Student Records
Family Educational Rights and Privacy Act
(Buckley Amendment)

This law applies only to educational institutions that are either direct or indirect recipients of federal funds made available by the Department of Education (20 USC § 1232g; 34 CFR Part 99). Specifically, the law states that: "No funds shall be made available under any applicable program to any educational agency or institution which has a policy of 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 . . . the right to inspect and review the education records of their children" (emphasis added) (20 USC § 1232g(a)(1)(A)).

Note the punctuation in the above sentence (i.e., which..., or which). Funds may be withheld **either** when there is a policy of denying access ***OR*** when the institution effectively prevents access, regardless of policy.

Also, FERPA will preempt conflicting state law (Rim of the World Unified Sch. Dist. v. Superior Court of County of San Bernardino, 129 Cal. Rptr. 2d 11 (App. Ct. 2002)).

Furthermore, assuming that FERPA violations were the result of unauthorized individual action contrary to established policy, those persons responsible for the infraction may be subject to disciplinary action, even termination (Henderson v. Huecker, 744 F.2d 640 (8th Cir. 1984)).

Qualifying as an Institution to Which Funds Have Been Made Available

To qualify as an educational agency or institution to which funds have been made available, the college/school district needs to receive a grant, cooperative agreement, contract, subgrant, or subcontract (34 CFR § 99.1(c)(1)).

Note that this definition is different than those used for other "recipient" statutes (e.g., title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, § 504 of the Rehabilitation Act, the Age Discrimination Act). Contracts and subcontracts will qualify an institution as a recipient under FERPA, while FERPA (like title IX) is limited in application only to educational entities (e.g., Letter to University of Wisconsin (FPCO Feb. 3, 2003) (finding no FERPA violation when the requested records were maintained by an organization and not the university)).

The college/school district is considered an **indirect recipient** of funds if its students receive monetary benefits such as federal grants, loans, or work-study (e.g., Pell Grants, Guaranteed Student Loans) (34 CFR § 99.1(c)(2)).

Note, however, that if the institution receives no federal funds and students receive either no funds or only nonmonetary benefits, FERPA does not apply (34 CFR § 99.1(b)).

In addition to the above, if federal funds are received anywhere within a college/school district, the **entire institution** must meet access and consent requirements, with some limited exceptions (34 CFR § 99.1(d)). For example, if a student were admitted to law school, but had been denied admission to medical school within the same university, only those records maintained by the law school would be accessible (34 CFR § 99.5(c)).

Qualifying as a Person to Whom Access is Permitted and From Whom Permission is Acquired

The FERPA provides access rights to the parents of a student until the student reaches the **age of 18**.

At **age 18** ***OR*** when the student attends an institution of postsecondary education, the student is permitted access and provides consent for others to gain access (34 CFR §§ 99.3 & 99.5; Mesa College, 6 FAB 7 (FPCO 2002)).

The child must be a current or former student—including **correspondence** and **work-study** programs on a **part-time** or **full-time** basis (34 CFR § 99.3).

Note, however, that a student must be a student in attendance at an institution before he or she can exert FERPA rights. Each institution is authorized to determine for itself when a student is "in attendance" (65 FR 41852). Such a determination may prohibit access until actual attendance and participation.

Access is not required for students who have only **audited** courses or for those who have applied but were denied admission (20 USC § 1232g(a)(6); 34 CFR § 99.5(c); Tarka v. Franklin, 891 F.2d 102 (5th Cir. 1989)).

Examples of **dates of attendance** include academic year, fall term, or first quarter; daily records are not necessary (34 CFR § 99.3).

Either parent should be given access, unless there is a court order, state statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights (34 CFR § 99.4).

A parent may be a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or guardian (34 CFR § 99.3). (For example, a surrogate parent representing a child with special needs would qualify under this provision.)

For parents to be given general access to their child's college records, they must have claimed the student as a **dependent** on their last federal income tax statement.

If so, then access may be permitted; if not, access must be denied (20 USC § 1232g (b)(1)(H); Internal Revenue Code, 26 USC §152).

Note that although FERPA **permits** colleges to provide access to "eligible parents," it **does not require** access, even if the student is found to be a dependent (Mesa College, 6 FAB 7 (FPCO 2002)).

Given that providing access to parents of college students is discretionary, it is recommended that the student be notified of the access request and be permitted to show that he or she is no longer a dependent. This practice will further protect the privacy right of the student.

