency or institution has been the focus of a number of court cases. In *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426 (2002), the United States Supreme Court stated, “The word ‘maintain’ suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database, perhaps even after the student is no longer enrolled.” 534 U.S. at 433. Even though student assignments were being graded by other students in a classroom, those student graders could not “maintain” the records for the school, and thus there was no violation of FERPA. In *S.A. v. Tulare Cnty. Office of Educ.*, 2009 WL 3296653, 2009 U.S. Dist. LEXIS 88007 (E.D. Cal. Sept. 24, 2009), the court held that the school district did not “maintain” e-mails sought by parents unless they were printed out and placed in a
student’s permanent file. Accordingly, the school district had not violated FERPA by failing to produce all e-mails that might name the student. In contrast, in *State Ex Rel. ESPN, Inc. v. Ohio State Univ.*, 970 N.E. 2d 939 (Ohio 2012), the Ohio Supreme Court found that the school district’s e-mails were protected by FERPA when all e-mails were retained on a central server and could not be deleted. (However, the University was required to release redacted e-mails to comply with FERPA).

The definition of “education records” is one of the revisions being discussed currently. The current discussion draft of legislation to revise FERPA defines “education records” to mean “those records, files, documents, and other materials which contain information directly related to a student and are (i) maintained, electronically or physically by an educational agency or institution or by a person acting for such agency or institution; (ii) accessible, collected, used, or maintained by an education service provider; or (iii) created by or for the state educational agency even though a student who attends a school subject to this section may not attend a school run by such State educational agency.” A broadened definition of maintenance to include physical or electronic storage and maintenance by a third-party provider of educational services could be a significant revision that will complicate future compliance with FERPA. However, in today’s world of Internet and cloud-based educational service providers, and phone apps where student information is transmitted or stored, it is likely that Congress will find a need to revise FERPA to further protect such electronic data.

C. Exceptions to the Definition of “Education Records” - 20 U.S.C. § 132g(a)(4)(B) and 34 C.F.R. § 99.3

FERPA and its regulations specifically exempt certain items from the definition of “education records” § 99.3. Those exclusions include: 1) records of instructional, supervisory, administrative personnel, and educational personnel ancillary thereto which are in sole possession of the maker thereof, and which are not accessible or revealed to any other person except a substitute; 2) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement (see also 34 C.F.R. § 99.8, and *Letter to Montgomery County Public Schools (MD) re: Law Enforcement Unit Records, 2/15/2006* (available on FPCO’s “Online Library”, which provides an excellent summary of what is and what is not a law enforcement record); 3) records relating to an individual who is employed by an educational agency or institution that are made and maintained in the agencies normal course of business and relate exclusively to the individual in the capacity of an employee (as opposed to a student) and are not available for use for any other purpose; 4) records on a student who is 18 years of age or older, or is attending an institution of post-secondary education, that are made or maintained by a physician, psychiatrist, psychologist, or other professional acting in his or her professional capacity for purposes of treatment of the student and which are disclosed only to the individuals providing the treatment; 5) records created or received by an educational agency or institution after the individual is no longer a student in attendance and they are not directly related to the individual’s attendance as a student; and 6) grades on peer-graded papers before they are collected and recorded by a
teacher. (This exception was added to the C.F.R. regulations following the *Falvo* decision discussed above).

D. **Eligible Student** - 20 U.S.C. § 1232g(d) and 34 C.F.R. § 99.3

An “eligible student” means a student who has reached 18 years of age or is attending an institution of post-secondary education. Generally, FERPA rights transfer to the student when the student reaches 18 years of age. However, also note that attendance at a post-secondary institution of education can make a student, even if under 18 years of age, an “eligible student”. This is significant since so many secondary schools offer dual credit or advance placement courses where the students attend a college or take college classes for credit. Such dual-enrollment could give both the student and a parent rights under FERPA. When a student has reached 18 years of age or is attending an institution of post-secondary education, all rights transfer to the student. FERPA permits, but does not require that, a post-secondary school provide access to parents if they are the “parents of a dependent student” as defined by the Internal Revenue Code. FPCO recommends that schools require the parents to supply a copy of the parents’ most recent federal income tax return. Schools may also ask students to identify their dependent status at the time of enrollment or registration.

E. **Personally Identifiable Information** - 34 C.F.R § 99.3

Although 20 U.S.C. 1232g(b)(1) prohibits a policy or practice of permitting the release of educational records or the “personally identifiable information contained therein, other than directory information”, it does not specifically define what Congress intended to be “personally identifiable information.” 34 C.F.R. § 99.3’s definition of “personally identifiable information” fills in some of those gaps, but provides a non-exclusive list. It defines “personally identifiable information” to include: the student’s name; the name of the student’s parent(s) or other family members; the address of the student or student’s family; a personal identifier, such as the student’s social security number, student number, or biometric record; and other indirect identifiers such as date of birth, place of birth, or mother’s maiden name.

