The Definitive Update on FERPA and Education Records

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Applicable Laws and Regulations

Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232g (now really part of the General Education Provisions Act)

FERPA is the federal law that sets forth basic privacy requirements for personally identifiable information contained in educational records created or maintained by schools. It was amended in 1996, 2000, and 2001 (USA PATRIOT Act of 2001—see below).

Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act of 2001), P.L. 107-56, H.R. 3162, 107th Cong. 1st Sess. (signed by President Bush October 26, 2001).

Section 507 of the Act amends FERPA by adding a subsection involving non-consensual disclosures of educational records to federal law enforcement authorities involved in anti-terrorism investigations.

Protection of Pupil Rights Amendment (PPRA), 20 U.S.C. §1232h; 34 C.F.R. Part 98.

Provides safeguards in situations involving surveys and studies funded by DOE that require responses from students on privacy-sensitive issues.

Federal regulations implementing FERPA, at 34 C.F.R. Part 99 (§§99.1-99.67).

The Part 99 regulations, promulgated by the Department of Education (DOE), set forth confidentiality requirements and provisions in much greater detail, in order for FERPA to be implemented by the schools. These regulations contain the specific provisions with which schools must comply under FERPA.

Individuals with Disabilities Education Act (IDEA), at 20 U.S.C. 1412(a)(8), 1417(c).

IDEA orders the Department of Education to take appropriate action to assure the protection of confidentiality of personally identifiable information maintained by school districts and state educational agencies. The Department of Education took such appropriate action by promulgating the IDEA regulations

that confirm and reinforce school districts' confidentiality duties with respect to personally identifiable information relating to IDEA-eligible students. In addition, IDEA requires that state plans (required for federal funding eligibility) contain policies and procedures to ensure protection of confidential information located in the schools.

Federal regulations implementing IDEA, at 34 C.F.R. §§300.127, 300.560-300.577.

As part of the set of federal regulations implementing IDEA, the Department of Education has also promulgated 18 regulations that serve to confirm and reinforce that personally identifiable information contained in educational records relating to IDEA-eligible students is subject to the requirements of FERPA. In some instances, the IDEA regulations add certain protections specific to parents of IDEA-eligible students.

Broad Outline of Basic FERPA Provisions

Coverage	Any educational agency that receives any type of federal funding, or directs and controls an educational institution. *See new* 34 C.F.R. §99.1(a)(2).
Purposes	To allow parents access to educational records relating to their children. To prohibit disclosure of education records to third parties unless the school obtains prior written parental consent for such disclosure, or an exception to the consent requirement applies.
Notice	School districts must notify parents of students annually regarding their rights under FERPA.
Amendments	Schools must set up procedures to allow parents to request amendments to educational records, as well as a hearing process, in case the parents disagree with a school's decision to not amend a certain record.
Enforcement	Department of Education has set up the Family Policy Compliance Office (FPCO) and the Office of Administrative Law Judges to enforce compliance with FERPA, review and investigate complaints, and, in the case of FPCO, provide technical assistance regarding compliance with FERPA.

Important FERPA Definitions (34 C.F.R. §99.3)

Education Records	Records that are directly related to a student, and maintained by an educational agency or a party acting on behalf of the educational agency.

The term "education records" does *not* include:

1) **Records kept in the sole possession of the maker, used only as a personal memory aid, and not accessible or revealed to any other person except a temporary substitute for the maker of the record.**

For example, **lesson plans or notes kept privately by a teacher** or counselor. meant as memory aids, and not shared with anyone except a substitute would not be education records subject to parental access under FERPA. Likewise, any other notes or documents created by a staffperson that are kept privately and not shared with other personnel are the private property of the staffperson and are not subject to parental access under FERPA.

Psychologists' notes fall under this exception if used only as memory aids and not disclosed to anyone except a substitute. *Irvine (CA) Unified School District*, 14 EHLR 353 (OCR 1989).

Test protocols—OSEP has stated that test protocols, test instruments, or question booklets are not considered FERPA records if they do not contain the student's name or other personally identifiable information. *Letter to MacDonald*, 20 IDELR 1159 (OSEP 1993); *FPCO Policy Letter* (FPCO—October 2, 1997). Schools, however, have to respond to requests by parents to inspect and review completed answer sheets or records related to a test completed by the student. *Fonda-Fultonville (NY) Central School*, 31 IDELR 149 (FPCO 1998); *see* 34 C.F.R. §99.10(c) (LEA "shall respond to reasonable requests for explanations and interpretations of the records."). Although a question booklet with no answers may not contain personally identifiable information, a school may need to review the booklet with the parent in response to a reasonable request for explanation or interpretation of the testing. *FPCO Policy Letter* (FPCO—October 2, 1997). Schools, moreover, should not destroy protocols that contain personally identifiable information of a student (except when complying with retention and destruction procedures). See *Charles Community School District*, 17 IDELR 18 (OCR 1990).

Copies and copyrights—FPCO also states that schools can avoid providing copies of protocol-type materials that are copyrighted (or otherwise prohibited for release by the publisher) by allowing parents access to the record by offering to review the document with them. *Id.* Problems can arise, however, when a parent lives in another state and cannot review the records personally. FPCO suggests that the school can contact the new out-of-state school,

send the school the child's protocols, and make arrangements to have the parents review them locally. *Id.* After the parents review the materials, presumably they would be returned to the original school. But might it be a copyright violation merely to have the old school release the protocols to the new school? FPCO does not address the possibility. One would think that FPCO would ensure that FERPA is interpreted and enforced in a way that does not place schools in the impossible conundrum of having to violate one federal law in order to comply with another.

2) **District police force records**, if maintained separately from education records, maintained solely for law enforcement purposes, and disclosed only to other members of a school police force. The school must not disclose education records to the campus police (unless with parent consent, or if an exception to the consent requirement applies).

