

FERPA

The Federal Education Rights and Privacy Act



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What is FERPA?

- Federal Law (20 U.S.C. 1232g; 34 CFR § 99)
- FERPA *regulates the disclosure* of student education records and personally identifiable information
 - FERPA grants parents and eligible students the right to inspect education records
- FERPA *protects the confidentiality* of student education records and personally identifiable information
- Addressed in Board Policy FL

When does FERPA apply?

- FERPA applies to all schools receiving federal funds
- FERPA applies to virtually all public schools and school districts

How long do FERPA rights last?

- Forever, as long as the student is alive
- FERPA rights do not end when a student graduates or withdraws
- FERPA rights may terminate at a student's death
 - If the student is 18 or older at death, FERPA does not apply to his or her records
 - If the student under 18 at death:
 - FERPA applies to his or her records; and
 - the *parents* still have FERPA rights

What is an “education record”?

- Records, files, and other materials that are:
 - directly related to a student; and
 - maintained by an educational institution or a party acting for the institution
- Information recorded in any way: handwritten, typewritten, audiotapes, film, videotapes, computer media, emails
- The definition of “education record” is very broad and has few exceptions

What is an “education record”?

- Report cards
- Progress reports
- Class schedule
- Enrollment cards
- Student ID numbers
- Participation in extracurricular activities
- E-mail addresses
- Photographs
- Tests
- Homework
- Information regarding parents or siblings
- Records received from prior schools/districts
- Peer-graded paper, *after* they are collected and recorded by the teacher

What is not an education record?

Memory Joggers

- Records of instructional, supervisory, and administrative personnel and educational personnel ancillary to them that are:
 - Kept in sole the possession of the maker of the record;
 - Used only as a personal memory aide; and
 - Not accessible or revealed to any other person except a temporary substitute for the maker of the record
- FERPA does not apply, but these records are arguably student records subject to *disclosure* under Texas law
 - Under Texas Education Code Chapter 38, parents and guardians are entitled to access their student's records, including medical records, maintained by a district. So, even though sole-possession records are not subject to FERPA, these records likely must be disclosed to parents/guardians if requested.

What is not an education record?

District Law Enforcement Records

- Records of a law enforcement unit of a *school district* that are:
 - Created by the law enforcement unit;
 - Created exclusively for a law enforcement purpose, and not for a disciplinary purpose; and
 - Maintained by the law enforcement unit, not by another office of the school district

*But, be careful – if a copy of a law enforcement record is placed in a student's file, it becomes an education record

*Also note: Education records do not lose their status as education records under FERPA just because they are in the possession of a law enforcement unit

More on District Law Enforcement Records

A disciplinary action or proceeding conducted by the educational institution is not a law enforcement purpose

The record must be exclusive to the law enforcement unit (created by them, for their purposes only, maintained by them)

Security videotapes – if the law enforcement unit is solely responsible for them, they are not education records

What is not an education record?

- Records that *only* contain information:
 - About a former student
 - Concerning events *after* the student is no longer in attendance
- ***But wait . . .*** records that concern a former student's previous attendance are education records regardless of when the records are created or received

What is “personally identifiable information”?

- “Personally identifiable information” is
 - other information that, *alone or in combination*, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or
 - information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates
- You may not release redacted or statistical information if other information, together with redacted or statistical information, will identify a student
- Look to local news, events, or media coverage to see if other information may identify a student
 - Includes the initials of a student or parent in high profile cases

What is “personally identifiable information”?

Examples of personally identifiable information:

- Name (or sometimes initials) of student, parent, or other family member
- Address of student or family member
- Personal identifiers (SSN)
- Biometric records: fingerprints, retina or iris patterns, voiceprints, DNA sequence, facial characteristics, *handwriting*
- Indirect identifiers such as date and place of birth or mother’s maiden name

A Note About Directory Information

- FERPA defines “directory information” is information contained in a student’s education record that would not generally be considered harmful or an invasion of privacy if disclosed
- The law permits school districts to designate certain types of personally identifiable information as directory information
- A district may release directory information if it has given public notice of:
 - the types of personally identifiable information that it has designated as directory information;
 - the right of parents or eligible students to restrict the disclosure of such information; and
 - the period of time within which a parent or eligible student has to notify the district in writing that he or she does not want any or all of those types of information designated as "directory information"
- Note: Some districts choose not to designate ANY information as directory information
 - This means that all personally identifiable information – even information usually designated by other districts as directory information – remains subject to FERPA

A Note About Directory Information

- Directory information *may* include:
 - Student's name
 - Address
 - Telephone listing
 - Electronic mail address
 - Date and place of birth
 - Honors and awards
 - Grade level
 - Photograph
 - Dates (ranges) of attendance
 - Most recent educational agency or institution attended
 - Participation in officially recognized activities
 - Weight and height of members of athletic teams

SSN is NOT directory information

A Note About Directory Information

- Student ID numbers are considered directory information when displayed on a student ID badge or card
 - *Except:* A student's education records may not be accessible by student ID number alone – one or more other factors must be required to access records (*e.g.*, PIN number or password)
- Parents can opt-out of having directory information (like student name and student ID number) on a student's ID badge or card

A Note About Directory Information

- A district may designate *any or all* information defined as “directory information” by FERPA
- A district may limit the disclosure of directory information to specific parties and specific purposes
- Parents must be allowed to opt out every year
- Directory information under FERPA that is not designated by a district as directory information for that district is excepted from disclosure under the Texas Public Information Act
- Must check Board Policy FL (Local) to determine what information, if any, has been designated as directory information

Who can access education records?