Two other definitions of personally identifiable information deserve special note. Subsections (f) and (g) in that definition prohibit the release of information in two circumstances. Subsection (f) prohibits the release of 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. Subsection (g) includes information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates. These definitions are particularly troublesome to schools because many, if not most, requests for another student’s records are made by a student or parent who knows who the other student is that was involved in some type of an incident and wants those records to use in their student’s disciplinary hearing.
FPCO has issued at least three letters which relate to the “easily traceable” language in subsection (f). See Letter to Miami University re: Disclosure of Information Making Student’s Identity Easily Traceable (10/19/04); Letter to Georgia Board of Regents re: Open Records Request (9/25/03); and Letter to Kennesaw State Univ., Georgia re: Open Records Request (9/27/02). (These letters are available on FPCO’s “Online Library”). FPCO, in these letters, stated that such information can be released if sufficient redactions can be made to remove information which would allow the receiving party to trace the identity of the students whose information was included in a response to a request for public records. FPCO noted in these instances that the school itself is always in the best position to determine, at least initially, what information must be removed from education records in order to ensure that a student’s identity is not traceable. However, if because of other records that have been released, or if other aspects of the release would make it easy to trace the identity of the student, FERPA would prohibit the release of such information.

There is however, little guidance, if any, dealing with subsection (g). Although redaction might remove the “personally identifiable information”, such redactions would be of little value since the requesting party already knows (from his or her own student) who the other student involved in the incident is. Refusal to allow inspection or copies of the records would protect the identity of the reporting party or victim and comply with 34 C.F.R. § 99.12, but that refusal might also arguably result in a violation of the requesting parent’s FERPA rights to receive educational records relating to his or her own student. (Orally informing the parent about the contents of the records regarding the parent’s student might be sufficient to comply with 34 C.F.R. § 99.12(a)). It would be advisable in such situations to make an inquiry of FPCO concerning the situation, if not request a formal letter opinion from them. E-mails or oral requests may be the only option available if there is a short deadline because of a pending disciplinary action. Parental consent from the reporting party’s or victim’s parents may be obtainable in some situations, but will likely not be available on all requests. (See the discussion at Section V.B. below for a related discussion).

G. Directory Information - 20 U.S.C. 1232g(a)(5)(A) and 34 § C.F.R. 99.3

34 C.F.R. § 99.3 defines “directory information” as information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. It and FERPA’s definition include in that category 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 of members of athletic teams, dates of attendance, degrees and awards received, and the most recent educational agency or institution attended. The definition in § 99.3 also adds, electronic mail addresses and photographs. It also states that directory information does not include a student’s social security number or student identification number. “Directory information” however does include, student identification numbers or user identification when such identifiers cannot be used to gain access to education records unless used in conjunction with other factors authenticating the user’s identity.

Despite the inclusion of these definitions of “directory information”, a school is not required to release any directory information. If a school district chooses not to release any
directory information, it will not be in violation of FERPA. However, an annual notice to parents of the categories of information that will be considered “directory information” must be given. 20 U.S.C. § 1232g(a)(5)(B); 34 C.F.R. § 99.37. Also, an educational agency or institution may specify that disclosure of directory information will be limited to specific parties, for specific purposes, or both. Such limitations must, again, be included in the annual notice to parents and the parents given an opportunity to opt out from such disclosures. 34 C.F.R. § 99.37(d).

A frequent concern to school districts is the release of student directory information that might be used for commercial purposes, including solicitation of students or parents to purchase merchandise. Many schools have not included addresses, phone numbers, or e-mail addresses in their lists of disclosable directory information in an attempt to prevent such uses of student information. However, when coupled with state open records laws that may prohibit making inquiries about the intended purpose of the request for information, schools may not always be able to tell what use will be made of that information.

The current discussion draft of FERPA revisions includes a ban on the use of student information for marketing or advertising, as well as the provision of such information to requestors without written consent of the parents or eligible student. (One exception is for official school pictures). While this ban is certainly a meritorious idea, it is also fraught with enforcement problems for schools. One such problem is the ban on any “person” with access to education records using information for this purpose. It will be impossible for a school district to regulate the conduct of each “person”, either within the school or with outside vendors, who is granted access to student information for legal purposes. Another problem is “marketing” and “advertising” are not defined and therefore may mean different things to different parties involved in the process. Such rules would place obligations on schools that they may be unable to perform.