3) **Records relating to an employee of the educational agency** that are maintained in the normal course of business, relate exclusively to the employee's capacity as an employee, and are not available for any other purpose (but does not include records of students employed by the school under a vocational program, office assistant, or work-study project).

4) **Records of a student who is 18 years or older, or is attending college that are maintained by health professionals**, and are maintained or used only in connection with physical or mental health treatment issues.

   Remedial educational activities or other services part of the educational institution's programs are not to be considered "treatment" within the meaning of this exception. 34 C.F.R. §99.3, definition of Education Records, subsection (b)(4)(iii).

5) **Records that contain information about a student after he or she are no longer a student at that educational agency.**

Directory Information — Information which would not generally be considered harmful or an invasion of privacy if disclosed, including name, address, telephone listing, e-mail address, photograph, date and place of birth, major field of study, participation in sports, dates of attendance, honors, awards, degrees, weight an height of team members, and most recently attended previous educational agency. *See* 34 C.F.R. §99.3, definition of "Directory Information" (amended August, 2000).

Disclosure — Permitting access to information, or releasing information by any means, including orally, in writing, or electronically.

Thus, there is no difference between providing a copy of a record and orally disseminating information contained in that record.

Parent Includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or guardian (very similar to the IDEA definition of "parent" under 34 C.F.R. §300.20).

The IDEA definition expressly includes surrogate parents appointed for IDEA purposes, but the FERPA definition does not. Moreover, there can be debate as to whether surrogate parents under IDEA are "acting as a parent in the absence of a parent or guardian" within the meaning of the FERPA definition. Surrogate parents are certainly acting as the parent for IEP-team purposes, but not anything else (e.g., feeding, clothing, supervising the child as a parent would). The issue has not come up, but we can safely agree that a surrogate parent under IDEA could not effectively fulfill their responsibilities without accessing information from educational records.

Personally Identifiable Information Name, names of family members, address, social security or student ID number, list of personal characteristics, or any other information that would make identity easily traceable.

ID numbers are FERPA-protected—FPCO has held that student ID numbers and social security numbers constitute personally identifiable information since they are "easily traceable" to the student. *Letter to Shea*, 36 IDELR ¶7 (FPCO 2001).

Records Information recorded in any way (e.g., handwriting, print, computer media, video or audiotape, film, microfilm, and microfiche).

Student and Parent Rights

General Rights

Either parent is accorded full rights under FERPA, unless the school has been provided with evidence of a court order, statute, or legally binding document relating to divorce, separation, or custody that specifically revokes those rights. 34 C.F.R. §99.4.

Thus, non-custodial parents in a divorce situation are still entitled to access to FERPA records, unless the divorce or custody decree specifically takes those rights away from the non-custodial parent.

Practical Tip for Schools—In divorce situations, schools should request that the parents provide the final divorce decree containing the custody provisions. Typical advice from school attorneys is that unless the decree clearly removes a non-custodial parent's rights to access records, it must be assumed that the non-custodial parent retains equal access rights. If custodial parents wish to prevent the non-custodial parent from accessing school records, they can seek an amendment to the divorce and custody decree through the courts (and possibly some sort of immediate injunctive relief).

When a student becomes 18 or enrolls in a postsecondary institution, the rights afforded to parents under FERPA transfer to the student. 20 U.S.C. §1232g(d), 34 C.F.R. 99.5(a). At that point, the student is called an **"eligible student"** in the regulations.

This means that when an IDEA-eligible student turns 18 FERPA rights to access records and prevent non-consensual disclosure to third parties transfer to the student, unless the student has been determined to be incompetent by a court of law. *See also* 34 C.F.R. §300.574.

Thus, an 18-year-old student who is not held incompetent could presumably prevent his parents from accessing his educational records. But the District must still try to ensure the participation of parents in IEP team meetings. *See* 34 C.F.R. §300.345. The only way to reconcile these provisions would be to understand that an adult student can prevent his or her parents from reviewing or accessing education records, but not from participating in IEP team discussions and deliberations, even if some personally identifiable information is disclosed to the parents incidentally in the course of deliberations.

Schools are free to provide access and privacy rights in excess of those required by FERPA. 34 C.F.R. §99.5(b).

If a student has attended a school and applies for admission to another component of the school, the student does not have FERPA rights with respect to records maintained by the new program (e.g., admission documents, application) unless the student is accepted and attends the new program. 34 C.F.R. §99.5(c). See also *FPCO letter* (FPCO—March 10, 1999).

Parent and Eligible Students' Rights to Inspect and Review Records

A District must comply with requests to access records within a reasonable period of time, without unnecessary delay, and, under IDEA regulations, before an IEP team meeting or hearing, and in no case later than 45 days after the request is made. See 34 C.F.R. §§99.10(b), 300.562(a).

Parents have a **right to inspect and review records**, as well as to have the District respond to reasonable requests for explanations and interpretations of the records. 34 C.F.R. §§99.10(c), 300.563(b)(1).

Parents have the right to request that the District provide **copies** of the records if failure to provide copies would effectively prevent the parents for exercising the right to inspect and review the records. 34 C.F.R. §§99.10(d)(1), 300.562(b)(2).

> The District can charge a **fee** for copies if the fee would not effectively prevent the parent from accessing the records. No fee can be charged for searching for or retrieving records. 34 C.F.R. §§99.11, 300.566.
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> In the case of *Lincoln-Way Area (IL) Special Education Joint Agreement District 843*, 35 IDELR ¶68 (OCR 2000), a parent challenged the school's policy of charging **30¢ per page** for copying student records for parents. The school also had a policy of providing one full copy of student files without charge before beginning to apply the copying charge. OCR found that the District had valid reasons for the charge (staff time, copying time, copy costs, related maintenance costs, etc.). Moreover, OCR found that the charge had not actually resulted in parents not getting access to their children's records. OCR therefore upheld the District policy.

