

FERPA Basics



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What is FERPA?

"The Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) is a Federal law that protects the privacy of student education records. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education."

<https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html>

FERPA: Two Purposes

1. Access to student's education records
2. Limit on disclosure
 - Prior written consent, or
 - Consent exception

Family Educational Rights and Privacy Act

"Education Records"

- Information "**directly related to student**"
- **Maintained** by educational agency or party acting for agency

34 CFR 99.3

Record

"Record means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm and microfiche."

34 CFR 99.3

Exception to “Education Record”

Records of school personnel which are:

- Kept in maker's **sole possession**
- Used only as a personal **memory aid**
- **Not accessible/revealed** to anyone except temporary substitute for record maker

34 CFR 99.3

Peer Grading

No education record is created until the student paper is recorded or “**maintained**” by the school

Owasso Independent Sch Dist v Falvo
534 US 426 (2002)

Note: Peer grading should be for legitimate pedagogical purpose, **not** teacher convenience!

Is it an Education Record?

“FERPA applies to the disclosure of education records and of personally identifiable information (PII) from education records that are maintained by the school. Therefore, FERPA does not prohibit a school official from releasing information about a student that was obtained through the school official's personal knowledge or observation, rather than from the student's education records. For example, if a teacher overhears a student making threatening remarks to other students, FERPA does not protect that information from disclosure. Therefore, a school official may disclose what he or she overheard to appropriate authorities, including disclosing the information to local law enforcement officials, school officials, and parents.”

<https://studentprivacy.ed.gov/frequently-asked-questions>

But...

It *is* an education record if:

- Information included in an assignment;
- Information also included in a record (e.g., student's disability status);
- Information otherwise meets definition of PII from education record.

Record Disclosure

- Is document an “education record”?
- Is disclosure to parent or adult student?
 - If not, do you have prior written consent?
 - Or, does a consent exception apply?

Some Consent Exceptions

- School official with “*legitimate educational interest*” as determined by school
- Other schools where student seeks to enroll, or is currently enrolled
- Parent of dependent student under IRC
- Health and safety emergencies
- Court order or lawfully issued subpoena
- Directory information

“Legitimate Educational Interest”

“[A] school official has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility...”

USDOE – SPPO FAQs on Protecting Student Privacy

“Legitimate Educational Interest”

- Sharing information about a student's family situation with a teacher to allow teacher to meet student's needs.
- Sharing disability-related information about a student with the student's teachers and service providers, as necessary to allow those individuals to appropriately serve student.
- Discussing student behaviors with current or past teachers to determine whether behaviors are new or ongoing.

Is it in this student's educational interest for this person to access the information?

“Directory Information”

Information in a student's education record that is generally not considered *“harmful or an invasion of privacy if disclosed.”*

34 CFR 99.3

“Directory Information”

The Board designates as student “directory information”:

- 1.a student's name;
- 2.participation in officially recognized activities and sports;
- 3.dates of attendance;
- 4.date of graduation;
- 5.awards received;
- 6.honor rolls;
- 7.scholarships.

Policy 8330

Consent Exemptions that Don't Exist

- To people who are not “school officials” as designated by Board
- To a colleague who would think it is interesting or funny
- To the police when they asked for it nicely
- To the police when they really, really want it
- To a non-parent who is easier to deal with than actual parent

Health or Safety Emergency

If there is an “articulable and significant threat” to the health or safety of the student or other individuals, an educational agency or institution may disclose information to appropriate parties without parental consent.

34 CFR 99.36(c)

What is an “Emergency”?

- Information of a threat of a terrorist attack, natural disaster, campus shooting, or the outbreak of an epidemic
- Information that a student may harm themselves or others
- Guidance counselor disclosed a student's initials, age, academic year, and pregnancy status in order to protect the student's safety

Does Not Include

- Information shared as gossip.
- Information shared with non-employees.
- Broad or blanket access to student records by individuals who do not have a “legitimate educational interest” in the information. Examples may include:
 - Board member access to student record system;
 - Athletic department access to special education records;
 - Elementary administration access to high school student records.