H. Parent - 34 C.F.R. § 99.3

The regulatory definition of “parent” maybe be broader than state laws’ definitions. In the regulation, “parent” is a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian. Given the different categories of people who will claim to be “acting as a parent” (such as grandparents, relatives, unrelated adults allowing a student to live in their home, and others), this definition may include people that a school would not ordinarily actually think of as a “parent”. Therefore, be aware that such persons’ rights under FERPA may be greater than they would appear on the face of the situation. All FERPA rights are to be given to either parent unless the school has been provided with evidence that there is a court order, state statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes those rights. 34 C.F.R. § 99.4

V. Parental and Students Rights Under FERPA
Although the outlines of these parental and student rights are actually contained in FERPA, this discussion of these rights will be taken from the Code of Federal Regulations since it more systematically organizes the rights and responsibilities of the parties.

A. Annual Notification - 34 C.F.R. § 99.7

Each educational agency and institution is to annually notify the parent(s) of students in attendance at its school of their rights under FERPA. The annual notice must inform parents or eligible students that they have a right to: inspect and review the student’s education records; seek amendment of the education records if they believe them to be inaccurate, misleading, or in violation of the student’s rights; consent to disclosure of personally identifiable information unless FERPA and regulations authorize disclosure without consent; and file a complaint with the Department of Education concerning FERPA violations. The notice must include the procedures for exercising the rights to inspect and review education records and the procedures for requesting amendments of the education records; a specification of the criteria for determining who constitutes a school official, and what constitutes a legitimate educational interest which would allow a school official to gain access to the student’s records.

A school may provide this notice by any means that are reasonably likely to inform the parents or eligible student of their rights. The notice can be given electronically or in any other form that will effectively provide notice to the parents or eligible student of their rights.

34 C.F.R. § 99.37 also provides additional details on the notification about directory information. This notice may be combined with the annual notice of FERPA rights discussed in § 99.7, although that combination is not mandatory. The notice regarding directory information would provide information to parents or eligible students about the opportunity to object to the release of such information and notify them that directory information will be released if the school has not received any objection or request to opt out of that release within a stated time period. If there is no objection or opt out notice provided by the parent or eligible student, the District may release directory information without obtaining additional consent from the parent or eligible student. This notice is often given in hard copy with a form to be returned by parents if they wish to opt out of such release.

Although the statute and regulation do not expressly say so, FPCO says that a school can require that the parent or eligible student allow disclosure of all directory information, or object to the release of and opt out of the release of all directory information, instead of allowing the parent or eligible student to pick and choose which category of directory information they may want to withhold or release. Because a school is not required by FERPA to release directory information, FPCO has previously advised that schools have the option to do an “all or nothing” opt out. In addition, some of FPCO’s model notices regarding directory information are worded in such a fashion that the “all or nothing” approach would be applied by use of the model notice. (The most recent model notice published on the FPCO website has slightly broader language which might allow a parent
to opt out of only some categories, instead of all categories.) It is obviously easier for a school district to keep up with a complete objection/opt out than it is to keep up with numerous individual choices made by multitudes of parents or eligible students. It is therefore recommended that the school request an “all or nothing” opt out. Some state laws require particular forms be used (such as Texas Education Code § 26.013), so check your state’s statutes relating to student records.


Except as limited by § 99.12, a parent or eligible student must be given the opportunity to inspect and review the student’s education records. This right is applicable to any educational agency or institution and any state educational agency and its components which maintain such records. The agency is to comply with that request for access within a reasonable time period, but not more than 45 days after its receipt of the request. (PLEASE NOTE: The current discussion draft of FERPA revisions would shorten that time period to 30 days). Schools are required to respond to reasonable requests for explanations and interpretations of the records. If a parent or eligible student is prevented by circumstances from exercising the right to inspect and review the records, the school shall provide the parent with a copy or make other arrangements for inspection and review. A school may not destroy any education records if there is a pending request to inspect or review those records.