Notice of Rights

Colleges/school districts are required to **annually notify** parents or eligible students of their rights to inspect and review records, seek amendment of records, provide consent to disclose records, and file a complaint with the Department of Education for compliance failures (34 CFR § 99.7(a)(1)&(2)).

The college/school district has the responsibility to effectively notify parents or eligible students who have a primary or home **language** other than English (34 CFR §99.7((b)(2)).

What Does and Does Not Qualify as a Student Record?

Records to which FERPA applies include any student-specific educational record that the institution is required to maintain by the federal or state government, or any record that college/school district officials elect to maintain.

Accessible records may be in **any form** (e.g., handwritten, print, computer media, video tape, audio tape, film, microfilm, microfiche) (34 CFR § 99.3).

Disciplinary records are included as student records and therefore receive FERPA protection, with some limited exceptions identified later in this handout (34 CFR § 99.36; United States v. Miami Univ., 294 F.3d 797 (6th Cir. 2002)).

Not included within the definition of educational records are:

- those that are prepared at the discretion of educators and administrators and are kept in the **sole possession** of the originator and revealed to no one other than a temporary substitute teacher;
- **law enforcement** records (DeFeo v. McAboy, 260 F. Supp. 2d 790 (E.D. Mo. 2003) (finding that records maintained by the campus police were not student records and therefore not protected by FERPA);
- **employment** records (Klein Indep. Sch. Dist. v. Mattox, 830 F.2d 576 (5th Cir. 1987) (finding that FERPA did not require access to employment records);
- records on a student who is age 18 or older, or attending a postsecondary institution, that are made by a physician, psychiatrist, psychologist, or other

professional or paraprofessional that are disclosed only to individuals providing **treatment**;

- **alumni** records (20 USC § 1232g(a)(4)(B); 34 CFR 99.3) (i.e., records of postgraduate activity);
- **records regarding preferential treatment** of athletes and coaches in regard to parking tickets (Kirwan v. The Diamondack, 721 A.2d 196 (Md. 1988)); and
- **test scores before they are recorded** in the teacher's grade book or placed in official school records (Owasso Indep. Sch. Dist. v. Falvo, 534 U.S. 426 (2002) (upholding the grading practice where the teacher had students exchange and grade papers). The Court concluded that scores were not "student records" as they were not "maintained" by school officials and that the graders did not act on behalf of the institution in maintaining records.

Also, colleges/school districts need not provide access to the following:

- **financial records** submitted by his or her parents (20 USC § 1232g(a)(1)(C)(i); 34 CFR § 99.12(b)(1));
- **test protocols** (Letter to MacDonald, 20 IDELR 1159 (OSEP 1993))—[If a request for review of protocols is submitted by a student, it is recommended that direct access be denied, but that access be permitted to a qualified professional of the student's choosing. Such a professional then could discuss test results with the student and review test items within limits imposed by ethics standards. A similar approach is taken for review of treatment records—34 CFR § 99.10(f)]; and
- "waived" **recommendations** and confidential letters (34 CFR § 99.12 (b)(3) [although the student does have the right to receive a list of persons who have submitted letters (20 USC §1232g (a)(1)(D)(i)]. Moreover, it is important to note that students cannot be denied admission, benefits, services, or financial aid for failure to waive access to **recommendations** (20 USC §1232g (a)(1)(D)(ii); 34 CFR § 99.12(c)(1)(i)). *See also* Slovinec v. DePaul Univ., 222 F. Supp. 2d 1058 (N.D. Ill. 2002) (holding that there was no private right of action in a FERPA claim regarding the program faculty's refusal to right letters of recommendation if the student refused to sign a waiver).

Note that FERPA does not stipulate **how long information must be retained.** State law, regulations, and policy should be consulted in such matters.

Student Access of Personal Records

The college/school district must make available any accessible student records that have been properly requested within a reasonable time and in no case more than **45 days** after the request (20 USC § 1232g(a)(1)(A); 34 CFR § 99.10(b); Mostaghim v. Fashion Inst. of Tech., No. 01 Civ. 8090 (HB), 2002 U.S. Dist. LEXIS 10968 (S.D.N.Y. June 19, 2002) (finding that the institution had complied within the required 45 days)).

To gain access to personal records, the student can be required to provide **proper identification** and to review the docket or file while in the records office.

The student does **not have the right under FERPA to remove** material, to substitute materials (e.g., withdraw one letter of recommendation and replace it with another), or to review material for which access has been waived by the student (e.g., letters of recommendation).