Threat Assessment Team

- *“Under FERPA, a school or school district may disclose personally identifiable information (PII) from education records without consent to threat assessment team members who are not employees of the school or school district if they qualify as ‘school officials’ with ‘legitimate educational interests.’”*
- *“[M]embers of the threat assessment team may only use PII from education records for the purposes for which the disclosure was made, i.e., to conduct threat assessments, and must be subject to FERPA’s redisclosure requirements in § 99.33(a). For example, a representative from the city police who serves on a school’s threat assessment team generally could not give the police department any PII from a student’s education records to which he or she was privy as a member of the team.”*

Michigan Penal Code

Crime	Maximum Sentence	Citation
Communicating a threat of terrorism	20-year felony	MCL 750.543m
Calling in a bomb threat	4-year felony	MCL 750.411a(1)(b)
Malicious use of a telecommunications device	6-month misdemeanor	MCL 750.540e
Threatening violence against school employee or student	1-year misdemeanor 10-year felony if specific intent to act on	MCL 750.235b

School Specific Threats

- **Misdemeanor:** *Threat to use firearm, explosive, or dangerous weapon to commit violent act against students or school employees on school property if threat can be reasonably interpreted as harmful, adverse or “dangerous to human life”*
- **Felony:** Same as above with either: (1) specific intent to carry out threat; or (2) overt act toward carrying out threat

MCL 750.235b (eff. March 28, 2019)

“All threats are NOT created equal.”

Federal Bureau of Investigation
*The School Shooter:
A Threat Assessment Perspective*

Types of Threats

- **Direct:** Specific act against specific target and delivered in clear manner. Ex: "*I am going to shoot up the school.*"
- **Indirect:** Vague, unclear. Ex: "*If I wanted to, I could kill everyone at school.*"
- **Veiled:** Implies, but does not expressly threaten violence. Ex: "*We would be better off if the principal died.*"
- **Conditional:** Warns that violence will happen unless terms are met. Ex: "*If Mr. Smith does not give me an 'A', I will shoot up the school.*"

"Threat" Continuum

- Figure of speech
- Joke
- Fleeting expression of anger
- Attention-seeking
- Thrill of causing disruption
- Attempt to intimidate/frighten
- Warning of impending violence

High Level of First
Amendment Protection

Not Protected

SCOTUS: "True Threat"

"[T]hose statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."

Virginia v Black
538 US 343 (2003)

Sixth Circuit: "True Threat"

Whether reasonable person would:

- (1) Take statement as serious expression of intent to inflict bodily harm, *and*
- (2) Perceive such expression of intent to inflict bodily harm as being communicated to effect some change or achieve some goal through intimidation

U.S. v Landham
251 F3d 1072 (CA 6, 2001)

Objective Test

- Would a "reasonable person" view the statement as a serious expression of intent to cause a present or future harm?
- Distinguish from hyperbole, jest, political views
- From whose viewpoint
 - Speaker?
 - Recipient?

Counterman v Colorado (June 27, 2023)

- 7-2 SCOTUS decision to overturn stalking conviction for making on-line threats against local singer
- A true threat (not protected by First Am.) requires speaker's conscious disregard of substantial and unjustifiable risk that speech will cause harm
- Although criminal case, analysis could apply to student "speech" situations

To be a “true threat” (and lose First Am. protection), government must show that speaker had “some subjective understanding of the threatening nature of his statements” and “recklessly disregarded a substantial risk” that the speech will cause harm to another

Tinker v Des Moines Indep SD **393 US 503 (1969)**

“Public school students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”

Justice Abe Fortas
7-2 decision

Tinker **Requirements**

- School must prove that speech would “**materially and substantially disrupt**” school work or discipline or have a “**reasonable forecast**” of disruption
- Cannot suppress speech due to “**undifferentiated fear or apprehension of disturbance**”

Substantial Disruption

*“Certainly where there is no finding and no showing that engaging in the forbidden conduct would ‘**materially and substantially interfere**’ with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained.”*

Tinker v Des Moines Indep Sch Dist
393 US 503, 509 (1969)

Mahaffey v Aldrich **(ED Mich, 2002)**

- Suspension for creating “Satan’s web page” which listed
 - Student names of
 - “People Who Are Cool”
 - “People Who Should Die”
 - Satan’s “Mission of the Week”
- Expulsion proceedings began and student withdrew and sued

Satan’s Mission For You This Week

“Stab someone for no reason then set them on fire throw them off of a cliff, watch them suffer and with their last breath, just before everything goes black, spit on their face. Killing people is wrong don’t do it unless I’m there to watch - Or just go to Detroit. Hell is right in the middle. Drop by and say hi.”