The IDEA regulations specifically allow parents of IDEA students the right to have their ***representatives*** inspect and review the records (representatives must have a written parent consent). 34 C.F.R. §300.562(b)(3).

Also under the IDEA regulations, parents must be provided with a **list of the types and locations of education records** kept by the District. 34 C.F.R. §300.565.

Parents can only obtain information about their children. 34 C.F.R. §99.12(a). If a record contains information about more than one student, it must be redacted accordingly before the parents can obtain access.

Students do not have a right access their parents' financial records that are now part of Districts' education records. In addition, students do not have to be permitted to access confidential letter and statements of

recommendation under certain circumstances. *See* 34 C.F.R §99.12(b)(2), (3).

Amendment of Education Records

Parents can request that a District make amendments to education records that they believe are inaccurate, misleading, or in violation of their privacy rights. 34 C.F.R. §§99.20, 300.567.

If the District decides not to amend a record as requested, it must inform the parents of its refusal and their **right to seek a hearing.** The District must decide whether to amend the record as requested within a reasonable time (probably safe to stay under 45 days).

The **hearing** must be held within a reasonable time after it receives a request for a hearing. The parents must be provided notice of the date, time, and place of the hearing reasonably in advance of the hearing. The hearing can be conducted by any individual, including an employee of the District, as long as such person has no direct interest in the outcome of the hearing. Parents can present evidence and be represented by any person, including an attorney. The District must render a decision in writing within a reasonable time after the hearing, and such decision must be based on the evidence alone. 34 C.F.R. §99.22.

If, as a result of the hearing, the District decides that the parents are correct in their allegations regarding the records, it must amend the record accordingly and inform the parent of such action in writing. 34 C.F.R. §99.21(b)(1). If not, the District must inform the parents that they have a right to place a statement in the record commenting on the contested information and/or the results of the hearing. §99.21(b)(2). Such a statement must be thereafter treated as an integral part of the record. §99.21(c).

School District Duties and Responsibilities

Annual Notice of FERPA Rights

The new FERPA regulations do not require that Districts maintain policies explaining FERPA requirements, but now require only the annual notification of FERPA rights to parents and eligible students. In fact, however, the new notice provisions incorporate many of the statements that had to be included in the old policies. *See old* 34 C.F.R. §99.6 (now removed and reserved).

Contents of the required notification (34 C.F.R. §99.7):

1) Statement of right to inspect and review education records.

2) Statement of right to seek amendment of records.

3) Statement of right to consent to disclosures of personally identifiable information to third parties, except where the regulations allow disclosure without consent.

4) Statement of right to file a complaint with the FPCO.

5) The District procedure for inspecting and reviewing records.

6) The District procedure for requesting amendment of records.

7) A specification of the criteria used by the District for determining who constitutes a "school official" and what constitutes a "legitimate educational interest" (since schools can disclose information without parent consent to other District employees with a legitimate educational interest in the information—see below).

With respect to ***disabled*** **parents or eligible students,** the notice must "*effectively*" notify such persons. 34 C.F.R. §99.7(b)(1). This is a higher standard of notice than for non-disabled parents and students, who are only entitled to notice "by any means that are reasonably likely to inform the parents or eligible students of their rights." 34 C.F.R. §99.7(b). For disabled parents, this section is likely to require notice in an appropriate communication medium, depending on the parent's disability (i.e. Braille or large-print for visually impaired parents).

Disclosure of Education Records or Information

General Rule of Prior Written Parental Consent

Unless an exception applies, a District may not disclose personally identifiable information in a student's education records unless the parent or adult student provides a signed and dated written consent to such disclosure. 34 C.F.R. §§99.30(a), 300.571.

Elements of Consent Form—The written consent must (1) specify the records that are to be disclosed, (2) state the purpose of the disclosure, (3) identify the party to whom the record is being disclosed. 34 C.F.R. §99.30(b).

The parent can request a copy of any record that is disclosed, or can request that a copy be provided to the student. 34 C.F.R. §99.30(c).

Falvo v. Owasso Ind. School Dist. No. I-011, **No. 00-1073, 2002 LEXIS 619 (2002)—Peer grading and calling out of scores in class.**

A parent sued a school where some teachers maintained a practice of having students grade each other's tests or assignments and call their

grades aloud, for alleged violation of FERPA. The District Court ruled for the school by summary judgment.

The 10th Circuit Court of Appeals held that the grades students record on one another's homework and test papers constitute "education records" under FERPA. Moreover, the court found that in assisting the teachers by marking papers, the students were "maintaining" the education records on behalf of the school. *See* 20 U.S.C. §1232g(a)(4); 34 C.F.R. §99.3 (definition of "educational record). Thus, the court held that FERPA applies and prohibited the practice unless the parental proviced prior consent.

The circuit court's ruling contradicted the position of the Family Policy Compliance Office (FPCO), which is the DOE office responsible for interpreting and enforcing FERPA in the schools. *Falvo v. Owasso Ind. School Dist. No. I-011*, 233 F.3d 1203 (10th Cir. 2000), *cert. granted*, 121 S.Ct. 2547 (2001). In an interpretive letter, the FPCO had previously found that by allowing students to grade each other's papers a school was not "maintaining" those grades in its educational records, and was thus not an activity prohibited by FERPA. The circuit court disagreed with the letter and its reasoning, and instead found that the act of a student grading another's paper meant the student was assisting the teacher to grade the paper, thus "maintaining" the record on behalf of the school, an act which comes within the language of FERPA.