Officials may not **destroy records** whenever there is an outstanding request for review (34 CFR § 99.10(e)).

Once access is gained, students have the right to have records **explained and interpreted** (34 CFR § 99.10(c)).

If requested, the parent or eligible student must be provided with a copy of any records that have been disclosed (assuming they have not been waived) (34 CFR § 99.30(c)(1)).

Unless it would effectively prevent a student from exercising the right to inspect and review records, a college/school district may charge a **fee for copying** all or part of a record. Calculation of the cost, however, cannot include labor charges associated with retrieval or search (34 CFR § 99.11).

Parent/Eligible Student Release of Records to Third Parties

Generally, student consent (**dated and in writing**) is required before the college/school district can disclose personal information from education records (34 CFR § 99.30(a)).

For example, it was a technical violation of FERPA when a KSU dean of technology posted grades and full names of students on his website that was open to the public. He received verbal permission but not written permission (Daily Kent Stater via U-Wire, April 22, 2002).

The **consent form** used by the college/school district must identify:

- the records to be released,
- the person to whom they are to be released, and
- the purported reason for the release (20 USC § 1232g(b)(2)(A); 34 CFR § 99.30(b)).

However, forms need not be completed when:

- the student gains personal access or has requested access for others;
- when college/school officials with legitimate educational interests review files; or
- when a third party accesses only directory information.

A **record of access** must be prepared and included within the student's file (34 CFR § 99.32(a)(1)). This record also qualifies as a student record and is accessible by the student.

Each request or disclosure should be recorded, including the identity of the parties

making to request or receiving the information and the legitimate interests of those parties (34 CFR § 99.32(b)).

Persons to whom access is permitted should be informed that they should not release the records to other parties without prior written consent and that they too must maintain a log if access is permitted. If such a secondary receiver of the records provides unauthorized access, the originating institution must deny records access to the violator for at least **five years** (20 USC § 1232g(b)(4)(B); 34 CFR § 99.30(a)(6)(iii); 34 CFR § 99.33(e)).

Access When Student Permission Is Not Required

Depending upon the aggregate of circumstances, a college/school district may disclose records without student permission to the following (34 CFR § 99.31(b)):

- college/school officials (including legal counsel) with a **legitimate educational interest** in the file (e.g., those needing information regarding prior academic performance or disciplinary actions) (20 USC § 1232g(b)(1)(A); 34 CFR § 99.31(a)(1));
- other colleges to which the student has applied (assuming notification of transfer) (20 USC § 1232g(b)(1)(B); 34 CFR § 99.31(a)(2));
- **juvenile justice** authorities (although not typically an issue in higher education) (20 USC § 1232g(b)(1)(E); 34 CFR § 99.31(a)(5)(i)(A); 34 CFR § 99.38);
- selected federal, state, and local education authorities for **audit** and **evaluation** purposes (20 USC § 1232g(b)(3)&(5); 34 CFR § 99.35(a); 34 CFR § 99.31(a)(3));
- persons needing access for **financial aid** purposes (20 USC § 1232g(b)(1)(D); 34 CFR § 99.31(a)(i)(4));
- selected educational organizations conducting **studies** for predictive test development purposes, the administration of student aid programs, or improving instruction (20 USC § 1232g(b)(1)(F); 34 CFR § 99.31(a)(6)(i)(A));
- organizations for accreditation purposes (20 USC § 1232g(b)(1)(G));
- persons needing **emergency** access to protect the health or safety of the student or other persons (20 USC § 1232g(b)(1)(I); 34 CFR § 99.31(a)(10); 34 CFR § 99.36(a); Jain v. Iowa, 617 N.W.2d 293 (Iowa 2000) (finding that FERPA claim had not been appealed properly to the court; plaintiffs had claimed that the emergency exemption created a duty on the part of the university to warn the parents of a suicidal student that said student was self-destructive));
- victims of **violent crime or nonforcible sex offense** (i.e., statutory rape, incest) and others (limited to records indicating the results of college disciplinary proceedings involving the alleged perpetrator) (20 USC § 1232g(b)(6); 34 CFR § 99.31(a)(13)&(14); 34 CFR § 99.39). Note also that victims may share this information with others even though colleges may at times attempt to block such disclosure (e.g., officials at William and Mary tried to stop a rape victim from naming her assailant and even informed her that he would be allowed back on campus after being found guilty—Newspaper Association of America, Public Policy, p. 6, June 2003);
- individuals with a lawfully issued **subpoena** or court order, although an effort

should be made to notify the parent/eligible student prior to the release—provides the opportunity to acquire a protective order (20 USC § 1232g(b)(1); 34 CFR § 99.31(a)(9)(i)&(ii); DeFeo v. McAboy, 260 F. Supp. 2d 790 (E.D. Mo. 2003); Letter to Kamieniecki, 6 FAB 10 (FPCO April 18, 2003) (finding that an IRS summons qualifies as a lawfully issued subpoena under FERPA));