Unless the imposition of a fee would effectively prevent a parent or eligible student from exercising their right to inspect and review the records, the school may charge a fee for a copy of an educational record. It may not charge a fee for the search or retrieval of the records. 34 C.F.R. § 99.11. § 99.12 provides important exceptions to this right of inspection and review. Subsection (a) provides that if the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about the requested student. (See also 20 U.S.C. § 1232g(a)(1)(A)). For many years, FPCO followed this literal language in its Letter Of Technical Assistance To School District Re: Disclosure Of Education Records Containing The Information On Multiple Students (10/31/03) (which did not specifically refer to videos) and Letter re: Berkley School District, 7 FERPA Answer Book 40, 104 LRP Publications 44490 (Feb. 10, 2004) (which did specifically involve videos). Accordingly, school attorneys for years informed their clients that if two students got into a fight which was caught on a school video, neither of the parents of the two students had a right to inspect the video, at least unless the video could be digitally altered or redacted in some way so that the identity of the other student was not disclosed. That interpretation was not followed by some courts which considered the question. In Rome City School District v. Grifasi, 806 N.Y.S. 2d 381 (N.Y. Sup. Ct. 2005), the court determined that FERPA did not apply to videotapes which were recorded to maintain the physical security and safety of the school building and which did not pertain to the educational performance of the students captured on the tape. In Lindeman v. Kilso School District, 173 P.3d 329 (Wash. 2007), that court agreed that videotapes were not student records, but were surveillance tapes.
In 2006, FPCO began to reconsider its position regarding videotapes. In two Texas Attorney General Opinions, OR 2006-00484, 2006 WL 208275 (Tex. Att’y Gen., Jan. 13, 2006), and OR 2006-07701, 2006 WL 2140988 (Tex. Att’y Gen., July 18, 2006), the Attorney General noted, without citation to any formal FPCO opinion letter, that FPCO had determined that videotapes which capture two students in an altercation in front of other student witnesses did not constitute education records of students who do not participate in the altercation, but did constitute education records of the students involved in the altercation. The Attorney General then said that the students involved in the altercation were directly related to each other because of the altercation, and that parents requesting a right of access to the video were entitled to such access. Shortly thereafter, FPCO provided similar advice in various informal guidance letters.

In conference with FPCO, it is our understanding that FPCO’s current position is that where a video (or other picture image) of one or more students is taken, the video or image is “directly related” to, and thus the “education record” of, the student or students who are the focus of the video (such as two students in an altercation). Therefore, students (or their parents) who are the “focus” of the video may view the video or image since it is their “education records”. If multiple students are the “focus” of the video, all students and their parents may view the video, although the school may not give copies of the video to any of the parents without the consent of the other parents. The video would not be a FERPA-protected education record for those students who are “set dressing” (walking down the hall, sitting on the bus, eating lunch, etc., but not involved in the altercation), since they are not the focus of the video. However, if the school uses the video to find witnesses to the altercation and the students are named or used as witnesses, the video becomes the witnessing student’s education record also. Schools will be initially required to make a determination as to whether or not video images of students are “directly related” to those students. At least one court has considered and seemed to approve this interpretation. Bryner v. Canyon School District, 2015 UT App. 131 (May 29, 2015). FPCO has stated that it will provide formal guidance to this effect at some time in the future. However, this has been pending for quite some time and no formal guidance has been issued yet.

§ 99.12 also provides information concerning the confidentiality of letters and statements of recommendation. While these may or may not arise frequently in a K-12 situation, beware that there are provisions for keeping such matters confidential if proper waivers have been obtained from the eligible student.


These sections establish the rights of a parent or eligible student to seek amendment of records which are believed to be inaccurate, misleading, or in violation of the student’s
rights of privacy. Such a request must be decided within a reasonable time after receipt of the request from the parent or eligible student. If the agency decides not to amend the record, it must inform the parent or eligible student of that decision and the right to have a hearing. Likewise, if a decision is made to amend the record, notice is also to be given to the parent or eligible student.

§ 99.22 provides the procedural requirements of the hearing. The school shall hold the hearing within a reasonable time after a request. It must give the parent or eligible student notice of the date, time, and place of the hearing reasonably in advance of the hearing. The hearing may be conducted by any individual, including an official of the education agency, who does not have a direct interest in the outcome of the hearing. The parent or eligible student shall have a full and fair opportunity to present relevant evidence in the hearing and may, at their own expense, be assisted by one or more individuals of their choice, including an attorney. The agency shall make its decision in writing within a reasonable period of time after the hearing. That decision must be based solely on the evidence presented at the hearing, and must include a summary of the evidence and the reasons for the decision. If the parent or eligible student does not prevail in either their request or the hearing, they have a right to place a statement in the school’s education record commenting on the contested information and stating why they disagree with the decision of the agency. That statement must be maintained for as long as the record itself is maintained. If any portion of the education records in question are disclosed, the statement must also be produced.

VI. Disclosure of Personally Identifiable Information from Education Records

20 U.S.C. § 1232g(b); 34 C.F.R. Subpart D, § 99.30 et. seq.

A. § 99.30 establishes the general rule regarding release of any student education records to persons other than parents or the eligible student. A signed and dated written consent from the parent or eligible student must be provided before a school can disclose personally identifiable information from the student’s education records, except as provided in § 99.31. That consent must specify the records to be disclosed, the purpose of the disclosure, and the identity of the party or class of parties to whom the disclosures may be made. Copies of the disclosed records shall be provided to the parent or eligible student if requested. The signed and dated written consent may include a record and signature in electronic form that identifies and authenticates that particular person as the source of the electronic consent, and that indicates that person’s approval of the information contained in the electronic consent.