The Supreme Court granted certiorari (review), heard oral argument, and subsequently issued its opinion on February 19, 2002. In a short, unanimous opinion by Justice Kennedy, the Court wrote that the 10th Circuit's logic "does not withstand scrutiny." Its rationale was based on the following points:

1. **At the time students are grading each other's assignments, those papers are not "maintained" within the meaning of FERPA.** Citing dictionary definitions for "maintain," the Court held that a student-graded assignment is not an educational record until the teacher records the grade.

2. **The Court rejected as "fanciful" the 10th Circuit's assertion that by grading a peer's paper and possessing it for a short time, a student "maintains" the record "on behalf of the school"** in the same way that the school registrar maintains the student's folder in the permanent file.

3. Looking to the ordinary meaning of the phrase "acting for," the **Court also rejected the argument that the student graders were "acting for" the school for purposes of FERPA.** "Just as it does not accord with our usual understanding to say students are 'acting for' an educational institution when they follow their teacher's direction to take a quiz, it is equally awkward to say students are 'acting for'

an educational institution when they follow their teacher's directions to score it."

4. The Court acknowledged the **educational policy argument** that peer grading is a valid educational tool for teachers to reteach, reinforce lessons, evaluate students' understanding of the material, and promote student-to-student cooperation and assistance. The Court stated that "[c]orrecting a classmate's work can be as much a part of the assignment as taking the test itself.

5. The **parents' reading of FERPA here would require bizarre and extreme results**, such as a written record of access for each and every instance that a student corrects a peer's work. Moreover, agreeing that student graders maintain records on behalf of the school would imply that educational records could be conceivably kept by many students in many locations. The Court found that the language of FERPA "suggests Congress contemplated that education records would be kept in one place with a single record of access." It noted that FERPA contains provisions about a single "school official" and "his assistants" as personnel specifically responsible for maintaining educational records.

6. **Federalism** constraints require an interpretation of FERPA that does not allow the federal government to force teachers to abandon long-used educational practices, such as group grading of team assignments. "We doubt Congress meant to intervene in such a drastic fashion with traditional state functions. Under the Court of Appeals' interpretation of FERPA, the federal power would exercise minute control over specific teaching methods and instructional dynamics in classrooms throughout the country. The Congress is not likely to have mandated this result, and we do not interpret the statute to require it."

   SIDEBAR: It may have hurt the parents' case when their attorney boldly asserted in questioning at oral argument that FERPA required prior written parental consent if a student ever saw a happy face, a gold star, or a disapproving remark on another classmate's paper in any of the many thousands of public classrooms in the nation. *See* Transcript of Oral Argument at 40 (Alderson's).

Exceptions to the Consent Requirement (34 C.F.R. §99.31)

USA PATRIOT Act of 2001 amendment to FERPA

On October 24, 2001, President Bush signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept

and Obstruct Terrorism (USA PATRIOT Act of 2001). Section 507 of the Act adds a new subsection to FERPA. *See attachments for text of new subsection.*

The new FERPA amendment authorizes the U.S. Attorney General to seek ex parte (without the other party getting notice) court orders requiring a school or college to submit educational records relating to anti-terrorism investigations and prosecutions. 20 U.S.C. §1232g(j)(1)(A). The AG must allege "specific and articulable facts giving reason to believe" that the education records are likely to contain information relevant to anti-terrorism investigations. 20 U.S.C. §1232g(j)(2)(A).

Schools need not make a record of access for disclosures under this provision. 20 U.S.C. §1232g(j)(4).

Schools are also immunized from liability associated with a good faith disclosure of educational records pursuant to this provision. 20 U.S.C. §1232g(j)(3).

Other Exceptions to the Consent Requirement (34 C.F.R. §§99.31(a)(1)-(13))

1) **Disclosures to other school officials or employees that the District has determined have a legitimate educational interest in the information. 34 C.F.R. §99.31(a)(1).**

   In its annual notice, the District must inform the parents of the criteria under which it determines who is a "school official" with "legitimate educational interests." 34 C.F.R §99.7(a)(3)(iii) (see above).

   Contract staffpersons who assist in providing a child with an appropriate education, such as contract related services providers, have been held to have legitimate educational interests in reviewing pertinent education records. *Marshfield School (Union 102)*, 22 IDELR 198 (SEA Maine 1995).

   Other Contractors and Consultants—Schools also do not have to obtain parental consent to release education records to their attorneys, accountants, collectors, or other consultants or contractors (e.g., MDs, psychologists) since they perform professional services as part of the operation of the institution that the school would otherwise have to do itself. *Letter to Garvin*, 30 IDELR ¶543 (FPCO 1998); *Letter to Diehl*, 22 IDELR 734 (OSEP 1995); *In re Jeremiah*, 25 IDELR 475 (SEA NH 1997). Thus, these contractors are considered school employees with a legitimate educational interest, entitled to access educational records without parental consent.

   Disclosures in due process hearings—A disclosure of an educational record to an impartial hearing officer, without parental consent, as part of a due process hearing is not a violation of FERPA. *M.R. v. Lincolnwood Bd. of Educ.*, 20 IDELR 1323 (N.D.Ill. 1994), *aff'd* 56 F.3d 67 (7th Cir. 1995). School officials showing a videotape of the student's behavior in a hearing constituted disclosure to school officials with legitimate educational

interests. See also *Letter to Stadler*, 24 IDELR 973 (OSEP 1996) (school is entitled to defend itself by disclosing relevant records to the hearing officer). In the August, 2000 amendments to FERPA new provisions are added expressly allowing disclosure of education records by the school in legal actions between parents and schools. 34 C.F.R. §99.31(a)(9)(iii) (see also below).