- the **court** in an **action** against the parents or eligible student (either as plaintiff or defendant—theory of **implied consent**) (34 CFR § 99.31(a)(9)(iii));
- the public in the form of **directory information** (34 CFR § 99.31(a)(11));
- the **parent or eligible student** (34 CFR § 99.31(a)(12));
- the parents of an underage (below age 21) child who has violated **alcohol and controlled substance policies**, as determined by the appropriate disciplinary committee or staff member (20 USC §1232g(i); 34 CFR § 99.31(a)(15)). (Notification must occur prior to the student reaching the age of 21, regardless the age when the inappropriate behavior took place.)

Directory Information

Unless restricted by state law (Krauss v. Nassau Cmty. Coll., 469 N.Y.S.2d 553 (Sup. Ct. 1983); Kestenbaum v. Michigan State Univ., 327 N.W.2d 783 (Mich. 1982), *rehearing denied*, 417 Mich. 1103 (Mich. 1983) (decision without published opinion)), colleges/school districts ***may*** make directory information available to the public without student consent (34 CFR § 99.37).

Release of such information would not generally be considered harmful or an invasion of privacy. Directory information may include, but is not limited to, the student's:

- name,
- address,
- phone number,
- e-mail number,
- photogragh,
- date and place of birth,
- major,
- grade level and enrollment status (undergraduate or graduate, full or part-time),
- list of activities and sports,
- weight and height of members of athletic teams,
- dates of attendance,
- degrees, honors, and awards received, and
- most recent previous educational institution attended (20 USC § 1232g(a)(5)(A); 34 CFR § 99.3).

Presumably, FAX numbers also would qualify under this category.

The Department discussed, but decided not to include, social security numbers, class rosters, and class schedules as directory information, given issues of safety and privacy.

After **general notice** is provided to all students stipulating that directory information will

be made available, the parent or eligible student then has the option to allow or to deny the distribution (20 USC § 1232g(a)(5)(B); 34 CFR § 99.37(a)(2)).

Right to Amend/Challenge Records

Parents/eligible students who believe that information contained in the education record is **inaccurate, misleading, or in violation of any of their FERPA rights** may request that the **records be amended** (20 USC § 1232g(a)(2); 34 CFR § 99.20(a)).

If the college/school official decides that the records should not be changed, the student must be advised of the **right to a hearing** (34 CFR § 99.20(c); Goodreau v. Rector and Visitors of Univ. of Va., 116 F. Supp. 2d 694 (W.D. Va. 2000)) to be conducted by a disinterested third party, although the person may work for the institution (34 CFR § 99.22(c)).

The hearing must be held within a **reasonable period of time** with the student given advanced notice of the date, time, and place (34 CFR § 99.22(a)&(b)).

At the hearing, the student may present evidence and be represented by individuals of his or her choice, including an **attorney** (34 CFR § 99.22(d)).

Within a reasonable time period, the **written decision** of the hearing officer must be given to the complainant. The decision must:

(1) be based only on the evidence presented at the hearing,
(2) provide a summary of the evidence, and
(3) identify the reasons for the decision (34 CFR § 99.22(e)&(f)).

If the parent or eligible student prevails, the record must be changed and the complainant must be informed of the amendment in writing (34 CFR § 99.21(b)(1)).

If the student is unsuccessful, he or she has the right to prepare a statement to be attached to the controversial document explaining the student's concern regarding the record. Such **rebuttal statement** must be included in the file for as long as the contested record is maintained, distributed, or reviewed with the rest of the docket (20 USC § 1232g(a)(2); 34 CFR § 99.21(b)(2)&(c)).