Although there may be occasions when a parent will not consent to the release of an educational record, school officials should always remember that a properly authorized consent will allow the release of any documents even if there are questions about the school’s authority to release the records. The school often does not wish to release any student records and will not have a need to ask a need to ask a parent for consent. However, if a need is deemed legitimate and no valid ground exists for release, seeking a parent’s consent will always remain a viable option.
§ 99.31 provides a detailed list of conditions under which prior consent is not required to disclose information (§§ 99.32-99.39 elaborate on some of those specific conditions):

1. § 99.31(a)(1) - Disclosure to other school officials whom the school has determined to have a legitimate educational interest.

Having student information would be of little value to a school if it could not share that information with school employees, agents, or other officials that have a legitimate educational interest in obtaining and using that information. Such interests are certainly clear if a teacher, counselor, nurse, or administrator dealing with that student would benefit from obtaining that knowledge. However, the “school official” is not limited only to such school personnel.

For example, the school’s attorney can qualify under this section even if there is no currently-pending legal action involving the student. See Letter to Parent Re: Disclosure of Education Records to Outside Legal Counsel (Sept. 7, 2004) (available on FCPO’s “Online Library”); and Letter to Anonymous, 111 LRP 36952 (FPCO 2011). In addition, “school officials” may include board members, school district consultants, contractors, volunteers, school resource officers, any outside service provider, an employee of a cooperative with which the school district contracts for placement of students with disabilities, and a parent or student serving on an official committee such as a disciplinary or grievance committee.

“Legitimate educational interests” could include working with a student, considering disciplinary or academic actions, participating in an individualized education program committee, compiling school data for the school, reviewing education records to fulfill the official’s professional responsibilities, or investigating or evaluating school programs. Although, “legitimate educational interest” is a broad description of a need to review educational records, the school should be careful to not disclose such information to someone that does not have any arguable need to review the student’s records.

Contractors, consultants, volunteers, or other parties to whom the school has outsourced institutional service or functions, may be “school officials” if the outside party (1) performs an institutional service or function for which the school would otherwise use employees, (2) is under the direct control of the agency or institution with respect to the use and maintenance of education records, and (3) is subject to the requirements of § 99.33(a) governing the use and redisclosure of personally identifiable information from education records. Schools must use reasonable methods to ensure the school officials obtain access to only those records in which they have a legitimate educational interest. If the school does not use physical or technological access controls, it must ensure that its administrative policy is effective and remains in compliance with the “legitimate educational interest” requirement.
A frequent concern in these regards are the many Internet, phone apps, or cloud-based providers of educational services. When schools outsource such educational services or the development of educational products, large amounts of student data are transferred to these entities. A number of online resources from FPCO, NSBA, and other agencies are available to give schools guidance concerning contracting with and working with such entities. In the current discussion draft of FERPA revisions, proposed revisions deal with notice to parents of the provision of educational records to these entities; written agreements with the entities governing the use, maintenance, and confidentiality of such student records; parental and student access to electronic information being provided to these entities; making copies of the agreements available to parents; designation of an official responsible for security of such student records; breach notification policies; and other restrictions. If enacted, schools will have a much more difficult challenge in using such outside vendors.

2. § 99.31(a)(2) - Disclosure to officials of another school, school system, or post-secondary educational institution 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. Such disclosures are also governed by the requirements of § 99.34, which require the disclosing school to make reasonable efforts to give notice to parents or eligible students, unless the disclosure is initiated by the parent or eligible student, or the school, in its annual notice, gives notice that it forwards such information to such other schools.

3. § 99.31(a)(3) and § 99.35 - Disclosure to the Comptroller General of the United States, the Attorney General of the United States, Secretary of Education, or state and local educational authorities. Such disclosures are allowed in connection with an audit or evaluation of federal or state supported education programs, or for the enforcement of or compliance with the federal legal requirements related to those programs. 34 C.F.R. § 99.35 imposes additional responsibilities on both the school and the state or federal agency in regards to any personally identifiable information which might be disclosed for such purposes. A written agreement must be used to designate authorized representatives of the agencies other than employees, must specify personally identifiable information to be disclosed, specify that the purpose for such disclosure is to carry out the audit or evaluation to federal or state supported educational programs, provide a description of the activity with sufficient specificity to make clear the work falls with within this exception, and require the authorized representative to destroy personally identifiable information from education records when no longer needed for the specified purposes. The agreement must also specify the time period in which the information must be destroyed and establish policies and procedures to protect such personally identifiable information from further disclosure.

4. § 99.31(a)(4) & 20 U.S.C. § 1232g(b)(1)(D) - Disclosures in connection with financial aid for which the student has applied or received, if necessary to determine
eligibility for the aid, the amount of the aid, the conditions for the aid, and enforcement of the terms and conditions of the aid.