Medicaid reimbursement issues—Prior parental consent is required for disclosures of information from student records to Medicaid agencies for purposes of reimbursement to the school. This includes providing lists of students with disabilities who receive IDEA services to Medicaid. *Letter to Wisconsin*, 28 IDELR 497 (FPCO 1997). But, schools can provide such information to Medicaid billing and reimbursement agencies they contract with to recover Medicaid funding. These agencies may not disclose educational record information to Medicaid or other agencies without parental consent, but they can compare school enrollment lists to lists of Medicaid-eligible persons they obtain from Medicaid agencies. Moreover, the parents' application for Medicaid assistance may suffice to meet the consent requirements if the proper elements are included.

> *Note to contractors and school attorneys*: FERPA protections attach to the educational records contained in legal files in law offices and other places of employment since the contractors are "acting for" the educational institution. Make sure your clerical and file management staff understand the privacy protections to which those records are entitled.

2) **Disclosures to other Districts or postsecondary institutions where the student seeks or intends to enroll. 34 C.F.R. §99.31(a)(2).**

In such situations, the disclosing District must attempt to notify the parent or eligible student at their last known address unless the parent or eligible student initiated the disclosure or the District has included in its annual notice a statement indicating that it routinely forwards education records to other Districts where the student seeks or intends to enroll. 34 C.F.R. §99.34(a)(1).

> ***Practical Note***: If the District's annual FERPA notice indicates that the District routinely complies with such requests from other schools, it does not need to attempt to contact the parents when disclosing. 34 C.F.R. §99.34(a)(1)(ii).

In addition, the District must also provide copies of the disclosed records upon request of the parent. 34 C.F.R. §99.34(a)(2).

The District must also provide the parents an opportunity for a FERPA hearing (see above), upon request. 34 C.F.R. §99.34(a)(3).

Students already in attendance at new school—Schools can also disclose educational records of a student already in attendance at another educational agency if the student is enrolled there and the school makes reasonable efforts to notify the parent (or maintains a policy of forwarding records in these situations). 34 C.F.R. §99.34(b).

Districts are not *required,* however, to disclose records to another District in which the child seeks or intends to enroll without parental consent. 34 C.F.R. §99.31(b). It is a matter of inter-District courtesy, but not legal obligation. But see also *Smith v. Wheaton,* 29 IDELR 200 (D.Conn. 1998) (failure to provide records to new institution may lead to violations of IDEA and §504); *Alexander S. v. Boyd,* 22 IDELR 139 (D.S.C. 1995).

> ***Practical tip***—It is probably wise to refuse to provide information over the telephone to another educational agency staffperson until some evidence is received to the effect that the information is truly being requested from a school employee (e.g., a fax or mail request on school letterhead) working for the District that is requesting the records.

3) **Disclosures to authorized representatives of certain government agencies, including the Comptroller General of the U.S., the Department of Education, the U.S. Attorney General or state and local educational authorities. 34 C.F.R. §99.31(a)(3).**

These agencies may have access to records in connection with an audit or evaluation of education programs, or enforcement of federal legal requirements relating to those programs. 34 C.F.R. §99.35(a).

4) **Disclosures in connection with student financial aid for which the student has applied or which the student has received. 34 C.F.R. §99.31(a)(4).**

The information must be necessary for determining eligibility for aid, amount of aid, conditions for aid, or to enforce the terms and conditions of the aid. The provision also applies to student loans and scholarships. *Letter to Wisconsin,* 28 IDELR 497 (FPCO 1997).

5) **Disclosures to state and local officials or authorities to whom the information is specifically allowed to be disclosed pursuant to a state statute. 34 C.F.R. §99.31(a)(5).**

If the statute was adopted before November 19, 1974, the disclosure must concern the juvenile justice system and its ability to effectively serve the student whose records are disclosed. 34 C.F.R. §99.31(a)(5)(i)(A).

If the statute was adopted after November 19, 1974, the disclosure must concern the juvenile justice system and its ability to effectively serve the student whose records are disclosed, prior to adjudication. The authorities

to whom the records are disclosed must certify in writing to the District that the information will not be disclosed to other parties except as provided by state law, unless they have the written consent of the parents. 34 C.F.R. §99.38.

6) **Disclosures to organizations conducting studies on behalf of educational agencies or institutions. 34 C.F.R. §99.31(a)(6).**

The disclosure must be for the purpose of developing, validating, or administering predictive testing, improving instruction, or to administer student aid programs. 34 C.F.R. §99.34(a)(6)(i).

The study must be conducted in a manner that does not permit personal identification of parents and students by persons other than representatives of the organization, and the information disclosed must be destroyed when no longer needed. 34 C.F.R. §99.34(a)(6)(ii).

If the FPCO determines that an educational study organization fails to destroy disclosed information when the information is no longer needed for the study's purpose, the District cannot allow that organization access to records for at least five years. 34 C.F.R. §99.34(a)(6)(iii).

> Note that the **Protection of Pupil Rights Amendment (PPRA)** amplifies parent and student rights with respect to surveys, analyses, or evaluations funded by DOE. 20. U.S.C. §1232h; 34 C.F.R. Part 98; see attached release from FPCO.
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> The PPRA (1) allows parents to review materials that will be used in a DOE-funded survey, and (2) requires parental consent prior to student participation in a DOE-funded survey that requests information concerning any of the following: political affiliation, psychological problems, sex behavior and attitudes, illegal or anti-social behavior, critique of fellow students who are close family members, privileged relationships (e.g., attorney, doctor, minister), income (unless an assistance program based on need).

7) **Disclosures to accrediting organizations as necessary to carry out their accrediting functions. 34 C.F.R. §99.31(a)(7).**

8) **Disclosures to parents of a dependent student, as defined in the Internal Revenue Code (§152 of the Internal Revenue Code of 1986). 34 C.F.R. §99.31(a)(8).**

9) **Disclosures required by judicial order or lawfully issued subpoena. 34 C.F.R. §99.31(a)(9).**

Districts must make reasonable efforts to notify the parent or eligible student of the order or subpoena in advance of disclosure, so that they may seek protective action. See *Letter to Simlick* (FPCO—June 22, 1998).