The FERPA right to challenge inaccurate records does not entitle the student to **challenge grades** assigned for courses, unless the grade resulted from mathematical error or was not what the instructor intended. Accordingly, if the grade was properly calculated and is one that the professor knowingly assigned, even if it is something less that the student felt he or she deserved, the student would fail to support a FERPA claim (Altschuler v. University of Pa. Law Sch., No. 95 Civ. 249, 1998 U.S. Dist. LEXIS 3046 (S.D.N.Y. March 13, 1998), *aff'd*, No. 99-7423, 1999 U.S. App. LEXIS 34303 (2d Cir. Dec. 27, 1999), *cert. denied*, 530 U.S. 1276 (2000); Adatsi v. Mathur, No. 90-2002, 1991 U.S. App. LEXIS 13087 (7th Cir. June 17, 1991); Tarka v. Cunningham, 917 F.2d 890 (5th Cir. 1990)).

Continuing Violations

Although somewhat confounded by the Supreme Court's decision in Owasso Indep. Sch. Dist. v. Falvo, 534 U.S.426 (2002), it appears that it still would violate FERPA if grades were posted by name or social security number without each student's consent. In such instances, the student's grades would have become part of the teacher's records that are required to be maintained on behalf of the institution.

If **grades** are to be **posted,** the teacher/professor and students need to have a system (e.g., the posting of test scores by random numbers assigned to students) where the identification of the student in combination with his or her grade cannot be identified by third parties (Krebs v. Rutgers, 797 F. Supp. 1246 (D.N.J. 1992); Kryston v. Board of Educ., E. Ramapo Cent. Sch. Dist., 430 N.Y.S.2d 688 (App. Div. 1980)).

Another common violation is the use of **pick-up boxes** for tests, papers, portfolios, etc. In such instances, students often are permitted to rifle through boxes of materials in an effort to retrieve their work. In the process, they have the unauthorized opportunity to review the work and grades of others. Accordingly, the teacher/professor or a staff member needs to be given the responsibility of returning materials directly to students who are known to them or have proper ID.

If a student were to request that he or she be allowed to pick up the work of another as a matter of convenience to the other student, prior authorization should be required.

Also, it remains an all too common a practice for professors to send a student his or her grade on a **post-card**. If this service is to be provided, written permission needs to be acquired or an envelope needs to be used.

Private Right of Action v. Complaint Procedure

There is **no private right of action under FERPA** (i.e., a student lacks standing to bring suit under this law). Moreover, a student **may not file suit under § 1983** to claim a FERPA violation (Gonzaga Univ. v. Doe, 536 U.S. 273 (2002) (finding no private right of action under § 1983 for a FERPA violation); Slovinec v. DePaul Univ., 332 F.3d 1068 (7th Cir. 2003) (finding no private right of action under either FERPA or the Higher Education Act of 1965); Shockley v. Svoboda, No. 00-1469, 2003 U.S. App. LEXIS 16903 (7th Cir. Aug. 19, 2003) (finding no private right of action under FERPA/§ 1983 claim); Cudjoe v. Independent Sch. Dist. No. 12, 297 F.3d 1058 (10th Cir. 2002) (finding no private right of action); Curto v. Smith, 248 F. Supp. 2d 132 (N.D.N.Y. 2003) (holding that there was no private right of action in a case where university officials disclosed a student's test score to an emeritus professor, various unnamed members of the public, and the Department of Education); Warton v. New Fairfield Bd. of Educ., 217 F. Supp. 2d 261 (D. Conn. 2002) (finding no private right of action in a case where a school psychologist reviewed records without student permission)).

However, a student may file a complaint with the **Family Policy Compliance Office (FPCO)** in the United States Department of Education. To contact FPCO, write to the

Department of Education at **400 Maryland Ave., S.W., Washington, D.C. 20202-4605.**

A **180-day statute of limitations** generally applies for filing complaints. The limitations period begins on the date the violation allegedly occurred or when the student knew or reasonably should have known of the violation (34 CFR §99.64(c)&(d)).

There is **no actual hearing** when FERPA-based complaints are filed. Instead, FPCO notifies the college/school district of the allegations and requests a written response. It then investigates the complaint, determines whether an infraction has occurred, and notifies the parties of its decision, including instructions on how to rectify the situation if the allegation is supported (34 CFR subpart E).

The Secretary of the Department of Education may initiate proceedings to **withhold federal funds** or terminate eligibility for future funding if a pattern of violations has been proven and the college/school district still has refused to amend its practices, notwithstanding DOE efforts to compel compliance (e.g., a cease-and-desist order) (34 CFR § 99.67).

Prior to the termination of financial support, it must be shown that **compliance cannot be secured** through voluntary means (20 USC §1232g(f)).