■ Parents of students under 18

- “Parent” includes:
 - Natural parent
 - Guardian
 - Individual acting as a parent in the absence of a parent or guardian
 - Surrogate parent - Special Ed regulations include surrogate parent appointed according to law and foster parent under conditions specified in regulations

■ Eligible Students

- 18 years old or attending postsecondary education institution
- When a student becomes an eligible student, the parents’ rights transfer to the eligible student *alone*
- ***But wait . . .*** parents may still review education records if the eligible student is a dependent (as defined by IRS)

Who can access education records?

Divorced, separated, or unmarried parents

- May access records unless the parent or guardian's rights have been terminated by law (*e.g.*, court order) or the information requested does not constitute an "education record"
- A parent or guardian's rights are presumed to be intact unless there is official documentation establishing that such rights have been terminated
- A certified divorce decree or judicial order that specifically states that parental rights have been terminated is usually sufficient to document that a parent or legal guardian's rights have been terminated
 - In the absence of such documentation any parent, whether divorced, separated, etc., has the right to review his child's records
 - One parent cannot unilaterally instruct school personnel to deny access to another parent

What FERPA rights do parents/eligible students have?

- Rights are very broad – encompasses virtually every document pertaining to student
- Right to inspect and review all education records
 - No right to copies
 - *Unless* failure to give copies effectively denies access to the records
 - The district can charge a reasonable fee for providing copies
- Right to request correction/amendment
- Right to control who has access
 - Consent of parent or eligible student required for disclosure to anyone else unless one of exceptions to consent applies

General rules for disclosure to parent or eligible student

- Disclose to parent or eligible student
 - Upon request
 - Within a reasonable time (not to exceed 45 days after receipt the request)
 - Remember to note the date of receipt on the request
 - A district may not destroy records if a request for access is pending

Disclosure to anyone other than a parent or eligible student

- A district may disclose education records to a person or organization *other than* a parent/eligible student if:
 - the parent/eligible student consents to disclosure; or
 - one of a few limited exceptions to consent applies
- Otherwise, disclosure violates FERPA

Consent

- Consent of a parent or eligible student is required prior to disclosure to anyone other than a parent/eligible student, unless one of exceptions to consent applies
- Consent must be:
 - In writing
 - Signed and dated
 - Specify the records that may be disclosed
 - State the purpose of the disclosure
 - Identify the party or class of parties to whom the disclosure may be made
 - Parent/eligible student has a right to copies of disclosed documents upon request
 - The required “signed and dated written consent” may include a record and signature in electronic form

Exceptions to consent requirement

- The exceptions to the consent requirement are very limited and apply only under specific circumstances
- Be sure to consult legal counsel prior to disclosure to ensure that the exception to consent truly applies

Exceptions to consent requirement

- Request by school officials who the district has determined have legitimate educational interests
- Request by school officials at a school in which a student is seeking to enroll or is receiving services, provided the sending school complies with FERPA's notice and hearing requirements
- Request by various state/federal officials for audit, evaluations, or enforcement proceedings
- Request to determine eligibility for and the terms and conditions of financial aid
- Request by an organization conducting a study for, or on behalf of, the educational institution
- Request from accrediting organizations

School officials with legitimate educational interests

- Who is a “school official”?
 - Generally, an employee, agent, contractor, or outside service provider used by the district to perform institutional services
- What is a “legitimate educational interest”?
 - working with a student
 - considering disciplinary or academic actions, the student’s case, or an IEP for a student with disabilities
 - compiling statistical data
 - reviewing an education record to fulfill the official’s professional responsibility
 - investigating or evaluating programs
- Disclosure to/among school officials is prohibited if the disclosure does not involve a legitimate educational interest
 - Gossiping and employee grievances are NOT legitimate educational interests

General Rule for Contractors

Board Policy FL (Local):

- “All contractors provided with student records shall follow the same rules as employees concerning privacy of the records and shall return the records upon completion of the assignment”

Exceptions to consent requirement

Judicial order or subpoena

- If you receive a judicial order or subpoena, notify your supervisor and Dyann Polzin immediately
 - Subpoena must be lawfully issued
 - If it's a civil case – methods such as faxing are sufficient
 - If it is a criminal case – must be personally served
 - There are other complicated requirements
 - Parent/guardian must be notified
- Judicial order includes a request by the court in a proceeding initiated by the educational institution or the parent/student