This requirement does not apply if the disclosure is in compliance with a **federal grand jury subpoena or a law enforcement subpoena,** where the court has ordered that the contents of the subpoena or the information furnished in response not be disclosed.

Timeline for reasonable effort to notify—The FPCO has held that FERPA does not define a proper timeframe for notifying parents of subpoena-related disclosures so they have the option of seeking to quash the subpoena or take other action. *Letter to Cochran* (FPCO—February 16, 1999). Factors used in determining whether the timeframe was appropriate include the time period for compliance, whether that timeframe was reasonable, good faith efforts, and the nature of the attempts to notify. The FPCO wrote that "we encourage educational agencies and institutions to strive to provide a sound and sensible time period to allow a parent or eligible student to take action to quash a subpoena, particularly where a subpoena duces tecum has been issued by a court from a state other than the one in which the parent or eligible student resides." Id.

State law must be consulted to determine whether a subpoena is **"lawfully issued."** *Letter to Simlick* (FPCO—June 22, 1998). Usually, a state's rules of civil procedure will answer the question.

A **general arrest or contempt of court warrant** against a student is not sufficient to meet the subpoena exception. Before the school complies with a request for records without parental consent the requesting agency must obtain a subpoena or other court order issued with respect *to the school,* not just the student or parents. *Letter to Layton* (FPCO 1997).

Lawsuits between schools and parents—The 2000 amendments to FERPA clarify issues related to records and lawsuits between parents and schools. Currently, if a school sues a parent or eligible student, the school may disclose education records as part of the litigation without obtaining parental consent, and without the need for a subpoena. 34 C.F.R. §99.31(a)(9)(iii)(A). Similarly, if the parent sues the school, the school can disclose records in its defense. §99.31(a)(9)(iii)(B). This new provision eliminates the need to articulate an implied waiver of FERPA privacy rights in cases of pending litigation. See *Letter to Smith* (FPCO—June 22, 1998).

Attorney-Client Privilege—FPCO has held that FERPA or its regulations are silent on the issue of whether the privilege can be invoked to deny a parent access to an education record. It notes that a school's ability to assert the privilege "may be inferred by the institution's need to obtain confidential legal advice in certain circumstances." *Letter to Smith* (FPCO—June 22, 1998). The FPCO has set forth the following conditions for asserting the privilege:

1. the school is or sought to be a client,
2. the communication is between the school and its attorney or their subordinate when acting as a lawyer,
3. communication relates to facts disclosed by the school for the purpose of securing a legal opinion or legal services (not to commit an illegal act or tort),
4. the communication is in fact confidential (not made to anyone outside the particular attorney-client relationship), and
5. the privilege has been claimed and not waived.

Note to school attorneys—Make sure that in creating documents containing personally identifiable information regarding students (e.g., opinion letter on a specific situation), the attorney-client privilege is clearly invoked in writing on the documents. The following statement is commonly placed at the top of many attorney-client documents: *"Privileged and confidential attorney-client communication."* Note that if the document is shared with persons not with the school, the privilege may be waived. Also ensure that the document refers to facts disclosed by the school that are relevant to the legal opinion being rendered.

10) Disclosures in connection with health or safety emergencies. 34 C.F.R. §99.31(a)(10).

The disclosure must be *necessary to protect the health or safety* of the student or other individuals, and only to *appropriate parties* in connection with the emergency. 34 C.F.R. §99.36(a).

Schools are free to include in a student's education records information concerning **disciplinary actions** taken against the student for conduct that posed a significant risk to the safety or well-being of the student, other students, or other members of the school community. §99.36(b)(1).

Such information can be disclosed to employees with legitimate educational interests in the student's behavior, or to teachers and school officials of other schools who have been determined to also have legitimate educational interests in the student's behavior. §99.36(b)(2), (3).

Thus, if a student has committed a serious offense that posed a significant risk to the safety or well-being of the student, staff, or other students, and the District knows that the student tends to go to another school in a neighboring District to visit his girlfriend, the District might be able to inform the neighboring District about the student's offense.

The regulations explicitly state that **the health or safety emergency exception "will be strictly construed,"** meaning that the FPCO will closely scrutinize a District's determination of what constitutes a health or safety emergency. 34 C.F.R. §99.36(c); see also *Irvine (CA)*

Unified School District, 23 IDELR 1157 (FPCO 1996) (disclosure to local doctor was not necessary to protect health or safety); *Irvine (CA) Unified School District*, 23 IDELR 1077 (FPCO 1996).

11) Disclosures of directory information (see above for definition of directory information). 34 C.F.R. §99.31(a)(11).

Districts must notify parents regarding (1) the types of information it considers directory information, (2) parents' right to refuse to allow the District to designate any or all of their child's information as directory information, and (3) the period of time within which a parent must elect to exercise their right to refuse designation of information as directory information. 34 C.F.R. §99.37(a).

Directory information regarding former students may be disclosed without complying with the above conditions. §99.37(b) (refer to the case of *Gonzaga University v. Doe*, 24 P.3d 390 (Wash. 2001), *cert. granted* (2002), discussed below with respect to FERPA/§1983 actions).

12) Disclosures to the parent of a student (who is not 18 or attending college) or to the student. 34 C.F.R. §99.31(a)(12).

Students can access their own educational records without the school obtaining parental consent. This section is also made necessary by the rule on non-custodial parents' retention of FERPA rights.

13) Disclosure is to an alleged victim of any crime of violence or a non-forcible sex offense about the results of any disciplinary proceeding conducted by a school against the alleged perpetrator with respect to that crime. 34 C.F.R. §99.31(a)(13).