5. § 99.31(a)(5) - Disclosures to state and local officials or authorities allowed under state statutes concerning the juvenile justice system and the system’s ability to effectively serve the student whose records are released and disclosed. If the state statutory authority was adopted after November 19, 1974, the school must also comply with the requirements of 34 C.F.R. § 99.38, which requires that the disclosure concern the juvenile justice system and its ability to effectively serve, prior to adjudication, the student, and that the authorities to whom the records are disclosed certify in writing to the school that the information will not be disclosed to any other party, except as provided under state law, without the prior written consent of the parent or the eligible student.

6. § 99.31(a)(6) - Disclosures to organizations conducting studies for, or on behalf of educational agencies or institutions to develop, validate, or administer predictive tests; administer student aid programs; or improve instruction. Re-disclosure of the personally identifiable information is allowed if conducted in such a way that it does not permit personal identification of parents or students by individuals other than representatives of the organization that have legitimate interest in the information, the information is destroyed when no longer needed, and the organization enters into a written agreement with the school that specifies the purpose, scope, and duration of the studies and information to be disclosed, and to comply with the other requirements of this section.

7. § 99.31(a)(7) - Disclosure to accrediting organizations to enable them to carry out their accrediting functions.

8. § 99.31(a)(8) - Disclosure to parents of a dependent student as defined by the Internal Revenue Code.

9. § 99.31(a)(9) - Disclosure to comply with a judicial order or lawfully issued subpoena. This also includes warrants served upon the school for such information. Disclosure is only permitted if the school makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action, unless: the disclosure is in compliance with a federal grand jury subpoena and a court has ordered the existence or contents of the subpoena not be disclosed; the subpoena is issued for law enforcement purposes and the court has ordered that the existence or contents of the subpoena, or the information furnished in response to it, not be disclosed; or an ex parte order is obtained by the U.S. Attorney General or designee concerning an investigation or prosecution of acts of domestic or international terrorism under federal law. (See also 20 U.S.C. § 1232g(j)).

Disclosure is also allowed under this section when the educational agency or institution initiates legal action against a parent or student. In such circumstances,
the agency may disclose to the court, without a court order or subpoena, relevant educational records needed to proceed with the action. If a parent or eligible student initiates action against the educational agency, the agency may disclose to the court, without a court order or subpoena, the student’s educational records that are relevant for the defense.

If the disclosure involves litigation initiated by or against the school, care should be taken in the production of relevant student records during the discovery process. Most federal and states courts allow attorneys for the parties to issue a subpoena without the involvement of a court, or the obtaining of a court order. Under such circumstances, disclosure of educational records, particularly of students other than the litigating student, could be a violation of FERPA. Likewise, interrogatories, requests for production, or depositions might seek such FERPA-protected information, but are not necessarily covered by this exception. It is advisable to seek protective orders or file motions with the court to prevent the improper disclosure of educational records.

10. § 99.31(a)(10) - Disclosure in connection with a health or safety emergency under the conditions described in § 99.36. If the agency determines that there is an “articulable and significant threat” to the health or safety of the student or other individuals, it may disclose the information to “any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals” including parents or an eligible student. In making this determination, the school may take into account the totality of the circumstances pertaining to the threat. If, based on the information available at the time of the determination that there was a rational basis for that determination, the Department of Education will not substitute its judgement for that of the educational agency evaluating the circumstances. These provisions give schools significant protection from enforcement actions if they actually have an articulable basis for believing that disclosure is immediately necessary.

An institution need not have absolute certainty that there is an imminent crisis before invoking this exception. It is sufficient that, based on the totality of the circumstances and the facts available at the time, that there was a rational basis for concluding that there was a threat to health or safety. That articulable basis and rational belief may be based in part on education records, but also in part on personal observations or knowledge of education personnel involved in the decision. However, care should still be taken that such personal knowledge is conveyed in such a way as to not unnecessarily disclose the contents of education records.

Without Legitimate Educational Interest; Limits of Health or Safety Emergency Exception (3/11/05) (available on FPCO’s “Online Library”). Although this letter opinion has been superseded in part by 2008 amendments to FERPA, FPCO determined that the university’s disclosure was improper because no imminent danger was shown to exist at the time of the disclosure. An employee of the university had “felt threatened” following a disagreement with a student. The disagreement was protracted over a 2 or 3 day period, but was not reported to police until the 4th day. When the report was made, the employee accessed the student’s education records to provide identifying information to the police. FPCO found that the employee had no legitimate educational interest in accessing the records or releasing the information and the health or safety exception did not apply to such facts because of the prolonged delay in making the report.