Exceptions to consent requirement

- Request by officials in a health or safety emergency
 - Only if knowledge of the information is necessary to protect the health or safety of the student or other individuals
 - District must take into account the totality of the circumstances and must determine that there is an articulable and significant threat to the health or safety of a student or other individual
 - May disclose to any person whose knowledge of the info is necessary to protect health/safety

Exceptions to consent requirement

- Organizations conducting studies for, or on behalf of, the educational agency or institution for the purpose of developing, validating, or administering predictive tests, student aid programs, improving instruction
 - Five-Year Rule
 - Applies when a district discloses personally identifiable information to a third party and the third party violates FERPA by redisclosing that information to an improper party or for an improper purpose
 - The district is prohibited from disclosing any personally identifiable information to that third party for five years

Exceptions to consent requirement

Request from a juvenile justice service provider

- Under FERPA, there is an exception to the consent requirement under certain circumstances related to the Juvenile Justice System if a state statute permits release
- Recent Texas law attempts to use this exception by requiring disclosure of a student's confidential information to a "Juvenile Service Provider" under certain circumstances
- However, the FERPA exception is very narrow, and the Texas law is very broad, thus the Texas law may exceed the limits of the FERPA exception

Exceptions to consent requirement

Request from a juvenile justice service provider

- Under the Texas law, a “Juvenile Service Provider” (JSP) is a governmental entity that provides services to a juvenile, including:
 - Juvenile justice or prevention services
 - Medical services
 - Educational services
 - Other support services

Exceptions to consent requirement

- Examples of a JSP include:
 - State or local juvenile justice agency
 - Health and human services agencies
 - DPS
 - TEA
 - ISD
 - JJAEP
 - Charter school
 - Local mental health or mental retardation authority
 - Court with jurisdiction over juveniles
 - District attorney's office
 - County attorney's office
 - Children's advocacy center

Exceptions to consent requirement

Request by juvenile justice service providers

- Texas law applies to a student's "educational records" that are in the possession of a primary or secondary educational institution and contain information relating to a student, including information relating to the student's:
 - identity;
 - special needs;
 - educational accommodations;
 - assessment or diagnostic test results;
 - attendance records;
 - disciplinary records;
 - medical records; and
 - psychological diagnoses

Exceptions to consent requirement

Request by juvenile justice service providers

- Texas law requires disclosure of a student's confidential information to a JSP, upon request, in two situations
 1. If the student has been:
 - Taken into custody or
 - Referred to a juvenile court for allegedly engaging in delinquent conduct or conduct indicating a need for supervision; or
 2. If the purpose of the disclosure is to:
 - identify a multi-system youth
 - coordinate and monitor care for a multi-system youth
 - improve the quality of juvenile services provided to a multi-system youth

*A multi-system youth is a person who is younger than 19 years of age and has received services from two or more JSPs

Exceptions: No parental consent required

Request by juvenile justice service providers

- What should you do if you receive this type of request?
 - Until the application of the Texas law is clarified, you should assume that you still have to comply with FERPA requirements and obtain consent or a subpoena unless another exception to the consent requirement applies
 - DO NOT DISCLOSE any information subject to FERPA
 - Notify your supervisor and Dyann Polzin immediately
 - When in doubt, demand a subpoena

Things to remember:

- Any time you receive a request to access or review a student's educational records, you should make sure that the request is:
 - in writing;
 - signed by the person requesting the information; and
 - dated by the person receiving the request
- Be aware that records may contain personally identifiable information of more than one student
 - You should always redact the information relating to the other student

More things to remember: Emails

- Emails that directly relate to a student and are maintained by the district are likely education records subject to FERPA
- Do not use a student's personally identifiable information subject lines because they are easily viewable by someone other than the recipient
- Be sure you know who the recipient of the email is and how they have a legitimate educational interest in student's information
 - Remember, you can only share a student's personally identifiable information with others at the district who have a legitimate educational interest

Consequences for FERPA Violation

- Good news: there is no private right of action under FERPA
 - *But*, civil suits for damages for defamation or invasion of privacy are possible if a FERPA violation occurs
- Bad news: if a district violates FERPA, the district could lose federal funds
 - *But*, a district's substantial compliance with FERPA will prevent termination of funding
- Bad news: violation of FERPA is good cause for termination of employment

Other Important Laws

■ Texas Public Information Act

- If you receive an open records request under the TPIA, you should notify Dyann Polzin immediately
- Very short and very strict time limits apply for withholding information
- Beware - failure to comply with the time limits results in a presumption that the information requested is public information

■ Texas Education Code § 26.004

- A parent is entitled to access all written records concerning the parent's child, including:
 - Attendance records
 - Test scores
 - Grades
 - Disciplinary records and reports of behavioral problems
 - Counseling and psychological records
 - Health and immunization records
 - Teacher and counselor evaluations

Best Practices

- Be careful how you handle any education records and/or personally identifiable information in your possession
 - Redact when necessary
 - Hold conferences/conversations about a student in private
 - Be careful about gossip
- Always get requests for student information in writing (even if just an email)
- Don't make the judgment call on your own
- When in doubt, demand a subpoena
- Keep records – A district must maintain a record of each request for access to and each disclosure from an education record

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