This exception was added in 2000. For the exception to apply, the disclosure must consist only of the *final results of the disciplinary proceeding* conducted by the school or postsecondary institution. The final results, however, may be disclosed without consent even if the proceeding concluded no violation was committed.

With the 2000 amendments, an new regulation was added to provide definitions for crimes of violence, non-forcible sex offenses, and other terms relevant to this provision. 34 C.F.R. §99.39

Exceptions do not *mandate* disclosure without consent—Schools should remember that these exceptions to the consent requirement do not require the school to disclose records, except when the parent, eligible student, or their representative seeks access. 34 C.F.R. §99.31(b). The exceptions merely allow the schools to disclose without parental consent if they wish to do so, and in accordance with any conditions set forth under the applicable exception.

Redisclosure of Records

The general rule is that a District may disclose confidential information from education records, subject to the provisions of FERPA, only on the condition that the party to whom the information is disclosed will not disclose it to any other party without parental or eligible student consent. 34 C.F.R. §99.33(a)(1).

> Schools are not strictly prohibited, however, from disclosing records to a party with the understanding that that party might make further disclosures on the school's behalf, if the original disclosure is appropriate under FERPA, and the record of access shows to whom there might be redisclosure (see below).

Exceptions to Redisclosure Rules—The general rule above does not apply to disclosures pursuant to subpoenas, litigation-related disclosures, court-ordered disclosures, disclosures of directory information, disclosures to a parent or eligible student, disclosures of results of disciplinary proceedings, or disclosures to parents of dependent students. 34 C.F.R. §99.33(c).

Districts must inform parties who access information of the requirement to not redisclose without parental consent, unless one of the above exceptions applies. 34 C.F.R. §99.33(d).

If the FPCO determines that a third party violated these requirements, the District that released records to that party may not release records to the party for at least five years. 34 C.F.R. §99.33(d).

Retention and Destruction of Records

Since IDEA records can be extensive, Districts may wish to destroy certain sets of old files to make better use of facility space and to maintain proper organization of records. IDEA allows for destruction of records under certain conditions, and subject to applicable state retention schedules or rules.

The IDEA regulations require that the District inform parents of IDEA students when (1) their children's records are no longer needed, and (2) that the District wishes to destroy them. 34 C.F.R. §300.573. Parents should also be informed that they may need the records for other purposes, such as Social Security benefits. Parents may elect to obtain the original records instead, or may request that the District destroy the records. The regulations allow Districts to maintain records permanently if they wish, unless parents request destruction. Parents, however, cannot demand destruction of information required to be maintained permanently, as set forth above.

> If a District cannot locate parents at their last known address, and have published notice of their intent to destroy old records in local or regional newspapers, the District is probably safe in destroying old records after a reasonable time.

IDEA regulations add a provision requiring schools, through the actions of its custodian of records (see below) to protect the confidentiality of the personally identifiable information contained in the records in the process of destroying them. 34 C.F.R. §300.572(a).

Destruction could take the form of incineration, recycling, or some other means that would ensure the confidentiality of the materials through the destruction process.

Electronic Retention of Records

Some Districts are moving to electronic retention of records, for improved efficiency in storing older records that must be retained under the schedules, but are not currently active. Consult with your appropriate state archive agency—it may have guidelines or procedures regarding e-retention of records.

District Record of Persons Accessing Records

Districts must maintain a record of parties obtaining access to education records each time records are accessed or disclosed. 34 C.F.R. §99.32(a)(1), 34 C.F.R. §300.562(c). The record must include the party's name, the date of access, and the purpose for which the party is allowed to access the records.

If the party to whom the records are disclosed might redisclose records or information contained therein on behalf of the District, the record of access must also include the names of the persons to whom the information may be redisclosed, and a statement of the legitimate interests of such persons. 34 C.F.R. §99.32(b). See above for additional discussion of redisclosure issues.

Practical Note: Districts can keep an access log sheet on the front of student eligibility folders. The form used should contain spaces for the party's name, date of access, and purpose.

Exceptions to the Record-of-Access Requirement

Access does *not* have to be documented for the following parties when they access education records (34 C.F.R. §99.32(d)):

1) Parents or eligible students accessing their children or their own records, respectively.

2) School officials or employees with legitimate educational interest in the records or information.

3) Parties with written consent from the parent or eligible student.

4) Parties seeking directory information.

5) Parties accessing records as directed by a federal grand jury or other law enforcement subpoena (if the grand jury or subpoena orders that the contents or existence of the subpoena, as well as information furnished in response, not be disclosed).

6) Federal law enforcement authorities conducting anti-terrorism investigations. 20 U.S.C. §1232g(j)(4) (USA PATRIOT Act of 2001).

District Custodian of Records

For IDEA students, IDEA regulations also require that Districts appoint at least one official to assume responsibility for ensuring the confidentiality of education records. In addition, all persons collecting or using personally identifiable information must receive "training or instruction" regarding the requirements of applicable laws. Districts must also maintain a list of those employees who may have access to education records. 34 C.F.R. §300.572.

The custodian of records (or whatever the person's title may be) and his or her assistants are expressly allowed to inspect and review records (even if they are not technically considered to have a "legitimate educational interest"). 34 C.F.R. §99.32(c)(2).

Enforcement of FERPA

Complaints with the Family Policy Compliance Office (FPCO)

The Department of Education (DOE) was ordered by Congress to take appropriate action to enforce FERPA and deal with violations. 20 U.S.C. §1232g(f). The ultimate enforcement action against a District is termination of all federal financial assistance, where the Department of Education is unable to secure compliance by voluntary means. The statute specifically ordered DOE to establish and designate an office and review board to investigate, process, review, and rule on violations and complaints. 20 U.S.C. §1232g(g).