It is important to remember that within a reasonable period of time after such a disclosure is made, the educational agency must record, in the student’s education records, the articulable and significant threat that formed the basis for the disclosure, and the parties to whom the information was disclosed. 34 C.F.R. § 99.32(a)(5). This will be further discussed at section C. below.

11. § 99.31(a)(11) - The information disclosed is designated as “directory information” and the conditions in § 99.37 were complied with in the disclosure.

12. § 99.31(a)(12) - Disclosures to the parent of a student who is not an eligible student or to the student.

13. § 99.31(a)(13) - Disclosure by a post-secondary education institution to a victim of an alleged perpetrator of a crime of violence or a non-forcible sex offense. Such disclosure may only include the final results of the disciplinary proceeding conducted by the institution with respect to those offenses. Disclosure may include the final results of the proceeding, whether or not the institution concluded a violation was committed.

14. § 99.31(a)(14) - Disclosure by an institution of post-secondary education in connection with a disciplinary proceeding in which it was determined that the student was an alleged perpetrator of a crime of violence or non-forcible sex offense, and with regard to the allegations against the student, the student has committed a violation of the institutions rules or policies. Names of other students, including a victim or witness, cannot be disclosed without the prior written consent of such students.

15. § 99.31(a)(15) - Disclosure to a parent of a student at an institution of post-secondary education regarding the student’s violation of state, federal, or local laws governing the use or possession of alcohol or controlled substances, if the institution has determined that the student committed a disciplinary violation with respect to that use or possession, and the student is under the age of 21 at the time of disclosure.
16. § 99.31(a)(16) - Disclosure concerning sex offenders and other individuals required to register under federal law.

17. § 99.31(b) - Educational agencies or institutions, or a party that has received educational records from them under § 99.31, may release records or information without consent after the removal of all personally identifiable information as long as the agency, institution, or other party has made a reasonable determination that a student’s identity is not personally identifiable. Such records can be released for the purposes of educational research by attaching a code to each record that will allow the recipient to match information received from the same source, provided that the agency, institution, or party does not disclose any information about how it generates and assigns the code that would allow the recipient to identify a student based on the record code. Such a code cannot be used for any other purpose, and cannot be based on the student’s social security number or any other personal information.

C. Record Keeping Requirements - § 99.32

Educational agencies or institutions must maintain a record of each request for access to, and each disclosure of, personally identifiable information from the student’s educational records, as well as the names of state and local educational authorities or federal officials that might make further disclosures of such information. Such records must be maintained with the education records for as long as those records are maintained.

The records kept must include the parties that have requested or received the information and the legitimate interest the parties had in requesting or obtaining the information. The agency must also obtain a copy of any further disclosures made after the removal of personally identifiable information under § 99.31(b). As noted above, if information has been released because of a health or safety emergency, the educational agency must document the articulable and significant threat that formed the basis for the disclosure and the parties to whom the information was disclosed. Records must also be maintained of any redisclosures authorized under FERPA.

Upon request of an educational agency, a State or local education authority, or federal authority listed in § 99.31(a)(3) must provide copies of the re-disclosed information within 30 days of the date of the request. Records relating to a student are also subject to inspection by the parent or eligible student, “school official or his or her assistants who are responsible for the custody of the records, and parties authorized to conduct audits of the institution. Such records of disclosures are not required if the requesting party is the parent, eligible student, or a school official authorized under § 99.31(a)(1); a party with the written consent for the parent or eligible student, a party seeking directory information; or a party seeking or receiving records under § 99.31(a)(9) (subpoena or court order).

D. § 99.33 provides detailed rules regarding the redisclosure of personally identifiable information from education records.
VII. Enforcement Procedures

All of these requirements would be of little value if there was no mechanism to enforce the requirements and restrictions of the statutes cited above. FPCO has been designated as the administrative agency to investigate, process, and review complaints of violations of FERPA, and to provide technical assistance to ensure compliance with it. 34 C.F.R. § 99.60. The opinion letters and guidance letters referenced in this paper, and found on the FPCO website are a result of FPCO’s attempt to provide that technical assistance to educational institutions. Educational institutions also have certain responsibilities. If an agency believes that it cannot comply with the act due to a conflict with state or local law, it is required to notify FPCO within 45 days of its determination. 34 C.F.R. § 99.61. FPCO can require educational agencies or institutions to provide relevant information to enable it to carry out its enforcement responsibilities. 34 C.F.R. § 99.62.