*PS: NOW THAT YOU’VE READ MY WEB PAGE
PLEASE DON’T GO KILLING PEOPLE AND STUFF THEN
BLAMING IT ON ME. OK?*

Mahaffey Court Ruling

- First Amendment violated
- No nexus to school
- No “*true threat*” because there was no serious expression of intent to harm
- No *Tinker* substantial disruption



“It’s pretty simple / I have a sweet gun / My neighbor is giving me 500 rounds / dhs [Douglas High School] is gay / I’ve watched these kinds of movies so I know how NOT to go wrong / I just cant decide who will be on my hit list / and that’s totally deminted and it scares Even my self.”



“and ill probably only kill the people I hate? who hate me / then a few random to get the record”

“that stupid kid from vtch. He didn’t do shit and got a record. I bet I could get 50+people / and not one bullet would be wasted.”

Wynar v Douglas Co Sch Dist (CA 9, 2013)

- Student expelled for threatening IMs to shoot specific students and “take out” others on Virginia Tech anniversary
- Reasonable forecast of substantial disruption as school officials “*reasonably could have predicted that they would have to spend considerable time dealing with [parents’ and students’] concerns and ensuring that appropriate safety measures were in place.*”

Deference to School Officials

*“[I]n the context of student speech favoring violent conduct, it is not for courts to determine how school officials should respond. **School administrators are in the best position to assess the potential for harm and act accordingly.**”*

FERPA: Education Record

- Photo/video of student is an education record if
 - Directly related to student
 - Maintained by school or party acting for the school
- FERPA excludes records created and maintained by school’s law enforcement unit

20 USC 1232g; FPCO FAQ (April 19, 2018)

Directly Related to Student

Context-specific to be determined on case-by-case basis, but does video depict activity:

- Which may be used for disciplinary action (or other official purpose) involving student (including victim)?
- Of student violating the law?
- Of student being injured, victimized?
- Of specific student focus?

20 USC 1232g; FPCO FAQ (April 19, 2018)

Video of Multiple Students

- If an education record, parent has right to review
- If images of other students can be redacted (without destroying meaning), school should do so
 - No charge to redact
 - May charge for copy
- FERPA does not generally require release of copies

20 USC 1232g; FPCO FAQ (April 19, 2018)

Video Disclosure to Police

If an education record, disclosure **only** if:

- Prior written consent from parent
- Application of consent exception
 - Health or safety emergency
 - Court order or subpoena

20 USC 1232g; FPCO FAQ (April 19, 2018)

FERPA Requests to Amend

"If a parent or eligible student believes the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy, he or she may ask the educational agency or institution to amend the record."

34 CFR 99.20(a)

Response to Amendment Requests

"The educational agency or institution shall decide whether to amend the record as requested within a reasonable time after the agency or institution receives the request."

"If the educational agency or institution decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and of his or her right to a hearing under §99.21."

34 CFR 99.20(b), (c)

FERPA Hearing

*"If the parents/eligible students request a Records Hearing, the Superintendent shall: (1) select the Records Hearing Officer (RHO) (who may be an official of the District who does not have a direct interest in the outcome of the hearing); (2) direct the person selected as the RHO to **arrange a hearing with the parents/eligible students within ten (10) business days from the date of the hearing request or at a mutually agreed time.**"*

Common FERPA Policy

FERPA Right to Inspect

- Parent right to inspect and review education records
- *"The educational agency...shall comply with a request for access to records within a reasonable period of time, but not more than 45 days after it has received the request."*
- May charge fee for copy; may not charge fee to retrieve records

34 CFR 99.10, 99.11

IDEA Access Rights

"Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to §300.507 or §§300.530 through 300.532, or resolution session pursuant to §300.510, and in no case more than 45 days after the request has been made."

34 CFR 300.613(a)

And...

The right to inspect and review includes:

- (1) The right to a response to reasonable requests for explanations and interpretations of the records;
- (2) The right to copies if failure to provide copies would effectively prevent the parent from exercising the right to inspect and review the records; and
- (3) The right to have a representative review the records.

34 CFR 300.613(b)