The office designated by the Department of Education for enforcement of FERPA is the Family Policy Compliance Office (FPCO). 34 C.F.R. §99.60. In addition, the Department designated the Office of Administrative Law Judges to act as the review board required under the Act.

Parents or eligible students can file written complaints regarding alleged violations of FERPA and its regulations at:

Family Policy Compliance Office
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, DC 20202-4605

The complaint must state specific allegations of fact giving reasonable cause that a violation has occurred. 34 C.F.R. §99.64. A complaint is untimely unless it is submitted within 180 days after the date of the violation or the date on which the complainant knew or should have known of the violation. The FPCO may extend the timeline for extenuating circumstances. *Letter to Wagoner* (FPCO—March 10, 1999).

Districts must be notified in writing of the complaint, and are also asked to submit a written response. 34 C.F.R. §99.65. The FPCO will also notify a District if it received a complaint against it that did not meet the requirements for a valid complaint.

The FPCO will issue written findings after allowing the parties to submit additional information and argument. 34 C.F.R. §99.66. If the District is found in violation, the FPCO will include a specific statement of the steps required for compliance and provide a reasonable timeline during which the District may comply voluntarily.

If the District refuses to comply, the Department of Education can withhold further payments of federal assistance due the District, issue a cease-and-desist order, or terminate eligibility to receive any federal funding.

Parent advocates and Standing—Persons other than the eligible student or parent, such as a parent advocate do not have standing to file a FERPA complaint. This is because FERPA vests rights only in eligible students and parents—only they can file complaints for harmful violations. To file a complaint on behalf of the student, an advocate must submit written parental authorization to FPCO for such a complaint. *Letter to Drumheiser*, 35 IDELR 219 (FPCO 2001).

§1983 Civil Rights Actions

The federal courts are in agreement with the initial point that the language of FERPA does not confer a private cause of action, which means that the statute does not expressly provide for a suit to enforce its provisions or provide compensatory damages to redress violations. *Klein Independent School District v. Mattox*, 830 F.2d 576 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 1473 (1988); *Girardier v. Webster College*, 563 F.2d 1267 (8th Cir. 1977).

In some situations, however, a statute that does not confer a private cause of action can still form the basis for a civil rights action under the Civil Rights Act of 1871, codified at 42 U.S.C. §1983. Section 1983 provides a cause of action in the federal courts for actions by state government officers or employees depriving a person of rights clearly established rights under the Constitution or a federal law, where such law does not provide an exclusive remedy at law. The remaining issue is whether a §1983 action may be premised on a FERPA violation.

Currently pending before the Supreme Court is the case of *Gonzaga University v. Doe*, 24 P.3d 390 (Wash. 2001), *cert. granted* (2002). The case involves a former Gonzaga student who claims he is unable to obtain a teaching job because the University disclosed private information about a date rape allegation made by a special education student and subsequently investigated by Gonzaga administrators. The special education student subsequently testified that no sexual assault took place. Doe claimed the disclosure of the initial rape allegation to Washington state education authorities prevented him from teaching.

A jury returned a verdict for Doe of more than a million dollars, and an appeal proceeded to the Washington Supreme Court, which held that a §1983 action was available for a FERPA violation. It applied the three-part test of *Blessing v. Freestone*: (1) whether Congress intended the law in question to benefit the plaintiff, (2) whether the right protected is so "vague and amorphous" that its enforcement would strain judicial competence, and (3) whether the statute imposes a binding obligation on the states. *Blessing v. Freestone*, 520 U.S. 329 (1997). It upheld the §1983 action, finding that (1) FERPA is intended to benefit students, (2) the right is not too amorphous (courts routinely review acts of entities for statutory compliance), (3) FERPA is a binding statute that confers upon DOE a fund termination power. Oral argument before the Supreme Court is scheduled for April 24, 2002.

> [The recent *Owasso* case on peer grading raised the issue of a FERPA-based cause of action. The Supreme Court opinion began its analysis by stating that "we note it is an open question whether FERPA provides private parties . . . with a cause of action enforceable under §1983."]

Two circuit courts of appeals that previously encountered the issue have held that a person can bring a civil rights action under §1983 to vindicate a deprivation of their rights under FERPA. In addition, the §1983 avenue creates a potential money damages in cases where they are appropriate.

> In *Tarka v. Franklin*, 891 F.2d 102 (5th Cir. 1989) and *Tarka v. Cunningham*, 917 F.2d 890 (5th Cir. 1990), the Fifth Circuit held that although no private cause of action exists under FERPA, a §1983 action can be maintained to vindicate the interests created under FERPA. In these lawsuits, a student challenged the University of Texas' actions in denying him access to letters of recommendation included in his application file, and in the second suit, the correctness of a grade given him in a physics course. The court upheld lower court rulings granting summary judgment and dismissal, respectively.
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> In *Fay v. South Colonie Central School District*, 802 F.2d 21 (2nd Cir. 1986), the Second Circuit determined that FERPA creates interests that may be vindicated in a §1983 action, since Congress did not demonstrate in the language of FERPA any intention to preclude such a remedy. The case involved a divorced mother who refused to provide her ex-husband with copies of education records regarding their children. When he sought

these records directly from the school district, the school refused (incorrectly—see above regarding FERPA rights of non-custodial parents in divorce context). He was awarded nominal damages without a hearing by the lower court. The Second Circuit remanded the case back to the lower court for a hearing on the amount, if any, of damages.

> See also *Doe v. Knox County Bd. of Educ.*, 23 IDELR 1109 (E.D.Ky. 1996) (FERPA-based §1983 action OK); *Maynard v. Greater Hoyt School District No. 61-4*, 22 IDELR 428 (D.S.D. 1995) (same).