If a complaint is filed with FPCO, it will investigate the allegations and determine whether or not there has been a violation of FERPA or its accompanying regulations. Such a complaint is untimely if submitted more than 180 days after the date of the alleged violation, or the date that the complainant knew or reasonably should have known of the alleged violation. FPCO may, however, extend that time limit for good cause shown. 34 C.F.R. § 99.64. FPCO will notify the educational agency or institution of the complaint, and direct the agency or institution to submit a written response within a specified period of time. 34 C.F.R. § 99.65. If the complaint fails to meet the requirements of § 99.64, FPCO will notify the complainant if it does not initiate an investigation. 34 C.F.R. § 99.65(b). After investigating the complaint and reviewing the submissions of the parties, FPCO will issue a written notice of its findings and the basis for those findings. It must direct the agency or institution of the specific steps that it must take to comply with FERPA, and provide a reasonable period of time for such compliance. 34 C.F.R. § 99.66.

Although no school district wants to be investigated, the most significant issue is what the penalties are for failing to comply with FERPA. As discussed above, the statute repeatedly provides that no federal funds will be distributed to any educational agency or institution that fails to provide the rights established by FERPA to its students or parents. That leads to the obvious question – “Has any school district ever lost its federal funds for failure to comply with FERPA?” Although the current answer is “no”, no one wants their school client to be the first one to suffer such a fate. None of us would want our districts to have to spend public funds defending an action by the Department of Education accusing the district of violating the parents’ or eligible student’s rights under FERPA. No one would want their school clients to face the adverse publicity and public scrutiny that might come from systematically denying federal rights to its parents or eligible students. All of those are possible results of failure to comply with FERPA. However, there are other penalties.

20 U.S.C. § 1232g(f) provides that the Secretary of Education is to take appropriate actions to enforce the section and to deal with violations, but that the action to terminate assistance (funds) may only be taken if the Secretary finds that there has been a failure to comply with FERPA, and has determined that compliance cannot be secured by voluntary means. 34 C.F.R. 99.67 provides additional options for the Secretary. The Secretary may take “any legally available enforcement action in accordance with the Act, including, but not limited to … 1) Withhold further payments
under any applicable program; 2) Issue a complaint to compel compliance through a cease and desist order; or 3) Terminate eligibility to receive funding under any applicable program.” 34 C.F.R. § 99.67(a)(1)-(3). If it is found that a third-party violated the Act, the educational agency or institution may be prohibited from allowing that third-party to access personally identifiable information from its education records for at least 5 years. 34 C.F.R. § 99.67(e).

In United States v. Miami University, 294 F.3d 797 (6th Cir. 2002), the Sixth Circuit found that the Department of Education was authorized to bring a cause of action for injunctive relief in order to halt or prevent a violation of FERPA under 20 U.S.C. § 1234(c). That court held that the department was within its rights in seeking injunctive relief because none of the administrative remedies authorized by FERPA would have stopped the violations. Thus, the court allowed the Department to take preemptive actions rather than waiting for the violations to occur. The court noted, “[o]nce personally identifiable information has been made public, the harm cannot be undone.” Id. at 818. As noted, the adverse publicity, public scrutiny, and legal expense, as well as the threat of disruption of federal funding should cause any educational agency or institution to think twice before daring to violate FERPA intentionally.

In Gonzaga University v. Doe, 536 U.S. 273 (2002), the United States Supreme Court found that no individual cause of action was created under FERPA or was enforceable under 42 U.S.C. § 1983 for alleged wrongful disclosure of education records. Despite that holding, in its comments in the 2008 revisions to 34 C.F.R. Part 99 (Federal Register, Vol. 73, No. 237, pp. 74842 – 74843), FPCO noted that the Gonzaga opinion did not address whether there might be individual causes of action for other FERPA requirements, such as parents’ rights to inspect and review their children’s education records and affording parents an opportunity for a hearing to challenge the content of the student’s education records. Although no cases of such a nature have been found, it appears that there is some potential that an individual cause of action might exist under FERPA for violations of FERPA’s rights and requirements.

In the current discussion draft of FERPA revisions, severe enforcement penalties have been proposed. The current discussion draft would empower the Secretary of Education to levy fines on educational service providers of $2,000.00 per student harmed up to a maximum of $500,000.00. The draft also proposes the establishment of a new office within the Department of Education to monitor compliance and to investigate, process, review, and adjudicate violations and complaints. Such financial penalties could seriously impact the financial condition of a school district.

VIII. Conclusion

Although FERPA can be an extraordinarily complex statute, it was created with a beneficial purpose. In focusing on that purpose, educational agencies and institutions need to do their best to always provide parents and eligible students with the rights granted them by FERPA, and to exercise great caution in how it discloses any personally identifiable information in the education records of students.

Hopefully this presentation has been of assistance in teaching you the current basics of FERPA implementation. But, be on the lookout for future revisions. The National School Board Association has been working diligently to head off potential problems which would be created
for educational agencies by some of the proposed revisions and will, as always, keep its membership informed on significant developments.